Treatment of Excessive and Unfair Pricing in Competition Litigation

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ABSTRACT

This article examines how economics informs the legal assessment of excessive pricing under UK and EU competition law. Drawing on recent decisions, including *Phenytoin, Liothyronine*, *Hydrocortisone*, *Le Patourel,* and *Kent*, it argues that the *United Brands* framework remains conceptually sound but requires disciplined economic interpretation.

The analysis advances three propositions. First, excessive pricing inquiries must begin with a clear view of economic cost – the efficient cost of supply and the normal return that would prevail under normal and sufficiently effective competition. Second, the notion of economic value should be evaluated within the unfairness limb and used to distinguish legitimate consumer benefit from the exercise of market power. Third, digital markets test these principles in new settings, where high fixed costs and network effects blur the line between innovation and entrenchment. Properly applied, the framework allows courts to separate reward from exploitation, protecting consumers while preserving incentives for investment and innovation.

Recent decisions of the UK Competition Appeal Tribunal have renewed attention on how excessive pricing should be assessed in law and economics. Most notably, in *Le Patourel v BT*, the Tribunal found that BT's prices for standalone fixed-voice phone services were excessive, even though the degree of excess was much lower than in the pharmaceutical cases previously before the Tribunal. The claim ultimately failed because the prices were not found to be unfair.

By contrast, in the *Kent v Apple* judgment, the Tribunal found that Apple's app store commissions were excessive when compared with a competitive benchmark. These outcomes, along with the differences in the Tribunal's reasoning across cases, raise important questions about how courts interpret and apply the excessive pricing framework in practice and the role that economic evidence plays in this determination.

This article aims to help practitioners – especially lawyers and generalist competition professionals –interpret and evaluate the economic reasoning that underpins excessive pricing claims. It explains how the economic analysis used by authorities and courts connects to core economic concepts of cost, value, and market power. The discussion is grounded in the case law but organized around three central economic themes: (i) the understanding of economic costs; (ii) interpreting economic value; and (iii) the role of excessive pricing in digital markets.

The Excessive Pricing Test

Excessive pricing constitutes an exploitative abuse of dominance under Article 102(a) TFEU and Chapter II of the UK Competition Act 1998. Unlike exclusionary abuses, which concern conduct that distorts market structure or forecloses rivals, excessive pricing focuses on outcomes. The conduct under investigation is the price itself. In markets where competition is weak or absent, dominant firms can harm consumers simply by exploiting their market power through prices that are significantly above competitive levels and which cannot be justified by cost, innovation, risk, or quality.

In competitive markets, prices above cost usually attract entry or expansion by rivals, which pushes prices down. Where markets are open and rivalry is effective, high prices are self-correcting. That mechanism fails in markets with structural barriers, where entry is unlikely, switching costs are high, or consumers are locked into their current choices. In such settings, prices can remain fixed at a supra-competitive level, even without further increases, because competition no longer exerts pressure to bring them down. Competition law recognizes that, along with exclusion, exploitation can harm consumers and justify intervention where the market cannot correct itself.

The leading authority remains *United Brands v Commission*. The European Court of Justice held that a price is abusive if it is both "excessive" and "unfair," either in itself or when compared with other products or markets.[1] Both limbs must be satisfied, raising two distinct economic questions:

1. Excessiveness: Is the price materially above a benchmark that reflects competitive conditions?

2. Unfairness: Is the difference between the price and that benchmark unjustified by cost, quality, or other objective factors?

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[1] *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* (Case 27/76) [1978] ECR 207, para. 252.

The judgment turns on two ideas that guide how the test is applied. First, a dominant firm abuses its position when it captures trading benefits it could not obtain under "normal and sufficiently effective competition" (NSEC). Second, an excessive price is abusive when it bears no reasonable relationship to the product's "economic value."[2] Although neither phrase has a precise technical definition, both can be examined through standard economic reasoning.

Later cases have applied *United Brands* but have not developed a uniform method for answering the two questions. In practice, authorities and courts have used comparative analysis to assess both limbs of the test. Actual prices are compared against a counterfactual benchmark that would prevail under conditions of NSEC. As we discuss in more detail below, the challenge lies in identifying a valid benchmark, particularly in markets that lack meaningful comparators or where all rivals face similar constraints. The Tribunal's reasoning in *Kent* shows that the framework can also be applied to complex multi-sided digital ecosystems, where identifying economic cost and value requires careful construction of the NSEC counterfactual.

