A Matter of Merits: the CAT overturns and remakes the CMA's Phenytoin Decision, upholding infringements

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I. Introduction

In a recent groundbreaking judgment, the Competition Appeal Tribunal (CAT) revisited the long-debated issue of excessive pricing, raising critical questions about the balance between robust enforcement and the evidentiary burdens placed on competition authorities.[1] This case arose from the Competition and Markets Authority's (CMA) initial 2016 infringement decision against Pfizer and Flynn Pharma, which concluded that the companies had abused their dominant positions by charging excessive prices for phenytoin sodium capsules.[2] Following appeals, the CAT reviewed and set aside the CMA's decision, challenging its application of the *United Brands* test, which comprises two limbs: (1) whether the difference between the cost and price is excessive (Excessive Limb) and (2) whether the price is unfair, either (a) in itself or (b) when compared to competing products (Unfair Limb)[3]. On appeal, the Court of Appeal (CoA) clarified that while the CMA could rely on the 'unfair in itself' part of the Unfair Limb, it must also assess all relevant evidence, including comparators provided by the

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[1] The legal assessment of excessive pricing has been a topic of extensive academic debate in general, see e. g M. Motta and A. de Streel, 'Exploitative and Exclusionary Excessive Prices in EU Law' in C.D. Ehlermann and I. Atanasiu (eds), European Competition Law Annual 2003: What Is an Abuse of a Dominant Position? (Hart Publishing 2003); D. Evans and J. Padilla, 'Excessive Prices: Using Economics to Define Administrable Legal Rules' (2005) 1(1) Journal of Competition Law and Economics 97; A. Fletcher and A. Jardine, 'Towards an Appropriate Policy for Excessive Pricing' in C.D. Ehlermann and M. Marquis (eds), European Competition Law Annual 2007: A Reformed Approach to Article 82 EC (Bloomsbury Publishing 2008); L. Röller, 'Exploitative Abuses' in C.D. Ehlermann and M. Marquis (eds), European Competition Law Annual 2007: A Reformed Approach to Article 82 EC (Bloomsbury Publishing 2008); E. Paulis, 'Article 82 EC and Exploitative Conduct' in C.D. Ehlermann and M. Marquis (eds), European Competition Law Annual 2007: A Reformed Approach to Article 82 EC (Oxford/Portland, 2008) 517; A. Ezrachi and D. Gilo, 'Are Excessive Prices Self-Correcting?' (2009) 5(2) Journal of Competition Law and Economics 249; P. Akman and L. Garrod, 'When Are Excessive Prices Unfair?', CCP Working Paper 10-4 (2012); G.J. Werden, 'Exploitative Abuse of a Dominant Position: A Bad Idea That Now Should Be Abandoned' (2021) 17(3) European Competition Journal 682; M. Marinova, 'Unmasking Excessive Pricing: Evolution of EU Law on Excessive Pricing from United Brands to Aspen' (2024) 20(2) European Competition Journal 315.

[2] CMA Decision: Case CE/9742-13, Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK (7 December 2016) (hereinafter: CMA *Phenytoin I* decision).

[3] Judgment of the CAT of 7 June 2018, in Joined Cases 1275–1276/1/12/17, Pfizer Inc and Pfizer Limited v Competition and Markets Authority and Flynn Pharma v Competition and Markets Authority [2018] CAT 11 (CAT I judgment); referred to Case 27/76 *United Brands v Commission* [1978] ECR I -207, para 252.

defendants.[4] In response, the CMA issued a second decision in 2022, reaffirming its findings with revised methodologies. This led to fresh appeals, culminating in the CAT's latest judgment, which exercised its jurisdiction and re-made the decision, providing significant clarifications while critically evaluating the CMA's approach to excessive pricing.[5] The CAT's ability to decide appeals on the merits introduces a unique layer of scrutiny in UK competition law.[6] Unlike judicial review, which limits its focus to legality and procedural fairness, the CAT's merits-based review evaluates the substantive correctness of a decision, ensuring that the decision is not only procedurally sound but also substantively justified.

Building on this foundation, this paper examines the latest judgment, focusing on the CAT's rejection of the CMA's approach and its subsequent re-made decision. It will assess whether the CAT established a standard for excessive pricing that has the potential to extend beyond the pharmaceutical industry. Furthermore, the analysis will situate the judgment within the broader framework of evolving legal standards in excessive pricing cases, considering its implications for both public and private enforcement.[7] This is particularly relevant in light of the recent developments in private enforcement in the UK over the past few years.

The remainder of this paper summarises the CMA's initial decision against Pfizer and Flynn, followed by the responses from the CAT, the Court of Appeal (CoA), and the second CMA's decision (Section Two).[8] It then analyses the latest CAT judgment and its implications for the CMA's approach to excessive pricing (Section Three) and considers how these developments may shape future enforcement efforts. Finally, the paper concludes by arguing that the CAT's

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[4] *The Competition and Markets Authority v (1) Flynn Pharma Limited; (2) Flynn Pharma (Holdings) Limited; (3) Pfizer Inc. (4) Pfizer Limited* [2020] EWCA Civ 339.

[5] Judgment of the CAT of 20 November 2024, in Joined Cases 1524–1525/1/12/22, Pfizer Inc and Pfizer Limited v Competition and Markets Authority and Flynn Pharma v Competition and Markets Authority [2024] CAT 65 (CAT II judgment)

[6] On this point, see M. Marinova, The UK's digital market regulation: the need for a proportionality principle in the CMA's new framework (2024) 15(7) Journal of European Competition Law & Practice, 491.

