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M&As: Will Competition Act be showstopper?

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Recently, the substantive provisions of the Competition Act, 2002 relating to (i) prohibition of anti competitive agreements and (ii) abuse of dominance have been notified. It is expected that the substantive provisions of the Competition Act with respect to regulation of combinations (mergers, amalgamations and acquisitions) will also be notified soon.

Section 60 of the Act states that its provisions will override all other provisions contained in any law. However, Section 62 states that these provisions are in addition to and not in derogation of any other law.

Thus, applying the principle of harmonious construction, where there is a direct conflict between the provisions of the Competition Act and any other law, the former will prevail, and where there is no conflict, provisions of both laws will apply together. But there are many areas of potential conflict between the provisions of the Competition Act and other Indian laws and regulations. Let us discuss a few such cases.

Companies Act, 1956

Sections 391–394 of the Companies Act, 1956 governs reconstructions and amalgamations of companies. The Companies Act requires the high court of appropriate jurisdiction to approve the merger and sanction the same which is said to usually take 4-6 months.

However, the maximum time that can be taken by Competition Commission of India (CCI) under the Competition Act is 210 days, which can be extended further under certain conditions. This would mean that the CCI could legally utilise the maximum time period available to it, thereby further extending the time period within which mergers may be sanctioned by the various regulatory authorities.

Thus, an issue that can arise on the concurrent review of the Companies Act and the Competition Act is that, the Competition Act empowers the CCI and Companies Act empowers the high court to make modifications to the scheme of merger/arrangement and a modification made by either of the regulators viz. CCI or high court would render the review undertaken by the other infructuous.

Takeover Code

The approval period of 210 days provided for in the Competition Act would impose additional financial obligations of the acquirer when the combination triggers open offer under the Indian Takeover Code.

When the acquirer is unable to pay the shareholders participating in the open offer within 15 days from the date of closure of the offer owing to non-receipt of any statutory approval, the extension of time to make such payment is subject to the acquirer agreeing to pay interest to the shareholders for the delayed payment.

The Competition Act requires the CCI to prima facie opine on the proposed combination with a turnaround time of 210 days. Thus, legally the CCI is entitled to a time period of 210 days to form its opinion, which could obligate the acquirer to pay interest to the shareholders under most circumstances, if the two enactments are triggered simultaneously.

Preferential allotment guidelines

A practical difficulty arises in cases of preferential allotments that are governed by Chapter XIII of the Sebi (Disclosure and Investor Protection) Guidelines, 2000 commonly known as DIP guidelines which provides that preferential allotment needs to be completed within 15 days from the date of passing of the resolution.

In case the allotment is pending regulatory approval, the same will have to be completed within 15 days of such approval. As mentioned above, the CCI is entitled to 210 days to approve/disapprove the combination. In such circumstances, the potential investor could be allotted shares at a price determined on the date which could be seven months older than the date on which allotment is made.

Telecom Sector

On the basis of TRAI's recommendations, the department of telecom (DoT) issued revised guidelines for intra-service area merger of cellular mobile telephone service/unified access services (CMTS/UAS or licenses). Thus, there is a possibility of an overlap of the regulatory framework between the DoT and the CCI.

The Guidelines issued by the DoT provides that the combined market share of any merged entity shall not be more than 40%. The guidelines also provide that no merger shall be allowed if the number of service providers reduces to less than four in the relevant market. The DoT guidelines will be in addition to the provisions of the Competition Act, and any provision which is repugnant to the provisions of the Act will be redundant in light of Section 60 of the Act.

It is important to note that transactions involving securities are highly price sensitive, and hence such transactions need to be consummated quickly.

The inter-play of the Competition Act and other legislations governing combinations will significantly increase the transaction timelines potentially leading to a slowdown in M& A activity. Such issues will have to be closely scrutinized by the regulators such that Competition Act acts as a facilitator for businesses and not a show stopper.

(The authors are with Mumbai-based law firm Nishith Desai Associates)