Editorial

# Excessive Pricing: The Flaws of '*Tea Party*' Competition Policy

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Since the adoption of the Guidance Communication in 2009, the Commission has kept exploitative abuses—and in particular excessive pricing cases—in a state of artificial hibernation, and focused on exclusionary cases as a matter of enforcement priority. The Commission's small antitrust policy against exploitative abuses is predicated on '*Tea Party*' competition economics: in the long term, high prices are presumed to deliver efficient outcomes, and competition enforcers risk doing more harm than good in trying to improve market outcomes.

Tea Party competition gurus are, however, wrong on three counts. First, they are wrong on the *theory*. Contrary to the ominous suspicion that competition agencies fiddle with excessive pricing laws to tax dominant firms' profits and achieve distributional transfers, there is a sound conceptual basis to justify the control of dominant firms' excessive prices. Take a monopolist charging excessive prices in market A. With this, the monopolist dries up demand in neighbouring markets (B, C, D, etc.). But the monopolist also dries up a range of unrelated markets (W, X, Y, Z) which include all the markets where customers purchase goods/services. For instance, a customer faced with surging oil prices will purchase lower quantities of milk, cereals, fruits, etc. (assuming finite resources). As a consequence, the monopolist's pricing policy on market A thus forecloses—possibly unwillingly—sales opportunities for other producers on a range of markets. In turn, this may force out a number of firms from those markets, increase concentration, decrease entry opportunities and eventually harm consumer welfare.[1] Competition authorities should thus pay attention to the foreclosure effects that arise on *ir*-relevant markets.

Second, Tea Party competition enthusiasts are wrong on the *practice*. In particular, the assertion that excessive prices cannot be objectively determined is not persuasive. Most of us have, for instance, noticed that the price of competition law conferences, books, or subscriptions has reached insanely high levels. And beyond such personal experiences, policy makers at all levels routinely consider that some prices are excessive, and craft policy decisions on this basis. This occurs, for instance, in all markets where States facilitate the purchase of high price products with subsidies (for instance, pharmaceutical products) or discourage the purchase of low priced products with taxation (for instance, cigarettes).[2] Last but not least, firms themselves often recognize that their prices are excessive. This is aptly illustrated in markets where firms engage in price discrimination (and thus slash some of their prices), in order to serve additional categories of customers with low reservation prices.

Of course, the remaining issue is of a methodological nature. It boils down to devising a standard of price excessiveness that ensures economic efficiency. But as in other legal disciplines (e.g. risk regulation), the absence of a '*silver bullet*' evidentiary method—or the existence of several methods with intrinsic limitations—should not hinder the enforcement of the law. Rather, the sole admissible limitation is that in such areas where legal standards are blurred, competition agencies should not inflict sanctions on non-compliant firms. This issue is at the heart of the *Microsoft* case currently pending before the EU courts.[3]

Third, Tea Party scholars and practitioners are wrong from an *institutional* perspective. Often, opponents of Article 102 (a) TFEU resort to scaremongering, suggesting that the application of excessive pricing doctrines would open the floodgates to litigation, with angry customers clogging up courts and competition agencies with requests to change the price

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1 This effect will be particularly acute on markets relating to products/services that do not fulfil basic needs, where customers will simply forgo consumption.

2 Closer to the province of competition law, a similar finding prompted the political decision to open up network industries to competition in Europe.

3 General Court, T-167/08, *Microsoft Corp. v Commission*, pending.

of all sorts of purchases. In the EU, where administrative enforcement prevails, this contention does not withstand scrutiny. Resource-constrained competition authorities can—and indeed do—define enforcement priorities, dismiss meritless complaints and set aside trivial cases. Of course, the next question is: which screening principles should competition authorities apply to excessive pricing cases?[4] On this, two propositions, which run in opposite directions, can be advanced. First, enforcement initiatives should focus on markets where dominant firms sell directly to end-consumers. This is because, on such markets, no intermediary players can absorb all or part of upstream price increases. In contrast, in markets where the supply chain comprises many layers (and players), a dominant firm's price increase may be absorbed by operators active at subsequent downstream levels,[5] who act as a buffering mechanism and shelter—in part or in full—end-consumers from the initial price increase.[6] Second, enforcement initiatives should stay away from markets for branded goods. On those markets, psychological considerations drive customers' valuations upwards. As a result, it is practically nigh on impossible to set an objective and general level at which prices become excessive.

In light of the above, the lax antitrust policy that lets powerful firms charge excessive prices is, in the author's opinion, ill-conceived—just as Tea Party contentions are, in the USA, in relation to the perils of Government intervention. The Commission, itself, has implicitly acknowledged this, and departed from the Guidance Communication, with the opening of a formal investigation against Standard & Poor's for abusive licensing fees. Of course, it is too early at this stage to talk of a '*revival*' of the control of exploitative abuses.[7] Yet, with rising inflation forecasts in certain European countries and tough austerity programmes in others, the protection of consumers against dominant firms' abusive prices may take on a growing importance in forthcoming policy debates.

*doi:10.1093/jeclap/lpr076*

4 We view as moot the scholarly proposition that Article 102 (a) TFEU should only apply where there are significant barriers to expansion/entry. This condition is already enshrined in the concept of dominance, which must be proven in all Article 102 TFEU cases.

5 Provided that they do not price at their marginal cost.

6 Those markets should thus not be dealt with as a matter of enforcement priority by competition authorities.

7 See P Hubert and ML Combet, 'Exploitative abuse: The end of the Paradox?' (2011) I(1) *Concurrences* Doctrines, 44.