

# A shot in the arm or an overdose? Excessive pricing cases in UK pharma

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# Why competition specialists (used to) hate excessive pricing cases...

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*“The Commission in its decision-making practice does not normally control or condemn the high level of prices as such. Rather it examines the behaviour of the dominant company designed to preserve its dominance, usually directly against competitors or new entrants who would normally bring about effective competition and the price level associated with it.”*

European Commission, XXVIIth Commission Report on Competition Policy 1997

*“in its practice, the Commission has been extremely reluctant to make use of that provision against (allegedly) high prices practiced by dominant undertakings. Rightly so, in my view. In particular, there is simply no need to apply that provision in a free and competitive market: with no barriers to entry, high prices should normally attract new entrants. The market would accordingly self-correct.”*

AG Wahl opinion, “Biedrība ‘Autortiesību un komunikēšanās konsultāciju aģentūra – Latvijas Autoru apvienība’ V Konkurences padome

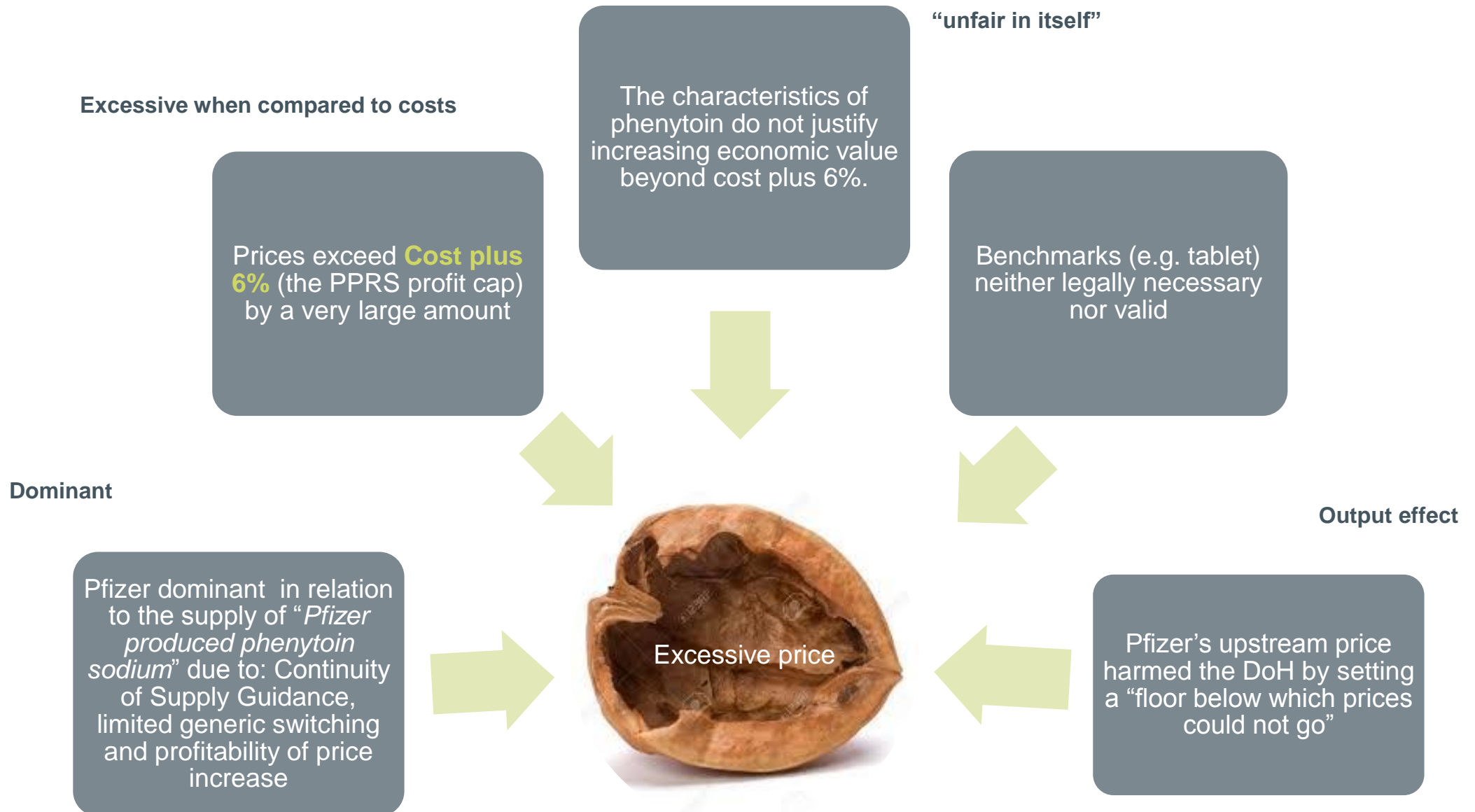
# Why economists hate excessive pricing!

