Abstract

The Indian Pharmaceutical sector is highly fragmented with more than 20,000 registered units. It has expanded exponentially in the last two decades. The leading 250 pharmaceutical companies control 70% of the market with market leader holding nearly 7% of the market share. The pharmaceutical industry survives in an oligopolistic structure. Merger and acquisition control and regulations play a crucial role. It helps the companies offset loss of new product options, improve their R&D efforts and improve distribution to penetrate markets. It is ensures widening of therapeutic coverage which will ultimately will help Indian companies to support the large R & D budgets required in order to remain competitive in the product patent era. Moreover, economies of scale will help to achieve savings in costs. The consolidation taking place amongst the Indian companies is also synergy driven, which will further contribute to the growth in the domestic market. Moreover, Indian companies are also expected to grow through increase in generic exports whereas MNCs are restricted on this front on account of the presence of their parent in various countries. In such a situation the role of the competition commission of India becomes decisive. For a healthy market to persist it is necessary that there is a perfect competition among competitors. The competition law through the Competition Commission of India ensures the same. It ensures that the budding pharmaceutical industry continues to grow through mergers and acquisition without leading to unwanted socio-economic implications that are often frowned upon.
Mergers and Acquisition in Pharmaceutical Industry

The news of the acquisition of Ranbaxy from its Japanese owner Daiichi Sankyo by Sun Pharmaceutical has created ripples in the pharmaceutical world. The acquisition if completed shall make the conglomerate world’s fifth largest specialty generic pharmaceutical company⁷. The two companies have 128 common formulations. If the proposed combination is allowed, Economics Times had reported, Sun Pharmaceutical will have a market share of more than 40 percent for 25 drugs. Out of these, for nine drugs its market share will be more than 65%. As a result this merger has come under the scrutiny of the anti-trust law of the India regarding its apprehensive impact.

The Indian pharmaceutical industry has seen a robust growth in the last decade. Various industry reports suggest that the pharmaceutical sector in India has been growing consistently at the rate of 13-14% every year since the last five years. According to the consulting firm McKinsey & Company, India’s pharmaceutical sector will touch 55 billion USD by 2020 and generics are expected to continue to dominate the market while patent-protected products are likely to constitute 10 per cent of the market till 2015. Globally as well as locally the pharmaceutical industry has improved vastly on account of the improvement in the technology which has made them much cheaper and cost efficient. With the expected growth rate of 14% per annum, Indian Pharmaceutical sector is expected to create more jobs in India in 2014 and add 45,000 fresh openings to its current strength. This sector has a competitive advantage of prospering steadily as the sector is not marred by recession as well as inflation. India is home to 10,500 manufacturing units and over 3,000 pharmaceutical companies. At the same time, the growth in healthcare insurance industry and the increasing penetration in the rural market in India are also expected to complement the overall growth in the pharmaceutical market. With huge populations, increasing prosperity, and improving longevity, India remains a very attractive market to not just national companies but also to the international pharmaceutical giants suffering from the stagnation of mature markets, patent expirations, and increased regulatory hurdles.

As pharmaceutical companies aspire for leadership in this market they face three implications. First, companies need to constantly innovate on the back of consumer insights. Players will need to depend more on research to understand and formulate products accordingly, instead of indiscriminately launching ‘me too’ products and extensions. Second, pharmaceuticals players in particular will need to enhance their channel management and merchandising capabilities. Finally, companies will need to consciously accept lower margins in a bid to dramatically scale up their brands. In the short term, the industry continues to face challenges like patent cliff, rising drug discovery cost, harsher regulations and price controls, coupled with spiraling healthcare cost. Growth and economic profit are the sine qua non of any successful company while a company that is stagnant loses both its customer base as well as market share.

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⁷ “Sun Pharma to acquire Ranbaxy for $4 billion in all-share deal”news.biharprabha.com. last accessed on 12/11/14.
⁹ Supra 3
⁵ India Pharma 2020 Propelling access and acceptance, realising true potential
Mergers and acquisitions play a critical role in both sides of this cycle. It is the most powerful and versatile growth tools employed by companies of all sizes and in all industries. In the last few years Mergers and acquisitions have played a crucial role in the growth of Indian companies especially for the pharmaceutical ones.

