

## EU COMPETITION LAW AND FISCAL LAW: THE INTRA-BRANCH COMPARISON METHODOLOGY APPLIED TO THE ASSESSMENT OF UNFAIR PRICES

### *DERECHO DE LA COMPETENCIA DE LA UE Y DERECHO FISCAL: LA METODOLOGÍA DE COMPARACIÓN INTRARAMAS APLICADA A LA EVALUACIÓN DE LOS PRECIOS INJUSTOS*

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**ABSTRACT:** Price has an undeniable importance for market operators. Changes operated in the legal environment may have an unanticipated impact on prices; therefore, regulators must be cautious when designing legal tools to assess the adequacy to legality of pricing practices, that is, when evaluating whether a given price is to be regarded as 'fair'. This paper finds that, from all the branches of a legal system, it is for tax law and competition law to have the highest impact on prices when monitoring the fairness of prices charged by enterprises operating in the market. By conducting a comparative analysis on the mechanisms used by the administrative authorities active in both branches of law it identifies the synergies that, transcending the divergences, lead one of the branches to learn from the experience of the other.

**Keywords:** EU competition law, fiscal law, unfair prices.

**RESUMEN:** La importancia del precio es indudable para los operadores del mercado. Además, los cambios que se llevan a cabo en un ordenamiento jurídico pueden conllevar un impacto inesperado en los precios; por lo tanto, los reguladores deben ser especialmente cautelosos cuando diseñan herramientas legales para evaluar la adecuación a la legalidad de las prácticas de fijación de precios. Este estudio demuestra que de todas las ramas del ordenamiento jurídico son el Derecho de la competencia y el Derecho fiscal las que tienen un mayor impacto sobre los precios que las empresas fijan en los mercados en los que operan. Por medio de un análisis comparativo de los mecanismos empleados por las autoridades administrativas de cada rama identifica las sinergias que favorecen que una aprenda de la experiencia de la otra en materia de evaluación de precios injustos<sup>1</sup>.

**Palabras clave:** Derecho de la competencia de la UE, derecho fiscal, precios injustos.

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<sup>1</sup> For all, TURINA AND ZINGALES (2009) p. 2.

## I. INTRODUCTION

The importance of price for market operators is beyond any doubt: it represents marketers' assessment of the value customers see in a product or service, contributing to show how customers perceive the product or service<sup>2</sup>. It is determined by what a buyer is willing to pay, a seller is willing to accept and competition is allowing to be charged. In this sense, it becomes of major importance the influence on prices of changes in the legal environment.

From all the branches of a legal system, it is for tax law and for competition law to have the highest impact on price through their monitoring over fairness of prices charged by enterprises active in the market. Regulators from both branches have the task of designing comprehensive tools when looking for the convergence between economic analysis and adequacy to legality of a given practice: competition and tax authorities must use complex economic concepts in order to analyze whether the price established by enterprises complies with the legal standard that allows it to be regarded as 'fair'.

We are going to conduct a comparative analysis of the intersections between tax law and competition law in the area of public economic policy broadly named as “price-based analysis”<sup>3</sup>. We will analyze to what extent two differentiated branches of law –competition and tax– are, indeed, closely related and, transcending the divergences (II.), we will focus on the strong existing synergies (III.) which will allow us to catch sight of the solutions to potential weaknesses that may affect one branch but not the other, in order to reflect on the applicability of the response given by the ‘uninfected’ branch.

While comparative studies are typically intended to analyze the rivalries and connection points between legal models of different territories, we are aiming at comparing two specialized branches of a single legal order. Are they comparable? To answer that question, it must be borne in mind that, it has already been proved a link between competition law and tax law: they are the only branches that exert the highest potential influence on price through their policies, affecting the behavior of market operators. The core endeavor will thus consist of looking for the horizontal cross-pollination of solutions that used by one branch can also be satisfactorily applied by the other one.

## II. DIVERGENCES

Whereas the study of the existing synergies will typically result in a clearer indication of the comparability of two notions, it must be borne in mind that even the divergences are to be viewed as indicators of the referred comparability – only notions that have some degree of comparability can be submitted to an analysis of their divergences, otherwise, in the absence of any resemblance, no comparison –be it positive (synergies) or negative (divergences)– could be operated.

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<sup>2</sup> PERNER (2014).

<sup>3</sup> TURINA AND ZINGALES (2009) p. 2.

## 2.1. NATURE OF THE SITUATIONS

Both tax and competition law are concerned with prices qualified as unfair as they have been established regardless of the constraints of a competitive market, harming, ultimately, not only the operators of a given market, but also the referred market itself. Due to the imperfect nature of markets, which are unable to regulate themselves, tax and competition authorities must monitor incessantly the pricing strategies of firms, designing adequate policies that prevent, specifically, in the case of fiscal authorities, firms from developing an unfair pricing strategy aimed at unduly evading their fiscal pressure or, in the case of competition authorities, undertakings from unlawfully distorting the dynamics of the market through unfair pricing strategies.

### 2.1.1. Territorial scope: Where are unfair pricing conducts concluded

Transfer pricing refers to terms and conditions surrounding transactions within a multinational company. Prices charged between non-independent associated enterprises established in different countries for their inter-company transactions may not reflect an independent market price<sup>4</sup>. Thus, transfer pricing implies a transnational character of the transactions, since associated enterprises concluding inter-company transactions are required to be in different countries<sup>5</sup>.

In contrast, excessive pricing and predatory pricing do not necessarily present a transnational character; in fact, what matters is the affected market<sup>6</sup>, which can be national or supra-national. In case a supra-national market is affected, it is due to the existence of a transnational element<sup>7</sup>. The territorial scope of the affected market –national or supra-national– will determine the authority competent to monitor the anticompetitive practices: National Competition Authorities, in the case of national market; or European Commission, in the case of EU market.

The legal basis that forbids practices such excessive or predatory prices is Article 102 of the Treaty on the Functioning of the European Union (TFEU), which regulates unilateral market power in EU competition law. An abuse of dominant position<sup>8</sup> may consist in “directly or indirectly imposing unfair purchase or selling prices [...]”. This same article has been used to prohibit excessive prices, which are ‘too high’, and predatory prices, which

<sup>4</sup> EUROPEAN COMMISSION (2014).

<sup>5</sup> Transfer pricing relies on the differences in national income tax rates applicable to associated enterprises: multinationals will use their transfer prices to shift profits from high-tax jurisdictions to low-tax jurisdictions. GRESIK (2009) p. 9.

<sup>6</sup> The definition of the relevant market is the first step in the evaluation of an anticompetitive practice to assess if it has an appreciable effect on competition, in RITTER AND BRAUN (2004) p. 24.

<sup>7</sup> Defining the market, the boundaries of competition between the parties directly concerned and between the parties and third parties –actual or potential competitors, customers, suppliers– are set, as explained in RITTER AND BRAUN (2004) p. 24.

<sup>8</sup> It is not in itself illegal for an enterprise to be in a dominant position, but such enterprise has a special responsibility not to allow its conduct to “impair genuine undistorted competition on the common market”, Communication from the Commission – Guidance (2009) § 1.

are 'too low'<sup>9</sup>. While both are exclusionary conducts<sup>10</sup>, excessive prices are, in addition, exploitative, existing no reasonable relation between the price and the economic value of the product<sup>11</sup>, as determined by a twofold test: (i) the price-cost margin is excessive and (ii) the price imposed is either unfair in itself or when compared to competing products<sup>12</sup>. A higher price is unfair if it is solely caused by a mere lack of competition<sup>13</sup>: dominance is attained in a market either before competition was introduced or before the existence of an effective enforcement by the competition authority<sup>14</sup>. In this sense, when it comes to excessive pricing, apart from the twofold test, a second question must be answered: how much deviation from the benchmark is allowed?<sup>15</sup> On the contrary, in the case of predatory pricing the question rests in whether the price is lower than the relevant cost benchmark<sup>16</sup> –the dominant firm deliberately incurs in losses or sacrifices profits in the short term in order to exclude competitors and strengthen its market power–.