- Profits incentivise entry, innovation, dynamic competition
- Price above “**normal competitive levels**” may result in economic inefficiency and harm consumer. But how to define?



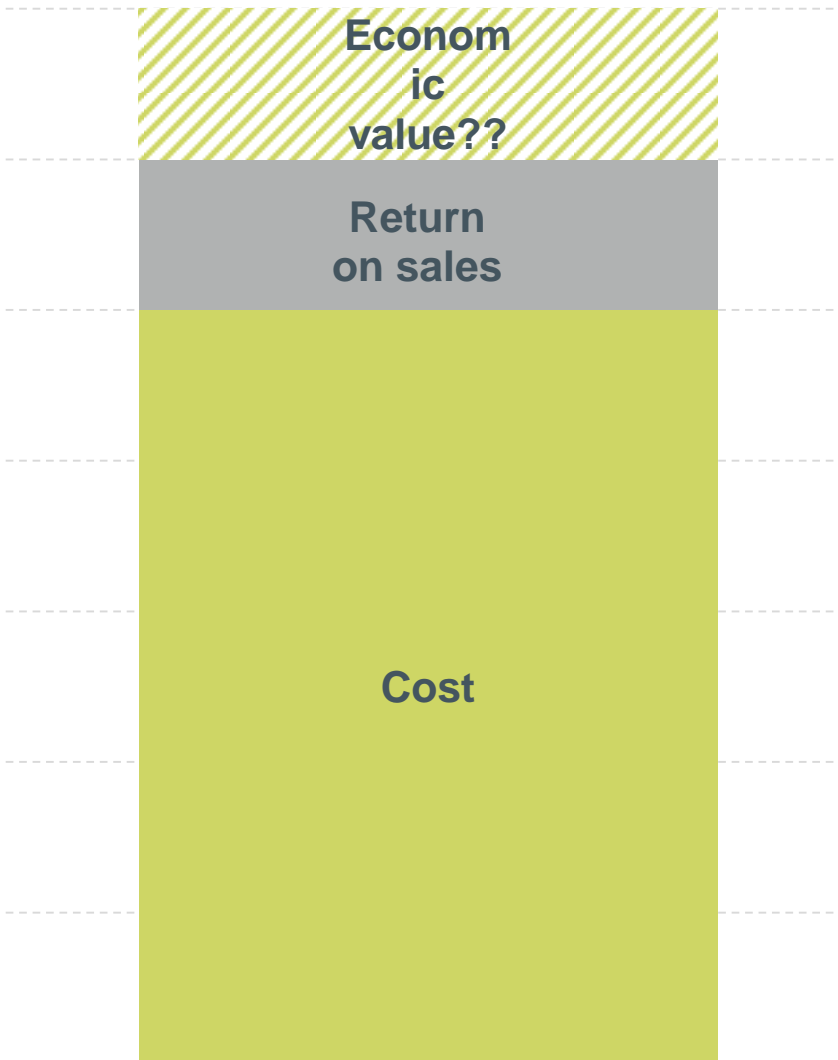
- (Very) old, off-patent, AED, produced by Pfizer
- Narrow therapeutic index raises questions about ease of switching across products, and even different formulations phenytoin sodium
- Pfizer sold the MA to Flynn in 2012, but carried on producing the product and selling it wholesale to Flynn
- Flynn “debranded” the drug, leading to a shift in the applicable regulatory framework
- Subsequently, a significant increase in the price charged for the product (2600%)
- But price derived from the benchmark for the phenytoin sodium tablet (which had been set following negotiations with DH)

# The CMA's case against Pfizer and Flynn in a nutshell



1. **Economic Value – what is it and how do we measure it?**
2. **United Brands Limb 2: the and/or question and the role of comparators**
3. **What to do when faced with multiplicity of benchmarks?**

- **United Brands:** A price is unlawful if “*it has no reasonable relation to the economic value of the product*”
- But economic value is defined as the price that consumers are willing to pay!
- Does this concept preclude the possibility of an excessive price?

