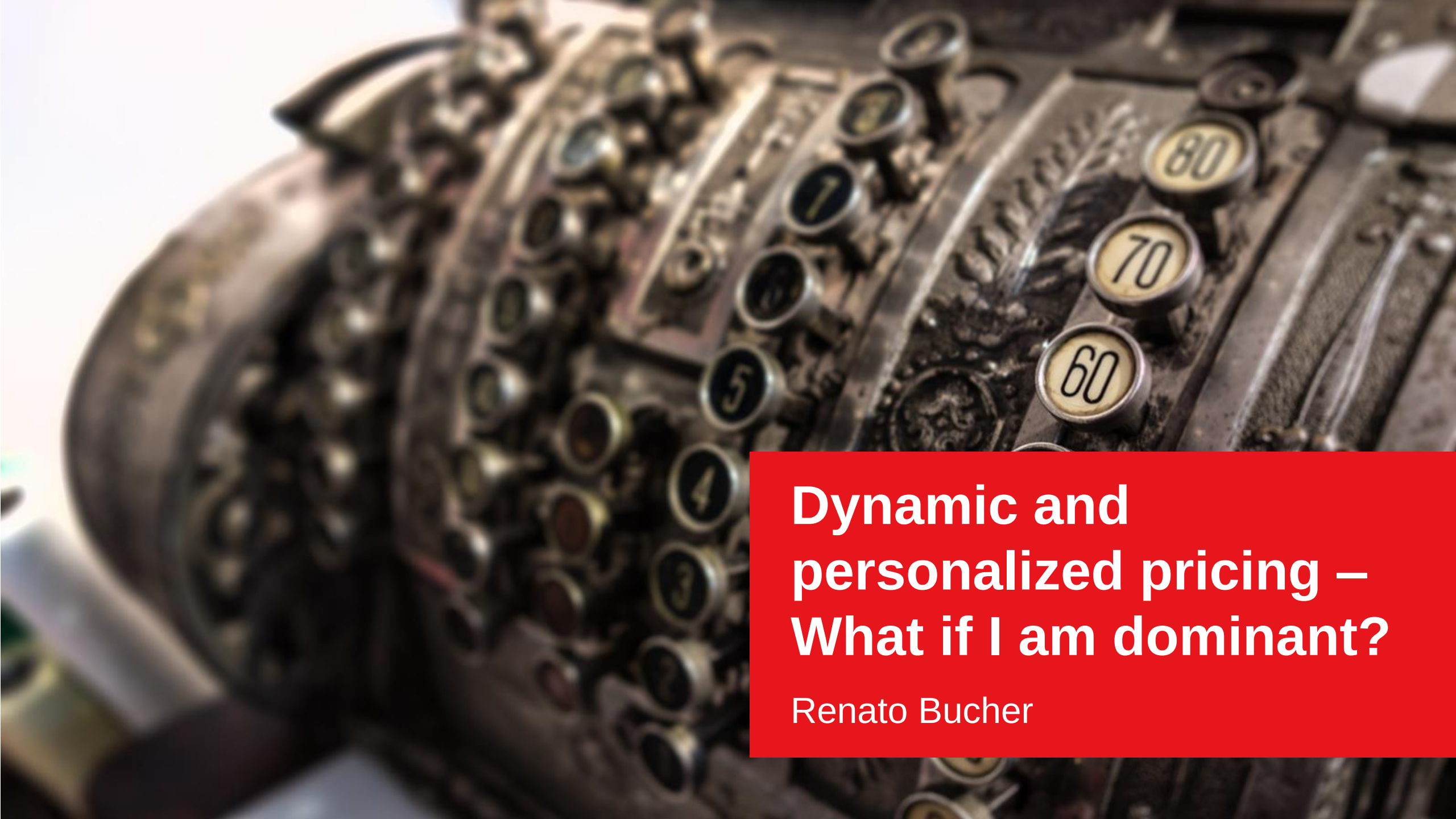


A close-up, slightly angled photograph of an antique mechanical calculator. The device is made of dark metal, possibly cast iron, and features a series of cylindrical dials or wheels. Some of these dials are clearly visible and numbered in black ink on a light-colored background. The numbers shown include 60, 70, and 80 on the right side, and 4, 5, 6, 7, and 8 on the left side. The machine's complex internal mechanism, including gears and levers, is partially visible through the frame of the dials. The lighting is soft, highlighting the metallic textures and the precision of the engineering.

