universität wien

MASTER THESIS

Titel der Master Thesis / Title of the Master‘s Thesis

„Comparative Study of European Union and Kazakhstan Competition Law Jurisprudence dealing with Excessive Pricing Cases“

verfasst von / submitted by

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angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M.)

Wien, 2022 / Vienna 2022

Studienkennzahl lt. Studienblatt / Postgraduate programme code as it appears on the student record sheet:	UA 992 548
Universitätslehrgang lt. Studienblatt / Postgraduate programme as it appears on the student record sheet:	Europäisches und Internationales Wirtschaftsrecht / European and International Business Law
Betreut von / Supervisor:	Marco Botta, Privatdoz. LLM PhD

LIST OF ACRONYMS

EU: European Union

ECJ: European Court of Justice

TFEU: Treaty on the Functioning of the European Union

CAT: Court of Appeal Tribunal

CMA: Competition Market Authority

Code: Entrepreneurial Code of the Republic of Kazakhstan

OECD: Organisation for Economic Cooperation and Development

Order: Order of the Minister of National Economy of the Republic of Kazakhstan No. 173

CHAPTER 1: INTRODUCTION, BACKGROUND AND SIGNIFICANCE OF RESEARCH

1.1.Introduction

Regulators have seen an increase in alleged abuse of "excessive pricing" in the EU, because of the "Coronavirus pandemic" which has been seen as an opportunity to raise prices.[1] "Excessive pricing" is a form of "exploitative practice".[2] When dominant organizations charge "excessive prices" it results in damage to consumers and competitors, and it is also perceived as anti-competitive behaviour. [3] The OECD in 2011 found it necessary for Competition Authorities to intervene against "exploitative conduct", with the goal of protecting consumers by directly protecting them[4] against "high and unfair prices".[5] However, some scholars are against the prohibition of "excessive prices" because it will decrease the need to "invest and innovate".[6] The reasoning behind this is that businesses are run to make a profit, and thus increase their prices to recoup their initial investments, therefore businesses will be "hesitant to invest and innovate" if their prices will be controlled.[7]

Ayata argues that on the first impression, it may seem as if "exploitative prices" are not "harmful" to competitors, but are rather of benefit to consumers, as it can lure buyers to cheaper products, which consequently results in healthy competition.[8] However, Kianzad & Minssen argue that actions which exploit consumers through charging excessively high amounts can undermine the attempts to reach an "integrated internal market" and to protect the consumer.[9] Whereas, Ayata further argues that "exploitative pricing" is said to encourage new players into the competitive market, as "potential entrepreneurs" can see the "high prices" as a chance to enter into the market.[10]

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[1] Grant Stirling, "The elusive test for unfair excessive pricing under EU law: revisiting *United Brands* in the light of Competition and Markets Authority Flynn Pharma Ltd" (2020) ECJ 368.
[2] Diletta Danieli, "Excessive pricing in the pharmaceutical industry: adding another string to the bow of EU competition law"(2021) 16 HEPL 64.
[3] Walid Gani, "Excessive prices: a new analytical approach" (2021) 17 ECJ 23.
[4] OECD, "Excessive Pricing" (2011) 308.
[5] OECD (n 4) 308.
[6] Zeynep Ayata, "A Comparative Analysis of the Control of Excessive Pricing by Competition Authorities in Europe" (2020) 35 Tul Eur & Civ LF 103.
[7] Ayata (n 6) 106.
[8] ibid 101.
[9] Behrang Kianzad and Timo Minssen, "How Much Is Too Much: Defining the Metes and Bounds of Excessive Pricing in the Pharmaceutical Sector" (2018) 2 EPLR 16.
[10] Ayata (n 6) 101.

The OECD report found that Kazakhstan's competition system should tackle the source of problems faced in the competitive market, rather than focus on regulating prices charged.[11] As a result Kazakhstan abolished the system of registering dominant organizations who occupied a certain percentage of the competitive market ranging from 30% to 50%, and such a move was celebrated.[12] This is because analysts believe that markets and positions should be founded on "sound economic" standards and must thus not be arbitrary.[13] The OECD argues that enforcement should rather focus on "exclusionary practices", and move away from controlling prices and profits made, this would result in healthy competition amongst dominant organizations, and allow the markets to correct themselves in terms of pricing.[14] However, Giosa contends that even though price-regulation is frowned upon by modern regulatory practices, it is important to be practised where excessive pricing does not self-correct.[15]

1.2 Unpacking the Concept of Excessive Pricing

Gani defines a price fixed as "excessive" when it is "significantly" higher than other competitors and stems from the organization's "market power".[16] Ayata also defines "excessive pricing" as prices charged being "appreciably higher" than the price in the competitive market.[17] In the context of this definition, a price is said to be "excessive" or "reasonable" only when compared to other prices in the competitive space. Academic authors and case law are divided with regards to "excessive pricing", a significant number of academic scholars argue that "excessive pricing" must not be allowed, whilst others state that it should be allowed in certain circumstances.[18] However, the key challenge with "excessive pricing" cases is calculating and determining the price charged is "excessive or reasonable",[19] which is central to this research.

The Italian competition regulator warned organizations over taking advantage of the pandemic by concluding "anti-competitive agreements" or by "abusing its dominant" status.[20] Generally,

[11] OECD, "Competition Policy in Kazakhstan: Promoting Efficient and Sound Markets" (2017) 39.
[12] ibid 39.
[13] ibid 49.
[14] ibid 49.
[15] Penelope Giosa, "Exploitative Pricing in the Time of Coronavirus—The Response of EU Competition Law and the Prospect of Price Regulation" (2020) JECLP 1.
[16] Gani (n 3) 23.
[17] Ayata (n 6) 104.
[18] ibid 101.
[19] ibid 101.
[20] Stirling (n 1) 369.

the EU Commission has been reluctant to conclude that companies price their goods excessively and there have been few cases, in which Stirling argues that it is because of the ambiguity surrounding the definition of what is an "unfairly excessive price".[21] Whereas, Kazakhstan competition authorities have pursued excessive pricing cases and oversight of monopolistic organizations.[22]

1.3 Aim of the Thesis

The aim of the thesis is to provide a comparison and critical analysis of the jurisprudence of Kazakhstan and the EU regarding excessive pricing cases, as these two jurisdictions are rarely compared and the development of their competition law has a very different historical foundation (the EU's jurisprudence developing out of a need to maintain fair competition between member states, versus Kazakhstan's history of dealing with the rise of monopolistic practices following the dissolution of the USSR).

1.4 Academic Hypothesis

Hypothesis:

> *"The jurisprudence of alleged excessive pricing cases tends to be regarded as excessive in Kazakhstan more than in the European Union."*

This hypothesis aims to demonstrate whether there are differences in approach by the courts of Kazakhstan and the European Union to excessive pricing enforcement cases, by analysing the jurisprudence of excessive pricing. Should the hypothesis be proven or disproven, this will provide impetus for further research.

1.5 Research Questions

The central research questions for this dissertation are:

1. How is excessive pricing defined and characterised in EU / Kazakhstan legislation and public policy, by taking into consideration the key differences and similarities, and their development over time?
2. Is there a difference in approach by the relevant authority in either jurisdiction to enforcement in excessive pricing abuse cases, including frequency, scope and aims of enforcement?

[21] Stirling (n 1) 369.
[22] Claudio Lombardi, "Competition Law Objectives in Kazakhstan" (2020) ECLID 1.

3. How is excessive pricing interpreted, assessed and applied by the courts in either jurisdiction and to what extent application by the courts has created convergence or divergence in excessive pricing jurisprudence?
4. Does evidence exist to suggest that jurisprudence in either jurisdiction has had material influence on the development of the other regarding the concept and enforcement of excessive pricing?

1.6 Research Gap

This dissertation conducts comparative research on the differences between EU and Kazakhstan jurisprudence, and policy on excessive pricing (if any) and research areas of similarity and convergence. This research includes an examination of the underlying historical and political factors which may have resulted in jurisprudential differences in excessive pricing cases.

However, the body of the dissertation focuses on the old cases that have developed and influenced the recent cases, which are also discussed in this research with regards to excessive pricing cases in the pharmaceutical and other industries, as well excessive pricing cases arising from the coronavirus pandemic, and the possibility of future convergence in excessive pricing enforcement. This may, for example, be accelerated by the accession of Kazakhstan to the Eurasian Economic Union, as the EAEU Commission expects member states to implement the EAEU Model Law on Competition[23] (though it is not a binding requirement).

The dissertation makes use of EU and Kazakhstan case law, legislation, legal theory and public policy as the main points of comparison.

1.7 Methodology and Research limitations

This research conducts a comparative research study by comparing the jurisprudence of excessive pricing between EU and Kazakhstan. The similarities and differences of cases are described and explained. This research is case-oriented and takes on a qualitative analysis.

The limitations to the study include language barrier and lack of literature written in English with regards to Kazakhstan competition policies.

[23] Interview of Minister on Competition of the Eurasian Economic Commission Nurlan Aladabergenov, available at: http://www.eurasiancommission.org/en/nae/news/Pages/456.aspx (accessed 02 July 2021).

1.8 Chapter Overview

Chapter 1 introduces the topic area of the thesis, providing a brief explanation of the concept of excessive pricing as a form of market abuse. This will provide context for the hypothesis. The hypothesis will be presented, with an explanation of what evidence will be required from the thesis to demonstrate that the hypothesis is either true or false. Additionally, this chapter gives a brief review of how research was conducted; which sources were used; and any difficulties encountered during research (such as language barriers). It will also provide reasoning for which cases will be designated as 'European' for testing the hypothesis.

Chapter 2 discusses the foundation of excessive pricing in the European Union, and therefore outlines the treaty definition of excessive pricing at Art. 102 TFEU and considers the foundational legal test in the EU for excessive pricing cases as set out by the CJEU in United Brands. It also considers the development of EU excessive pricing jurisprudence until today, examining how the legal test may have changed in that time in the context of CJEU reference cases and other developments. The historical and political context and understanding regarding excessive pricing developments pre-2010 is assessed. Additionally, Chapter 2 conducts an analysis of European Union Excessive Pricing case law, and thus considers the development of CJEU excessive pricing cases in this period in the context of the hypothesis. These will include such cases such as Flynn Pharma[24] and Pfizer Inc.[25], in which the European Commission intervened and the United Brands test featured prominently, and the Judgment of the Court (Second Chamber) of 14 September 2017 in the Latvian case of Autortiesību un komunicēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v Konkurences padome, which saw the CJEU adopt a second test for excessive pricing. Other cases will also be considered, as well as academic articles. This chapter gives an overview of decisions in favour of or against cases involving the relevant member state enforcing authority, which will be used to test the hypothesis.

