Chapter I
Introduction

1.1 Background

India like many other developing countries has enacted a modern competition law on the lines of international best practices (Sharma, 2013). 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 (Shroff and Uberoi, 2014). The Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011, as amended from time to time, ("Combination Regulations") serve as the implementing regulations. These have been amended a number of times to streamline merger review in India.

In a merger or an acquisition, a firm decides to merge with another firm (mergers and amalgamations) or acquire another firm or its assets (acquisition) in lieu of expanding organically. This type of growth is called inorganic growth and offers various opportunities such as relatively faster expansion in the same or complementary line of business or vertically into downstream or upstream businesses (Ray, 2013). For selling firms, it offers a means to streamline business activities or exit from certain businesses. As in case of other economic activities mergers and acquisitions (M&As) are driven by market forces of market demand and supply and profit considerations. They 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 (UNCTAD, 2010). At the same time, while some M&As may give rise to competitive concerns thereby justifying merger regulation, most M&A activity is at best

healthy and at worst benign. It is thus important to ensure that merger regulation does not delay or impede this normal aspect of the market process (UNCTAD, 2010). Further, M&As are also a means through which foreign direct investment (FDI) is channeled into the economy. The existence of a sound legal system including competition law is an 'important consideration' for foreign investors (Shahein, 2012). Therefore, efficiency in filing and processing of M&A notices by the competition authority is an important aspect of the ease of doing business), while effective merger[1] review or merger control is important for healthy markets and economic activity (Chawla, 2015).

Effective implementation of merger review would require *inter alia* that its regulatory framework is simple, clear, predictable and consistent, fair & transparent. These are widely accepted as the basic features of effective regulation (ICN, 2005b). 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[2] and information asymmetries[3] coupled with limited experience and capacities of the competition regulator can hinder effective implementation (Budzinki and Beigi, 2015). 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 (Gal and Fox, 2015).

International bodies including the International Competition Network (ICN) and the Organization for Economic Cooperation and Development (OECD) have developed widely accepted best practices in merger review. The ICN calls these Recommended Practices. These include recommended practices on procedures and those on substantive merger analysis. These recommended practices are commonly used by member nations for

[1] The term 'merger' is normally used in competition law to encompass various types M&A transactions i.e., the terms includes acquisitions and it shall be used in this manner in thus study.

[2] 'The ability [of regulated entities] to capture regulators through lobbying reduces incentive of regulated firms to comply with regulation and to compete in the market through productivity & efficiency rather than rent seeking, thereby imposing a social cost' (Bo, E.D. as cited in Gulati (2015), p.98).

[3] 'Whereas the regulated firm has insider knowledge of its operating environment, the regulator lacks the same' (Cook, P. cited in Gulati (2015), p.98).

self-assessment and benchmarking of their regulation (ICN, 2005b). Indian law itself is modeled to a large extent on the laws of the developed nations, in particular, that of the United States of America (USA) and European Union (EU) (Tiwari, 2011; Sharma, 2013).The Competition Commission of India (CCI) is an active member of the ICN and works closely with ICN and OECD, especially in the area of capacity building (Chawla, 2014a).

Domestic and international commentators while appreciating CCI for its progress and positive approach have highlighted the scope for improvement as regards the basic features of merger regulations (Reeves and Harison, 2011; Shroff and Uberoi, 2014). While there may be no substitute for 'learning by doing' and each jurisdiction has to climb its own 'learning curve' (Kovacic, 2012, p.27), there is merit in learning from the vast experience of advanced jurisdictions such as USA and the EU which have after years of 'trial and error' developed robust competition law systems (Shahein, 2012) whose basic elements are embodied in the ICN recommended practices.