[7] Grant Stirling, 'The elusive test for unfair excessive pricing under EU law: revisiting United Brands in the light of Competition and Markets Authority v Flynn Pharma Ltd' (2020) 16(2-3) ECJ 368 and more recently M. Marinova, Rethinking the legal test for excessive pricing: Insights from the Landmark UK *CMA v Pfizer/Flyn*n Case and Its Legal Implications' (2025) 13(1) The Antitrust Enforcement Journal, 115. See also Claudio Calcagno, Antoine Chapsal and Joshua White, Economics of excessive pricing: an application to the pharmaceutical industry (2019) 10(3) JECL & Practice 166, 171. See also, Robert O'Donoghue, 'The Political Economy of Excessive Pricing in The Pharmaceutical Sector in The EU: A Question of Democracy?' (2018) CPI <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/07/CPI-ODonoghue.pdf > accessed 24 February 2024, suggesting that if the excessive pricing is as a result of lack of regulation, then the solution should be changing the regulatory regime and not using Article 102 TFEU as a form of ad hoc plug for a perceived regulatory gap.

[8] This section is based on a previously published paper, see M. Marinova, Rethinking the legal test for excessive pricing: Insights from the Landmark UK *CMA v Pfizer/Flyn*n Case and Its Legal Implications' (n 7).

approach, while offering critical clarifications, imposes additional evidentiary burdens that may challenge the effectiveness of future enforcement actions under both public and private enforcement in the UK.

II. Background of the case

2.1 The CMA Phenytoin I Decision

In December 2016, the CMA fined Pfizer and Flynn Pharma for breaching UK and European competition laws by selling the epilepsy drug phenytoin sodium at excessive prices. After the drug's patent expired in 2000, Pfizer acquired the brand and, in 2012, debranded it to bypass UK price controls, transferring the Marketing Authorisations (MAs) to Flynn.[9] This move removed price caps, allowing Flynn to significantly raise the drug's price overnight, despite years of price stability. [10]

The CMA concluded that Pfizer and Flynn held dominant positions due to their high market shares, lack of effective competition, high barriers to entry, and their status as unavoidable trading partners for the NHS, which lacked sufficient buyer power to constrain their behavior. The CMA also noted that the principle of Continuity of Supply locked patients into using the product, and the small, declining patient base deterred potential market entrants, as new competitors could not attract these specific patients.[11]

The CMA based its assessment on the leading excessive pricing case, *United Brands*.[12] The CMA conducted a comparison between costs actually incurred plus a reasonable rate of return and the price (the so-called 'cost-plus' test) and examined three possible measures for each of Pfizer's and Flynn's rate of return, namely the return of capital employed (ROCE); return of sales (ROS); and gross margins and considered that a 6% ROS would be a reasonable benchmark (which represented the standard ROS under the Pharmaceutical Price Regulation Scheme). Based on that, it found that Pfizer's prices exceeded this benchmark by 29% to 705% across various capsule strengths,[13] and Flynn's prices exceeded it by 31% to 133%.[14] The CMA concluded that these excesses were 'material' and 'sufficiently large' to satisfy the Excessive

[9] CMA *Phenytoin I* decision, para 1.9.
[10] The British Parliament passed legislation to close the gap that allowed Pfizer to use its debranding initiative to circumvent the pricing regulations.
[11] CMA Phenytoin I decision, para 4.190.
[12] *United Brands*, para 252.
[13] CMA *Phenytoin I* decision, para 5.125.
[14] Ibid, para 5.218.

Limb of the *United Brands* test for both companies.[15] Further, the CMA conducted price comparisons over time (which is a test that the courts have endorsed as a separate benchmark, i.e., it did more than a cost-plus test) and found considerable price increases.[16]

The CMA assessed the Unfair Limb by considering two elements, i.e., whether prices were unfair 'in themselves' or 'when compared to competing products as alternative rather than cumulative tests and, as such, it decides it was sufficient to demonstrate that one of these tests was satisfied in order to establish an infringement.[17] It concluded that prices were unfair in themselves, as no non-cost factors, such as consumer preferences, increased the economic value beyond the cost of production plus a reasonable rate of return.[18] It was held that it was unnecessary to evaluate whether those prices were unfair when compared to competing products.[19] However, for completeness, potential comparators like parallel import, NRIM's product, and tablets have been considered and rejected as they were unsuitable for meaningful comparisons.[20]

The CMA identified several factors supporting the unfairness of the price, including a significant disparity between the price and the products' economic value, lack of competitive market conditions, and adverse consumer impacts.[21] It emphasized that the substantial price increase for phenytoin sodium capsules was unjustified by costs, investment, or risk, particularly for an old, off-patent drug historically sold at much lower prices.[22] Notably, Pfizer continued to sell the same medication profitably at significantly lower prices in other EU Member States. Moreover, the Parties failed to provide an objective justification, leading the CMA to conclude that the price was excessive and, therefore, abusive.[23] The CMA imposed a penalty of £84.2 million on Pfizer and £5.2 million on Flynn and directed both companies to reduce their prices.

2.2 First Appeal to the CAT

[15] Ibid, paras 5.127 and 5.222.
[16] Ibid, para 5.356. In the NAPP, CD Farma and Aspen cases (both the Italian Aspen cases and the Commission Decision of 10 February 2021 (Case AT.40394 (Aspen)), this comparator was used in combination with other tests.
[17] Ibid, paras 5.243-4.
[18] Ibid, para 5.247.
[19] Ibid, para 5.476.
[20] Ibid, para 5.491.
[21] Ibid, para 5.351.
[22] Ibid, para 5.356.
[23] Ibid, para 5.450.