Chapter 3 examines the foundation of excessive pricing in Kazakhstan. This chapter examines the foundation and development of excessive pricing in Kazakhstan. It will generally mirror Chapter 2, but primarily considers the 2008 Laws "On Competition" and "On Natural Monopolies and Regulated Markets" as the pre-2010 laws governing competition and

[24] *Flynn Pharma Ltd and Flynn Pharma (Holdings) Ltd v Competition and Markets Authority* [2018] CAT 11.
[25] *Pfizer Inc. and Pfizer Limited v Competition and Markets Authority* [2018] CAT 11.

excessive pricing abuse, as well as any relevant foundational cases. Cases and legislation will only be considered following Kazakhstan's independence from the USSR. Chapter 3 further discusses the recent developments in excessive pricing in Kazakhstan**:** this chapter considers the actions taken by Kazakhstan to strengthen its competition laws regarding excessive pricing after 2010. These include its response to the OECD Peer review[26], the introduction of Entrepreneurial Code of the Republic of Kazakhstan (specifically, Arts. 170, 174 and 226) and the Order of the Minister of National Economy of the Republic of Kazakhstan dated May 4, 2018 No. 173 which sets out methodology for identifying monopoly high (low) prices. Cases such as Kazteleradio JSC (in the resolution of the Specialized Interdistrict Administrative Court of the city of Almaty from July 31, 2018) are taken into account. This chapter considers the influence of Kazakhstan's accession to the EUEA on its domestic competition law, such as to what extent it has adopted the (non-binding) Model Law on Competition. Additionally, Chapter 3 analyzes Kazakhstan Excessive Pricing case law, and thus considers recent excessive pricing cases heard in Kazakhstan.

Chapter 4 the final chapter presents a comparison of differences and similarities between EU and Kazakhstan jurisprudence on excessive pricing. It seeks to conclude whether there is evidence that either jurisdiction has influenced the development of jurisprudence in the other and whether the jurisprudence of each appears to be diverging or converging over time based on evidence collected in the above chapters. Chapter 4 examines the hypothesis of the research. This chapter reviews the information presented in Chapters 2 and 3 to discover whether the hypothesis is true or false. It will then provide a rationale as to the result. Reasons for a true or false outcome may be because of different market priorities, different legal systems and tests, attitudes to competition and open economies and functioning of the relevant enforcing authorities (among other things).

Chapter 5 sets out the key findings of the research and further reiterates the key important issues that are discussed in this discussion with regards to excessive pricing including the attitude of the courts towards alleged cases of excessive pricing. Additionally, Chapter 5 discusses how the courts have suggested how competition authorities or themselves in future cases will calculate if a price charged is excessive. Chapter 5 also highlights the shortcomings of the methodologies used by the courts and its effectiveness including the challenges of determining if a price is excessive or reasonable in the EU. Chapter 5 reiterates the definition

[26] OECD, "Competition Policy in Kazakhstan: Promoting Efficient and Sound Markets" (2017) 39.

of excessive pricing as provided for by Kazakhstan legislation and the methodologies provided for to determine if a price charged is reasonable or excessive. The Chapter also highlights the intentions of the legislator and underlying loopholes of the provisions. Chapter 5 concludes on the status of excessive pricing in the EU and Kazakhstan and whether the jurisprudence of Kazakhstan tends to be regarded as excessive in Kazakhstan more than in the EU and thus gives the outcome of the hypothesis.

CHAPTER 2: A JURISPRUDENTIAL ANALYSIS OF "EXCESSIVE PRICING" IN THE EU

2.1 Introduction

Chapter 2 defines what is "excessive pricing" according to courts and scholars, and further confirms that such an act or inaction is prohibited under EU law. The TFEU is used as the primary source to explain "excessive pricing", including case law and academic writers. Furthermore, Chapter 2 discusses which methodologies and approaches can be adopted to determine if an alleged case of excessive pricing can be concluded as "excessive" or "reasonable", by taking into account legislation, regulations, case law and various authors. Chapter 2 highlights the challenges of adopting such approaches and methodologies and the loopholes when applying them to cases. Chapter 2 interprets and assesses how "excessive pricing" is dealt with in the courts, and its influence on the jurisprudence of "excessive pricing" in the EU.

2.2 Comprehensive analysis of "Excessive Pricing" in the EU

2.2.1 Definition of "Excessive Pricing" in the EU

As already defined above, Hou also defines an "excessive price" as a price that seeks to control prices charged beyond competition level with the aim of exploiting its customers.[27] EU laws do not explicitly define "excessive pricing", but simply prohibits "excessive pricing". However, the courts have clearly defined what "excessive pricing" is in the EU. Therefore, in the case of *United Brands Company*,[28] the court defined "excessive pricing" as a "price" which has no sensible correlation with the monetary value of the goods.

2.2.2 Explaining Art 102 of the TFEU under "excessive pricing"

The TFEU forbids excessive pricing and states the following, that any abuse committed by any commitment or act by one with a "dominant position" who seeks to control the "internal market" as a whole or partially is not permitted by conducting actions such as;

- imposition of unjust "buying or selling price",
- restricting the production, marketing or technical development of goods and services detrimental to the customer,

[27] Liyang Hou, "Excessive Pricing within EU Competition Law" (2011) ECJ 1.
[28] ECR [1976] 425.

- implementing different "conditions" to the same transactions to another trading partner with the result of disadvantaging another competitively,
- concluding contracts which includes additional obligations to be accepted by "other parties" yet there is no commercial use and relation to the contracts. [29]

Art 102 TFEU forbids the direct or indirect fixing of unfair pricing, and as a result EU courts in certain instances have found "excessive pricing" as an "infringement" of this provision.[30] However, Ayata argues that "high prices" are likely not to have "exclusionary" consequences but would encourage consumers to move to buy cheaper "competitors", and is thus beneficial to the "competitors.[31] Nevertheless, if a firm with "true monopoly" charges excessively, consumers will not have an "alternative" of where to buy those particular goods and services, and is thus forced to buy at the excessively priced rate.[32] Goisa holds that "National Competition Authorities and the European Commission" has an "interest" in cases dealing with "excessive pricing", when they infringe on the provisions of Article 102 of the TFEU. The "pharmaceutical sector" has been dealt with heavily by the NCA and EU when accused of charging excessive prices.[33]

Additionally, Article 102 is directly against "unfair" purchases and "selling prices" fixed by a "dominant" organization.[34] Goisa argues that there is uncertainty with regards to the meaning of "market power", and the behaviour expected by legally established organizations that are subject to Article 102.[35] The *Italian Glass*[36] case clarified that Article 102 doesn't only apply to a single organization to be recognized as a "dominant firm", but also applies to two or more organizations connected economically who control the same market against other competitors. The two or more companies can acquire dominant status through "licenses" or "agreements", which affords them the power to act "independently" from their competitors and customers.[37] This could be the case, for example, where two or more independent undertakings have jointly, through agreements or licences, taken a technological lead affording them the power to behave

[29] TFEU, Art 102.
[30] Ayata (n 6) 104.
[31] ibid 104.
[32] ibid 104.
[33] Goisa (n 15) 2.
[34] ibid 2.
[35] ibid 2.
[36] OJ [1989] L 33/44, [1990] 4 CMLR 535.
[37] Goisa (n 15) 2.

to an "appreciable" extent, independently of their competitors, their customers, and ultimately their consumers.[38]

2.2.3 An analysis of the "United Brands" case: how to determine excessive pricing

The court developed an "excessive pricing analytical framework" which contains three procedures, namely;

- to compare the "selling price" of goods vis-a-vis the "production cost", which will thus reveal the "profit margin",
- to enquire if the difference between "production cost" and "price charged" is excessive, and if it is so, to enquire if price charged is unjust within itself or in comparison to other products and,
- through the implementation of other rules to determine if the price charged on the goods is unjust.[39]

The "*excessive limb test*" is the initial step used in the *United Brands* test. Competition authorities must compare "revenues" against "costs" of the dominant organization, and take note if the "profit margin" is fair.[40] In other words, the authority must determine if the amount of profits gained are reasonable. Botta states that to determine if the profits are "reasonable" from the industries perspective in question, competition agencies must consider the "average rate of profits" of other players in their industry.[41]

The Competition Authority must test whether the "profits" are appropriate and must compare with other competitors to determine if the profits are "fair" within that industry.[42] The "*unfairness test*" uses the "cost plus" technique by comparing revenues and expenses of the "dominant firm" and also taking into account "profit percentage".[43] Competition agencies have established an advanced technique to evaluate the costs incurred during production by the "dominant firm" of a particular good that is linked to the purported abuse.[44] Ayata states that the ECJ emphasized the importance of conducting a "cost-plus analysis" before conducting the second step of "comparing prices".[45] The Court further held that if the findings conclude that

[38] ibid 3.
[39] *United brands* (n 28) 242-245.
[40] ibid 301.
[41] Marco Botta, "Sanctioning unfair pricing under Art. 102(a) TFEU: yes, we can!" (2021) 17 ECJ 164.
[42] ibid 164.
[43] Behrang Kianzad & Timo Minssen (n 9) 37.
[44] Botta (n 41) 163.
[45] Ayata (n 6) 117.

the prices are unfair in themselves, they can thus move onto comparing prices.[46] Botha argues that the "EU Court of Justice" has not yet considered applying a "minimum threshold" when ascertaining if a price is "excessive".[47]

The second leg test of the *United Brands* involves the "*unfairness limb*". The court argued that to conclude that a price is infringing on Art 102(a) on the basis that the price is excessive due to the difference in expenses incurred, is not a sufficient reason to make such a finding, and thus argued that the fixed price given must be "unfair in itself" or "unfair in comparison to other competing goods".[48] Botta further argues that economists have consensus over the fact that Art 102(a) only applies to restrict "excessive pricing", where there is "monopoly/quasi-monopoly".[49] Therefore, it is impossible to compare prices fixed by the "dominant" company and their competitor, because usually the "dominant" company will be the only company offering the particular goods in that market.[50] Consequently, the "unfairness limb" will be "difficult" to conduct since it has to be compared to "competing goods",[51] which may be different in value and characteristics.