The Tribunal's recent judgments suggest that the *United Brands* framework can operate in these complex markets, but they also expose its limits. The absence of true comparators forces reliance on abstract benchmarks and introduces subjectivity into both limbs of the test. The concept of NSEC remains central but has proved difficult to pin down.

The Economics of Excessive Pricing

There is no single empirical test that determines whether a price is excessive or unfair. Each case turns on market circumstances that prevent normal competitive forces from disciplining the dominant firm. These settings explain why outcomes have varied and why no uniform method exists for identifying when prices cross the line from high to excessive and unfair. Courts have approached the question through comparative analysis. The search for that benchmark centres on the concept of NSEC, which provides the overarching framework for both limbs of the test.

What Does NSEC Mean?

United Brands did not define what NSEC means or how it should be interpreted. Later case law has used terms such as "workable competition" interchangeably, but these have not added precision to the counterfactual benchmark.

[2] Ibid., paras 249–252.

The Court of Appeal judgment in *Liothyronine*[3] addressed the meaning of workable competition more directly. It made clear what NSEC is not. It is not the textbook model of perfect competition in which equilibrium prices equal marginal cost in the short run. The case law has correctly rejected that benchmark, since no real market operates in that way.

The appellants in *Liothyronine* proposed a "bright line" test, arguing that a market is workably competitive where there is no dominance, no collusion, and low entry barriers, and that prices in such markets would necessarily be lawful.[4] The Court rejected that approach. It held that workable competition is a guiding benchmark, not a prescriptive test. It recognized that markets differ in cost, risk, and demand conditions, and that fairness requires judgment informed by evidence. A rigid standard that equates workability with zero profit or uniform margins ignores these differences and risks undermining the structure of the *United Brands* analysis.

The Court also noted that the idea of workable competition has a long pedigree in economic thought, originating in John Maurice Clark's 1940 article "Toward a Concept of Workable Competition" in the *American Economic Review*. Clark's article sought to move beyond the abstractions of perfect competition by proposing a pragmatic test of whether rivalry is sufficient to keep firms efficient and responsive to consumers.[5] The judgment also referred to an article by Jesse Markham, who argued that an industry may be judged to be workably competitive when, after its structural characteristics and the dynamic forces have been thoroughly examined, public policy intervention would not make social gains greater than social losses.[6]

Clark's concept of workable competition can be understood in economic terms as referring to long-run market outcomes rather than short-term fluctuations. Even in competitive markets, prices may rise above marginal cost when demand is high or capacity is constrained. These temporary increases perform a useful allocative function by signalling scarcity and encouraging new investment or entry.

In the long run, competition will tend to produce prices that cover the full cost of production, including fixed and sunk costs, and yield a normal return on capital. Because most firms operate

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3 *Hg Capital LLP, Cinven Partners LLP, Advanz Pharma v. Competition and Markets Authority*

4 *Cinven and Others v Competition and Markets Authority* [2025] EWCA Civ 578, paras 72–84.

5 J M Clark, "Toward a Concept of Workable Competition" (1940) 30 *American Economic Review* 241.

6 Jesse W Markham, "An Alternative Approach to the Concept of Workable Competition" (1950) 40 *American Economic Review* 349, 361.

with economies of scale or product differentiation, they will typically earn positive margins above economic cost. In dynamic markets, these margins are higher to allow recovery of initial investment outlays. The long-run competitive equilibrium can be understood as the price at which existing firms do not wish to exit, and potential entrants cannot profitably enter. Economically, it lies somewhere between the idealized perfectly competitive price and the monopoly price.

The difficulty arises when these provisions are applied to markets far removed from these conditions. Such markets – those with high sunk costs, regulatory barriers, network effects, or pronounced consumer inertia – rarely display outcomes that resemble effective rivalry. In these circumstances, the benchmark for NSEC cannot be observed and must instead be thought out. It involves abstracting from some structural features while recognizing the role they play in conferring market power. It also requires judgment about the extent to which the benchmark should internalise existing entry barriers. In some cases, the resulting NSEC price may approach the monopoly price, which raises a tension with the purpose of excessive pricing control, namely, to constrain monopoly pricing in markets where self-correction cannot be expected.