Dynamic and personalized pricing – What if I am dominant?

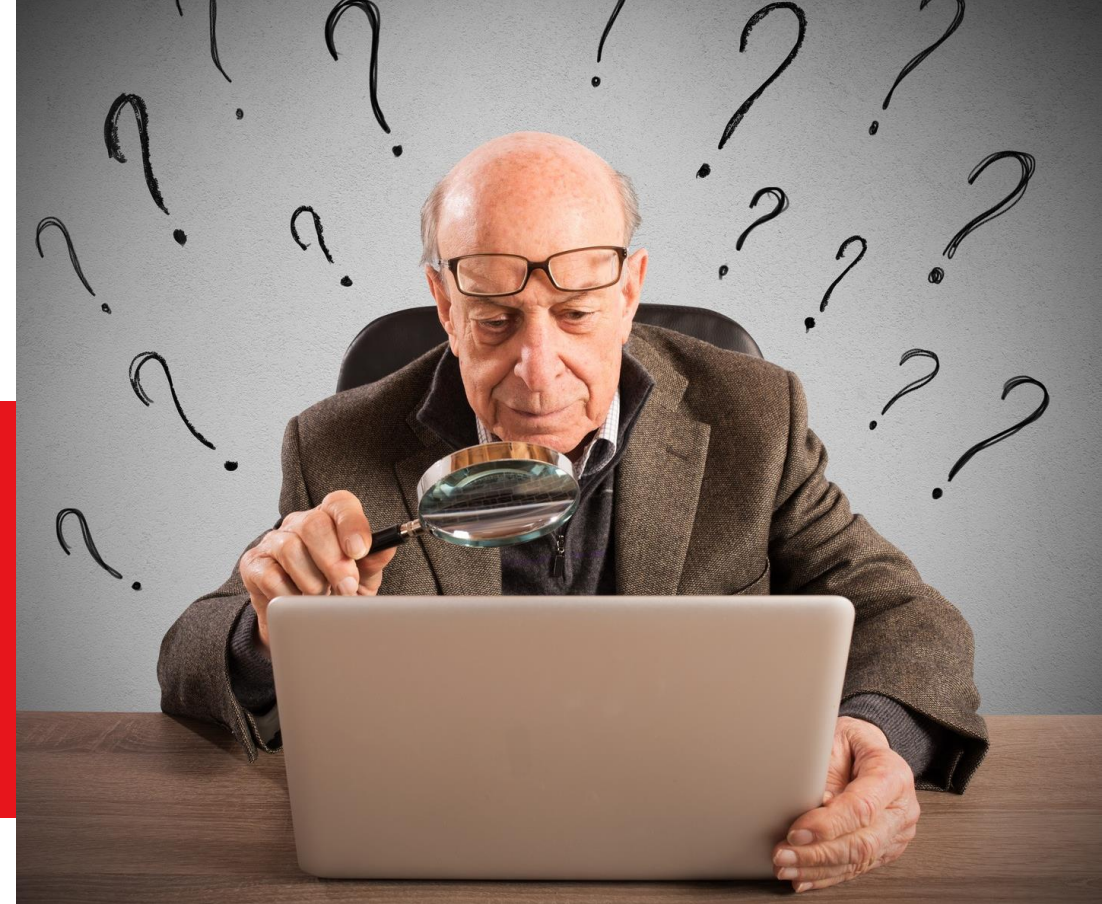
Renato Bucher



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May dominant undertakings apply dynamic or personalized pricing strategies?