2.2.4 Other methodologies used to determine excessive pricing

The Court of Justice in the EU has developed new ways to determine whether the price fixed is "unfair" by introducing what we call "*benchmarking*", whereby the "Competition Agency" should compare against a "benchmark price" instead of comparing against "expenses and price charged by the dominant company".[52]

The case of AG Jacobs, suggested the use of "benchmarking" to determine if the "price was fair", instead of testing if there is a "price difference" due to the nature of the goods which were intangible ("copyright musical work").[53] Additionally, in the case of AKKA-LAA, the court also argued that comparing prices is not logical when dealing with "intangible goods".[54]

Additionally Motta and Steel provides for methodologies to determine "excessive pricing" of dominant organization's, namely,

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[46] *United brands* (n 28) 301.
[47] Botta (n 41) 166.
[48] *United brands* (n 28) 301.
[49] Massimo Motta and Alexandre De Streel, "Excessive Pricing in Competition Law: Never Say Never? (Swedish Competition Authority, ed), "The Pros and Cons of High Prices" (Swedish Competition Authority, ed) (2007) 22.
[50] Botta (n 41) 168.
[51] ibid 168.
[52] ibid 170.
[53] Case C-395/87 *Ministère public v Jean-Louis Tournier* [1989] ECLI, Opinion of AG Jacobs, para 21.
[54] Case C-177/16, *Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome* [2017] ECLI, Opinion of AG Wahl, para. 37

- comparing expenses incurred during production and prices,
- comparing the prices charged between the the dominant organizations in “different markets”,
- comparing the prices charged between the the dominant organizations and other organizations within the “same market”,
- comparing profit made by the dominant organization with other organizations or within the normal “competitive levels”.[55]

2.2.5 Criticism of Art 102 of the TFEU and methodologies used to determine excessive pricing

Goisa remarks that Article 102(a) is applicable to cases where companies are “profiteering” beyond normal levels during the coronavirus pandemic despite the problems related to proving “exploitative abuse” emanating from an organization's dominant status.[56] Gani critiques this methodology, by enquiring the scientific importance of comparing pricing and profits of dominant organizations and their competitors.[57] For example, how does one determine the difference between the dominant organizations price and their competitors to conclude it as “excessive”.[58] Additionally, are comparisons adequate to draw “reliable conclusions” of an alleged “excessive price” or must investigations include extra requirements?[59]

Parcu *et al* argues that some authors have embraced the additional set of abuses added onto the list to enforce due to the new technological advancements and businesses, however, some are against a "formalistic approach" pursued by EU courts which have considered new business undertakings, as under the list of abuses despite the lack of consideration of appropriate "economic analysis" to determine how it will affect the competitive market.[60] Courts must thus be cautious when enforcing “excessive pricing cases".[61] Additionally, there have been few cases that deal with excessive pricing and it is therefore “difficult” to make “conclusions” with regards to which tests and techniques to apply when determining “excessive pricing”.[62]

[55] Massimo Motta and Alexandre de Streel (n 48).
[56] Goisa (n 15) 1.
[57] Gani (n 3) 25.
[58] ibid 25.
[59] ibid 25.
[60] Pier Luigi Parcu, Giorgio Monti and Marco Botta, “Abuse of Dominance in Competition Law” (Edward Elgar Publishing 2017) 4.
[61] Ayata (n 6) 117.
[62] ibid 117.

In the case of *General Motors*, the court acknowledged that the EU can penalize for "excessive pricing", however the court did not shed light on when the "price" charged due to a "dominant" action is regarded as "excessive".[63] Additionally, in the case of *United Brands*, the CJEU defined prices as "excessive" when there is no sensible correlation between the price charged and the monetary value of the goods being sold, however the court failed to give a criteria on how the EU should calculate the monetary value of the goods in question.[64] Stirling highlights the shortcomings of the United Brands test by questioning what methodology is applicable to determine the "economic value" of a product.[65] The EU Commission argued that the cost for the "Chiquita bananas" sold to "Denmark, Germany and the Netherlands" was 100% higher than Ireland yet the cost of transporting and "product quality" is the same.[66] The court dismissed the evidence submitted by the EU Commission by stating that they should have assessed the "cost structure" under the dominant action taken in comparison to the costs of production, so as to determine if the "profit margin" was excessive.[67] The European Commission concluded that the Deutsche Post charged 25% higher to deliver posts, which was higher than normal cost of distribution, and thus considered the "price" to be "excessive" according to the "United Brands test".[68] Consequently, the EU Commision penalized the company and was charged to pay 1000 Euros, since there was no "legal framework" in Germany when the company was in breach.[69]

Economists contend that the evaluation of "unfair pricing of goods" is "speculative" and thus leads to "false-negative error" by "Competition Agencies".[70] Due to the rise of legal cases alleging unfair pricing, current jurisprudence at EU level has implemented "safeguard tools" to mitigate "risk of false negative" mistakes.[71] British courts have implored competition agencies to apply multiple tests when evaluating "unfair pricing".[72] Additionally, the CJEU has identified the likelihood of the dominant company submitting " objective justifications" to rebut evidence that alleges abuse due to its strategy.[73]

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[63] [1975] ECLI:EU 150.
[64] *United Brands* (n 28) 209.
[65] Stirling (n 1) 377.
[66] *United Brands* (n 28) 211.
[67] ibid 250-252.
[68] Stirling (n 1) 377.
[69] ibid 192.
[70] Botta (n 41) 179.
[71] ibid 179.
[72] ibid 179.
[73] ibid 179.

2.3 Analysis of "Excessive Pricing" Cases in the EU

2.3.1 Pfizer and Flynn Pharma Limited v. Competition and Markets Authority

Pfizer acquired rights to produce "epanutin" a drug used to treat epilepsy, which was "off patent", but became a "branded" product of Pfizer and thus became regulated by the NHS "Pharmaceutical Price Regulation Scheme".[74] Pfizer authorised Flynn to sell the product who withdrew the product from the "Pharmaceutical Price Regulation Scheme" and was no longer under any form of regulation.[75] The drug was sold at a price charged for dispensing the medication. However, in 2014 Flynn started to increase the price remarkably, yet there was no new invention or patent of the product and the CMA estimated the percentage increase to be between "448% and 1309%" by Pfizer and "2000%" by Flynn over four years.[76]

The CMA alleges that it applied a two-step test to determine if "Pfizer and Flynn" abused their position. The first step involved implementing a "cost-price" analysis and considered the expenses incurred in comparison to the reasonable amount of return, including an investigation into whether the "prices" were "excessive".[77] The second step applied, included to establish if the price was "unfair" in itself or against other "competing drugs", in which the CMA argues that these are alternating tests.[78] CMA argues these are "alternative tests" and not "cumulative".

The CMA contended that Flynn did not experience a significant "commercial risk", therefore making the excessive pricing unjustifiable and found that Pfizer and Flynn had sustained excessive prices for over several years.[79]. The CMA also stressed that Flynn did not incur any major "commercial risks" during this period, which made the "excessive prices" even less justifiable.[80] For the second step of its analysis, the CMA claimed that to establish the abuse, the competition authority must prove that the prices are unfair in themselves or in comparison to competing products.[81] According to the CMA, these are alternative tests. Furthermore, the CMA asserted that a competition authority need not establish that prices are both unfair in themselves and in comparison to competing products. In other words, the CMA claimed that

[74] Behrang Kianzad & Timo Minssen (n 9) 21.
[75] ibid 23.
[76] ibid 23.
[77] Flynn (n 25) 25.
[78] ibid 25.
[79] Flynn (n 25) 28.
[80] ibid 28.
[81] Flynn (n 25) 25.

these tests are not cumulative.[82] The CMA did nevertheless present a thorough analysis that took into account various factors. It considered primarily additional non-cost-related factors that may have increased the economic value of the product and would have therefore justified the increase in prices. The CMA emphasized, for instance, that Pfizer and Flynn could sustain these excessive prices for several years because they were concealed from effective competition

In this case the "UK Competition and Markets Authority" (hereafter CMA) contrasted various "profit methodologies" and applied the "return on sale" methodology which determined what was to be considered as a reasonable profit for Flynn and thus concluded it as 6%.[83] However the UK Competition tribunal dismissed the profit percentage calculated and argued that it was too low and acted as if it was within normal competition conditions, yet on the ground, Pfizer was the "dominant manufacturer" of the "phenytoin sodium capsules" and thus a "quasi-monopoly".[84]

In the case of Pfizer-Flynn, the tribunal critiqued the CMA for failing to assess the "economic value" of goods in question, since the CMA decided that the price of the capsules was "unfair in itself" (according to the second limb test), therefore the Court must have determined the "expected economic value" by the consumers using the medication in question.[85] Whereas, the "Court of Appeal" held that determining the "economic value" of the goods is part and parcel of the description of "abuse", and must not be regarded as a step on its own as in the United Brands test.[86] Therefore, there remains uncertainty with regards to whether the agency must consider the "economic value" of goods according to the "United Brands Test". Botha argues that even though "Competition Agencies" have established vigorous techniques to calculate costs and approximate "reasonable profit", it is still uncertain whether agencies must consider the "value" of goods when evaluating the "plus part" of the assessment.[87]

The Pfizer-Flynn case, the CMA argued that the rebranding of the "phenytoin sodium" medication which led to a significant increase in the price was "unfair in itself" because the

[82] *Flynn* (n 25) 118.
[83] Raphael De Coninck and Elina Koustoumpardi, "Excessive pricing cases in the pharmaceutical industry: Economic considerations and practical pitfalls" (2017) 3 Concurrences 13.
[84] *Flynn* (n 25) 24.
[85] *Pharma* (n 26) 58.
[86] *Flynn* (n 25) 86.
[87] Botha (n 41) 166.

