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Curbing competition in India

Recent changes in the Competition Act are making it more a hindrance than a tool to promote competition

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If you're looking at acquiring a company and looking at acquiring it fast, you may just end up waiting for up to seven months to get a green light from the Competition Commission of India (CCI), the apex body under the Competition Act, 2002.

A significant delay in closing a merger or acquisition is not the only problem you may encounter. You can also conclude a merger with another company, only to have CCI tell you your merger never took place! These are a few examples of the implications of India's Competition Act, the constitutional validity of which was questioned in the Supreme Court in 2005 in a writ petition. As a result, certain amendments were proposed to the Act by way of the Competition (Amendment) Bill, 2007). This Bill was recently passed by Parliament without any debate.

While prohibiting "anti competitive" agreements and prohibiting entities from abusing their dominant position may be warranted, the provisions concerning the regulation of "combinations" (defined in the Act to encompass acquisitions, mergers or amalgamations) seem to do more harm than justice, more so in light of the changes proposed by the Bill.

Parliament's indifference to so critical a legislation, without even a debate before passing the Bill, is disconcerting

Where previously the reporting of a combination was optional, the Bill proposes to make it mandatory for persons undertaking combinations above a prescribed threshold limit in India or overseas (albeit with an India connection) to notify CCI and obtain its approval before undertaking such mergers and acquisitions.

Further, no combination is regarded as effective until CCI approves the combination or the lapse of 210 days from the date of notification to CCI—whichever is earlier. Though mandatory notification is a part of competition laws of international jurisdictions such as the US, the waiting period is significantly shorter (30 days). The lengthy 210-day wait in India's case impacts time lines for closing transactions, and raises the costs involved in waiting, too.

Indian companies bidding for overseas assets/companies in a competitive bidding process would be adversely affected as the lengthy wait could lead to automatic disqualification. Competition law in India should be enacted in line with the dynamics of the Indian economy as opposed to merely replicating international principles, particularly so when it results in the law becoming more a hindrance than a tool to promote competition, which is the stated

objective of the Act.

The threshold limits (calculated on the basis of asset value or turnover) for combinations are low and impractical. For instance, mere asset size is not a sufficient criterion to restrict enterprises from expanding their market base. Capital intensive sectors such as infrastructure and petroleum refining, need substantial asset creation and may unnecessarily be subjected to the rigours of the Act merely by virtue of their asset size.

Further, once an enterprise crosses a prescribed threshold, any combination thereafter, however insignificant, would be governed by the Act. In preference to an “asset size” criterion, a hand-in-hand correlation between asset size and market share should be used. When it comes to developing economies, where the operation and scale of combinations may not yet be significant, governments should foster the growth of mergers and acquisitions as opposed to prematurely curtailing such activity.

Regulatory bodies, such as Trai in the telecom sector, along with CCI, have powers to deal with combinations in India—this leads to the possibility of contradictory interpretations, which could hinder M&A activity. The Act also confers CCI with the authority to investigate any combination (post its completion) and render it void if it believes that such a combination has an appreciable adverse effect on competition. Such sweeping powers for CCI could lead to situations where enterprises, even after obtaining CCI’s approval or completing the waiting period, could find CCI rendering a combination void. Consequently, enterprises would be wary of undertaking combinations.

It was hoped that the government’s significant delay in formulating a comprehensive competition policy would be justified by the introduction of a well thought out Bill. It is disappointing to note that after nearly a decade, the government has, instead, passed a Bill that:

1. Prescribes threshold limits that do not correspond to the disparate needs of various sectors of the Indian economy,

2. Seems to thwart the completion of combinations, including outbound combinations that have put India in the limelight of corporate activity globally,

3. Imposes time-consuming notification requirements, with little corresponding certainty even after the expiry of the prescribed waiting periods, and

4. Still lacks clarity by not defining certain technical terms used in the law.

Further, the key to the efficacy of the law lies in its implementation, and there too, there could be concerns as yet unvoiced. Unless the shortcomings are adequately dealt with, India’s competition law could project India’s economy as being unfavourable to globalization and as one that is unduly restrictive of competition.

The indifference to so critical a legislation by Parliament, without so much as a debate before passing the Bill, is disconcerting. The onus of evaluating the implications of such a law and mitigating its rigours would thus have to shift to industry players in whose hands lie the future of turningIndia into a truly globalized and competitive economy.

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