

Wither Fairness: Pricing Issues In The Pharmaceutical Industry

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The theme of this Annual Conference of the ATRIP is on 'fairness' and 'morality' in the regime of Intellectual Property. The focus of this research paper is on fair pricing of medicines-both patented and non-patented drugs. Fair price means the price that allows a reasonable return on investments in exchange for an affordable price. A reasonable price is not necessarily a low price. The term 'fairness' is an elusive term, at times it is 'illusory' too as neither the buyer nor is the seller is fully satisfied with the consideration given or received by them and it is left to the State regulators to be the ultimate arbiter to decide the reasonableness of the price fixed by the inventor/manufacturer. Courts have a restrictive role in the pricing of products .It reviews the policy adopted in fixing prices and does not indulge in affixing the price. It can direct the government to replace the pricing strategy if found irrational. Similarly the Competition authorities time and again, repeated that they do not see themselves as price regulators. Indeed, competition authorities are not well placed to fix prices, given their lack of industry expertise and the need for continuous intervention Adam Smith in his treatise wealth of Nations said labour is the universal measure to determine the value of a product. In other words the efforts spent in producing it needs due recognition. The effort of an inventor is rewarded with the right to fix the price of his invention. It is in pursuit of providing incentives to produce innovative products of social utility that led to the evolution of the Patent system. Science has made great strides in combating diseases and in achieving the highest possible level of health albeit at a huge cost. The precision and personalized medicines are reserved for the affluent while the proverbial lemons in the form of generics are at the disposal of the masses that yearn for accessibility, affordability and availability of basic medicines.

Patents in the pharmaceutical sector enjoy a lucrative market. The inventors and the first movers enjoy a dominant position. Monopoly is an attribute of a patent. Where monopoly exists there is bound to be a dominant position. This exclusive status leads to the ability to prevent effective competition and capture market forces. It is observed that a patent is not denied when the drug is highly priced. The acceptance of Gilead's Sofosbuvir for hepatitis C virus and to Pfizer for its PCV 13 vaccine for pneumonia has proved that the therapeutic effect gains precedence over price. The Courts have not denied the therapeutic considerations to overrule the price driven econometrics. There is however yet another dimension to the dominant power –Dominance is subject to social responsibility. Greed is insatiable .Misuse of the dominant power is not surprising.

Competition Laws investigate the exploitative/discriminatory/predatory/exclusionary pricing strategies while Patent laws have an inbuilt mechanism to curb exploitative prices.

This paper unravels the extremely complex socio/ economic/ political/legal issues that are entangled in setting a 'fair price' for medicines.

The paper is divided into five sections

1. The major pricing strategies will be identified
2. The role of generics as an alternative means to the existing patents will be discussed.
3. The misuse of dominance by the Patent holder and dominant undertakings will be highlighted.
4. The State responsibility in providing health care to its citizens will be discussed.
5. Way forward - the objective of this paper is to balance the private rights of the innovators with the public interest of the consumers.

The Paper ends with suitable recommendations.