The two-limb *United Brands* framework can provide a coherent analytical structure. Its usefulness depends on accurately measuring the difference between actual prices and economic costs under the excessive limb and ensuring that the analysis of economic value under the unfairness limb.

Understanding Economic Costs Under the Excessive Limb

United Brands explains that excess may be "determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin." It continues that "[t]he questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive."[7]

The relevant question for economists is how far observed prices exceed economic cost, not accounting cost. Economic cost reflects the efficient cost of supply, including a normal return on capital that compensates investors for the risk they bear under conditions of NSEC. Prices above this level generate economic rent, but only a material and persistent rent indicates

[7] *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* (Case 27/76) [1978] ECR 207, paras 251–252.

potential abuse. Courts have not set quantitative thresholds, so the assessment must consider both the size and the duration of any margin.

Comparator prices can assist, but only when the markets being compared share broadly similar cost structures and risk. Reliable measurement of economic cost remains the foundation of any excessive pricing assessment.

UNDERSTANDING ECONOMIC COSTS

A cost-plus benchmark is the most common way to approximate economic cost under NSEC. It estimates the lowest price that allows a firm to cover its operating costs and to earn a normal return on invested capital. The Tribunal has sometimes criticized the use of cost-plus as "idealised or near perfect competition," and not the real world.[8]

From an economic perspective, the cost-plus approach does not reflect the prices that would prevail under perfect competition, as it cannot be interpreted as an estimate of marginal cost. At this level, a firm earns a normal profit and has an incentive to continue supplying the product or service, rather than exiting. In practice, most firms would be able to price above cost-plus and make economic profit, without being in danger of pricing excessively. In competitive markets, it is likely that only the marginal or least-efficient competitor makes zero economic profit.

In practice, cost-plus analysis helps assess the scale of any apparent excess under the excessive limb. It provides a practical reference point within the overall assessment by indicating how far the observed price sits above a level consistent with NSEC.

CONSTRUCTING A COST-PLUS BENCHMARK

Constructing a cost-plus benchmark usually involves three elements: direct production costs, an allocation of common or overhead costs, and a reasonable return on capital. Direct costs can usually be obtained from accounting data. Allocating overheads, however, requires judgement. In *Liothyronine* and *Hydrocortisone*,[9] the Competition and Markets Authority (CMA) rejected revenue-based allocations because high prices would absorb a disproportionate share of overheads and understate product-level margins. Revenue-based allocations distort the benchmark because they embed the very price differences the analysis seeks to test. Instead,

[8] *Flynn Pharma Limited, Pfizer Inc. and others v Competition and Markets Authority* [2018] CAT 11, para. 318.

[9] *Allergan, Advanz, Cinven, Auden/Actavis & Intas v. Competition and Markets Authority*

the courts indicated that overheads should be apportioned using operational drivers such as volumes so that the benchmark is not contaminated by observed prices.[10]

Defining the capital base and the appropriate return is the most demanding step of the cost analysis. Competition authorities commonly apply a return-on-capital-employed (ROCE) approach, identifying the capital invested and applying a risk-adjusted rate of return such as the weighted average cost of capital (WACC) derived from the capital asset pricing model (CAPM). Where the activity is capital-light, analysts may instead use a return-on-sales (ROS) approach, adding a margin drawn from firms that operate in competitive markets. ROS can be useful, but it embeds assumptions about capital intensity and risk that must be tested against the evidence.

The treatment of sunk costs under the overarching framework of NSEC has been central to the analysis of the excessive limb. In the short run, pricing depends on variable cost, but in the long run, all costs are variable. Firms invest in research and development (R&D) or facilities only if they expect, *ex ante*, to recover those costs with a normal return. Excessive pricing assessments should consider the value of sunk investments and the extent to which they reflect pricing power during the alleged infringement period. In considering these factors, it is helpful to examine the product lifecycle, particularly in dynamic markets where investment and innovation drive competition, and to ask whether high profits reflect recovery of initial investment rather than exploitation of market power.

Historic accounting book costs may not provide useful information for valuing sunk investments. Instead, the benchmarks should rest on the current economic value of the assets required to supply the product or service. Economic cost, therefore, includes the opportunity cost of holding and maintaining those assets as well as a normal return for the risk that remains. This approach recognizes that sunk costs matter for investment incentives *ex ante*, yet should influence the benchmark *ex post* only to the extent that the underlying assets remain necessary for supply.