On appeal, the CAT set aside the CMA decision on the ground that the CMA misapplied the legal test for finding that prices were unfair.[24] The CAT criticized the CMA for failing to properly assess the appropriate economic value of the product and for insufficiently considering price comparisons with comparable products, such as phenytoin sodium tablets. The CAT also noted that the two-limb test from *United Brands* has not always been applied in practice, particularly in cases where determining production costs is impractical, such as performing rights cases. It clarified that unfair prices could be established using alternative methods beyond the two-limb approach.[25] Referring to Advocate General Wahl's opinion in *AKKA/LAA* (rather than to the CJEU judgment), the CAT considered that the 'cost plus' approach adopted by the CMA was an insufficient basis for establishing excessive pricing if other methods were available.[26] Further, following AG opinion, the CAT held that for the excessiveness limb, the CMA should establish a benchmark price (or range) that would prevail under conditions of normal and sufficiently effective competition. This benchmark should then be compared with the actual price charged to determine whether it was excessive.[27] Additionally, the CAT emphasized the importance of considering market conditions, the evolution of pricing over time, and the stability of the price differential when assessing excessiveness.

For the Unfair Limb, the CAT suggested that the CMA should evaluate whether the price is unfair using either of the alternative tests but must give proper consideration to arguments that the price could be fair under either test if conflicting results arise. The CAT specifically criticized the CMA for failing to adequately consider the competitive conditions surrounding phenytoin sodium tablets, which Pfizer regarded as clinically identical, and to determine whether they could serve as a meaningful comparator.[28] The CMA argued, however, that under the *United Brands* test, it was not legally required to assess both alternatives, maintaining that if a price was deemed unfair in itself, there was no obligation also to evaluate unfairness by reference to competing products.

[24] Judgment of the CAT of 7 June 2018, in Joined Cases 1275–1276/1/12/17, Pfizer Inc and Pfizer Limited v Competition and Markets Authority and Flynn Pharma v Competition and Markets Authority [2018] CAT 11 (*Phenytoin I* CAT judgment).
[25] Ibid, para 289.
[26] Ibid, para 356 referring to Case C-177/16, *AKKA/ LAA*, Opinion of AG Wahl, 6 April 2017, EU:C:2017:286
[27] Ibid, para 443.
[28] Ibid, para 391.

Further, the CAT held that if the price is considered unfair, an assessment of whether it bears a reasonable relation to the economic value should follow as a standalone assessment.[29] On this point, the CAT criticised the CMA for not taking into account the fact that at least some economic value should be derived from the therapeutic benefit to patients of phenytoin sodium capsules,[30] given that all relevant circumstances have to be considered when determining the economic value of the product.[31] The CAT was clear that the term 'economic value' is a legal rather than an economic concept, which is highly fact-specific and, as such, a matter of judgement.[32] Further, the court made it clear that while a substantial and prolonged price increase might prompt an investigation into potential abuse of a dominant position, this factor should not be conflated with the actual test for unfair pricing.[33] The CAT decided not to deliver a judgment on substance because the CMA did not evaluate relevant facts, and provisionally concluded that the case should be remitted back to the CMA for further consideration in light of the existing case law and the judgment.[34] The CAT's judgment was appealed by the CMA, Pfizer and Flynn.

2.3 Appeal to the UK Court of Appeal

In a judgment delivered on 10 March 2020, the UK Court of Appeal (CoA)partially overturned the CAT's ruling and referred the case back to the CMA for further assessment of the defendants' arguments on whether the prices were excessive and unfair. The CoA held that the CAT was wrong to require the CMA to establish a hypothetical benchmark price beyond a cost-plus calculation to determine excessiveness.[35] Much of the debate before the CoA concerned the assessment of unfairness. The CoA considered that it was not necessary to adhere rigidly to *United Brand's* assessment of unfairness (either 'in itself' or by comparison) because it was neither purely disjunctive (i.e. 'one or the other') nor a combinatorial test. The CoA agreed with the CMA that it can establish excessive pricing abuses by showing that the price is excessive and as such unfair in itself, and it does not have to consider whether it is also unfair when compared with a competing product, disagreeing with CAT's position on this point.[36] It emphasized that the CMA has a 'margin of manoeuvre' in deciding which methods and

[29] Ibid, para 443.
[30] Ibid, para 419.
[31] Ibid, para 425.
[32] Ibid, para 407.
[33] Ibid, para 439.
[34] Ibid, para 443.
[35] Ibid, paras 248 and 254.
[36] Ibid, para 259.

evidence to use when assessing excessive pricing but cannot ignore evidence and arguments put forward by the defendants providing valid comparators as evidence as to why the prices they charge are in fact fair.[37] In addition, the CoA considered that the question of patient benefit will need to be revisited when the CMA reconsiders the matter[38] but disagreed with the CAT that a free-standing assessment of economic value in addition to the assessments of excessiveness and unfairness was required.[39] The CoA clarified that there is no single method or definitive approach for determining whether the price charged bears no relation to the economic value of the product.

2.4 The CMA Phenytoin II Decision

Following the CoA's judgment, the CMA re-investigated the case and issued an infringement decision on 21 July 2022, finding that the parties have infringed competition law by charging unfairly high prices for phenytoin sodium capsules, adopting a similar but slightly revised approach to its initial decision.[40] Under the Excessive Limb, it relied solely on the cost-plus test without exploring other methods.[41] In its reassessment, the CMA applied the ROCE methodology to cross-check the ROS analysis (for Pfizer) and reviewed the suitability of ROS comparators submitted during the earlier investigation and remittal.[42] It revised Pfizer's ROS from 6% to 10% to account for the full infringement period, comparing ROS earned by the business units within Pfizer and the Global Established Pharma ('GEP') division after 2014,[43] and found that the prices exceeded costs plus a reasonable rate of return, deeming the excesses 'material' and 'sufficiently large' to satisfy the Excessive Limb.[44]

For the Unfair Limb, the CMA re-evaluated evidence, including comparisons with tablets and other AEDs, but found these unsuitable due to differences in product characteristics, clinical use, and prescribing guidelines.[45] It also reassessed the economic value of the products, considering supply and demand factors, and concluded that demand-side factors, such as patient benefit, did not increase the value beyond the cost-plus figures.[46]

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[37] Ibid, para 273.
[38] Ibid, para 281.
[39] Ibid, para 282.
[40] CMA Decision: Case 50908, Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK (21 July 2022) (hereinafter Phenytoin II).
[41] Ibid, para 4.11.
[42] Ibid, paras 5.120 -21.
[43] Ibid, paras 5.142 and 5.143.1.
[44] Ibid, para 5.188.
[45] Phenytion II, paras 6.142, 6.466 and 6.530.
[46] Ibid, para 7.2 ref to para 172 from the CoA judgment.

