Chapter 5
Evaluation of Regulatory Framework for Merger Review

5.1 Introduction

In this Chapter, the results of the above analysis of challenges faced by CCI and industry are utilized to evaluate the Indian merger review framework so as to differentiate between changes that can be made forthwith, those that require amendments to more than one area of law and those that must await CCI gaining more experience and confidence in merger review. This would lead to concrete recommendations in terms of law and procedures which would then be validated by using case studies and expert interviews.

5.2 Praiseworthy Progress

As may be seen from discussion in Chapter 4, CCI's merger review framework has been appreciated for its progress in terms of number and type of cases settled, the responsiveness of CCI to industry feedback by way of the frequent amendments to regulatory framework to improve ease of doing business and attempts to align it with international best practices as also embodied in the RPs. A perusal of Table I and Table II, and the findings of Chapters 3 and Chapter 4, shows that in most matters CCI's merger review provisions are at par with the RPs. As a young competition regulator CCI has been able to clear 465 cases, including more than 30 Form II filings and 4 cases involving detailed Phase II investigations[38] receiving praise from stakeholders along with feedback for further improvements. That the number of filings is increasing year after year (CCI, 2016),[39] signifies both a vigorous economy as well as a healthy respect for CCI's ability to detect non-notified mergers and bring defaulters to book through successful penalty proceedings. CCI has faced legal challenge from parties with regard to penalty proceedings in 4 settled cases[40] of which its

[38] As on 20.2.2017. Information courtesy CCI.

[39] 47 cases in 2011-12,63 in 2012-13, 46 in 2013-14, 91 in 2014-15, 106 in 2015-16 (CCI Annual report 2015-16).

[40] Lakhsdeep Investment & Finance Pvt. Ltd./Telewings/Telenor, Combination No.202/10/87, Deepak Fertilizers/SCM Soilfert Ltd., Combination No.C-2014/05/175, and Piramal Enterprises Ltd/ Shriram Capital, Combination No.2015/02/249 and Thomas Cook/Sterling, Combination No. 2014/02/153. Appeal was rejected in all but last case. (Information courtesy CCI).

decision was upheld by COMPAT on 3 occasions. Appreciating CCI's progress in handling cases where remedial action was required before the mergers could be approved,[41]Uberoi (2015) has commented that,

> '[t]he abovementioned decisions clearly establish the CCI's pro-business approach in facilitating the commercial interests envisaged by the parties to the Combination, thereby evidencing its increasing maturity in objectively considering remedies to mitigate the adverse effects arising out of a Combination. The CCI's recent approach in assessing the Phase II cases provides significant encouragement to the business community that the Indian competition regulator will aim to strike a perfect balance and factor the interests of the various stakeholders.'

While CCI itself seems to shy away from issuing guidelines, its approach to the concept of 'control,' clever structuring to evade notification and gun-jumping has not only been been praised as being at par with mature jurisdictions (Uberoi, 2014) but has withstood legal challenges. For example, with reference to CCI's decisions in Alpha TC Holdings Pte. Limited/Tata Capital Growth Fund I, Combination Registration No. C-2014/07/192 and Caladium/Bandhan Financial Services Limited, Combination Registration No. C-2015/01/243, it has been stated that, 'The CCI has adopted an approach akin to mature antitrust jurisdictions and has interpreted control to include negative control (Uberoi, 2015)

5.3 Amendments for Immediate Implementation

The areas where amendments requested by stakeholders can be carried out without negative consequence and which would align CCI's legal framework with RPs include the following:

5.3.1. Removal of the 30-day Deadline for Filing

In a suspensory regime, this does not serve any purpose as the onus is on the parties to file well in time, given that CCI has 210 days to approve the case. In fact, in case of multi-

[41] Sun/Ranbaxy, (Combination Registration No. C-2014/05/170) and Holcim/Lafarge, (Combination Registration No.C-2014/07/190)

jurisdictional mergers this deadline often works to the disadvantage of both the parties and CCI as the former are forced to file hurriedly before thrashing out market definitions and overlapping activities with other jurisdictions, and CCI too comes under pressure to clear the case, despite the same. Further, if CCI wishes to wait for mature jurisdictions to take the lead on such substantive matters and / or on remedies, it starts running out of time, as filing takes place much later in other jurisdictions. Incorporating this change would require an amendment to Section 6 (2) of the Act to remove the reference to thirty days.[42] Further, it gives parties and CCI very little time to engage in consultation and discussion before filing. PFCs on substantive matters such as identification of relevant markets and information requirements would be greatly facilitated if this legal provision was amended.

5.3.2 Pull and Refile

The second area where reform could be straightforward and uncomplicated is introducing the ability of parties to pull and refile. This means allowing parties to voluntarily withdraw notification when for example, their deal undergoes significant changes which would affect competition assessment. This would also prevent invalidation of the notice. Such a provision could be introduced by amendment to Regulation 17(a)[43]of the Combination Regulations dealing with termination of proceedings at the behest of the parties. Another advantage of having a pull and refile provision is that parties can exercise it to avoid Phase II investigation. Thus, they could either (a) pull and refile with a different agreement (e.g., one that avoids / minimizes acquisitions in overlapping markets) which has lesser competition concerns or they could (b) pull and refile to give CCI more time to review the

---

[42] S.6(2): Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, [shall] give notice to the Commission, in the form as may be specified and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within [thirty days] of—
(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;
(b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section.

[43] Regulation 17. Termination of proceedings. –
The proceedings under this Act relating to the combinations shall be terminated upon,-
(a) receiving an intimation from the person(s) or enterprise(s) who filed the notice to the effect that the proposed combination will not take effect.

same transaction. The latter is permissible in the FTC but parties have to bear the cost of filing fresh notices.[44]

5.3.3 Explanation for Turnover under Section 5 of the Act

The third area is introducing an explanation for value of turnover at par with that of assets as provided in the Explanation under Section 5 of the Act. The absence of such an explanation creates ambiguity.

5.3.4 Enhancing Transparency

Of the other provisions that do not relate to amendments in legal framework, the single most important issue is enhancing transparency and certainty through guidance and more information in the public domain. However, this would require a graded approach wherein, as settled jurisprudence, CCI's experience and confidence grow, greater clarity regarding conduct of merger review is provided by placing increasing amounts of information and guidance in the public domain. This is discussed in section 5.5, under Specific Recommendations.

5.4 Reforms which may be postponed

There are certain areas which do not merit immediate change regardless of industry feedback or the RPs given the status of merger review and regulatory environment in India. These are mentioned below.

[44] 'In transactions where the agency's review continues into the latter part of the waiting period [equivalent of Phase II], the parties have two options. First, they may withdraw their HSR forms and then re-file them (a "pull-and-refile"). A pull-and-refile restarts the 30-day clock and provides the agency more time to evaluate the transaction before it must move into the more in-depth, extended "Second Request" review phase. Parties typically only choose a pull-and-refile where they believe that giving the agency an additional 30 days has a reasonable chance of leading to a clearance without a Second Request [equivalent of a Phase II investigation]. Multiple pull-and-refiles are possible, but the parties are required to pay the HSR filing fee again for a subsequent pull-and-refile' (Egge and Cruise, 2013).

5.4.1 Reducing Information Requirements

One area where it is recommended that CCI does not alter status quo is allowing for shorter forms than Form I for filing what in the parties' view are non-problematic transactions (RP V). As explained in the analysis contained in Table II, while the request for having to supply lesser information in simpler cases is apparently reasonable, the Commission at this stage probably lacks adequate experience to form its view on AAEC based on only limited information from parties and lacks comprehensive sector / party data as of now. Instead, to provide relief to parties and to free up its own human resources, CCI may while continuing to obtain and retain information filed in Form I, evolve internal guidelines and procedures to clear non-problematic transactions such as those not involving overlaps between parties, early. The internal guidelines would specify which type of notifiable transactions that are to be cleared through expedited review. Once CCI has tested the guidelines internally for a period of time, it may place these in the public domain so that parties too know when they may expect faster clearance. At a later stage, the entire procedure for expedited review can be built into the Combination Regulations. Once CCI has settled several cases, it is likely to have an adequate data base on sectors, markets and parties and can then consider aligning more closely with RPV.

