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Overseeing pharma mergers through competition lens?

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Health minister Ghulam Nabi Azad is worried about the impact of mergers in the pharmaceutical sector on prices of medicines, while the corporate affairs minister, Salman Khursheed, is yet to decide whether the merger provisions of the Competition Act, 2002, are to be notified. The potential victims of unregulated mergers are the poor consumers, who may end up paying more, while a sound regulatory policy willed by the parliament to protect and promote their welfare is unable to evolve.

The merger & acquisition (M&A) spree in the Indian pharmaceutical market has the potential to distort competition and subject consumers to increase in prices of medicine. The health minister's concern is not at all unfounded. The utility of the Competition Act, 2002, as a forward looking tool for the protection of both business and consumers against possible abuse of dominance, cannot be re-emphasised.

While no one disputes the counter arguments that such M&As could help provide synergies between innovator and generic manufacturers, thereby helping Indian companies as well as the economy at large, the concerns regarding potential competition distortions and abuse of future dominance remain unanswered. In any case, having such cases under the lens of a competition authority does not imply that the companies will not be allowed to enter the Indian market, but rather fences would be put in place to regulate their behaviour. It is very rare that competition authorities have rejected mergers, but approve potentially harmful ones with some conditionalities.

It is a fact that any innovator would devise possible means to try and stop generic drugs from competing with the original product once the patent has expired. Anticipated benefits from entrance of MNCs in the generic drug business would largely require the companies to help promote generic drug manufacturing once their patents have expired. Whether these companies would be happy to allow generic drugs to continue to compete with their original products is a big question, which, however, is not the main subject of this article.

MNCs, which recently entered the Indian market, include Abbot Labs (by acquiring Piramal Healthcare), Sanofi-Aventis (which purchased Shantha Biotech), Fresenius Kabi (through Dabur Pharma) and Daiichi Sankyo (which bought Ranbaxy). They joined other MNCs such as GlaxoSmithKline (GSK) and Novartis, which were already present in the Indian market. While nobody disputes the fact that these companies were attracted by the potential in the generic drug market rather than the desire to engage in anti-competitive practices, it cannot be ignored that these companies have the potential to engage in such practices if opportunities present themselves.

Such opportunities are indeed likely to present themselves in the near future. Data released in various newspaper articles shows that the hold of MNCs on the Indian pharmaceutical market is increasing; the top four firms now include only one local company (Cipla), a complete contrast to the situation in 2008 when GSK (now ranked fourth in terms of market share) was the only MNC in the top 10. Collectively, MNCs have now cornered about 25% of the market share.

The situation is not yet alarming. The market is still far from being highly concentrated, as there are many firms in the market, with the top firm still below 7% market share. But with more investment in R&D, which is actually the cited rationale for the mergers, the gap between MNCs and local firms is going to increase. The fact that Abbott was willing to pay a price that is nine times the value of the company is evident of this future growth potential. A pattern is indeed developing where the market is being slowly transformed from a very competitive one to one dominated by few companies. If such companies were to dominate the market, there is nothing that can stop them from abusing the position if they believe they can get away with it. An interesting question then arises whether these companies have a history for respecting competition laws under different jurisdictions.

A look at the competition cases on the global scene over the past years will reveal that these companies are no saints, in so far as respecting competition laws. Sanofi-Aventis, for example, was part of the famous international vitamins cartel, which according to published research, has been convicted of price fixing for more than ten times in its history. GSK has been a subject of investigation under EU and Greece competition laws under allegations of abuse of dominance in the pharmaceutical market. A lawsuit was filed in April 2004 against Abbott Labs after it was accused of abusing its monopoly over an essential anti-retroviral drug to overcharge tens of thousands of AIDS patients. Early this year, Mexico's Federal Competition Commission fined Fresenius Kabi and two other firms for rigging government tenders for insulin. To expect that these companies will behave like angels in the markets in India might be expecting too much.

While it can be said that the Competition Commission of India (CCI) would be monitoring the companies when they are in the market, other competition authorities, who are more experienced in monitoring and investigating cases than CCI, have taken steps at controlling potential abuse during the M&A approval stage. In South Africa, GSK's merger with Aspen Pharmacare was approved but subject to conditions aimed at ensuring continued availability of generic medicines at cheaper prices by licensing other generic drug manufacturers. In the EU, Abbott's acquisition of Solvay Pharma was approved subject to the divestment of one business of Solvay's subsidiary (the Cystic Fibrosis testing business). The EU also approved the acquisition of Zentiva by Sanofi-Aventis on condition that it divest fifteen drugs from their production line in six European Union member states.

If the EU is afraid of letting the companies dominate the market, even with its investigative strength, should we also not worry? It is, therefore, that I have often argued that there is an urgent need for CCI to be empowered to assess and regulate all mergers. This is only to ensure that if they potentially harm competition, then steps are taken to ensure that the harmful effect is diluted. The argument is not, and has never been, that MNCs should be stopped from coming to India or Indian MNCs from going out.

—*The writer is the secretary general of CUTS International. Cornelius Dube of CUTS contributed to this article*