On 12 October 2022, the parties appealed the CMA's decision, challenging the re-imposed fines and criticizing the CMA's cost-plus methodology as flawed and improperly applied. They argued the CMA failed to consider real-world indicators of phenytoin sodium's economic value, rejected valid comparators, and did not adequately demonstrate that prices were unfairly high. Procedurally, they claimed the CMA failed to address procedural and methodological deficiencies raised in prior appeals.

2.5 The CAT Phenytoin II judgment

On 20 November 2023, the CAT judgment upheld the appeals and set aside the CMA's decision, finding significant flaws in its methodology. However, the Tribunal exercised its jurisdiction to re-make the decision, concluding that the parties infringed the Chapter II prohibition and imposed fines of £62,370,000 on Pfizer and £6,704,422 on Flynn.

In this judgment, the CAT addressed the CMA's repeated reliance on a 'cost plus' model and its failure to incorporate broader economic indicators, market dynamics, the importance of real-world competition factors, the economic value of the product, and the role of comparators in assessing both the excessive and unfair limbs of the *United Brands* test. The next section of this paper will analyse how the CAT addressed the grounds of appeal, set aside the CMA's decision, and re-made the findings through an evidence-based approach.

III. Analysis of the judgment

A. Assessment of the Excessive Limb

Traditionally, the assessment of the Excessive Limb in excessive pricing cases focuses on determining whether the difference between cost and price is excessive, as established in the *United Brands*. The methodology of conducting this price-cost test has been developed to establish that a price may be excessive if it significantly exceeds the costs of production plus a reasonable profit margin, the so-called cost-plus test.[47] This suggests that the cost-plus test reflects companies' profitability and, therefore, prices. The plus part of the test involves profitability indicators such as ROCE, ROC, gross margin, etc. A key aspect of these profitability indicators is that they are not assessed in isolation but rather in comparison with

[47] The European Commission acknowledged in the Scandlines case, paragraph 224, that it is reasonable for a company to aim at recovering its capital costs. Correspondingly, in the *Albion Water Limited v Dŵr Cymru Cyfyngedig* [2013] CAT 6 (*Albion Water II)* para 317, the CAT recognized that costs usually should encompass a return on capital. Thus, when determining the "incurred costs," it's typically essential to assign a fair rate of return to account for capital expenses.

similar companies within the same industry. This suggests that the *United Brands* price-cost test has evolved to incorporate comparators, enabling an assessment of a dominant company's profitability and pricing against similar businesses. This approach aligns with the second element of the *United Brands* test – the Unfair Limb, as it helps determine whether a price is unfair in relation to market standards.[48] Consequently, the CMA's cost-plus methodology can be seen as providing additional benchmarks to assess unfairness in pricing.

However, in the latest judgment, the CAT carefully analysed the cost-plus test, making an important observation that if the product unit price consists only of the product unit cost and the reasonable rate of return, without any producer surplus, the price cannot be considered excessive, and the Excessive Limb is not satisfied. This position is in contract with CAT's previous rulings. In addition, the CAT introduced two economic concepts: the consumer surplus (which is the amount a buyer saves when they pay less than they are willing to for a product) and the producer surplus (the additional value a seller gains by selling a product for more than the minimum they would have accepted, informed by their costs and need to achieve at least a normal profit) and explained the relationship between reasonable rate of return, consumer surplus, and producer surplus.[49] The CAT stated that if the producer surplus exists, it may indicate excessiveness, depending on the broader context, and it is particularly important in industries like pharmaceuticals, where firms often face high fixed costs and require incentives for innovation.[50] The CAT highlighted that, specifically, the pharmaceutical sector depends on producer surplus to sustain innovation and long-term viability. This position is in striking contracts with the CAT's position in its previous judgment,[51] the decision of the CoA,[52] and similar cases in the pharma industry - *Liothyronine* and *Hydrocortisone* - where the CAT endorsed this methodology.[53] Moreover, the same methodology was accepted in the Italian *Aspen* case as well as the European Commission's *Aspen* case.[54] In all of the cases, this

[48] M. Marinova, Rethinking the legal test for excessive pricing: Insights from the Landmark UK *CMA v Pfizer/Flyn*n Case and Its Legal Implications' (n 7).
[49] *Phenytoin II judgment*, para 61.
[50] Ibid, para 200.
[51] Judgment of the CAT of 7 June 2018, in Joined Cases 1275–1276/1/12/17, *Pfizer Inc and Pfizer Limited v Competition and Markets Authority and Flynn Pharma v Competition and Markets Authority* [2018] CAT 11 (CAT judgment).
[52] The Competition and Markets Authority v (1) Flynn Pharma Limited; (2) Flynn Pharma (Holdings) Limited; (3) Pfizer Inc. (4) Pfizer Limited [2020] EWCA Civ 339.
[53] Judgment of the CAT in joint cases 1419/1/12/21 1421/1/12/21 1422/1/12/21 Advanz Pharma Corp. and others v CMA [2023] 52.
[54] Aspen Italian NCA (Case A480, Autorità Garante della Concorrenza e del Mercato) decision of 29

methodology was accepted as reliable for assessing the excessiveness, as more than one comparator was used. This is because, within the cost-plus methodology, the profitability indicators are not calculated for themselves but are compared with similar companies in the same industry. This means that the cost-plus methodology compares the profitability (and, as such, prices) of the dominant company against the profitability/ prices of similar companies within the same industry, which resembles the second element of the Unfair Limb of the *United Brands* test. By shifting focus to context-dependent excessiveness and recognizing producer surplus as essential for pharmaceutical innovation, the CAT departed from its previous rulings, rejecting the strict cost-plus methodology it had previously endorsed.