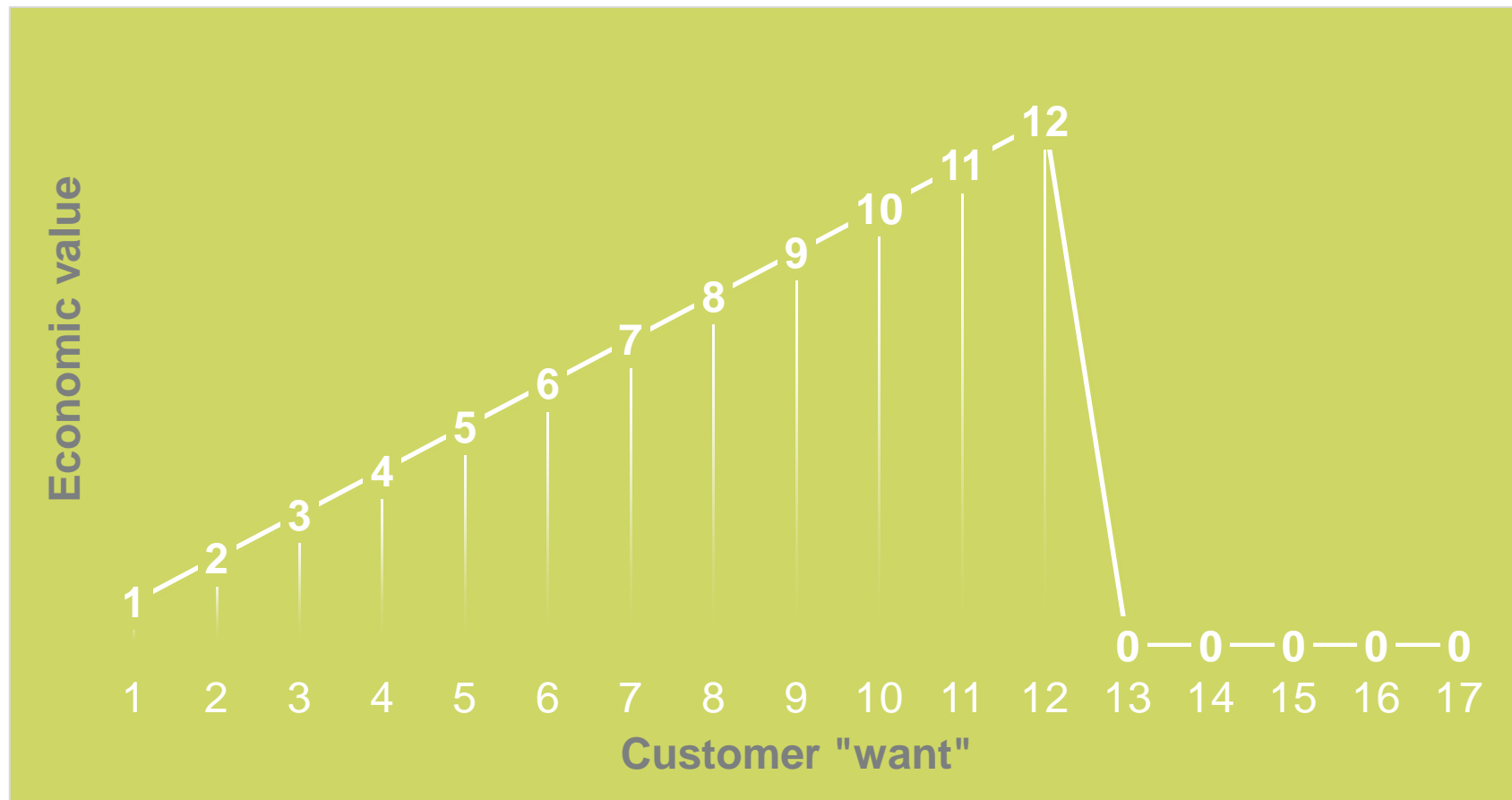


- CMA treats economic value as a potential “add-on” to cost plus
- Decided on product characteristics (United Brands “unfair in and of itself”):
  - Old, Off Patent
  - Third line treatment
- No additional economic value *credit*
- *...notwithstanding value to customers who are stabilised on it*