5.4.2 Providing Written Advise in PFCs

As has been explained in Chapter 2 and Table II, a young jurisdiction may hesitate to make its advise public especially if given at staff (not Commission) level. Escalating PFCs to Commission level would be impractical given the responsibilities of the Commission. Hence, for the time being, advise may continue to be informal and non-binding as specified on the CCI Website. However, what may be considered is culling out issues where CCI is confident and anonymizing PFC questions into a searchable data base of questions. This when placed on CCI Website would act as a useful supplement to the existing FAQs. Thus, the actionable portion of this issue is deliberated in section 5.5.3 under the discussion vis-à-vis RP VIII.

5.5 Specific Recommendations

There are a number of other stakeholder suggestions in Table II apart from those covered in sections 5.3 and 5.4 above that merit looking into as they will enhance the effectiveness of merger review regime and are in keeping with the RPs. Some of these however cannot be incorporated as it is without concomitant and complementary changes to other laws / procedures. These include, (a) allowing parties to propose remedies / modifications during Phase II and in general make submissions and have more hearings/ discussions with CCI prior to its decision (over and above formal mechanism already laid down in Section 29 and 31 of the Act) in accordance with RP IX; (b) allowing the notification thresholds to refer to only the size of the business being acquired rather than the size of the target enterprise (RP I); and (c) aligning more closely with recommended practices on transparency (RP VIII) in a phased manner depending upon CCI's comfort level. This RP subsumes the requirements of many other RPs and is highly recommended.

5.5.1 Allowing Parties to Propose Remedies in Phase II cases-Building in Flexibility in to the Legal Framework[45]

Unlike the legal framework of EU and USA, the Act requires that CCI propose modifications to the Combination when it has as a result of its investigation come to the conclusion that the Combination has AAEC concerns that need to be addressed (remedied) before the case can be approved. At present, parties can propose modifications formally only during the Phase I investigation stage. Thus, under Regulation 19(2) of the Combination Regulations, parties may propose modification[46] to the Combination and the Commission can take an additional 15 days (over and above 30 working days) to form its *prima facie* opinion on AAEC. [47] If parties were to take this opportunity seriously, they

---

[45] Please see item 9 of Table II.

[46] S.29(2): For the purpose of forming its *prima facie* opinion under sub-section (1) of section 29 of the Act, the Commission may, if considered necessary, require the parties to the combination to file additional information or accept modification, if offered by the parties to the combination before the Commission has formed *prima facie* opinion under sub- regulation (1), as deemed fit by it:
Provided that the time taken by the parties to the combination, in furnishing the additional information or for offering modification shall be excluded from the period provided in sub-regulation (1) of this regulation and sub-section (11) of section 31 of the Act.

[47] S.19(1): The Commission shall form its *prima facie* opinion under sub-section (1) of section 29 of the Act, on the notice filed in Form I or Form II, as the case may be, as to whether the combination is likely

could avoid the detailed Phase II investigation. Thus, there should be a sincere dialogue with parties to let them know about possible competition concerns as early as possible so as to enable them to offer meaningful and appropriate modifications. At present, in the absence of enabling legal provisions, parties can informally offer remedies / modifications to the Commission during Phase II, based on the competition concerns communicated to them the Show Cause Notice issued under Section 29(2). However, it would be preferable to formalize this process. In order to ensure adequate time to examine parties' submissions on remedies, CCI could allow parties 15 working days to make a submission after it has published the Combination under Section 29(3)[48] as in any case, it would at this stage wait for 15 working days to receive public comment. Further, subsequent to the passage of these 15 days, the Act provides the opportunity to seek clarifications from parties under Section 29(4)[49]. To incorporate this provision, an amendment would be required to the Act by insert an appropriately worded Section 23(3A) in the Act. Also the Combination Regulations could be amended by way of inserting a sub regulation under Regulation 24 of the Combination Regulations which deals with affording the parties an opportunity to be heard.[50] This is followed by Regulation 25 which details procedure for CCI to issue proposal for modification to the parties.

However, before any such change can be considered, it is very important to note that CCI has to decide the case in 210 calendar days and currently the regulatory clock stops

to cause or has caused an appreciable adverse effect on competition within the relevant market in India, within thirty working days of receipt of the said notice.

[48] S. 29(2): The Commission may invite any person or member of the public, affected or likely to be affected by the said combination, to file his written objections, if any, before the Commission within fifteen working days from the date on which the details of the combination were published under sub-section (2).

[49] S. 29(4): The Commission may, within fifteen working days from the expiry of the periods specified in sub-section (3) call for such additional or other information as it may deem fit from the parties to the said combination.

[50] Regulation 24: Appearance of the parties before the Commission: Where the Commission deems it necessary to give an opportunity of being heard to the parties to the combination before deciding to deal with the case in accordance with the provisions contained in section 31 of the Act, the Secretary shall convey its directions to the said parties, to appear before it by giving a notice of such period as directed by the Commission.

including those under Regulation 14,[51] Regulation 19 (2)[52] or Regulation 19(3)[53] of the Combination Regulations are not excluded from this statutory time line of 210 calendar days. Further though there is a provision under Section 31(12)[54] to exclude any extension of time sought by parties (in phase I or II) from the reckoning of 210 calendar days, CCI's present manner of interpretation of this section is that it does not apply to processes that occur before a proposal for modification is issued under Section 31(3). In actual fact, the Act does not provide enough time even to realistically complete the steps outlined from Section 29 to Section 31 for a Phase II investigation (Appendix V). This leaves no time for discussion and dialogue with parties including about remedies / modifications. It may be noted that in USA, the FTC negotiates with the parties over months to arrive at suitable remedies (Egge and Cruise, 2013).[55] Apart from this, there is enough flexibility built into timelines in both EU and USA. Firstly, the clock stops till the parties have certified compliance with information requests, regardless of how much time this may take[56] and secondly, parties can waive off time limit voluntarily to make room for discussion[57]

---

51 Dealing with defect letters.

52 Dealing with seeking additional information from parties or accepting voluntary modifications offered by parties in Phase I.

53 Dealing with seeking of information from third parties.

54 S.31(12): Where any extension of time is sought by the parties to the combination, the period of ninety working days shall be reckoned after deducting the extended time granted at the request of the parties (ninety working days is an error in the Act. It is to be read as 210 days).

55 'If the agency indicates that it intends to challenge the transaction, the parties may consider offering remedies, such as asset or business divestitures, or conduct restriction agreements, to address the agency's antitrust concerns. Remedy negotiation is a lengthy, often multi-month process that requires extensive discussions between the parties and the agency, provision of information and documents to the agency to confirm that the remedy will sufficiently address its antitrust concerns, and negotiation of the contents of a remedy agreement. Note, however, that the U.S. process is flexible in this regard – remedy negotiation can happen at any stage – but it is typical not to offer remedies until the agency has identified and articulated serious concerns that can be supported in litigation, which normally happens late in the process, except in those circumstances where the antitrust issues are so obvious from the outset to warrant quick treatment' (Egge and Cruise, 2013, p. 4).

56 For e.g., in FTC, '[t]*he issuance of a Second Request stops the antitrust review clock. The clock only begins to run again once both parties have certified "substantial compliance" with the Second Request*' (Egge and Cruise, 2013, p.4). Similarly, in the EU, '*Time periods can be suspended ("Stop the clock") where due to circumstances for which an undertaking concerned is responsible, the European Commission has taken a formal decision requiring information to be supplied or, ordering an inspection*.'

57 For e.g. in FTC. '[a]*t that point, a new 30-day waiting period begins. During this new waiting period, the parties and their counsel and economists often meet with the senior staff, economists and head office management at the DOJ or FTC to discuss the status of the agency's analysis of the deal. Often, the agency asks the parties to agree to a "timing agreement" that allows the agency additional time beyond the 30-day waiting period to consider the parties*' (Egge and Cruise, 2013, p.4). The timing agreements normally prolong review up to 60-90 days beyond the Certification of Compliance with the 2nd Request.

(Appendix VI and Appendix VII). While the former may not be acceptable in the Indian milieu (and would give rise to anxiety about delays on account of inefficiency of the regulator), the latter is possible if CCI were to interpret Section 31(12) differently and introduces appropriate regulations detailing the procedure for such timing agreements / extensions by the parties on the lines of EU and USA. Unless more time for debate and discussion is built into the Act, the remedy process will remain less than satisfactory. Without such a change in the regulatory framework, acceding to parties' requests for multiple submissions and hearings would burden CCI and its staff further given the already unrealistic time lines laid down in the Act. (This is illustrated in Case Study I).