In *Hydrocortisone* and *Phenytoin*,[11] the CMA focused narrowly on working capital, excluding sunk investments. In *Liothyronine*, it treated the marketing authorization and manufacturing know-how as part of the capital base, valuing them using actual entry costs. The CAT endorsed that approach, reasoning that those intangible assets were essential to supply and bore

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[10] *Advanz Pharma and others v Competition and Markets Authority* [2023] CAT 52 (*Liothyronine*), paras 158–160; Competition and Markets Authority, Decision in Hydrocortisone (July 29, 2021), para. 5.119–5.125.

[11] *Flynn Pharma Limited, Pfizer Inc. v. Competition and Markets Authority.*

commercial risk.[12] The principle is that the capital base should reflect the resources genuinely at risk in supply, whether tangible or intangible. Intangible assets such as licences, distribution rights, or brand value belong in the base only when they are required for supply and expose the firm to commercial risk. Recognition of such assets should not lead to double rewards. If a higher capital value already internalises entry barriers, those factors should not be credited again in the unfairness limb as additional economic value.

In *Kent*, the Tribunal rejected Apple's approach of valuing intangibles based on its market capitalization. It correctly found the approach to be "circular," as such a method would include investor expectations of future cash flows, which were inflated by any excessive and unfair pricing infringement, making it an unsuitable reference point for asset valuation purposes. Instead, the Tribunal capitalized R&D spending in a reconstructed balance sheet and found that the App Store still generated very high profits.[13] The Tribunal's approach in *Kent* underscores that asset valuation must reflect the efficient cost of supply under competitive conditions, not the capitalised expectation of monopoly rents.

Determining the appropriate rate of return should reflect the systematic risk involved in supplying the product or service. Two firms facing identical risks can show different profit margins depending on capital intensity. Where the capital base is small, modest profit changes can produce large swings in ROCE and give a misleading impression of excess. In such cases, ROS can be a useful cross-check provided the comparator set faces genuine competition and similar risk.

Le Patourel illustrates this method in a low-capital context. The experts built a cost stack for BT's standalone fixed-voice service and added a 13.5% margin, reflecting the average margin observed in comparable competitive markets. The Tribunal also accepted that BT's brand strength contributed to value, which raises the risk of double-counting if brand effects were already captured in the 13.5% comparator margin.[14] ROS benchmarks must therefore be interpreted carefully. That same caution applies in assessing economic value under the unfairness limb, which should not treat brand-related willingness to pay as a further justification once it has been remunerated through the cost benchmark.

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[12] Ibid., paras 158–160; upheld on appeal in Liothyronine [2025] EWCA Civ 578, paras 110–117.

[13] *Dr Rachael Kent v Apple Inc and Apple Distribution International Limited* [2025] CAT 67, paras 605–610.

[14] *Le Patourel v BT Group PLC* [2024] CAT 76, paras 567, 642–643, 1135.

Whether ROCE or ROS is used, cost-plus offers a workable proxy for economic cost. In *Liothyronine*, the CMA found that observed returns were far above the WACC during the infringement period and that the profits were outliers when compared with those of other firms facing similar costs and risks. Distributional cross-checks of this kind are not determinative but can strengthen the conclusion that observed returns are inconsistent with competitive discipline. Because WACC and capital valuation are uncertain, analysts should rely on ranges rather than single figures and test whether profits fall persistently outside those ranges.

ALTERNATIVE APPROACHES TO MEASURING PROFITABILITY

In industries with long product lifecycles, profitability can also be analyzed using an internal rate of return (IRR) framework. IRR measures the discount rate that equates the present value of a project's cash inflows and outflows, which mirrors how investors evaluate projects *ex ante*, since both IRR and the cost of capital express expected returns as annualized rates. A lifecycle IRR close to the cost of capital suggests that high profits in some years reflect normal recovery of earlier losses or expected erosion later in the cycle. A truncated IRR, limited to the alleged infringement years, can isolate profitability over the relevant period but may overstate returns if it ignores early investment or later decline. A high truncated IRR over a short period therefore does not necessarily imply excessive pricing.

This distinction is particularly important in pharmaceuticals and other long-cycle products. In early recovery years, margins can appear very high, but that may simply reflect normal recoupment of sunk costs. By contrast, in the generic phase, when risks are low and sunk costs have been recovered, persistently high margins will cause the truncated IRR to diverge sharply from the cost of capital. In such circumstances, the evidence may point to excess returns. For this reason, IRR is best interpreted in its lifecycle context.