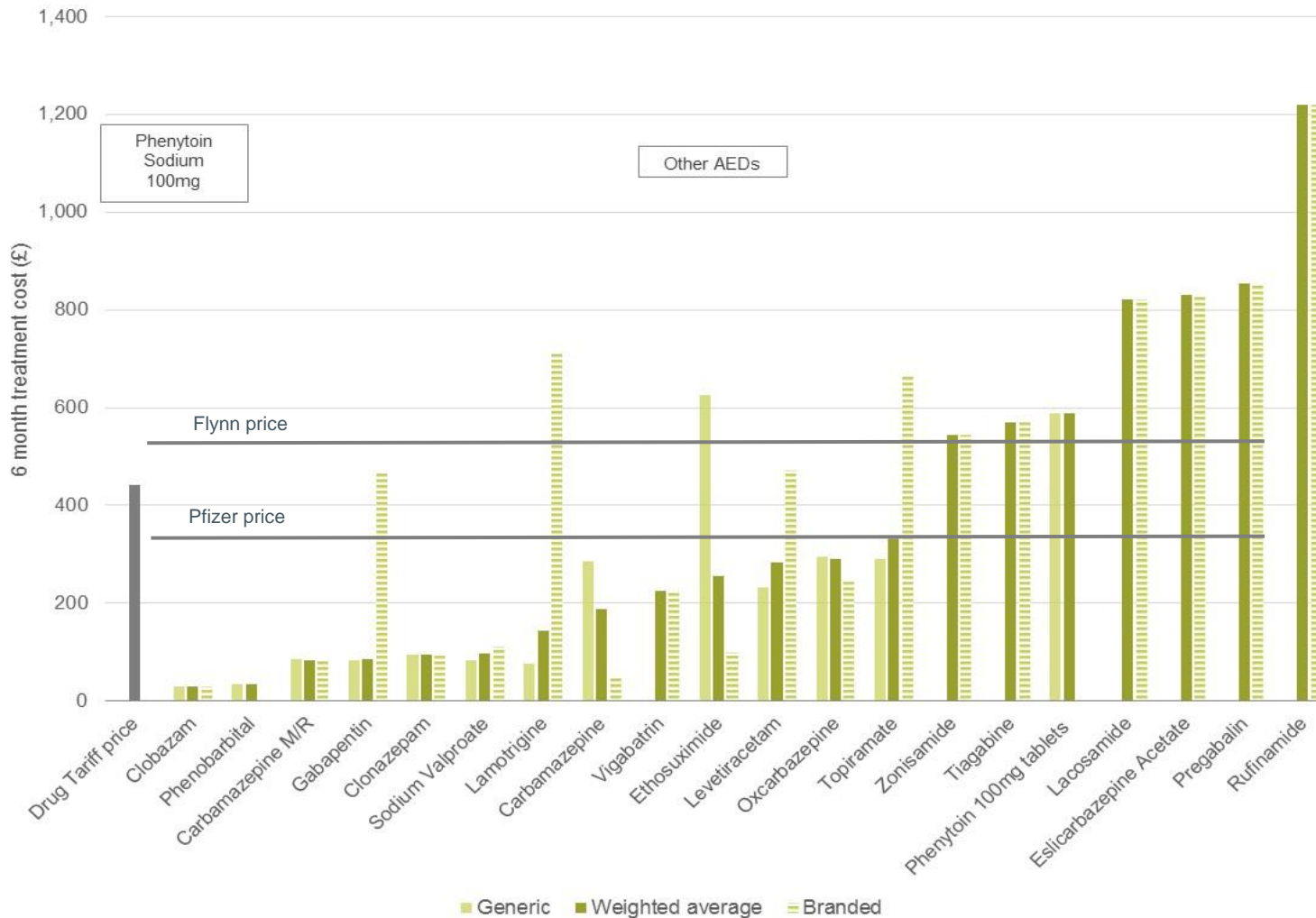
# Economic value (3)

- If economic value is meant to capture the demand side (brand value, customer “liking” for the product), why is “want” rewarded but not “need”?