### 2.1.2. *Personal scope: Who can conclude unfair pricing conducts*

Transcending all theoretical analysis, which may imply some concerns about the adequacy of looking for ways of circumventing the overly burdensome legal constraints, if we turn to the practice, we must admit an important difference based on opportunity: taxes reduce benefits, therefore, it seems naïve to defend that there will be multinationals not being eager to 'play' with the legal order to discover how much they can push prices among their non-independent associated enterprises without making tax authorities intervene. There exist important incentives to seek for the opportunity to manipulate their fiscal burden, since the least they pay in taxes, the higher their return<sup>17</sup>.

In opposition, when it comes to anticompetitive pricing conducts, for the competition authorities to intervene, it is not sufficient that companies acting in the market pursue opportunities to increase their income through their unfair pricing policies; in order to consider such conducts anticompetitive, companies have to meet certain criteria, being the prevalent one their holding of a dominant position of which they make an abusive use.

<sup>9</sup> AKMAN AND GARROD (2010) pp. 1-2.

<sup>10</sup> Inside price-based "exclusionary conducts" we find specific forms of conducts such as predation, excessive pricing or exclusive dealing, which will imply an intervention of the Commission as long as they mean an anti-competitive foreclosure of competitors considered to be as efficient as the dominant enterprise, Communication from the Commission – Guidance (2009) § 23.

<sup>11</sup> ECJ, 27/76, *United Brands v Commission*, § 250.

<sup>12</sup> ECJ, 27/76, *United Brands v Commission*, §§ 251-252.

<sup>13</sup> What matters is the protection of an effective competitive process by ensuring that dominant firms do not exclude their competitors by other means than competing on the merits, Communication from the Commission - Guidance (2009) § 6.

<sup>14</sup> AKMAN AND GARROD (2010) pp. 2-5.

<sup>15</sup> How much the price is allowed to exceed the cost level respectively the average cost of capital, OECD (2011) p. 4.

<sup>16</sup> ECJ, C-62/86, *AKZO Chemie vs. Commission*, § 72: "prices below average total costs –fixed costs plus variable costs– [...] can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which [...] are incapable of withstanding the competition waged against them".

<sup>17</sup> By manipulating transfer prices multinationals change the relative tax burden that they have to face in their different countries of operation. They may also reduce their worldwide tax payments. SWENSON (2001) p. 8.

Consequently, not all the companies operating in a given market will have at their disposal the opportunity of pricing anticompetitively. Instead, only dominant companies will be in a position to hinder the competition in the market through exclusionary pricing practices –be them excessive or predatory–.

## 2.2. DISPOSAL OF THE OUTCOME

Enterprises are concerned about the likeliness of reaching a conventional termination over a dispute that may arise on the unfair nature of their pricing strategies.

The key difference between both specialized branches of law is the possibility to reach an agreement with the concerned public authorities over the qualification of their prices. While firms are provided with the possibility of reaching an agreement with tax authorities even before the dispute has actually arisen (2.2.1), competition authorities do not count on the possibility to provide companies with such an *ex ante* certainty about their acceptance; thus, in cases bordering the legality, there will be no other option but resorting to an administrative procedure to discern whether prices charged by the dominant firm are actually unfair. In any case, the impossibility for companies to reach an *ex ante* agreement does not mean that there is no scope left for negotiation in the realm of competition law (2.2.2): once the competent competition authority has already initiated the proceedings, there might still be a possibility for the firms to offer their commitments.

### 2.2.1. Conventional *ex ante* termination

In the sphere of international taxation, multinationals must be provided with a high level of certainty when managing their taxes in an increasingly regulated business environment. In this eager search for the so-perceived crucial certainty, multinationals may count on the possibility of concluding an Advance Pricing Agreement (APA). Thanks to APAs, multinationals may solve actual transfer pricing disputes and, also, potential ones in a cooperative manner.

From a dispute avoidance perspective, APAs are agreements between tax administrations defining how future transactions between related taxpayers established in several Member States will be taxed<sup>18</sup>. In this sense, the possibility of concluding an APA over a potential dispute leaves the door open to an *ex ante* resolution of problems that may arise. There will be no need for multinationals to wait for the tax authority to take a decision on a dispute over the adequacy of the transfer prices in order for the taxpayers to be certain about the point up to which prices of the transactions among their non-independent associated enterprises can be pushed<sup>19</sup>.

<sup>18</sup> Communication from the Commission SEC (2007) 246 (2007) § 13.

<sup>19</sup> We should acknowledge that the advantage of APAs is that they provide taxpayers with certainty about the fiscal burden of their transactions. Nevertheless, being practical, if we accept that multinationals use tax engineering to reduce their taxes to the minimum, it may not seem insane to point out that taxpayers seek the highest certainty –through APAs in this case– for the sake of accurate tax engineering. It is not certainty for the pleasure of being certain. Certainty on transfer prices' admissibility by tax authorities is just the means to safely make their calculations when looking for the best alternative to conduct their transactions.

Dispute avoidance becomes of particular relevance if we bear in mind the fact that transfer pricing related disputes do not only involve the taxpayer and a single tax administration. They frequently lead to double taxation and, hence, to the necessity for the tax administrations involved to relieve this double tax<sup>20</sup>. Moreover, apart from the above mentioned *ex ante* certainty concerning the transfer pricing methodology, APAs simplify and prevent costly and time-consuming tax examinations into the transactions included in the APA, leading to important savings, what is of major importance in order to achieve a properly functioning internal market<sup>21</sup>.

The main concern is the possibility for multinationals to dispose, together with tax authorities, of the outcome of the disputes that may arise in relation to transfer prices. As it is a jointly agreed outcome, multinationals may concentrate their efforts on agreeing a mutually satisfactory transactional APA. It is not a mere application by tax authorities of the legal standards set forth by the legislative power. The added value of APAs lies on their conventional nature. In fact, they start with the taxpayers' decision to request an APA and they require formal agreement between the tax administrations involved in order to guarantee requesting taxpayers certainty over the tax treatment of the transactions<sup>22</sup>.

### 2.2.2. *Conventional ex post termination*

In relation to Competition law, the Commission may consider the commitments offered by firms if the proceedings have already been initiated<sup>23</sup>; in this sense, firms offer commitments in order to meet the concerns voiced by the Commission in its preliminary assessment<sup>24</sup>. It is important to make clear that whether the Commission accepts the commitments depends entirely on the Commission's appreciation of the benefits of an earlier termination of the infringement and the saving in costs of longer proceedings. The Commission will balance those benefits with the contributions to enforcement of Article 102 TFUE that infringement decisions typically imply, in terms of clarification of the law, public censure, deterrence, disgorgement of illicit gains and punishment, and facilitation of follow-on actions for compensation<sup>25</sup>. Optimally, it will only opt for a commitment decision when its benefits outweigh an enforcement decision's benefits. There is thus no right to a commitment decision. In fact, commitment decisions can only be issued as long as the Commission is not intending to impose a fine<sup>26</sup>. This implies that the Commission should have already taken a preliminary position about the existence of an infringement and about the likeliness of the imposition of a fine<sup>27</sup>.

Finally, commitment decisions make the commitments binding on the firms that offered them, but, at the same time, they do not imply that the compliance of the practice

<sup>20</sup> Communication from the Commission SEC (2007) 246 (2007) § 3.

