

# RELATIONSHIP BETWEEN COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS IN INDIA: A CASE STUDY OF PHARMACEUTICAL SECTOR

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## ABSTRACT

Competition law and intellectual property laws have a common goal to promote innovation. However, there are instances where exercise of IPRs can be held as anti-competitive. Generally it is observed in IP licensing, patent pooling, grant back, standard setting, tie-up sales, denial of market access etc. Newer issues are arising in patenting strategy, reverse payment and access to essential patents. The Competition Act 2002 enforced in 2009 in India has provisions related to IP owners' right to impose reasonable restrictions through IPRs in relation to anti-competitive agreements under Section 3(5)(i) of the Competition Act 2002. However what amounts to unreasonable use of IPRs is not clear under this provision. In case of abuse of dominant position there is no such exemption to IPRs. The Patent Act 1970 includes certain measures to control abuse of IPRs through compulsory licensing and declaring restrictive trade practices such as packaged licensing, exclusive grant back, and tie up sales as unlawful. The *Bayer v. Natco Ltd* is the first compulsory licensing case in IPR with respect to excessive pricing. Pharmaceutical sector is crucial for public health concern in India. There is rapid growth in recombinant drug sector in India and it is expected that total share of recombinant drugs will be one third of all drugs. The present study attempts to analyse the statutory perspective of the Competition Act and the Indian Patent Act 1970 from the perspective of anti-competitive agreement and abuse of dominant position. Legislative comparisons are done with certain jurisdictions. The state of competition in pharmaceutical sector particularly the recombinant drug sector in India is examined using the SCP model. The Indian Competition Act 2002 is similar to European Union Competition Law. Legislative comparison across jurisdictions reveals that Indian competition law and European Union competition law unlike US do not require existence of intention of firms in case of abuse of dominance or anti-competitive agreements. In this study ten determinants to unreasonable use of IPRs that can be possible from the purview of Sec 3, Sec 19 (3) and Sec 19 (4) of the Competition Act were identified. Among these entry barriers and raising rivals cost by strategy could be the major basis of intervention by CCI in different markets. Compulsory licensing of IPRs through the Competition Act 2002 is possible under Section 4(2)(i) of the Competition Act 2002. While the factors relevant are market share of enterprises, relative importance in market, vertical integration and consumer dependency, it is suggested that additional factors such as non-availability of alternative technology and denial of new product to consumers due to refusal to access could be considered. There is moderate concentration in the recombinant drug segment of pharmaceutical sector in India. Export and patent play a major role in the performance of recombinant drug segment. Entry barriers in the recombinant drug segment are higher unlike other small molecule based drugs segments.

**Key Words: Anti-competitive agreement, Abuse of dominant position, Pharmaceutical sector, Competition Law, Patents, IPR**