In addition, the CAT scrutinized the CMA's use of ROCE as the primary methodology, abandoning the ROS approach used in *Phenytoin I*.[55] It noted that the Tribunal in *Phenytoin 1* had criticized the narrow application of ROS, not the methodology itself, and the CMA's decision to shift entirely to ROCE lacked sufficient justification.[56] Additionally, the CAT reviewed the CMA's application of the WACC, which accounts for the cost of funding, including interest rates, equity returns, and the debt-equity ratio.[57] The CAT identified flaws in the CMA's assessment of capital employed and return calculations, undermining the reliability of its conclusions.[58] The CMA's reliance on an inaccurate capital figure (£3.5 million compared to the actual £74 million from Focal Product Spreadsheets) further undermined its conclusions.[59] The CAT found this methodology problematic, particularly in the context of the pharmaceutical industry.[60] Again, this position contrasts sharply with similar pharmaceutical cases, such as *Hydrocortisone* and *Liothyronine*, where the CAT accepted the CMA's approach. The lack of clarity arises from the absence of a clear explanation of where the CMA's methodology fell short in this case, despite being consistent with its approach in those earlier decisions. This effectively imposes a higher standard on the CMA in this case. Notably, the

September 2016; Judgment of the Lazio Regional Administrative Tribunal n. 8948/2017 Aspen of 26 July 2017. The Council of State (Consiglio di Stato) upheld that Decision in its Judgment of 20 February 2020 in Case No 8447/2017; Case AT.40394 Aspen Commission Decision of 10 February 2021.

[55] Ibid, para 85-8

[56] Ibid, para 111.

[57] Ibid, para 89.

[58] Ibid, para 153 and subseq.

[59] Ibid, para 137.

[60] Ibid, para 170.

CAT does not provide an explicit rationale for applying a stricter standard here, which invites legitimate criticism of its reasoning.

B. Assessment of the Unfair Limb

The second element of the two-fold test from *United Brands* requires a determination of unfairness, which as outlined above, consists of two elements: whether the price is 'unfair in itself' or when 'compared with competing products.' It is also generally accepted that the two elements/limbs are alternatives. Once the excessiveness of the price is established, the competition authority must determine whether the price is either unfair in itself or compared to competing products. However, the CAT departed from this interpretation by criticising the CMA's limited consideration of comparables and reliance on cost-plus analysis alone, which demonstrates excessiveness under the Excessive Limb.

This criticism, however, overlooks the sophistication of the CMA's cost-plus methodology, which, as explained above, far from being confined to a simple cost-price exercise, integrates multiple profitability indicators and industry benchmarks to measure in practice both excessiveness and unfairness. A closer look at the CMA's cost-plus methodology demonstrates that the CMA applied not only Return on Sales (ROS) but also Return on Capital Employed (ROCE), drawing on internal comparators (across Pfizer's own divisions) and external industry data.[61] This approach serves a dual function: it establishes a robust measure of excessiveness under the first limb while offering relevant comparators for assessing the fairness. From this perspective, the cost-plus test not only establishes excessiveness but also incorporates a comparative component relevant to the second limb of the *United Brands* test. In effect, this comparative component embedded in the CMA's cost-plus analysis already serves the function that the CAT sought to achieve through a separate assessment of comparables. The CAT's insistence on an additional, distinct comparator analysis, therefore, appears unnecessarily duplicative and imposes a more rigid and formalistic interpretation of the unfairness test.[62] While the CAT formally acknowledged that the two limbs of the unfairness test are alternatives, it nevertheless held that, in cases of conflicting results, the CMA must fully assess comparables. This effectively collapses the two limbs of the unfairness test, which is clearly a departure from

[61] A detailed examination of the CMA's methodological approach is provided in M. Marinova, Rethinking the legal test for excessive pricing: insights from the landmark UK CMA v Pfizer/Flynn Case and its legal implications (n 7).

[62] F. Abbott, 'The UK Competition Appeal Tribunal's Misguided Reprieve for Pfizer's Excessive Pricing Abuse' (2018) IIC 49, 845–853 criticizing the CAT judgment on the same ground.

established case law, which treats them as distinct and alternative paths to demonstrating unfairness.[63]

By contrast, the CoA reaffirmed the alternative nature of the two limbs, confirming that the CMA is not under obligation to consider both alternatives of the Unfair Limb, while clarifying that the CMA cannot ignore evidence and arguments put forward by the defendants providing valid comparators as evidence as to why the prices they charge are, in fact, fair. In its remittal decision, the CMA undertook an extensive assessment of comparables, addressing nearly 100 pages of analysis, considering all comparators carefully, only to arrive at the same conclusion as in the first decision.