<sup>21</sup> Resolution of the Council (2006) Recital 6.

<sup>22</sup> Communication from the Commission SEC (2007) 246 (2007) § 21.

<sup>23</sup> Commission Regulation 773/2004, Article 2.1.

<sup>24</sup> Council Regulation 1/2003, Article 9.1.

<sup>25</sup> WILS (2006) p. 8.

<sup>26</sup> Council Regulation 1/2003, Recital 13.

<sup>27</sup> WILS (2006) p. 11.

with the commitment makes such practice compatible with Article 102 TFEU; it rather implies that the Commission must either have considered that the practice would no longer constitute an infringement, or it must have concluded that further action against the remaining infringement would not have fitted in its enforcement priorities<sup>28</sup>. Indeed, the Commission counts on a prerogative to decide what infringements it chooses to pursue<sup>29</sup>, depending on its enforcement priorities<sup>30</sup>.

In conclusion, playful firms willing to set their prices on the edge of compliance with EU competition law, deemed to keep an eye on the legislation, as well as on the interpretation made of such legislation by the European Court of Justice (hereinafter, ECJ), are not provided with the opportunity to conclude an *ex ante* agreement over the legality of their future pricing strategies. It will be for the Commission to determine whether the prices already set by the firms, due to their excessive character or to their predatory effect, constitute an infringement of the 102 TFEU that is worth being pursued. Even so, those firms may resort to their ability to reach an *ex post* (once the Commission has started the proceedings) agreement in order to achieve a conventional termination instead of an infringement decision.

### III. SYNERGIES

#### 3.1. ADMINISTRATIVE SIMPLIFICATION: LOOKING FOR LEGAL CERTAINTY

Nowadays, due to the immense increase in transnational trade, there is a clear need for legal certainty, which may be provided by an administrative simplification, both in relation to transfer pricing and in relation to excessive and predatory pricing. To pursue it, tax and competition authorities can learn from each other: the solutions provided to problems that, apparently, only affect one of the branches, can be applied by the other branch.

##### 3.1.1. Identification of the unfair prices

Tax administrations face policy and practical problems linked to the difficulty of determining the income and expenses of an enterprise –or of a permanent establishment– part of a multinational group that should be taken into account within a jurisdiction<sup>31</sup>. They are to reconcile their right to tax the profits of a taxpayer based upon income and expenses that can be reasonably expected to arise within their territory with the need to prevent double or multiple taxation<sup>32</sup>. Moreover, they may encounter obstacles to obtain pertinent data located outside their own jurisdiction<sup>33</sup>.

<sup>28</sup> WILS (2006) p. 16.

<sup>29</sup> ECJ, 247/87, *Star Fruit Company SA v Commission*, § 11. The ECJ has maintained this jurisprudence unaltered, Court of First Instance (CFI), T-24/90, *Automec v Commission*, §§ 73-77 and 85, and, more recently, ECJ, C-119/97, *Ufex v Commission*, §§ 87-88.

<sup>30</sup> Commission Notice (2004) § 27.

<sup>31</sup> OECD (2010) §§ 1-2 of the Preface.

<sup>32</sup> OECD (2010) § 4 of the Preface.

<sup>33</sup> OECD (2010) § 4 of the Preface.

Within the EU, as set forth in the Resolution of the Council on a code of conduct on transfer pricing documentation<sup>34</sup>, transfer pricing needs to be viewed in the framework of the OECD Transfer Pricing Guidelines<sup>35</sup>. Following the wording of the OECD Guidelines, **arm's length principle** is the transfer pricing standard that OECD member countries have agreed should be used for tax purposes by multinational groups and tax administrations<sup>36</sup>. Indeed, transfer prices set by non-independent associated enterprises for their transactions have to be established in accordance with the arm's length standard to be considered fair<sup>37</sup>. This principle seeks to adjust profits by reference to the conditions that would have been obtained between independent enterprises in comparable transactions and comparable circumstances<sup>38</sup>.

To better understand why an administrative simplification is desirable, we should make before a brief, but comprehensive, explanation on how tax administrations apply the arm's length standard. The OECD Guidelines make an exhaustive explanation on how tax administrations are expected to apply arm's length principle. In doing so, the OECD clarifies that attention should be drawn to the nature of the transactions between non-independent associated enterprises and, consequently, to whether the conditions thereof differ from the conditions that would be obtained in comparable uncontrolled transactions<sup>39</sup>. In short, by the use of arm's length standard tax administrations try to ensure that they will be able to tax corporate income generated within their respective territories<sup>40</sup>. In any case, while we could assume that, in a non-tax world, managers would basically enter into arm's length transactions anyhow<sup>41</sup>, tax administrations should not automatically assume that associated enterprises seek to manipulate their profits<sup>42</sup> by not concluding at arm's length their related-party transactions. But, what criteria do tax authorities apply in order to identify the unfair nature of a pricing strategy when applying arm's length principle?

Tax administrations seek for an efficient allocation of their resources when applying the arm's length principle<sup>43</sup>. The heart of such examinations will be constituted by a comparability analysis in line with which the tax administration concerned will make a comparison between conditions imposed between associated enterprises and those that would

<sup>34</sup> Resolution of the Council (2006).

<sup>35</sup> Resolution of the Council (2006) Preamble.

<sup>36</sup> OECD (2010) § A.1.1. There exist other alternatives to arm's length standard, such as the global formulary apportionment (a formula predetermined for all taxpayers is used to allocate profits), but OECD member countries have considered none of it as a realistic alternative to the arm's length principle since, among other reasons, they do not prevent from double taxation and they tax on a consolidated basis, abandoning the separate entity approach and obviating relevant factors that may play a significant role when dividing profits between enterprises of the same multinational group in different tax jurisdictions.

<sup>37</sup> OECD Convention, Article 9.1.

<sup>38</sup> Members of the same multinational are treated as separate entities, rather than as inseparable parts of a single unified business, as explained in OECD (2010) § B.1.

<sup>39</sup> OECD (2010) § B.1.6.

<sup>40</sup> SCHÖN (2011) p. 2.

<sup>41</sup> SCHÖN (2011) p. 3.

<sup>42</sup> OECD (2010) p. 31.

<sup>43</sup> OECD (2010) § A.1.5.

have been made between independent entities, and a determination of the profits that would have been accrued at arm's length<sup>44</sup>.

As the comparability analysis is aimed at selecting the most appropriate transfer pricing method and applying it<sup>45</sup>, it has to maintain a linkage among its various steps: a) the preliminary analysis of the conditions of the controlled transaction; b) the selection of the transfer pricing method, through the identification of potential comparables; c) the conclusion about whether the controlled transactions being examined are consistent with the arm's length principle<sup>46</sup>.

Tax administration's endeavor is to obtain sufficiently comparable information to carry out the above mentioned comparability analysis. Once obtained, the tax administration will have to judge it adequately, taking into consideration how independent enterprises would evaluate potential transactions<sup>47</sup> and, eventually, making the necessary adjustments to achieve comparability<sup>48</sup>. Nevertheless, information, when accessible, may be incomplete or difficult to interpret. It may also be the case that the information cannot be obtained due to its unknown location, to confidentiality concerns, or that it simply does not exist. Finally, it should be acknowledged the possibility that there may not be any comparable independent enterprise<sup>49</sup>.