price increase was not led by increase in expenses or due to higher demand.[88] Additionally, CMA alluded that there was no company/goods competing with Pfizer in the UK, therefore there was no full evaluation of the price charged for the "competing goods".[89] The CMA noted that the two tests of determining that the price fixed was "unfair in itself" or "comparing two competiting goods", acted as two "alternatives", and not as a single test, therefore a further evaluation of the price of "competing goods" is not necessary.[90]

However, the ruling on Appeal, dismissed the CMA findings and argued that the second limb test in United Brands which referred to "competing goods" does not mean goods of the same market in the context of "competition law".[91] Botha adds that the CMA should have evaluated the " retail price" of the same medication in other European countries, although they are of a "different regional market" according to competition law.[92]

The Appeal Court held that the two tests "unfair in itself", or "comparing two competiting goods", must be regarded as a single test and not as "alternatives" and thus the CMA was supposed to evaluate the evidence that shows that the price of the medication was not unfair when comparing them to other competing goods, and thus the court found the price not to be excessive.[93] It still remains unclear whether the test of unfairness must include both tests that the goods are "unfair in itself" or by "comparing with other competing goods", or by using them as alternatives.[94]

2.3.2 Akka-Laa v Konkurences Padome

This case was heard in Latvia, whereby the "collecting society" AKKA/LAA was a "legal monopoly" that provided licenses to perform "musical works" in public, in which the rates were found to be "excessive" by the "Latvian Competition Council" and were calculated according to the "surface" of the public area and thus AKKA was found guilty of abusing its

[88] *Flynn* (n 25) 86.
[89] *Flynn* (n 25) 95.
[90] *Flynn* (n 25) 138.
[91] *Flynn Pharma Ltd and Flynn Pharma (Holdings) Ltd v Competition and Markets Authority* [2020] EWCA Civ 617.
[92] Botta (n 41) 168.
[93] Behrang Kianzad & Timo Minssen (n 9) 23.
[94] Botta (n 41) 165.

"dominant position".[95] The "Regional Administrative Court" upheld the Council's findings but revoked the Council's decision on the penalty given.

The "Latvian Competition Council" compared the average price against two "diferent" groups namely," two neighbouring countries" and also against "twenty EU countries", this method was regarded as "valid" since the wider comparison validated the narrower comparison.[96] The countries to be selected for the comparison test had to meet the requirements of objectivity and appropriateness.[97] For instance comparison of different countries is practical if the countries have "similar" spending habits and socio economic structures such as GDP per capita and "cultural heritage".[98] Another challenge is determining the number of countries that must be considered to be "representative".[99]

The ECJ concluded that the use of prices used by neighbouring EU countries rather than all EU countries in general was "appropriate and sufficient" to determine if the alleged prices were "excessive" in connection to copyright access.[100] Secondly, the ECJ enquired when the "prices used and prices charged" as a comparison, could be taken as fair, thus putting the "onus" on the company "*enjoying the dominant status*" to show that the "price is fair".

The court further deliberated on comparing "pricing" between different or same competitive markets and found that "competition authorities" have flexibility when testing if a price is "excessive" and that there is not one method that is regarded as sufficient.[101] Competition authorities must thus establish which test of comparison is relevant to prove if there has been abuse within the sectors affected by "excessive pricing".[102] The ECJ demonstrates that the courts did not apply new methods to determine excessive pricing but just explained further the already existing methods.[103]

[95] *Autortiesību un komunicēšanās konsultāciju aģentūra v. Latvijas Autoru apvienība v Konkurences padome* [2017] ECLI 689 para. 49.
[96] Ayata (n 6) 121.
[97] *Akka-Laa* (n 87) 41.
[98] ibid. 41.
[99] ibid 41.
[100] ibid 40..
[101] *Akka-Laa* (n 87) 49.
[102] Ayata (n 6) 121.
[103] ibid 121.

2.4.3 AGCM, Autorità Garante della Concorrenza e del Mercato, A480 – Incremento prezzi farmaci Aspen

The "Italian Competition Authority" (hereafter ICA) argued that "excessive pricing" should not be allowed under competition law if there is no possibility of a competitor entering the market.[104] ICA stated that "excessive pricing" exacerbates "inequality" and thus hinders the progression of "social equity".[105] The court emphasized the importance of the two-fold test provided for by the United Brand case and also incorporated the view of Advocate Wahl who recommended the use of other "methods".[106] The ICA used the" two-fold test" introduced by the United Brands. As already mentioned above, the first step determines if the price was excessive, and the second step tests if the price involves testing if the price was unfair by using different methods.[107] The first step of "economic analysis" the ICA applied a "cost price test", whereby "direct and indirect" expenses were considered and conducted an extensive analysis to determine if there is an "excessive" disparity between the expenses incurred during manufacturing and the price raise.[108] The ICA applied the "unfairness test" by taking into account price changes, absence of economic reasons, nature of products and the harm endured by the NHS due to the price hike.[109]

The ICA used two methods to measure, firstly by measuring the "percentage gross margin" and by measuring the "average percentage rate of return on sales".[110] Both methods revealed that the price was "disproportionate" based on its "economic value" and it also showed an excess "cost plus" of up to 400%.[111] Furthermore, the ICA used the benchmarking test, whereby the calculated "average cost of capital" was 8% for the entire "pharmaceutical sector" the cosmos medication was sold twice as high the average price, which proved that Aspen had unfair profit gain.[112] The ICA established that there was no just reason for imposing a price increase under the unfairness test.[113]

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[104] Ayata (n 6) 122.
[105] ibid 122.
[106] ibid 122.
[107] ibid 123.
[108] ibid 123.
[109] Elizabetta Maria Lanza & Paola Roberta Sfasciotti, "Excessive Price Abuses: The Italian Aspen Case" JECLP (2018) 382.
[110] Danieli (n 2) 68.
[111] ibid 68.
[112] ibid 69.
[113] ibid 69.

The ICA found Aspen, a South African pharmaceutical company guilty of abusing its dominant status as envisaged under Art 102 (a) of the TFEU because they charged the "Italian Medicine Agency" 1500% more for "anticancer drugs" and was thus fined over 5 million euros.[114] The ICA concluded that Aspen held a "dominant position" in the pharmaceutical market with regards to the "Cosmos drugs" and they were the only company permitted to market.[115] To establish if the price charged by Aspen was "excessive", the ICA compared the expenses incurred during the production of the medication and the price Aspen charged.[116] Additionally, after applying the two-fold test under the United Brands test the ICA ruled that the prices charged were both "excessive and unfair".

2.3.4 Scandlines Sverige AB v Port of Helsingborg

This case dealt with the alleged complaint that port fees charged to provide ferry services between Sweden and Denmark (along the "helsingborg-Elsinore" route") were "excessive". The complaint was lodged against the Port of Helsingborg for abusing Art 102 of the TFEU which was against the abuse by dominant companies to charge "excessive pricing".[117] The service included the transportation of people and goods which is one of the key ferry routes in the EU because of high traffic.[118]

The Court took the approach of considering if the price is excessive by testing if there is a relationship between the price fixed and the "economic value of the product. and thus reiterated the definition of excessive pricing as a price that lacks a "reasonable" relationship with the "economic value" of the goods.[119] The court followed three key approaches as envisaged by *United Brands* namely, to compare the alleged excessive price against the expenses incurred to produce the goods so as to determine profit margin. Therefore, if it established that the price was excessive due to the comparison made above, to determine if the price was "unfair in itself" or in comparison to other "competing products", and lastly, the court accepted the methodologies may be used to determine if a price is excessive.[120]

[114] ibid 68.
[115] ibid 68.
[116] ibid 68.
[117] Pinar Akman and Luke Garrod, "When are Excessive Prices Unfair"' (2011) 7 J Comp L & Econ 424. *Scandlines Sverige AB v Port of Helsingborg* [2004] COMP/A.36.568/D3.
[118] ibid 1.
[119] ibid 32.
[120] ibid 24.

The Commision applied the United Brands Test and thus calculated the expenses of the Port incurred during the provisions of goods and services, and compared it against the prices charged. The Commission examined if the fees set by the Port were "unfair" if contrasted to other Ports or if the fees were 'unfair" in themselves.[121] To determine the expenses incurred by the Port the Commission made an estimation from information provided for by their "audited financial reports", however it was impracticable to establish all the expenses incurred.[122] The difficulty arose due to the indirect costs incurred because of various users with different expenditure. The Commission bears the "burden of proof" to prove that the organization committed an act of abuse Art 102, however must be aware that the information supplied by the organization in question can be "unreliable" and thus the Commission must "prove" that the organization charged" unfair prices".[123] The judges admitted that determining the expenditure for producing goods was difficult and open to "criticism".[124] The Commission "cost-price" analysis showed that the ferry operation made profits whilst the activities did not make any profits. The *Scandlines Sverige AB* argued that the profits gained were "unreasonable", meaning that the port fees were excessive. However, the Commission found that despite the argument that the profit margin was unreasonable it did not automatically mean that the price was "excessive". considering that a price can be "reasonable" in accordance to the "economic value of the goods".[125] The Commission assessed if the port fees could be concluded as "unfair" when compared to other ports and fees charged to other customers.[126] The Commission noted that it is not easy to compare the fees set by other ports for services because services differ and have various price setting systems.[127] However, the Commission continued to compare, and found that there is not enough evidence to state that the price set by the Port was "unfair" in comparison to other Ports rates charged to its customers.[128]

2.3.5 Isabella Scippacercola and Ioannis Terezakis v. Commission

In this case the complainant argued against the charging of excessive airport fees by the airport in Athens when compared to other airports in the EU.[129] The EU Commision dismissed this

[121] ibid 24.
[122] ibid 25.
[123] ibid 53.
[124] ibid 54.
[125] ibid 54.
[126] ibid 54.
[127] ibid 54.
[128] ibid 54.
[129] *Isabella Scippacercola and Ioannis Terezakis v. Commission* [2008] ECLI 9.

application including the "General Court" and "Court of Justice" and rejected the comparison test against other airport fees as a "valid benchmarking" test because the prices given offered different services from airport to airport in which the comparison test would be ineffective.[130] Botta advises that competition authorities must be cautious when applying the "benchmarking method" as seen in the case of *Schippacercola* where it is impracticable to compare "similar" services or goods that are not in competition yet in the same "relevant" market.[131]

2.4 Conclusion

Chapter 2 recognises that the legislators did not define excessive pricing under the TFEU, but simply stated that it is prohibited, however the courts in the *United Brands* case defined "excessive pricing" as a price charged with no correlation to the "economic value" of its product. Additionally, the court developed an analytical framework which competition authorities can use to test whether a price charged is excessive or not, namely the comparison test, excessive limb test, unfairness test and other multiple tests. Chapter 2 also establishes the challenges and loopholes of applying these tests, such as, the difficulty of determining the differences when comparing against other competitors, the scientific reliability methodologies applied. Additionally, there is no criteria provided on how to calculate the economic value of products. It is still unclear whether the test "unfair in itself" or "comparing with other competing goods" are alternative tests or single tests.

