COMPETITION ISSUES IN HEALTH SECTOR

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***Abstract**: Competition Issues in the Pharmaceutical Industry have been highlighted by a number of studies such as by CUTS international. Dr Geeta Gauri, Member, Competition Commission of India has also spelt the issues involved in her paper "Competitive Issues in the Generic Pharmaceuticals Industry in India." Pharmaceutical Industry, Corporatisation of Health Services, Pharmacy Services and Diagnostic Services, and the Health Insurance sector have been making rapid strides. The sector has emerged as the biggest service sector after I.T. Sector and is still expanding. With these developments, the anticompetitive practices of each of the segments are cohering to the detriment of consumers, i.e. the patients, across all the segments of society.*

The objective of a healthy competition policy would be to provide consumers with quality products and services at competitive costs. Conversely if, for a stated quality, additional costs are continued to be brought on a consumer, the practice would be anticompetitive. Further, consumer should be able to make an informed choice from amongst the competitive products available in a free market.

When a consumer goes to market for selecting a health related service and product, he is severally handicapped in exercising a choice from amongst the alternatives of services and products available. Health issues are complicated. Seemingly identical symptoms may ultimately be caused by completely different maladies requiring completely different lines of treatment and drugs. An ordinary customer has to, in the first instance, get to reach the specialty doctor as early as possible and his first point of contract should be to refer him to the appropriate doctor without delay, even disregarding his own opportunity. If valuable time elapses and an inadequate treatment is given to the patient before he is referred for the correct specialty treatment, additional costs result to the patient and hence such an instance would be an issue for the competition policy of the sector. The policy would have to create appropriate elements in its advocacy programme as to how a consumer locates appropriate specialty without loss of time and what mechanism needs to be placed in position by the physicians, dispensaries, hospitals, etc.

The above narration would make it clear that a consumer would be dependent on his doctors throughout his treatment for choosing the line of his treatment and the medicines and

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administration of services like physiotherapy and diagnostics. There is very little scope of exercising an independent choice. In such a scenario, the service provider's responsibility to offer suitable information to the consumer gets enhanced. The patient needs to be kept informed as to why, in the opinion of his doctor, a particular treatment was being proposed. Proper patient care record needs to be maintained and provided to the patient at all stages so that he should be free to seek another opinion. Such records should reflect the prognosis, diagnostic history and related reports and drugs, etc., administered and should be in a format which is intelligible to practitioners in the profession universally and also comprehensible by the patients of reasonable intelligence. Maintenance of records would help make an informed opinion on the line of treatment, etc., and opine accordingly if avoidable additional costs have been brought on the patient/consumer. Thus, maintenance of appropriate records in recognized formats would be an issue in the competition policy of the health sector.

Doctors have to make a choice from amongst the competing drugs manufactured by various companies, particularly in respect of those formulations where rights under the patent regime no longer exist. A choice, however, is also made from amongst the drugs of similar efficacy in those cases where rights under the patent law still subsist. In between a doctor and a manufacturer, there is a pharmacist (retailer and stockist of medicines) who facilitates the availability of medicines prescribed. There is another element of diagnostic services which the doctor would bring on the patient to facilitate the doctor in determining the prognosis and the line of treatment. Broadly, thus a patient is provided services by:

- Doctor
- Pharmacy
- Pharmaceutical Company
- Diagnostic laboratory
- Paramedicos like Physios

There would be competitive issues among the entire set of different providers and would be particular to each one of them and yet mutually reinforcing. Fulcrum around which these services would be provided by different service providers would be a Doctor. In the changing and emerging scenario, medical services are being corporatized. The concept of family doctors and independent doctors is giving way to services being provided by corporate hospitals. The change has taken place at a much faster pace in metro and urban agglomerates. The emergence of Insurance sector in health and recognition of such corporate hospitals by the

