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Abstract

Recent years have seen renewed interest in exploitative abuses under competition law, an area that has traditionally attracted less enforcement attention than exclusionary conduct. While excessive pricing has long been the principal focus of the enforcement and policy debate in this area, interest has increasingly expanded to non-price forms of exploitative conduct, including data-related exploitation and the imposition of unfair trading conditions.

This paper examines how exploitative abuse is understood, assessed and addressed across jurisdictions. It considers the principal arguments for and against enforcement, compares the legal frameworks used to address the underlying conduct, and examines the analytical approaches emerging from enforcement practice.

Key words: exploitative abuse, excessive pricing, unfair trading conditions, abuse of dominance, abuse of economic dependence, unilateral conduct, competition, antitrust

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Executive summary

Exploitative abuse is receiving renewed attention, although enforcement remains relatively limited.

Competition authorities have traditionally focussed on exclusionary conduct, protecting the competitive process that disciplines prices, output and quality. Many jurisdictions also have provisions prohibiting exploitative conduct, including excessive prices and unfair trading conditions imposed by dominant firms, but enforcement has remained relatively limited. The issue is nevertheless being revisited amid concerns that exploitation may persist in some markets where market power is entrenched, and as new business models and technologies have expanded the range of potentially exploitative conduct.

Views differ on whether, and under what conditions, competition law should address exploitative abuse.

On the one hand, the case for intervention rests on the view that addressing exploitative conduct can directly advance consumer welfare, one of the main objectives of competition law. In particular, where market power is entrenched and entry barriers are high, markets may fail to self-correct, and sector regulation may be absent or insufficient to address the resulting harm. On the other hand, the case against intervention emphasises protecting the competitive process rather than regulating outcomes. High profits may encourage entry and innovation, while intervention may weaken incentives for both. Difficulty in determining when prices are excessive or trading conditions unfair increases the risk of enforcement errors and reduces legal certainty. Sector regulators may also be better placed to oversee prices and trading conditions. Jurisdictions balance these considerations differently, with some not addressing purely exploitative conduct under competition law and others intervening under certain conditions.

Competition law operates alongside other frameworks that can address exploitative conduct, each with distinct objectives and tools.

Where exploitative conduct is addressed under competition law, abuse of dominance provisions are generally the principal tool. Some jurisdictions also use rules on relative market power or economic dependence to address exploitation affecting businesses that depend on a trading partner. More broadly, the role of competition law should be considered alongside consumer protection law, sector regulation and other relevant frameworks, taking account of their different objectives, powers and remedies. Sector regulators' expertise and monitoring powers may make them better suited to the ongoing supervision of prices and trading conditions, while consumer and small business protection laws may offer tailored safeguards and direct redress for the parties they protect. Competition-law intervention may nevertheless have a distinct role in addressing harm arising from the exercise of market power and, where appropriate, strengthening competitive constraints through remedies. It may also complement other frameworks where their protection does not extend to the conduct or parties concerned.

Despite the legal tests developed in enforcement practice, identifying reliable benchmarks for excessive prices remains challenging, while non-price exploitation raises broader questions about unfairness and the limits of competition law.

Exploitative abuse under competition law has traditionally been discussed primarily in relation to excessive pricing, but exploitation through non-price trading conditions has attracted growing attention, particularly in digital markets. Both raise the same core question of where to draw the line between the legitimate exercise of market power and unlawful exploitation, although the legal tests applied to each differ.

In excessive pricing cases, authorities generally examine whether a price bears a reasonable relation to the economic value of the product. They use cost-based and comparative methods, sometimes in combination. Cost-based methods raise difficulties in allocating costs and determining a reasonable return, while comparative methods depend on finding sufficiently comparable products and market conditions. These limitations make it important to assess the evidence as a whole. In practice, cases have concentrated in sectors such as pharmaceuticals and in markets where competitive constraints are unlikely to emerge and prices diverge substantially from relevant reference points.

The assessment of unfair trading conditions presents a different challenge. Such conditions may impose diverse burdens or restrictions on consumers or business counterparties, making it difficult to establish a common benchmark for unfairness. Depending on the applicable legal framework, authorities have assessed the harm the condition causes and examined whether it serves a legitimate purpose, whether that purpose could be achieved through less burdensome terms and whether the burden is disproportionate to it. A further question concerns the role of dominance. It remains debated whether it is sufficient that a dominant firm imposes an unfair condition, or whether market power must also have enabled the firm to impose it or aggravated the resulting harm.

In digital markets, discussions of potentially exploitative conduct have extended to algorithmic personalised pricing and trading conditions governing data. In recent data-related cases, the concerns have centred on users' lack of meaningful choice over personal data collection and platforms' use of business users' non-public data for their own commercial benefit at those users' expense. Such conduct may directly harm consumers or business users while also strengthening the platform's market position. Some authorities have found exploitative abuse on the basis of this direct harm, without separately establishing exclusionary effects. This approach may capture harm that an analysis focussed solely on exclusionary effects could overlook. Some commentators, however, raise concerns about the risk of using an exploitative theory of harm as a substitute for establishing the exclusionary effects of the conduct.

Clearer guidance and closer co-operation could support more effective and predictable enforcement.

The lack of clear benchmarks and methods applicable across cases and sectors, together with limited case law, reinforces the need for guidance and greater legal certainty. Where exploitative conduct also falls within consumer protection, data privacy, or sector regulation, clear institutional roles and closer co-operation could help ensure that harm is prevented or effectively addressed by the most appropriate authorities, drawing on their respective expertise. Differences in legal and institutional approaches across jurisdictions also reinforce the need for international co-operation, particularly in relation to multinational companies and global markets.

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1 Introduction

1. In competitive markets, rivalry among firms constrains market power and shapes prices, output, quality and other trading conditions. While its objectives vary across jurisdictions, competition law generally seeks to protect this competitive process. However, where competitive constraints fail to discipline the exercise of market power effectively, competition law may intervene more directly by assessing whether the resulting prices or trading conditions are excessive or otherwise unfair (Gal, 2013[1]; O'Donoghue and Padilla, 2020[2]). These two modes of intervention correspond to the distinction between exclusionary and exploitative abuse. Both address the harms associated with market power, one by preserving the process that shapes market outcomes, the other by scrutinising the outcomes themselves.

2. Competition authorities have traditionally devoted considerably greater attention to exclusionary conduct. This may reflect the view that preserving competition offers a more fundamental solution than directly addressing the consequences of a lack of competition. Enforcement against exploitative conduct has been more selective, reflecting the difficulty of determining when a price or trading condition becomes unfair, as well as concerns about the risks of intervening directly in market outcomes. As a result, the standards governing exploitative abuse remain less developed and, in some respects, less predictable than those applicable to many forms of exclusionary conduct.

3. The question of whether more active intervention against exploitative conduct is warranted has nevertheless gained renewed relevance. In markets where competitive constraints are weak or unlikely to emerge within a reasonable timeframe, reliance on exclusionary enforcement alone may leave the abuse of market power unaddressed. Changes in business models and technology have also drawn attention to a wider range of potentially exploitative conduct, including personalised pricing and the imposition of non-price trading conditions governing the collection, use and control of data. These developments raise questions about whether established theories of exploitative abuse provide sufficiently clear and workable standards for changing market practices.

4. Jurisdictions take different approaches to exploitative conduct. While some do not address it under competition law, those that do rely primarily on provisions prohibiting abuse of dominance. Some jurisdictions also use provisions regulating economic dependence, superior bargaining position, or comparable forms of relational power to tackle such conduct. Consumer protection law and sector-specific regulation may provide additional or alternative avenues. These differences raise questions about the appropriate scope, objectives and institutional framework for intervention.

5. Against this background, this paper examines how the concept of exploitative abuse is understood, assessed and addressed across jurisdictions. It considers the principal arguments for and against enforcement, compares the legal frameworks used to address the underlying conduct, and examines the analytical approaches emerging from enforcement practices.

6. For the purposes of this paper, exploitative abuse refers to the exercise of market power to unfairly extract advantages from, or impose disadvantages on, end consumers or trading partners through, for example, excessive prices or other unfair trading conditions. The paper focusses primarily on this conduct where it constitutes an abuse of dominance under competition law. It does not provide a detailed account of other legal frameworks that may address exploitative conduct, such as rules on abuse of economic dependence or superior bargaining position, consumer protection law and sector-specific regulation. These

frameworks are considered to the extent relevant to understanding their relationship with competition-law rules on exploitative abuse.

7. The remainder of the paper is structured as follows. Section 2 examines the principal arguments for and against active enforcement against exploitative conduct and identifies the analytical and institutional concerns underlying those positions. Section 3 maps the legal approaches adopted across jurisdictions, focussing on abuse of dominance and briefly considering its relationship with other relevant legal frameworks. Section 4 builds on the legal frameworks outlined in Section 3 to examine in greater depth how exploitative conduct is assessed in practice under competition law, distinguishing between pricing practices and non-price trading conditions. Section 5 concludes by drawing together the comparative findings and considers their implications for competition policy and enforcement.

2 The debate on intervention against exploitative conduct

8. The treatment of exploitative abuse, as well as the concept of exploitative behaviour itself, has historically been a controversial topic of discussion amongst academics and policymakers. As highlighted in Gal (2013[1]), while successful exclusionary conduct ultimately leads to exploitation, the question of whether exploitation which does not result from exclusionary conduct should be a stand-alone prohibition remains a subject of debate. This is reflected in the variety of approaches employed by jurisdictions worldwide to address these conducts, and their evolution over time.

9. The analysis of the economic and legal concerns behind competition law enforcement, or lack thereof, in these cases can serve to frame the discussion, and provide a yardstick to appraise competition authorities' interventions in this field. Further, and in light of recent trends, it can constitute a valuable basis to understand the extent to which these provisions can, or should, be used to mitigate emerging competition issues in key sectors, such as digital markets.

10. The following sections provide an overview of the main arguments for stronger enforcement against exploitative abuses and those broadly against enforcement, abstracting from any jurisdiction-specific legal provisions in place. The latter category, in particular, comprises a number of considerations which have translated into the existing legal frameworks, and current enforcement practice, to different degrees. On the one hand, in jurisdictions recognising the potential illegality of exploitative conduct and endowing competition authorities with the powers to enforce this prohibition, the arguments analysed below have led to a cautious approach, with reduced enforcement activity at times. On the other hand, in other jurisdictions these same main theoretical foundations have resulted in a lack of prohibition at the legislative level, with conduct such as the imposition of excessive prices or unfair trading conditions not constituting an independent competition-law infringement, and thus not regarded as potentially illegal.

11. The arguments and counterarguments at the centre of this debate – provided separately in the remainder of this section – are intended to be read as a spectrum of factors and considerations that, balanced and combined to different extents, have resulted in a varied practice across jurisdictions.

2.1. Arguments for active enforcement

12. The increased attention towards exploitative conduct in recent years aligns with the views of a number of academics, policymakers and enforcers, proponents of a more interventionist approach vis-à-vis this category of abuse.

13. As underscored in OECD (2018[3]), the conceptual premises of this perspective rely on the simple philosophical point that *"the primary rationales for competition policy are to limit the potential for exploitative behaviour and to lower prices for the benefit of consumers",* and as such there is a legitimate fit between enforcement against these practices and the overarching objectives of competition policy, justifying active intervention.

14. In particular, this view underscores the centrality, for competition law enforcement, of exploitative abuse provisions which protect consumers directly, alongside exclusionary abuse provisions which indirectly prevent harm to consumers by preserving competitive market structures. Indeed, the imposition of exploitative or "unfair" prices or trading conditions by dominant firms may warrant intervention even absent exclusionary effects, as such provisions can effectively address the direct loss of consumer welfare.

