

**ON APPEAL FROM THE COMPETITION APPEAL
TRIBUNAL**

BETWEEN

**(1) FLYNN PHARMA LIMITED
(2) FLYNN PHARMA (HOLDINGS) LIMITED**

**Appellant C3/2018/1847
Respondent C3/2018/1874**

and

**(1) PFIZER INC.
(2) PFIZER LIMITED**

Respondent C3/2018/1874

v

THE COMPETITION AND MARKETS AUTHORITY

**Appellant C3/2018/1874
Respondent C3/2018/1847**

EUROPEAN COMMISSION

Intervener

**EUROPEAN COMMISSION'S SKELETON ARGUMENT
OF 14 JUNE 2019, FOR HEARING ON 26-28 NOVEMBER 2019**

References “(§...)” are to the Judgment of the Competition Appeal Tribunal under appeal

I. INTRODUCTION

1. This is the skeleton argument of the European Commission (“**Commission**”) as intervener in the Appeals against the judgment of the Competition Appeal Tribunal (“the Tribunal”) of 7 June 2018 (“**Judgment**”) setting aside the decision of the

Competition and Markets Authority (“CMA”) of 7 December 2016 (“Decision”) insofar as it found that Pfizer and Flynn had abused their dominant position on the market for phenytoin sodium capsules, contrary to Article 102 of the Treaty on the Functioning of the European Union (“TFEU”).

2. Whether the Decision had sufficiently established an abuse by Pfizer and Flynn, the Judgment largely turns on the application of the judgment of the Court of Justice of the European Union (“CJEU”) in Case C-27/76 *United Brands v Commission*.¹
3. In brief, the Commission agrees with the CMA that the Judgment erred in departing from the test laid down by the CJEU in *United Brands* for determining an abuse under Article 102(a) TFEU: in addressing the *United Brands* test, the CAT introduced additional requirements and overstated the import of subsequent Commission and CJEU practice, resulting in the CAT formulating a methodology that departs from the established law and which would, if followed, render the application of Article 102 TFEU to unfair pricing impracticable – for companies, for courts and for competition authorities alike.
4. The Commission is conscious of the fact that the Judgment is based on extensive findings of fact made by the CAT and emphasises that it does not seek to call into question any of the primary facts found by the judgment. Rather, the Commission’s concern is with the application of the law to those facts, for the reasons given below.
5. As noted by commentators, intervention by competition authorities against excessive prices are quite rare.² The CMA’s intervention here appears to have been prompted

1 EU:C:1978:22.

2 “While cases involving this category of abuse are relatively rare, the Commission and national competition authorities have been prepared to pursue them” – Bellamy and Child, *European Union Law of Competition*, 8th Ed. §10.117, referring to the present case. “It is clear that neither the European Commission nor the [CMA] in the UK have an appetite for investigating high prices under Article 102 or the Chapter II prohibition. However this is not to say that such cases never arise...” – Whish and Bailey, *Competition Law*, 8th Ed. pp 761-762, referring to Commission statements that it has no desire to become a price regulator. See also *Commission Staff Working Document on Ten Years of Antitrust Enforcement Under Regulation 1/2003*, at pp. 20-21 (SWD(2014) 230/2), which provides a breakdown of the types of

by the fact that Flynn’s sales price to wholesalers and pharmacies rose by [>2000%] from those which Pfizer charged directly to pharmacies prior to the impugned conduct.³ These are striking increases, which invite investigation and the Commission agrees with the CMA that its Decision sufficiently established an abuse by Pfizer and Flynn in this case.

6. For the reasons given below, the Commission submits that the CMA’s appeal should be allowed. Alternatively, if the Court sees merit in any of the Respondents’ arguments, the Commission submits that it should make a reference to the CJEU for a preliminary ruling pursuant to Article 267 TFEU.

II. SUMMARY OF THE COMMISSION’S SUBMISSIONS

7. The Tribunal accepted the validity of the Decision applying *United Brands*, but its interpretation of the law meant that the CMA was required to do much more than *United Brands* requires of a competition authority. It is notable that before addressing the CMA’s approach the Judgment reviews the CJEU’s case law on excessive pricing generally, but does so without taking account of the fact that the “other approaches” recognised as possible in *United Brands* are just that – *other* approaches, which, as *alternatives*, do not detract from the validity of the *United Brands* two-limb test (where this can be applied).