5.5.2 Limiting Thresholds to Relevant Business Activities combined with Power to Review Non-Notifiable Transactions

While this is one of recommendations of the RPs (RP I), it may be noted that in the Indian scenario in the absence of a complementary provision to enable review of non-notifiable transactions, this could lead to important transactions escaping scrutiny. As has been discussed in Table II, a Phase II investigation was carried out by CCI in PVR/DUL, Combination No.C-2015/07/288, an acquisition which involved the creation of a potentially dominant position for the acquirer i.e. PVR Ltd. (PVR) in the market for exhibition of films in multiplex cinemas and single screens in certain parts of Delhi. This transaction was taking place between two big cinema players but if the value of business being acquired was to be considered as criteria for thresholds instead of the size of the selling enterprise i.e. DLF Utilities Ltd. (DUL) and its parent DLF Ltd. (DLF), the transaction would have escaped scrutiny of CCI to the detriment of competition in that relevant market. Thus, instead of going only by the size of the transaction alone as has been suggested by industry, it may be useful to incorporate a dual test as in USA wherein (a) only large transactions are notified or (b) smaller transactions between large parties are notified.[58] Even with this amended criteria, some important transactions may escape notification. For example, acquisition of patents by a firm from its sole competitor in case

In the EU also, there is a provision for a 20 day extension at the behest of parties or on agreement between parties and the competition authority. (Hogen Lovells, 2013).

[58] Refer footnote 33.

the target firm has limited presence in India and thus both size of transaction and parties are below thresholds. When borrowing legal provisions from RPs or mature jurisdictions one has to consider not only capacity, experience and regulatory environment of the borrower jurisdiction but also the entire legal framework of the jurisdiction being emulated. The merger regime in USA is empowered with the ability to review non-notifiable transactions[59] and the FTC has in fact challenged a good number of non-notifiable mergers (OECD, 2014). In the Indian scenario, a similar provision exists by way of Section 6(1) of The Act which prohibits anticompetitive combinations.[60] However, the definition of Combination under Section 5 of the Act is limited to notifiable transactions. The introduction of such a provision would ensure that liberal exemptions and high thresholds do not preclude review of transactions that may have a potentially anti-competitive effect. It would also allow CCI to review cases that though they fall much below thresholds, have competitive significance.[61] Thus, by removing the anxiety surrounding a more relaxed notification regime, such a reform would enable CCI to receive and review fewer cases with greater likelihood of competition impact. Needless to say, this would benefit industrial stakeholders who would be spared from notifying low value transactions or those that are merely technically notifiable on account of not falling within the ambit of narrowly defined or interpreted exemptions. CCI is most likely to discover such cases from media or based on complaints from concerned stakeholders or from the information received as part of notified cases as it occurs in regimes like USA, Canada and Brazil. Such a provision could

[59] 'In the United States, the Department of Justice and the Federal Trade Commission (collectively, "the Agencies"), State Attorneys General, and private parties can challenge mergers and acquisitions under federal and state antitrust laws. The Hart-Scott-Rodino Act, 15 U.S.C. § 18a, Section 7A of the Clayton Act (the "Act" or "HSR Act"), requires that parties to certain mergers or acquisitions notify the Agencies before consummating the proposed acquisition. Although the U.S. premerger notification system subjects most mergers of significant size to premerger competitive review, a transaction does not have to be subject to such review for the Agencies to be able to challenge it under the antitrust laws. Under Section 7 of the Clayton Act, 15 U.S.C. § 18 –which was enacted many years before the HSR Act – the Agencies can challenge acquisitions of stock or assets, without regard to whether the acquisition requires a premerger notification under the HSR Act, and such challenges can be brought either before or after a transaction is consummated. Indeed, the Agencies have investigated and challenged a number of transactions that were not reportable under the HSR Act. If a consummated merger violates the antitrust laws, the same types of remedies are available as in the case of reportable mergers' (OECD, 2016).

[60] S.6(1): No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void. The US provision also prohibits M&As which lead to substantial lessening of competition without relating the same to notification thresholds.

[61] This happens for example in the case of industries for niche products and services where there is heavy dependence on a few foreign/ Indian firms such as merger of Facebook and WhatsApp.

be introduced by amending Section 6(1) and Section 20(1) of the Act[62] to expand its scope to non-notifiable transactions. Such a provision exists in Brazil.[63]

5.5.3 Transparency in application of merger control laws subject to protection of confidential information (RP VIII) to Pave the way for Flexibility in Working

This RP requires that the review process should have a high degree of transparency subject to confidentiality requirements. It is summarized in Figure 3. Adherence to this RP is very important for a young regime like India where the competition culture is developing and the regulatory environment is such that there is the constant threat of interference and capture. This implies that building the credibility of the regulator is very important to create the requisite stakeholder confidence.

It is no secret that Indian regulatory environment is yet to see regulators as being truly independent of the government. Most regulators are dependent on the related executive arm for budgetary support and prone to interference. Be in in the context of TRAI or RBI or the NPPA, the need for regulatory independence and transparent decision making has often been stressed. It has for example been said that many regulators in India do not publish reasoned orders for their decisions and even those who follow a consultative process of decisions making, do not always explain why stakeholder views have been rejected. 'This discrepancy calls for a common standard of transparency, accountability and independence' in functioning for Indian regulators. …[Also] cosy relationships between a regulator and its department leads to dilution of the law over time' (Parsheera and Zaveri, 2016). At the same time, strong regulators have faced resistance found it tough to function in the Indian regulatory environment where protecting the regulators ability to say 'no' becomes an issue (ESN, 2016). The lack of standard operating procedures,

---

[62] S. 21(1): The Commission may, upon its own knowledge or information relating to acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of section 5 or merger or amalgamation referred to in clause (c) of that section, inquire into whether such combination has caused or is likely to cause an appreciable adverse effect on competition in India.
Provided that the Commission shall not initiate any inquiry under this subsection after the expiry of one year from the date on which such combination has taken effect.

[63] Brazil: Article 88, para. 7: "Cade may, within one (1) year as of the respective date of fulfillment, require the submission of the concentration acts that do not fall within the provisions of this article." Canada too limits the window available to the competition agency to one year. (OECD, 2014).

transparency and independence of regulators creates an uncertain business environment and this concern has often been voiced by stakeholders (Patel, 2017).

Summary of RP VIII

A. Transparency of merger review process implies that the public can see and understand it: transparency enhances consistency and credibility as even parties know what to expect from prospective filings. Transparent implementation of merger control laws means that all material related to applicable laws, regulations, policy and practices should be easily available to public in a timely fashion. All this is of course subject to legal confidentiality protection measures.

B. *The jurisdictional thresholds, decision making procedures, principles and criteria for substantive review should be transparently available in public domain*: This includes exclusions to filing and clarity on notification requirements, procedures, contact details of agencies involved, filing deadlines, notification procedures and fees, review periods, processes of merger review and appeal against adverse decisions, rights of parties and third parties, procedures relating to violation of merger laws (e.g., failure to file) and confidentiality etc. Transparency demands that apart from law and rules, 'case law, enforcement policies and administrative practices' should also be publicly available. Manner in which substantive review takes place including consideration for non-competition factors if any should be included in publicly available material.

C. *Current state of merger control law and policy should be readily available to public:* Transparency can be enhanced by 'publishing guidelines on substantive law and procedure,' individual orders or decisions, press releases on important orders, speeches, international material etc. Essentially information as above would allow the public to appreciate the agency's 'consistency, predictability and fairness 'in implementation of merger review law. Once the agency has gathered sufficient expertise, it could consider publishing guidelines on topics such as jurisdiction, procedures and substantive analysis to help parties. The development of such guidelines can involve taking public feedback. If an agency relies on guidelines, policies or precedents from other jurisdictions, this should be transparently known to the public too. All such publication should be carried out in a timely manner and regularly updated on the agency website. An English translation would greatly help foreign firms.

Figure 3: RP VIII, Summary of Recommendations

In the specific context of competition regulators, Jenny (2016) has stated that, 'over and beyond formal rules, it is widely acknowledged that greater transparency in operation can, in general, increase the agency's perceived legitimacy and can be a useful barrier against government or business encroachments' Means of achieving transparency include publication of press releases, guidance notes and well-written decisions etc. 'The more transparent its decision-making processes, the more apparent would be cases where undue influence has been applied and this itself would deter outside forces from attempting to influence the agency' (p.35).