Tax administrations, when compelled to make adjustments to improve the reliability of their comparability analysis<sup>50</sup>, they will first take into account several comparability factors in order to establish the degree of actual comparability. Those comparability factors include the characteristics of the property or services transferred, the functions performed by the parties (taking into account assets used and risks assumed), the contractual terms, the economic circumstances of the parties, and the business strategies pursued by the parties<sup>51</sup>. In any case, the importance of any missing piece of information (whether it is incomplete, difficult to interpret, unobtainable or inexistent) on possible comparables will be evaluated taking into account the nature of the controlled transaction and the transfer pricing method adopted<sup>52</sup>.

<sup>44</sup> OECD (2010) § B.1.7.

<sup>45</sup> However, in this section we will not tackle the specificities of each of the transfer pricing method; instead, we will just give some hints on the different transfer pricing methods among which the tax administration selects the most appropriate one in order for the reader to have the complete picture of tax administrations' task when it comes to transfer pricing.

<sup>46</sup> OECD (2010) § A.3.1.

<sup>47</sup> Independent enterprises will enter in a certain transaction if, after comparing it to other options realistically available to them, they see no other alternative clearly more attractive or they do not consider that there exist any difference between the options that would significantly affect their value, OECD (2010) §§ D.1.33-35.

<sup>48</sup> Comparability adjustments will be made to improve the reliability of the comparison when there exist differences between the situations compared that could materially affect such comparison, OECD (2010) § D.1.34-35.

<sup>49</sup> OECD (2010) § B.1.13.

<sup>50</sup> OECD (2010) § D.2.

<sup>51</sup> OECD (2010) § D.1.36-37.

<sup>52</sup> OECD (2010) § D.1.2.

Comparability adjustments aim the effect of any existing difference among the situations being compared, as for example, differences that may arise from the use of different accounting practices or differences in capital, functions, assets or risks. The purpose of the adjustments is thus to increase the reliability of the results; therefore, they will be considered only if they sooth the differences that have a material effect on the comparison. As a consequence, it may be regarded as a sign of the low degree of comparability the need to perform numerous or substantial adjustments to key comparability factors. In fact, it may be the case that there is a plurality of comparable transactions; thus, when possible, the degree of comparability will play a selective factor that will eliminate those uncontrolled transactions that have a lesser degree of comparability.

To sum up, identifying whether certain prices set by non-independent associated enterprises for their transactions have been established at arm's length implies a case by case analysis. While a process can be clearly identified (analysis of the conditions of the controlled transaction, identification of potential comparables in order to select the most appropriate transfer pricing method and conclusion about whether the controlled transactions are consistent with the arm's length principle), tax administrations will not be able to count on an unaltered systematical application of such process, since, at each stage, the tax administration concerned may be obliged to adjust the process to reality depending on the outcome of the previous stage, which in turn vary depending on the circumstances of each individual case.

However, when, despite a conscientious effort to satisfactorily apply the arm's length principle, two or more tax administrations take different positions in determining arm's length conditions, double taxation is likely to occur. In this case, as we have anticipated, tax administrations, if they intend both to attract foreign investments and to facilitate the movement of capitals, may prevent double or multiple taxation when claiming for their right to tax the profits of a taxpayer based upon income and expenses that can be reasonable expected to arise within their territory. But it is unavoidable: transfer pricing disputes may arise not only between taxpayers and their administrations, but also between different tax administrations. Therefore, it does not come as a surprise the existence of diverse administrative procedures, conceived to minimize transfer pricing disputes and to help resolve controversies that have actually arisen either between taxpayers and their administrations or between tax administrations themselves. Among these administrative procedures, we find the mutual agreement procedure (Article 25 of the OECD Model Tax Convention), the corresponding adjustments, the use of simultaneous tax examinations<sup>53</sup>, the development of safe harbors for certain taxpayers, and the APAs, already explained in the previous section, applicable to specified controlled transactions<sup>54</sup>.

<sup>53</sup> Simultaneous tax examinations are a form of mutual assistance that allows various countries to cooperate in tax investigations.

<sup>54</sup> Although we will not study them in depth for the reasons explained in the following footnote, it is worth noting that they are intended to supplement what we are analyzing in this subsection: the traditional administrative mechanism, as well as judicial and treaty mechanisms. Moreover, they can be conducted under the mutual agreement procedure.

At this stage of the study, we will develop the first two methods, which are closely related as they are both used by concerned administrations to mitigate or eliminate double taxation by their cooperative interaction on the application of transfer price adjustments. Then, we will jump into a brief commentary on the improvements in terms of administrative simplification due to the establishment of safe harbors<sup>55</sup>.

In line with Article 25 of the OECD Convention, when a dispute arises over the application of a transfer price adjustment that has led to a double taxation concern, tax authorities have the obligation to resort, at request of the individual concerned, to a mutual agreement procedure in order to try to solve it<sup>56</sup>. In fact, competent authorities are intended to use the referred Article 25 to solve problems of both juridical and economic double taxation arising from transfer pricing adjustments<sup>57</sup>.

Another option for tax administrations to eliminate double taxation concerns in transfer pricing cases is to apply the corresponding adjustments. Such adjustments may be, in practice, set as part of the mutual agreement procedure, since, competent authorities will, when necessary, consult each other to consider corresponding adjustment requests. In such a case, tax administrations will seek for a consistent allocation of profits in order to mitigate or, if possible, eliminate double taxation. In view of maintaining the fiscal sovereignty of each country, under no circumstances will corresponding adjustments be mandatory for neither of the tax administrations; otherwise, it would entitle the acceptance of the potential consequences of an arbitrary or capricious adjustment imposed by another tax administration<sup>58</sup>, but, as a consequence, there is a high likelihood for the emergence of double taxation concerns.

The main weakness of both procedures is the lack of sufficient safeguards as to efficiently prevent double taxation. No matter the application of the procedures, double taxation may occur. However, such weakness has been somehow overcome through the introduction of the resort to arbitration if within two years there are still unresolved issues that prevent tax authorities from reaching a mutual agreement.

Finally, as we had announced, we will deal with the provision of safe harbors by tax administrations. Safe harbors are a set of rules under which transfer prices would be automatically accepted. The specific administrative requirements of a safe harbor may vary

<sup>55</sup> In this subsection we will just cope with those procedures conducted by tax administrations (unilaterally or cooperatively), without entering into a repeated analysis of those procedures that leave a scope for a transactional outcome between tax administration(s) and taxpayers (APAs) because in those procedures the ability of taxpayers to reach an agreement will decisively influence the qualification of transfer prices. We just aim at comparing, both in tax law and in competition law, tax administrations' task to define the nature of prices when the decision on the unfair nature is taken by them on their own or on equal foot with another tax administration, without any intervention on the side of the taxpayer.

<sup>56</sup> Tax administrations will be compelled to solve the problem as long as there is an arbitration clause included in the bilateral or multilateral convention of reference similar to the one of paragraph 5 of Article 25 of the OECD Model Tax Convention. This paragraph leaves a period of two years for the tax administrations to solve the problem. In the absence of an agreement, unresolved issues will be submitted, at request of the person who presented the case, to arbitration.

<sup>57</sup> OECD (2010) § C.1.4.30.

<sup>58</sup> OECD (2010) § C.1.4.32-39.

from a total relief of targeted taxpayers to the obligation to comply with various procedural rules as a condition for qualifying for the safe harbor. From the perspective of tax administrations, the main advantage of setting safe harbors is the relief of administrative burden that it provides: there would be a minimal examination by tax authorities with respect to transfer prices of controlled transactions among taxpayers who have been considered to be able to apply the safe harbors. Consequently, tax administrations would be able to design a more efficient allocation of their resources, by focusing on other transactions and taxpayers. Needless to mention the benefits for taxpayers, such as compliance simplicity and a 'theoretical' certainty. On one hand, taxpayers would know in advance the range of prices or profit ranges where their corporations should fall to qualify for the safe harbor; on the other hand, they would have the assurance that they would not be subject to a further audit or reassessment in connection with their transfer prices<sup>59</sup>.

