



CROSS BORDER MERGER CONTROL AND THE PHARMACEUTICAL INDUSTRY

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ABSTRACT

In the recent years India has seen a sudden increase in the cross border mergers, especially in the pharmaceutical industry. These mergers pose many anti-competitive issues which the Competition Commission of India (“CCI”) deals with by using various merger remedies. These issues faced by the CCI and the respective measures taken by it to deal with the problem is analyzed in the paper using different case studies. The two major issues that the paper considers is that, *firstly*, there is a lot of ambiguity as to how the merger remedies are approved by the CCI because as of yet, there are no specific guidelines issued to clarify the same. *Secondly*, the CCI only uses ‘Relevant markets’ approach to analyze the anti-competitive effects of the mergers and completely overlooks the effect on the Research and Development which is one of the most crucial element in the pharmaceutical industry. Therefore, this paper suggests that the CCI should issue proper set of guidelines with respect to the merger remedies which will help to remove any sort of uncertainty and hence, ease the merger process in the long run. Also, the CCI should duly consider the effect of such mergers on incentive to innovate which is of utmost importance in the pharmaceutical mergers. Therefore, this paper argues that the CCI should use the ‘Innovation markets’

approach in addition to the relevant markets approach.

INTRODUCTION

In this era of globalization, there has been a wave of mergers and acquisitions (“M&A”) all over the world in almost all types of industries, and the pharmaceutical industry is no exception to this. India, popularly known as the pharmacy of the world,¹ has also witnessed a substantial rise in cross border mergers (“CBMs”) between pharmaceutical enterprises. Like any other industry, pharmaceutical M&A are also subject to antitrust laws. Pro-competitive mergers will be beneficial to consumer welfare while anti-competitive mergers will be harmful to it. This has posed plenty of challenges for the CCI as they need to make sure that the proposed merger is not anti-competitive in nature. CCI, for the right reasons, has been more in favour of approving the mergers between the pharmaceuticals rather than disapproving them, as generally they are beneficial for the economy. Until now, the CCI has approved all the mergers proposed to it, akin to any merger remedies which are considered if there is any competition issue involved in that proposed combination. Over the years, there has been a lot of uncertainty relating to these merger remedies because as of yet, the CCI has not issued any formal guidelines regarding the same.

The reason behind merger remedies being taken into account is that the proposed M&A deal was determined to be anti-competitive by the antitrust authorities. Currently, the merger analysis done by CCI is confined to the ‘markets approach’ as seen in the major pharmaceutical mergers

¹ Kalpana Tyagi, ‘Mergers between Generics: How Competition Commission of India promotes

Innovation and Access through Merger Control?’ (2018) 11 Global Antitrust Review 33



approved by it where it only analysed the 'Appreciable Adverse Effect on Competition' ("AAEC") in the 'relevant markets' those industries dealt in. The primary issue that lies here, especially in the pharmaceutical industry, is that the deal becomes anti-competitive if the deal affects the Research and Development ("R&D") or incentive to innovate of the merging firms negatively and the 'markets approach' fails to consider that. Due to the fact that the merger remedies, as the name suggests, are there to nullify the anti-competitive effects of the merger, they give no regard to the impact on other aspects of competition, mainly the incentive to innovate of the merged firms and, thus, are likely to fail in nullifying the anti-competitive effects of the said merger. Therefore, this paper proposes that the CCI should consider a different approach to merger analysis, which takes into account the innovation aspect as well, especially for the pharmaceutical industry.

The article begins with analysing the two types of cross border mergers that are outbound and inbound. Then in part II, the paper analyses the benefits of such mergers while also considering some of its critiques. In part III, the paper looks into the relevant regulations relating to CBMs in India. Thereafter in part IV, it goes on to analyse some of the major CBMs in India that have been approved by the CCI. Consequently, with the help of these case studies, the paper critiques the merger analysis approach adopted by the CCI and proposes a new approach to deal with the same, in part V.