[130] ibid.
[131] Botta (n 41) 172.

CHAPTER 3: A JURISPRUDENTIAL ANALYSIS OF "EXCESSIVE PRICING" IN KAZAKHSTAN

3.1 Introduction

Chapter 3 considers the development of excessive pricing in Kazakhstan and the perception of alleged excessive pricing cases in the courts, legislators and authors. Chapter 3 identifies and discusses the various laws that govern pricing in Kazakhstan, including the actions that are prohibited and amount to excessive pricing. Therefore, this chapter defines and explains what excessive pricing is. Central to this research is the methodologies and approaches used to determine if a price is said to be "excessive or reasonable", according to case law, legislation and regulations. Nevertheless, Chapter 3 highlights the challenges of applying such methodologies and approaches to determine if a price is "excessive or reasonable". Chapter 3 identifies the shortcomings of the Kazakhstan legislation and case law in determining the methodologies that must be used to determine if an alleged price is excessive or reasonable. Chapter 3 thus interprets and assesses how excessive pricing is dealt with in the courts and its influence to excessive pricing jurisprudence.

3.2 Historical Account and Political Context of "Excessive Pricing" in the Kazakhstan pre-2010

Kazakhstan's economic transition saw a "shift" in "policy objectives" in the competition space.[132] The "competition authority" of Kazakhstan integrated with the country's pricing committee and thus formed the "State Committee on Prices and Antimonopoly Policy" and was in charge of "price administration, to protect consumers, de-monopolisation and to promote competition".[133] The Authority mostly decides on determining rates and "retail prices in the various economic sectors ranging from construction, manufacturing to medical.[134] The first draft of Kazakhstan's Constitution adopted an "anti-monopolistic" approach but the new Constitution embraced a "less restrictive" approach allowing "monopolisation", thus regulating "dominant market participants".[135] In terms of legislation the Kazakhstan authority drafted the "Law On Competition adopted in 2008 and the Law On Natural Monopolies and Regulated Markets".

[132] OECD, "Competition Policy in Kazakhstan: Promoting Efficient and Sound Markets" (2017) 16.
[133] ibid 16.
[134] ibid 16.
[135] ibid 16.

Kazakhstan competition regulations seeked to move from the failed "large scale demonopolization" practiced in the 1990's to regulating the pricing and behaviour of dominant organizations.[136]

The Law of Competition, gave the "Competition Authority" extensive authority to regulate dominant organizations who had gained their "dominance" through market share whilst there was no comprehensive study of the "market conditions".[137] As soon as an organization reached the percentage to be deemed as dominant organization, they were registered in the "State Register for Dominant Undertakings".[138] The Law of Competition defined a "monopolistically high price" as a price fixed by the "dominant" organization that must satisfy two requirements, namely, exceeding the highest price fixed by projects not of the same market or under the same economic environment but in a competitive space and exceeding the expenses incurred during producing and distributing the goods.[139]

The systems pursued to control the "prices" charged and "profits" made for all companies that were registered as dominant, however this was identified as a "weakness" of "the Kazakhstan competition law" and was thus abolished on the first of January 2017.[140] Additionally, a long list of certain actions were regarded as "abusive" and was criticized with regards to its enforceability. [141]

3.3 Comprehensive Analysis of "Excessive Pricing" in the Kazakhstan

3.3.1 Background and Perceptions Excessive Pricing in Kazakhstan

Competition Authorities find it difficult to solve cases that deal with "excessive pricing" and thus rather "avoid" them.[142] It is difficult to determine "justified profits" and to measure expenses, as a result of this difficulty, the risk of making an error is heightened and can cause considerable damage to production and growth of businesses including the consumers needs.[143] Price regulation is not seen as a solution to deal with market abuses. In Kazakhstan, businesses

[136] ibid 42.
[137] ibid 42.
[138] ibid 42.
[139] Law on Competition, Art 14.
[140] OECD, "Competition Policy in Kazakhstan: Promoting Efficient and Sound Markets" (2017) 42.
[141] ibid 43.
[142] OECD "Competition Law and Policy in Kazakhstan"(2016) 54.
[143] OECD "Competition Law and Policy in Kazakhstan"(2016) 49.

have the right to set their own prices,[144] however there are exceptions where the state regulates prices, namely for socially significant food products, for " products, work, services" of state monopoly or conducted in" international business transaction" retail petroleum products, medicinal goods, vodka or strong alcoholic drinks, cigarettes, gas and other products.[145] The state argues that it regulates prices to guarantee "national security", and to safeguard "public order", "human rights" and "public health".[146]

3.3.2 The definition and determination of Excessive Pricing according to Kazakhstan Laws

The primary piece of legislation which defines and prohibits excessive pricing in Kazakhstan is "excessive pricing" is the Entrepreneurial Code. The Entrepreneurial Code prohibits the dominant or monopoly companies to act in the following ways that limit access to the goods market or percent, limit or remove competition:

- by setting and maintaining high prices or low prices,
- applying different prices or environments to agreements that are equal without any good justification excluding instances were prices are different because of different expenses incurred during producing, selling and delivering of the commodity,
- by restricting the reselling of products purchased from the dominant/monopoly firm within his territory,
- by withdrawing the flow of goods with the effect of increasing the price of goods,
- by establishing different prices for the same goods.[147]

Additionally, Article 175 of the Entrepreneurial Code specifically deals with excessive pricing and is titled as "Monopoly high and monopoly low price of goods". The Code states that a price is excessive when a dominant organization sets a price that "exceeds" the "highest price" of the same product in the competitive market or "exceeds the price" set in a commodity market that it can be compared to.[148] Secondly, a price is said to be excessive if it "exceeds" the amount that is considered "necessary" to produce and sell the product considering its expenses and profits.[149] To determine if a price is high, one must compare it against the volume of goods sold, the characteristics of buyers and sellers of the products and the reason for selling and

[144] Entrepreneurial Code, Art 116 (1) .
[145] Entrepreneurial Code, Art 116(1) - (6).
[146] Entrepreneurial Code, Art 116 (2).
[147] Entrepreneurial Code, Art 174 (11).
[148] Entrepreneurial Code, Art 175(1) para 1.
[149] Entrepreneurial Code, Art 175(1) para 2.

buying the goods.[150] If it is difficult to determine to make a comparison within the same competitive market or outside Kazakhstan, an analysis must be conducted considering the expenses and profits of the organization and will thus determine what was supposed to be the reasonable price.[151] Lombardi states that the Entrepreneurial features detailed regulations stating the actions and methodologies, and restrictions that anti-monopoly authorities must apply during enforcement.[152]

Excessive pricing is also forbidden under the two categories of anti-competitive agreements, namely, "horizontal agreements" refer to organizations in the same market that sell or buy goods,[153] and secondly, "vertical agreements", refer to organizations that are not competing in the same market space whereby one provides goods/services and the other acquired goods/services.[154]

Horizontal agreements are considered to be cartels and are not allowed if the agreement results in the following:

- fixing and maintaining of prices, discounting and extra fees,
- increase or reduction of prices in a "tender, bid or auction",
- dividing of the "commodity market" in terms of territorial regulations, number of sales/purchases and the make-up of sellers or purchasers,
- the stoppage or decrease in manufacturing goods,
- denying to sign agreements with specific sellers or purchasers.[155]

Another important regulation is the "Order of the Minister of National Economy of the Republic of Kazakhstan No 173" (Hereafter The Order) which deals with how to determine the methodology to identify if a price is excessive. The Order also defines excessive price as the price set by the dominant organization, whereby the amount exceeds the cost of producing goods and profit, with the inclusion of a price rise yet there cost of producing the goods, purchasers and sellers, state regulations, taxes, tariffs, custom fees and state of the goods

[150] Entrepreneurial Code, Art 175(3)
[151] Entrepreneurial Code, Art 175(3)
[152] Lombardi (n 22) 5.
[153] Entrepreneurial Code, Art 168(1).
[154] Entrepreneurial Code, Art 168(2).
[155] Entrepreneurial Code, Art 169(1).

remained the same or where the change is out of proportion in comparison to the circumstances.[156]

Art 90-5(18) of the Code gives power to the antimonopoly authority to disclose a dominant organization that sets high prices, and also authorizes the methods that can be used to determine high prices.[157] The Code also states that to determine if a price is high, the competition authority must consider over the counter prices set in the world and Kazakhstan markets.[158] According to Chapter 2(6) of the Order, the antimonopoly authority of Kazakhstan has the authority to identify information that shows signs of breaching Article 174 of the Code by a dominant organization who sets high prices for products and conducts an analysis as to the "price dynamics", quantity of products sold on the competitive market. Additionally, Chapter 2 subsection 6 of the Order mentions that the role of the antimonopoly authority is to "identify" violations of section 174 of the Code in order to establish whether the prices are charged by a dominant organization are excessive by considering ;

- if the price also exceeds prices of those offering the same goods within the same comparable goods market,
- the excess "growth rate" of prices charged for commodities, and compare with "corresponding" growth rates",
- if the price increase is as a result of reducing the "physical characteristics" of the goods such as weight and,
- if there is a decrease in the production and supply of goods despite the demand from customers where one can produce and supply the goods.

Another mechanism to identify "high price" by the authority as provided by Chapter 2(9) of the Order is by comparing the price charged by the dominant organization with the price of goods within the "same market. Moreover, Chapter 2(9) of the Order provides that where it is impracticable to establish the price within the "competitive market", the authority can compare prices with the "comparable product market" including out of the borders of Kazakhstan and if it is still impraticable, then the authority must conduct a "cost and profit analysis" of the relevant market and establish if the price charged was reasonable.