8. As regards the Decision’s analysis of whether Pfizer’s and Flynn’s prices were excessive (within the first limb of *United Brands*), the Commission submits that the Judgment made two broad legal errors of approach:

- 8.1. It misinterpreted *United Brands* to introduce an additional requirement of “benchmarking” the hypothetical price that would have been charged under sufficiently effective (but not idealised) competitive conditions

infringements pursued by national competition authorities. Exclusionary abuses alone account for only about 15% of enforcement activity, pricing abuses being a sub-set of that category.

³ Decision, §1.18.

- 8.2. Advocate General Wahls' Opinion in *Latvian Copyright*⁴ was treated as a general restatement of the law, relevant to the application of the *United Brands* test, whereas; (a) it was not, and (b) insofar as used to interpret *United Brands*, was not followed in all respects by the Court. In particular, on a proper understanding of *Latvian Copyright*, the judgment⁵ does not endorse the suggestion made in the Opinion that it would be necessary to combine several different methods of analysis that are mutually corroborating to reach a conclusion on whether a particular price is unfair and therefore abusive.
9. As regards the Decision's analysis of whether Pfizer's and Flynn's prices were unfair, the Judgment made two broad legal errors of approach:
- 9.1. Although the CAT ostensibly accepted that *United Brands* allows unfairness to be established in one of two ways, the effect of the judgment is to require Alternative 2 (unfair compared to competing products) to be applied, even if Alternative 1 (unfair in itself) is satisfied. This is unsupported by *United Brands*, and if followed would impose an unjustifiable burden on a competition authority or other party with the burden of establishing an infringement of Article 102(a) TFEU.
- 9.2. The Tribunal's misinterpretation of the general scheme of *United Brands* and of the copyright cases, including *Latvian Copyright*, led it to impose a number of additional requirements and a further test of applying demand-side considerations to the "economic value" of the product in determining whether the price was unfair. In this context, the Tribunal overstated the import of the Commission's decision in *Scandlines*.

⁴ Case C-177/16 *Autortiesību un komunikēšanās konsultāciju aģentūra v Latvijas Autoru apvienība v Konkurences padome*, EU:C:2017:286.

⁵ EU:C:2017:689.

III. PRELIMINARY – UNITED BRANDS AND THE COPYRIGHT LICENSING CASES

(i) Article 102 TFEU

10. Article 102(2)(a) identifies “unfair” selling prices imposed by a dominant undertaking as a form of abuse. As with the other forms of abuse identified by Article 102, this reflects the special responsibility placed on dominant undertakings: what would be unobjectionable to competition law if practised by a non-dominant undertaking is objectionable if done by a dominant undertaking, whose market power puts it in a position to “impose” unfair prices, causing direct damage to consumers.

(ii) The Tribunal’s general approach to the cases

11. The Decision, whilst recognising that other approaches are possible,⁶ is squarely based on the two-limb test of *United Brands*.⁷ However, before addressing the Decision’s application of *United Brands* to the circumstances of the case, the Judgment reviews the CJEU’s case law on excessive pricing generally, including cases where *United Brands* was *not* applied (§298).

12. As regards *United Brands* itself, the Commission submits that the Tribunal erred in its interpretation of the judgment in that case. The Judgment, sets out the critical paragraphs of *United Brands* (§285) and describes §§248-250 as imposing “the need for an over-arching assessment”, which appears to have influenced the Tribunal in concluding that it was necessary to set a “benchmark” for the “normal competitive price” in assessing whether the dominant undertaking’s price is excessive (under the first limb) (§313).⁸

13. Although the Judgment states that this approach is “cited in the subsequent jurisprudence”, this subsequent jurisprudence is not identified and the Commission

⁶ Decision, §5.9.

⁷ Decision, §5.2.

⁸ The Judgment emphasises at §286 and §443 that UB related to several discrete infringements, unlike the present case, but the relevance of this to the analysis is unclear.

does not find support for this approach in subsequent practice. The Commission submits that, insofar as it is useful to characterise *United Brands* as requiring an overarching assessment, this is already done through the two limbs of the *United Brands* test. The judgment in *United Brands* paraphrased Article 102 TFEU at §248, from which *United Brands* at §§249-250 explains the mischief that Article 102 TFEU seeks to address and §§251-252 explain how an infringement is to be established – “The questions therefore to be determined are...”. There is no further “over-arching” question to be answered (§443(8)(ii)).⁹