1. TYPES OF CROSS BORDER MERGERS

There are essentially two types of cross border mergers – Inbound and Outbound. An inbound merger refers to the merger of the foreign entity into an Indian company with the latter being the surviving entity.² In this kind of merger, all the assets, liabilities, properties, and foreign company employees are transferred to the Indian company.³ On the other hand, an outbound merger refers to the merger of an Indian company with a foreign company with the latter being the resultant company.⁴ Here, all the assets, liabilities, etc., of the Indian company are transferred to the foreign company.⁵

2. PROS AND CONS OF CROSS BORDER MERGERS

Cross border M & A are beneficial to the merging entities because they help to foster expansion and growth in a more cost-effective way.⁶ Also, it leads to a quick increase in the companies' market share and enables a smooth entry into other markets.⁷ Additionally, it leads to economies of scale through increased production of broader range of products and services, enhancing the companies' overall profitability.⁸ Moreover, it improves the global competitive strength of the companies through foreign direct investment, resource sharing, and inter-partner learning.⁹

While there are many advantages of cross border M&A, it has some shortcomings

² Bhumesh Verma & Soumya Shekhar, 'Key Changes Brought About by and Implications of Cross Border Merger Regulations, 2018' (2018) 84 PL (CL) July 1

³ Ibid

⁴ Ibid

⁵ Ibid

⁶ Samit Kumar Maity Datta, 'Legal issues and challenges of cross-border merger and acquisition under the companies Act 2013' (2015) 4(2) International Journal of Law 9, 10

⁷ Ibid

⁸ Ibid

⁹ Ibid



as well. Firstly, there is a possibility of cultural differences and goal conflicts between the merging companies, which can create problems in the long term.¹⁰ Secondly, the cost of operating in a foreign market is more than the domestic market's operating cost, due to the lack of knowledge about the new market and amount of coordination required.¹¹ Moreover, foreign firms face certain competitive disadvantages over domestic entities in the new market.¹²

3. CONTROLLING CROSS BORDER MERGERS

Cross border M&A refers to the M&A transactions between two or more companies belonging to different countries. The Draft FEMA Regulations define CBM as "any merger, demerger, amalgamation or arrangement between Indian company(ies) and foreign company(ies)."¹³ There are few different acts and regulations that regulate CBM. Therefore, before proceeding with the analysis of case studies, it is important to take look at the relevant regulations applicable to CBM in India.

3.1 REGULATIONS PERTAINING TO CROSS BORDER M&A IN INDIA

A. Companies Act, 2013

Companies Act, 1956, dealt with M & A transactions in a limited way as it allowed for only inbound mergers. However, the Companies Act, 2013 ("Act") brought some of the key changes with regards to the regulation of cross border M&A in India. These legal reforms have helped bring Indian companies on a global level and hence,

ultimately helped boost the Indian economy. The Act has permitted both inbound and outbound mergers through approval from the National Company Law Tribunal (N.C.L.T). The Ministry of Corporate Affairs (M.C.A) notified section 234 of the Companies Act, 2013, along with the companies (Compromises, Arrangements, and Amalgamations) Rules 2017 through its notifications dated December 2017.¹⁴ Section 234 of the Act deals with the schemes of mergers and amalgamation of an Indian company with a foreign company incorporated in the jurisdiction of foreign entities as notified by the Central Government. This allows the Central Government to make rules relating to cross border M&A in consultation with the Reserve Bank of India (RBI). The M.C.A has also amended the Companies (Compromises, Arrangements and Amalgamations) Rules 2016 and inserted Rule 25-A, which provides the scope of application of section 234 of the Act.¹⁵

B. Foreign Exchange Management Act, 1999

Previously, Section 234 of the companies act, 2013 along with Rule 25-A of the Act required prior approval of the RBI for any cross-border M & A. However, with the introduction of Foreign Exchange Management (Cross border Merger) Regulations, 2018 under the Foreign Exchange Management Act, 1999 (FEMA), a cross border M&A is now deemed to be accepted by the RBI if all the Merger Regulations have been complied with. Also, FEMA regulations lay down general

¹⁰ Amy L Pablo & Mansour Javidan, *Advances in Mergers and Acquisitions* (Wiley, 2009) 45, 52

¹¹ Ibid

¹² Ibid

¹³ Foreign Exchange Management (Cross Border Merger) Regulations 2018 (India), s 2(iii)

¹⁴ Ibid Verma & Shekhar (n 2) 1

¹⁵ Ibid Datta (n 6)



provisions relating to both inbound as well as outbound M&A in India, under sections 4 and section 5 of the said Regulations.