The CMA applied both alternatives from the unfair limb of the *United Brands* test in its recent decisions delivered after the CoA judgment. In the *Hydrocortisone* decision, the CMA concluded that the prices were unfair, both in themselves and when compared to competing products. Similarly, the CMA evaluated extensively the comparators advanced by the parties in the *Liothyronine* decision. This analysis was in line with the CoA decision, according to which, regardless of the fact that the two limbs are alternatives, the authority should evaluate evidence related to the second limb (comparison with competing product) put forward by the dominant party, which ultimately makes them cumulative. However, in the latest judgment, the CAT remained unsatisfied, holding that even imperfect comparables may offer relevant context. The CAT viewed both limbs not as a procedural response, but as a requirement of a substantive assessment of the two elements of the Unfair Limb. It concluded that the CMA's approach effectively merged the two distinct limbs 'unfair in itself' and 'unfair when

[63] M. Botta, 'Sanctioning unfair pricing under Art. 102(a) TFEU: yes, we can!' (2021) 17(1) European Competition Journal 156-187, 169 and F. Abbott, (n 62). See also, J. Davies and J. Padilla, 'Another Look at the Economics of the UK CMA's Phenytoin Case' in Y. Katsoulacos and F. Jenny (eds) *Excessive Pricing and Competition Law Enforcement* (2018, Springer) 71. Some economists supported the view that the CMA should consider both alternatives because the only meaningful benchmark for 'economic value' is the price of a similar product in a reasonably competitive market, so the 'comparator' version of this part of the test has a compelling logic in economic theory. Secondly, this is particularly the case if the alternative is for the CMA to fall back on the same price-cost analysis that led it to find the price to be excessive in the first place. They also claim that economics of producing generic medicines can be similar for different products, because production costs are often a small part of the total cost of the supply chain. Consequently, the price of a similar capsule that has an entirely unrelated clinical use might be of interest, if such a product can be found priced under conditions of competition.

compared' assessments into a single exercise, thereby undermining the distinct analytical role of the Unfair Limb.[64]

The CAT further clarified that the Unfair Limb requires a separate analysis focused on the justifiability of the producer surplus identified during the Excessive Limb. It explained that the legitimacy of producer surplus should be central to determining whether prices are unfair, emphasizing that the Unfair Limb is not concerned with the mere existence of producer surplus but with whether it can be justified by legitimate factors such as innovation or efficiency.[65] According to CAT, this should form the first element of the Unfair Limb of the *United Brands* test.

This framing, however, departs from how the Unfair Limb has traditionally been applied in case law. Under *United Brands* and subsequent judgments, the Unfair Limb examines whether the price, once found to be excessive, can nonetheless be considered unfair either in itself or by comparison with competing products. However, a closer examination of EU case law following *United Brands* reveals that EU case law has consistently considered the unfairness assessment as turning on whether the price, having been found excessive, lacks an objective justification; where no such justification exists, the price is deemed unfair.[66] The second limb of the unfairness test, i.e., compared to competing products, has never been used as a separate test to establish unfairness and may have limitations related to difficulties in finding competing products, as the investigation concerns a dominant undertaking.[67] The focus is on the justifiability of the excessive level, not on the legitimacy of the surplus it generates. By shifting attention to whether the producer surplus itself is justified, the CAT reframes the test as it conflates the outcome of pricing (the surplus) with the legal question of whether the price level is objectively justified.

This reformulation is also reflected in the Tribunal's broader approach to how economic value is assessed. In particular, the CAT rejected the CMA's reliance on cost-plus figures and its conclusion that no added value arose from therapeutic benefit. In fact, the CMA considered demand-side factors, including patient benefit, and concluded that these did not add economic value beyond the cost-plus figures. The CMA reasoned that the therapeutic benefit of phenytoin sodium was already captured in the cost-plus calculation and found no additional

[64] Ibid, para 217.
[65] Ibid, para 226.
[66] M. Marinova, Unmasking excessive pricing (n 1).
[67] Ibid, p. 339

improvements, innovations, or other factors to justify a higher economic value. However, the CAT interpreted the CMA's cost-plus analysis as overly simplistic and equating economic value with costs alone, referring to the Cellophane Fallacy doctrine, which is not entirely accurate.[68]

The Cellophane Fallacy warns against equating prices in a monopolized market with economic value, as high prices can distort substitutability. In such markets, consumers may be forced to seek alternatives, creating an illusion of competition in what is, in reality, a distorted market. The CAT argued that equating economic value with monopolistic prices effectively legitimizes the monopolist's ability to exploit its position. This is why the CJEU in *United Brands* emphasizes the need for a reasonable relation between price and economic value.

However, the CMA's approach does not inherently fall into the Cellophane Fallacy, as it does not treat the actual price as indicative of economic value. Instead, the CMA used cost-plus as a benchmark and evaluated whether anything beyond costs plus a reasonable rate of return justified the price. The CAT's position, therefore, appears to misinterpret the CMA's methodology, as the CMA did not conflate the actual price with the fair market value but instead sought to evaluate whether the price exceeded economic value in a manner consistent with competitive conditions.

The CAT also advanced the definition of 'economic value' in the context of unfair pricing, emphasizing that it cannot simply equate to the price paid in conditions of restricted competition, as this would conflate economic value with an abusive price.[69] It stressed the need for a reasonable relationship between price and economic value, which should encompass both appropriate producer surplus and consumer surplus. In cases of dominance, where competitive market forces are absent, economic value must lie between the CMA cost-plus figure and the actual price charged. The determination of this value depends on various factors, including real-world competition conditions, willingness and ability to pay, and the balance between producer and consumer surplus.

However, this reformulation appears to disregard the specific characteristics of pharmaceutical markets. Demand in this sector is influenced by multiple stakeholders with different interests, *i.e.*, patients, physicians, reimbursement bodies, and insurers, which creates a complex market dynamic where cost-effectiveness and sustainability are crucial considerations for

[68] *United States v Du Pont de Nemours & Co* 351 US 377 (1956).
[69] CAT *Phenytoin II,* para 243.

reimbursement bodies and insurers, while patients and physicians prioritize medical effectiveness. Unlike in traditional consumer markets, the demand side in pharmaceuticals does not reflect consumers' willingness to pay a premium price but rather their need for life-saving medication.