14. The Tribunal, having emphasised that the Decision rests on *United Brands*, and having acknowledged that “this approach [the two-limb test] has not actually been applied in practice” in the copyright cases (§289) nevertheless proceeds to consider *Latvian Copyright*, in particular Advocate General Wahl’s Opinion in that case, which the Tribunal described as “an authoritative review of the *relevant* jurisprudence”¹⁰ and as seeking to provide “a single framework within which the issues could be considered”. However, the issues in *Latvian Copyright* were *not* the application of the *United Brands* test: as the Opinion, §37 notes, “a cost-price comparison makes little sense with regard to the supply of certain intangible goods such as — as is the case in the main proceedings — copyrighted musical works”.¹¹ Accordingly, as made

⁹ This is confirmed by the CJEU’s order in Case C-159/08 P *Scippacercola and Terezakis v Commission* at §44 – “the Court of First Instance observed, at paragraph 100 of the judgment under appeal, that ‘a price which is excessive because it has no reasonable relation to the economic value of the product supplied’ (*United Brands v Commission*, paragraph 250) may constitute an abusive practice prohibited by Article 82 EC **and that in that regard** ‘the questions to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products’ (*United Brands v Commission*, paragraph 252).” Emphasis added. Thus, the two limbs of *United Brands* are the means by which it is established whether the price has no reasonable relation to the economic value of the product supplied.

¹⁰ Emphasis added.

clear in that judgment (§37-38), the CJEU applied one of the possible “other approaches” referred to in *United Brands*.

15. *Latvian Copyright* concerns the interpretation and application of the method used by the CJEU in previous copyright cases, in particular *Tournier* and *Lucazeau*.¹² The questions referred by the Latvian Supreme Court concerned the “appropriateness” and “sufficiency” of this method to prove an abuse in circumstances in which the geographic scope of the Member States used as comparators had been narrowed down.
16. Advocate General Wahl’s Opinion refers to *United Brands* only by way of setting the scene regarding unfair pricing cases under Article 102 TFEU generally. The Tribunal does not appear to have appreciated this, and accorded too much significance to the statement in the Opinion, §17 that whether the dominant undertaking’s price is an abuse is to be assessed by reference to a benchmark of the price that undertaking would hypothetically have charged had there been effective competition in the market (§294(3)-(4)). However, for the reasons given above about the interpretation of *United Brands*, §§248-252, this transposes the underlying rationale for the prohibition on unfair prices into an additional element of the legal test itself for unfair pricing. Further, for the reasons given below, and as the CMA explains, such a

11 The Opinion is in this respect consistent with other copyright licensing cases, such as Case 395/87 *Ministère public v Tournier*, where the point was explained very clearly by Advocate General Jacobs, in his Opinion, §53 – “There is a consensus in the observations made to the Court in these cases that the test laid down in Case 27/76 *United Brands v Commission* ...for determining whether a price is excessive in relation to the economic value of the benefit conferred is inapplicable in the present context... because it is impossible to determine the cost of the creation of a work of the imagination such as a musical work. It is moreover impossible to compare the level of the royalties charged by Sacem with that of competitors because there are none.” The Commission notes that the Judgment, §308(2) cites *Latvian Copyright* as authority for one of the elements of the legal test, but as submitted above, *Latvian Copyright* is not to be understood as modifying *United Brands*.

12 A method of geographic price comparison consisting in comparing the prices (rates) charged by different undertakings (copyright collecting societies) most of which to date occupy monopoly positions in different Member States, and to do so “on a consistent basis”.

benchmarking step in the context of the two-limb test in *United Brands* is not supported by the case law of the CJEU.

17. Advocate General Wahl's Opinion, §18 accurately summarises *United Brands* as holding that, "a comparison can be made between the sale price and the cost of production" to see whether the difference is excessive. This is acknowledged by the Judgment as stating the *United Brands* test, but deflected as, "not the only method of calculating the benchmark price" (§294(5)). Whilst this is correct (for the "other methods" recognised in *United Brands*), it does not answer the CMA's point that the *United Brands* test remains available to a competition enforcer: nothing in *Latvian Copyright* suggests otherwise and nor is it correct that *Latvian Copyright* is a re-orientation of *United Brands* or a "version of that test" (§307). As the CJEU made clear in *Latvian Copyright*, having noted *United Brands* and its dictum that there are other methods for determining if a price is excessive, it confirmed that "a method" (comprising the comparison of prices charged by different undertakings supplying the same or a similar service in different Member States) "must be considered valid" (§38). The CJEU thereby confirmed that its judgment is not to be taken as altering the test in *United Brands*, but concerns the different test used in the copyright licensing cases.