[156] Order of the Minister of National Economy of the Republic of Kazakhstan, Chpt 1(3).
[157] Entrepreneurial Code, Art 90-5(19).
[158] Entrepreneurial Code, Art 175(7)

Chapter 2 (12) of the Order provides for the information that the authority must analyze when making a final decision to establish if the price is "exclusively high", by considering,

- the commercial and financial business of the organization, the variables in producing the products including expenses, and volumes of producing the goods considering the capacity to produce,
- the agreements which influence the fixing of prices and the various types of pricing including the costs incurred during production as well as staff "salaries", and the profit gained by the organization emanating from its "dominant' status,
- the "investment" plan of the organization and what it owes to its lenders and responsibilities towards other financial institutions.[159]

Chapter 2(12) of the Order explains that when the authority seeks to identify high prices by taking into account the expenses and profits gained as a result of selling the produced goods, the authority must consider the "supporting documents" such as "agreements and invoices, the quantity of resources used such as energy, fuel, raw materials to produce a certain amount of products. Additionally, Chapter 2(12) of the Order holds that the authority must consider staff salaries and allowances, cost of depreciation according to the company accounting regulations, charges incurred as a result of loans, costs incurred during production and the amount calculated as profit to sustain the business and its growth.[160]

Lastly, the Civil Code of the Republic of Kazakhstan prohibits actions caused by citizens and companies to harm others or abuse their rights.[161] Additionally, the Civil Code prohibits business owners from using their"civil rights"to restrict competition, abuse their dominant position by limiting and stopping production so as to "increase prices". [162]

3.3.3 Criticism of Kazakhstan laws in defining and determining excessive pricing

The competition authority ought to establish if the dominant organisation had a justified reason to refuse the conclusion of the agreement, even though the legislator does not provide for what is an "unjustified refusal".[163] However, in practice "unjustified refusal" is when there is no

[159] Order of the Minister of National Economy of the Republic of Kazakhstan, Chpt 2(11).
[160] Order of the Minister of National Economy of the Republic of Kazakhstan, Chpt 2(12).
[161] Civil Code of the Republic of Kazakhstan, Art 8(2).
[162] Civil Code of the Republic of Kazakhstan, Art 11(2).
[163] A.T. Ajtzhanova, "*Nauchno-prakticheskiy kommentariyk Predprinimatelskomu kodeksu Respubliki Kazahstan*" (Astana: Centr razvitija i zaŝity konkurentnoj politiki 2016).

economic or technological grounds to refuse, for example, where a contracting party wants to pay a price lower than the expenses incurred during production of goods.[164]

The legislator in Article 174(8) did not reveal what the concept of withdrawal of goods entails nor does it define the level at which price increase applied is defined to be contravention of the Code.[165] Ajtzhanova *et al* recommends that this provision should be applied in following circumstances based on reason, when withdrawal causes artificial shortage, and there is no reasonable justification for such withdrawal and consequently the price increases.[166] Moreover, there must be a "casual relationship" between price increase and withdrawal of goods and lack of justified reasons for withdrawal.[167]

Additionally, as will be discussed in the cases below, the OECD noted that the Competition Authority deals with 30 cases per year which is higher and more frequent than the EU.[168] Most of the cases were instituted as a result of "customer or competitor complaints", as a result the "hard core cartels" are not dealt with, but simply prevented and prohibited price increase.[169]

3.3.4 Defining what is a dominant organization according to Kazakhstan laws

The main regulatory legislation in the competition space is the "RK Entrepreneurial Code No. 375-V of 29 October 2015" (hereafter the "Entrepreneurial Code"). The Entrepreneurial Code differentiates between a "monopolistic position" and "dominant position". An organization that is described as having "dominant position" has a "share" of "50% or 35% "of the goods on the market on the conditions that:

- the organization can solely decide the price of the goods and change the environment of the sale of goods in the market,
- and thus influences such a decision for a long period of time,
- the existence of technology and administration limitations for other organizations to gain access to the goods.[170]

[164] ibid 64.
[165] ibid 63.
[166] ibid 69.
[167] ibid 70.
[168] OECD "Competition Law and Policy in Kazakhstan"(2016) 102.
[169] ibid 102.
[170] Entrepreneurial Code, Art 172 (3).

Whereas, an organization with" monopolistic position" holds 100% share of the goods on the market.[171] The wording of the "Entrepreneurial Code ", to define a dominant position also refers to actions by the dominant firm to limit entry to the market so as to limit, avoid, reduce and block competition including to action not related to competition but also those that infringe on the rights of other companies or individuals, even if it is just a single company.[172] The Antimonopoly Agency enquired against Kcell JSC because they charged their customers a "Daily Unlimited" without providing the service and was in breach of regulations and infringed on their customer rights.[173] The court established that Kcell abused its dominant position in the competitive market, and was thus fined 10% of their revenue because of their "monopolistic behaviour".[174]

One of the matters which have been considered vague is to determine "sole abuse" of a collective dominant abuse, however Kazakhstan in practice recognises such scenarios as possible.[175] The antimonopoly authority of Kazakhstan , determined that the prices charged by "D" were excessive and exceeded their competition players' prices.[176] "D" was found to be registered in the "Register of Dominants" as prescribed by the requirements of collective dominance and had a "market share" of 50% with another company of the same market and thus "D" was charged for abuse of dominant status.[177] However, authors have criticized the recognition rendered to "sole abuse of collective dominant status" as inconsistent with the definition of what constitutes dominant status which is defined as the ability to control the market and to impact the flow of goods.[178] Moreover, the alleged abuse such as setting a "monopolistic price" can reduce the company's chance of being part of the "market share" as consumers can purchase from their competitors who did not raise their price.[179]

[171] Entrepreneurial Code, Art 172 (7).
[172] Ajtzhanova (n 163) 54.
[173]Aitzhanov Aldash Turdykulovich & Knyazeva Irina Vladimirovna, *Competition Policy of the Republic of Kazakhstan* (JSC Center for Development and Protection of Competition Policy 2015) 7.
[174] ibid 7
[175]Ajtzhanova (n 163) 54.
[176] ibid 64.
[177] ibid 64.
[178] ibid 65.
[179] ibid 66.

3.4 Analysis of "Excessive Pricing" Cases in the Kazakhstan

3.4.1 Zhasyl El – Taraz

A medium-sized company that used to manage and control waste in the city of Taraz increased its pricing for the services it offered. The company was registered as one with "dominant position", as it had a "market share of city waste management" of over 35% within Taraz.[180]

Consumers complained to the Authority, who thus investigated and found the project to be an "abuse of dominance" by charging "monopolistically high prices" which increased 59% quicker than its competitors in the same region of "Zhambylsk" and 36% quicker than those of their neighbouring region Pavlodar.[181] The court thus fined Zhasyl El-Taraz, "KZT 154 544 an equivalent of 1000 USD" including a total amount of "KZAT of three million an equivalent of 20 000 USD" which was calculated as the profit made during its "anti-competitive" undertaking.[182] This case was decided upon when the Law of Competition was in force. Anti-monopoly authority has the responsibility to verify that the profits gained are "justified" where the company occupies a "dominant position".[183]

3.4.2 AES Ust-Kamenogorsk TEC

"AES Ust-Kamenogorsk TEC" was registered as a company with "dominant position" as they controlled over 68% of the "electricity competitive market". The company increased the price of electricity by over 51.89% in comparison to 38.49% across the East Kazakhstan region.[184] The "Competition Authority"' found the "AES Ust-Kamenogorsk TEC" guilty of charging "monopolistically high prices" within the competitive market for electricity in the area of East Kazakhstan.[185] In 2011 the court upheld the Authority's decision that fined the company KZT 136 million equivalent to 900 000 USD for "abuse of dominance".[186] However, the court was lenient and did not seize the profit made under the "monopolistic action" of the company that amounted to "KZT 136 billion" which is equivalent to 900 million.[187] This case recognised the

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[180] Collection, "Intersection of violations of antimonopoly legislation (best practices 2009-2013)" (2014) Astana 142.
[181] ibid 142.
[182] ibid 142.
[183] OECD "Competition Law and Policy in Kazakhstan"(2016) 51.
[184] ibid 51. Aitzhanov Aldash Turdykulovich & Knyazeva Irina Vladimirovna, *Competition Policy of the Republic of Kazakhstan* (JSC Center for Development and Protection of Competition Policy 2015).
[185] ibid 51.
[186] ibid 51.
[187] ibid 51.

"abuse of dominance", and shows that the competition authority of Kazakhstan is provided with a "powerful" tool that allows it to control prices charged by dominant organizations.[188]

3.4.3 Shymkent Regional Court

The Competition Authority decided against "seven local yeast producers" for increasing the price of their yeast product, in which they argued that it was because of the price increase pof wheat.[189] However, the Court Authority found that there was no connection between the price increase of wheat and selling price of yeast because the wheat price increased by an average of 18% whereas the yeast price increased by 81%.[190] The authorities found their behaviour to be concerted on the basis that "parallel increase" of the "consumer price" which can not be explained by at least one reason that has the same effect across all producers within the competitive market was found to be a "concerted action" if it occurs over three consecutive months.[191] A concerted action is illegal and was thus defined as parallel actions committed by an organization over three months in which they gain "economic benefits" they would have not otherwise enjoyed had it not been for such actions.[192] Additionally, concerted actions are unlawful when its objective is to limit competition and infringe the rights of consumers by fixing pricing.[193] The yeast producers were fined 5% of the profits through the "unlawful concerted action" gained "KZT 31 million and equivalent of 200 000 USD", but it did not seize the "monopolistic profit" made from two of the other producers.[194] Enforcement practices are largely observed "parallel pricing" and the reasons provided for by the dominant organization for charging in that manner.[195] Additionally, the courts do not require evidence of collaboration between organizations within the market to engage in parallel pricing.[196] Parallel pricing that results in the increase of prices is also perceived as an infringement on the rights of "consumers" by the competition authority.[197]

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[188] OECD, "Competition Law and Policy in Kazakhstan"(2016) 28.
[189] ibid 28.
[190] ibid 28.
[191] ibid 28.
[192] Law of Competition, Art 11(2).
[193] OECD, "Competition Law and Policy in Kazakhstan"(2016) 51.
[194] ibid 51.
[195] ibid 28.
[196] ibid 28.
[197] ibid 28.

