

## Chapter 8

### Case Study II

#### 8.1 Introduction

This case study is about a combination related to Eli Lilly's acquisition of the global veterinary pharmaceutical business of Novartis AG called "Novartis Animal Health" (NAH) business<sup>83</sup>. The parties to the combination are Eli Lilly and Company ("Eli Lilly") and Novartis AG ("Novartis"). Eli Lilly is an American company engaged in the business of pharmaceutical products. Its animal health products are developed and marketed by its Elanco Division. Novartis is a Swiss pharmaceutical company and its animal health business arm is called NAH. The combination concerned the acquisition of NAH by Eli Lilly from Novartis. NAH develops drugs for the prevention and treatment of diseases in pets, production animals and farmed fish. In this case, the RPM was animal health products including, (i) oral antimicrobials for production animals; (ii) animal feed enzymes; and (iii) prevention and treatment of coccidiosis in poultry. The RGM was India.

#### 8.2 Brief description of the case

The parties' activities had overlaps in animal health products, specifically in, (i) oral antimicrobials for production animals; and (ii) animal feed enzymes. There was also a minimal overlap between the parties' activities in anti-coccidial products in India, in that Eli Lilly supplied products used for the *prevention* of coccidiosis in poultry and Novartis supplied one product used for the *treatment* of coccidiosis. In the market for oral anti-microbials for production animals and the market for animal feed enzymes, the combined market share of Acquirer / Eli Lilly post combination was 10%-15% and 15%-20%, respectively. The Commission noted the presence of various competitors supplying competing products in both these relevant markets. In the market for prevention and treatment of coccidiosis in poultry in India, the market share of Eli Lilly was 25%-30% and that of Novartis was negligible. Accordingly, the incremental

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<sup>83</sup> Copy of order at Appendix IV.

market share of Eli Lilly in the market for prevention and treatment of coccidiosis in poultry, post combination, was held to be insignificant. The Combination was therefore held to not cause any appreciable adverse effect on competition and was approved.

### 8.3 Issues Emerging from this Case

This case presented some unique issues vis-à-vis the legal framework for merger review which are therefore pertinent to the study.

#### *8.3.1 Target Business to be considered for assessing Local nexus thresholds in consonance with ICN RPs*

In this case, Eli Lilly had argued that the relevant assets and/or turnover for determining whether local nexus thresholds are met, should be limited to those of the business being acquired and not that of the seller enterprise. Eli Lilly has submitted that the target business, i.e., NAH's sales and assets in India, were below the asset and turnover thresholds provided in the *De Minimis* exemption. Eli Lilly further argued that the Act defines an enterprise by focusing on its activities rather than its legal form and accordingly, the size of the entity being acquired should be assessed with reference to the business being acquired and with reference to the seller enterprise. However, the Commission noted that the provisions of the Act as well as the *De Minimis* exemption require the value of its assets and turnover to be determined with reference to that of the enterprise (whose assets, control, shares, voting rights) are being acquired; and not that of the target business or assets being acquired. CCI held that NAH is not an enterprise and therefore it is Novartis in India, whose financials must be assessed. The Commission noted that the assets and turnover of Novartis in India exceeds the value of asset and turnover set out in the *De Minimis* exemption and therefore the Combination did not qualify for the *De Minimis* exemption and was required to be notified. Further, Eli Lilly had argued to the Commission that Indian law should be consistent with merger control regimes of other jurisdictions, which follow the RPs. Specific reference was drawn to the RP I on local nexus thresholds which require local nexus to be confined to the relevant entities/businesses being combined in the proposed transaction. The Commission noted that that the recommended practices are in the nature

of guidelines and are to be adopted by each jurisdiction in consonance with its own laws. As mentioned above, the Commission noted that the *De Minimis* exemption sets out in clear terms that the local nexus jurisdictional thresholds apply only to the seller enterprise (whose assets, control, shares, voting rights or assets are being acquired) and not to the business division or the assets being acquired.

### *8.3.2 Informal Guidance on the Website of CCI*

Eli Lilly had also submitted that the Commission does not have any informal material / guidance on its website which provides information on the manner in which the Commission calculates the value of assets and turnover for purposes assessing jurisdictional thresholds of Section 5 of the Act. ICN RP VIII requires a competition agency to publish guidelines on substantive law and procedure including jurisdictional thresholds. The Commission in its order however recorded that it offers pre-filing consultation to anyone that requires clarification on filing requirements and that Eli Lilly had approached the Commission for any clarifications on the filing requirements in respect of its acquisition.

## 8.4 Analysis of the Issues in terms of Legal Framework for Merger Review

The issues highlighted in section 8.3 merit analysis in terms of present legal framework and possible amendments thereof.

### *8.4.1 Target Business to be Considered for Assessing Local Nexus Thresholds in Consonance with ICN RPs*

This is a case where the notification was required since thresholds are defined at the enterprise level, as per the Indian statutory framework. However, this case did not have any likely competition concerns, highlighting the fact that defining thresholds based on business activities does, at time, lead to inconsequential notifications. It is a fact that the ICN's RPs recommend that the thresholds for notification be determined solely on the basis of the size of the business activities being acquired rather than the size of the seller enterprise, and that this practice is being followed in advanced jurisdictions (ICN RP I).

However, as has been noted in Chapter 5, FTC which follows a dual threshold test of size-of-transaction along with size-of-parties, also has the legal provision whereby the competition agency can review non-notifiable mergers. This acts as a safeguard to prevent important transactions from escaping scrutiny.

#### *8.4.2 Informal Guidance on the Website of CCI*

This case pre-dates the publication of FAQs on CCI's website. The concerns of the parties in this case is a valid one. The FAQs, as available at present, do cover the aspect of thresholds being determined at enterprise-level. However, in addition, if the Commission were to provide a searchable access to its database on pre-filing consultations, many such issues could be understood by parties without succumbing to penalty proceedings. It may be noted that penalty proceedings are not only time-consuming for parties and detrimental to their reputation, they also take up a considerable amount of the Commission's resources and time. Therefore, it would be in the interest of CCI as well as stakeholders to place as much guidance as possible in the public domain, in keeping with ICN RP VIII as discussed in Chapter 5. This is particularly important in the case of foreign parties and transactions taking place outside the country and has a major impact on both the credibility of the regulator as well as investment climate because merger notification is one of the regulatory clearances required for investments in India and impacts the ease of doing business.

#### **8.5 Conclusion**

This Case study highlights the downside of having notification thresholds based on size of business being acquired. It demonstrates that such a notification requirement can lead to inconsequential cases, lacking competitive significance being filed with CCI. The case also demonstrates the discomfort of foreign parties with regard to laws that are at variance with international best practices as embodied in the RPs. Finally, it reveals that parties expect to find information more about CCI's regulatory framework by way of guidance in the public domain than is available at present. The implications of these findings in terms of recommendations for amendments in the regulatory framework for merger review in India are further discussed in Chapter 9.