- Legal landscape
- Dynamic pricing?
- Personalized pricing?
- Discussion



The legal landscape / European perspective (TFEU)

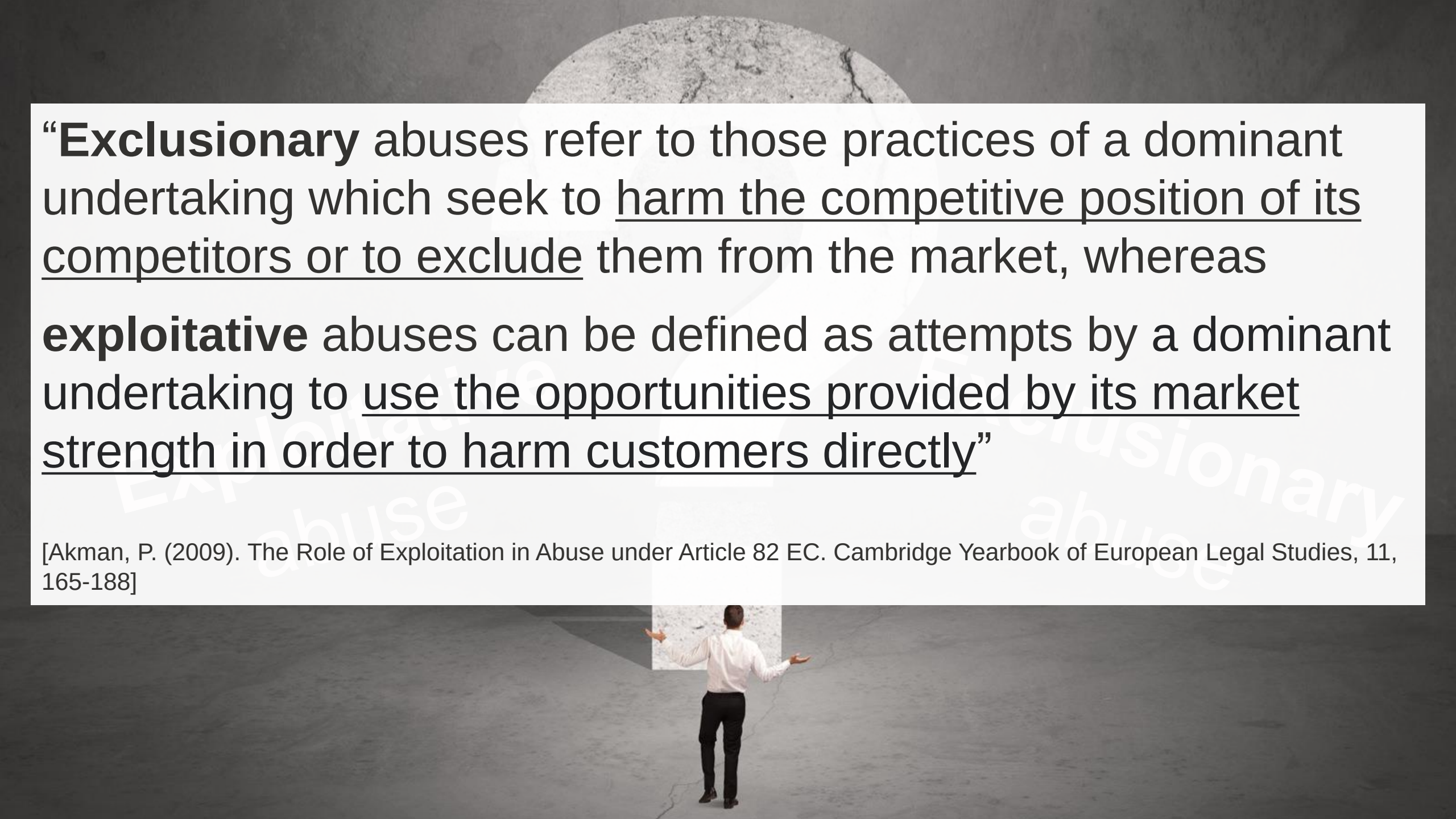
Article 102

(ex Article 82 TEC)

Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly **imposing unfair purchase or selling prices** or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) **applying dissimilar conditions to equivalent transactions** with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.



