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Whose monopoly is this anyway?

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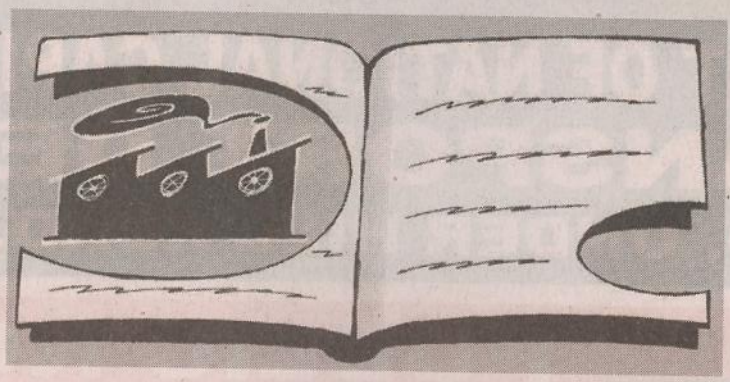
THIS is the age of globalisation-competition. The two go together. Globalisation has become inevitable thanks to technology; competition has become a reality and this is all to the d for Indian consumer who's been long neglected.

In the micro-control and economic regulation period of 1947-1991, there was a Monopolies and Restrictive Trade Practices Act. This was supposed to deal with monopolies, cartels and other unhealthy and unwanted business practices. It turned out to be a monster of excessive control by government, inhibiting Indian business's freedom to grow. The act was rightly dispensed with.

In 2003, a new law was passed, the Competition Act. This was challenged, and the Supreme Court suggested changes to separate the judicial and regulatory functions under the act. This, then, went through the parliamentary process and, eventually, a modified was passed by Parliament.

Sadly, major amendments have been made which will hurt Indian industry's globalisation and competitiveness strategy.

The 2003 Act had a "voluntary" notification requirement for companies in regard to a proposed merger or acquisition to be sent to the Competition Commission of India, which would assess its impact, adverse or otherwise. The standing committee of Parliament recommended that this "voluntary" notification be made "mandatory", and prior approval be obtained from the commission. This change was not part of the draft bill, nor was it the subject matter of the writ in the Supreme Court.



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Interestingly, the ministry of corporate affairs accepted this recommendation and included this provision in the modified bill of August 2007. This key amendment was not brought to public notice nor did the ministry engage in a consultative process. In doing so, it ignored the Report of the Raghavan Committee (set up by the ministry itself) which had recommended a voluntary notification regime.

Moreover, the ministry had given a written response earlier to the standing committee of Parliament opposing mandatory notification because it would result in "unjustified interventions and delays".

As a result of this mandatory requirement in the legislation, the Competition Commission will have to deal with numerous applications which require a high degree of expertise. Delays are inevitable, thus hurting Indian industry's ability to move with speed. (The UK, Singapore, Australia and New Zealand have successfully followed the voluntary system.)

Apart from this, the amended act provides no transaction threshold, which will result in even small transactions requiring approval from the commission merely because the companies cross certain asset/turnover limits. Instead, India can learn from other countries which provide a transactions threshold above which transactions need to be approved by the competition authority — for instance, acquisition of 26 per cent to 50 per cent of voting stock.

The act provides for a seven-month, or 210-day, waiting period for the commission to approve a transaction. In many countries it is 60-120 days. To take seven months could mean killing the proposal.

Cross-border M&As with no competitive impact in India too need CCI approval. This is unique to India and without precedent.

Another major lacuna in the new law is it does not provide for any quantitative threshold for determination of dominance in the market. Competition laws in most countries specify quantitative criteria for dominance ranging from 20 per cent to 50 per cent of market share; some take the approach of using combined market share of major players to define dominance (for example, if post-merger, the three largest firms together have 70 per cent or more of market share). Subjective and discretionary determination in such key aspects can result in abuse.

Finally, there is a concept of a 'group' in the law, a unique approach to identify business conglomerates without considering the different industries and product markets in which companies in the conglomerate do business

All these issues were brought to the notice of the ministry and the commission with a submission that the enforcement of the Competition Act be deferred till such time that the law is appropriately amended. In turn, an assurance was made by the ministry and the CCI that industry's concerns would be mitigated through business-friendly regulations.

The commission has recently framed various draft regulations. These regulations do not sufficiently address industry concerns.

Some examples of inadequacy in the regulations include provisions relating to the transaction threshold, the concept of a 'group', the waiting period, cross-border M&As, and determining 'dominance' and 'predatory pricing'.

And urgent review is required. Otherwise, just as Indian industry is moving ahead, a new set of handcuffs will shackle enterprise.

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