15. The perceived dissonance between competition policy's objectives and the reluctance to intervene against these conducts has been considered paradoxical, in that the prohibition of exclusionary practices in order to, ultimately, avoid consumer exploitation is widely accepted while the direct prohibition of such exploitative practices less so (Combet and Hubert, 2011[4]; OECD, 2012[5]; Lyons, 2007[6]).

16. Building on this conceptual basis, advocates for increased attention towards exploitative effects highlight how, in specific circumstances in particular, intervention becomes pivotal. According to this view, this is the case in the presence of durable market power and high barriers to entry, where the market may fail to self-correct within a reasonable timeframe, leading to persistent consumer exploitation (see also (Ezrachi and Gilo, 2009[7]; Gal, 2013[1]).

17. These conducts are especially relevant in critical sectors for consumers, such as pharmaceuticals, food supply chain, or energy, carrying a risk of entrenched dominance or monopolisation, which can justify intervention not only in the case of exclusionary conduct but also exploitation. In particular, acknowledging the value (or supremacy) of preserving the competitive process and addressing exclusionary effects can co-exist with the recognition that enforcement against exclusionary conduct is imperfect and may not always achieve the desired outcomes, leaving a need to tackle the direct outcomes of market power's abuse.

18. While the specific market-dynamics in these sectors, mentioned as a way of example, vary considerably, they can often lead to the concentration of market power in the hands of large firms. On the demand side, this may mean that consumers do not have viable alternatives to easily switch to in response to exploitative conduct by a dominant firm, resulting in greater welfare loss. On the supply side, the presence of high entry barriers preventing new entry and limiting competition hinders the market ability to self-correct.

19. As a result, in markets characterised by concentrated market power and high barriers to entry, underenforcement in the presence of exploitative behaviour may lead to persistent consumer harm. More active intervention towards exploitative conduct in these instances would ensure that the absence of rivalry does not become a de facto safe harbour for the abuse of market power, particularly where sector-specific regulation is not available or timely. Intervention against exploitative abuse is thus seen as a fundamental tool to reduce the negative implications of market failure and monopoly power (OECD, 2012[5]).

20. Relatedly, another category of arguments supporting this approach sees competition law as a gap-filler where sector-specific regulation is absent or incomplete, providing a basis for intervention against exploitative conduct or where the acquisition of monopoly power is not caught by competition law (see also (OECD, 2012[5]; Röller, 2007[8]).

21. Where sector-specific regulation targeting the risk of exploitation either does not exist, or it is partial, timely intervention by competition authorities under competition law can help minimise the resulting harm to business users and final consumers. Further, in the context of the interaction between ex ante frameworks and ex post enforcement, competition authorities' interventions can help bring any potential regulatory gaps into the spotlight, thus prompting sector regulation to be strengthened afterwards.

22. The above considerations help explain why enforcement against exploitative abuses has taken on renewed relevance in the digital sector. Especially in these markets, which are characterised by "winner-takes-most" dynamics, significant entry barriers, and shaped by data as a key competitive variable, behaviours such as the imposition of unfair trading conditions and practices related to excessive data collection can substantially affect the functioning of competition, and lead to substantial consumer harm

even absent exclusionary behaviour. Further, these same distinctive features have also constituted the ground for revising the concept of exploitation around non-price parameters while broadening the variety of behaviours that can lead to exploitative effects, justifying increasing intervention in digital markets (see also (Balasingham and D'Amico, 2025[9]; Abraham, 2025[10])).

23. In particular, reframing the concept of exploitative abuse in light of platform dependency's dynamics where unfair terms and data extraction are means to exploitation, is also central to considerations around ex-ante regulations' provisions and pivotal antitrust decisions – such as the Bundeskartellamt 2019 Facebook decision[1] – which link together data exploitation, consent, unfair terms, constitutional values and signal a shift in the consideration of exploitation, at least at the European level.

24. Finally, support for enhanced intervention stems also from the more philosophical debate on the role of competition and related distributional and fairness considerations.[2] Although the role of competition law in this context remains contested, addressing exploitative conduct may serve broader policy objectives by limiting wealth transfers from consumers to dominant firms (Khan and Vaheesan, 2017[11]; Röller, 2007[8]; Botta, 2023[12]).

25. In particular, as noted in AG Pitruzzella's Opinion in SABAM,[3] in cases where the market does not self-correct and competition law enforcement fails to intervene, there is more at stake than "simply the distortion of competition", in that the exploitative behaviour could constitute "an attack on some of the fundamental values of our society, such as social equality, where there is a point at which differences in the possession of basic goods cannot depend on earning capacity without undermining social cohesion". In this context, the risk of under-enforcement based on type 2 errors thus bears implications not only for consumer welfare, but carries broader negative consequences at the societal level, and this is the reference point to be balanced against the risk of over-enforcement, and related harm.

26. This perspective thus links the way concepts like excessive prices are characterised in the competition law framework of certain jurisdictions to the economic culture and legal system behind it, which refer back to the "social market economy"[4] (see also (McMahon, 2022[13])**.** Overall, these considerations fundamentally pertain to the interaction between competition policy and the broader socio-economic context, and the legitimacy of pursuing wider objectives and values under the competition law framework, which varies substantially across jurisdictions.

2.2. Arguments against enforcement

27. The theoretical underpinnings behind the arguments presented above are countered by the perspective, historically associated with the Chicago School amongst others, holding that competition law's primary objective is preserving the competitive process, and that intervention against exploitative behaviour such as excessive prices should be avoided, allowing the market to self-correct. This perspective is also illustrated by the US Supreme Court's observation in Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP that the mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful but is an important element of the free-market system.[5]

28. Building on this specific view on the role and objectives of competition law, which totally rejects exploitation as an integral component, this approach further relies on a number of economic and legal arguments to oppose enforcement against exploitative conduct, which will be detailed below. These same arguments have been used by a number of experts and academics as a conceptual frame of reference to call for a cautious approach to exploitative enforcement,[6] in jurisdictions where the legal framework expressly provides for such interventions.

29. Proponents of this cautious approach generally share the view that exploitative abuse enforcement may entail significant error costs and legal uncertainty, as well as a risk of substituting regulatory judgments

for market outcomes and of dampening incentives for investment and innovation, requiring a thorough assessment of the case-specific conditions before intervention, as well as the definition of limiting principles (see also (Evans and Padilla, 2005[14]; Motta and De Streel, 2007[15]; Petit, 2011[16]),).

30. As highlighted in the introduction, depending on the extent to which these considerations have been integrated into the jurisdiction-specific approach to competition policy, and counterbalanced by the arguments supporting stronger intervention, these have resulted in a spectrum going from systems not allowing for intervention against exploitative abuse under competition law, to established practices where competition authorities have traditionally exercised considerable caution in pursuing such cases even where the legal framework expressly provides for such interventions.

31. As a premise, advocates for this view highlight the ability of markets to self-correct. Their arguments thus rely on a specific vision of the market and market dynamics, including the role of monopoly pricing (see also (Gal, 2013[1])). In the case of excessive pricing in particular, it is often argued that monopoly profits[7] may attract entry and innovation, thereby correcting market outcomes over time (Davies and Padilla, 2019[17]).

32. More broadly, as noted in AG Wahl's opinion[8] in AKKA/LAA, "there is simply no need to apply that provision in a free and competitive market: with no barriers to entry" as high prices would attract new entrants and the market would ultimately self-correct. Similarly, (Davies and Padilla, 2019[17]) note that in the absence of "very high and persistent barriers to entry", it is undesirable to use competition law "to penalise a firm's pricing decisions ex-post", as an intervention where markets would otherwise self-correct might "chill competition and harm consumers."

33. In line with the emphasis on self-correcting market mechanisms, it is considered that there is a higher error cost of enforcement compared to exclusionary conduct (Balasingham and D'Amico, 2025[9]), leading to the conclusion that if timely entry is possible, allowing the competitive process itself to remedy the consequences of the conduct is preferable to intervening with enforcement. In this context, the higher error cost is explained by the perceived high risk of false positives, due to the complexity of the assessment of unlawful exploitation (see below), and the resulting disruption of the market dynamics, including through effects on investments, innovation, and market signals for future entry.

34. Further, while regulatory gaps can exacerbate market failures, a number of experts and academics have observed that if intervention is needed, the responsibilities should sit with a sector regulator in charge of ongoing oversight, as competition law enforcement is not necessarily the most appropriate instrument to address this. Moreover, according to this argument, there is a significant risk of overlap between the institutional role of competition authorities, whose role should remain the enforcement of competition law to protect the competitive process (OECD, 2006[18]) rather than regulating prices or trading conditions,[9] and that of sector-specific regulators.

35. Finally, other considerations pertain to the lack of clear legal standards when it comes to the treatment of exploitative conduct: historically[10] there has been no clear benchmark for determining when a price is "excessive" or when contractual terms become "unfair", leading to legal uncertainty (see also (Colangelo, 2023[19]; Werden, 2021[20]; Davies and Padilla, 2019[17]; Mazziotti, 2025[21]; Motta and De Streel, 2007[15])).In particular, cases of unlawful exploitation require competition authorities and courts to determine what the "correct" market outcome should have been, on the basis of concepts that generally lack a precise economic definition. This may increase the risk of false positives (or negatives), while reducing predictability for market actors.

36. While this is evolving, with tests being developed both in academic literature and through courts decisions and case practice[11] to determine when prices or trading conditions can be deemed excessive or unfair, it remains contentious. As shown in these sections the ongoing debate around exploitative conduct rests on legal, economic, philosophical, and political considerations, which constitute the underpinnings of the different approaches to this type of abuse across jurisdictions.

3 Approaches to exploitative conduct

37. Building on the debate outlined above as to whether, and how, competition law should respond to exploitative conduct, this section examines the way jurisdictions have translated these different views into legal frameworks. It focusses on abuse of dominance rules, the applicable legal standards and the principal issues arising in their application. It also briefly considers other frameworks addressing similar concerns and their relationship with competition law.

38. Under competition law, exploitative conduct is principally addressed through the prohibition of abuse of a dominant position. Such prohibitions may encompass excessive prices as well as unfair trading conditions imposed by dominant firms. The central challenge is to draw a line between the legitimate exercise of market power and conduct that is excessive or unfair for the purposes of competition law. Section 3.1 examines how jurisdictions have approached this task in their laws and practice.

39. Some jurisdictions supplement abuse-of-dominance rules with provisions addressing abuse of economic dependence, relative market power or superior bargaining position. These provisions may also be used to address the exploitation of dependent trading partners. Section 3.2 examines the rationales and risks of intervention below the dominance threshold.

40. Section 3.3 provides a brief overview of other legal frameworks addressing exploitative concerns and their relationship with competition law. Some respond to concerns arising in particular sectors, such as telecommunications, pharmaceuticals and energy. Others are not confined to a particular sector but protect specified categories of market participants, including consumers and small and medium-sized enterprises. These frameworks may complement competition law enforcement or provide the principal basis for intervention where competition law does not address purely exploitative conduct.

3.1. Exploitative conduct as an abuse of a dominant position

3.1.1. Legal frameworks

41. Not all jurisdictions recognise exploitative abuse in legislation or case law.12 Where exploitative conduct is addressed under competition law, it is primarily addressed as an abuse of a dominant position. Intervention under these rules therefore requires a finding of dominance in the relevant market. This requirement limits the scope of intervention to situations in which competitive constraints may be insufficient to discipline the firm's conduct. Where customers can readily switch to alternatives or new firms can enter the market, these constraints may limit the prices and terms a firm can impose. Where such constraints are weak, excessive prices or unfair terms may persist. Confining intervention to such situations helps prevent competition law from becoming a general instrument for reviewing prices and contract terms.

42. Once dominance is established, the question is whether the conduct of the dominant firm constitutes an exploitative abuse. Legislation seldom uses the term "exploitative" as such. Relevant provisions often refer instead to unfair prices or unfair trading conditions and vary in the extent to which they specify the applicable assessment criteria.