CCI has been praised for being available for consultation on merger review. It has been said that,

> '[T]he Combinations Division, is fairly receptive to constructive engagement with parties. The Indian merger control provisions specifically allow parties to reach out to CCI for pre-filing consultations to: (i) seek (albeit informal) clarification from the Combinations Division, CCI in case of any confusion regarding the notifiability of a transaction; and (ii) 'perfect' the filing, i.e., request the opinion/inputs of the Combinations Division on a draft version of the notification, which can go a long-way towards ensuring fewer subsequent RFIs and quicker approvals. Another useful initiative is to offer the Combinations Division, CCI, an opportunity to be briefed by the parties' business personnel to help explain the products and markets involved in a simpler, more interactive manner' (AZB & Partners, 2016).

Yet at the same time stakeholders find this mechanism is too formal and unwieldy and useful only after 'a level of trust' has developed with case team (Shroff *et al*., 2016). Given the overall staff constraints and tight deadlines, given the growing number of multi-jurisdictional transactions involving foreign parties, it is important that as much information as possible is available in the public domain, including the CCI website, in an easily accessible form. Most importantly, as complete transparency in working also keeps a check on external influence, this would pave the way for greater delegation of decision making to staff, affording much needed flexibility to the process of merger review. This

would build trust into the system and eventually allow the case officers to seek information from parties / third parties, provide informal guidance and discretionary waivers, without fear of censure. Enhancing transparency has two important aspects. One is increased availability of formal guidance and the second is improved e-governance. These are discussed in subsequent sections.

5.5.3.1 Guidance

Table II analysis has already demarcated areas of guidance where CCI has developed sufficient jurisprudence in merger review. These are as follows: (a) The first is guidance on constituents of turnover, which is one of the criteria for notification. CCI has now acquired experience of receiving cases from diverse sectors and should be able to develop guidance notes for placement in public domain. This includes guidance on the constituents of turnover including issues such as treatment of Indian firms' income from exports; (b) The second area is gun jumping. Having imposed penalty for gun jumping in at least 14 cases, CCI can publish broad non-exhaustive guidelines which can be refined as it gains even more experience; (c) As regards Schedule 1 exemptions including the concept of 'control,' CCI could publish guidance on this matter. As mentioned above CCI's jurisprudence in this matter has in fact been appreciated as being along the lines of mature jurisdictions; (d) The same would apply to interconnected transactions wherein CCI has enough experience and its stand has been vindicated by COMPAT.[64] CCI can certainly issue at least non-exhaustive, indicative guidance as mentioned in Table II analysis; (e) CCI's Form II can be modified to consist of only additional information required over and above Form I and the form should have explanatory notes as in case Form I; (f) CCI can come out with a guideline on its stand on acceptable non-compete clauses which would be considered ancillary to the Combination. Once again this can be based on settled cases and non-exhaustive in scope; and (g) CCI should also provide a written guidance on what it considers aggravating and mitigating factors for determining the quantum of penalty under Section 43A[65]. This is very important to establish a credible and non-discriminatory approach.

[64] See footnote 40 above.
[65] Please refer to Table II for detailed analysis.

As Table II has highlighted, certain processes need to be streamlined through at least internal policies and guidance. One of these is the matter of continuing defects[66] and this should be closely monitored as it is often complained about by stakeholders. Issue of guidance on continuing defects does not imply that CCI should in any way cast away its right to obtain information.[67]An extract from description of the merger review process in FTC (below) should make it clear that even a mature jurisdiction like USA with much greater resources and experience than India demands a good deal of information and parties understand and cooperate with this requirement.

> '*During the 30-day waiting period, the DOJ or FTC may request voluntary information submissions from the parties to help advance its analysis of the competitive effects of the transaction. Typical requests include customer and supplier lists, business and strategic plans, industry reports and financial information. These requests may come in the form of a "voluntary access letter" or may be delivered more informally (by phone or email) as piecemeal requests. For transactions where the parties anticipate close scrutiny by the DOJ[68] or FTC, they may invite the agency to provide an access letter very early in the process (even before filing the HSR forms) or they may submit information without an agency request in order to try to accelerate the agency's review and hopefully conclude it within the 30-day waiting period*' (Egge and Cruise, 2013, p.3).

In the EU, while formal review periods are short (The Phase I equivalent is 25 working days) the pre-notification consultation period can extend into several months and the competition agency ensures that all information gaps are overcome even before parties actually file the case (Hatton *et al.*, 2014). Thus, it is important for a jurisdiction to strike a balance based on its regulatory framework. As CCI's Form I asks for fair amount of details about the parties and the transaction, the first consideration is to make sure that Form I information is supplied properly. Large gaps in information should attract invalidation and minor gaps identified holistically and addressed early. Additional

---

66 Item 6 of Table II.
67 RP XII. Please see Chapter 3.
68 Department of Justice.

information should be asked after proper appreciation of the case and continuing defects issued only when required.

5.5.3.2 CCI Website: Improving Credibility and Certainty through E-governance

A. Available Information

The primary source of information today is an agency's website. If one examines the CCI website [69] from the viewpoint of information available as far as merger review or Combinations is concerned, it is noted that under the link 'Combination' the following information/facilities are available:

- The Combination Regulations including all amendments
- Government notifications
- Forms for filing
- Notes to Forms
- Notes to Form I
- Procedure for requesting Meeting
- Procedure for Pre-Filing Consultation
- List of Combination notices filed and orders issued in theses cases
- Orders Archive
- Frequently Asked Questions (FAQs)

There is a separate application for e-filing Combinations.