IV. THE TRIBUNAL ERRED IN ITS APPROACH TO THE DETERMINATION OF WHETHER THE PRICES WERE EXCESSIVE

18. The Tribunal's erroneous approach to the interpretation of *United Brands* and its acceptance that Advocate General Wahl's Opinion in *Latvian Copyright* restates the *United Brands* test led it to err in holding that the *United Brands* test is not "necessarily sufficient in any one case" (§315) to determine if a price is excessive and that it cannot be "the sole method when there are other valid methods available to assist the authority" (§316) in establishing the "benchmark" price.
19. *United Brands* notes that there could be "other ways" of determining if a price was abusive, but did not suggest that, where the competition authority selects price/cost as the methodology, any of the possible "other ways" must be used in addition. The Tribunal's finding that "*United Brands* does not establish that Cost Plus is, in

isolation, a sufficient method for establishing the excess if other methods are available and, particularly, if they suggest different results” is difficult to reconcile with the terms of the judgment in *United Brands*. The Tribunal appears to have confused the first limb of the *United Brands* test with Alternative 2 of the second limb.

20. Pfizer and Flynn suggest that in *Latvian Copyright*, by repeating the Opinion of Advocate General Wahl to the effect that "there is no single adequate method" (Opinion §36), the CJEU also endorsed Advocate General Wahl's suggestion that a competition authority should combine several different methods of assessing whether prices are excessive and unfair to meet its burden of proof under Article 102 TFEU. That would not however be a correct reading of the CJEU judgment.

20.1. The CJEU's judgment does not refer to the Opinion, §43, which is where that suggestion is made.¹³

20.2. As noted above, *Latvian Copyright* concerns the interpretation and application of the method endorsed by the CJEU in *Tournier*.

20.3. The answer given by the CJEU was that, subject to some requirements to ensure reliability of the results¹⁴, this method is enough for purposes of examining whether there is an abuse under Article 102 TFEU.¹⁵ If, applying this method, it is found that rates are “appreciably higher” than in the comparator countries (i.e., the difference is significant and persistent) this is indicative of an abuse and it falls onto the dominant undertaking to provide an objective justification, failing which it is permissible to conclude that the rates are unfair and therefore abusive (*Latvian Copyright* §38, 44, 53, 56-57 and 61).

¹³ Nor does the judgment refer to points 71 or 80 of the Opinion where that suggestion is alluded to. No previous case law is cited in those points, either.

¹⁴ i.e., that the comparison be made on a consistent basis and that comparator markets have been selected on the basis of criteria that are objective, verifiable and appropriate.

¹⁵ *Latvian Copyright*, §51. See also, §38-39, 44-46.

21. It is true, as Flynn points out¹⁶, that there was a second geographic price comparison in that case, involving some 20 comparator countries with the rates adjusted for the difference in living standards.¹⁷ But it was the same method; the second price comparison merely involved more comparator countries than the first one. The CJEU noted that this second comparison “may serve to verify” (*Latvian Copyright* §43) the results of the first comparison without however requiring such verification. More importantly, the CJEU did not endorse Advocate General Wahl’s suggestion that the referring court should check if alternative methods could theoretically have been used in combination with the method actually used and went on to hold as set out above. *Tournier* also supports the conclusion that combining different methods is not a legal obligation. There the CJEU referred to “other criteria” that may have served to establish the unfairness and Advocate General Jacobs had reviewed the merits of these possible alternative methods in his Opinion, but this did not lead the CJEU to require a combined application of different methods.
22. The CJEU’s statement in *Latvian Copyright* that “there is no single adequate method” (§49) is merely a re-statement of the general proposition that there is not a single method that would work or be available in all circumstances. It is precisely for that reason that the CJEU accords competition authorities a “certain margin of manoeuvre” to determine the method that it considers is best suited to the circumstances.¹⁸
23. Pfizer’s contrary suggestion of a “consistent practice” of competition authorities and courts to rely on a broad range of available methods¹⁹ does not reflect the EU case law, and Pfizer does not refer to any such case. As regards the practice of competition authorities, Pfizer refers to *Deutsche Post*²⁰ and *Scandlines*. However,

16 Flynn Respondent’s Skeleton §32.

17 *Latvian Copyright*, §10, 39 and 46.

18 *Latvian Copyright*, §49. The

19 Pfizer Respondent’s Skeleton §29.

20 Case COMP/36.915, OJ [2001] L331/40.

these cases do not involve a combination of the *United Brands*' two - limb method with a different method.