43. In the European Union (EU), Article 102(a) TFEU is one of the principal provisions addressing exploitative abuse. It provides that abuse may consist in "directly or indirectly imposing unfair purchase or

selling prices or other unfair trading conditions." In its 1978 *United Brands* judgment, the European Court of Justice further described the abuse as obtaining trading benefits that the dominant undertaking would not have obtained under "normal and sufficiently effective competition."[13] The wording of Article 102(a) is mirrored or closely followed in the competition laws of many European jurisdictions,[14] while comparable provisions are also found outside Europe, including in India, Kenya and Malaysia.[15]

44. Other laws set out more specific criteria for assessing exploitative abuse, particularly excessive pricing. Under German competition law, an abuse may arise where a dominant undertaking demands prices or other business terms that "differ from those which would very likely arise if effective competition existed", with particular account taken of the conduct of undertakings in comparable markets where such competition exists.[16] South African competition law assesses whether a price exceeds a competitive price and whether the difference is unreasonable, taking into account factors such as price-cost margins, comparator prices and market structure.[17] Kazakhstan applies a cumulative test in principle, requiring the price to exceed both the sum of the costs and profits necessary to produce and sell such goods and the price formed under competitive conditions in the relevant or a comparable product market.[18]

45. Overall, these provisions and their application, despite differences in wording, generally entail assessing the price or trading condition imposed by a dominant undertaking against what would have prevailed under effective competition. In practical terms, this may involve comparing the actual price or condition with a counterfactual competitive outcome.

3.1.2. Analytical issues

46. Where exploitation is addressed as a form of abuse of dominance, its application raises two closely related analytical questions. The first concerns the point of reference against which a price or trading condition should be assessed. The second concerns how far the conduct must depart from that point of reference before it becomes excessive or unfair and warrants intervention under competition law.

47. With respect to the first question, the provisions and case law discussed above commonly take as their starting point the price or trading condition that would have prevailed under effective competition. The difficulty is that this competitive counterfactual cannot be observed directly. In relation to prices, economic theory does not provide a single price that necessarily represents the competitive outcome. Prices in competitive markets may exceed marginal cost and vary according to fixed and common costs, risk, investment, demand, product differentiation and other market conditions. Authorities must therefore infer an appropriate benchmark from evidence such as costs and profitability or comparisons across firms, products, markets or periods, each of which has its own limitations (OECD, 2012[5]).

48. Identifying an appropriate benchmark may be even more difficult for non-price trading conditions. Prices are expressed in quantitative terms and can be compared, if imperfectly, with costs or with prices charged in other markets or periods. Non-price conditions are often multidimensional and lack a common metric against which they can be measured or compared.

49. Beyond these difficulties of measurement, competition does not necessarily produce identical or evenly balanced contractual terms. Even in competitive markets, differences in bargaining position and commercial circumstances may result in terms that favour one party over another or allocate benefits, costs and risks unevenly. An individual term also forms part of a broader negotiated agreement and may involve trade-offs with the price or other conditions. Assessing it in isolation may be misleading, while evaluating the agreement as a whole adds complexity by requiring consideration of how its various terms interact. The mere fact that a term disadvantages a consumer or trading partner therefore does not establish that it constitutes an abuse of dominance (OECD, 2022[22]).

50. A further difficulty remains even where an appropriate benchmark can be established. A departure from that benchmark is not in itself sufficient to establish an abuse. For prices, the difference can generally be quantified, but it remains necessary to determine how substantial it must be and what circumstances

may justify it (Evans and Padilla, 2005[14]). For non-price conditions, the divergence may be difficult to quantify. The assessment may instead require consideration of the nature and extent of the disadvantage imposed, its significance in the context of the transaction and any justification for the condition. In both cases, the threshold is expressed through open-ended legal concepts such as "excessive", "unreasonable" and "unfair", which offer limited guidance on where the line should be drawn. Translating these concepts into predictable and workable criteria is therefore a significant challenge for competition authorities.

51. These analytical difficulties may help explain the cautious and limited enforcement often observed in cases of exploitative abuse. Nevertheless, competition authorities and courts have sought to address them through a range of benchmarks, evidentiary methods and legal criteria. Such efforts do not necessarily indicate a move towards more intensive enforcement but may also help define the boundaries of intervention and limit the risks of enforcement error and legal uncertainty. These benchmarks and criteria are examined in greater detail in Section 4.

3.2. Exploitative conduct involving economic dependence or relational power

3.2.1. Legal frameworks

52. Some jurisdictions have provisions, alongside abuse of dominance rules, that can address exploitative conduct without requiring dominance in a relevant market. These provisions may apply where an undertaking lacks market-wide dominance but can exercise substantial bargaining power over a particular trading partner with no viable alternative. They therefore shift the focus from the undertaking's position in the market as a whole to the economic relationship between the parties, and the circumstances that may make one party dependent on the other (Bakhoum, 2018[23]).

53. Within competition law, relational power is captured through different legal concepts. Germany, Austria and Switzerland apply the concept of "relative market power", extending certain rules governing abuse of dominance to undertakings that do not meet the ordinary dominance threshold.[19] Belgium and France establish a distinct prohibition of "abuse of economic dependence", centring on whether the affected trading partner has sufficient and reasonably available alternatives.[20] Japan and Korea address abuse of a "superior bargaining position" within their broader prohibitions of unfair trade practices, under which an imbalance in the trading relationship may enable one party to impose disadvantages that the other cannot reasonably avoid.[21] These provisions provide a basis for public enforcement by competition authorities, although their precise requirements vary.

54. Other jurisdictions cover comparable conduct through provisions located outside competition law, while linking them to competition enforcement under specified conditions. Italian law, for example, prohibits abuse of economic dependence under legislation governing subcontracting relationships. Individual disputes may be brought before the civil courts, while the Italian Competition Authority may intervene where the conduct is relevant to the protection of competition and the market.[22] Spanish law similarly prohibits the exploitation of economic dependence under unfair competition legislation, with competition authority intervention available where the conduct distorts free competition and affects the public interest.[23]

55. Despite differences in legal form and terminology, these rules rest on the premise that dependence within a particular trading relationship may create scope for exploitation even in the absence of dominance. They may therefore apply where an undertaking uses that dependence to obtain an advantage or impose a disadvantage that the affected party cannot avoid. Since the conduct concerns the terms and outcome of an individual commercial relationship, it may also fall within contract law or other private-law rules. The inclusion of such conduct within public competition enforcement accordingly places these rules at the boundary between private law and competition law.

3.2.2. Analytical issues

56. The central analytical issue is determining when the exercise of bargaining power within an individual trading relationship amounts to exploitation warranting enforcement. This requires consideration of both the competition-law rationale for intervention and the limiting principles that distinguish such cases from those addressed solely under contract law or other private-law rules.

57. One rationale links such intervention to the protection of the competitive process. Dependence may make it difficult for a trading partner to switch to alternatives or determine its trading terms independently, thereby impairing its ability to compete. Although these effects may initially arise within an individual relationship, they may extend beyond it where similar arrangements form a network of contracts, restrict market access or weaken the competitive position of dependent firms (Bakhoum, 2018[23]). Yet the undertaking exercising such relational power may not be dominant in the relevant market. On this view, rules addressing relational power may complement conventional abuse-of-dominance rules by reaching conduct that can impair the competitive process but is not necessarily captured by the dominance threshold.

58. A second, complementary rationale recognises the commercial autonomy of dependent trading partners and the fairness of their trading relationships as values that competition law may protect in their own right. Treating the loss of such autonomy or the imposition of an unavoidable and unjustified disadvantage as a competition-law concern reflects a policy choice concerning the objectives of competition law. Under frameworks adopting this view, such harm may warrant intervention without necessarily requiring a separate showing of restrictive effects on competition in the relevant market. This requirement is not shared across all jurisdictions, which differ in the extent to which they recognise these values as objectives of competition law alongside the protection of the competitive process (International Competition Network, 2008[24]).

59. Under either rationale, competition-law intervention is not intended to encompass every private contractual dispute. It is therefore necessary to distinguish conduct warranting public competition enforcement from matters appropriately addressed through private-law remedies (Lee, 2026[25]). Jurisdictions draw this boundary through different legal requirements and assessment factors, as the following examples illustrate.

60. In some jurisdictions, this boundary is drawn by requiring an express connection between the abuse of economic dependence and competition. The Belgian provision applies where the abuse may affect competition in the Belgian market or a substantial part of it. The French provision applies where the abuse is capable of affecting the functioning or structure of competition.[24] These requirements do not necessarily entail proof of realised restrictive effects across the market, since potential effects may suffice. They nevertheless require a sufficiently concrete connection between the harm suffered by the dependent trading partner and competition. In its 2026 judgment in *Apple*, the French Court of Cassation upheld the French Competition Authority's 2020 finding that Apple had abused the economic dependence of its resellers, concluding that the practices had "produced an appreciable effect on the functioning and structure of competition" (see Box 1 below).[25]

61. The boundary may also be drawn by considering whether the consequences of the conduct extend beyond an individual trading relationship and may affect the market more broadly. In Japan, the JFTC's Guidelines on Abuse of a Superior Bargaining Position consider the degree and scope of the disadvantage imposed, including whether it is imposed systematically on multiple trading partners or may spread to other trading relationships.[26] A related consideration appears in Korea. In a case concerning abuse of a superior bargaining position against consumers, the Korean Supreme Court held that conduct may have sufficient implications beyond the individual dispute where it risks harming an unspecified number of consumers or where similar conduct may occur continuously or repeatedly.[27]

62. The limiting principles illustrated above may help manage the tension between the value of these provisions and the risks they raise. By directing public enforcement towards conduct with a sufficient connection to competition, or implications extending beyond an individual trading relationship, they reduce the risk of competition authorities becoming engaged in the general supervision of contractual fairness (Colangelo, 2026[26]). At the same time, they preserve the capacity of these provisions to address exploitation arising from relational power that a dominance threshold would not capture (Bakhoum, 2018[23]). However, where the harm does not extend beyond the parties concerned, the added value of these provisions over private-law remedies may be less clear. Consistent and well-defined application by competition authorities is therefore central to maintaining this balance.

Box 1. Harm to a dependent trading partner and competition concerns

The following cases illustrate how French and Japanese courts connected harm within trading relationships to broader competition concerns under their respective legal standards.

In *Apple* (2026), the French Court of Cassation upheld the French Competition Authority's finding, in its 2020 decision, that Apple had abused the economic dependence of its Apple Premium Resellers (APRs). Apple's discriminatory supply conditions placed the APRs at a disadvantage relative to Apple Stores and other distribution channels and were capable of weakening the independent reseller channel. The Court also noted that the APRs' share of sales of Apple products other than iPhones fell from 13% in 2008 to less than 6% in 2013, while Apple's own distribution channels expanded significantly. It concluded that the practices had produced "an appreciable effect on the functioning and structure of competition".[1]

In *Ralse* (2021), the Tokyo High Court dismissed an action brought by Ralse, a supermarket operator, seeking annulment of a JFTC decision maintaining cease-and-desist and surcharge orders concerning conduct affecting 88 suppliers. Ralse had required suppliers to dispatch employees without bearing most of the costs of dispatch, make sponsorship payments and have their officers and employees purchase products unrelated to their supplies. The Court emphasised that Ralse had engaged in a series of disadvantageous practices against numerous suppliers over an extended period, "continuously, systematically and according to plan". It found that this conduct risked impeding the suppliers' free and independent business judgment, placing them at a disadvantage relative to their competitors and Ralse at an advantage relative to its competitors and adversely affecting the fair competitive order. [2]

The cases illustrate different ways of identifying significance beyond the immediate disadvantage imposed on a trading partner. In *Apple*, the connection was established through the weakening of an independent distribution channel and an appreciable effect on the functioning and structure of competition. In *Ralse*, the assessment emphasised the systematic application of the conduct to numerous suppliers and its implications for their independent decision making and competitive position.