[69] www.cci.gov.in

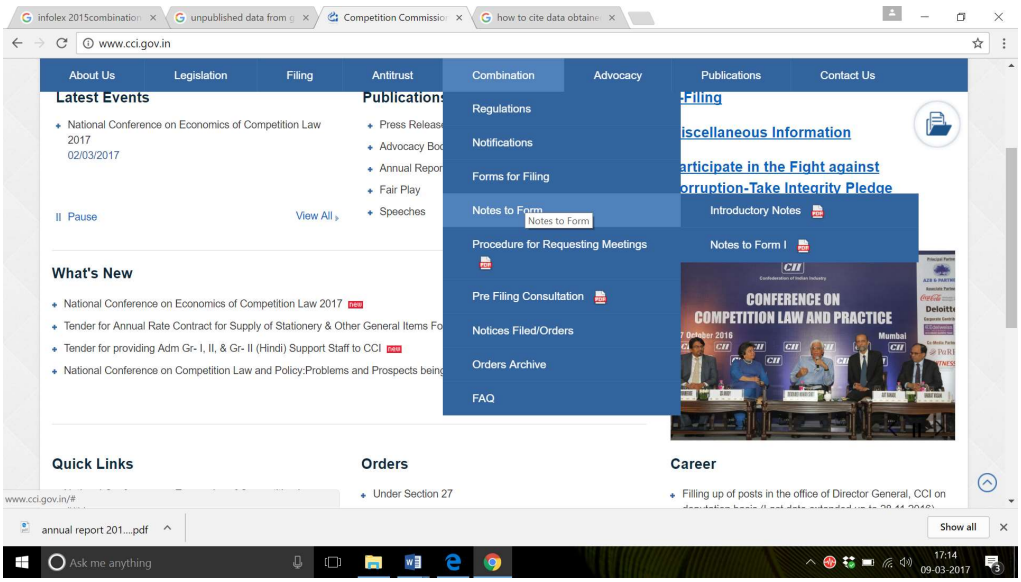

Figure 4: Services in relation to Combinations on CCI website

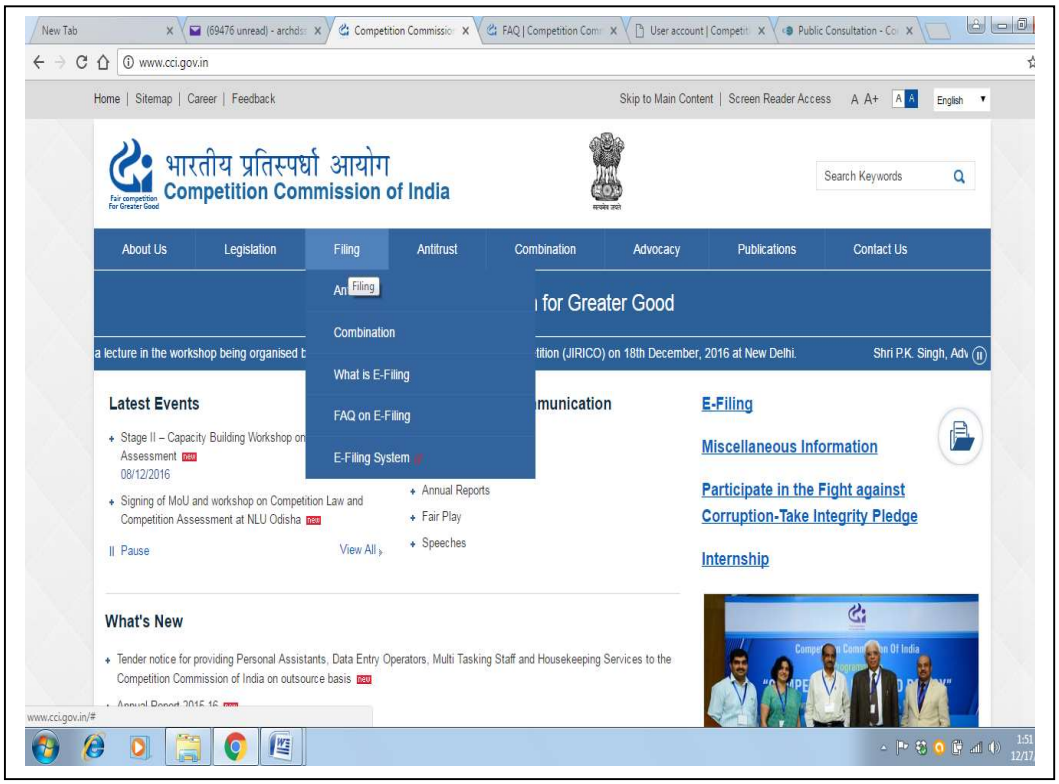

Figure 5: Facility for E-filing of Combination cases on CCI Website

B. SWOT Analysis of CCI website in terms of RP VIII

It would be useful to carry out a strength, weakness, opportunity and threat (SWOT) analysis. This tool is a frequently used in strategic management and managerial decision-making to appreciate both external and internal environmental factors and use this information for strategy generation and selection (Koch, 2000). In the present context, it would help focus attention on strong and weak points, potential and pitfalls of CCI's e-governance capabilities in the context of merger review thereby highlighting future direction more clearly. The subsequent analysis is also sought to be informed by benchmarking against the web resources of relatively mature jurisdictions.[70]

STRENGTHS	WEAKNESSES
1. Legal position available–Act, rules, Govt. notifications 2. Procedures available-Forms, Notes to Forms, E-filing 3. FAQs exist on procedural and substantive issues 4. Orders available	1. Organisation is from CCI viewpoint 2. E-filing is not truly online 3. FAQs address only some issues 4. Orders not easily searchable 5. No Guidelines 6. Exact stage of case status not known
OPPORTUNITIES[71]	THREATS
1. Organise website from a stakeholder perspective 2. Provide Notification forms online with in-built validation facility 3. Increase scope of FAQs to cover more procedural and substantive issue 4. Provide formal guidance on important substantive issues 5. Issue Defect letters online and allow responses to be uploaded[72] 6. Add discussion forum-blogs 7. Searchable data bank of PFCs 8. Password protected access to case status to parties[73]	1. Complexity of designing online forms 2. Form II may not be amenable to online submission at present 3. It may be too early for detailed FAQs/Guidelines as they may bind CCI

Figure 6:SWOT Analysis of present e-Governance set up

[70] These fulfil partly the requirements of RP VIII.
[71] These would take care of requirements of RP 1, RP II, RP. V, RP VI, RP VIII, and RP IX.
[72] Please refer to Item 6 of Table II.
[73] Please refer to Item 7 of table II.

The SWOT analysis above helps to pave the path for understanding limitations and designing and implementing a better system. The elements of the new design are detailed in the next sub-section.

C. Suggestions to improve transparency through e-governance

(i) User based Organisation of the Web Pages dealing with Combinations.

A comparison with the website of the Competition Commission of Singapore would make it apparent that CCI's website can be better organised keeping in view the stakeholders' perspective. The Singapore website clearly places the stakeholder/user at the centre of its design to structure pages according to anticipated user queries. The questions therein appear from user perspective. How do I..?, Where can I…?

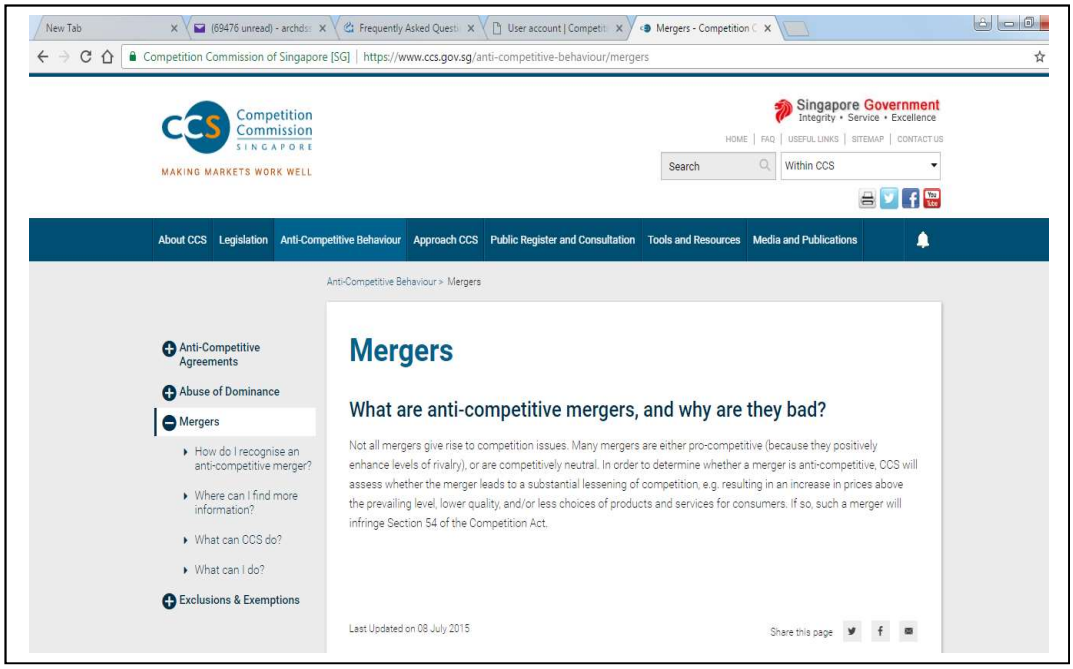

Figure 7: Singapore's Competition Commission, a Role Model for Stakeholder centric organisation of website

This would not be very difficult for CCI to emulate. The approach followed could be similar to the FAQs. The idea is to anticipate what stakeholders would typically want to know or do. The number of pages normally would remain the same, only the routes to these pages would be multiple based on an intuitive assessment of user needs and thought processes. For example, though CCI places the summary of cases filed with it on the

website, purportedly to inform the general public and allow them to write to CCI (and this has worked well), there is actually no indication of this facility on the website. Hence, ideally there could be a link to the question "What can I do" as in case of Singapore. The "Give Views" option would guide the stakeholder in this case. Similarly, the law requires CCI to publish details of Combinations into Phase II (wherein a detailed inquiry) is conducted to elicit public comment. This process too would fall within "Public Consultation" which should have a permanent link as on Singapore website. At present, CCI places this request only on the home page only when required. The same would apply to public consultation on amendments to regulations. Having a permanent link for 'Public Consultation' would encourage users to check the page often, participate and provide feedback regularly.