- How to interpret United Brands Limb 2?
  - **United Brands Limb 1:** “*the difference between the costs actually incurred and the price actually charged is excessive*”
  - **United Brands Limb 2:** If yes (ii) the price imposed “*is either unfair in itself **OR** when compared to competing products*”
- CMA reading:
  - price is unfair in itself – no need for comparators
  - comparators must be in the same market
- But from an economic perspective, products in the *same market* would be tainted comparators for “competitive” price

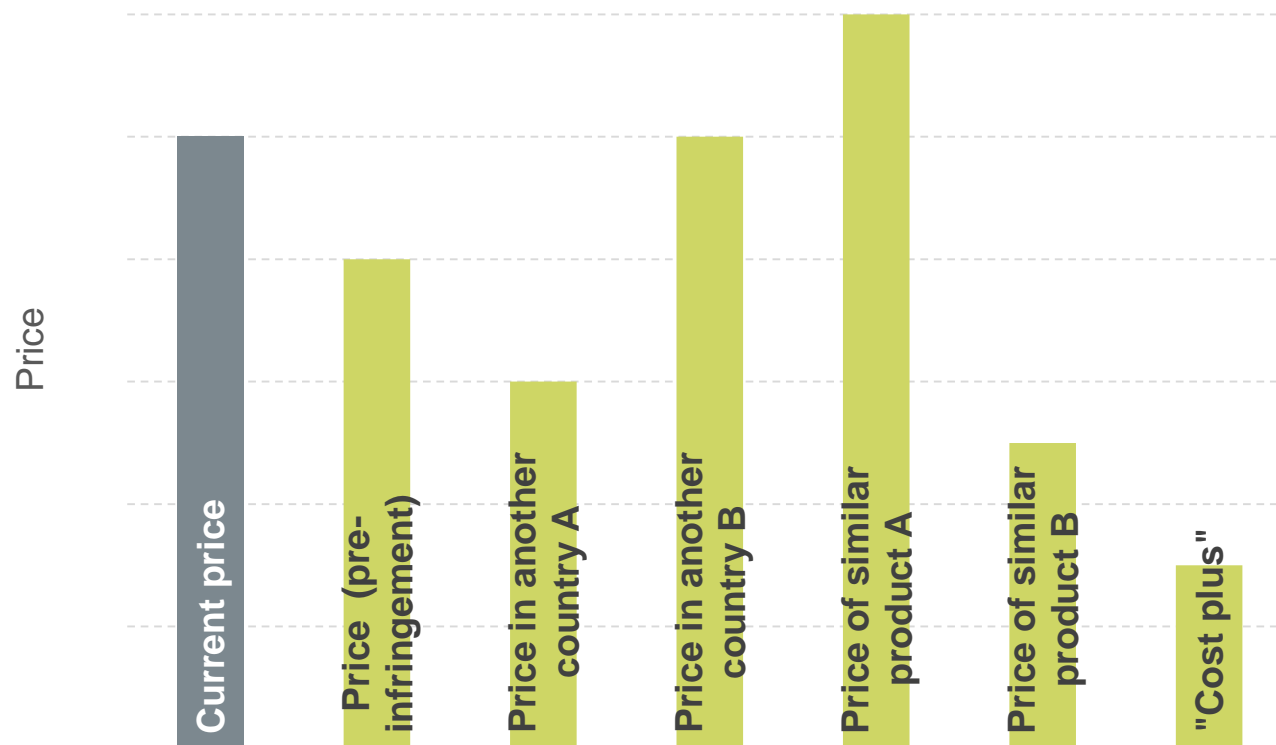
Benchmarks (prices of similar products set under competitive market conditions) are the most obvious means of testing if a price is excessive



- But the CMA dismisses that evidence because:
  - United Brands Limb 2 does not need to be assessed if Limb 1 is met
  - The tablet was “not in the same market” (!) and (allegedly) also priced excessively (despite CMA not investigating)
  - Other AEDs may not be a like for like comparison (disputed)
  - International price comparisons lead to different conclusion

# Interesting questions: Multiplicity of benchmarks

- AG Wahl (very sensibly) recommends multiple benchmarks, noting limitations of each method
- But what to do when those benchmarks point in different directions?



- The CMA Decision sets out a highly formulaic approach to excessive pricing in the pharmaceutical industry
  - Cost plus 6% the benchmark + characteristics assessment sufficient for excessive pricing finding
  - Large margins above that level presumptively excessive
- By so doing, it sets a test that many products seem likely to fail
- If followed as precedent, significant potential for further cases (across Europe)
- What about the more relevant/ informative tests: i.e. benchmarking?