IRR analysis relies on assumptions and is sensitive to measurement choices. Estimating asset values at the start and end of the period can be difficult, and cash flow data may be incomplete. The method must also address how common costs are allocated within multi-product firms, which requires judgment about appropriate cost drivers. Although no approach is perfect, IRR can serve as a valuable cross-check against ROCE and ROS results and can reveal inconsistencies between short-run accounting profits and long-run economic returns.

EXCESSIVE WHEN PRICES ARE "MATERIALLY AND PERSISTENTLY" ABOVE COST

Once the difference between price and cost has been determined, courts must still assess whether that difference is excessive. This assessment requires judgment and depends in part

on the size and duration of the margin above the competitive benchmark. For example, in *Liothyronine*, the CMA found that the average price exceeded the cost-based benchmark by around 1,700%, while in *Hydrocortisone*, the margin was around ninefold. In *Phenytoin*, prices for certain capsules exceeded the benchmark by nearly a factor of eight in some years.[15]

These margins indicate returns well beyond what workable competition would have allowed, given the level of risk and investment in those markets. In *Le Patourel*, the Tribunal found prices excessive even where BT's margin exceeded the benchmark by only 25–50%. In *Kent*, the Tribunal found that Apple's high profitability, as measured by several accounting metrics, including a ROCE of at least 351%, was significantly and persistently above the economic cost.[16]

The contrast between the CMA's approach in the pharmaceutical cases and the Tribunal's reasoning in *Le Patourel* shows that intervention thresholds vary. In the pharmaceutical cases, the CMA acted only when margins reached extreme levels. One interpretation is that the CMA's approach reflects a cautious enforcement stance that may have overlooked earlier instances of sustained economic rent. In mature, low-innovation markets where firms have recovered sunk costs and face limited risk, competition regulators might treat persistent returns above a reasonable benchmark as evidence of excess. This accords with economic logic, since rents that persist without justification signal market power rather than value creation.

In summary, a price is not excessive simply because it is high. It becomes excessive when returns remain persistently above economic cost. Those applying the test must benchmark the price and interpret the margin in context. That means assessing the capital employed, including any intangible assets, evaluating the risks the firm faced, and considering how long the margin persisted. Ultimately, it is for the court to decide whether the margin between price and cost is excessive, but that decision should be grounded in a structured and transparent economic analysis.

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[15] Competition and Markets Authority, Decision in *Liothyronine* (July 29, 2021), Table 1.1, p. 12 (based on a simple average of the differential from 2009-2017); Competition and Markets Authority, Decision in *Hydrocortisone* (July 15, 2021), Table 5.4, p. 434 (879% excess per pack for 10mg tablets and 702% for 20mg); Competition and Markets Authority, Decision in *Phenytoin* (July 21, 2022), Table 5.7, p. 189 (667% excess for 100mg capsules and 653% for 300mg).

[16] *Le Patourel v BT Group* PLC [2024] CAT 76, para. 925; *Dr Rachael Kent v Apple Inc and Apple Distribution International Limited* [2025] CAT 67, para. 610.

‘Economic Value’ Under the Unfair Limb

The concept of economic value first appeared in *United Brands*, which held that “charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied would be such an abuse.”[17] The judgment did not, however, define the term or explain its role within the framework. Since then, courts and competition authorities have debated both its meaning and its place within the *United Brands* analysis.

THE ECONOMIC MEANING OF ‘ECONOMIC VALUE’

In economic terms, a product’s value derives from the benefits it provides to consumers – reflected in their willingness to pay – and the efficiency with which it is produced. Competition tends to align prices with that value by rewarding efficiency and penalising waste. The position of “economic value” within the framework has been contested.

Arguments before the courts had suggested that “economic value” might operate as a third, distinct limb of the United Brands test, separate from excessiveness and unfairness. The Court of Appeal in *Phenytoin* and *Liothyronine* rejected that view. They confirmed that value must be evaluated within the two-limb structure. Because the excessive limb already examines supply-side costs, it is most coherent to treat economic value as part of the unfairness limb, where the focus lies on whether non-cost factors – such as product quality, reliability, or brand – justify the residual margin between price and cost. This placement ensures that demand-side considerations, which create genuine consumer benefits, are captured without duplicating the cost analysis.

