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Excessive pricing in pharma and telecoms - where do we stand?

Speakers: Dr Avantika Chowdhury, Oxera Consulting LLP (**AC**)
Daisy Mackersie, Monckton Chambers (**DM**)
Chaired by Bruce Kilpatrick, Linklaters LLP (**BK**)

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Introductions

Bruce Kilpatrick provided an overview of the CAT and CMA's roles in assessing excessive and unfair pricing in the UK. He noted the fact-specific nature of such cases, particularly in pharma where suppliers often face a single dominant buyer. He highlighted the CMA's focus on these cases, the growth of collective actions, and then opened the floor for discussion.

The United Brands framework

Daisy Mackersie discussed the continuing relevance of the *United Brands* test, drawing on her experience as counsel for the CMA in *Hydrocortisone* and for BT in *Le Patourel*:

- The two-limb test remains central, but a preliminary assessment – whether a price is objectively “unfair” – must come first. This depends on what a fair price would look like in the specific firm and market context.
- Even before *United Brands*, the CJEU had already provided guidance on indicators of unfair pricing, including whether prices were set under conditions of effective competition, and whether they bore a reasonable relationship to economic value. DM noted that defining economic value is crucial but inherently imprecise, making it a likely focus of future interpretation and debate.
- The two limbs of the *United Brands* test:
 - 1) whether the price is excessive relative to costs, and if so,
 - 2) whether it is unfair (in itself, or compared to competing products),

are alternatives, not cumulative. The second limb requires a broader assessment, including whether the firm had market power or whether wider, legitimate market dynamics explain the pricing.



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- DM stressed that, although both limbs are often argued together, they represent alternative approaches rather than joint requirements.

Reflections on the United Brands test as applied to Le Patourel

DM discussed how in *Le Patourel*, the Tribunal found the price excessive (Limb 1) but not unfair (Limb 2), for two key reasons:

- The Tribunal was satisfied that, in a workably competitive market, a similar price could plausibly arise, based on evidence from an adjacent market.
- Consumers were found to ascribe value beyond cost to the service, including the BT brand, and were willing to pay for it.

DM noted how in *Le Patourel*, access levels played a key role in assessing unfairness under the second limb of the United Brands test.

- The class representative argued that BT's landline-only customers should receive 90% of the value available to typical telecom users, but the CAT found a 33% benchmark more realistic. This large discrepancy made it difficult to prove unfair pricing, as the Tribunal considered the lower level of access consistent with the actual value those customers derived from the service.

Reflections on the United Brands test as applied to Phenytoin, Hydrocortisone and Liothyronine

DM observed that while cost-plus pricing remains a widely used benchmark in assessing Limb 1 of the *United Brands* test, particularly in pharmaceutical cases, it is not the only method:

- The Court of Appeal has recognised cost-plus pricing as a well-established tool, grounded in over five decades of jurisprudence, but has not endorsed it as the exclusive method for assessing excessive pricing.
- In *Liothyronine*, the CAT held that cost-plus was not an appropriate benchmark in that context.

AC questioned the weight given to Limb 1 in the *United Brands* test and whether courts rely too heavily on cost-plus at the expense of a fuller Limb 2 analysis. She drew distinctions across three cases:

- In *Phenytoin* and *Hydrocortisone*, the level of excess made it difficult for firms to justify prices via product improvements.



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- As noted above, in *Liothyronine*, the CAT formally rejected cost-plus pricing as the appropriate benchmark, instead adopting an entry-incentivising price to assess excessive pricing.
 - However, in practice, when assessing the real-world prices after Teva and Morningside entered the market, the CAT dismissed these post-entry prices as “contaminated” and unreliable.
 - AC argued the CAT overlooked real market dynamics, like sustained margins and ongoing competition, by relying too much on cost-plus logic. Even after one firm exited, post-entry prices stayed above cost, but the CAT gave little weight to whether this reflected sustainable competition.

Cost allocation and economic value in pricing assessments

AC noted that cost-plus remains relevant to both limbs of the *United Brands* test. Two recurring issues are:

- 1) Which costs should be included? Only direct costs, or also shared (common) costs?
- 2) If common costs are included, how should they be allocated across different products in a multi-product business?
 - In *Le Patourel*, the CAT allowed BT to recover 40% of its common costs, citing demand-side links between services such as fixed-line plus TV and broadband bundles.
 - In contrast, the CAT has taken a stricter approach in pharma, where links are typically supply-side (e.g. shared manufacturing), and not enough to justify broader cost recovery.

AC noted this distinction may matter more in digital markets, where firms like Apple and Google offer complementary products across hardware, software, and services.

DM added that consumer value perception, key in *Le Patourel*, will be crucial in brand-driven digital markets, benefiting such firms as courts shift towards Limb 2 and economic value. In regulated pharma, however, the main issue remains whether firms had real freedom to set prices, making commercial context more important than brand.