

**Excessive Prices in Antitrust**  
**(Are you kidding ...)**

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# 0. Overview

Each expert made his case well

- Spiegel used regulated prices of Tnuva's sliced cheese as benchmark, and documented (meticulously as always ...) that prices of Tnuva's packaged cheese exceed benchmark by 'high' %, not explainable by cost differences
- Perlman (from summary of his opinions) offered the standard arguments that 'excessive prices' should not be an antitrust concern, but was constrained by Israeli law and policy stance (more on this below)

My discussion plan

1. Primarily, review main standard arguments and their relative strengths
2. Offer some comments on Spiegel in light of this review
3. Pose the open question: what *should* we do about 'egregious' cases?
4. Caution against the Israeli approach

# 1. Arguments Against Tackling ‘Excessive’ Prices via Antitrust

I’ll review three arguments

- A. No need to intervene because high prices are “self correcting”
- B. Protect Incentives: setting a bright line
- C. Determining if prices are excessive is hard

For an informative & broader discussion, see Spiegel 2018: “Antitrust Enforcement of the Prohibition of Excessive Prices: The Israeli Experience,” in Y. Katsoulacos and F. Jenny eds, *Excessive Pricing and Competition Law Enforcement*, Springer.

## A. High Prices Are “Self Correcting”

This argument is less convincing

- Market power can be durable
  - (But in such cases, like natural monopolies, we typically police conduct not through ATR but via sector regulator: prices, service requirements, ...)
- Entry decisions depend on expected *post entry* price, so high pre-entry price need not induce entry
  - But maximum price regulation of incumbent may discourage rather than encourage entry (e.g., low prices for wireline telcos in US delayed cellular)

## B. Protect Incentives: Setting a Bright Line

US antitrust: Monopoly position is OK if obtained legitimately via “skill, foresight or industry.” (*Alcoa*, 2<sup>nd</sup> Circ, 1945). Then, monopoly price is OK—to provide ex ante incentives (*Trinko*, US Supreme Court, 2004):

- *“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.”*

**Objection 1:** Incentive argument could justify any monopoly

**Reply:** US ATR distinguishes between monopoly arising from legitimate unilateral conduct vs. mergers or illegitimate conduct (collusion, exclusion)

- Regarding incentives, Fred Kahn supported line-sharing obligations with ISPs for telcos, whose investment was made under franchise monopoly regime, but not for cable companies that invested under unregulated regime

**Objection 2:** Tradeoff between providing incentives vs. tolerating ex post loss from high prices (to consumers and total welfare) => laissez faire is unlikely to be optimal

- Place burden on dominant firm to provide efficiency defense: a seemingly excessive price is justified by efficiency considerations
- Legal uncertainty for firms whether their prices will be found excessive can be reduced via safe harbors

**Reply:** We do tolerate uncertainty in various areas of ATR, under rule of reason; but we also have per se rules (e.g. against naked collusion)

- Here, a bright line of legality may, like democracy, be the worst system — except for all the others ...
- Requiring firms to justify that prices are not excessive ex post creates large hold-up risk, deters effort, and spawns costly fights over ‘right’ prices

## C. Determining if Prices are ‘Excessive’

Labeling a price as ‘excessive’ if it exceeds the ‘competitive price’ is not helpful: that benchmark is unobservable

Suppose we agree on the firm’s appropriate cost of capital (as under rate-of-return regulation)

Serious difficulties remain in determining if a specific price is excessive, beyond the standard problems of relying on accounting cost data:

**Survivorship Bias.** We observe only the successful products, not the failures; profit in this biased sample will overstate overall profit

- Major problem in pharma & biotech; yet often overlooked (e.g. political demands to disclose profit margin on individual drugs)

**Common Costs for multiproduct firms.** Efficient (Ramsey) and profit-maximizing prices depend on marginal costs *and* demand elasticities

- But proposed benchmarks for judging if price is ‘excessive’ ignore demand elasticities, e.g., use monopolist’s prices for (i) other versions of same good or (ii) same good sold in other markets, adjusted for cost differences
- Constraining price discrimination too much can be inefficient (e.g., creates risk of dropping lower-price markets / products)
- U.S. Robinson-Patman Act – that prohibits price differences to competing purchasers unless ‘cost justified’ – has caused many perverse effects (M. Schwartz, Antitrust Bulletin, 1986)

## 2. Comments on Spiegel

Takes as benchmark regulated prices for sliced cheese. Cites increased gap with deregulated packaged-cheese prices as evidence that latter are 'excessive'

### a) Are regulated prices the right benchmark?

- Cynic's definition of the common law:  
*A sin which was committed once, may be committed again with impunity ...*
- Price regulation in Israel has been criticized as "highly inefficient"
- If regulation was binding, natural to expect a rise after deregulation ...

### b) Is 2<sup>nd</sup> degree price discrimination not permissible?

- Sliced cheese is more of a 'luxury' item, priced higher – menus of price-quality options are a common form of 2<sup>nd</sup> degree p-disc'n

### c) Are the price differences 'large'? 50% differentials are common for different 'versions' of same good: business airfare vs economy, ....