24. The *United Brands* test seeks to determine whether the dominant undertaking's prices are excessive by comparison with those likely under conditions of "normal and sufficiently effective competition" (§316). For this purpose, under first limb of the *United Brands* test, the question "to be determined" is "whether the difference between the costs actually incurred and the price actually charged is excessive", the rationale being to determine excessiveness by looking at the profit margin. In that respect, the Commission notes that whether the 6% ROS used by the CMA was appropriate for that purpose is in dispute: the CMA contends that the Tribunal erred in finding that the CMA's use of 6% ROS implied finding that Pfizer's and Flynn's prices were excessive by reference to "a theoretical concept of idealised or near perfect competition" (§318),²¹ whereas Flynn contends that the returns actually earned by "comparable companies," and Flynn itself on other products, were higher.²²
25. The Commission notes however that the Tribunal was "sympathetic to the point that a drug in the circumstances of phenytoin might be expected to be at the lower end of return" (§335) and did "not find that any of the comparators suggested to us, in themselves, presented such a clear evidential picture that they undermined the conclusions reached by the CMA in deciding on a reasonable rate of return" (§345). The Tribunal's conclusion that the Decision's findings on excessiveness had to be set aside appears therefore to be based on its concerns about the CMA's "overall approach" (§345).
26. Subject to the Court's findings on Flynn's and Pfizer's arguments about the reasonableness of the rate of return used by the CMA, the Commission submits that, the Decision cannot be impugned on the grounds of the CMA's "overall approach" (summarised at (§310). Further to the submissions above:

21 CMA Appeal Skeleton, §§59-62.

22 Flynn Respondent's Skeleton, §45.

- 26.1. Contrary to the Judgment, an authority's choice to rely on *United Brands* as the method of calculating the excess does not imply that that choice was made because it was the most favourable to establishing an infringement – *United Brands* simply prescribes a methodology, which if available in the circumstances (as here, where costs could be established) cannot be impeached by ascribing an ulterior motive to the competition authority (§314) or characterised as ignoring potentially exculpatory evidence.²³ What matters is if the method chosen is reliable and that the evidence gathered is, in the round, sufficient to satisfy the authority's burden of proof.
- 26.2. The Commission agrees with the CMA²⁴ that the excessive limb of *United Brands* does not require a comparison between the price actually charged by the dominant undertaking in the relevant market and the price which that undertaking would hypothetically have charged if there had been effective competition ("benchmark" price). In *Latvian Copyright*, Advocate General Wahl's Opinion, §17 refers to "the first step" but as explained by the CMA and above, this relates to the overarching purpose of the enquiry in this type of abuse and is not dealing with the first step (the excessive limb) of *United Brands* which, as pointed out, concerns a comparison of costs v. prices, and not a comparison of prices v. prices (see, Opinion e.g., 39, 42, 45).
- 26.3. Advocate General Wahl does not identify any case law where this kind of benchmarking has been endorsed *as part of the first limb* of the *United Brands* test. The Opinion, §43 articulates the suggestion that an authority should combine different methods of analysis and states that those methods found in the CJEU case law "which have been illustrated in points 18 and 19 [of the Opinion] may serve that purpose". Thus the suggestion (not endorsed by the CJEU, as explained above) was to combine the *United Brands* two-limb method with the other, alternative, methods found in the case law such as geographic

²³ Pfizer Respondent's Skeleton, §66.

²⁴ CMA Appeal Skeleton §41-43.

price comparisons or price comparisons over time, and not to incorporate a “benchmarking” of prices into the excessive limb of *United Brands*.

27. The Commission therefore respectfully submits that the Tribunal erred in concluding that, to establish whether the price was excessive under the first limb, the CMA should “consider a range of possible analyses, reflecting market conditions and the extent and quality of the data that can be obtained, to establish a benchmark price, or range, that reflects the price that would pertain under conditions of normal and sufficiently effective competition” (§443(1)) as this goes beyond the requirements of *United Brands*, as recently confirmed in *Latvian Copyright*, §36.

V. THE TRIBUNAL ERRED IN ITS APPROACH TO THE DETERMINATION OF WHETHER THE PRICES WERE UNFAIR

(i) Alternatives 1 and 2 in *United Brands* are alternatives

28. The Judgment does not take issue with the Decision’s finding that Pfizer and Flynn’s prices were unfair in themselves, within the meaning of Alternative 1 of the test for unfairness in *United Brands*. However, the Tribunal found the CMA erred in basing its assessment of unfairness only on Alternative 1 (§362), despite recognising that it is clear from *Scippacercola*²⁵ that the CJEU has confirmed that the two tests of unfairness in *United Brands*, §252 are indeed alternatives (§366).

