

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Excessive Pricing in Pharmaceutical Markets - Note by BEUC****28 November 2018**

This document reproduces a written contribution from BEUC submitted for Item 9 of the 130th OECD Competition Committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at
www.oecd.org/daf/competition/excessive-pricing-in-pharmaceuticals.htm

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

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BEUC

1. Introduction

1. BEUC welcomes the discussion on the role of competition law enforcement in the field of excessive pricing of medicines.
2. In general, cases of excessive prices are rare because competition authorities are cautious due to the complex assessment of what constitute an excessive price and the risks of type I errors (over-enforcement). However, the existing cases in Europe reveal that under certain circumstances intervention is needed, in particular when a firm takes advantage of its dominant position to impose a price on its customers that economically is not justifiable¹.
3. In the field of pharmaceuticals, we have seen a number of cases that demonstrate the challenges of enforcing competition laws *e.g.* through the definition of what can constitute an excessive price but, at the same, the important role that competition authorities play in addressing these behaviours which jeopardise not only the economic interests of payees but also the right of patients to affordable healthcare.
4. This is particularly important if we take into account that one of the objectives of Article 102 TFEU is to protect customers from exploitative behaviours applied by firms in a dominant position, for example in the form of excessive prices. It is worth noting that a high price set by a firm in a dominant position does not automatically lead to an infringement of competition laws. On the contrary, there could be different factors explaining high-prices. What Article 102(a) prohibits is firms making use of their market power to obtain a price which in absence of that conduct would not have been possible to get.
5. Of course, the enforcement of this provision in the field of pharmaceutical is surrounded of many practical challenges, including the application of the *United Brands*² two-step test³ and the selection of the appropriate methodology to identify the excessiveness of a price that is relevant for a competition law assessment. However, this should not deter competition authorities from looking into potential abuses of dominant position in markets of products with limited or no substitutability, which is a characteristic often found in life-saving medicines.

2. Experience from national consumer organisations

6. BEUC members have been closely following the evolution of prices in the pharmaceutical sector. One of their tasks has been to identify the existence of price hikes

¹ See M. Colangelo and C. Desogus, “Antitrust Scrutiny of Excessive Prices in the Pharmaceutical Sector: a Comparative Study of the Italian and UK Experiences”, *World Competition: Law and Economics Review*, Vol. 41, No. 2, 2018

² C-27/72, *United Brands Company and United Brands Continental BV v Commission*

³ Accordingly, first, the excessiveness needs to be established in relation to the difference between the selling price and the product’s cost of production and, second, whether the price is unfair.

that *a priori* cannot be explained because the R&D costs have been already recouped (for example upon expiration of the IP protection). This was the case of the Aspen Pharma investigation initiated in Italy when our member Altroconsumo sent an inquiry to the Italian Competition Authority in 2013 after the consumer organisation received several complaints by individual consumers⁴. As a result, Aspen Pharma was fined in 5m EUR for abusing its dominant position when negotiating the re-categorization of its ‘Cosmos’ anticancer drugs⁵. Similar monitoring activities have been carried out by our members Test-Achats⁶ and OCU⁷ in Belgium and Spain respectively. The European Commission is currently looking into whether Aspen has abused a dominant market position in breach of EU antitrust rules in other countries of the EEA⁸.

7. Although this case, like others brought in the UK (*Flynn and Pfizer*) and Denmark (*CD Pharma*), involved off-patent drugs, there could be also situations in which the prices of new innovative drugs can be unreasonable in relation to the investments in R&D and the benefits of the new drug in comparison to pre-existent treatments. In this context, one of the main barrier consumer organisations have faced when assessing the excessiveness of a price related to the lack of transparency from the pharmaceutical companies’ side regarding R&D costs. One of the ways to obtain an estimation about such costs has been following the acquisitions of small labs which developed molecules that later developed into blockbuster medicines since this information can be deduced from financial reports. However, apart from these cases, it is very difficult to obtain reliable information about the real R&D costs.

8. Another indicator of excessiveness can be given by differences between the prices set across member states along the lines of the recent AKKA/LAA⁹ ruling of the European Court of Justice. In this regard, consumer organisations in different member states can collect data about the prices and compare them post purchase power parity adjustments. This can provide a first indication of excessiveness if in one country the price is ostensibly higher than in others with similar social-economic conditions.

⁴ See L. Crisigiovanni, “Lisa’s story and the price of anti-cancer drugs”, <https://www.beuc.eu/blog/lisas-story-and-the-price-of-anti-cancer-drugs/> (accessed on 23 November 2018)

⁵ Decision No. 26185 of 29 September 2016

⁶ Test-Achats, “Chantage de la firme pharmaceutique Aspen sanctionné”, <https://www.test-achats.be/action/espace-presse/communiqués-de-presse/2016/aspen> (accessed on 23 November 2018)

⁷ OCU, “Multa millonaria a la farmacéutica Aspen”, <https://www.ocu.org/salud/medicamentos/noticias/multa-aspen>

⁸ European Commission, “Antitrust: Commission opens formal investigation into Aspen Pharma’s pricing practices for cancer medicines”, http://europa.eu/rapid/press-release_IP-17-1323_en.htm (accessed on 23 November 2018)

⁹ C-177/16, *Autortiesību un komunikēšanās konsultāciju aģentūra/Latvijas Autoru apvienība v Konkurences padome*