C. Competition Act, 2002

In June 2011, combination regulations popularly known as the merger control regimes came into force in India under the Competition Act, 2002.¹⁶ This allowed CCI to review the proposed combinations broadly under section 5 and section 6 of the Competition Act. Section 5 defines such combinations, whereas regulations relating to it are provided under Section 6. Section 5 offers certain thresholds concerning the value of assets or turnover in India or outside India to determine whether a transaction amounts to a 'combination' or not. On the other hand, Section 6 prohibits any such combination from taking place that is likely to cause an AAEC within the relevant market in India.

All combinations do not come within the scrutiny of CCI. Only those combinations that trigger the thresholds limits set out under section 5 have to be mandatorily notified to the CCI under section 6(2) of the Competition Act. The CCI then examines such combinations as per sections 29, 30 and, 31 of the Competition Act. Moreover, under section 20 of the Competition Act, CCI can inquire into whether a combination as per section 5, causes an AAEC in the relevant market or not.

Additionally, the scrutiny of CCI has been strengthened through the inclusion of section 32 of the Competition Act, which deals with the mergers taking place outside India entirely between foreign to foreign companies. So, this provides an extra-

territorial jurisdiction to the CCI concerning mergers taking place outside India but having an AAEC in India. Such mergers need to pre-notified to CCI, if it meets the thresholds under section 5 of the Competition Act.

4. ANALYSING CROSS BORDER MERGER DEALS IN INDIA

India has witnessed various major CBM deals over the years, especially in the pharmaceutical sector. These deals form a significant part of the Indian economy and highlight some critical competitive aspects that need to be considered by the competition authorities. When CCI finds an anti-competitive agreement for mergers, it does not hold that merger anticompetitive immediately. Rather, it makes itself open to changes in the agreement to ensure that there is no violation of competition. These changes made in the deal are known as 'merger remedies'. However, the problem here is that while analysing these merger remedies only the 'markets approach' is used by the CCI. It overlooks the effects of mergers in other aspects of competition, mainly the effects on incentive to innovate which is crucial in terms of the pharmaceutical firms. The following deals bring up some oversights that the CCI has made in the analysis of these deals. This paper analyses three major cross border M&A deals namely, the acquisition of Ranbaxy by Daiichi-Sankyo, Ranbaxy's acquisition by Sun Pharma, and Mylan's acquisition of Agila.

¹⁶ Udayakumara Ramakrishna B.N., 'Cross Border Merger Control: Some Reflections on India's Position' (2018) 5(24) GNLU L. 1, 2



4.1 A PROBLEMATIC DEAL BETWEEN RANBAXY AND DAIICHI

In 2008, a Japan-based company named Daiichi Sankyo acquired a controlling stake of 63.92% in India's Ranbaxy Laboratories for \$ 4 billion.¹⁷ At that time, Ranbaxy was considered to be India's largest generic company, while Daiichi was termed as the largest innovator company in Japan. The primary motive behind the merger was to enable both companies to gain access to international markets.¹⁸ This transaction helped Daiichi to combine its innovation and R&D capabilities with Ranbaxy's low-cost manufacturing skills, hence achieving a competitive position in the generic sector across the globe.¹⁹ It seems that the acquisition was meant to strategize the market position of both the companies.

However, this 'hybrid model' could not pave off much for Daiichi in the long run. Soon after the acquisition, Ranbaxy came under the scrutiny of the United States Food and Drug Administration (FDA) relating to its irregular activities such as falsification of data, hence receiving a ban from exporting to the US market.²⁰ Post the merger, Daiichi's Earnings per Share, net profit ratio trend as well as its return on equity descended, causing huge losses to the company.²¹ This ultimately forced Daiichi to sell off Ranbaxy

to Sun Pharma. All these losses can be attributed to the carelessness shown by Daiichi while investigating Ranbaxy's financials. Daiichi failed to carry out its due diligence while making the deal, which, in turn, affected its competitive strength in the market in the long run.

Even if the deal went smoothly, we need to ask the question: In the light of this possible change in generic pharma strategy by Daiichi, will the future competitiveness of the Indian industry be affected if more such deals are allowed? Some commentators have suggested that foreign acquirers should not be allowed to take over such Indian companies that have been built up by the government through its national policies.²² The argument is that letting foreign stakeholders acquire such companies will ultimately remove the economic benefits that such companies were intended to secure for India in the long run.