Notes:
1. French Court of Cassation, Commercial Chamber, judgment of 13 May 2026, Joined Cases Nos. 22-22.623, 22-22.647, 22-22.677 and 22-22.727, *Apple*, paras. 92–95.
2. Tokyo High Court, judgment of 3 March 2021, Heisei 31 (Gyo-ke) No. 13, *Ralse Co., Ltd v Japan Fair Trade Commission*, Part VIII, section 6. The proceedings concerned a JFTC decision of 25 March 2019 maintaining the cease-and-desist and surcharge orders issued on 3 July 2013.

3.3. Other legislation addressing exploitative conduct

63. Exploitative conduct may also be addressed through legal frameworks other than competition law, notably sector-specific regulation and legislation protecting consumers or certain business counterparties. Sector-specific regulation focusses on designated sectors, within which it may govern prices, access or service provision. Consumer and business protection legislation often applies across sectors, focussing on parties whose vulnerability, arising from their status or commercial relationships, may warrant specific protection. These frameworks may overlap with competition law, but their objectives, standards and remedies differ.

64. Sector-specific regulation, for example in pharmaceuticals, energy and telecommunications, may respond to structural barriers, statutory exclusivity or other market failures, while pursuing objectives such as access, affordability, quality and security of supply. Whereas competition-law enforcement against exploitative abuse generally assesses particular conduct ex post, regulation may establish pricing methodologies or requirements governing trading conditions in advance, supported by continuing oversight and periodic review.[28] This can provide a more structured basis for addressing some of the benchmark difficulties discussed in Section 3.1, but entails ongoing information requirements and supervisory responsibilities. Its scope is, however, confined to the sectors, products and instruments defined by the legislator, and practices or counterparties outside its mandate may remain unaddressed.

65. Consumer protection law addresses disadvantages arising from asymmetric information, difficulty in evaluating contractual terms and behavioural biases (OECD, 2010[27]). As these stem from the nature of consumer transactions rather than the trader's market position, its rules generally apply irrespective of market power. They typically prohibit unfair contractual terms and misleading or aggressive practices that impair informed choice. Their focus is on contractual rights and obligations and on how prices and terms are disclosed, agreed or imposed rather than on whether the price level is excessive, although the scope of price scrutiny varies across jurisdictions.[29] Remedies may stop prohibited practices, render unfair terms non-binding or provide compensation, price reductions or contract termination. Because individual losses are often small relative to the cost of pursuing a claim, many jurisdictions also provide for collective redress.[30] The emphasis is therefore on preventing and remedying harm in consumer transactions, under standards distinct from those governing exploitative abuse.

66. Other legislation protects certain business counterparties against disadvantages arising from weaker bargaining power or dependence on a trading partner, for instance where switching to another trading partner is difficult. Unlike competition rules on abuse of dominance, it applies by reference to specified types of transactions, such as subcontracting, retail supply or franchising, sometimes combined with size thresholds.[31] These laws typically prohibit practices that shift costs or risks onto the weaker party, such as delayed payment or unilateral changes to agreed terms. Some set obligations in advance, such as payment deadlines, which can be enforced without a broader assessment of market power. Remedies may secure payment, correct prohibited practices or compensate the affected party. As dependent firms may be reluctant to act against a trading partner, some regimes rely on public enforcement and protect complainants' confidentiality.[32] The emphasis is thus on protecting vulnerable counterparties within defined commercial relationships, under rules and remedies tailored to those relationships.

67. The availability of these instruments raises the question of what competition-law intervention can add. Where prices or trading conditions require direct and continuing control, some commentators regard sector regulators as better placed, given their legislative mandate, sector expertise and regular reporting mechanisms (Motta and De Streel, 2007[15]). Consumer and business protection rules can be tailored to the protected party and often provide remedies more directly aimed at redressing harm, such as compensation, price reductions or the recovery of unpaid amounts. Competition-law enforcement may nevertheless remain relevant where the harm stems from market power, where the conduct or affected parties fall outside other frameworks, or where remedies can strengthen competitive constraints rather than establish continuing controls (OECD, 2012[5]). The question is therefore not which framework is

preferable in general, but how they can complement each other in addressing a particular concern, in light of its nature, the objectives of intervention, the available powers and remedies, and the costs and risks of additional intervention (OECD, 2018[3]).

68. Where several frameworks apply, co-operation is relevant at each stage of intervention. When considering whether and how to intervene, authorities can examine the protection already provided, any remaining harm and the risk of unnecessary duplication, bearing in mind that regulation does not in itself preclude competition-law intervention. In assessing alleged abuse, co-operation can clarify how other legal requirements shape the conduct and what discretion remains with the undertaking. In designing remedies and overseeing implementation, co-ordination can help avoid conflicting obligations, take account of relief already provided and make use of existing monitoring arrangements. This can promote a coherent response while respecting the distinct purposes of each framework (OECD, 2022[28]).

4 Assessing exploitative conduct

69. Building on Section 3's analysis of the existing legal frameworks for exploitative behaviour, this section provides a mapping of the most relevant ways exploitative abuse can materialise and can be assessed under competition law. While the extent to which these concerns have been encountered in practice varies, the following sections aim at providing broad overview by including less established theories of harm that have been gaining attention in recent years.

4.1. Exploitation through pricing strategies

4.1.1. Excessive prices

70. The imposition of excessive, or unfair, prices by a dominant company has traditionally been regarded as the most prominent manifestation of exploitative behaviour in competition law. Under this theory of harm, the "unreasonably" high price itself is of concern, regardless of the existence of any associated exclusionary conduct or effect, due to its direct negative effect on consumer welfare.[33] Notwithstanding the theoretical debate illustrated in Section 2, competition authorities and courts faced with these types of practices aim at addressing the direct consumer harm resulting from monopoly or near-monopoly prices.

71. However, while appraising the mechanism through which consumers would be harmed by such a conduct is relatively straightforward, the application of this theory requires a complex assessment, in order to determine in which instances prices could be considered to depart from competitive prices and lead to harm. This implies a comparison between the prices charged by the dominant firm, which may be deemed abusive, and hypothetical prices that would persist under a competitive market structure. In practice, absent this counterfactual, a variety of methodologies have been developed for this purpose, building on the idea that prices need to have a "reasonable relation to economic value" in order not to be considered excessive or unfair (OECD, 2012[5]), as held by the European Court of Justice in *General Motors*[34] and later in *United Brands*.[35]

72. For those jurisdictions enforcing competition law against excessive prices, European case law has provided a frequently adopted conceptual framework to determine whether pricing is excessive and unfair, and can thus constitute an abuse of dominant position. A key legal standard was established in *United Brands*, where the CoJ defined a two-stage test, according to which a price infringes Article 102(a) TFEU where (i) the difference between the costs actually incurred and the price charged is excessive and, if so, (ii) the price is either unfair in itself or unfair when compared with competing products.

73. Since then, subsequent cases across OECD jurisdictions have put forward different methodologies to assess the price at stake and establish if it meets the test, which provides a benchmark allowing for flexibility and case-by-case adaptations.[3637] In some jurisdictions, such as Israel, the competition authority has published guidelines in order to illustrate the accepted methodologies for identifying unfairly high prices.[38] This is particularly relevant given the sophistication of concepts such as economic value and unfair price (see also (McMahon, 2022[13])), which remain subject to interpretations even in the context of this framework.

74. The difficulty of establishing harm derived from the imposition of excessive prices is consistent with the more cautious and selective enforcement approach, which is generally observed in jurisdictions that prohibit this conduct. Nonetheless, a sector that has seen multiple investigations, and infringement decisions, in the past decade is pharmaceuticals. Despite the specificities of the sector, these cases can provide valuable insights on the notion of excessive pricing as well as evolution of the main methodologies used to fulfil the United Brands test. Box 2 below illustrates such methodologies applied in two recent cases in the European Union.

Box 2. Excessive prices in pharmaceuticals

Aspen

In 2016, the Italian Competition Authority (ICA) found that Aspen had abused its dominant position by charging excessive and unfair prices for several off-patent cancer medicines, following price increases ranging from approximately 300% to 1 500% after Aspen acquired the products from GlaxoSmithKline. Applying the two-stage test established in United Brands, the ICA first found an excessive discrepancy between the costs incurred and the prices charged. The ICA initially compared the gross contribution margin of the products with the total fixed and indirect costs, and then applied a cost-plus test using a return of sales (ROS) benchmark equal to average ROS of two major generic pharmaceutical companies. The ICA found that Aspen's prices exceeded its costs by between 100-150% and 250-300%. The authority subsequently assessed whether those prices were unfair by reference to a range of complementary factors, including the magnitude and trajectory of the price increases, the absence of any objective economic justification, and the impact on the Italian National Health Service. The ICA reached its conclusion on the basis of the cumulative evidence, rather than treating any individual consideration as determinative.

Following the ICA's investigation, the European Commission (EC) opened an investigation against Aspen, which constituted the first EU-level excessive pricing investigation in the pharmaceutical industry and was ultimately concluded through commitments offered by Aspen.[1] In its preliminary assessment, the EC applied the cost-plus test using a 23% EBITDA margin as a proxy for a reasonable profit margin and found that Aspen made profits significantly exceeding industry levels between 2013 and 2019. It also found no legitimate reasons underlying the set prices, such as investment, innovation or material improvements.

While both authorities applied detailed price-cost analyses, challenges in the quantitative assessment remained, particularly regarding the identification of the most appropriate methodology, the underlying cost-allocation assumptions and obtaining reliable data. The EC acknowledged that these factors could affect the precision of the profitability calculations and should therefore be taken into account. As regards unfairness, although the Commission considered that Aspen's prices were unfair in themselves and therefore did not face an evidentiary challenge, its assessment of competing products highlights the difficulty of finding suitable competing products for comparison in excessive pricing cases in the pharmaceutical sector. In particular, the Commission noted that recent generic medicines were not appropriate comparators where effective generic competition had not yet emerged, while innovative medicines protected by exclusivity rights were not comparable to off-patent products.

Leadiant

In 2021, in the Netherlands the Autoriteit Consument & Markt (ACM) fined Leadiant for charging an excessive price for CDCA-Leadiant, a drug used to treat a rare genetic metabolic disorder. After obtaining orphan drug designation and marketing authorisation, Leadiant secured a ten-year period of

market exclusivity in the EU for CDCA-based drugs. To assess whether the price charged[2] was excessive, the ACM applied a price-cost test using two variants based on the net present value method.

First, under the Internal Rate of Return-Weighted Average Cost of Capital (IRR-WACC) approach, it compared the project's IRR with its WACC. Second, the ACM compared the actual price to the lowest price at which Leadiant would have achieved a profit. The findings indicated that the project involved low costs compared to its revenues, low risks and a very high return, and the price charged by Leadiant was exorbitantly high.[3] The ACM further concluded that the price was unfair in itself as the product involved no innovation or added therapeutic value. The price of CDCA-Leadiant was also considerably higher than the prices of earlier molecularly identical products and the compounded CDCA product manufactured by Amsterdam University Medical Center. The ACM concluded that by charging excessive prices, Leadiant harmed not only CTX patients and health insurers, but also Dutch society, since the excessive price was ultimately borne by all insured individuals and taxpayers.

