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Regulating mergers & acquisitions

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THROUGHOUT the last century, there was a proliferation of competition laws in countries across the globe and, as of now, there are 106 of these. Almost all of these have merger control provisions. Such large number overwhelmingly demonstrates the necessity of having competition law, including provisions of merger control.

It is a proven theory that competition brings about lower prices, better quality and spurs innovation. It is widely acknowledged that competition benefits both the consumers and enterprises.

Enterprises have an innate desire to acquire monopoly position or substantial market power, even if for a brief period. This desire leads to expansion of business, either through organic or inorganic growth. As for the latter, while most M&As bring about efficiency and are thus beneficial, some can have anti-competitive effects through unilateral or coordinated effects. If the combining enterprises come to wield substantial market

power, they can raise prices or reduce outputs or do both, without bothering consumers and competitors. Sometimes, a combination of enterprises can transform market structure to facilitate concerted or collusive action. The former results in unilateral effect and the later in coordinated effect.

International experience shows that 80-85% of mergers and acquisitions do not raise competitive concerns and are generally approved between 30-60 days. The rest tend to take longer time and, therefore, laws permit sufficient time for looking into complex cases. The International Competition Network, an association of global competition authorities, had recommended that the straight forward cases should be dealt with within six weeks and complex cases within six months. The Indian competition law prescribes a maximum of 210 days for determination of combination, which includes mergers, amalgamations, acquisitions etc. This however should not be read as the minimum period of compulsory wait for parties who will notify the Competition Commission. In fact, the law clearly states that the compulsory wait period is either 210 days from the filing of the notice or the order of the Commission, whichever is earlier. In the event the Commission approves a proposed combination on the 30th day, it can take effect on the 31st day. The internal time limits within the overall gap of 210 days are

proposed to be built in the regulations that the Commission will be drafting, so that the over whelming proportion of mergers would receive approval within a much shorter period.

All proposed combinations need not be notified to the Commission. The law prescribes threshold limits, in terms of value of assets or turnover, which are indeed very high in comparison to limits provided in the laws of other countries. The Indian threshold limits are twice as that of the UK and are even higher than the EU's. Since cross border M&As are the order of the day, the law takes care to provide domestic nexus as a pre-requisite for notifying the Commission in terms of assets or turnover in India of the combined entity. It is possible for the Commission to amplify the domestic nexus in its regulations so that proposed combinations that are not likely to impact markets in India because of the absence of one of the parties from the Indian market need not come under its scrutiny.

Concerns have been raised regarding the recent amendment to the Competition Act, 2002 which has changed voluntary notification regime into a mandatory regime. Of the 106 countries having competition law, only nine seems to have voluntary notification regimes. Such an overwhelming confidence in mandatory regime leaves little scope for any meaningful debate.

A voluntary notification regime brings about lot of uncertainties for business, thus raising risks associated with combining.

What would be consequences of deferment of regulation of combinations ? Post- combination, if anti-competitive behavior is proved, de-merger will be a distinct remedy. This will be very difficult for the competition authority and the enterprises concerned. OECD, in its Economic Survey India Report of 2007, has stated that the Indian competition law is state-of-the-art.

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