Observed willingness to pay in a non-competitive market cannot by itself define economic value. In the absence of rivalry, prices may rise above cost without delivering additional benefit to consumers. At the opposite extreme, defining value solely by reference to cost would overlook legitimate demand-side factors that consumers may genuinely value under normal competition. A purely cost-based notion of value would therefore fail to identify when higher prices reflect consumer benefit rather than market power.

The task for economic analysis is to isolate the component of consumers’ willingness to pay that corresponds to genuine product attributes and to distinguish it from that arising from limited choice or inertia. Limited choice can inflate observed willingness to pay when

[17] *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* (Case 27/76) [1978] ECR 207, para. 250.

consumers face few realistic alternatives, while inertia may sustain high prices where switching is costly or inconvenient, even if consumers would prefer cheaper options under normal competitive conditions.

Many markets in which excessive pricing claims arise exhibit some degree of product differentiation or consumer preference that does not imply higher production costs. Demand-side factors can therefore influence equilibrium prices as much as, or more than, supply-side conditions. The assessment of economic value should account for these factors while remaining disciplined by the competitive counterfactual. If the analysis collapses into observed willingness to pay, excessive pricing control would lose any traction; if it collapses into costs alone, it will ignore genuine sources of consumer benefit.

DOUBLE COUNTING WITH EXCESSIVE LIMB

A common pitfall in assessing unfairness is crediting under "economic value" features already remunerated in the cost benchmark. For example, if the cost-based analysis includes a return on capital for brand investment, service infrastructure, or regulatory compliance, those factors should not also justify a higher price under the unfairness limb. This risk was illustrated in *Le Patourel*, where the Tribunal used a ROS comparator and then considered whether residual premiums were justified by brand or service value. Unless those comparators lacked equivalent features, the reasoning risked counting the same value twice. Economic value should be confined to attributes that confer genuine, incremental benefit to consumers beyond what is already reflected in cost or a normal return.

ATTRIBUTING "VALUE" TO STRUCTURAL FEATURES THAT CONFER MARKET POWER

A more fundamental challenge is distinguishing between consumer value and the apparent value created by market structure. Recent cases highlight this difficulty. In *Le Patourel*, switching behaviour and brand value were treated as potential sources of economic value, while in *Phenytoin*, the Tribunal acknowledged some value in continuity of supply. Both cases illustrate the danger of conflating structural features that sustain dominance with genuine consumer benefit.

In economic terms, switching behavior provides information about residual demand elasticity – the responsiveness of the consumers who remain once others have migrated away. In L*e Patourel*, most consumers transitioned from standalone fixed-voice services to bundles that offered broadband and mobile. A residual group stayed with BT's legacy product, often citing

comfort with the brand or a wish to avoid change. The key question is why these consumers remained.

If continued patronage reflects verifiable quality or reliability that would command a premium under normal competition, the observed premium may represent value. If it stems from behavioral inertia or informational frictions that BT could exploit because of its entrenched position, the premium reflects market power, not value. The evidence left this distinction unresolved. The Tribunal treated switching as indicating that customers were not captive; however, non-captivity alone does not prove that the higher price corresponded to greater value. The remaining consumers appear to have been the least price-sensitive segment, a pattern consistent with price discrimination rather than quality-based differentiation.

Brand value can represent legitimate economic value when it results from past investment in quality, reliability, or reputation. It can also act as a mechanism of market power when consumer attachment is detached from objective performance differences. In mature or declining markets, brand familiarity may serve as a barrier preventing migration to cheaper or better substitutes. The relevant question is whether the observed premium is supported by incremental cost or service quality. If not, the brand may function as a device for rent extraction, rather than as a source of value.

A similar issue arose in *Phenytoin*. The Tribunal accepted that continuity of supply created some distinctive value because switching between capsule and tablet forms risked destabilising treatment. Yet it found that the supplier had incurred no additional costs to provide that continuity. The premium was therefore not justified by efficiency or risk but by regulatory constraints limiting substitution. The economic distinction is between value that would persist under competition and value that exists only because market power prevents consumers from exercising choice.

The tension between limited switching, which can appear to signal consumer preference, and the structural lock-in typical of digital "ecosystems" was central to the *Kent* judgment. The Tribunal returned to these issues when assessing economic value in a platform context, as discussed in the following section.