3.4.4 "Bukhtarma Cement Company", "Semey Cement Factory" Ltd., and JSC "Central Asia Cement"

Three cement manufacturers had a market share of over 65% in Kazakhstan. The Competition authority investigated to prove if their action constituted a "concerted action", to raise the price of cement in the Eastern Region of Kazakhstan.[198] The Authority found that from May to June the manufacturers raised the prices of cement without a just cause such as an increase in expenses to manufacture cement.[199] The courts in 2011 agreed with the findings of the Authority to issue a penalty of "KZT 54 million and equivalent of 360 000 USD" on both the cement manufacturers.[200] The increase of prices by two or more dominant organizations within a competitive market that exceeds the "growth rate" of expenses incurred during production is considered to be "anti-competitive concerted action" by Kazakhstan competition laws.[201] Authorities thus use the law to control prices in socially significant and "oligopolistic markets" that are subject to unforeseen price changes such as cement.[202] Aitzhanov defines oligopolistic markets: it is practically difficult to enter the market and there are few suppliers, typically dominated by two to ten organizations who provide for half the market.[203]

3.4.5 A.N.Vlasov, V.I.Popov, A.M.Baranov, N.K.Zanudina, & "Nome Master

In Ust-Kamenogorsk, four sole entrepreneurs provided "home intercom services" and increased their services simultaneously by 10% on the monthly rate.[204] The competition authority found the service providers guilty of "anti-competitive behaviour" with the objective of raising and fixing monthly charges. The suspects argued that the "price increase" was not organized by the sole entrepreneurs but prices were fixed through the "equal" economic environment in the province. Smith identified that for competition to function fully one of the five key elements is that competitors should "act independently" and not by "collusion".[205] The court dismissed the argument of "services providers" and held that the service provider failed to convince the court that the price hike was as a result of the same economic conditions

[198] Aitzhanov A and Batyrbayeva A, "The Specialized Administrative Court of Kazakhstan fines two major regional cement producers for a tacit collusion (Semei Cement Plant. Bukhtarma cement company)" (2013) 53112 e-Competitions Bulletin.
[199] ibid.
[200] OECD, "Competition Law and Policy in Kazakhstan"(2016) 28.
[201] ibid 29.
[202] ibid 29.
[203] Aitzhanov (n) 22
[204] ibid 29.
[205] A Shastitko, "Competitive policy during the crisis" (2009) 3 VOPR Eco 56.

affecting all the intercom service providers.[206] They were thus fined "KZT 1 million which is an equivalent of 6 500USD" including the profit gained throughout the "anti-competitive action" which was regarded as "monopolistic income".[207]

3.4.6 Kazteleradio JSC

The "Competition Authority" in Kazakhstan investigated an alleged "abuse of dominant position" by Kazteleradio JSC who established and maintained monopolostically "high prices" for storing telecommunication equipment.[208] The Administrative Court found the company guilty and was given a penalty of up to 32 000 USD (KZT 11,618,205.36) aand led to the seizure of money gained through monopoly amounting to 440 000 USD.[209] Additionally, the courts held that the company must immediately stop their acts of violation and mitigate their harmful actions.[210]

3.4.7 JSC "Yu-kant"

The anti-monopoly authority found that U-Kant, a dominant firm in the wholesale sector of sugar, charged different prices in the South Kazakhstan region.[211] Invoices showed that the LLP company was charged 11.29 tenge per kilogram whereas business owners who sold via stores and supermarkets were charged 120 tenge/ per kilogram.[212] To determine if there was indeed violation the antimonopoly body has to consider a variety of issues namely, if there was different pricing or circumstances applied for goods, if the agreements were equal, if there were no reasons provided justifying the differentiation.[213] The legislator however does not determine what must be applied to determine reasons that are said to be justified and to establish if contracts are equal and thus each case is assessed on its own. Consequently, technology, the economy and other reasons can justify[214] one's pricing.

When taking into account whether there was excessive pricing it is important to consider if the commodity is the same, in its quality, therefore comparison of prices charged must be from the

[206]OECD, "Competition Law and Policy in Kazakhstan"(2016) 29.
[207] ibid 29.
[208] OECD "Excessive Pricing in Pharmaceutical Markets - Note by Kazakhstan" (2018) 3.
[209] ibid 3.
[210] ibid 3.
[211] Turdykulovich (n184) 104.
[212] ibid 104.
[213] ibid 104.
[214] Ajtzhanova (n 163) 55.

same competitive market.[215] Additionally, when establishing if contracts or prices are equal, other circumstances must be taken into account.

Authors have listed different conditions that justify the charging of different prices to consumers and prices are varied because of delivery terms, deferred payment or prepayment, wholesale discounts, different volumes and manner of delivery of goods, difference in quality of goods, difference in cost of delivery, difference in cost of production, methods of production, technology including other conditions.[216] Additionally, other justifications for pricing a certain amount or differentiated pricing is the presence or lack of receivables to the supplier, the need to attract new buyers and the terms of commercial cooperation with a specific party.[217]

3.5 Conclusion

Excessive pricing is prohibited in Kazakhstan under the Entrepreneurial Code and includes any actions that set and maintain high prices. The perception of excessive pricing in Kazakhstan is largely shunned and competition authorities tend to fine and can be described as over-regulated in comparison to the EU. Courts and the OECD do admit that it is difficult to determine if a price charged by a dominant organization is excessive or not. However, Kazakhstan laws have a detailed outline of how the competition authorities can determine whether a price charged is excessive or reasonable. The Code states that a price is excessive if it exceeds the highest price of the same product or the amount used to produce the product and when compared to other competitors. The anti-monopoly is provided with authority to determine excessive pricing according to the Code. The Order specifically outlines how the Competition Authority determines excessive pricing by using the comparison test, evaluating the value and quantity of goods and assessing the profit and cost margins.

[215] ibid 57.
[216] ibid 60.
[217] ibid 62.

CHAPTER 4: A COMPARISON BETWEEN EU AND KAZAKHSTAN JURISPRUDENCE ON "EXCESSIVE PRICING

4.1 Introduction

Chapter 4 details the similarities and differences between the Competition policy between EU and Kazakhstan with specific reference to excessive pricing. Chapter 4 highlights the contribution made by legislators, judges and scholars with regards to what is excessive pricing and how to determine if the price charged was excessive. Chapter 4 will thus highlight the difference in approach by the courts and legislators when dealing with "excessive prices" cases including commentary by authors. Therefore, the frequency of dealing with excessive pricing cases is established and the objectives in enforcement.

4.2 The Similarities between EU and Kazakhstan Jurisprudence on "Excessive Pricing"

4.2.1 Excessive pricing must have been undertaken by an entity with a "dominant position"

In the EU Article 102 provides that the abuse must have been undertaken by an entity with a dominant position in the competitive market or at least have a significant portion of the market in a manner that affects trade between countries. Likewise, in Kazakhstan Article 174 of the "Entrepreneurial Code" prohibits any action by those enjoying "dominant position" to limit entry to the market and thus prevents, limits and removes competition.

4.2.2 Excessive Pricing in prohibited in both countries

The TFEU prohibits charging excessive pricing and clearly states that this is a form of abuse whether "directly or indirectly" by charging "unfair" prices in the EU.[218] Similarly, the Code in Kazakhstan prohibits action by those with a "dominant position" from fixing monopolistic high prices.[219] The EU treats exploitative behaviour and excessive pricing as abusive according to EU Law despite such conduct not being associated with other anti competitive actions.[220]

[218] TFEU, Art 102(a).
[219] Entrepreneurial Code, Art 174(1).
[220] De Coninck (n 83) 3.

4.3 The Differences between EU and Kazakhstan Jurisprudence on "Excessive Pricing"

4.3.1 Determination of what constitutes having a "dominant position"

The TFEU does not explicitly provide for what constitutes a "dominant position", although it provides that "dominant" entities are prohibited from excessive pricing. Whereas, the "Entrepreneurship Code" defines what is a "dominant or monopolistic position" as the "position" an entity possesses within a market of a particular goods sector, with the ability to control that particular market and have an effect on the "circulation" of the products.[221] The Code also mentions that the "dominant position" of an organization is determined by utilising a methodology accepted by the "anti-monopoly body", that assesses and analyzes the circumstances of the competitive market.[222] Additionally, an organization with a market share of 35% or more is regarded as "dominant" if it meets certain conditions, and in the context of excessive pricing, if it single-handedly decides on the price of the products, with the ability to influence the circumstances in which goods will be sold within that market.[223]

The TFEU expressly states that the "dominant position" must affect "trade" between countries, whereas the Code states that the "dominant position" must limit entry of other competitors into the "competitive market", thus preventing and removing any form of competition. Padilla and Evans argue that for an organization to be recognised as dominant they ought to have "near monopoly" within the market for the "prices" to be considered as "excessive".[224]

The EU relies on case law, with Hoffmann-La Roche case being known for defining "market dominance", as the status enjoyed by an organization through an action which allows it to restrict healthy competition as it has the ability to operate independently without the influence of "competitors and customers".[225] However, such actions does not completely "preclude competition" but allows the dominant torganization to enjoy profits from it, and if not, to influence the environment that competitors have to operate

[221] Entrepreneurial Code, Art 172(1).
[222] Entrepreneurial Code, Art 172(1)
[223] Entrepreneurial Code, Art 172(3)(1).
[224] David Evans & Jorge Padilla, "Excessive Prices: Using Economics to Define Administrable Legal Rules" (2005) JCLE 97.
[225] ibid 100.

4.3.2 Kazakhstan legislation has a more distinct definition of what is excessive pricing over EU

The TFEU simply states that "unfair selling prices" are prohibited, whereas the Code in Kazakhstan explicitly defines what excessive pricing is. The determination of what entails excessive pricing was thus determined by the *United Brands* case and the definition and methodologies to determine excessive pricing has continuously been developed by the courts over a period of time, however with many methodologies still a bone of contention. The EU competition authorities have been largely left to determine what is excessive pricing and how to determine if a price is excessive or not, whereas the Code in Kazakhstan clearly defines what "excessive pricing is. Moreover, Kazakhstan enacted an Order that specifically deals with how the competition authority must determine if a price is excessive or not, by outlining detailed steps of what the competition authority must take as discussed in Chapter 3 .