“**Exclusionary** abuses refer to those practices of a dominant undertaking which seek to harm the competitive position of its competitors or to exclude them from the market, whereas

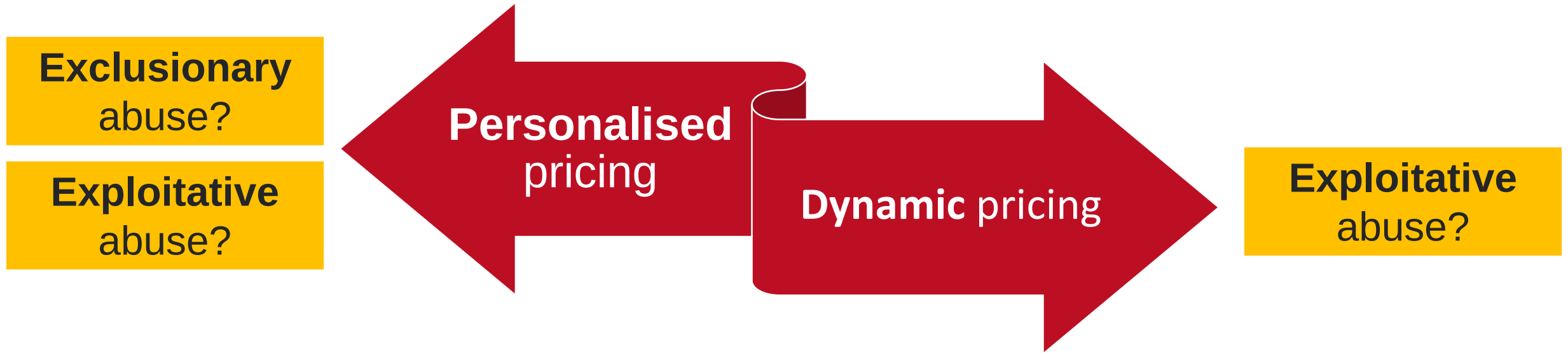
exploitative abuses can be defined as attempts by a dominant undertaking to use the opportunities provided by its market strength in order to harm customers directly”

[Akman, P. (2009). The Role of Exploitation in Abuse under Article 82 EC. Cambridge Yearbook of European Legal Studies, 11, 165-188]



« **Personalised pricing** is different from "dynamic pricing", such as adjusting air fares or hotel prices based on the date of booking or based on real-time supply and demand. While two people sitting next to each other on a plane might have paid very different prices for similar seats, there is a difference between the person who booked early and the person who booked late. The person who booked late kept her options open longer and therefore enjoyed flexibility. The person who booked early reduced the flexibility of her travel plans earlier. »

Personalised, dynamic, dynamic, personalised...?



Does dynamic pricing amount to an exploitative abuse? United Brands (CJEU, C-27/76, 1978)

- 248 The imposition by an undertaking in a dominant position directly or indirectly of unfair purchase or selling prices is an abuse to which exception can be taken under Article 86 of the Treaty.
- 249 It is advisable therefore to ascertain whether the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.
- 250 In this case charging a price which is excessive because it has **no reasonable relation to the economic value of the product supplied** would be such an abuse.

Does dynamic pricing amount to an exploitative abuse? United Brands (CJEU, C-27/76, 1978)

- 251 This excess could, *inter alia*, be determined objectively if it were possible for it to be calculated by making a comparison between the selling price of the product in question and its cost of production, which would disclose the amount of the profit margin; however the Commission has not done this since it has not analysed UBC's costs structure.
- 252 The questions therefore to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products.

Does dynamic pricing amount to an exploitative abuse?