ASSESSING WHETHER CONSUMERS RECEIVE A FAIR SHARE

The unfairness limb also allows a welfare-based inquiry: whether consumers receive a fair share of the gains from trade. In microeconomic terms, each transaction generates a total surplus divided between consumers and producers. Empirical and theoretical work in industrial

organisation shows that the division of total surplus between consumers and producers depends on market structure, demand elasticity, and entry conditions. Under effective competition, prices tend to allocate a larger share of the gains from trade to consumers, whereas reduced rivalry shifts surplus toward producers. When dominance allows a firm to appropriate nearly all the surplus, the outcome is likely exploitative.

Economic analysis can assist by estimating demand and recovering measures of consumer surplus at both the observed and benchmark prices. Comparing these estimates shows whether the distribution of surplus aligns with outcomes expected under normal competition.[18] This exercise does not define fairness in legal terms but grounds the judicial assessment within a workable economic framework.

The reasoning in *Le Patourel* can be interpreted through this welfare lens. The Tribunal found that BT's prices were moderately above cost-plus but that certain service improvements and limited consumer captivity mitigated the risk of exploitation. Although no explicit surplus analysis was undertaken, the decision reflects a qualitative balancing of producer and consumer welfare. In contrast, in markets where residual demand stems primarily from inertia or information gaps, such a balance would tilt sharply towards producers, indicating rent extraction rather than value creation.

New Digital Frontiers for Excessive Pricing

Digital markets create new contexts for assessing excessive pricing. Platform-based and data-driven ecosystems often display the same structural features that have motivated intervention in traditional cases, displaying high fixed and sunk costs, network effects, switching costs, and limited transparency. These characteristics can make it difficult for market forces to discipline prices and may allow dominant firms to capture rents long after they have recovered their initial investments. Yet these same features also mean that high returns can, at least in part, reflect innovation and risk-taking.

The challenge for competition enforcement is to distinguish returns that reward innovation from those that signal entrenchment. The Tribunal's recent judgment on *Kent* sheds light on the economic approach for excessive pricing claims in digital markets.

[18] Peter Davis & Vivek Mani, The Law and Economics of Excessive and Unfair Pricing: A Review and a Proposal" (2018) 63 *The Antitrust Bulletin* 399, 430.

ECONOMIC CHARACTERISTICS OF DIGITAL MARKETS

Many digital markets exhibit strong economies of scale and scope. Once a platform or service is established, the marginal cost of serving additional users is close to zero, while the value to users often rises with scale through network effects. These dynamics can lead to concentrated structures that persist over time and to high observed profits that do not necessarily indicate excessive pricing. Such profits may reflect a temporary phase of innovation-driven competition, where firms earn short-lived monopoly rents that reward successful innovation before new rivals enter the market. However, network effects, behavioral lock-in, and data accumulation can sustain dominance and turn a temporary advantage into structural market power.

Digital platforms often use algorithmic pricing, personalized offers, and complex fee structures that obscure effective prices and make benchmark comparisons difficult. The absence of transparent reference points limits the usefulness of traditional tools such as cost benchmarks or cross-market comparators. Economic analysis must therefore focus on the mechanisms that sustain margins, including scale advantages, control of data, and user captivity.

In dynamic markets, high prices may incentivise investment. Firms undertake risky and capital-intensive investments such as building data infrastructure, developing AI models, or vertical integration on the expectation that successful innovation will yield temporary rents. Excessive pricing control must be applied carefully because intervention that undermines expected rewards can weaken incentives to invest. The relevant question is whether observed returns are consistent with the level of risk and the pace of innovation. Where innovation is rapid and entry is contestable, high margins may be self-correcting and should not be regarded as excessive.

When the pace of innovation slows and entry barriers remain high, persistent supra-normal returns lose their dynamic justification. Once fixed and sunk costs have been recouped, continued high prices may no longer reward investment but instead reflect the preservation of monopoly rents. Under NSEC, continuing innovation would erode rents over time. The absence of such erosion may be evidence of weak competition rather than incentive success.

LESSONS FROM *KENT*

In *Kent*, the Tribunal confronted many of the analytical challenges that arise when applying the *United Brands* framework to digital ecosystems. It examined how Apple's control of the iOS environment and its interlinked hardware and software services affected the assessment of both excessiveness and unfairness.