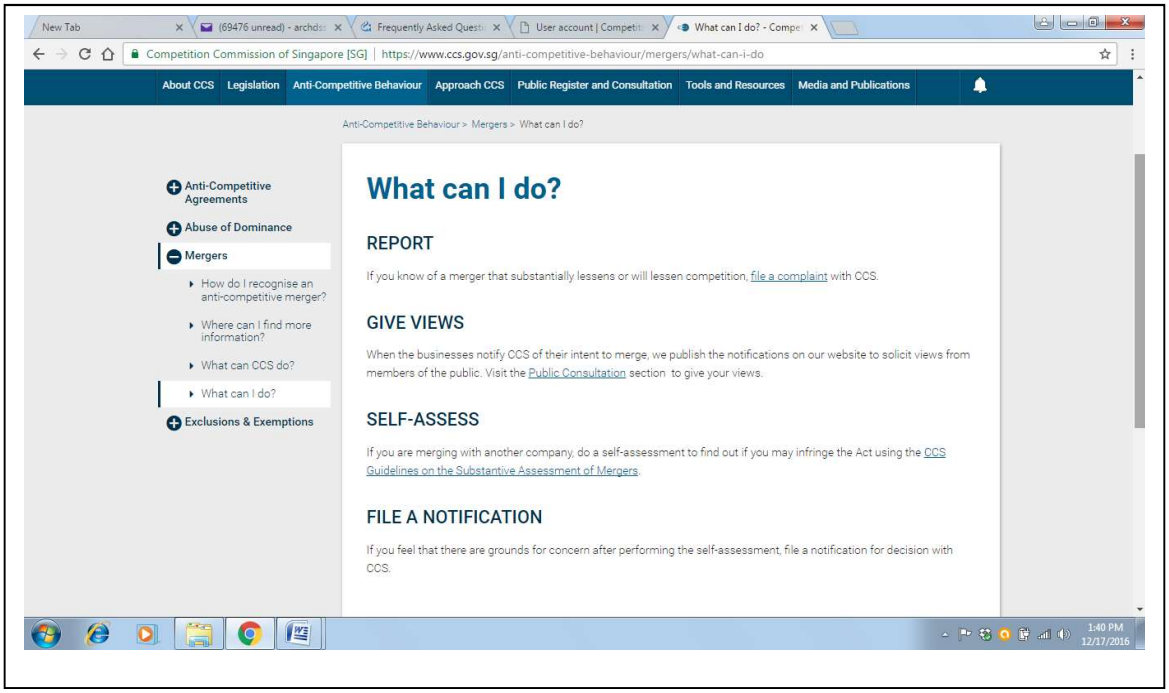

Figure 8: Singapore's Competition Commission, Empowering Everybody through Feedback

(ii) User-Friendly Search for Orders

As is the case with other jurisdictions, the orders of CCI in previous Combination cases are the most valuable source of jurisprudence and guidance for stakeholders. Even though all notices are received with details about sector and national industrial classification code as per notification requirements, CCI does not provide search facilities other than by date or

by key word. The former is not very useful and the latter will work only if that word happens to be in the name of the case. Thus, for e.g., search by "petrol" would not throw up all cases relating to petrol unless that word happened to be in the name of either of the parties, nor would it help the public find all cases related to the oil and gas sector. A good example of a user-friendly site is the European Union one where one can search on multiple criteria. (Figures 10 & 11) Federal trade commission, USA too allows search by industry (Figure 12)