However, such a precious contribution to administrative simplification has a price, and, in this case, the use of safe harbors raises numerous concerns in relation, precisely, to their possible incompatibility with the arm's length principle. OECD Guidelines clearly explain that, under a safe harbor, taxpayers may merely apply a simplified transfer pricing method, not being required to follow, or even have, a specific pricing method<sup>60</sup>. Such simplified method, logically, may not always correspond to the most appropriate method with reference to the facts of the taxpayer under the regular transfer pricing provisions. Thus, it could be viewed as inconsistent with the arm's length principle<sup>61</sup>. Even if we assumed that the simplified method imposed under a specific safe harbor is appropriate to the facts of a case, the application of such safe harbor would imply the sacrifice of accuracy in reporting the transfer prices since they will be established by reference to a standard target rather than to the individual facts of the transaction. In addition, one of the claimed benefits for taxpayers, the certainty, remains illusive. As long as tax administrations retain the ability to verify any aspect of taxpayer's income tax self-assessment, certainty will not be absolutely guaranteed. The introduction of a safe harbor is no more than a surrender of the tax administration's discretionary power in favor of automatic rules, but it does not mean the rejection by the tax administration of its power to review the accuracy of the taxpayer's self-assessed tax liability and its basis<sup>62</sup>.

The only adequate solution would be that tax administrations take the burden of setting accurate safe harbor parameters through a continuous analysis of prices and pricing development in order to fit, if not exactly, almost, the varying circumstances of firms. Notwithstanding, this would impose such a workload on the administration that it would hamper one of the objectives of safe harbors: administrative simplicity.

<sup>59</sup> OECD (2010) § E.3.4.97-101.

<sup>60</sup> Two distinct set of rules would be applicable: a) a set of rules requiring conformity of prices with the arm's length principle; and b) another set of rules, applicable to enterprises qualified for safe harbors, requiring conformity with a simplified set of conditions that may not necessarily be the most appropriate one in relation to the facts and circumstances of the taxpayer.

<sup>61</sup> OECD (2010) § E.4.4.105.

<sup>62</sup> OECD (2010) § E.5.4.121.

To sum up, if we balance the benefits of safe harbors –compliance simplicity for taxpayers and relief from administrative burden for tax administrations– with the wide range of concerns that they raise, we conclude that, even if the path opened by the use of safe harbors implied the placement of the first stone in the search for certainty through administrative simplification, nowadays there are other alternative administrative practices that, being more respectful with the arm's length principle, may achieve the same objectives – i.e., the establishment of more flexible administrative practices for small taxpayers.

As for Competition law, the Commission has clearly stated that its aim is to protect an effective competitive process within the fold of the internal market. In line with the search for such effective competitive process, competitors willing to stay in the market should provide consumers with their best in terms of price, choice, quality and innovation. On one side, competitors who deliver less to consumers in those terms may well find themselves leaving the market; on the other side, directly exploitative conducts, such as excessively high prices, may also trigger the intervention of the Commission. Generally, vigorous price competition is beneficial to consumers. Even if there is a dominant firm in the market, its pricing conduct may have no adverse impact on effective competition, provided that an equally efficient competitor could compete effectively. Consequently, in the absence of any damage cause to effective competition, no harm would be caused to stakeholders and, therefore, the Commission would refuse to intervene.

To analyze the unfair nature of price-based exclusionary conducts, the Commission will measure the likeliness for competitors to benefit, in the absence of a so-perceived abusive practice, from demand-related advantages<sup>63</sup>. Indeed, such advantages constitute an essential pillar for the enterprise in its unending endeavor to find the best alternative to enhance efficiency.

With regard to excessive pricing, an excessive price is aimed at exploiting consumers, rather than at excluding competitors from the market<sup>64</sup>. However, it must be noted that the difficulty to assess excessive prices<sup>65</sup> has led the European authorities (both the Commission and the EU courts: the European General Court and the European Court of Justice) to only find excessive pricing conducts in two cases: *British Leyland v. Commission*<sup>66</sup> and Commission Decision *Deutsche Post AG*<sup>67</sup>.

The Commission, making express reference to "excessively high prices" has clearly stated that it **may** decide to intervene in order to ensure the protection of consumers and

<sup>63</sup> Communication from the Commission – Guidance (2009) § 24.

<sup>64</sup> As explained in HOU (2011) p. 47, it is this purpose of exploiting consumers what makes excessive pricing different from other conducts such as a disguised refusal to supply or a variant of price squeezes. The latter are aimed at excluding competitors, instead of consumers.

<sup>65</sup> There are two opposite arguments towards the adequacy of intervening in relation to excessive pricing practices: interventionist vs. non-interventionist. The interventionists keep a cautious attitude, caused by the doubts cast by most economists on the viability of excessive prices in the long term. In any case, excessive prices will be likely to sustain as long as there exist "high and non-transitory entry barriers". HOU (2011) p. 51.

<sup>66</sup> ECJ, 226/84, *British Leyland v. Commission*.

<sup>67</sup> Commission Decision COMP/C-1/36915, *Deutsche Post AG*.

the proper functioning of the internal market<sup>68</sup>. However, this clearly interventionist approach of the Commission, in accordance to the literature, does not imply an automatic intervention of the competition authorities in all the cases related to excessive pricing. Instead, the prohibition of excessive pricing should be initiated only in exceptional circumstances<sup>69</sup>. In short, three cumulative conditions must be met in order for competition authorities to intervene: (1) there must be high and lasting entry barriers<sup>70</sup>; (2) the infringer must have a super dominant market position<sup>71</sup>; and (3) the Commission must take great care when intervening in excessive cases where there are sector-specific regulators in place<sup>72</sup>.

The ECJ defined first the analytical framework for the assessment of excessive prices in *United Brands*. That analytical framework contains different methods to determine whether prices are excessive<sup>73</sup>: (a) make a comparison between the selling price of the product in question and its cost of production –it will disclose the amount of the profit margin–; (b) analyze first if the difference between the costs actually incurred and the price actually charged is excessive and, in the affirmative, if an excessive price, in itself or when compared to competing products, has been imposed<sup>74</sup>; and (c) any other way to determine whether the price is unfair<sup>75</sup>.

As for the third method, no alternative ways have been suggested so far; therefore, nowadays the Commission may count, in theory, on the two remaining methods. But, in practice, both the Commission and the European courts have resorted to the second method. Two steps compose this second method: first, the Commission evaluates the profit margin –i.e. selling price minus cost of production–. If the profit margin is considered excessive, it goes to the second step, which, in its turn, has two parallel prongs: the price is either unfair in itself or it is unfair in comparison to competing products. One of the hardest tasks of competition authorities when assessing the excessiveness of the profit margin –first step– is the cost calculation. In fact, although the ECJ has not provided an

<sup>68</sup> Communication from the Commission – Guidance (2009) § 7.

<sup>69</sup> HOU (2011) pp. 51-56.

<sup>70</sup> No intervention is needed when the entry barriers are low, since, without the protection of high entry barriers, excessive prices are not sustainable under the threat of an easy potential entry. However, when high and lasting entry barriers exist –be them structural (natural monopoly) or legal–, they can effectively prevent potential competitors from entering the market, at least in a reasonable period. In that case, an antitrust intervention is justified.

<sup>71</sup> According to some scholars, more than a normal dominance is required, HOU (2011) p. 54. In any case, the presence of competitors in a certain market does not preclude excessive pricing conducts; thus, as long as the dominant company has a relatively overwhelming market power in comparison with its competitors and there are barriers to expansion, excessive prices may succeed.