A merger or an acquisition in a company sense can be defined as the combination of two or more companies into one new company or corporation. The main difference between a merger and an acquisition lies in the way in which the combination of the two companies is brought about. Section 5 of the Competition Act of 2002 with the sub-title Combination deals with the definition of merger and acquisitions. It says that acquisition of one or more persons or merger or amalgamation of enterprises shall be combination under the competition act if certain threshold conditions as specified under the section 5 are satisfied. Although they are often uttered in the same breath and used as though they were synonymous, the terms merger and acquisition mean slightly different things.

When one company takes over another and clearly establishes itself as the new owner, the purchase is called an acquisition. From a legal point of view, the target company ceases to exist, the buyer "swallows" the business and the buyer's stock continues to be traded. In the pure sense of the term, a merger happens when two firms, often of about the same size, agree to go forward as a single new company rather than remain separately owned and operated. This kind of action is more precisely referred to as a "merger of equals."

Mergers and acquisition have played a vital role in the growth, development and subsistence of the Indian Pharmaceutical Company albeit only a handful of merger and acquisition are in the $200 million plus range with a majority being small-sized acquisitions in value terms. Pharmaceutical corporations participate in mergers and acquisitions for a variety of reasons, the most prevalent in recent years being growth through external rather than internal means. Such growth may benefit the acquirer by increasing capability for product diversification, expansion of existing product lines and increasing market share. However such merger and acquisition may result in the creation of monopolies having control over price or circulation as a result of which economic efficiency losses to society and product quality and diversity may also be affected.

The advantages of perfect competition are three-fold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices.

Competition implies large number of suppliers and large number of consumers, though distortion can take place due to restrictive and unfair trade practices. In order to promote competition the aim of every economy is to ensure that there are large numbers of suppliers accompanied by low

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7 Mergers & acquisitions from A to Z by SHERMAN, Andrew J., and Milledge A. HART
8 Mergers and Acquisitions by Professor Alexander and Ors.
9 http://i.investopedia.com/inv/pdf/tutorials/ma.pdf last accessed on 14/11/14
10 Supra 10
11 http://brandindiapharma.in last accessed on 14/11/14
12 Larsen, 1991
13 http://cci.gov.in last accessed on 11/11/14
entry barriers along with a competition law and an implementing authority which keeps a check on the anti-competitive practices.

The Competition Commission of India, a quasi-judicial body created by the competition act, 2002, has been conferred with extra-territorial jurisdiction to fulfill its mandate of eliminating adverse competition. The ambit of CCI includes regulating mergers and combinations having ex-ante operation.

Under the scheme of the Act, this Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and to a limited extent even advisory jurisdiction. The act specifically provides for threshold limits in case of mergers and acquisition only after which the competition act comes into play. The Act also provides with specific procedure under Sections 29 to 31 of the Act to be followed in the case of combinations.

For conducting inquiry and passing orders, as contemplated under the provisions of the Act, the Commission is entitled to evolve its own procedure under Section 36(1) of the Act. However, the Commission is also vested with the powers of a Civil Court in terms of Section 36(2) of the Act, though for a limited purpose. After completing the inquiry in accordance with law, the Commission is required to pass such orders as it may deem appropriate in the facts and circumstances of a given case in terms of Sections 26 to 31 of the Act.

Ever since the inception of the provisions relating to the regulation of combinations, the competition regulator has been inundated with filings seeking approval for their respective proposed “combination”.14

During an inquiry and where the Commission is satisfied that the act is in contravention of the provisions stated in Section 33 of the Act, it is empowered by the act to restrain the party temporarily from carrying on such merger and acquisition, until the conclusion of such inquiry or until further orders without giving notice to such party. 15

If the CCI is satisfied that the combination does or is likely to have an appreciable adverse effect on competition, it may direct that such a combination shall not take effect or propose suitable modification in order to mitigate any adverse impact of such merger and acquisition.

