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MARKET INTELLIGENCE IN COMMERCIAL DISPUTES: EXAMPLES IN THE BIOPHARMACEUTICAL INDUSTRY

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Commercial disputes under international arbitration between multinational firms often require assessing the impact of commercial strategy, planning and execution. In the biopharmaceutical industry, these disputes often centre on failed co-development, co-marketing, and co-promotion agreements, typically as a result of one party asserting that the other has not performed according to the agreement. In this article, we outline how the building blocks of market intelligence can be used to assist in the evaluation of such claims.

Grounded in the theories and applied principles of marketing science, decision sciences and econometrics, market intelligence provides a rational basis to understand strategic choices and their consequences. Typically, there are choices available to a strategist to define the market opportunity, identify the competitive set, determine the target populations, develop the marketing mix (including pricing, promotional efforts and messaging), and allocate resources. All of these choices and decisions can have an impact on commercial performance. Commercial experience is an important factor in these decisions; but relying on an empirical, market-driven foundation of research, analysis, description and prediction provided by market intelligence provides a scientific basis to formulate forward-looking strategy. Just as market intelligence can be important to inform such strategic questions, it can also play a useful role in assessing the appropriateness of strategic decisions in hindsight, as may be required in the case of disputes arising from performance under a contract.

Sizing the opportunity

One of the most important requirements for formulating effective commercial strategy is an understanding of the potential opportunity. In disputes between licensing partners in the biopharmaceutical industry, expectations of commercial effort, expenditures, and potential returns can often be traced back to differences in the size of the population to be treated with the product at issue. There are different methods for sizing opportunity. These do not all yield similar estimates. In the biopharmaceutical industry, opportunity sizing tends to depend on a number of factors: epidemiology factors regarding the prevalence and growth of a condition, product characteristics regarding safety and efficacy (especially relative to competing therapies), diagnosis and treatment rates, and patient persistence and compliance with therapy. Accordingly, it would not be uncommon for a strategist to triangulate outputs from two or more alternate sizing methodologies. Commercial disputes often arise because partners use different methods, and thus have different market expectations of the potential business opportunity. To some extent, this is expected – deals often happen because each partner thinks that it has a more canny or accurate view of the opportunity. Using market intelligence to understand the causes for differences in estimates of market opportunity can help define the scope of issues leading to corporate disputes.

Understanding customer behaviour

Another common area of discord between licensing partners that can lead to arbitration disputes is the sales uptake or launch curve of a new product. The success of commercial effort supporting a launch depends on how customers and competitors react. In the biopharmaceutical industry, the actions and reactions of regulators and payers with respect to clinical trial results, the evolution of treatment guidelines, pricing, access, and reimbursement typically also play significant roles in determining sales uptake. Understanding (and predicting) how customers will behave when exposed to commercial effort in a multi-dimensional environment – with often conflicting influences – is important to assess the impact of commercial effort on performance and to set the context for dispute resolution. Market intelligence methods exist to map the detailed impact of alternate commercial strategies on customer behaviour, as well as to understand what can and cannot be expected as a result of expending certain levels of commercial resource. Using such methods, it is possible to generate insight about factors that strongly impact product purchase. Thus, while market intelligence typically guides commercial effort, it can also be used in the context of arbitration to provide the parties with information on the bounds of what could be achieved with a commercialisation plan, or to determine what methods a commercialisation partner could have or should have employed to stimulate demand for a licensed product.