### 3. What to do about ‘egregious’ cases?

Some cases of price increases for monopoly good are clearly egregious:

It was 2015 when **Martin Shkreli**, then CEO of Turing Pharmaceuticals and the notorious “pharma bro,” jacked up the cost of the lifesaving drug Daraprim by 5,000 percent. Overnight, its **price** tag skyrocketed from \$13.50 a pill to \$750. The move drew criticism from all corners.

*[https://www.washingtonpost.com/national/health-science/for-shame-pharma-bro-shkreli-is-in-prison-but-daraprim-price-is-still-high/2018/05/04/ade40860-4f7b-11e8-85c1-9326c4511033\\_story.html](https://www.washingtonpost.com/national/health-science/for-shame-pharma-bro-shkreli-is-in-prison-but-daraprim-price-is-still-high/2018/05/04/ade40860-4f7b-11e8-85c1-9326c4511033_story.html)*

Q. Would you have done anything differently? “I probably would have raised the price higher ...” <https://www.youtube.com/watch?v=NS9blbLrKv4>

And after his Congressional testimony, he tweeted:

“Hard to accept that these imbeciles represent the people in our government”

<https://www.politico.com/story/2016/02/martin-shkreli-congress-hearing-218725>



Martin Shkreli JOSHUA ROBERTS / REUTERS

“Pharma bro” Martin Shkreli, the “most hated man in America,” the man who raised the price of a life-saving drug 500 percent in a day, ... is giving the people what they want.

On Tuesday night, Shkreli tweeted that he’s **raffling off the opportunity for someone to punch or slap him in the face**—for a good cause: “If you donate to this site, you are entered into a raffle to slap/punch me.” The bids quickly topped \$10,000

<https://www.theatlantic.com/news/archive/2016/09/martin-shkreli-punch-face/502010/>

But bad cases make bad law ... So how to stop them without seriously damaging antitrust? US approach: swallow hard and accept egregious cases

Other approaches:

a) Sector regulator

- Not practical in most cases, nor desirable; avoid creating durable bureaucracy to regulate each industry

b) Price control agency

- Delegate price control to separate agency, where decisions transcend competition issues. Keep antitrust focused on promoting competition

c) Antitrust, but impose very high hurdles — contrast Israel (next)

## 4. Caveats on Israeli Approach

My understanding is that class actions may challenge excessive price if firm is a “monopoly” — 50% share of relevant market, but possibly even less

- So a firm with two strong rivals may be a “monopoly” ...
- Safe harbor if markup over accounting cost  $\leq 20\%$  is far too weak

Former head of Israeli Antitrust Authority wrote:

- *the prohibition of excessive pricing, if enforced in a coherent manner, can become as predictable to the dominant firm as many other antitrust violations.*

Alas, reality has disappointed — the floodgates have opened. Some 40 class actions are pending, in diverse products (Spiegel 2018, Table 1; Perlman email)

- Green tea; 1.5 L bottle of Coca Cola; Israeli couscous; sport betting; razor blades; Stolen vehicle recovery & tracking services; burial services (DWLoss?)
- Popcorn in cinemas, flight from TLV to Mumbai for time sensitive passengers ...

**Table 1** Pending class actions concerning excessive pricing

	The product/service	The monopoly	When was the class action filed?
1.	Cottage cheese	Tnuva	July 2011
2.	White cheese and heavy cream	Tnuva	February 2014
3.	Natural gas	Noble energy Mediterranean ltd.	June 2014
4.	Prepackaged yellow cheese	Tnuva	November 2014
5.	Milky (dairy chocolate pudding) and dairy desserts	Strauss	April 2015 and May 2016
6.	Stolen vehicle recovery and tracking services	Ituran	May 2015
7.	Infrastructure to transmit data to the tax authority	Bezeq	August 2015
8.	Communication services	Bezeq	November 2015
9.	Cigarettes	Philip Morris	March 2016
10.	Cocoa powder	Strauss	May 2016
10.	Green tea	Wissotzky Tea	May 2016
11.	Electricity	The Israel Electric Corporation	May 2016
12.	Margarine	Unilever	June 2016
13.	Instant coffee	Strauss	July 2016
14.	1.5 L bottle of Coca-Cola	The Central Bottling Company	August 2016
15.	Israeli couscous	Osem (Nestle)	October 2016
16.	Online platform for trading used cars	Yad 2	October 2016
17.	Sport betting	Israel Sport Betting Board	November 2016
18.	Razor blades	Gillette	May 2017
19.	Passenger boarding bridges	Civil Aviation Authority of Israel	July 2017
20.	Baby formula	Materna (Nestle)	September 2017
21.	Coca-Cola Zero and Coca-Cola Diet	The Central Bottling Company	November 2017
22.	Burial services	Chevra Kadisha	October 2017 and November 2017