4.3.3 Different testing methods to determine if a price is excessive

There is no legislation or regulations that explicitly provides for the definition and methods to determine if a price is "excessive" in the EU and is largely defined by case law and scholarly writers, whereas in Kazakhstan the law defines what excessive pricing is, including methods to determine excessive pricing. Excessive pricing was thus defined in the case of *United Brands Company*, as a "price" which has no sensible correlation with the monetary value of the goods.[226] The court further established the methods to determine if a price is excessive or not by comparing the "selling price" of goods vis-a-vis the "production cost", which will thus reveal the "profit margin", enquiring if the difference between "production cost" and "price charged" is excessive, and if it is so, enquiring if price charged is unjust within itself or in comparison to other products and lastly, implementing other rules to determine if the price charged on the goods is unjust.[227] Calcagano states that the line between what constitutes "excessiveness" and "maximisation" of prices is not clearly defined and thus falls in space between "*competitive pricing and monopoly pricing*".[228]

[226] *United Brands* (n 28) 217.
[227] ibid 244.
[228] Claudio Calcagano, "Economics of Excessive Pricing: An Application to the Pharmaceutical Industry" (2019) 10 JECLP 166.

4.3.4 EU is more conservative in its approach when establishing "excessive pricing" than Kazakhstan

Botta states that cases that deal with "unfair pricing" have been perceived as a "taboo" to enforce under Art. 102 of the TFEU.[229] However, as already mentioned above, there has been a "resurgence" of cases dealing with "excessive pricing", as a result the jurisprudence of "excessive pricing" in the EU is reconsidering its position to shift its position away from a "non-enforcement paradigm".[230] Courts have subsequently been recently tasked with investigating "excessive pricing" cases particularly in the pharmaceutical sector and thus have a duty to clarify the test to determine excessive pricing.[231] Calcagano however affirmed remarks made by the CAT in the Pfizer/Flynn case that competition authorities must be wary of getting themselves involved in deciding prices as "excessive", as they will begin to take the role of the regulator.[232] Price determination must rather be established by the relevant regulatory authority as it can operate "prospectively" rather than courts who are forced to operate retrospectively which can raise more challenges in the future.[233] Over-enforcement can lead to the reduction of innovation , therefore competition authorities are advised to be cautious when intervening in alleged "excessive pricing" cases.[234] Calcagano recommends that where there is regulatory failure that results in "excessive pricing" must rather be solved by means of "regulatory intervention" or "bargaining", rather than punishing businesses.[235]

4.4 Conclusion

EU jurisprudence is largely influenced by scholars and the courts to define excessive pricing and how to calculate whether a price is excessive or not, whereas Kazakhstan legislation clearly defines what excessive pricing is, and the steps to be taken to decide if the price charged was reasonable or excessive. Hence, the reason why most alleged cases of excessive pricing in Kazakhstan are easily determined as excessive since the law clearly describes how to determine excessive pricing prices. However, as seen in Chapter 3, scholars note that the EU finds it difficult to determine if an alleged pricing case is excessive or not since there is no legal certainty with regards to certain aspects of the methodology in determining "excessive pricing.

[229] Botta (n 41) 184.
[230] ibid 184.
[231] ibid 184.
[232] Calcagano (n 228) 171.
[233] ibid 171.
[234] ibid 171.
[235] ibid 171.

There are similarities between EU and Kazakhstan with regards to “excessive pricing”, in that both countries prohibit excessive pricing and the action must have been committed by an organization with a dominant position in the competitive market. However, there are also differences such as defining what a dominant organization is. Secondly, the approach of the courts is more restrictive in its approach when deciding whether an alleged case of excessive pricing is excessive or not in the EU than Kazakhstan. Despite the rise of cases in the EU against “excessive pricing”, the recent case of *Flynn and Pfizer* by the Court of Appeal’s final judgement demonstrates that courts are not yet convinced by the methodology set out to determine if a price is “excessive” or not, and due to legal uncertainty the courts will therefore shy away from concluding that a dominant organization charged an excessive price.

CHAPTER 5: CONCLUSION AND KEY ASSESSMENTS

Excessive pricing is prohibited in both the EU and Kazakhstan. Excessive pricing is defined by the courts in the EU, whereas in Kazakhstan it is defined in its legislation and is described as "monopolistically high pricing". The *United Brands* case provided the definition of excessive pricing in the EU and provided for the analytical framework to determine what is excessive pricing. The *United Brands* case formulated a two tier-test known, as the "excessive limb test and the "unfairness" limb test. A price is excessive when compared to the "economic value" of the goods and if it is "unfair in itself" or in comparison to other "competing goods". However, the *United Brands* case is not the sole test that is used to assess "excessive pricing" cases. The CJEU has also implemented benchmarking techniques to discover if there was excessive pricing or not. Moreover, courts have also incorporated "safeguard" tools which include applying several tests and allowing the organization to give just reasons, so as to mitigate the risk of wrongly accusing an organization of charging excessive prices.

The recent increase of "excessive pricing" cases has added to the jurisprudential discourse in the EU with regards to "excessive pricing", by assisting to clarify the methodologies applicable to test if a price is "excessive or not. Despite the increase of "excessive pricing" cases in the EU, there is still legal uncertainty with what "unfair pricing" entails in reality. There is a lack of legal certainty as to what is a price that is "unfair in itself", according to the "cost plus" method, and the manner in which the "economic value" of the goods fit into the test. As a result, these two aspects need to be established, for competition authorities to be fully involved in investigating alleged "excessive pricing" cases. Kazakhstan however has a more precise definition of "excessive pricing" in which it describes instances to identify if a price is excessive or not. The price must exceed the "highest price" in the market, or must exceed the amount necessary to produce and sell it. Kazakhstan legislation has developed a legal framework that has intricate details of how to determine if a price is excessive or not, however this research has found that it is not without difficulties especially when applying comparison tests within and outside Kazakhstan. However, due to the more specific and detailed outline of competition laws in Kazakhstan, most alleged cases of excessive pricing cases are determined as such. Whereas, EU courts shun from deciding cases as excessive due to the higher probability of false negative errors, since there is no precise, accurate and definite methodology to determine if an alleged case is excessive or not, despite the recent surge of cases of excessive pricing in the EU particularly in the pharmaceutical sector. Some of the difficulties competition authorities have to face is to look for comparable markets, determine how costs are measured

including what is a “justified profit margin”. Therefore the risk of making a mistake is considerably high which could harm businesses and consequently production and the customer. Moreover, the Appeal Court in the Pfizer/Flynn case shows that the courts are still hesitant to conclude that prices charged are excessive. Nevertheless, excessive pricing must not be completely shunned and must be viewed as a type of abuse under Art 102 of the TFEU. Moreover, the Court of Appeal was against the court replacing the role of regulators in controlling prices, since they operate retrospectively whereas regulators operate “prospectively” which is key for business for future planning and can create innovation and sustainability.

What is still of concern is that despite the new discourse of “excessive pricing” within EU jurisprudence, the main deliberations of how to determine “excessive pricing” is still “unanswered” as already identified above. Therefore, until there is clarity with regards to what excessive pricing is and how to determine it, it will remain an area that courts do not want to make findings on. Whereas, in Kazakhstan because of the” powerful” tool that their competition authority is equipped through the Code and the Order which specifically outlines what “excessive pricing” is and how to determine it. Therefore, the authorities can directly control pricing systems and decide on many “monopoly high prices” cases as it regards itself as having the responsibility to monitor fair amounts of profits to be made by dominant organizations. However, this research showed that even of Kazakhstan competition authorities such determination is not without its challenges. There is a need for certainty and clarity to determine what is “excessive pricing” for competition authorities and courts to make accurate and conclusive judgements.

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ABSTRACT

Die Coronavirus-Pandemie hat zu einer Preissteigerung für Waren mit hoher Nachfrage geführt. Übermäßige Preissteigerung wirkt negativ auf die Verbraucher, besonders in einer so schweren Zeit wie Pandemie. Im Laufe von vielen Jahren haben die zuständigen Behörden Ermittlungen zu angeblichen „Fällen der Preisüberhöhung“ eingeleitet. Während der Pandemie hat jedoch die Zahl der Fälle der Preisüberhöhung, insbesondere in Bezug auf die Waren mit hoher Nachfrage wie pharmazeutische Produkte, Handreiniger, Desinfektionsmittel und Masken. Einige sprechen sich jedoch gegen Preiskontrollen aus, da dies als Schädigung eines offenen Wettbewerbsmarktes gedeutet wird. So ist die übermäßige Preissetzung zu einem Schlachtfeld im politischen und rechtlichen Raum geworden und hat kürzlich eine Unterstützung von Gerichten bekommen. Der Wettbewerb ist dafür bekannt, die Innovationen und Technologien zu stimulieren, die eine gesunde Wirtschaft schaffen, zu qualitativ hochwertigen Produkten führen und die Preise herabsetzen. Die Wissenschaftler treten der Preisregulierung als Hindernis für Wirtschaftswachstum und Innovationen entgegen. Während andere behaupten, dass die Preisregulierung das willkürliche Verhalten der Organisationen beseitigen soll, insbesondere von denen, die eine dominierende Position einnehmen. Außerdem wird es befürchtet, dass die Gerichte die Fälle in Bezug auf “überhöhte Preisbildung“ prüfen werden, da es schwierig ist zu bestimmen, ob der Preis “vernünftig oder übermäßig“ ist, da jedes Produkt und jede Dienstleistung in Bezug auf Kreativität, Produktion, Innovation und Kosten einzigartig ist. Demzufolge kann ein Eingriff der Gerichte dem Geschäft Schaden anrichten und letztlich den Verbraucher schädigen. Die Die Debatte über die Rechtspraxis in Bezug auf überhöhte Preise in der EU und in Kasachstan, die Feststellung überhöhter Preise, die Bestimmung, ob ein erhobener Preis übermäßig oder vernünftig ist, und die Diskussionen über die Folgen der Anerkennung eines Preises als übermäßig oder vernünftig, werden zwischen Wissenschaftlern und Gerichten fortgesetzt.

Stichworte: übermäßige Preissteigerung, Kasachstan, Europäische Union, Wettbewerbsrecht, dominierende Position.