

Excessive pricing: a differential diagnosis

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The rise and rise of excessive pricing cases...

- **Aspen** (ICA, EC)
- **LKKA/LAA** – opinion of AG Wahl (C-177/16) and Court ruling
- UK:
 - **Pfizer/Flynn** (CMA, Competition Appeals Tribunal)
 - Further pipeline of pharma cases (presumably awaiting outcome of Court of Appeal ruling)

~~Introduction to~~ Failings of the economic and legal tests

- **An economic definition**
 - A price is excessive if it is significantly and persistently above the levels that would be expected to prevail under conditions of normal, effective, competition
 - But economics provides no reliable way to establish what price would prevail under normal conditions of competition
- **Legal test**
 - An excessive price “*has no reasonable relation to the **economic value** of the product supplied*” (United Brands)
 - Risks defining excessive pricing out of existence

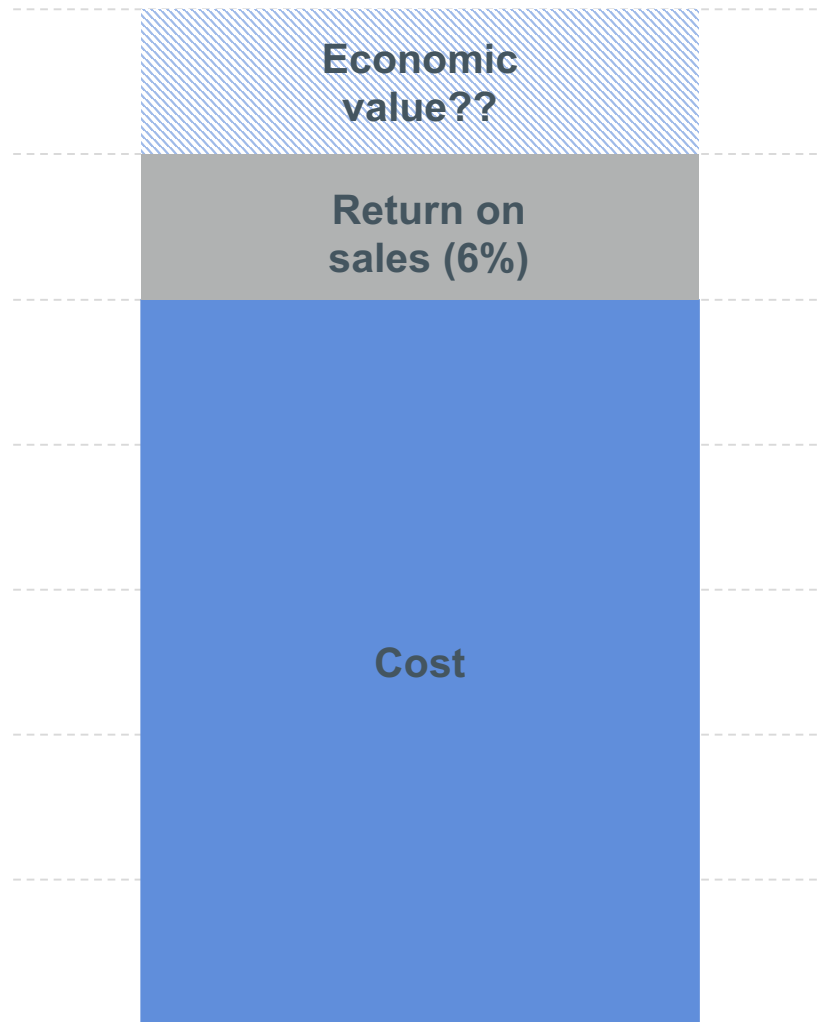
Key issues (1): Limitations of cost-based benchmarks

United Brands:

- (1) Is the difference between the *costs* incurred and the price charged excessive?
and if so
(2) is the price “*either unfair in itself or when compared to competing products*”.

- Approach to the CMA’s “cost plus 6%” benchmark was a key area of dispute in Pfizer/Flynn
- Seen as a “bottom up” cost benchmark to build up a measure of price in perfectly competitive markets
- CAT view “*Any approach should be premised on a comparison with prices likely to have pertained in normal and sufficiently effective competition not idealised competition*”

Key messages (2): Treatment of “economic value”



CAT view: *“There is clearly some economic value to be derived from the significant contribution of phenytoin to treating epilepsy in a significant number of patients”*

But guidance on how to assess this is limited

Key messages (3): Benchmarks – the holy grail?

United Brands (253) “Other ways may be devised - and economic theorists have not failed to think up several - of selecting the rules for determining whether the price of a product is unfair”

- Prices of similar products in competitive markets can offer a pragmatic benchmark
- Recent judgments underline the importance of such benchmarks
 - **LKKA/LAA:** prices in other countries form an appropriate test
 - **Pfizer/Flynn:** obvious benchmarks cannot be ignored
- **But unanswered questions:**
 - What is the standard for a sufficiently close comparator product/market?
 - What to do when different benchmarks point in different directions?

Dominance: a necessary condition for or a necessary consequence of abuse?

- Focus on cases where significant price increases are observed plays a role in dominance assessments
- Very narrow market definitions in part based on a finding of a significant and sustained price increase relative to alternative products (without sufficient volume losses)
- Dominance assessment is inherently circular for excessive price abuses
 - **Market definition:** can a hypothetical monopolist profitably increase price (above the competitive level)?
 - **Excessive pricing:** is the observed price above the competitive level?
- A SSNIP test falls prey to the cellophane fallacy
- Finding of abuse “answers” the market definition/ dominance?