The Competition Act, 2002 seeks, inter alia, to regulate combinations consisting of acquisition, merger or amalgamation. The law is not against every acquisition, mergers or amalgamation, but it refers only to those acquisitions, mergers and amalgamations within its purview and, which are sufficiently of high thresholds in terms of assets or turnover.16 Competition law concerns with the possibilities of mergers and acquisitions which will make the market less competitive in the near future than in the present. However there are very few decision rendered by the Hon’ble Supreme Court on mergers and acquisition as most of the issues are set through the Competition

14 Introduction of the Competition (amendment Bill), 2012 in India by Kochar & Co.
15 Competition Commission of India v. SAIL (2010)10 SCC 744
16 http://www.cci.gov.in/images/media/ResearchReports/Acquisition%20of%20Minority%20Shareholding%20and%20Merger%20Control%20in%20India.pdf last accessed on11/11/14
Commission of India and settled by consent order.\textsuperscript{17} The test generally applied to decide whether the merger or acquisition is likely to result in “substantial lessening of competition”.\textsuperscript{18}

The Indian Pharmaceutical sector is highly fragmented with more than 20,000 registered units. It has expanded drastically in the last two decades. The leading 250 pharmaceutical companies control 70\% of the market with market leader holding nearly 7\% of the market share. The Indian Pharmaceutical sector is highly fragmented with more than 20,000 registered units. It has expanded drastically in the last two decades. The leading 250 pharmaceutical companies control 70\% of the market with market leader holding nearly 7\% of the market share.\textsuperscript{19}The pharmaceutical industry of India is passing through a phase of consolidation. The industry has seen rapid growth in the last decade. But after a decade of growth the industry is staring at its saturation stage. The pharmaceutical industry survives in an oligopolistic structure. Here, merger and acquisition control and regulations play a crucial role. It helps the companies offset loss of new product options, improve their R&D efforts and improve distribution to penetrate markets. It is ensures widening of therapeutic coverage which will ultimately will help Indian companies to support the large R & D budgets required in order to remain competitive in the product patent era. Moreover, economies of scale will help to achieve savings in costs. The consolidation taking place amongst the Indian companies is also synergy driven, which will further contribute to the growth in the domestic market. Moreover, Indian companies are also expected to grow through increase in generic exports whereas MNCs are restricted on this front on account of the presence of their parent in various countries.\textsuperscript{20}

In such a situation the role of the competition commission of India becomes very decisive. For a healthy market to persist it is necessary that there is a perfect competition or a competition analogous to perfect competition. The competition law through the Competition Commission of India ensures the same. Competition Commission of India is entrusted with the task of ensuring compliance under the Act in India. Before every merger and acquisition, the competition regulator has to be inundated by filings seeking approval for their respective proposed “combination”\textsuperscript{21}. Also, if the Commission feels that a merger or acquisition will have a negative impact on the market, the commission can suo moto take up enquiry. If significant market power or dominant position is finally established by merger and acquisition by pharmaceutical company, Competition Commission of India can resort to two possible approaches: structural remedies, such as asking the players to divest brands or facilities making concerned products or behavioural remedies like imposing an output and product line maintenance condition.\textsuperscript{22} It ensures that the budding pharmaceutical industry continues to grow through mergers and acquisition without leading to unwanted socio-economic implications that are often frowned upon.

\textsuperscript{17} Competition Law and Indian Pharmaceutical Industry by Centre for trade and Development (Centad), New Delhi 
\textsuperscript{18} Supra 18
\textsuperscript{19} http://pharmaceutical-drug-manufacturers.com/pharmaceutical-industry/ last accessed on 11/11/14
\textsuperscript{20} http://www.crisil.com/Ratings/Commentary/CommentaryDocs/pharma.pdf last accessed on 11/11/14
\textsuperscript{21} Supra 15
\textsuperscript{22} http://articles.economictimes.indiatimes.com/2014-08-05/news/52471127_1_market-share-aiocd-awacs-sun-ranbaxy-combine India Pharma 2020 Propelling access and acceptance, realising true potential