Relying on consumers' willingness to pay, as in the European Commission's decision in *Port of Helsingborg,*[70] would effectively prevent any excessive price from constituting an abuse, given the inelastic nature of demand for essential medicines.[71] This observation suggests that demand-side factors are unreliable in this context. This ultimately makes the evaluation of economic value in the pharmaceutical market pointless because relying on the patient's maximum willingness to pay would mean that no excessive price could ever constitute an abuse.[72] This observation challenges the CAT's argument that economic value should balance Producer and Consumer Surplus, particularly in the pharmaceutical industry.

In addition, the CAT criticized the CMA's reliance on four factors for assessing unfairness under the Unfair Limb: higher prices compared to pre-2012 levels, the absence of cost or quality improvements, the impact of de-branding on pricing constraints, and the product's impact on patients and the NHS. The Tribunal found the first three factors more relevant to the Excessive Limb.[73] Yet this reasoning overlooks their role as indirect indicators of unjustified pricing. A closer reading of post-*United Brands* case law reveals that EU courts have not treated such factors as confined to excessiveness. Rather, they contribute to the overall justification analysis, which is the essence of the Unfair Limb. Only the fourth factor, concerning the

[70] COMP/A 36.568/D3 *Scandlines Sverige AB v. Port of Helsingborg* [2004].
[71] T. van Helfteren, 'Excessive Pricing in Pharmaceutical Markets: A Review of the Legal Test for Competition Authorities' 42(8) (2021) European Competition Law Review.
[72] Commission Amicus Curiae, para 39.3. See also OECD, 'Competition Issues in the Distribution of Pharmaceuticals' DAF/COMP/GF (2014) 5 making a point that in the pharmaceutical industry, the demand is extremely inelastic, and the bodies liable for the payment of medicines have no control of the demand, which lead to a potential to exceptionally high prices.
[73] Ibid, para 228. Indeed, these factors were endorsed as a reliable indicator of excessiveness in the EU jurisprudence, for example, in the *British Leyland* judgment, the Court used only this comparator and found that the increase in price compared to the levels of the prices in the past, which was not justified by cost increase, was abusive. For analysis of the legal test of excessive pricing at EU level, see M. Marinova, 'Unmasking excessive pricing: evolution of EU law on excessive pricing from United Brands to Aspen,' *20*(2) 2023 *European Competition Journal*, 315–339.

product's impact on patients and the lack of alternatives, was accepted as potentially relevant, although the CAT required deeper analysis within the context of the pharmaceutical market.[74]

The CAT further criticized the CMA's approach to the Unfair Limb, focusing on two additional factors: the claim that the dominant companies exploited the regulatory system to increase prices, and the adverse effects of the prices on patient welfare and the NHS. While acknowledging their relevance, the CAT found that their treatment in the CMA's decision was insufficient to sustain a finding of unfairness.[75] The CAT considered that what is relevant for the Unfair Limb is the underlying reason for the existence of the producer surplus, which requires an assessment of whether the identified producer surplus arises due to an infringement of competition law.[76] It must be determined that the producer surplus would not exist, or would exist to a lesser extent, under conditions of 'Real World Competition' without dominance.[77] Therefore, the analysis focuses on the justification for the producer surplus rather than its mere extent.

The Court identified three key scenarios where producer surplus may be justified under the Unfair Limb.[78] Case 1 involves relative inefficiency among sellers, where the dominant firm's efficiency allows it to profit from higher prices without being unfair. Case 2 concerns distinct value creation, where non-price differentiation, such as unique product features, generates demand and justifies higher prices. Case 3 addresses the recovery of legitimate extraneous costs, particularly in industries like pharmaceuticals, where successful products often fund the high costs of failed developments. The Court emphasized that these factors must be carefully weighed, particularly in cases where producer surplus reflects legitimate business needs rather than abusive practices.

IV. Practical significance and conclusion

4.1 *Increased Evidentiary Burden on Authorities*

The *Phenytoin II* judgment reformulates the legal standard for assessing excessive pricing under *the United Brands* framework, imposing additional evidentiary obligations on the CMA.

[74] CAT *Phenytoin II*, para 229.
[75] Ibid, para 230.
[76] Ibid, para 231.
[77] Ibid, para 232.
[78] Ibid, para 242.

By requiring a more extensive evaluation under both limbs, excessiveness and unfairness, it imposes a more complex and resource-intensive standard for enforcement. Its approach, particularly the incorporation of producer surplus into the Excessive Limb and the insistence on evaluating comparators even though such comparables are arguably limited or imperfect, marks a departure from previous decisions and carries implications beyond the pharmaceutical sector.

The CAT's reasoning suggests that the two limbs of the Unfair Limb may operate cumulatively in practice, despite their formal status as alternatives. This development has already shaped enforcement in *Hydrocortisone* and *Liothyronine*, where the CMA, following the CAT's reasoning in the *Pfizer/Flynn* case, conducted full assessments under both elements of the test. However, the CAT reasoning goes beyond the CoA's position that the CMA must consider comparables only if put forward by the investigated party. Instead, the CAT appears to impose a broader obligation to assess comparables even where they are arguably flawed. The result is a more resource-intensive process, thereby raising the evidentiary threshold for establishing excessive pricing.

