

# **Analysis of Regulatory Framework for Merger Review in India and Recommendations for Improvement**

Archana G. Gulati

## **Introduction**

India like many other developing countries has enacted a modern competition law on the lines of international best practices. India's competition law i.e., the Competition Act, 2002 (Act) was enacted in 2002. The provisions relating to Sections 3 & 4 dealing with anti-competitive agreements and abuse of dominance respectively, came into effect in 2009 whereas, Sections 5 and 6 and other sections dealing with merger review came into effect in 2011. Mergers and acquisitions (M&A) are an important means by which businesses grow and reorganize and they represent business response to market signals. Thus, M&As are an integral part of healthy play of market forces required for economic development. However, M&As can have an anti-competitive effect as they can become a means for acquiring dominant position in the market. Hence, effective enforcement of merger review by the competition regulator is key to ensuring that markets remain competitive

Effective implementation of merger review would require *inter alia* that the concerned regulatory framework is simple, clear, predictable and consistent, fair & transparent. These are widely accepted as the basic features of effective regulation. It is generally acknowledged that developing countries face problems of weak institutions including lack of regulatory independence. This makes enforcement of laws a challenge. In particular, when it comes to merger control, issues like regulatory capture and information asymmetries, coupled with limited experience and capacities of the competition regulator can hinder effective implementation. One viewpoint is that a simple but efficient legal and regulatory framework with a focus on basic features of good regulation can overcome the institutional deficiencies to achieve better enforcement.

## **Rationale for Research**

Indian merger review regime is at a nascent stage and given the importance of merger regulation on ease of doing business and economic development it would be important to evaluate, emulate and adapt the regulation in the context of international best practices and challenges faced by both industry and the competition regulator, to ensure effective merger review. Domestic and international commentators while appreciating CCI for its progress and positive approach, have highlighted the scope for improvement as regards the regulatory framework of merger review. Appropriate improvements in the regulatory framework would be expected to achieve the twin objectives of facilitating ease of doing business, along with better enforcement. The purpose of this research is to suggest improvements in the regulatory framework for merger review in India in order to facilitate ease of doing business as well as to improve enforcement. This would benefit the economy by boosting business activity, while ensuring that markets remain competitive.

## **Organization of the Study**

The dissertation is organized into 10 chapters. The first chapter provides a background for the study laying down its rationale, the research questions, objectives, scope and the research design. The second chapter contains a detailed literature review which covers topics such as importance of competition law and merger review in developing countries as well as the exceptional aspects of merger review in developing countries and in India, apart from providing a brief background on international best practices in merger review. This chapter highlights the gaps in literature. The third chapter provides a detailed description of the international best practices in merger review as captured in ICN's work on the recommended practices for merger review procedures and compares the Indian regulatory framework for merger review against these recommended practices. In the fourth chapter the challenges faced by CCI and industry vis-vis the abovementioned recommended practices are explored in detail. The fifth chapter contains an evaluation of Indian regulatory framework for merger review. The methodology for validation of recommendations is provided in the sixth chapter. The seventh and eighth chapters contain two case studies used for validation of findings. The ninth chapter discusses the results of validation. The tenth chapter provides the recommendations of the study and way forward.

## **Summary of recommendations for Improvement in the Regulatory Framework for Merger Review in India**

### **A. Recommendations that May be Given Effect Immediately**

- (i) Removal of 30-day deadline for notifying a Combination with CCI;
- (ii) Introducing ability to 'Pull and Refile'; and
- (iii) Introducing an Explanation for value of 'turnover' at par with that for 'assets as provided in Explanation (c) to Section 5 of the Act.

### **B. Specific Recommendations**

- (i) Allowing parties to formally propose remedies / modifications in Phase II, and increased level of interface with parties by way of frequent submissions, hearings, discussions.
- (ii) Limiting thresholds to relevant business activities of the target as per industry feedback, combined with the power to review non-notifiable transactions within one year of their consummation.
- (iii) Progressively increasing level of transparency by means of publication of guidance and improved e-governance by:
  - (I) 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.

II. 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 with strong cyber / data security measures in place;
- (c) Embedded Combination application creating linkages between the online form, public feedback, digital archives, internal knowledge bank;
- (d) Automated generation of Defect letters, online summary, Combination Review Reports and Orders;
- (e) Searchable data bank of Pre-Filing Consultations organized by issues; and
- (f) Discussion Forum and blog.