<sup>72</sup> National sector-specific regulators are better equipped than competition authorities in price regulation. Whereas, in theory, there is no legal support for this statement, at least at EU level, in practice, the Commission has showed its courtesy to national regulatory authorities by passing them on cases initially opened by the Commission itself.

<sup>73</sup> LAMALLE *et al.* (2004) pp. 40-41, when commenting on two decisions from the Commission that rejected the existence of excessive pricing in the port sector in application of the methods set forth in *United Brands* by the ECJ.

<sup>74</sup> LAMALLE *et al.* (2004) §§ 251-252.

<sup>75</sup> LAMALLE *et al.* (2004) § 253.

ultimate solution for cost calculation, it has conceded the inclusion of a discretionary apportionment of indirect costs and general expenditure in order to work out productions costs<sup>76</sup>. In addition, the Commission may require the company concerned to provide cost related data, but if it casts doubt on the accuracy of such information it will conduct its own calculation.

Once the costs have been adequately measured, the Commission assesses whether the profit margin is appropriate –not excessive– and, therefore, the price is fair. Unfortunately, both the Commission and the EU courts have refused to set a threshold above which profits may be regarded as excessive, and they have preferred to establish a second step on the excessiveness analysis. The Commission has to determine whether the prices charged are unfair, either in themselves or when compared to those imposed by competitors –by benchmarking–. In fact, by the need to conduct this second step of the assessment on the unfair nature of a price, the Commission acknowledges the possibility that even if the profit margin achieved by the dominant firm is high –or excessive–, the price may not necessarily be abusive. When it comes to determining the abusive nature of a price in itself, the hardness lies in the discovery of the economic value of the product concerned. This economic value would be ultimately compared with the price. Thus, the economic value has to be estimated based on a cost-plus framework that takes into account the costs of production and the non-cost-related factors<sup>77</sup>.

As for the determination of the abusive nature by benchmarking, up to date the Commission and the EU courts have applied various benchmarks, which can be classified as follows: historical prices benchmark<sup>78</sup>, geographical benchmark<sup>79</sup> and competitors benchmark<sup>80</sup>. If the benchmarks are taken from the same relevant market –dominant firm's past prices for the same product; dominant firm's current price for other products in the same market; or dominant firm's competitors' prices in the same relevant market–, the data provided is more reliable because products from the same relevant market share a greater number of characteristics, and, thus, the comparison is more robust<sup>81</sup>. However, practice shows that sometimes, due to the absence of comparables, it is not possible to find an ideal benchmark.

In respect of predatory pricing, the dominant firm deliberately incurs in losses or sacrifices profits in the short term with the aim of excluding one or more of its actual or potential competitors in order to strengthen or maintain its market power. It may also be

<sup>76</sup> LAMALLE *et al.* (2004) § 254.

<sup>77</sup> The Commission has refused to use a simple cost-plus approach that obviates non-cost-related factors, such as the demand-side aspects of the product or service. Thus, higher prices may be explained by customers' willingness to pay more.

<sup>78</sup> The dominant firm's past price for the same product.

<sup>79</sup> The dominant firm's current price for other products in the same relevant market –different product, same market–; the dominant firm's prices of the same product in other geographic market –same product, different market–; and the dominant firm's prices of related products in other markets –related products, different market–.

<sup>80</sup> The dominant firm's competitors' prices in the same relevant market; the dominant firm's; and other firms' prices of comparable products in other markets –comparable products, other markets–.

<sup>81</sup> HOU (2011) pp. 63-64.

the case that the dominant firm, thanks to its dominance in a given market, exerts an influence on a related secondary market, on which it is not yet dominant, and, using the profits gained in the dominated market, it cross-subsidize its activities in the secondary market and threatens to eliminate effective competition in that other market<sup>82</sup>.

The Commission requires sufficiently reliable data on cost and sales prices in order to examine if the dominant firm is engaging in below-cost pricing. In the absence of such data, the Commission may use the cost data of competitors or other comparable reliable data<sup>83</sup>. If sufficient reliable data is available, the Commission will conduct an assessment to determine whether the dominant firm's below-pricing is capable of harming consumers by reducing the likelihood that competitors will vigorously compete or by deterring the entry of potential competitors<sup>84</sup>.

The Commission will assess whether the dominant firm incurred losses that could have been avoided. In doing so, the Commission is likely to use the Average Avoidable Cost (AAC) as the cost benchmark. It is the average of the costs that could have been avoided if the company had not produced a discrete amount of (extra) output. Failure to cover AAC indicates a sacrifice of profits by the dominant firm in the short term. Therefore, an equally efficient competitor may not be able to serve the targeted customers without incurring a loss<sup>85</sup>. Additionally, the Commission may also analyze whether a reasonable alternative conduct could have existed. It may not compare the actual conduct that led the dominant firm to incur avoidable losses with more theoretically profitable alternatives; it will only take into account economically rational and practicable alternatives that can realistically be expected to be more profitable<sup>86</sup>.

The vast number of difficulties and uncertainties encountered in all the steps when assessing the unfairness of prices set by a dominant firm forces us to conclude that there is still a long way in terms of legal certainty for competition authorities to walk. The uniqueness of each case hardens the settlement of a single method applicable under all circumstances, and practice shows that competition authorities are bound by the existence of valid comparable.

If we make a comparison between the methods applied by public authorities of both branches, the main strength in terms of legal certainty when it comes to the identification of unfair prices is on the side of the tax authorities. The OECD Guidelines devote a whole section to discuss all the variables that may occur, depending on the transfer pricing methodology adopted. Moreover, they go even deeper, making reference to the adjustments required to restore comparability. Therefore, due to the analytical structure of the guidelines, tax administrations confine themselves to an inductive reasoning to conclude if the transactions have been made at arm's length. Competition authorities, on their part, lack such a consis-

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<sup>82</sup> Communication from the Commission – Guidance (2009) §§ 63-65.

<sup>83</sup> Communication from the Commission – Guidance (2009) § 25.

<sup>84</sup> It is not necessary that competitors exit the market –it is sufficient that the dominant firm deters potential competitors from entering the market or that it has actual competitors follow its pricing, preventing a decline in prices that would otherwise have occurred, Communication from the Commission– Guidance (2009) §§ 69-71.

<sup>85</sup> Communication from the Commission – Guidance (2009) § 26.

<sup>86</sup> Communication from the Commission – Guidance (2009) § 65.

tent evaluation standard, leaving up to the Commission the decision on the best alternative in terms of comparability to conduct its assessment on the fairness of the prices. In fact, the approach adopted is more theoretical. To a great extent, the development of an analytically structured instrument such as the OECD Transfer Pricing Guidelines would provide with a higher degree of certainty and it would result in the so desired administrative simplification. Additionally, the adoption of soft law instruments is not alien to competition law.

### 3.1.2. Allocation of the burden of proof

The variety of methods used by administrations of both branches of law to identify unfair prices represents a mere reflection of the hardness of the process that administrations encounter when dealing with unfairness. They have to select, taking into account the facts of each case, the most appropriate method in order to identify if the prices are to be qualified as unfair.

In this identification, basic principles of sanctioning proceedings are not unknown to administrative authorities: the responsible of proving the unfair nature of the pricing strategy is the party or authority alleging the infringement<sup>87</sup>. Otherwise, a reversal of the burden of proof would go against the presumption of innocence<sup>88</sup>. However, the wide scope intentionally left to the right of defense in the competition administrative procedure may lead to the fact that the dominant firm deemed to have set exclusionary prices rebuts the evidence laid down by the Commission, so that the latter has to resort to other evidence.