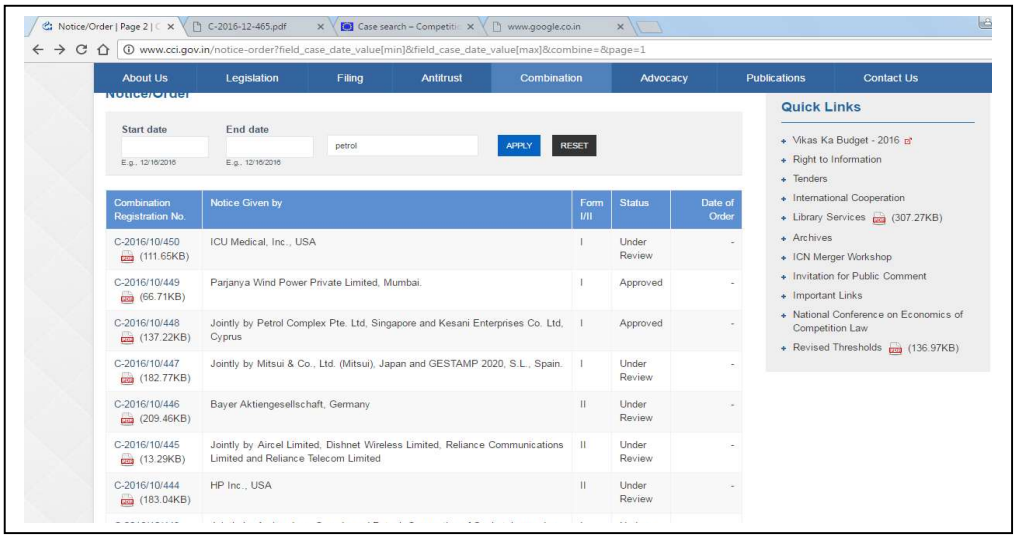

Figure 9: CCI's Order Search by key word/date

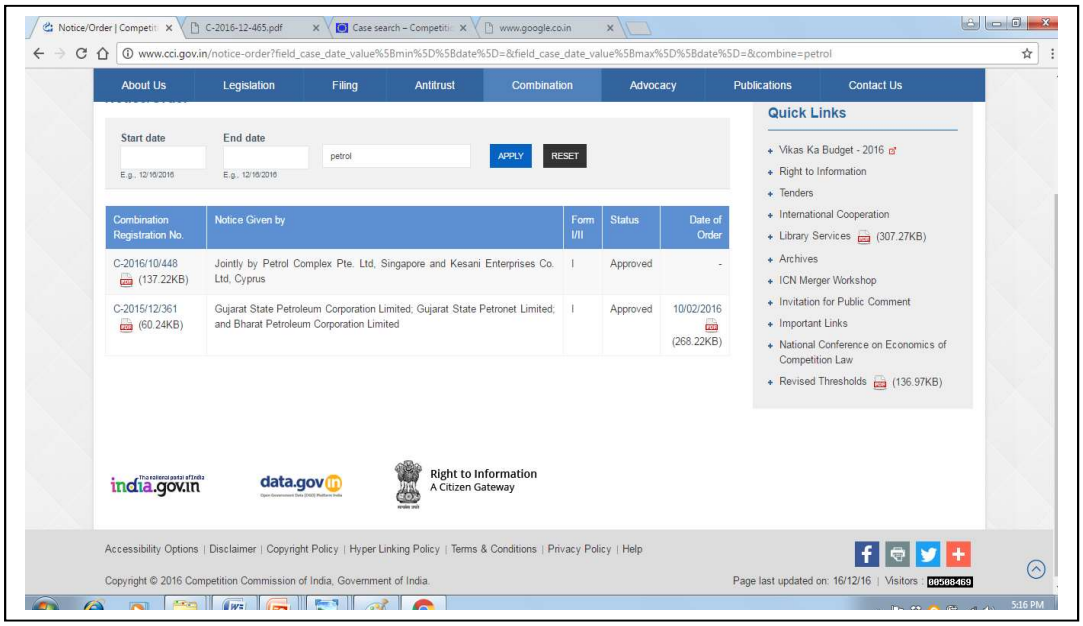

Figure 10: CCI's order search by key word

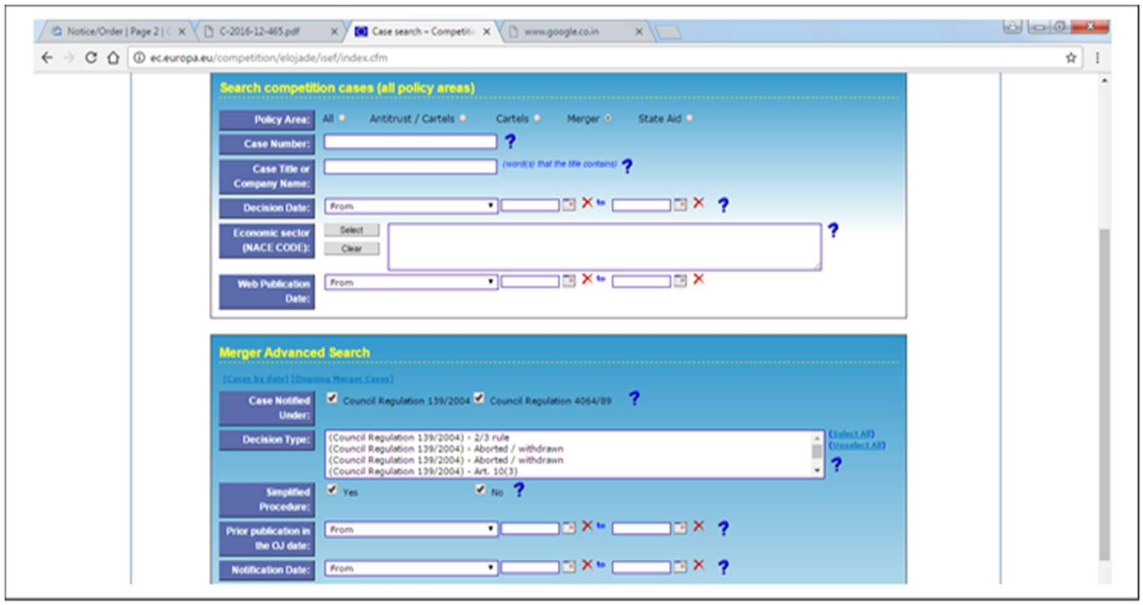

Figure 11: EU Website and User Friendly Search

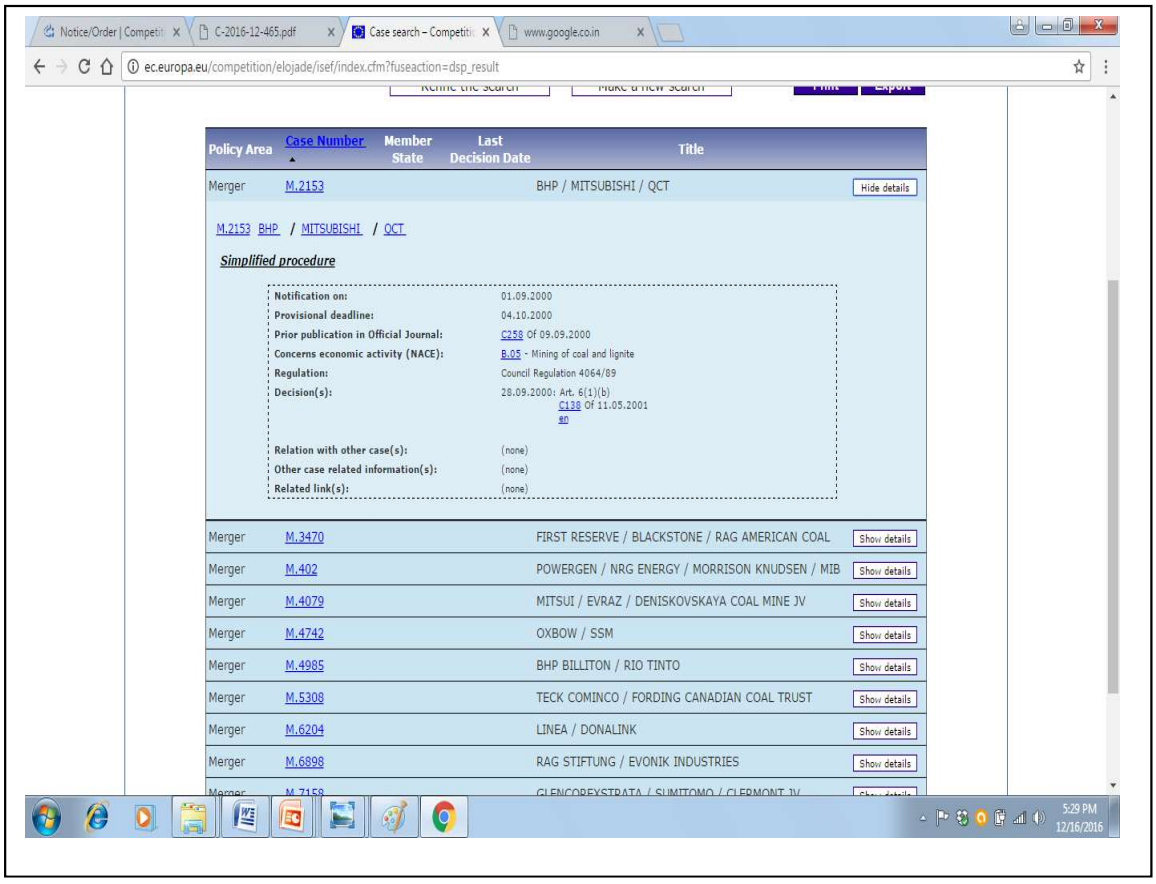

Figure 12: EU Website and Search by Industry

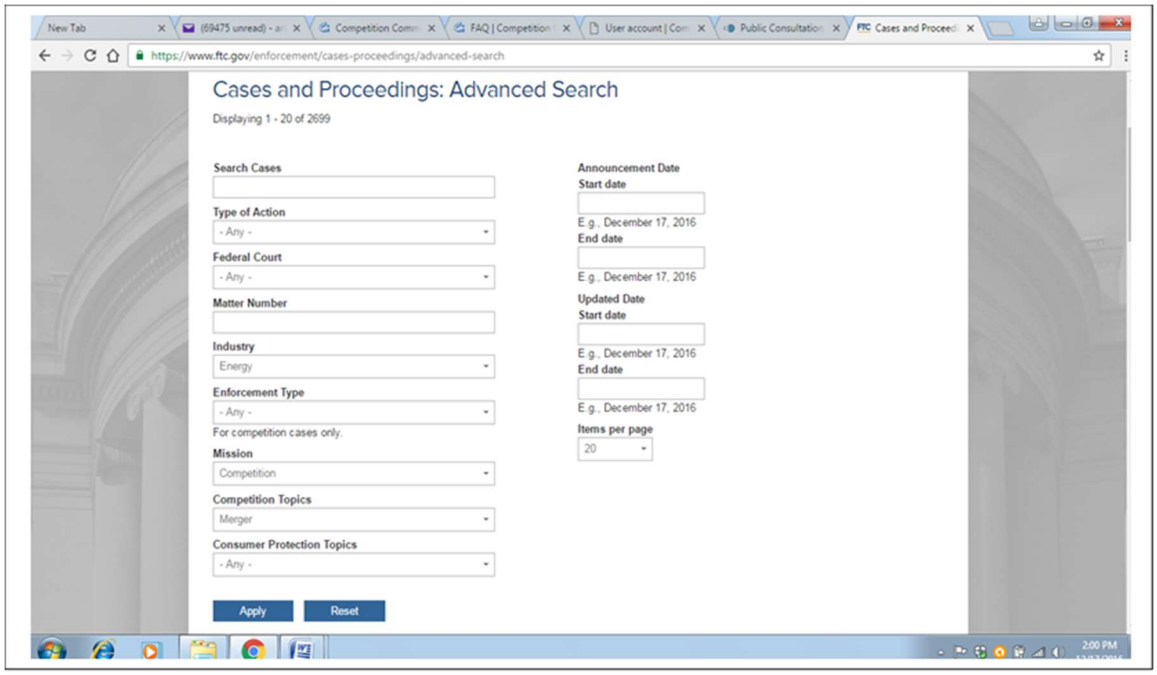

Figure 13: FTC site and Search by Industry

(iii) Providing a better version of E-Filing

At present the e-filing facility of CCI is limited to uploading a pdf version of the otherwise offline version of the Combination notice. This facility does make it easier for outstation firms to file their cases on time and follow up later with a hard copy as required. However, it would be a good idea to have an application such that the form could actually be filled up online. This would be particularly useful in the case of Form I filings which are shorter and more amenable to online submission. Admittedly Form II is much more detailed and given that 90% cases are filed in Form I, it is Form I that should go online first. Form II should be first reengineered such that information that is incremental to Form I should be identified and asked for separately. At present, it has a lot of repetition and can be streamlined.

There are many advantages of making Form I online. The first is that built-in validations in the online form (enabled by the embedded application Combination Application) would make it impossible to submit an incomplete form that skips questions. Secondly, as incomplete forms (where important details and data tables are skipped) are a major reason for issue of Defect letters which delay cases, CCI could cut down delay and even generate

Defect letters online. The application could also place the summary filed along with Form I online for public opinion seamlessly with no human interface. Thirdly, the same application could transfer data received in the Form I to a backend embedded Combination Application, which could be used by the case officers to directly feed data to the Combination Review Report (CRR) in a systematic way. The same application would be linked to a Digital Archive on parties, sectors, markets, legal issues etc. As the case officer, would be able to draw information from the archive in a systematic way, this would further streamline and hasten process of reporting to the Commission by preparing the CRR and mining other required information on the parties, sector etc., that the Commission may require thereby cutting regulatory timelines. The same software could auto-fill up basic details of the online Order Format and once a case is decided, the same software would update the Registry for case status and the Digital Archives for future datamining. The case officer would thus be working with this comprehensive Combination Application with minimal requirement to refer to disparate sources of information as these would now all be linked. These linkages are described pictorially in the Figure 14.