Insurance companies has added strength to the corporate sector hospitals. These institutions are being empanelled by the companies and even governments to accord health facilities to their employees. Corporate structure of hospital exacts discipline from the employees and empanelled doctors certain additional compliance, which may not be a part of the formal contract, but which may be in the nature of bringing additional costs on the patients and hence would be an issue of competition policy. Situations become further adversarial for the customer that such corporate hospitals, pharmacies and pharmaceutical companies together are in a position to commonly command the non-competitive policies on the patient to bring upon him the cumulative effect of their efforts in bringing additional costs on him. Corporate hospitals, attached pharmacies and some pharmaceutical companies can work out ways and means to push selected brands at MRP prices leaving very little choice to the patients. There is evidence to suggest that MRP prices are unreasonably marked high to provide more than adequate margin to the concerned players. Corporatisation of hospitals has facilitated the task of pharmacists and the pharmaceutical companies, which they have been performing among the disaggregated doctors and patients receiving treatment from them. According to a write up of India Brand Equity Foundation, the Indian healthcare sector is expected to become a US$280 billion industry by 2020 with spending on health estimated to grow 14 per cent annually. Expected spending on this sector would be of 8% of GDP in 2012 from 5.5% in 2009. This sector would be next to the IT sector. At present, the sector is estimated to be $40 billion and will grow to 78.6 billion dollar by 2012. As per a study by an industry body and Ernst and young, India would require another 1.75 billion beds by the end of 2025 and required investment would be $86 billion of which government's contribution would be 15–20%. Therefore, big corporate efforts would get further entrenched. Alongside this development, health insurance sector is also booming and is expected grow at a 25% compound annual growth during the period 2009–10 to 2013–14.

As per the data released by the Department of Industrial Policy and Promotion, the drugs and pharmaceuticals sector has attracted FDI worth US$1.82 billion between April 2010 and September 2010, while hospitals and diagnostic centres have received FDI worth US$955.10 million in the same period.

Medical Tourism is also booming and India's share would be 3% by 2013 and would generate revenue of $3 billion. In the year to follow the medical tourism industry would grow further because the cost of treatment would remain relatively cheaper. The associated industries like

hospital industry, medical equipments industry and pharma industry will stand to benefit from this boom.

In this scenario, pharma industry, which was in its infancy in 1970, has also developed with a galloping speed. The spurt to this growth was triggered off by the preference given to process patent regime over product patent regime. With the assistance of technical manpower available in India, it was possible to develop different processes to arrive at the final products and the phenomenon came to be known as reverse engineering. As of now, as per India Brand Equity Foundation, July 2010, India's pharma industry is now the 3rd largest in the world in terms of volume and stands 14th in terms of value. Annual turnover of the industry in the year 2008–09 was US$21.04 billions and the domestic market was worth $12.26 billion. The turnover is expected to reach $55 billion by 2020 and India is expected to be in league with US, Japan and China.

Diagnostic Industry is also growing in tandem, at a CAGR of 20% during 2010–2012. Thus, there is rapid growth in all directions ensuring that the healthcare sector attains its full potential of growth by 2020. There would be growth of corporatization of health services, diagnostic services/para services, pharmacy services and pharma production. In all likelihood, stronger inter relationships would emerge among these service providers whose activities would be spurned by growth in health insurance sector, general economic growth and also with spurt in medical tourism.

Glittering future for all the players and service providers in the health sector is also throwing up the challenge of dealing with the nexus of players with a view to ensuring that additional costs are not brought on the patents because of such a nexus. The task is really daunting. But the sector is amenable to checks and that, too, effective. As stated earlier, all treatments should be supported with a formatted record to which the patient should have free access to enable him to have another opinion at any stage with respect to the diagnosis and line of treatment and in regard to the quantum and number of drugs and tests prescribed. Regulatory framework needs to be placed in position to audit the medical records technically with a view to reporting about the lapses/excesses, if any, and in grave circumstances collating preliminary actionable evidence under the competition laws and other laws. The work of such audit teams would also involve close scrutiny of the pricing of medicines and diagnostic treatments to see if alternate formulations and tests could be taken and costs reduced. Direction should be given that high value medicines are to be administered in the presence of friends and relatives of the

patient and where they can't be present, doctor should supervise the administration and certify.