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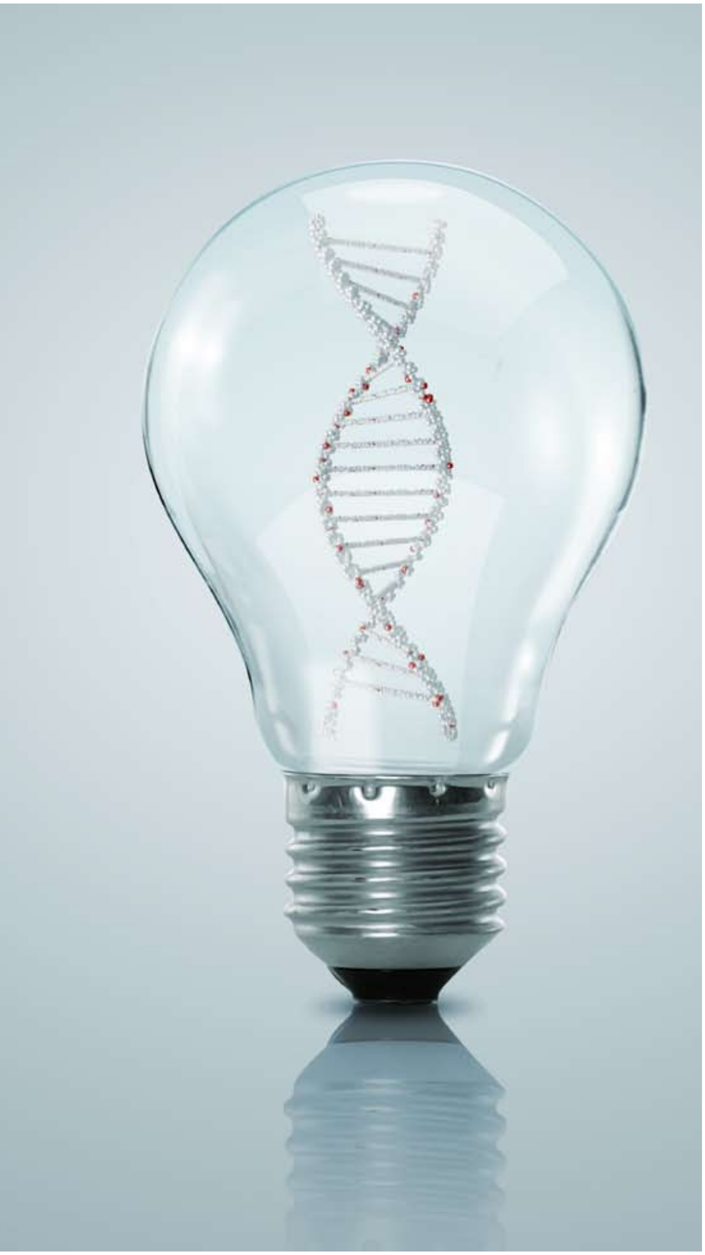
Identifying market segments

In many markets, variation exists in how different types of customers react to commercial outreach; not all of these variations may be known in advance. Typically, such variation is best characterised through the identification of customer segments; i.e., internally homogenous clusters of customers who can be expected to react similarly to commercial outreach. The application of market intelligence methods can identify multiple, distinct customer segments of varying sizes and characteristics, each of which may have specific implications for commercial strategy.

Thus, even if licensing partners agreed on a particular commercialisation plan, deviations from expected outcomes could drive the parties into dispute as one partner continues to hew to the original plan targeting a type of customer segment, while the other expresses concerns and adjusts its strategy, perhaps appropriately, based on the market outcomes being realised. Market intelligence to identify, value and target customer segments often uses data on customer attitudes, behaviour, preferences and choices, and provides a rational basis for making choices about which segment, or segments, to target. These data can be collected using prospective survey research and retrospective databases. The application of marketing modelling methods to simulate the behaviour of these segments can then highlight likely responses to commercial activities, providing a rational basis for



predicting the impact of strategy on product uptake, sales and market share. In the case of commercial disputes or arbitration, similar techniques may be used in retrospect to assess potential response to an alternative set of commercial activities and efforts. For example, in a dispute involving the sizing of a sales force and its impact on product sales, it is likely important to understand which customer segments were selected for targeting by the sales force, and with what rationale and method, before making conclusions about the magnitude of the observed impact on performance.

