

When Are Excessive Prices Unfair?

BACKGROUND

- Under EU competition law, the abuse of a dominant position is prohibited. One type of abuse is the charging of *unfair* prices. The prohibition has been used to sanction *excessive* prices that are 'too high'.
- According to the European Court of Justice in the *United Brands* case, a two-stage test may be applied, according to which a price is abusive if:
 - (i) the price-cost margin is excessive; and
 - (ii) the price is unfair compared to other prices.
- However, there is little guidance in how to determine whether a price is excessive and/or unfair.

METHODOLOGY

- The authors consider whether the principle of 'dual entitlement' can be used to define explicitly what constitutes an unfair price in the second stage of the *United Brands* test. This principle states that transactors are entitled to the terms of trade of a reference transaction, and it is unfair if a firm charges a price that, relative to the reference transaction, realises a gain for the firm at the expense of its customers' entitlement.

KEY FINDINGS

Finding Heading

- The authors find that the principal of dual entitlement is aligned with the goals of an effective prohibition of excessive prices. This is because the principle states that, other things being equal, a higher price is unfair if it is caused by a lack of competition but it is not due to the firm's production costs.
- A procedure is developed that defines a price as unfair in terms of the principle of dual entitlement. The first step determines whether the terms of trade are significantly different to a given reference transaction. The second step determines whether the firm has gained at its customers' expense.
- This procedure has the advantage that it provides some objectivity to the second stage of the *United Brands* test. As a result, the procedure provides greater *ex ante* legal certainty of the test and could lead to more effective prohibition.
- The authors also find that that European competition law enforcers in their attempts to define prices as unfair relative to others have followed similar arguments to those of the procedure developed here.
- However, certain adverse effects of a prohibition of excessive pricing are found to remain even in the presence of a well-defined test.

POLICY ISSUES

- The procedure developed by the authors may help to improve the *ex ante* legal certainty of the two-stage test. This, in turn, may lead to more effective prohibition of excessive prices.
- However, the procedure by itself does not resolve all problems. In the long-term, it is important that policy-makers reconsider how exploitation is dealt with in Article 102 TFEU.

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