While it is necessary that there are closer professional interactions among all service providers, unlikely alliances are not developed. It may not be possible to have an actionable evidence to prove the development of unlikely alliances; effects would be felt emerging from technical audits and otherwise. The jurisprudence needs to be developed that 'felt' effects are taken cognizance of for passing necessary directions and seeking compliance of directions.

India is a vast country with a bewildering set of markets as we go into the interiors. Though, most medical facilities might not have matched the aspirations of the citizens and expectations of the planners, the service sector would make its inroads to the extent it is profitable. Level of awareness and standard of implementation of laws to curb market malfeasance in such markets is likely to be poor. There would be competition issues much more magnified bordering on criminality. There have been cases in MRTP when fast moving consumer industry segments exhibited less than expected level of diligence in removing post expiry date items from the retail shelves. What if pharma companies and pharmacist indulge in a similar game?

Association of pharmacists has, in different regions, created difficulties for new entrants in the field of pharmacy to minimize the competition. Many cases to this effect came before the MRTP Commission. There were also cases when the pharmacists association refused to display the products of some pharma companies on flimsy grounds in order to attract better discounts and on other considerations. Sometimes the pharmacies have been dictated by powerful pharma companies in order to put down the product of a rival company.

Pharma companies enjoying patent protection rights have devised ways to extend the life of protection by mixing the technical and legal processes preventing the new entrants even after the expiry of the period of protection and thus have maintained their dominance.

In the pharma sector, particularly and healthcare sector, Mergers and Acquisitions have to be scrutinized with microscopic lens to ensure that monopolistic conditions do not develop as a result of M&A in the chain.

Theoretically, Competition Commission Act 2002 has adequate provisions and teeth to handle anticompetitive practices of:

a) Anticompetitive Agreements

b) Abuse of Dominance

c) Abuse arising out of M&A

In fact the law is also capable of being administered to deal with situations where the matters are governed by sector specific enactments by way of adhering to the crux if the competition is being thwarted under the veil of such legislations by lifting the veil. So, if there seems to be an abuse of protection under the patent law the act can be effectively used to lift that veil.

However, every action at each stage must stand the scrutiny of higher courts and particularly when the parties invoke the provisions of Article 226 and Article 32 of the Constitution. Developing jurisprudence need take notice of the Indian Market, its level of perfection and imperfection and also the specific nature of the sector with a view to arriving at judgement based on felt effects rather than insisting for a proof beyond reproach. Non competitive alliances are hatched in a hush-hush manner with no or little foot prints and yet the felt effect is there. In the absence of direct evidence, there may not be deprivation of liberty of the colluding parties; adequate binding directions may serve the purpose.

More than the commission, the onus should be shared by the professional bodies and industry associations in keeping their members within ethical limits. After all, this sector is dealing with the health of the citizens and the mightiest among them alone cannot take a decision, then what to speak of the common man. The onus on all the players becomes increasingly large. If doctors are fulcrum, pharma companies are fountain heads. Pharma companies should be the leaders in ensuring that they do not become parties to the creation of anticompetitive policies and such an initiative would curb the anticompetitive processes down the line.

Before concluding this paper, it would be necessary to recall the recent observation of courts in regard to violations of land lease agreement entered into by some of the corporate hospitals and nursing homes disregarding their obligations under such agreements in extending medical facilities to the disadvantaged and the poor, and, government's inaction towards enforcing the terms of deed. Such establishments had obtained land on much below the prevailing market price and thus government and its agencies had foregone their revenues in consideration of the expectations that the poor would also stand benefited and thus such establishments would share the obligation of government in the healthcare of the poor. The continued denial of benefits to the poor despite court judgements is not only contempt of court, but also a non-competitive practice as the denial of agreed facilities amounts to costs on society in general.