

Aspen Excessive Pricing in pharmaceuticals

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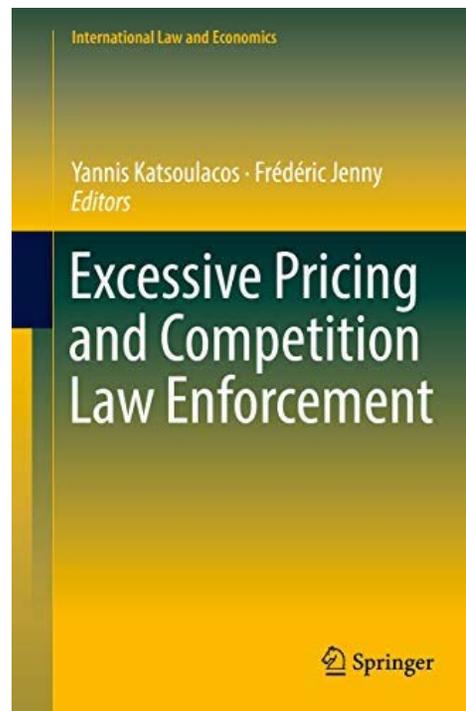
General considerations

- Excessive price cases are hard
 - Cost is hard to measure (e.g., how do you allocate common costs)?
 - How high a price should be to be deemed “excessive”?
 - A ban on excessive pricing may have a chilling effect on investment
 - We still know little about the consequences of intervention, so maybe it’s better not to go after excessive pricing

- But in this case:
 - GSK did not lose money, so the price was above cost even before the increase (no need to measure cost)
 - The price increase is 300%-1,500% (nobody will argue that this is not substantial)
 - Aspen did not develop anything; they bought the drugs from GSK
 - The relevant consumers here cancer patients who need protection badly and their benefit clearly outweighs any cost due to type 1 errors (falsely not approving a price increase)

“Excessive Pricing and Competition Law Enforcement,” Katsoulacos and Jenny (Eds.), 2018

- More considerations, as well as the treatment of excessive pricing in various countries, appears in the following recent book (<https://www.springer.com/us/book/9783319928302>)



The main arguments of Aspen

- Aspen appears dominant only because prices are so low that consumers never bothered to look for substitutes (a “reverse cellophane fallacy”)
 - The devil is in the details... Do we really know about substitutes?
 - SSNIP: a huge price increase indicates that Aspen may not believe there are good substitutes (o/w many consumers will switch once prices increase by 300%-1,500%)
 - The “silent majority fallacy”: suppose the drugs have good substitutes for some patients but not others; shouldn’t antitrust protect the latter group? (in a sense a ban on excessive pricing is meant to help those who cannot help themselves by switching)

- The price was not raised for many years
 - Fine, but GSK owned the drugs from 1995-2009 and did not lose money, so why raise the price?
 - Anyway what “justifies” a price increase other than “an exercise of market power” and the desire to make more money (nothing is wrong with that so long as the price is not “excessive”)?

The main arguments of Aspen

- The price is much higher in other European countries
 - But how do we know that the price is “right” in other countries, especially as its all above cost?

- The price was negotiated with AIFA
 - Can regulation be a defense against antitrust scrutiny? (yes in the Bezeq int'l case in Israel)
 - Aspen threatened to exit the market
 - Was the threat credible? If so, maybe Aspen is right that the profit is not sufficiently large (this is supported by the ICA admission that there was no threat of entry; if the market is profitable why not enter?)
 - But now that the ICA won, does Aspen indeed plan to exit (if not, the threat was a bluff)

- The real consumer who pays the excessive price is the Italian NHS, so arguably there's a monopsony on the consumer side
 - The ICA does not believe the NHS has power vis-à-vis Aspen because if they exit the patients are in a bad shape
 - The whole thing is a bit cynical given that exit may be a death sentence to some patients (this is not your DWL harm; its real death)

Economic value

- Aspen claims that economic value = price
- But which price?
- If economic value = actual price, the economic value can never be above the price \Rightarrow firms can never be convicted
 - This is totally unhelpful
- David Gilo: economic value = competitive price
 - How do we know what the competitive price is?
 - What if we have vertical product differentiation so we cannot have a competitive price ?
 - What if we have moral hazard so the price has to be sufficiently high to ensure high quality?
- How about comparing aggregate consumer surplus with profits or producer surplus? (not easy to do but we understand the concepts)

When are prices excessive?

- Judge Potter Stewart: "I shall not today attempt further to define the kinds of material I understand to be ... ["hard-core pornography"], and perhaps I could never succeed in intelligibly doing so. But *I know it when I see it*"
- Finkel (2001): Defining what's fair is tricky but "Most often there is agreement over unfairness, and most cases are not hard cases" (albeit there are outliers)
- Kahneman, Knetsch, and Thaler (AER1986):
 - 82% of subjects think its unfair to raise the price of shovels after a snow storm
 - 91% think its unfair to raise rent after learning that the renter got a job near the apt. and is less likely to leave
- Frey and Pommerehne (JEBO, 1993): 78% of subjects believe its unfair to raise the price of water on a hot day
- Xia, Monroe, and Cox (JM, 2004): "... perceptions of fairness are induced when a person compares an outcome ... with a comparative other's outcome... A reference other may be ... the individual himself relative to his experiences from an earlier point in time..."
- By these standards Aspen's price increase is unfair

Regulation vs. antitrust enforcement

- Many commentators (e.g., Evans and Padilla (2005) and Motta and de Streel (2007)) claim that price regulation is the solution to high prices
 - Ex ante and forward looking (clear rules and no uncertainty) while antitrust is ex post and backward looking (unclear rules and huge uncertainty)
 - Regulators have the expertise to set price while antitrust agencies and courts do not typically know how to set prices and cannot continue to follow the price over time and update it when needed
 - Regulation involves a bargaining process while antitrust enforcement is adversary

- The ICA argues that regulation failed and that AIFA was unable to deal with Aspen's threats ... Regulation is not always the right answer

Gilo and Spiegel (IJIO 2018)

- Ex post regulation of excessive prices through antitrust enforcement:
 - Restrains the dominant firm ex ante (in case it has to lower prices later say after entry of rivals)
 - Discourages the dominant firm ex post from lowering prices (that may expose past prices as excessive)
 - Encourages entry because the dominant firm cannot lower prices by much in response to entry

- Could it be that Aspen was worried that the low price in Italy will expose its high prices elsewhere as excessive?

- Was Aspen worried about parallel imports from Italy to other EU countries?

Bottom line

- As usual, what seems clear from a distance becomes more murky when you learn more

- Aspen has some good arguments

- But given
 - the nature of the product (blood cancer drugs)
 - Aspen's cynical threat to exit unless they make more money (and thereby putting patients' lives at risk)
 - the size of the price increaseit's pretty clear to me that if excessive pricing should be an antitrust violation, this is exactly the right case to enforce the ban