29. The Tribunal’s position is not entirely clear:

29.1. In criticising the CMA for relying “only on Alternative 1”, the Judgment follows this up by criticising the CMA for not having properly assessed “the possible impact of meaningful comparators (in particular, phenytoin tablets) for the purpose of assessing whether the prices charged were unfair” (§362), a criticism which paraphrases Alternative 2 of *United Brands* (“unfair...when compared to competing products”).

29.2. Yet the Tribunal maintains (§367) that it does *not* hold that a competition authority “cannot find that there is an infringement where one Alternative

²⁵ Case T-306/05 *Scippacercola and Terezakis v Commission* EU:T:2008:9, upheld on appeal in Case C-159/08 P.

demonstrates unfairness and the other does not since it does not need to succeed on both heads.” This is however very difficult to reconcile with (§362).

29.3. The position is further clouded by the Judgment seeking to distinguish *Scippacercola* on the grounds that the issue there was whether the Commission had to satisfy Alternatives 1 and 2 cumulatively, but it is submitted this is a distinction without a difference:

29.3.1. *per* the Tribunal, a competition authority does not have an unfettered discretion to select Alternative 1 or 2, such that “a finding under one Alternative that the pricing is unfair, when a *prima facie* argument has been raised that under the other Alternative, the pricing is fair” (§366) cannot allow the competition authority to conclude that the pricing is unfair.

29.3.2. In effect, this amounts to a requirement to satisfy the unfairness tests under both Alternatives. The Judgment recognises that the CMA did examine, “for completeness” various comparators, but this did not extend to tablets, because the CMA considered that tablets might themselves be excessively priced (§§377-378). Although the Tribunal recognised that “the CMA clearly gave some consideration to the suitability of tablets as a comparator” it nevertheless held that this was not done “in sufficient depth” (§379).

29.3.3. As indicated above, it is not for the Commission to assess the evidence, but it notes that the CMA affirms that in any event it undertook a “detailed consideration” of tablets and refers in this respect to passages in the Decision other²⁶ than those acknowledged by the Judgment as considering tablets as a possible comparator (§§377, 385, 391). As the CMA submits,²⁷ the Alternatives ostensibly acknowledged by the Judgment are not really alternatives at all.

²⁶ CMA Appeal Skeleton, §§71-72 and the references therein to the Decision.

²⁷ CMA Appeal Skeleton, §76.

- 29.4. The Tribunal's approach is again influenced by its misconception of the "over-arching" element of the *United Brands* test (§368).
30. In conclusion, *United Brands*, as confirmed by *Scippacercola*, shows that it was open to the CMA to rely on Alternative 1 in any event. Alternatively, to the extent that it was necessary for the CMA to take account of evidence about pricing of comparator products before concluding that Pfizer' and Flynn's prices were unfair, the "full and proper examination" required by the Judgment cannot be reconciled with the CJEU's case law.
31. In this respect, the Commission notes that the Tribunal observed that one could not have expected Pfizer or Flynn to discuss how the potential comparator (Teva) set its price (§380), a point which illustrates the impracticable implications of the Judgment. In the context of a possible private action for damages against a dominant undertaking, the Tribunal's acknowledgement that it would be "virtually impossible and indeed inappropriate" to obtain pricing information from another undertaking illustrates the difficulties the parties would be placed in.
32. The Commission's primary submission is that Alternatives 1 and 2 are just that – alternatives. Alternatively, if despite unfairness being established under Alternative 1, it is necessary to examine *prima facie* arguments supporting fairness under Alternative 2, it is submitted that a valid *prima facie* argument can be refuted by *prima facie* indications to the contrary. In this respect:
- 32.1. The CMA explained why *prima facie* a comparison with tablets was unsuitable to show that prices were actually fair. It explained that the market for tablets was subject to the same constraints as the market for capsules as regards continuity of supply, making tablet prices *prima facie* unsuitable to show fairness.
- 32.2. Regarding a comparison over time the CAT "agreed that a large price increase, sustained over a large period may be indicative of an abuse of a dominant position." (§439).

32.3. Pfizer did not increase prices in the same way in other Member States, and UK prices were significantly higher. In other words, *prima facie*, the significant price increases and a comparison with other Member States suggested unfairness. That evidence appears sufficient to refute a valid *prima facie* argument of fairness.