Moreover, a few more deals like these can threaten the national capability of the pharmaceutical industry as a whole in the country.²³ It was also argued that since Ranbaxy is a national industry, and there are laws in India protecting domestic industries from foreign industries, the acquisition of Ranbaxy by Daiichi should not have been allowed.²⁴ Foreign companies should not be

¹⁷ Centre for Trade and Development, 'Competition Law and Indian Pharmaceutical Industry' (2010) Centad

¹⁸ Girish Kumar R, 'Global IP Governance: Disciplining the South through WTO Regime' (2014) 7(1) IJSAS 5, 95

¹⁹ Ibid

²⁰ PB Jayakumar, 'Daiichi Sankyo's disastrous India foray with hybrid model', (*Business Today*, April 22, 2015)

<<https://www.businesstoday.in/opinion/perspective/daiichi-sankyo-disastrous-india-foray-with-hybrid-model/story/218404.html>> accessed 17 May 2020

²¹ Santosh Gopalkrishnan, Parth Aggarwal, Nehachandra Balabhadra, 'Developing Synergies in the Pharmaceutical Sector: M&A Activity post 2005' (2019) 8(2) IJRTE 3256, 3260-3261

²² Nagesh Kumar, 'Policy Response to Ranbaxy Takeover?', (*The Economic Times*, Sep 05 2008) <<https://economictimes.indiatimes.com/policy-response-to-ranbaxy-takeover/articleshow/3446019.cms?from=mdr>> accessed 17 May 2020

²³ Ibid (n 17)

²⁴ Ibid



allowed to make use of India's technological capabilities for their own advancement.²⁵

A study has shown that the R&D expenditure of Ranbaxy Laboratories hardly increased over the remaining years of the acquisition.²⁶ This deal provides a proof of the fact that firms tend to lose their incentive to innovate while trying to enhance their growth through investment in companies with lesser R&D oriented environments. Such M&As allow these firms to enter into a new market without any prominent innovation strategies.²⁷ Hence, this study describes how innovation takes a back seat through such M&As, ultimately making the competition suffer.

4.2 ACQUISITION OF RANBAXY LABORATORIES BY SUN PHARMA

The agreement between Ranbaxy laboratories and Sun pharma is considered to be one of the biggest deals in the history of M&As in India with a valuation of approximately US \$4 billion.²⁸ Though the deal was announced in April 2014, it was concluded after almost a year in March 2015. Post this, Ranbaxy laboratories was transferred to Sun pharma from its parent company Daiichi Sankyo. This deal came at a very crucial time when Ranbaxy was facing huge financial losses owing to a ban imposed

on the company by the FDA.²⁹ So, one of the key elements of the deal was indemnification provided by Daiichi for any expenses incurred by Sun Pharma during any further investigation by the FDA. Subsequently, Daiichi continued sharing the post-merger risks and benefits with Sun Pharma.³⁰ The main aim behind such a merger was penetration into new markets, diversification of the product portfolio of the company, and strengthening the global presence of Sun Pharma.³¹

CCI's assessment of the transaction

Since this was such a high-value deal, the merger had to get approval from various authorities before it could be initiated. This deal directly came under the scrutiny of CCI and the Federal Trade Commission (FTC) of the US. The CCI, in this case, found that both these companies were mainly involved in the generics manufacturing and dealt with the sale, manufacturing as well as the marketing of various pharmaceutical products.³² It focussed its investigation on the relevant markets for formulations in which the proposed combination was likely to cause an AAEC.³³ Additionally, it also investigated any possibility of vertical foreclosure in the distinct relevant market for Active Pharmaceutical Ingredients (APIs).³⁴

²⁵ Ibid Kumar (n 22)

²⁶ Ibid Kumar (n 18) 95

²⁷ Ibid

²⁸ JM Financial Institutions Securities, *Who buys best? A guide to some of the most impactful acquisitions in India's pharmaceutical industry*, Sector update India Pharma (2018)

²⁹ Abhinna Srivastava, 'Opportunities and threats of mega merger: A case study of sun pharmaceuticals and Ranbaxy laboratories' (2016) 2(8) International Journal of Commerce and Management Research 112, 113