4.2 Redefining the Excessive Limb

The judgment introduces a conceptual shift in how excessiveness is assessed. Traditionally, a price above cost-plus, was sufficient to indicate excessiveness. The CAT departs from this approach by requiring evidence of an unjustified producer surplus. The CAT stated that a price is not excessive merely because it exceeds cost and includes a reasonable rate of return; rather, excessiveness may be found only where the price also includes a material, unjustified producer surplus. This surplus must be assessed in light of broader contextual factors, including product lifecycle, historical investments, market risks, and long-term incentives. This approach departs from previous judgments, including the CAT's own earlier reasoning, and adds complexity to what has traditionally been the cost-plus exercise.[79] Authorities must now supplement traditional profitability metrics (e.g. ROCE, ROS) with evidence of producer surplus and real-world value assessments. However, this shift does not necessarily provide a workable alternative for markets where cost-based benchmarks are unavailable or unreliable, as for example, in the context of collective rights management cases, where cost benchmarks are

[79] Judgment of the CAT of 18 September 2023 in Joint cases 1407/1/12/21 1411/1/12/21 1412/1/12/21 1413/1/12/21 1414/1/12/21 Allergan PLC and others v the Competition and Markets Authority [2023] CAT 56 (Hydrocortisone decision) and Judgment of the CAT in joint cases 1419/1/12/21 1421/1/12/21 1422/1/12/21 Advanz Pharma Corp. and others v CMA [2023] 52 (Liothyronine decision).

often absent or inapplicable, and the Court has instead relied on alternative indicators such as comparisons with tariffs in other Member States.[80]

4.3 Redefining the Unfair Limb

The Tribunal defined unfairness as pricing significantly higher than what would be expected under real-world competitive conditions, emphasizing the unfairness cannot be established by reference to cost-plus excess and instead requires evaluation of comparators and a broader assessment of economic value, defined by reference to both producer and consumer surplus. The CAT's interpretation now requires an assessment of both producer and consumer surplus, implying that a price that exceeds cost-plus must also involve an unjustified producer surplus to be deemed unfair. However, this approach is problematic. The CAT's focus on consumer surplus risks overlooking the unique characteristics of demand-side factors, such as the therapeutic value of phenytoin sodium capsules. As outlined above, demand in this sector is mediated by multiple stakeholders – patients, prescribers, reimbursement bodies, and insurers, rather than by consumer preference in any meaningful sense. The CAT overlooks the fact that demand in these markets is structurally inelastic and shaped by regulatory and clinical constraints. Consequently, consumer surplus becomes an unreliable metric.

Further, the Tribunal's expectation that authorities methodically evaluate comparators, even where imperfect, imposes a significant procedural burden. The CMA's rejection of such comparators in Pfizer/Flynn, based on supply constraints and clinical interchangeability, was arguably justified in the specific context of the product. Yet, the CAT found this insufficient and instead elevated the role of comparables within the assessment of unfairness. This position represents a clear departure of the EU jurisprudence.[81] It introduces a more context-sensitive and potentially unpredictable standard for enforcement.

While the CAT outlined several potential factors relevant to assessing the Unfair Limb when the Excessive Limb is satisfied: (1) the nature of the product, including its importance to consumers and any unique characteristics; (2) the structure of the market, including barriers to

[80] Case 110/99 Lucazeau v SACEM [1989] ECR 2811 and Case C-177/16, Biedrība 'Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība' v Konkurences padome (hereinafter 'AKKA/ LAA') ECLI:EU:C:2017:689.

[81] See Marco Botta, 'Sanctioning unfair pricing under Art. 102(a) TFEU: yes, we can!' (2021) 17(1) ECJ 156, 169; Frederick Abbott, 'The UK Competition Appeal Tribunal's Misguided Reprieve for Pfizer's Excessive Pricing Abuse' (2018) IIC 49, 845 criticizing the CAT judgment on the same ground, and more recently M. Marinova, Rethinking the legal test for excessive pricing: Insights from the Landmark UK *CMA v Pfizer/Flyn*n Case and Its Legal Implications' (n 7).

entry and the degree of competition; (3) the regulatory environment and its impact on pricing decisions; (4) the need for innovation and investment in the industry, particularly in pharmaceuticals; (5) the risks associated with product development and commercialization; (6) the broader economic value of the product beyond simple cost calculations; (7) the impact of the pricing on consumers, including healthcare systems and patients; (8) the availability and viability of alternative products, provide some practical guidelines, its open-ended nature may generate inconsistent application. Although the Tribunal noted that the list is not exhaustive and that the weight of each factor will vary by case, the absence of clear guidance on their prioritisation may reduce legal certainty in enforcement.

These factors have already informed judicial reasoning, as reflected in the recent *Le Patourel v BT* judgment, the first collective action case under the UK competition regime, which was delivered after the CAT's *Phenytoin II* judgment.[82] In *Le Patourel*, the CAT dismissed claims that BT's prices for standalone landline services were unfair. The Tribunal found that the prices were neither 'unfair in themselves' nor 'unfair when compared to competing products.' Central to the decision was the lack of evidence showing that BT's pricing bore no reasonable relationship to the economic value of its services.[83] The CAT considered consumer preferences and brand loyalty - key demand-side factors - and concluded that these attributes contributed to the economic value of BT's services.[84] The *Le Patourel* case also reflected the CAT's approach to comparables in Pfizer/Flynn, which confirms that the CAT's reasoning in Pfizer/Flynn may now function as a general template across industries. The CAT acknowledged the challenges in identifying valid comparators due to BT's dominant position but stressed that imperfect comparables could still provide valuable context. However, in the absence of compelling evidence, the claimants failed to demonstrate that BT's pricing was unfair. *Le Patourel* judgment ullustrates the practical significance of *Pfizer/Flynn*, affirming that assessing unfair pricing requires a careful evaluation of economic value, demand-side factors, and market dynamics. It also demonstrates that the principles articulated in *Pfizer/Flynn*, such as considering comparables thoughtfully, are applicable across industries.

Overall, the CAT's approach introduces a more expansive test for unfair pricing and raises the evidentiary standard for excessive pricing enforcement, making future investigations more complex and resource-intensive. This increases the complexity and cost of investigations,

[82] *Justin Le Patourel v BT Group PLC* [2024] CAT 76.
[83] Ibid, para 1086.
[84] Ibid, para 1156.

potentially reducing the likelihood of intervention in high-cost but socially important markets, such as pharmaceuticals. Future enforcement will require more detailed economic assessments, a broader set of justifications, and more robust analysis of imperfect comparables. While the judgment introduces a richer analytical framework, it does so at the cost of predictability and administrative efficiency.