(ii) *United Brands* does not provide for an additional test of the economic value of the capsules to users

33. As a preliminary step to considering whether Pfizer's and Flynn's prices were unfair in themselves, the Decision assessed the economic value of the capsules. In this context, the Decision assessed whether there were any "non-cost related factors which would increase the economic value "of the capsules beyond their cost of production plus a reasonable rate of return" ²⁸ ("**Cost Plus**"), the Decision concluding that there were no such factors and that the economic value of the capsules was therefore Cost Plus. The unfairness of the prices was therefore assessed on that basis.

34. The Judgment finds that the economic value of the capsules is a matter to be determined separately, "after the assessment of unfairness in the Unfair Limb" (§405), as part of the over-arching assessment the Tribunal held was required by *United Brands*. This difference of approach appears to have had repercussions for the CMA, the Judgment holding that the Decision appeared to have assessed the issue put in *United Brands*, §§249-250 "mainly as part of its consideration of unfairness 'in itself' under the Unfair Limb, rather than as an over-arching assessment, as we think it should have done" (§427). Consequently, although the Tribunal recognised that, "[t]reating this Cost Plus figure as the same as the product's economic value and using the same data to conclude that the price bore no reasonable relation to the economic value of the product does express those findings in terms consistent with the *United Brands* approach; ... it renders largely otiose the clearly separate Unfair Limb under that approach" (§428).

²⁸ Decision, §5.274.

35. It is not clear to the Commission how this latter finding that the CMA's approach had rendered otiose the second limb of the *United Brands* test is reconcilable with the finding in the Judgment's previous paragraph that the Decision's assessment of whether the price bore no reasonable relation to the economic value of the product had been carried out in the context of the second limb of the *United Brands* test. The Tribunal's analysis here appears to be predicated on the need for an over-arching assessment to address the requirements of *United Brands*, §§249-250, but as submitted above, this approach is misconceived. The Commission submits that to the extent that demand side value of the capsules is relevant, when applying *United Brands*, it is to be taken into account in the second limb of the *United Brands* test.
36. In any event, the Tribunal's concern, in substance, appears to be that the expert evidence before it led it to the conclusion that the benefit of the capsules to patients had to be given some economic value (§§416-417) but that the CMA had not put any value on the therapeutic value for patients of the capsules (§419).
37. The Commission notes that there is a dispute between the main parties as to whether the Tribunal correctly characterised the Decision:
- 37.1. The CMA submits that it did not attribute a zero value to the demand side benefits of the capsules, but "demand-side factors did not provide economic value *beyond or additional to* the value represented in the cost of making Phenytoin Capsules, plus the reasonable rate of return".²⁹
- 37.2. Flynn maintains that the CMA had made an outright rejection of attributing any value to the therapeutic benefit to patients of the capsules, and that the CMA's position is predicated on patient dependency, whereas the evidence here showed that dependency was a matter of degree, Flynn thereby contesting that the circumstances are comparable to those in *Tournier*.³⁰

²⁹ CMA Appeal Skeleton, §81.

³⁰ Flynn Respondent's Skeleton, §§77-80.

37.3. Pfizer emphasises the Tribunal’s finding that dependency was a matter of degree, and thus also denies that the circumstances are comparable to those in *Tournier*.³¹

38. The Commission can only address the point on the basis of the Judgment’s findings, which accepted that patient dependency was a matter of degree (§417). The Judgment also accepted that to the extent that switching from the capsules to another formulation was restricted, this would decrease the demand side value, so to some extent, the view taken by Advocate General Jacobs in *Tournier* was applicable, but overall, the Tribunal was critical of the “outright rejection of any value at all to patients” (§412).

(iii) The relevance of demand side factors in assessing unfairness

39. The Commission’s decision in *Scandlines/Port of Helsingborg* was central to the parties’ arguments and to the Judgment. The Commission therefore makes the following observations, to put that decision into its proper context for the Court:

39.1. The Decision is not a final decision under Article 7 of Regulation 1/2003; it is only a rejection of a complaint and makes no definitive findings. Furthermore, it is the only example of demand side factors having been considered in the Commission’s practice and no judgment of the GCEU or CJEU has endorsed doing this.³²

39.2. The passages addressing “economic value” relied on in these proceedings appear in the context of the unfairness limb of the *United Brands* test, which is only included in the decision for completeness – the decision makes no finding that the Port of Helsingborg’s prices were excessive.³³

31 Pfizer’s Skeleton, §§79-83.

32 Since 2004, the Commission has investigated a number of excessive pricing cases in different sectors including in energy, mobile telephone services, IT, financial services and pharmaceuticals.