Similarly in 2022, Italian[4] and Spanish Competition Authorities found that Leadiant abused its dominant position in their respective national markets by imposing unfair prices for the sale of CDCA Leadiant, causing direct damage to the national healthcare systems. This follows a similar decision by the Israeli Competition Authority, imposing fines in 2021.[5]

Notes: 1. The Commission considered Aspen's commitments, which included an approximately 73% reduction in prices and a five-year supply guarantee as offering a fast, comprehensive and lasting solution.
2. During the periods from 1 June 2017 to 31 March 2018 and from 26 July 2018 to 31 December 2019, Leadiant charged and collected the price of EUR 13 090 per package.
3. The District Court of Rotterdam upheld the ACM's methodology for assessing the excessiveness of the price. The Court recognised that the ACM had certain level of discretion in selecting the appropriate assessment methodology and was justified in applying an NPV based model rather than the risk-adjusted NPV model proposed by Leadiant.
4. In 2024, the Italian Council of State upheld the judgment of the Lazio Regional Administrative Court, which had found the fine imposed on Leadiant to be lawful.
5. https://www.gov.il/BlobFolder/news/mbi/he/pressreleases2021_%D7%9C%D7%99%D7%93%D7%99%D7%90%D7%A0%D7%98.pdf
Sources: Autorità Garante della Concorrenza e del Mercato, Case A480 – Incremento prezzi farmaci Aspen, Decision No. 26185, 29 September 2016; TAR Lazio, Sez. I, Judgment No. 8945/2017, 26 July 2017; Consiglio di Stato, Sez. VI, Judgment No. 1832/2020, 13 March 2020; European Commission, Case AT.40394 (Aspen), 10.2.2021, C(2021) 724;
Autoriteit Consument & Markt (ACM), Decision of 1 July 2021, Case ACM/20/041239, Leadiant;
Rechtbank Rotterdam (District Court of Rotterdam), Judgment of 13 February 2025, Case ROT 23/531;
Autorità Garante della Concorrenza e del Mercato, Case A524 – Leadiant Biosciences Decision No. 30156, 31 May 2022;
Comisión Nacional de los Mercados y la Competencia, Decision of 10 November 2022, Case S/0028/20, Leadiant;
Il Consiglio di Stato (Italian Council of State), Decision of 29 March 2024, Case 02967/2024, Leadiant.

75. Overall, regardless of the sector at stake, various methods can be used to build the benchmark against which to assess the allegedly excessive price. These generally involve cost-based approaches relying on mark-ups or profitability analysis, as well as comparisons based on other geographic markets or other companies providing identical or similar products or services (OECD, 2012[5]). Further, price benchmarks can be retrospective or contemporaneous (see also (Gilo and Spiegel, 2018[29]).

76. Yet each methodology presents inherent limitations. Cost-based approaches raise questions regarding cost allocation, capital treatment and the appropriate benchmark rate of return. For example, the South African Competition Appeal Court addressed these difficulties directly in Sasol Chemical Industries, overturning a Tribunal finding of excessive pricing on the ground that the firm's actual cost structure had not been properly accounted for.[39] Comparative approaches require sufficiently comparable markets, products and competitive conditions. The UK Competition Appeal Tribunal considered this requirement central in the Pfizer/Flynn proceedings, for instance, holding that a competition authority should not base a finding of excessive pricing on a single comparator where other relevant methods are available.[40]

77. Reflecting these challenges, competition authorities and courts generally prefer to rely on multiple methodologies in combination, reaching a conclusion based on the overall body of evidence rather than

on any single benchmark (OECD, 2012[5]; 2018[3]). A recent example of this approach is Chile's Tribunal de Defensa de la Libre Competencia (TDLC) 2025 decision[41] against WOM.[4243] To determine that the new fee for the network access was undoubtedly excessive, the TDLC relied on WOM's historical prices, the tariff subsequently established by the sector regulator, the tariff proposed by WOM during the regulatory pricing process and the prices charged by WOM's direct competitors.

78. Finally, the difficulty in establishing in a concrete and predictable way what constitutes excessive prices coexists with the complexity of identifying in which instances potential harm would most likely materialise and persist. As highlighted in Section 2, this may depend on factors such as the existence of high and non-transitory barriers to entry or the characteristics of the dominant position (see for example the Danish Competition Authority findings in the recent Scandlines decision,[44] where, in order to reach its conclusions the authority assessed how, due to significant entry barriers, it would be unlikely for other players to "start competing businesses on commercial terms").[45]

79. South Africa's Competition Tribunal's first case against excessive prices, *Mittal Steel v Harmony Gold Mining Company,*[46] described in Box 3 below, provides a relevant example of these challenges. This case underscores a possible tension between predictability and accuracy, illustrating a dynamic where a structural presumption approach could contribute to lowering the evidentiary burden on proving the actual exploitative characteristic of the price, but where, according to the Court, the nature of the conduct does not lend itself to such a steer in enforcement practice.

Box 3. Two-step test in excessive prices cases: *Mittal Steel v Harmony Gold Mining Company*

To reach its 2007 decision in *Mittal Steel v Harmony Gold Mining Company*, the Competition Tribunal put forward a two-step test, combining an assessment of the structure of the market and of the conduct in question. First, it determined the "super dominant" position of Mittal, highlighting how the company was "*to all intents and purposes, an uncontested firm in an incontestable market*". For the second leg of its assessment the Competition Tribunal decided to depart from what it considered "arithmetical" approaches to the interpretation of price and economic value (akin to *United Brands).* Instead, it considered that *"by withholding output, an option only available to a super-dominant firm", Mittal assured "its ability to charge its pre-selected target price, a price unconstrained by any competitive considerations in its relevant market, and thus has contravened the Act's proscription of excessive pricing".*[1]

This approach, establishing that "*if a 'super-dominant' firm exercises to the full its market power in setting a price, then its price is ipso facto excessive",*[2] was not supported by the Competition Appeal court,[3] which overturned the decision highlighting how the Competition Act did not provide a foundation for it. In particular, the court stressed how, given the nature of the matter, the decision at stake "is not a technical legal one", but should entail "an evaluation of detailed economic and financial evidence".

Notes:
1. https://www.saflii.org/za/cases/ZACT/2007/21.html.
2. Mittal Steel South Africa Limited and Others v Harmony Gold Mining Company Limited and Another (70/CAC/Apr07) [2009] ZACAC 1 (29 May 2009).
3. https://www.saflii.org/za/cases/ZACAC/2009/1.html.

80. Case law clearly shows how competition authorities carrying out excessive prices investigations are faced with significant challenges in the practical application of this theory of harm, in order to meet the legal standard, and the key role of economics. Regardless of the complexities that can be encountered, the variety of methodologies applied in the past decades have established a potential path towards the

definition and assessment of excessive prices, offering guiding principles that, with case-specific adaptations, can provide a valid starting point to enforce against this conduct.

81. It appears, however, that competition authorities remain cautious vis-à-vis this type of cases, apart from a few exceptions (both in terms of jurisdictions and sectors). This may reflect a propensity to focus on exclusionary effects, addressing as a priority those conducts distorting the competitive process, or a selective approach that takes into consideration complexity of the assessment and the higher probability of error in this type of cases, with investigations being opened mainly in markets where competitive constraints are unlikely to emerge and prices diverge substantially from relevant benchmarks. Indeed, where the price "excessiveness" is extreme, practical difficulties in the assessment are less likely to affect the outcome.

4.1.2. Personalised pricing and potential exploitation

82. Aside from excessive prices, dominant firms' pricing strategies can lead to exploitation through the use of discriminatory pricing, which occurs when two similar products, with the same marginal cost to produce, are sold by a firm at different prices (OECD, 2016[30]). Price discrimination,[47] which is often beneficial for consumers and the economy, can entail a broad category of behaviours (covered in detail in OECD (2016[30])), the effects of which may, in certain instances, be exploitative, distortionary or exclusionary, and harm business customers as well as final consumers.

83. In the context of digital markets in particular, one specific type of price discrimination, taking the form of personalised pricing (which involves charging different prices to final consumers according to their willingness to pay, personal characteristics and conduct, as defined in OECD (2018[31])), has gained increased attention in recent years. New concerns related to this conduct have emerged in particular in relation to companies' use of data-driven personalised pricing or AI-enabled price discrimination (Botta and Wiedemann, 2020[32]; Li, Philipsen and Cauffman, 2023[33]; Marinova and Bergqvist, 2026[34]; OECD, 2025[35]), purporting that these practices can lead to an unfair treatment of consumers and reduce consumer welfare.[48]

84. As highlighted in Botta and Wiedemann (2020[32]), while exploitative forms of price discrimination are "extremely rare",[49] conducts such as personalised pricing, that were not "technologically feasible" until recently, could lead to a re-consideration of the enforcement of exploitative abuse provisions. AI-driven algorithms and new technologies more generally, allow companies to collect consumers' data on a granular level, which can be used to price discriminate on the basis of a wide range of personal data and dynamic behavioural patterns, often without the knowledge of consumers, more accurately predicting each consumer's willingness to pay. When carried out by a dominant firm this can increase the rent that can be extracted from consumers, as well as the potential harm of this form of price discrimination, as the conduct may enable consumers exploitation by imposing higher prices than they would otherwise be offered, absent the personalisation strategy.

85. Further, as noted in (OECD, 2016[36]), a lack of transparency regarding this practice may prevent consumers from distinguishing and choosing, "between buying from firms that set personalised prices and those that do not". At the same time, personalised price discrimination can be costly to carry out, and "where firms hold market power the costs of this rent-seeking may be passed onto consumers".

86. The characteristics of personalised pricing strategies by dominant firms could justify a framing of such conduct as a form of unfair pricing, to be assessed as an exploitative abuse harming end-consumers. Indeed, even if not excessive, the price imposed could still be considered unfair in that certain consumers are charged higher prices for reasons not related to costs (OECD, 2018[31]). Further, certain academics consider that the behavioural dimension of data-driven personalised pricing should be taken into account in the abuse assessment, as it shifts "the question from the price level to the fairness of the pricing process itself" (Marinova and Bergqvist, 2026[34]).

87. A lack of consensus on whether, and how, the existing legal frameworks could effectively address this harm as an exploitative abuse under competition law remains. Due to the relative novelty of these practices, their potential welfare-enhancing effects, as well as difficulties with identifying the circumstances under which a particular instance of personalised pricing is anti-competitive, and the complexity of the associated burden of proof for exploitative forms of price discrimination directed at end-consumers[50] (Botta, 2021[37]; Maggiolino, 2017[38]), relevant case law is, to date, scarce.

88. Notwithstanding the need for a case by case consideration of the potential harm, these complexities point towards an increased need for guidance on how the application of abuse provisions to personalised pricing strategies could be operationalised in practice, as their use might continue to expand in digital markets, broadening the scope for enforcement under existing frameworks. Further, the risks related to the use of personalised pricing are often addressed by a combination of other policy tools, including consumer protection (see also (OECD, 2026[39]; 2018[31])). This reinforces the call for cross-regulatory co-operation in markets, such as digital ones, where considerations pertaining to competition, data privacy and consumer protection often overlap.

4.2. Exploitation through non-price trading conditions

4.2.1. Unfair trading conditions

89. Whereas excessive pricing focusses on whether the level of a price is unfair, unfair trading conditions encompass a broader range of terms imposed by a dominant undertaking beyond the price itself. The resulting detriment may take various forms, depending on the condition imposed, including reduced quantities or lower service quality, as well as burdens or restrictions concerning the counterparty's obligations and rights. The breadth of trading conditions presents a particular analytical difficulty. Excessive pricing requires an assessment of the price against appropriate benchmarks, although identifying those benchmarks can itself be challenging. Trading conditions may impose different types of burdens or restrictions, which cannot be captured by a single indicator equivalent to the price level. Their assessment therefore generally starts by identifying the trading condition at issue, who is harmed by it and in what way, before examining whether the condition is unfair under the applicable legal standard.

