

## **APPENDIX VIII**

### **Schedule for Questionnaire for Validation of Recommendation by Experts**

#### **INTRODUCTION**

CCI has made tremendous progress over the past 6 years in terms of improvements in its regulatory framework for merger review. The fact that it has amended the Combination Regulations five times in response to stakeholder concerns and the appreciation that it has received, suggests that CCI is very receptive and responsive as regards industry feedback. Further, based on its own increasing experience in merger review, CCI has also sought to plug certain loopholes in the law through its amendments to the Combination Regulations.

However, a perusal of the commentary available in the public domain suggests that there are challenges that continue to be faced by both CCI and the industry. CCI being a relatively young regulator, implementing a nascent merger review regime, faces challenges in terms of limited experience, human resource capacity and a less than favourable regulatory environment. Many of the problems that CCI faces are found in other developing countries also. The industry has often highlighted the fact that insufficient guidance is available in the public domain on important procedural and substantive issues, and that they would like more clarity and certainty.

The feedback received from industry as regards amendments to the legal framework is a valuable source of information as to the problems faced by industry. This feedback has been analysed with reference to the ICN's Recommended Practices on Merger Notification and Review Procedures ("**RP**s") and it is found that there are indeed certain aspects of the Indian legal framework which fall short of the ICN's RPs. The analysis also reveals that while there are certain areas where CCI could immediately align its regulatory framework with the RPs, in other aspects, a number of complimentary changes are required in the legal framework before industry requirements can be met.

In this context, the following questionnaire has been designed to elicit your views as an expert on the subject.

## Questions

**Question 1.** The feedback received from industry is that the 30-day deadline for notification of combinations should be removed.

**Do you agree? In your view, would the removal of the 30-day deadline for notification of combinations be appropriate for immediate implementation? What in your view would be the advantages and disadvantages or legal /practical difficulties with such a provision?**

**Question 2.** Industry has argued in favour of introducing the ability of parties to voluntarily 'Pull and Refile' a notification' .

**Do you agree? In your view, would the inclusion of a Pull and Refile provision in the regulatory framework be appropriate for immediate implementation? What in your view would be the advantages and disadvantages or legal / practical difficulties with such a provision?**

**Question 3.** It has been an industry demand that an Explanation for the value of turnover be introduced at par with that of assets<sup>1</sup>, as provided in Explanation (c) to Section 5 of the Act.

**In your view, is this required and appropriate for immediate implementation? Are there any advantages and disadvantages of doing so? Please elaborate.**

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<sup>1</sup> Explanation (c) to Section 5 of the Act states, '*the value of assets shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout- design or similar other commercial rights, if any, referred to in sub-section (5) of section 3*'.

**Question 4.** As a part of the feedback, industry has demanded that parties be allowed to propose remedies / modifications in Phase II. There is also a general demand to increase consultation with parties in merger review, especially in Phase II cases. There are stringent statutory timelines under the Act with very few statutory clock stops.

**In your view,**

- **Would it be appropriate for CCI to introduce legal provisions to formally consider remedies proposed by parties in Phase II?**
- **Do you agree that CCI needs to increase its level of cooperation and coordination with parties, particularly in Phase II cases?**
- **Do you believe that the timelines provided under Sections 29 and 31 of the Act are impractical?**
- **Do you agree that Section 31(12) of the Act ought to be interpreted so as to exclude all extensions sought by the parties at any stage of the proceedings?**
- **Do you agree that CCI needs to introduce legal provisions to allow for timing agreements with parties on line with FTC and EU?**
- **Is there anything you would like to add to the above in terms of analysis of the industry demand?**

**Question 5.** A constant concern of industry has been the current position of merger review framework in India wherein thresholds are determined by the size of the target enterprise rather than the size of the acquired business. One solution could be to introduce a two-pronged test, as is followed by the FTC<sup>22</sup> on the lines of the FTC dual Size-of-parties and Size-of-Transaction test. However, it may be noted that FTC is legally empowered to review non-notifiable mergers which allows FTC to assert its jurisdiction over competitively significant mergers, regardless of the transaction size.

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<sup>22</sup>Under the US merger control thresholds, transactions valued at > US\$ 323 million are notifiable. Transactions of lesser value, i.e., transactions valued from US\$80.8 to US\$323 million are notifiable, if persons with sales/assets  $\geq$  US\$161.5 million acquires a person with sales/assets of  $\geq$  US\$16.2 million, or vice versa.

**In your view,**

- **Is the concern of industry valid in the sense that defining thresholds at the target-enterprise level results in notification of competitively insignificant transactions?**
- **Do you agree that the law should be amended in this regard?**
- **Do you agree that CCI should follow a dual test as is followed in the USA?**
- **Do you agree that along with a dual test, the Act should empower CCI to review non-notifiable transactions?**
- **Do you anticipate any advantages or disadvantages or legal /practical concerns as regards any of the above?**
- **Is there anything you would like to add to the above in terms of analysis of the industry demand?**

**Question 6.** Much of the feedback from industry tends to centre around the need for greater guidance on substantive and procedural issues and the availability of more information on various aspects of conduct of proceedings. Do you think that the credibility of CCI's merger review can be enhanced by increasing level of transparency by means of publication of Guidance and improved e-governance. This would include:

- (A) Publication of Guidance on:
- a) Constituents of turnover, including clarity on Indian firms' income from exports;
  - b) Gun-jumping;
  - c) Schedule I exemptions under Regulation 4 of the Combination Regulations;
  - d) Inter-connected transactions;
  - e) Revision of Form II along with Notes to Form II;
  - f) Non-compete clauses;
  - g) Factors to be considered for quantum of penalty to be imposed; and
  - h) Continuing Defects.
- (B) *Improved E-Governance in Merger Review regulation:*

- a) Organization of website from a stakeholder perspective;
- b) Online filing of notification with built-in validation facility;
- c) Embedded combination application creating linkages between the online form, public feedback, digital archives, internal knowledge bank<sup>3</sup>;
- d) Automated generation of Defect Letters, Online Summary, CRR and Orders<sup>4</sup>;
- e) Password protected access to case status for parties
- e) Searchable data bank of PFCs organized by issues; and
- f) Discussion Forum and blog.

- **Do you agree with all of the above?**
- **Do you think any of the above is not required and why?**
- **Would you recommend any other changes in terms of enhancing transparency?**

**Question 7. Apart from the above, would you like to add some suggestions as regards improvements in the regulatory framework for merger review in India?**

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<sup>3</sup> For CCI expert only

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