Competition Commission conditionally approves Sun-Ranbaxy deal

Contributed by **Vaish Associates Advocates**

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In a December 5 2014 order the Competition Commission conditionally approved the proposed merger between Sun Pharma and Ranbaxy, subject to the parties divesting their products related to seven relevant markets for formulations. This is the first time in the history of the Competition Law that the commission has ordered the sale of certain assets before approving a merger.

Conditional approval

After considering the response of both parties to the commission's show cause notice and public comments on the proposed merger (after the parties had published details of the merger), the commission noted that both parties were engaged in the manufacture, sale and marketing of various pharmaceutical products, including formulations and medicines, as well as active pharmaceutical ingredients (APIs), which constituted a separate relevant product market.

Accordingly, the commission defined the relevant product market based on the substitutability of the molecules for each formulation. It also observed horizontal overlaps between the parties in the markets for formulations and APIs. Both parties were primarily generics manufacturers with a small number of licenced molecules.

The commission focused its investigation on 49 relevant product markets for formulations where the proposed combination was likely to have an appreciable adverse effect on competition in India based on:

- the parties' combined market share;
- the parties' incremental market share as a result of the proposed combination;
- the market shares of competitors; and
- the number of significant players in the relevant market.

In addition to these 49 markets, the commission identified two relevant markets for formulations in which Sun Pharma was already marketing and selling its products and Ranbaxy had pipeline products which were to be launched in the near future.

In relation to the horizontal overlap in the relevant product markets for APIs, the commission noted that both parties sold APIs to third parties and the horizontal overlap raised no substantial competition concerns. Similarly, the vertical integration post-merger for sale of APIs that were manufactured and sold by the parties was also found unlikely to result in vertical foreclosure, as Sun Pharma's revenue from its API sales constituted only 5% of its total revenue and Ranbaxy's revenue from its API sales constituted only 6% of its total revenue. Accordingly, the commission focused its examination on 51 molecules or relevant product markets for formulations which resulted in a 15% market share and found that in seven formulations, the combined entity would have an appreciable adverse effect on competition due to high market share (more than 50%) post-merger. This examination was based on:

- the market share of the merged entities;
- the market shares of competitors; and
- the number of significant players in the relevant market.

Divestiture

The commission originally proposed the approval of the merger subject to the following modifications (remedies):

- Ranbaxy must divest all products containing five specified formulations.

- Sun pharma must divest all products containing two specified formulations.

After considering the commission's proposal, the parties suggested amendments. On consideration, the commission directed Sun Pharma to divest one formulation (ie, all products containing tamsulosin and tolterodine – marketed and supplied under the brand name Tamlet). Ranbaxy was directed to divest six formulations – that is, all products containing:

- leuprorelin – marketed and supplied under the brand name Eligard;
- terlipresslin – marketed and supplied under the brand name Terlibax;
- rosuvastatin and ezetimibe – marketed and supplied under the brand name Rosuvas;
- olanzapine and fluoxetine – marketed and supplied under the brand name Olanex F;
- levosulpiride and esomeprazole – marketed and supplied under the brand name Raciper L; and
- olmesartan, amlodipine and hydroclorthiazide – marketed and supplied under the brand name Triolvance.

The commission also asked the parties to disclose all information regarding the divestment products to potential purchasers in order to enable them to undertake reasonable due diligence.

The divestment will not include:

- manufacturing facilities owned by the two companies;
- IP rights which do not contribute to existing operations;
- domain name rights;
- books and records that must be retained pursuant to statute, rules, regulations or ordinances; and
- general books of account and books of original entry that contain the parties' permanent accounting or tax records.

Sun and Ranbaxy must both appoint a senior management-level employee (ie, a hold separate manager). The manager will be supervised by a monitoring agency and must ensure that the economic viability, marketability and competitiveness of the divestment products are maintained until the closing date. In addition, for a five-year period following the closing date, the parties cannot acquire direct or indirect influence over any of the divestment products.

Detailed directions (eg, being independent and having no connection with the merging parties) for prospective buyers of the divestment brands have been issued. The commission will approve buyers once it has been determined that they meet the purchaser requirements prescribed in the order. If the parties fail to reach an agreement with a purchaser regarding the divestiture of a divestment product in the first divestiture period (ie, within six months), the commission may direct the parties to divest the product in the second divestiture period (ie, within four months) and appoint an independent agency to act as a divestiture agency in order to effect the divestiture as provided in the order. Further, the commission may appoint a monitoring agency to supervise the modification. In accordance with the monitoring agency agreement, the monitoring agency will supervise the due diligence process – including the preparation of data room documentation – and submit a written report to the commission every month (within 10 days) with recommendations and comments regarding the suitability of the purchaser proposed by the parties. After divestiture, the parties must receive the commission's approval for the terms and conditions of the sale and the party to which they are selling, as the objective of the sale is to ensure that effective competition exists in relation to the divested products.

The merger will take effect after the divestment; a period of six months has been granted for the divestment to take place. If the process takes more than six months, a subsequent second divestment period of four months will be granted. The commission directed that the proposed merger must not take effect before the parties divested of the specified products.

Comment

Final approval of the merger from all necessary regulatory bodies (including the commission) will create India's largest drug manufacturer and the world's fifth largest drug manufacturer. The combined entity will have operations in 65 nations, 47 manufacturing facilities across five continents and a global portfolio of specialty and generic products.

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