On one side, as for the international taxation, the usual absence of factual proof entails tax administrations to interpret and apply transfer pricing guidelines in order to inductively conclude that prices set in a given non-independent related-party transaction are unfair. Furthermore, in line with European accounting directives, while transactions between a company and its affiliated undertakings are required to be disclosed, disclosure of other types of related-party transactions –i.e., key management members and spouses of board members– is only compulsory when such transactions are not carried out at arm's length. To put it in other words, when they are not carried out under normal market conditions<sup>89</sup>. This eventuality may make even heavier the burden of tax administrations to identify and prove the unfair prices. However the existence of the guidelines, mainly thanks to their analytical structure, brings along with it a high degree of legal certainty on the side of the companies, who are able predict with a significant accuracy the result of the inductive reasoning conducted by tax administrations.

On the other side, with reference to competition law, the standard of proof remains on the Commission<sup>90</sup>, who can draw conclusions from typical sequences of events on the

<sup>87</sup> The existence of the alleged infringement has to be performed to the required legal standard, in line with the Recital 5 of Council Regulation 1/2003.

<sup>88</sup> Article 6.2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and Article 48.1 of the Charter of Fundamental Rights of the European Union (2000).

<sup>89</sup> Directive 2006/46/EC, Recital 6.

<sup>90</sup> The standard of proof is "the requirements which must be satisfied for facts to be regarded as proven", Opinion of the AG Kokott in C-97/08, *Akzo Nobel v. Commission*, footnote 64.

basis of common experience<sup>91</sup>. Thus, it is for dominant companies alleged to have set exclusionary prices to contradict those prima facie conclusions, adducing cogent evidence to the contrary<sup>92</sup>, prior to consideration of the objective burden of proof. Consequently, as set forth in the Regulation N° 1/2003, it is for the company invoking the benefit of a defense against a finding of an infringement to demonstrate that the legal conditions for applying such defense are satisfied<sup>93</sup>. In conclusion, according to those principles, while the legal burden of proof is borne by the Commission, the factual evidence on which it relies may be of such a kind as to require the so-perceived infringing company to provide an explanation or justification<sup>94</sup>. It will be in the absence of such justification that it will be permissible to conclude that the burden of proof has been discharged<sup>95</sup>.

In order to justify its conduct, the dominant firm can either demonstrate that its conduct is objectively necessary or that it generates efficiencies that outweigh any anticompetitive effects on consumers<sup>96</sup>. The dominant firm is required, thus, to demonstrate, on the basis of verifiable evidence, that (1) the efficiencies have been, or are likely to be, realized as a result of the conduct; (2) the conduct is indispensable to the realization of those efficiencies; (3) the likely efficiencies outweigh any likely negative effects on competition and consumer welfare in the market; and (4) the conduct does not eliminate effective competition<sup>97</sup>.

To conclude, the existence of almost universally accepted guidelines, such as OECD ones on transfer pricing, on one hand, provides firms with a higher degree of legal certainty, and, on the other hand, allows tax administrations to simplify the process to prove prices of unfair nature, since they will just aim at applying the most appropriate transfer pricing method in order to identify whether transactions have been made at arm's length. By an accurate interpretation and application of the transfer pricing method selected thanks to carrying out a comparability analysis, tax administrations will prove the unfair nature of a given pricing strategy. The development of soft law becomes, in this sense, a key factor.

However, the character of competition law has led judicial authorities to bend towards the preferential use of hard law, in detriment of soft law instruments, vastly developed in the field of competition law<sup>98</sup>. Moreover, the uniqueness of each case, where

<sup>91</sup> Opinion of the AG Kokott in C-97/08, *Akzo Nobel v. Commission*, § 72.

<sup>92</sup> Opinion of the AG Kokott in C-8/08, *T-Mobile*, § 89; Opinion of the AG Kokott in C-97/08, *Akzo Nobel v. Commission*, § 74. Also, Communication from the Commission - Guidance (2009) § 31.

<sup>93</sup> Council Regulation 1/2003, Recital 5.

<sup>94</sup> The AG Kokott, clearly defines the notion of burden of proof in his Opinions: "The burden of proof determines, first, which party must put forward the facts and, where necessary, adduce the related evidence (*subjektive* or *formelle Beweislast*, also known as the evidential burden); second, the allocation of that burden determines which party bears the risk of facts remaining unresolved or allegations unproven (*objektive* or *materielle Beweislast*)".

<sup>95</sup> ECJ, Joined Cases C-204/00, C-205/00, C-211/00, C-213/00, C-217/00 and C-219/00, *Aalborg Portland v Commission*, § 79.

<sup>96</sup> Communication from the Commission – Guidance (2009) §§ 28-31.

<sup>97</sup> Communication from the Commission – Guidance (2009) § 30.

<sup>98</sup> Traditionally, judicial authorities tend to rely on legally binding instruments. The reason is the absence of normative value of soft law instruments. Also, they are not enacted following the procedurally legitimate process, they are not subject to Article 263 TFEU (review of legislative acts, others than recommendations and opinions) and the complicated terms in which they are drafted increases legal uncertainty. However, the lack of

the slightest detail can make two cases appearing to be factually identical differ in their outcome, hardens the consecution of a definitive administrative simplification. Obviously, a more procedurally complex process is not necessarily a synonym of a less legally certain one. But when the administrative authority of reference –in this case, the Commission– can based its standard of proof on an observation of ‘typical sequences of events’ –*prima facie* evidence–, the legal certainty is in practice overshadowed by the ability of the dominant firm to prove, in a concrete case, that its pricing conduct, albeit exclusionary, provides the market with efficiencies that could not be otherwise obtained. It is not a mere interpretation and application of a set of rules; it entitles an additional subjective appreciation of the facts in the light of the considerations provided by the dominant firm to justify a conduct that has been proved to be anticompetitive.

### 3.2. COOPERATION: FOSTERING OF THE DIALECTICS BETWEEN PUBLIC AUTHORITIES AND PRIVATE FIRMS

The relationship between public authorities and private firms, often believed to be controversial due to their apparently divergent interests, can benefit from a more cooperatively working scenario based on mutual understanding. The particularities of each branch result in a different degree of cooperation: from a cooperative forum built upon the belief that both are at an equated level and, thus, work together in the design of a tax environment that, in compliance with the legal order, is acceptable for both sides; to the development of compliance strategies –‘business compliance programs’ or ‘compliance programs’– by the firms in order to ensure the respect to competition law rules, and, thus, minimize the risk of involvement in competition law infringements and the costs resulting from an anticompetitive behavior<sup>99</sup>.

Nevertheless, both tools aim at fostering the cooperation between public authorities and private actors in order to reduce the burdensome costs that an administrative process may suppose. In the sphere of tax law, thanks to the interaction between tax administrations and private firms under the wing of the EU Joint Transfer Pricing Forum (hereinafter, JTPF), both sides will be able to know in advance the position of the counterpart. This will avoid complicating needlessly the administrative process to qualify a pricing strategy as unfair. In the realm of competition law, the Commission has published several documents in order to help firms develop a proactive compliance strategy, summarizing the key com-

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binding force does not imply that soft law instruments are deprived of legal effects. First, the Commission, as it has unilaterally opted for limiting its own power and discretion, binds itself through the rules laid down in those soft law instruments. And second, firms must be provided, to some extent, with the certainty that, when acting in the market in accordance with the provisions contained in a soft law instrument, they are not going to be held liable for conducting anticompetitive practices. Further, it must not be obviated the increasing number of references to soft law in the judgments and orders of the European Courts and in the opinions of the AG, as analyzed in STEFAN (2008) pp. 1-12.