Following the *United Brands* approach, the Tribunal first determined whether the 30% commission yielded profits that were significantly and persistently above economic cost, and then asked whether those profits could be justified by factors consistent with workable competition in the unfairness limb. Four lessons emerged:

1. The absence of product-level accounts does not remove the need to test excessiveness. The Tribunal accepted that, although the accounting data were imperfect, profitability could be estimated using conventional techniques. Dr. Kent's multi-factor analysis – drawing on rate of return (ROR), return on assets (ROA), and return on capital employed (ROCE) – was found to provide reasonably reliable evidence that the App Store was highly profitable.

2. The Tribunal also addressed what may be termed the willingness-to-pay fallacy. It found that, while the App Store clearly created value for developers, those developers were paying a rate higher than would prevail under workable competition because access to the iOS user base was available only through Apple. The significant revenues earned by developers, therefore, said little about the fairness of the commission: their willingness to pay reflected dependence on Apple's exclusive control of access to iOS users, rather than conditions of workable competition.

3. The Tribunal considered Apple's argument that its commission should be viewed in the context of ecosystem-wide innovation and investment. It acknowledged that Apple had made substantial investments in its hardware and software, but rejected the attempt to attribute the total value of the Apple brand or ecosystem to the App Store, describing such an approach as speculative and economically unsound. The logic mirrors the rejection of portfolio-pricing arguments in the pharmaceutical cases: it is investors, not products, who bear portfolio risk and who require, *ex ante*, an expected return commensurate with systematic risk. Allowing firms to recover unrelated costs from captive consumers would sever the link between price and competition, distort investment incentives, and weaken consumer protection.

4. Even imperfect comparators can provide useful evidence of the workably competitive counterfactual if those comparators are themselves subject to some degree of competition. The Tribunal accepted that adjustments might be needed to account for differences in quality, reputation, or functionality between other app-distribution

platforms and Apple's, but considered such benchmarking economically appropriate where markets are broadly comparable.[19]

The *Kent* judgment indicates that digital markets do not require a new theory of excessive pricing. What they demand is disciplined application of established economic principles, a clear understanding of costs, a coherent identification of genuine value, and recognition of the point at which innovation gives way to entrenched market power.

Conclusions

The *United Brands* framework continues to provide the foundation for excessive pricing control. Its application depends on sound economic reasoning to link prices, costs, and value to consumer welfare, and to identify when market conditions make self-correction unlikely. Economics therefore plays a central role in ensuring that intervention is directed at genuine and durable problems of market power. The assessment of excessive pricing depends as much on economic reasoning as on legal structure.

Three observations follow. First, analysis should begin with a coherent view of economic cost, meaning the price and return that would prevail under NSEC. Significant and persistent margins above this benchmark are an indicator of high entry barriers and potential market failure.

Second, the interpretation of economic value remains conceptually and empirically demanding. It requires an understanding of whether observed willingness to pay reflects genuine product benefits or the persistence of market power. Recent cases, including *Le Patourel*, show how difficult that distinction can be. Economic analysis can assist by testing whether high prices correspond to consumer benefit or to exploitation of captive demand.

Third, digital markets test these principles in new settings. Their high fixed costs and strong network effects can sustain rents that blur the line between incentive and entrenchment. The core challenge – distinguishing reward from exploitation – remains the same. Kent provides a template for such an assessment.

Ultimately, the interaction between law and economics in excessive pricing control demands both analytical discipline and institutional restraint. Courts must ensure that intervention targets genuine exploitation without undermining efficient pricing or incentives to innovate. As markets evolve – particularly in the digital sphere – the durability of the *United Brands*

[19] *Dr Rachael Kent v Apple Inc and Apple Distribution International Limited* [2025] CAT 67, paras 662–681.

framework will depend on how effectively it accommodates dynamic competition and evidence-based analysis. The *Kent* judgment demonstrates that, when applied rigorously, established economic principles can still guide assessment in new and complex settings. In this sense, it marks not the end of the debate, but the beginning of a more nuanced dialogue between competition law and economics.

Disclosure: *Before joining The Brattle Group, Senthuran Rudran worked on excessive pricing investigations in the pharmaceutical sector at the CMA. The views expressed in this article are solely those of the authors and do not reflect the views of the CMA or The Brattle Group.*