90. Enforcement practice provides examples of the detriment examined in assessing unfair trading conditions. Such detriment has included requiring counterparties to provide economic benefits without corresponding compensation, shifting costs and risks onto them, and restricting their ability to make key business decisions or exercise consumer choice (see Box 4). Despite this variety, the common concern is that a dominant undertaking imposes unfair terms that allocate benefits, costs, risks or rights in its favour, to the detriment of counterparties with limited competitive alternatives.

Box 4. Detriment arising from unfair trading conditions

The EU DSD case provides an example of a payment obtained without a corresponding service. DSD operated the only nationwide system in Germany for collecting and recovering used sales packaging from households, and required manufacturers and distributors to pay a fee for all packaging bearing its logo. The European Commission found in 2001 that requiring the full fee where packaging bearing the logo was in fact collected and recovered by competing systems constituted an abuse of a dominant position, since DSD provided no service in return. The decision was upheld by the EU Courts.[1]

The shifting of costs and risks to the trading counterparty is illustrated by the Indian Faridabad Industries Association v Adani Gas case. In 2014, the Competition Commission of India found that a dominant gas supplier had imposed an unfair condition requiring industrial customers to meet minimum payment

obligations even in the event of an emergency shutdown involving a complete or partial interruption of gas off-take. The condition therefore placed on customers the financial risk associated with being unable to take the contracted quantity in circumstances beyond their control. The appellate tribunal upheld the finding that this condition was unfair in 2020.[2]

A further form of detriment arises where trading conditions restrict customers' freedom to make their own commercial decisions, as illustrated by the EU Tetra Pak II case. In 1991, the European Commission found that Tetra Pak's sale and lease contracts restricted customers' use of packaging equipment. In relation to purchased machines, certain contractual conditions limited customers' ability to modify or relocate the equipment and required them to use specified materials and services. The Commission concluded that several restrictions deprived purchasers of ordinary rights associated with ownership and went beyond what was necessary to protect Tetra Pak's legitimate interests. Its decision was subsequently upheld by the EU Courts.[3]

Notes: 1. European Commission, Decision 2001/463/EC of 20 April 2001, Case COMP D3/34493, DSD, OJ L 166, 21.6.2001, p. 1; Case T-151/01, Der Grüne Punkt – Duales System Deutschland v Commission, EU:T:2007:154; Case C-385/07 P, Der Grüne Punkt – Duales System Deutschland v Commission, EU:C:2009:456.
2. Competition Commission of India, Faridabad Industries Association v Adani Gas Limited, Case No. 71/2012, Order of 3 July 2014; National Company Law Appellate Tribunal, Adani Gas Limited v Competition Commission of India, TA (AT) (Competition) Nos. 33 and 34 of 2017, Judgment of 5 March 2020.
3. European Commission, Tetra Pak II, Decision 92/163/EEC of 24 July 1991, paras. 105–127; Case T-83/91, Tetra Pak v Commission, EU:T:1994:246; Case C-333/94 P, EU:C:1996:436.

91. Beyond the forms of detriment described above, a related question is whose harm may be relevant to the assessment. The answer may vary depending on the applicable legal framework, as some provisions expressly protect particular categories of counterparties.[51] In many cases, however, the assessment does not turn on a strict distinction between consumers and businesses or between purchasers and suppliers. The relevant counterparty may be a final consumer purchasing a product or service, a business customer acquiring an input, or a supplier subject to conditions imposed by a purchaser. [52] What matters is whether that counterparty has been subjected to the type of harm addressed by the applicable provision, rather than its formal position in the supply chain.

92. The treatment of harm to business counterparties nevertheless raises the question whether such harm is sufficient in itself or whether broader harm to final consumers should also be demonstrated. Some commentators suggest that effects on final consumer welfare should inform the assessment as one of the factors determining whether intervention against exploitative conduct is justified (Balasingham and D'Amico, 2025[9]). For example, terms imposed on suppliers may affect their ability or incentives to invest, with possible consequences for the quality and range of products available to consumers. Consideration of such effects may help distinguish a competition-law concern, involving implications for the competitive process and consumer welfare, from a dispute confined to the allocation of value between businesses. The decisional practice examined in this section does not, however, suggest that separate proof of harm to final consumers is generally required. The fact that the directly affected counterparties were businesses did not preclude a finding of abuse under the applicable legal framework.

93. A related but distinct question concerns the relationship between the counterparty subject to the condition and the persons who bear the resulting harm. These need not be the same. This may occur where a condition imposed on an intermediary affects the prices, choices or information available to its customers, thereby transmitting the consequences further downstream. In its 2024 Apple App Store Practices decision, the European Commission characterised Apple's anti-steering provisions as unfair trading conditions and therefore as a form of exploitative abuse under Article 102(a) TFEU. Although the provisions were imposed on music-streaming app developers, the Commission's theory of harm focussed principally on iOS users. The Commission considered that the provisions could contribute to higher subscription prices, degrade the user experience and make it more difficult for users to find or switch to alternative offers.[53] The decision does not establish that harm to final consumers is required in every case,

but illustrates how the persons bearing the relevant harm may differ from the trading counterparties directly subject to the condition.

94. The discussion so far has examined the nature of the harm and whose harm may be relevant to the assessment of unfair trading conditions. Identifying such harm does not, however, establish that the condition is unfair and abusive. The question remains what makes the condition unfair. Although the applicable tests vary across legal frameworks, the approaches examined below consider the purpose served by the condition, whether it can be objectively justified, and how that justification relates to the harm imposed on the counterparty.

95. An important judgment in this context is the European Court of Justice's 1974 ruling in *BRT v SABAM*, concerning a Belgian copyright collecting society's requirement that members assign their present and future copyrights to it. The Court's reasoning focussed on necessity and proportionality. It first recognised that the society needed an assignment of rights to manage them effectively. It then required consideration of whether the scope of the obligations exceeded what was necessary for that purpose, taking account of members' freedom to dispose of their works. An assignment could therefore serve a legitimate function while still being excessive in its scope or duration.[54]

96. The Indian approach similarly considers both the effects of a condition on the trading partner and the business justification for imposing it. In its 2019 decision in *Indian National Shipowners' Association v ONGC*, concerning a unilateral termination clause in contracts for the charter hire of offshore support vessels, the Competition Commission of India applied a "fairness or reasonability test". The Commission found that the clause was not abusive in the circumstances, taking into account an exceptional change in market conditions, the operational risks borne by ONGC and the manner in which it had exercised the clause. It nevertheless indicated that the assessment could differ if the clause were used "capriciously and/or frequently" to obtain illegitimate gains at the counterparty's expense.[55] This reasoning leaves room to examine whether the exercise of an otherwise justified contractual right becomes excessive or upsets the balance between the parties' interests.

97. South African competition law sets out comparable considerations in more specific terms. The Buyer Power Regulations 2020, made under the Competition Act, provide detailed assessment criteria. These include whether the condition bears a reasonable relationship to the objective of the supply agreement. They also include whether it places a one-sided or onerous burden on a protected supplier, including through an unreasonable transfer of risks or costs.[56] These criteria bring together the commercial basis for the condition and the extent of the disadvantage imposed.

98. The precise requirements differ across jurisdictions, yet these approaches share a common feature. They go beyond identifying who suffers harm and in what form. They also examine the reasons for imposing the condition and whether those reasons justify the nature and extent of the burden placed on the counterparty. These are important criteria for distinguishing conditions that are merely disadvantageous from those that are unfair. From a competition law perspective, however, a further question remains. Given that the assessment concerns abuse of dominance, what role should dominance itself play? Is it sufficient that a dominant undertaking imposes an unfair trading condition, or must a further connection between dominance and the condition be demonstrated?

99. The literature offers different views on how dominance should be connected to an unfair trading condition. P. Akman (2009[40]) argues that "exploitation can be meaningfully objected to only when it would not occur but for the dominance of the undertaking". She stresses the need for a clear boundary between competition law and general contractual unfairness, since harm to customers alone does not establish harm to competition. (Padilla, 2026[41]) by contrast, rejects a requirement to show that dominance enabled the condition to be imposed. His proposed approach instead requires the condition to be harmful by virtue of dominance and, where necessary for a legitimate objective, disproportionate as a result of dominance. His reasoning is that similar conditions may have different effects depending on the competitive constraints

facing the undertaking. A condition may therefore be harmful when imposed by a dominant undertaking, even if non-dominant firms use similar terms.

100. How this connection is defined, and how strong it must be, shapes the evidential burden for establishing an abuse and, consequently, the scope for intervention by competition authorities. Where the test requires identifying the trading conditions that would have prevailed under effective competition, establishing that counterfactual is likely to be particularly challenging, as discussed above, and may therefore pose a substantial constraint on enforcement. Requiring a closer connection may clarify the boundary between abuse of dominance and general contractual unfairness, but may also increase the risk of leaving persistent exploitation in markets with limited competition unaddressed. The choice of standard therefore involves a policy judgment about the balance between addressing exploitation that competitive forces are unlikely to correct and setting appropriate limits to intervention. How the connection between dominance and unfair trading conditions should be defined remains an open question (Witt, 2026[42]) and requires further clarification.

101. Despite these developments in case law, enforcement practice and the literature, considerable uncertainty remains about the assessment of unfair trading conditions. Concepts such as harm, necessity and proportionality are open-ended and leave substantial room for interpretation in particular commercial and factual settings. The unsettled role of dominance in applying these concepts adds a further layer of complexity. The literature proposes different ways of addressing these concerns, including anchoring intervention more closely to demonstrated harm to competition (Akman, 2009[40]) and developing more structured criteria and guidance for identifying cases warranting intervention (Balasingham and D'Amico, 2025[9]; Witt, 2026[42]). The challenge is to clarify the boundary between competition-law concerns and matters of contractual bargaining while preserving the flexibility required for a context-specific assessment.

4.2.2. Data-related practices and potential exploitation

102. Non-price terms assume particular significance in digital markets, where many services are supplied at a zero monetary price or through multi-sided business models. In such settings, monetary price may provide an incomplete benchmark for assessing possible exploitation because it does not capture changes in service quality or other non-monetary disadvantages associated with the collection and use of data. Recent enforcement and commentary have given increased attention to unfair trading conditions, including data-related terms, as potential forms of exploitative abuse in digital markets (Balasingham and D'Amico, 2025[9]). Against this background, this section considers the circumstances in which terms governing the collection, combination and use of data may raise exploitative concerns for end users or business users.

103. For end users, extensive collection and use of personal data may reduce consumer welfare by weakening privacy and users' control over their personal information, both of which may constitute non-price dimensions of service quality. Data practices covering multiple sources or purposes, or described in opaque terms, may make it difficult for users to understand what information is collected, how it will be used and what consequences may follow (OECD, 2024[43]). These concerns may be compounded by information asymmetries and behavioural biases, which can impair users' ability to assess data-related trade-offs and choose terms consistent with their preferences (Acquisti, Taylor and Wagman, 2016[44]). Where a provider holds a dominant position and users have limited alternatives, their ability to reject unfavourable data terms by switching services may also be constrained. Weak competitive pressure may therefore allow such terms to persist even where they do not reflect users' preferences. Under these conditions, formal consent or continued use of a service may be insufficient, by itself, to demonstrate that the terms reflect an informed and freely made choice.

104. Extensive data processing is not, however, inherently detrimental to end users. Data processing may improve personalisation, recommendations and service functionality, while data-driven advertising may help finance services supplied at a zero monetary price (OECD, 2018[45]). Users may also value these

trade-offs differently. Some may prefer greater data privacy, while others may accept broader data processing in return for a free or more personalised service (Acquisti, Taylor and Wagman, 2016[44]). The scope of data processing is therefore not, by itself, sufficient to establish consumer harm.