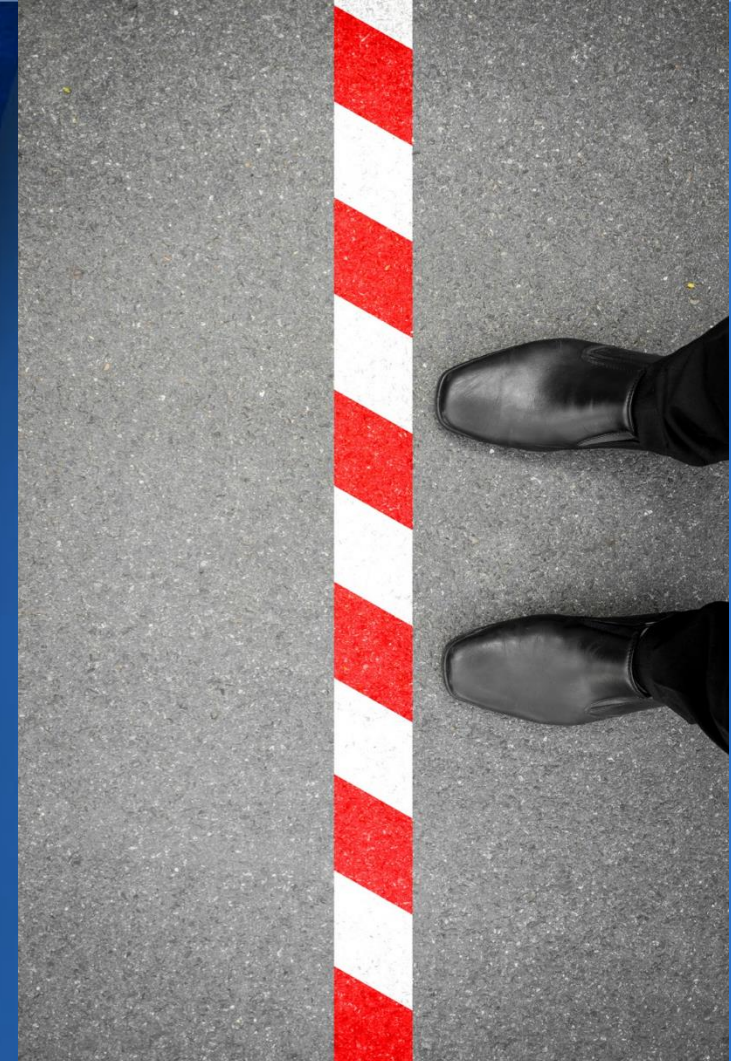
Excessive profit margin

+

Price unfair
„in itself“

or

Price unfair
compared to
competing products



Does dynamic pricing amount to an exploitative abuse?



- **Strong position of Air Berlin** in market for domestic flights
- October 2017: **grounding of Air Berlin**
- up to **40% loss of capacity** following bankruptcy, until market entry of EasyJet in January 2018
- Short-term **monopoly by Lufthansa**
- **25-30% price increase** in November and December 2017
- Several **complaints** filed with German competition authority (*Bundeskartellamt*)

Does dynamic pricing amount to an exploitative abuse?



- German competition authority **refrains from initiating formal investigation** against Lufthansa:
 - Reduced capacity leads to price increase
 - Price increase only 25-30%

«Irrelevant whether price increase results from an algorithm or human intervention – algorithms do not relieve undertakings from their responsibility»

Does personalized pricing amount to an exclusionary abuse?

Discrimination. Article 102 contains a list of examples of abuses. One of those examples, Article 102(c), prohibits "applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage". For this example to apply, there has to be a relationship of competition between the favoured and disfavoured trading parties, in their own relevant market.²⁶ This is also called "secondary-line" price discrimination. However, that list of examples in Article 102 is merely indicative, not limitative, so one may take a broader view of the definition of an "abuse" than the strict drafting of those examples.

Does personalized pricing amount to an exploitative abuse?

Exploitation. With regard to the possibility of an exploitative abuse, a price is excessive under Article 102 where it is "disproportionate" or "excessive" "in relation to the economic value of the service provided" or other factors.²⁷ In recent years, the European Commission has taken action in relation to concerns about excessive prices.²⁸ However, in relation to personalised pricing, it is not clear that the price charged to wealthier consumers would be excessive as such, according to the standards used in precedents in this area. Under personalised pricing, the price difference between two consumers may be subtle, for example 60 euros for Mr A for a tennis racquet, as in the example above, and 70 euros for Mr B.

Hypotheses



**Personalized
pricing for
trading
partners**



**Personalized
pricing for
(European)
consumers**



**Dynamic pricing, if
such pricing does
not lead to «overall»
excessive profits**

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