³⁰ Ibid Tyagi (n 1) 46

³¹ Hetanshi Shah, 'Mergers and Acquisitions in the Indian Pharmaceutical Sector: Trends, Sample Study, and Financial Analysis of Pre and Post Merge' 2018 3(2) IJERP 55, 62

³² Competition Commission of India, CCI approves the proposed merger between Sun Pharma and Ranbaxy subject to modification, (Press Release, 2014)

<https://www.cci.gov.in/sites/default/files/press_release/prs.pdf?download=1>

³³ Ibid

³⁴ Ibid



Post the investigation, CCI formed a prima facie opinion, under section 29(2) of the Competition Act, that the proposed combination between Sun Pharma and Ranbaxy was likely to cause an AAEC in the relevant market.³⁵ So, it directed the parties to publish the details about the said merger, so that people who were affected or likely to be affected by the acquisition could be informed about it.³⁶ It also invited the public's opinion about the proposed merger under section 29(3) of the Act.³⁷

CCI opined that the AAEC of the proposed combination could be eliminated through some modifications. CCI gave its approval to the deal on the condition that Sun Pharma and Ranbaxy would divest seven of its brands to Pune-based pharmaceuticals company Emcure.³⁸ This was so because Emcure was a company actively involved in a similar line of business as Sun Pharma. In addition to this, it had the required expertise and capabilities to give a tough competition to the parties in the relevant market. So, the divestiture ensured that the merger would not lead to the creation of a monopoly of the merged company in the generics manufacturing, hence avoiding the cause of an AAEC in the relevant market.

4.3 MYLAN – AGILA DEAL: ISSUE OF NON-COMPETE

Non-compete clauses are an essential part of the merger agreements signed between the entities. It helps the purchasing entity realise the complete value of the transferred assets and gain trust and loyalty of the customers. It also enables them to make proper use of the acquired know-how of the company. But since such clauses give protection to the purchasers from the competition in the market, CCI is usually sceptical about them. Such clauses usually come under the scrutiny of the CCI if they raise any concerns related to competition in the market.

In the deal between Mylan Inc. and Agila; Mylan, a company incorporated in the USA, acquired Agila India from its parent company, Strides Acrolab Ltd for INR 94.8 billion.³⁹ CCI gave its approval order to the combination under section 31(1) of the Competition Act after certain merger remedies being accepted by it.⁴⁰ CCI opined that the deal was not likely to cause an AAEC, as both the companies had a minimal presence in the domestic markets in India. Agila had less than 5 percent consolidated sales in 2012, while more than 80 percent consolidated sales of Mylan were export-driven.⁴¹ In addition to this, it noted that the products offered by the companies mostly belonged to different therapeutic categories, except for a few which also had different

³⁵ Competition Commission of India, CCI invites comments from public in respect of proposed merger between Sun Pharma and Ranbaxy, (Press Release, 2014)

<https://www.cci.gov.in/sites/default/files/press_release/C-2014-05-170-Press-Release.pdf?download=1>

³⁶ Ibid

³⁷ Ibid

³⁸ 'Sun-Ranbaxy \$4 billion merger completed', (The Economic Times, Mar 24 2015),

<<https://economictimes.indiatimes.com/industry/healthcare/biotech/pharmaceuticals/sun-ranbaxy-4-billion-merger-completed/articleshow/46677498.cms?from=mdr>>

merger-completed/articleshow/46677498.cms?from=mdr> accessed 17 May 2020

³⁹ Ajay Kr Sharma, 'Cross Border Merger Control by the Competition Commission of India: Law and Practice' (2015) 2015 Freilaw: Freiburg L Students J 11

⁴⁰ Competition Commission of India, Guidance on Non-Compete Restrictions (2017)

<https://www.cci.gov.in/sites/default/files/Non-Compete/Guidance_Note.pdf>

⁴¹ Ibid



characteristics and intended use.⁴² It also observed that the companies did not engage in similar products in the relevant market as Mylan dealt in the sales of APIs, while Agila mainly dealt in sales of injectable formulations.⁴³ Additionally, these APIs were mostly non-sterile, so it could not be used in the production of injectable products.⁴⁴

However, the issue that troubled the CCI regarding this acquisition was the existence of a non-compete clause in the agreements signed between the parties. Under the said clause, the target enterprises were blanketly discouraged from carrying out any business activities relating to any injectable, ophthalmic or oncology pharmaceutical products anywhere in the world.⁴⁵ These categories even included such products which were not currently being produced by the target company.

