

Effects of dominance in price

By  Nicci Botha

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There's been Increased focus on pharmaceutical pricing, both domestically and internationally. In the UK, two drug companies have been penalised with massive fines for excessive pricing. While locally, Pfizer and Roche are being investigated by the Competition Commission over the price of their cancer drugs.



Photo: Roche

Cancer drugs

Pfizer is the only supplier of xalkori crizotinib in the country. The commission said that it had received information that the lung cancer treatment was unaffordable in South Africa, and medical aids were refusing to pay the R152000 price tag for a dosage of 250mg. Subsequent information suggests that the price was reduced to R72,000. "This conduct is suggestive of abusive behaviour," the commission said in a statement.

It's also questioning a similar scenario with Roche, and its breast cancer drug, Trastuzumab (branded as Herceptin).

At the [Board of Healthcare Funders](#) conference, Tony Norton, founder of Nortons Inc Attorneys, explained what weapons the Competition Commission had in its arsenal and the precedent set in other parts of the world. "The commission looks at the abuse of dominance in the marketplace," he said.

Abuse of dominance

Section 7 of the Competition Act says that if the company has 45% of the market share, it is unrebuttably dominant and its share is 35%, it's rebuttably presumed dominant. There is no penalty for being dominant, but such companies have a special duty not to abuse that dominance.

Norton looked at the [Napp Pharmaceuticals judgement](#) in the UK. In this case the company argued that it had to charge these prices to subsidise R&D and other less successful drugs, and that it was not dominant because British medicine pricing regulation prevented from any domination it might have. Both arguments rejected.

More recently, [Pfizer and Flynn were fined £84m and £5m respectively and directed to lower the price](#) of epilepsy drug that had been on the market for more than 80 years. The judgement is on appeal.

Locally, Norton referred to the [Sasol case](#) on how the commission may react.

“However, the jury is still out on what excessive pricing is, but the key questions are to what extent does legislation impact on independent pricing decisions? And to what extent do different rules apply to innovation products such as pharmaceuticals?” Norton asked.

He said the extent to which legislative factors impact on pricing and undermine arguments about firms allegedly using their market power to price anti-competitively also needed to be questioned. “The concept of economic value is a matter of judgement, which involves a considerable margin of appreciation, based on an objective assessment of the particular case.”

Impact of single exit pricing on excessive pricing

An amendment to Medicines and Related Substances Act prescribed a single exit price regime in 2003, where medicines must be sold at the single approved price throughout the supply chain.

“So, is single exit pricing a defence to claims by the Competition Commission of excessive pricing?”

“And is the use of the formularies, prior approvals for biologics and immunotherapy treatment, sub-limits on certain drugs and maximum medical aid pricing evidence of countervailing power by the medical aid schemes?”

Economic value

The concept of economic value is a matter of judgement, which involves a consideration margin of appreciation, based on an objective assessment of the particular case.

“As a matter of law, parties’ subjective belief as to what is a fair or reasonable price are not relevant for the assessment. The economic value of a product may exceed its cost plus as a result of some non-cost related factors, including additional benefits not reflected in the cost of supply or any particular enhanced value from the customers’ perspective.

“Economic value is not simply whatever price a product or service would fetch, or which the market can reasonably bear.”

ABOUT NICCI BOTHA

Nicci Botha has been wordsmithing for more than 20 years, covering just about every subject under the sun and then some. She's strung together words on sustainable development, maritime matters, mining, marketing, medical, lifestyle... and that elixir of life - chocolate. Nicci has worked for local and international media houses including Primedia, Caxton, Lloyd's and Reuters. Her new passion is digital media.

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