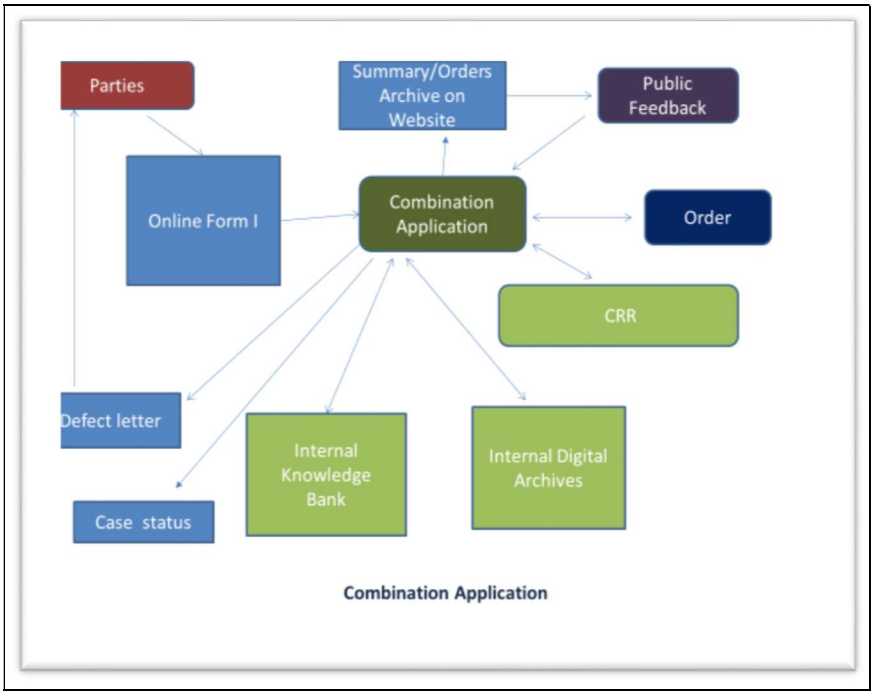

Figure 14: Embedded Combination Application

(iv) Other Elements

Despite the high level of transparency required by a developing jurisdiction like India, it is understood that CCI, given the relative newness of its merger review regime would be diffident about taking a strong stand on jurisprudence and shy away from disclosing more about its internal working or providing detailed guidance to the public. Literature review carried out in Chapter 2 has shown that this is normal at the early stages of a merger regime's existence. However, given the number and variety of cases it has settled and the sizable number of PFCs[74] the Combination division has carried out, the website could provide guidance notes on substantive issues and internal procedures, more detailed FAQs which go into substantive issues of law, blogs and discussion forums. Examples of such facilities can be seen on the FTC website[75]which has details on procedures, templates and substantive guidance. Similar facilities are available on EU website.[76] The available electronic data bank on PFCs could be reorganised to make it easily searchable and placed online to supplement FAQs. This would serve as a valuable guidance to stakeholders and avoid repeated PFCs on similar issues saving valuable time for both stakeholders and CCI. Table II and the above discussion have already highlighted areas where CCI could publish guidance on various aspects of merger review to provide transparency, predictability, certainty and credibility to its working.

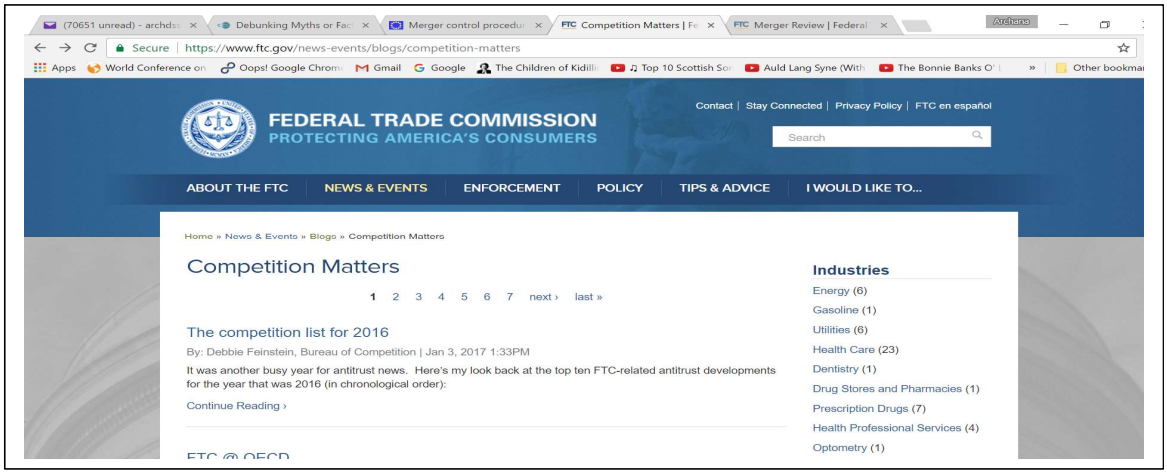

Figure 15: FTC blog on Competition matters

[74] More than 20. Information courtesy CCI.
[75] https://www.ftc.gov/enforcement/merger-review
[76] http://ec.europa.eu/competition/mergers/procedures_en.html

INVESTIGATION RESOURCES

Steps in the Review Process
Voluntary Submissions
Model Second Request
Second Request Appeals Process
Best Practices for Merger Investigations
BC Production Guide
Best Practices on Data Submissions
Protocol for Coordination in Merger Investigations with State Attorneys General
International Waivers of Confidentiality

SEARCH CASES

Use our Advanced Search page to find a specific antitrust case. To see all antitrust cases, select "Competition" in the mission field. To see a specific type of competition case, select from the list of available topics in the competition topics field.

REMEDIES

Negotiating Merger Remedies
FAQs on Remedies
Divestiture Study
Policy Statement Regarding Duration of Orders
Policy Statement Concerning Prior Approval

GUIDANCE & WORKSHOPS

Horizontal Merger Guidelines (rev. 8/10)
Commentary on the Merger Guidelines (2006)
HMG Review Project (2010)
Unilateral Effects Analysis and Litigation Workshop (2008)
FTC/DOJ Merger Enforcement Workshop (2004)
Merger Best Practices Workshop (2002)
1992 Horizontal Merger Guidelines (With April 8, 1997 revisions to Section 4 on Efficiencies)

ENFORCEMENT

Competition Statutes
Annual Enforcement Reports
Competition Enforcement Stats
Part 3 Rules
Policy Statement on Administrative Merger Litigation

Figure 16: Guidance available on FTC site

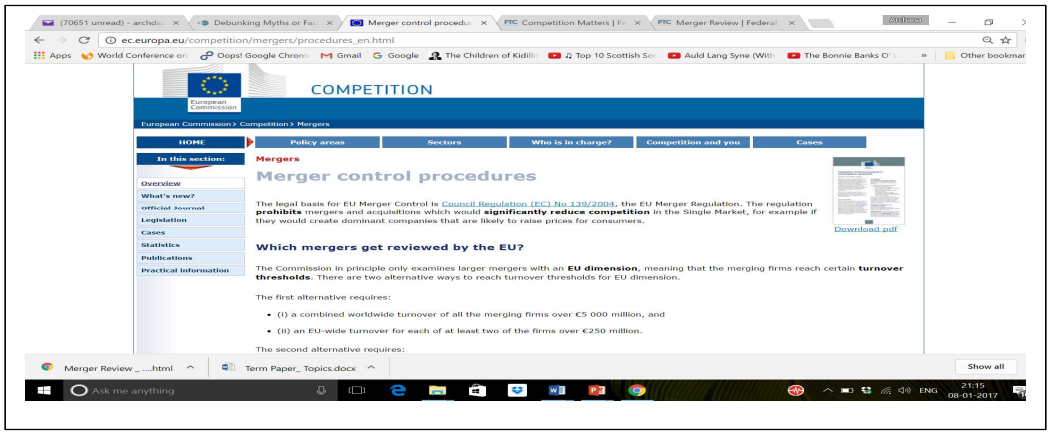

Figure 17: Guidance on EU website

5.6 Conclusion

The evaluation of challenges faced by CCI and industry in the context of the RPs and legal framework of mature jurisdictions throws up useful answers on the way forward by way of recommendations for regulatory reform. The recommendations include those that are relatively straightforward and can be implemented forthwith and those that require concomitant legal / procedural changes or a progressive approach. Before these findings can be treated as final, they must be subject to validation.