The parties tried to justify the agreement by arguing that such clauses were inserted in order to protect the business interests of both the companies. However, CCI referring back to its decision in the case of *Hospira-Orchid* merger, stated that the non-compete clauses should be reasonable in terms of its duration, geographical area and the persons on which such restraint is applicable so that it does not lead to an AAEC in the relevant market.⁴⁶ Henceforth, under Regulation 19(2) of the Combination Regulations, the parties suggested some modifications to the agreement.⁴⁷ They

agreed to reduce the duration of the clause from six years to a period of four years.⁴⁸ Further, they agreed to curtail the applicability of the non-compete clause to only the products being manufactured by the target enterprises.⁴⁹ This included the products which were in the pipeline or development phase.⁵⁰ Therefore, based upon the following modifications made by the parties, the CCI gave its approval order to the combination.

Guidance Note Issued by the CCI

Since the non-compete clauses are prevalent in combination agreements, the CCI has issued few guidance notes relating to the same. These notes are certainly not binding upon the parties, however, it serves as an essential tool to help draft such non-compete clauses.⁵¹ One of the key elements of the guidance note is that the non-compete restriction must be directly related and, at the same time, necessary to the proposed combination.⁵² The guidance notes also clarified that the duration of the clause, scope of its application, and its geographic applicability shall be in line with what is reasonably required for the business to be conducted efficiently.⁵³ These guidelines have been laid down in order to ensure that the companies can reap the full benefits of the combination, while at the same time ensuring that the competition does not get affected by it.

⁴² Ibid

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Ibid Tyagi (n 1) 53

⁴⁶ Ajay Kr Sharma, 'Cross Border Merger Control by the Competition Commission of India: Law and Practice' (2015) 2015 Freilaw: Freiburg L Students J 11

⁴⁷ Ibid (n 40)

⁴⁸ Ibid Sharma (n 46)

⁴⁹ Ibid

⁵⁰ Ibid

⁵¹ Competition Commission of India, Guidance on Non-Compete Restrictions (2017)

<https://www.cci.gov.in/sites/default/files/Non-Compete/Guidance_Note.pdf>

⁵² Ibid

⁵³ Ibid



5. A NEW APPROACH: INNOVATION MARKETS

5.1 THE PROBLEM OF INNOVATION

The Daiichi-Ranbaxy deal shows that when the merger analysis is not done properly, it can harm the incentive to innovate of the firms involved. The Sun Pharma-Ranbaxy deal is an example of the situation where the CCI considered merger remedies as a solution to what was initially deemed as an anti-competitive merger. But the CCI, in this deal, only considered the effects on relevant markets and no other aspects of competition law, mainly the incentive to innovate. In the Mylan-Agila deal, the CCI again considered merger remedies as a solution to the problem of the non-compete clause and, for the first time, published a guidance note on merger remedies but only relating to non-compete clauses, and the problem of incentive to innovate once again took a back seat.

Innovation and competition are interlinked with each other. Consumers are able to enjoy the benefits of innovation in the long run through the existence of competition between the generic industries. In order to ensure that these products are available to the consumers at affordable rates, a certain number of competitors need to be maintained in the market, through merger control, to promote quantity and price-led competition.⁵⁴ Both CCI and US antitrust authority FTC have cleared plethora of mergers till date in exchange for merger remedies being submitted by the parties, ensuring their successful entry into the market. However, the issue here with the merger control is that the CCI has not yet

issued any guidelines relating to how the industries may offer such remedies and how the CCI actually considers such proposals. For now, it seems like the CCI is only operating under Section 6 of the Competition Act, that is, as long as the merger does not cause an AAEC in the relevant market, the authority approves it. So, either CCI will give its own remedies or, the enterprises may offer up theirs, post which the M&A would be approved by the CCI.

The problem, particularly in mergers between pharmaceutical firms, is that the firms generally compete over the superior quality of their new products. The introduction of new and improved drugs through innovation in the market usually commands higher prices. For instance, if a drug has no effect or has a lot of side effects, then it will lose its market share to its competitor even though it is comparatively cheaper. So, the competitive position of a pharmaceutical company in the market depends upon its innovative products and technological performance. Hence, merger analysis should consider competition with respect to R&D in addition to an effect on competition in the existing product market.⁵⁵ Therefore, CCI needs to consider a new approach to merger remedies, especially in case of pharmaceutical companies.