105. The Indian WhatsApp proceedings illustrate how the absence of meaningful user choice, rather than the volume of data collection alone, may inform the assessment of data-related terms. In 2024, the Competition Commission of India found that WhatsApp's 2021 privacy policy required users to accept broad and open-ended terms governing the sharing of their data with other Meta companies, without a granular option to refuse data sharing unrelated to the provision of the messaging service. The resulting loss of privacy and control was treated as a reduction in service quality, and the policy was found to impose an unfair condition under the Indian Competition Act. In 2025, the appellate tribunal upheld the finding of an unfair condition, while setting aside a separate leveraging finding and part of the remedy.[57]

106. Data-related exploitation may also affect business users that rely on platforms to reach customers. Their activities may generate commercially valuable information concerning transactions, product performance, pricing, inventory and customer interactions (Hausemer, Rabuel and Graux, 2018[46]). Concerns may arise where a platform uses non-public data generated by business users for its own commercial purposes without providing compensation or another corresponding benefit. Where the platform also competes with those business users, the same conduct may extend beyond exploitative concerns and raise exclusionary issues if the use of their data strengthens the platform's position and weakens their ability to compete (Graef, 2019[47]; Małobęcka-Szwast, 2021[48]).

107. The European Commission's Meta Marketplace decision shows how data-related terms may directly harm business users. The Commission held that Meta's terms allowed it to use advertising-related data generated by providers of online classified advertising services for the benefit of Facebook Marketplace. The Commission considered that the terms were unilaterally imposed and allowed Meta to obtain commercially valuable data without compensating the affected providers for its ability to use those data. It also found that the possibility of such use could induce providers to reduce their advertising activity on Meta's platforms, thereby diminishing the quality of the advertising services they received. As the unrestricted use of the data was neither necessary nor proportionate to a legitimate objective, the Commission characterised the terms as unfair trading conditions under Article 102(a) TFEU.[58]

108. Although not an infringement proceeding, South Africa's 2023 *Online Intermediation Platforms Market Inquiry* illustrates how a platform's use of non-public business-user data may appropriate value generated by those users. The Competition Commission found that Takealot used marketplace seller data to inform its own retail offering and develop private-label products. As sellers had borne the costs and risks of identifying, testing and promoting successful products, the Inquiry considered that this practice "expropriates this investment and undermines the returns to innovation". It required restrictions on retail buyers' access to all marketplace data and on the private-label team's access to disaggregated marketplace data.[59]

109. One notable feature of data-related exploitative abuse is that the conduct may cause direct harm to users or business partners while also having the potential to restrict competition. Data obtained through the challenged terms may itself become a source of competitive advantage. A larger volume or variety of data may improve service quality, algorithms and advertising targeting. These improvements may attract additional users and generate further data or revenue for investment in the service, creating feedback loops that reinforce the undertaking's position and make it more difficult for rivals with access to less data to compete or enter the market (OECD, 2016[49]).

110. Where conduct has both exploitative and exclusionary dimensions, a question arises as to which theory of harm should form the basis of intervention. The existence of potential effects on rivals or entry does not necessarily require the conduct to be pursued as exclusionary abuse. An authority may instead focus on the harm directly imposed on users or business partners and assess the conduct as exploitative, provided that the requirements of the applicable provision are satisfied. The choice of theory of harm

matters because it determines the nature of the harm that must be established and whether the conduct's capacity to restrict competition must be demonstrated. Recent enforcement in digital markets, including cases involving data-related practices, illustrates the use of exploitative theories of harm.[60]

111. In the German *Facebook* proceedings, the immediate concern related to users' loss of control and the absence of a meaningful choice over the combination of their data. The Federal Court of Justice also reasoned that the additional quantity and quality of data available to Facebook could make its advertising services more attractive, disadvantage rivals with access to less data and increase barriers to entry in social networking.[61] In *Meta Marketplace*, discussed above, the Commission acknowledged that the harm to providers of online classified advertising services could hamper their ability to compete and ultimately contribute to their foreclosure. It nevertheless stated that "this does not turn the abuse identified by the Commission in this case into an exclusionary abuse" and did not require separate proof that the conduct could produce exclusionary effects.[62]

112. Commentators differ in their assessment of this enforcement approach. Some consider that an exploitative theory may provide a more complete account of conduct that simultaneously affects users or business partners and the competitive process. On this view, an analysis confined to foreclosure may overlook restrictions on choice and control or the appropriation of value generated by parties using the service, even where the resulting data advantage also reinforces the undertaking's market position (van de Waerdt, 2023[50]). Others emphasise the greater risk of error associated with intervention against exploitative conduct. In particular, they caution that an exploitative theory could become an alternative route to intervention where the requirements of an exclusionary case cannot be established, and therefore propose limiting principles for identifying the circumstances in which such intervention is justified (Balasingham and D'Amico, 2025[9]).

113. Whether competition law directly addresses exploitative abuse, and whether an exploitative or exclusionary theory of harm applies in an individual case, reflects the objectives and policy choices embodied in each jurisdiction's competition law. Recent cases suggest that some authorities have used an exploitative theory as an additional lens for assessing conduct that may also carry exclusionary implications, bringing the direct effects on users or business partners within the competition-law assessment while allowing potential effects on the competitive process to inform the broader context. That said, decisional practice on exploitative abuse remains more limited than that relating to exclusionary abuse, and the relevant assessment criteria have therefore had fewer opportunities to be clarified. Further clarification through judicial and administrative decisions, together with the consistent application of those criteria, could contribute to greater legal certainty and predictability.

5 Conclusion

114. The majority of OECD countries formally envisage the enforcement of competition law provisions against exploitative conduct. These legal frameworks enable competition authorities to address the abuse of market power that can lead to direct harm to consumer welfare, through behaviours such as the imposition of excessive prices or of unfair trading conditions, amongst others. In those systems where the safeguard of consumers' welfare, alongside that of the competitive structure of the market, constitutes a fundamental goal of competition policy, these provisions thus sit within the rationale behind its enforcement.

115. However, to date, enforcement efforts in most jurisdictions have largely focussed on exclusionary effects, with cases where the principal theory of harm is exploitative seldom prosecuted, and the overall jurisprudence on exploitative abuses remaining, in proportion, limited. A number of factors can support competition authorities' decision as to whether intervention might be warranted. These include the persistence of entrenched market power, the likelihood (and timeliness) of market self-correction, the magnitude of the potential consumer harm, and the availability of alternative regulatory instruments.

116. While this tendency is heterogeneous, varying across jurisdictions, sectors, and years, and may be the result of multiple factors, the significant complexities associated with the assessment of exploitative harm can have a role in explaining it. Due to the nature of these conducts, determining whether they can constitute an abuse relies on concepts such as excessiveness or unfairness, which remain strongly case-specific and generally require the establishment of proportionality tests in order to be assessed under the antitrust lens and meet the evidentiary standard of proof. Further, this is accompanied by the intrinsic uncertainty around the identification of an appropriate counterfactual, as well as questions about the harmed counterparty – trading partners, business users, and/or consumers – and its role when meeting the legal test.

117. Recent cases have shown that while the use of economics and established tests plays a key role in facilitating the assessment of these conducts, the absence of clear benchmarks and standard methods that can be applied across cases and sectors is apparent. This is compensated with flexible case-by-case approaches, often combining various indicators and benchmarks. These complexities are amplified by the limitations of existing case law, especially for conducts other than excessive pricing, creating an increased need for guidance and legal certainty. Indeed, while exploitative theories of harm are not new, considerations pertaining to exploitative effects, especially in relation to non-price exploitation, have most often co-existed with exclusionary theories of harm, thus leaving open questions as to how these would be investigated and assessed in isolation.

118. These considerations have become increasingly relevant in recent years, in light of the expansion of large platforms and the new non-price forms of exploitation that can emerge in digital markets. While these behaviours are not exclusively found in the digital sector, these markets provide a solid example of the shift from price-centric to multi-dimensional exploitation strategies, occurring through non-pricing terms such as data, contractual terms, privacy considerations. The use of data-driven practices, generally facilitated by AI, can also entail a deepening of information asymmetries, making it harder for end users or trading partners to identify, anticipate, or challenge the conditions they face, and lead to exploitation in the form of individual extraction of surplus.[63] Overall, notwithstanding the ongoing relevance of excessive prices' harm, reflected in a number of recent cases, additional considerations around "excessive extraction"

from users, and in particular through the imposition of unfair trading conditions, are becoming increasingly central to the enforcement of exploitative abuse.

119. This, in turn, heightens the potential overlap between different legal frameworks, such as competition law, consumer protection, data privacy regulation, contract law, or sectoral regulations, and consequently the need for, on the one hand, clear institutional boundaries, and, on the other, enhanced cross-regulatory cooperation. An increased level of co-ordination and co-operation could help ensure that potential harm from exploitative conduct is prevented, or effectively addressed ex-post, by the most appropriate authority(ies), relying, where needed, on synergies and shared expertise. Finally, these instances also allow for significant divergences to emerge across jurisdictions, where a variety of different institutional and legal approaches can develop, exacerbating the need for international co-ordination and co-operation, especially vis-à-vis multinational companies and global markets.

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Notes

[1] Bundeskartellamt Decision B6-22/16 of 6 February 2019 and related Court decisions.

[2] These are taken into account to different degrees across jurisdictions' competition laws, which is reflected in the divergences of approach towards exploitative abuse.

[3] Opinion of Advocate General Pitruzzella delivered on 16 July 2020. Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World BVBA and Wecandance NV, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62019CC0372.

[4] See for example Opinion of Advocate General Pitruzzella delivered on 16 July 2020. Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World BVBA and Wecandance NV https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62019CC0372; and Article 3(3) TEU.

[5] US Supreme Court (2004), Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407.

[6] See for example Guidelines 1/17 (2017) by Israel's Antitrust Authority, noting that enforcement of the prohibition against unfairly high prices should be carried out with caution and in moderation https://www.gov.il/BlobFolder/legalinfo/opinion117/en/englishsite_opinions_Publicn%20statement%201_17%20unfairly%20prices.pdf.

[7] Trinko ruling for the United States.

[8] Opinion of Advocate General Wahl delivered on 6 April 2017. Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome, infocuria.curia.europa.eu/tabs/document?source=document&text=&docid=189662&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=609171 ; https://www.lexology.com/library/detail.aspx?g=c677c632-a90d-428c-96bf-04532705f4b7.

[9] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[10] CJEU case law to make this point: British Leyland as the clearest example of excessive prices upheld by the CJEU (with very few others); and Duales System Deutschland on UTP.

[11] See Apple (music streaming) and Facebook Marketplace decisions for recent definitions of unfairness in antitrust, and United Brands two-stage test for excessive prices or benchmarking test.

[12] For example, the United States, Canada and Mexico do not prohibit exploitative abuse as such under competition law. See OECD (2023), Algorithmic Competition, Section 3.2.2, https://doi.org/10.1787/cb3b2075-en.

13 Case 27/76, United Brands Company and United Brands Continentaal BV v Commission, EU:C:1978:22, para. 249.

[14] For example, Italy, Law No. 287 of 10 October 1990, Article 3(a); Portugal, Law No. 19/2012 of 8 May, Article 11(2)(a); Spain, Law 15/2007 of 3 July on the Defence of Competition, Article 2(2)(a).

[15] India, Competition Act 2002, Section 4(2)(a); Kenya, Competition Act No. 12 of 2010, Section 24(2)(a); Malaysia, Competition Act 2010 (Act 712), Section 10(2)(a).

[16] Germany, Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB), Section 19(2), no. 2.

[17] South Africa, Competition Act 89 of 1998, Sections 8(1)(a) and 8(3).

[18] Kazakhstan, Entrepreneurial Code of the Republic of Kazakhstan, Article 175(1).

[19]Austria, Federal Cartel Act 2005, Sections 4a and 5; Germany, Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB), Section 20(1), (1a) and (2); Switzerland, Federal Act on Cartels and Other Restraints of Competition, Articles 4(2bis) and 7.