Price and value assessments

Assessing the impact of product pricing can be an important determinant of commercialisation strategy. The importance of price as a driver of success in the marketplace, however, can vary depending upon a number of factors such as the number of competitors, customer segment sensitivity to variations in price, the perception of value provided by a product, and the impact of marketing. In the biopharmaceutical industry, these factors include value assessments of the product's features by different stakeholders (e.g., patients, payers, and physicians); the perceived quality of available clinical data; and patient affordability, experience and influence. Further, successful pricing strategies are often dynamic and need to be in sync with changing market conditions. For example, the withdrawal of a key competitor or the introduction of a new one may necessitate a reappraisal of an existing pricing strategy to better address evolving value judgments made by a product's current and potential customers. Investigation of appropriate pricing options can play a role in commercial arbitration. In circumstances where partners dispute pricing or value decisions directly, or the effect of those decisions on sales is at issue, market intelligence can explore the gamut of possible prices consistent with observed or foreseen market dynamics, the product's value proposition as perceived by its target segments, and competitive commercial activities in play in order to assess the effectiveness of the pricing strategy chosen by a party and compare it to the likely outcomes of other pricing options.

The impact of positioning

An effective positioning strategy differentiates a product from its competition, thus carving a viable niche for it in the minds of customers. Generating awareness, inducing trial, maintaining usage, and expanding the customer base through positive word-of-mouth about the product's features and benefits in comparison to its competition are some of the key goals of positioning strategy. Market intelligence methods seek to develop marketing strategies that can achieve such goals.

In the case of a biopharmaceutical product, the objective is to raise awareness of the product among physicians who could prescribe it, patients for whom it might be appropriate to prescribe, and payers who incur a portion of the cost to ensure that there are no inappropriate barriers to access. Following awareness, trial must be induced and regular usage could follow. To accomplish these objectives, an effective positioning strategy often seeks to influence perceptions regarding product features relative to the competition, price sensitivity, and the propensity to use the product at appropriate times.

The impact of product positioning on sales is almost always confounded by competitor pricing, positioning, and marketing and sales activities. As such, initial efforts to identify linkages between investments in positioning strategy development and product performance may be unable to isolate a significant, direct relationship. It could, however, be important in a dispute situation to specify the detailed linkage between positioning and the intermediate components of the chain by which customers become aware of a product, learn about its benefits, form perceptions, acquire knowledge and try it before committing to usage. In this context, awareness, trial, and usage (ATU) surveys may be used to capture the influence of positioning activities and develop an empirical model that describes and reliably predicts what positioning has been able to accomplish.

Forecasts and resource allocations

Finally, the sales forecast is a standard output of consideration regarding the formulation and impact of commercial strategy. A forecast can play a significant role in commercial disputes; oftentimes, failure to achieve the forecast triggers the dispute. A principal issue becomes the rationale for failure to achieve the forecast. Does such failure signal ineffective or insufficient performance on behalf of one of the parties? Was the forecast itself unreasonable? Is the failure a result of changes in the market environment? Or is it because one of the parties did not react appropriately to changes in the environment? Typically, assessing the forecast and actual performance includes analyses of resource allocation against budget and assessments of the justifications for variances against the budget or forecast. The assessment of forecast and performance focuses on the viability of the forecast, the implications for resource allocation, and any unanticipated changes in the market environment with the expected consequences for resource allocation.

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In biopharmaceuticals and other commercial situations, forecasts should not be considered as guarantees of performance. Rather, they should be considered as dynamic expectations, reflecting key commercial assumptions about market size, target segments, prices, product positioning, competitive activities and the full range of resources that may be allocated. Forecasts are thus sensitive to the forecasting party's own activity, competitor activity, and other activity in the marketplace, such as the evolution of customer demand.

An informed market intelligence analysis provides a range of inputs to the forecast, allowing it to make dynamic and transparent predictions – reflecting key commercial assumptions about market size, target segments, prices, product positioning, competitive activities and the full range of resources likely to be allocated.

Conclusion

The resolution of commercial disputes may be facilitated by the principles and methodological tools of market intelligence. Proven precepts of marketing science, applied statistics, decision science and econometrics offer a valid basis for generating market intelligence. Analyses, insights and relationships identified thus can form the basis for predicting the impact of commercial effort on product performance under a variety of realistic assumptions. As such, market intelligence can be of considerable use in the resolution of commercial disputes. CD

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