5.2 THE INNOVATIONS MARKET APPROACH

There are three approaches that the authorities can undertake to analyse the relevant market affected by a merger. Two of these approaches which are already being used by the antitrust authorities include

⁵⁴ Ibid Tyagi (n 1)

⁵⁵ Dror Ben-Asher, 'In Need of Treatment: Merger Control, Pharmaceutical Innovation, and Consumer Welfare' (2000) 21 J Legal Med 271



‘current market’ assessment and ‘future market’ assessment.⁵⁶ The third approach which is the most recent one is called the ‘innovation markets’ approach.⁵⁷ This approach examines the effects of mergers on innovation and its impact on competition in the long run. An innovation market is defined as the amount of R&D that is directed towards production of new and improved products, and to the close substitutes for that R&D.⁵⁸ Under this approach, any merger is prohibited which is likely to cause an effect on competition in the R&D market.⁵⁹ This is done by examining whether a hypothetical monopolist, post M&A, would reduce his efforts in the R&D or not.⁶⁰ Criteria such as competitive effects, market concentration, post-merger investment incentives and efficiencies should also be applied to R&D activity, in order to determine whether a transaction would lead to a reduction in innovation.⁶¹

It is imperative that the CCI considers the effects on innovation in its merger analysis. Both the EU and the US have tried to pay due attention to the effects of mergers on competition and ensure that innovation is not suffered in this process.⁶² This is especially important in the case of pharmaceutical industries with regards to the role that innovation plays in coming with new products and offering competitive prices to the consumers.

Hence, this new approach will reduce the possibility of harm to consumer welfare by identifying various anti-competitive effects. Once these effects are identified, this

approach will help in the formulation of effective remedies to counter the same.⁶³ Therefore, the CCI must consider this approach while analysing the impact of an M&A on the competition in the market.

CONCLUSION

The objective of competition law is to protect competition in the economy as a whole, while striking a balance between consumer welfare and producer welfare. Therefore, CCI being the antitrust enforcer in India, tries to balance both ends while it conducts its merger analysis. Although the deal between Daiichi and Ranbaxy brings up the challenges that CBMs might bring up, the deal between Sun Pharma and Ranbaxy is a clear evidence that if a CBM happens without any significant issues, it has a real potential of forming a synergy between the firms involved.⁶⁴ Hence, it improves the competitive strength of the combination in the market. Therefore, after conducting its merger analysis, CCI has always been in favour of approving a proposed merger.

But the problem with this merger analysis is that it is solely based on the ‘markets approach’ where the CCI only takes into account the effect of a merger on the competition in the relevant market and disregards the effect on the incentive to innovate. This becomes a major issue, particularly in mergers between pharmaceutical industries because the competition in this industry is mainly based on the new innovative products that they produce. This ultimately helps them to offer

⁵⁶ ELEANOR J. MORGAN, ‘Innovation and Merger Decisions in the Pharmaceutical Industry’ (2001) 19(2) Review of Industrial Organization 181, 183-184

⁵⁷ Ibid

⁵⁸ Ibid

⁵⁹ Ibid

⁶⁰ Ibid

⁶¹ Ibid Asher (n 55)

⁶² Ibid

⁶³ Ibid

⁶⁴ Ibid Pablo & Javidan (n 10)



more competitive prices to the consumers. As seen in the Daiichi-Ranbaxy deal, the mergers between the pharmaceuticals have the tendency to affect the incentive to innovate negatively, thus affecting the competitiveness of the combination.

Henceforth, this paper suggests that the CCI should consider the 'innovation markets' approach in addition to the markets approach while conducting its merger analysis. This approach will help improve consumer welfare while formulating effective remedies for anti-competitive effects of the merger. As the Mylan-Agila deal shows that the CCI has made an effort to give some guidelines relating to the non-compete clause, but there are no such guidelines provided for other aspects of merger remedies. So, it is imperative that the CCI issues its guidelines relating to merger remedies, which are very important in the case of pharmaceutical mergers, where the M&A rate between the companies is very high.