[20] Belgium, Code of Economic Law, Articles I.6(17°) and IV.2/1; France, Commercial Code, Article L.420-2, paragraph 2.

[21] Japan, Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Articles 2(9)(v) and 19; Korea, Monopoly Regulation and Fair Trade Act, Article 45(1)(6), and Enforcement Decree, Article 52 and Table 2, paragraph 6.

[22] Italy, Law No. 192 of 18 June 1998, Article 9, particularly paragraphs 3 and 3-bis, as amended.

[23] Spain, Unfair Competition Act 3/1991, Article 16(2); Competition Act 15/2007, Article 3.

[24] Belgium, Code of Economic Law, Book IV, Article IV.2/1; France, Commercial Code, Book IV, Article L.420-2, paragraph 2. Both provisions form part of the respective national competition-law frameworks and may be enforced by the national competition authorities and courts.

[25] France, Commercial Code, Article L.420-2, paragraph 2; French Court of Cassation, Commercial Chamber, judgment of 13 May 2026, Joined Cases Nos. 22-22.623, 22-22.647, 22-22.677 and 22-22.727, Apple.

[26] Japan Fair Trade Commission, Guidelines Concerning Abuse of a Superior Bargaining Position under the Antimonopoly Act, 30 November 2010, as last amended on 17 June 2026, Part I.1.

[27] Supreme Court of Korea, Decision 2012Du18325, 10 September 2015; Korea Fair Trade Commission, Guidelines for Review of Unfair Trade Practices, amended on 31 December 2015, currently KFTC Rule No. 477, 30 December 2024.

[28] See, for example, Ofcom (2024), Prohibiting inflation-linked price rises. See also OECD (2011), Excessive Prices, Section 3.

[29] See, for example, Council Directive 93/13/EEC, Articles 3, 4(2) and 8; Directive 2005/29/EC, Articles 6–9; Australia, Competition and Consumer Act 2010, Schedule 2, Sections 18, 23–24 and 26; and Japan, Consumer Contract Act (Act No. 61 of 2000), Article 10. For provisions permitting scrutiny of manifestly excessive advantages or unjustified price increases, see Brazil, Consumer Defence Code (Law No. 8,078 of 1990), Article 39(V) and (X).

[30] On remedies, see, for example, Council Directive 93/13/EEC, Articles 6–7; Directive 2005/29/EC, Articles 11 and 11a; and Australia, Competition and Consumer Act 2010, Schedule 2, Sections 232, 236–239 and 243. On collective redress, see Directive (EU) 2020/1828, Article 9; Brazil, Consumer Defence Code, Articles 81–104; and Japan, Act on Special Measures Concerning Civil Court Proceedings for the Collective Redress for Damage Incurred by Consumers (Act No. 96 of 2013).

[31] See Directive (EU) 2019/633, Recitals 1 and 9, on bargaining imbalances and dependence. For examples of statutory coverage, see Japan, Act on Preventing Delay in Payment to Small and Medium-Sized Entrusted Business Operators in Relation to Manufacturing Consignment (Act No. 120 of 1956, as amended), Article 2(8) and (9); Korea, Fair Transactions in Subcontracting Act, Article 2; Australia, Competition and Consumer (Industry Codes—Franchising) Regulations 2024, section 7 and Chapter 2; and Directive (EU) 2019/633, Article 1(2).

[32] On prohibited practices and payment obligations, see the Japanese Act cited above, Articles 3 and 5, and Directive (EU) 2019/633, Article 3. On corrective measures and compensation, see Korea, Fair Transactions in Subcontracting Act, Articles 25 and 35. On public enforcement and complainant confidentiality, see Directive (EU) 2019/633, Articles 4–6.

[33] With the associated allocative inefficiency, i.e. a transfer of wealth from consumers to producers accompanied by a reduction in total welfare to society (OECD, 2012[5]).

[34] Case 26/75 *General Motors Continental NV v Commission* [1975] ECR 1367, para. 12.

[35] Case 27/76, United Brands Company and United Brands Continentaal BV v Commission [1978] ECR 207.

[36] For example, in *AKKA/LAA* (2017), a case from Latvia, the Court of Justice examined a national competition authority's decision to assess the fees charged by a copyright collecting society by comparing them with rates in neighbouring and other Member States. The Court held that such a comparative method is appropriate provided the comparator markets are chosen on objective, appropriate and verifiable criteria, and that a resulting price difference is indicative of abuse only where it is both significant and persistent, rather than temporary or episodic. The case illustrates how cross-country comparisons may serve as a benchmark where a domestic competitive price cannot be observed, and the safeguards needed to make such comparisons reliable. Case C-177/16, Autortiesību un komunicēšanās konsultāciju aģentūra / Latvijas Autoru apvienība v Konkurences padome, EU:C:2017:689.

[37] For example, in EDELMAG (2008), the Chilean Competition Tribunal assessed electricity tariffs against a price-adjustment formula established through the competitive tender by which EDELMAG had obtained its exclusive right to supply. EDELMAG increased its tariffs to reflect a diesel tax omitted from its original calculations. The Tribunal found that this omission did not justify departing from the agreed formula and passing the additional cost on to customers. The Supreme Court upheld the infringement finding while reducing the fine. The case shows how a price formula resulting from a competitive process and incorporated into the contractual framework may provide the relevant benchmark. Chilean Competition Tribunal, Judgment No. 73/2008, 20 August 2008; upheld, Supreme Court of Chile, judgment of 26 November 2008.

[38] See Public Statement 1/17: The Antitrust Director General's Considerations in Enforcing the Prohibition Against Unfairly High Prices https://www.gov.il/BlobFolder/legalinfo/opinion117/en/englishsite_opinions_Publicn%20statement%201_17%20unfairly%20prices.pdf.

[39] Sasol Chemical Industries (Pty) Ltd v Competition Commission, Competition Appeal Court of South Africa, Case No. 105/CAC/Jun15, judgment of 9 July 2015.

[40] Flynn Pharma Ltd and Pfizer Inc v Competition and Markets Authority [2018] CAT 11.

[41] Sentencia-N°-204-2025, https://www.tdlc.cl/wp-content/uploads/2025/06/Sentencia-N%C2%B0-204-2025.pdf

[42] Monopolist in the market for A2P SMS termination services on its own network.

[43] In this case the TDLC concluded that the mobile network operator had abused its dominant position by increasing the network access fee for international A2P SMS traffic not routed through the company Infobip to a rate approximately 67 times higher than the previous fee.

[44] Case 24/04924, 24 June 2026 Foreløbig version af afgørelse Scandlines misbrug af dominerende stilling; https://en.kfst.dk/news/decisions/2026/20260624-scandlines-has-charged-excessive-prices-on-the-roedby-puttgarden-route.

[45] https://kfst.dk/konkurrenceforhold/afgoerelser/afgoerelser-paa-konkurrenceomraadet/raads-og-styrelsesafgoerelser/2026/20260624-scandlines-prissaetning-af-personbilsbilletter-paa-roedby-puttgarden.

[46] Harmony Gold Mining Company Ltd & Another and Mittal Steel South Africa Ltd and Another (13/CR/FEB04) [2007] ZACT 21; [2007] 1 CPLR 37 (CT) (27 March 2007).

[47] As illustrated in OECD (2026[39]), “In economics, there are traditionally three degrees of price discrimination being the first degree the scenario where perfect discrimination among customers materialises, with each consumer being charged a price equal to its willingness to pay. Second degree discrimination refers to situations in which businesses grant discounts once a specific purchase quota is achieved, with prices being set in two parts. This means that they offer the same product at different prices for different quantity or quality levels. Third degree price discrimination takes place when businesses charge different prices to different groups of customers based on certain characteristics that groups them”.

[48] In terms of redistribution effect, the potential outcomes of personalised pricing “can theoretically range from maximising consumer welfare to a scenario where consumer welfare drops to zero”, depending on the degree of personalisation and the level at which prices are set (OECD, 2018[31]).

[49] See Advocate General (AG) Wahl’s opinion in MEO Case C-525/16, AG’s Opinion, para. 80.

[50] As highlighted in OECD (2018[31]), the question of whether personalised pricing may potentially qualify as an abuse of dominance, and therefore amount to an antitrust violation, remains largely unanswered, “because competition provisions in many countries appear to explicitly forbid only the discrimination of business trading partners, and not final consumers, as in the case of the EU. Moreover, the question of whether personalised pricing amounts to a competition law infringement can hardly be answered by the scarce case law on price discrimination, as so far competition authorities have not investigated cases where price discrimination directly targets final consumers”.

[51] For example, Section 8(4) of South Africa’s Competition Act applies to unfair prices or trading conditions required from or imposed by a dominant buyer on suppliers that are small and medium businesses or firms

controlled or owned by historically disadvantaged persons in designated sectors. South Africa, Competition Act 89 of 1998, Section 8(4); Buyer Power Regulations, 2020, Government Notice No. 168 of 13 Feb. 2020.

[52] See, for example, Competition Commission of India, Belaire Owners' Association v DLF Ltd, Case No. 19 of 2010, Order of 12 August 2011, concerning final consumers as purchasers; Faridabad Industries Association v Adani Gas and Tetra Pak II, cited above, concerning business customers or purchasers.

[53] European Commission, Apple App Store Practices (Music Streaming), Case AT.40437, Decision C(2024) 1307 final of 4 March 2024, para. 555; Summary of Commission Decision, OJ C/2024/3554, points 10 and 19. An action for annulment is pending before the General Court in Case T-260/24, Apple and Apple Distribution International v Commission.

[54] Case 127/73, BRT v SABAM, EU:C:1974:25, paras. 8–12.

[55] Competition Commission of India, Indian National Shipowners' Association v Oil and Natural Gas Corporation Ltd, Case No. 01 of 2018, Order of 2 August 2019, paras. 135–152.

[56] South Africa, Competition Act 89 of 1998, Sections 8(4) and 78; Buyer Power Regulations 2020, regulation 5.

57 Competition Commission of India, Updated Terms of Service and Privacy Policy for WhatsApp Users, Suo Motu Case No. 01 of 2021, order of 18 November 2024; National Company Law Appellate Tribunal, WhatsApp LLC v Competition Commission of India and others and Meta Platforms, Inc. v Competition Commission of India and others, Competition Appeal Nos. 1 and 2 of 2025, judgment of 4 November 2025.

58 European Commission, Meta Platforms/Facebook Marketplace, Case AT.40684, Decision C(2024) 8053 final of 14 November 2024.

59 Competition Commission of South Africa, Online Intermediation Platforms Market Inquiry, Final Report and Decision, July 2023.

60 See, for example, Germany, Bundeskartellamt, Decision B6-22/16 of 6 February 2019, Facebook, and Federal Court of Justice, decision of 23 June 2020, Case KVR 69/19; Competition Commission of India, In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users, Case No. 01 of 2021, Order of 18 November 2024; European Commission, Apple App Store Practices (Music Streaming), Case AT.40437, Decision C(2024) 1307 final of 4 March 2024; and European Commission, Meta Platforms/Facebook Marketplace, Case AT.40684, Decision C(2024) 8053 final of 14 November 2024. On discriminatory treatment or lack of neutrality informing the assessment of unfair trading conditions, see also France, Autorité de la concurrence, Gibmedia, Decision No. 19-D-26 of 19 December 2019, and Apple ATT, Decision No. 25-D-02 of 31 March 2025.

61 Germany, Federal Court of Justice, decision of 23 June 2020, Case KVR 69/19, Facebook.

[62] European Commission, Meta Platforms/Facebook Marketplace, Case AT.40684, Decision C(2024) 8053 final of 14 November 2024, para. 1121.

[63] While traditional exploitative abuse often involved high prices applied broadly across market participants, data-driven personalised pricing and similar practices may enable more individualised forms of value extraction.