<sup>99</sup> In this research we are dealing with exclusionary pricing strategies carried out by a dominant firm –Article 102 TFUE–; therefore we are not going to cope with other cooperation tools such as the leniency program and the settlement procedure, which may entitle a higher degree of cooperation but are aimed at enabling the detection of secret agreements between competitors –Article 101 TFUE–.

petition rules companies should respect<sup>100</sup>. In fact, in relation to firms holding a dominant position, they have a special responsibility not to engage in behavior that is considered abusive<sup>101</sup>. Therefore, by the adoption of such strategies, the firms raise the awareness of potential antitrust conflicts and disseminate adequate knowledge on how to avoid them at all levels of the company<sup>102</sup>. In the end, if the compliance strategy happens to be efficient, no administrative process will be needed, as the compliance strategy will simply prevent any infringement from happening<sup>103</sup>.

### 3.2.1. *Joint Transfer Pricing Forum*

The JTPF, informally settled in 2002, was officially set up with effect from 1 March 2007<sup>104</sup>. Since 2002, the valuable contribution of the JTPF as a discussion forum between Member States and private firms facilitated the adoption of two Codes of Conduct and encouraged the Commission to promote its consolidation through the selection of governmental and private-sector experts in the field of transfer pricing<sup>105</sup>.

The work of the JTPF is divided into 2 main areas: the Arbitration Convention and other transfer pricing issues identified and included in the JTPF's working program. The Arbitration Convention is a specific dispute resolution mechanism that provides for the elimination of double taxation by agreement between the contracting states. The Convention<sup>106</sup> has its origin in the proposal of the Commission for a directive to eliminate double taxation in the case of transfers of profits between associated enterprises in different Member States<sup>107</sup> and the White Paper on the completion of the Internal Market<sup>108</sup>. However, after long negotiations in the Council, the Commission proposal was transformed from a Directive into the inter-governmental Convention<sup>109</sup>.

<sup>100</sup> EUROPEAN COMMISSION (2012).

<sup>101</sup> ECJ, 322/81, *Michelin v. Commission*, § 57: "[F]inding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market" [emphasis added]. Also, ECJ, C-202/07 P, *France Télécom v. Commission*, § 105.

<sup>102</sup> EUROPEAN COMMISSION (2012) p. 16.

<sup>103</sup> However, it must not be inferred that the mere existence of a compliance program will prevent the Commission from intervening if an anticompetitive behavior is detected.

<sup>104</sup> Commission Decision 2007/75/EC, Article 1.

<sup>105</sup> In its first Decision, of 22 December 2006, the Commission set up the JTPF until 21 March 2011. In 2011, before the expiration of the Decision, the Commission adopted a second Decision, in order to set up a new expert group EU JTFP for the continuation of the work of the forum.

<sup>106</sup> Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, 90/436/EEC.

<sup>107</sup> Proposal of the Commission (1976).

<sup>108</sup> White Paper from the Commission to the European Council, COM(85)310 final.

<sup>109</sup> As explained in VOEGELE AND FORSTER (2006), the political decision to adopt a convention form was based on the collective hesitation to surrender a significant part of the Member States' fiscal sovereignty: (1) a convention only binds the Member States that have signed it –certain directives impose on all Member States the obligation of their implementation in domestic law–; (2) the Convention is ruled by international law –the directives are ruled by EU law–; (3) the Commission is neither entitled nor obliged to supervise the correct and timely implementation and compliance with the Convention's mandates –unlike in the case of the directives–;

To ensure a uniform interpretation and an effective application of the Convention, the JTPF worked on a Code of Conduct that was adopted by the Commission on 23 April 2004 and by the Council on 7 December 2004. On 14 September 2009, the Commission adopted a proposal for a revised code of conduct for the effective implementation of the Arbitration Convention. The proposal was based on the work of the JTPF from March 2007 to March 2009. It was on 22 December 2009 when the Council adopted it<sup>110</sup>.

### 3.2.2. Compliance programs

EU competition rules concern everyone who does business in the EU, as they apply directly to all undertakings that are active within the EU<sup>111</sup>. An ideal approach to the firms' compliance with competition law suggests that they must comply with it when conducting their businesses, but, in practice, firms should comply with competition rules because of the potentially high cost of non-compliance<sup>112</sup>.

The Commission has expressed its support to all compliance efforts by firms, as "they contribute to the firm rooting of a truly competitive culture in all sectors of the European economy"<sup>113</sup>. In fact, the Commission is eager to encourage firms to design an effective compliance program that prevents companies from infringing competition law. Therefore, the Commission constantly seeks to improve the accessibility of relevant legislation and information on EU competition rules.

In relation to the abuse of a dominant position through the establishment of exclusionary pricing strategies –be them predatory or excessive prices–, dominant firms have a special responsibility not to engage in abusive behaviors. Therefore, it becomes of major importance that they respect competition rules when conducting their practices, not to un-awarably engage in anticompetitive practices<sup>114</sup>.

## CONCLUSIONS

Tax law and competition law are the only branches of law that exert the highest potential direct influence on price through their policies, affecting inevitably the behavior of market operators. Both, through their policies, aim at achieving an ideal of market competitiveness. They regulate the market, which has proved to be imperfect. When assessing the unfair nature of firms' pricing strategies, a horizontal cross-pollination of the solutions provided by either of the branches can be inferred. As said, both branches pursue the same

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and (4) it is not possible to submit to the adjudicative jurisdiction of the EU courts unless all Member States submit to it –it is not presently the case–.

<sup>110</sup> Resolution of the Council (2009).

<sup>111</sup> EUROPEAN COMMISSION (2012) p. 9.

<sup>112</sup> The Commission can impose fines as high as 10% of the firm's annual worldwide turnover and it issues a press release whenever it has made a finding of an illegal conduct and it has fined the firm involved, what turns out to be bad press for the wrongdoer and it may have a detrimental impact on the reputation of the firm.

<sup>113</sup> EUROPEAN COMMISSION (2012) p. 20.

<sup>114</sup> The ignorance of the law will not shield them from the consequences of breaking it, but it must be admitted that the awareness of the rules is a precondition for an effective adherence to them.

objective in relation to unfair prices: designing adequate policies to monitor the pricing strategies of firms. It is clear that several divergences exist between both branches; however, those divergences do not render impossible the cross-pollination of the solutions of one of the branches for the problems of the other. Instead, the existence of divergences proves that there is some degree of comparability, since, in the absence of any resemblance, no comparison, be it positive –synergies– or negative –divergences–, could be operated.

The synergies outweigh the existing divergences between both branches. On one side, there is an undeniable tendency towards an administrative simplification. On the other, cooperation between public authorities and private firms is deemed essential to reduce the costs of resorting to an administrative procedure. The proceedings conducted either by tax authorities or by competition authorities to qualify a price as unfair require an efficient allocation of their resources. Competition and tax authorities must, at some stage of the proceedings, conduct a comparability analysis. Therefore, it is crucial to obtain sufficiently comparable information. Furthermore, the legal burden of proof is borne by the administrative authority that alleges the existence of an unfair price. Finally, authorities have encouraged firms to actively engage in the enforcement of the law, whether it is through their participation in the JTPF and the subsequent proposition of pragmatic, non-legislative solutions to the Commission, or it is through the adoption of compliance programs.

In any case, competition authorities lack a consistent evaluation standard comparable to the OECD one on transfer pricing. The existence of almost universally accepted guidelines, as OECD Guidelines, provides firms with a higher degree of certainty. Moreover, the absence of an initiative such as the JTPF does not permit the public-private sector cooperation to be as intense as it is in the tax law realm. Indeed, the Commission just commits itself to facilitate key information to firms, but not to formally advise or approve individual compliance programs.

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