33 *Scandlines*, recital (158) – “In any event, **even if it were to be assumed** that the profit margin of HHAB is high (or even “excessive”), this would not be sufficient to conclude that the price

39.1. Recital (232) of the decision states that “*In the present case, the economic value of the product/service cannot simply be determined by adding to the approximate costs incurred in the provision of this product/service as assessed by the Commission, a profit margin which would be a pre-determined percentage of the production costs*” a feature of the case being that, on the demand side, there were just three ferry operators. In such a concentrated market, intervention against prices charged by the Port of Helsingborg would be liable merely to have shifted profits from to the port to the ferry operators, leaving final consumers continuing to pay high prices, which is a relevant consideration in the assessment of unfairness. This is the explanation given of that decision in a Commission paper to the OECD in 2011, which emphasised that a definition of economic value based on what customers are willing to pay would thereby preclude any finding of abuse by excessive pricing.³⁴

40. The CMA’s submission is that it had already sufficiently taken account of demand side factors in its Cost Plus methodology.³⁵ The parties arguments about the evidence of patients’ dependency on the capsules are a matter for the Court, but even if the Court were to uphold the Tribunal’s finding that there is not complete

charged bears no reasonable relation to the economic value of the services provided...” (emphasis added).

³⁴ “The Court in its judgements described above has always based the economic value of a product on its costs of production including a necessary profit margin to attract sufficient capital. It is thus clear that a definition of economic value based on what customers are willing to pay would not be aligned with the case law, as it would define away any possible excessive price. The Commission’s decision could be understood as an attempt to avoid that the port might be punished for providing a superior product. While the services provided by HHAB were not necessarily superior to the services provided elsewhere at other ports, the fact that the services were provided at Helsingborg allowed ferry operators to cross the Øresund in an expeditious way, which, according to the Commission, is in itself valuable.²⁶ This would fit the second limb of the test” – OECD paper DAF/COMP/WP2/WD(2011)54, of 17 October 2011, “*Article 102 and Excessive Prices*”, European Commission contribution.

³⁵ CMA Appeal Skeleton, §82.

dependency, it is submitted that this does not mean that the assessment of whether prices were unfair had to attribute some additional value to the demand side.

41. The circumstances of the present case are much closer to those of *British Leyland* than *Scandlines*. In *British Leyland*, British Leyland's pricing policy meant that its Metro car was sold at a considerably lower price on the Continent, prompting British consumers to buy Metros on the Continent, despite them being left-hand drive, and import them into the United Kingdom with a view to converting them to right-hand drive for use on British roads. British Leyland sought to dissuade consumers from doing this by greatly increasing the price of a National Type Approval ("NTA") certificate for left-hand drive Metros.
42. The Commission decision finding this to be an abuse of British Leyland's dominant position in NTA certificates for Metros was upheld by the CJEU, which held that "the Commission was entitled to conclude that the fee was fixed at a level which was clearly disproportionate to the economic value of the service provided"³⁶ without regard to demand side value. Yet on the logic of the Tribunal here, the NTA certificate had additional demand side value because it enabled a consumer to purchase a car for use in the United Kingdom at a price considerably below the usual price charged in the United Kingdom.

VI. CONCLUSION

43. For the reasons given above, the Commission respectfully submits that the CMA's appeal should be allowed.
44. Alternatively, a reference to the CJEU on the interpretation of *United Brands* and its application to the facts of the present case should be made, pursuant to Article 267 TFEU, concerning in particular:

44.1. The appropriateness and sufficiency of the two-limb test in *United Brands* to prove an abuse under Article 102 TFEU.

³⁶ Case 226/84 *British Leyland v Commission*, EU:C:1986:421, §30.

- 44.2. Whether benchmarking against the hypothetical price that would have been charged by the dominant undertaking in conditions of sufficiently effective, but not idealised competition is required when applying the *United Brands* test.
- 44.3. Whether there is a legal requirement to combine different methods.
- 44.4. The alternative nature of the unfair limb, and the necessity to enquire into a *prima facie* argument of fairness under the other limb.
- 44.5. The circumstances in which it is necessary to assess economic value and whether the price bears a reasonable relationship to it, and whether this is to be done as a separate step from the two-limb test of *United Brands* with a view to an “over-arching” assessment.

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