1.2 Statement of the Problem

Mergers & Acquisitions are an important means by which businesses grow and reorganize to improve their performance (Tiwari, 2011). CCI reviews notifiable M&As (Combinations) to avoid anti-competitive impact on the relevant markets. Simple and clear, efficient, transparent and fair, timely, consistent and predictable regulation of M&A is an important aspect of economic regulation. It has an important bearing on market efficiency, economic growth, competitiveness, FDI etc. (ICN, 2005b). Along with inexperience and capacity constraints, CCI like competition regulators in other developing countries, has to deal with information asymmetries, poor compliance culture and attempts at regulatory capture (Gulati, 2015). This impacts performance (Bhatia, 2016; Shroff and Uberoi, 2014). 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 (Chawla, 2015) Appropriate improvements in the regulatory framework would be expected to achieve the twin objectives of facilitating ease of doing business, along with better enforcement.

1.3 Purpose of the Research

The purpose of the 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.

1.4 Research Objectives

1. To describe international best practices in design of merger review regulation,
2. To explore the challenges faced by CCI and the industry vis-à-vis present regulatory framework for merger review,
3. To evaluate merger regulation in India in the context of best/recommended practices and above mentioned challenges, and
4. To make recommendations on improvement in the regulatory framework.

1.5 Research Questions

1. What are the international best practices in design of merger review regulation?
2. How does CCI's regulatory framework fare in comparison?
3. What are the problems faced by CCI and industry vis-à-vis the current regulatory framework?
4. How can these be addressed through improvements in regulatory framework?

1.6 Scope of the Study

The study will focus primarily on modifications in merger regulation (secondary legislation) rather than on changes in the statue itself (Act). However, there may be some recommendations on change in statutory framework too as these may be inevitable to

address stakeholder issues and to improve the overall legal framework. The scope of the study is restricted / limited to procedural aspects of regulatory design that affect the desired characteristics of regulation,[4] as captured in internationally recommended best practices. It will not examine substantive aspects of merger review i.e. the methodology of competition assessment including economic analysis. The study will take the regulatory environment including institutional and regulatory capacities and characteristics as a given and focus on how regulatory design can overcome challenges to effective enforcement.

1.7 Limitations

Given that CCI started reviewing Combinations in June, 2011, there is limited experience in terms of the number of cases settled so far and accordingly, the description and evaluation of challenges faced too would be limited (to five years). Accordingly, the present study may not be able to explore the entire spectrum of problems that may emerge with time. Another limitation would be the scarce material available in the public domain as regards challenges faced in the regulatory process. This is mostly in the form of brief comments from law firms either in law journals or in the media. The other source of material would be feedback received by CCI from stakeholders-either *suo motu* or in response to a consultation process. This is not placed in the public domain by CCI and would have to be studied with their permission. Finally, the overarching issue of restricted time period available for the research would imply a less than exhaustive study of the existing literature on the subject.

1.8 Methodology

1.8.1 Methods & Data Sources

The research method would be an extensive Literature Review (1996-2017) focusing on books on merger review in developing countries, academic journals (national & international), ICN website, OECD websites, newspaper articles and blogs on merger

[4] Transparency, credibility, fairness etc. (ICN, 2005b).

review, documents relating to letters/feedback received by CCI from stakeholders in relation to merger review etc. For validation of findings, expert opinion from two experts would be sought. This would include one expert representing the industry view point and one regulatory expert. The expert opinion would be obtained through a structured, face to face interviews conducted with the help of a pre-determined schedule of questions seeking to elicit the views of the experts on the recommendations emerging from the study. Two case studies would be also be employed for the purpose of validation of recommendations. The final recommendations would be based on the validated findings of the study.

1.8.2 Research Design

Research design would include a detailed description of international best practices in merger review procedures based on the work of ICN and OECD so as to capture the experience of several competition jurisdictions across the world, including that of advanced jurisdictions like USA and EU. An exploratory study of challenges faced by CCI and industry in the conduct of merger review would be conducted. This would be based upon thorough examination of secondary data consisting of books, articles, speeches and as well as feedback form industry received by CCI as a part of its regulatory reform efforts. The research design would also entail a comprehensive and organized description of how merger regulation in India matches up vis-à-vis best international practices. The above-mentioned challenges would be systematically evaluated in detail in the context of the present regulatory framework and international best practices so as to arrive at potential areas of regulatory reform.

1.9 Chapterisation Plan

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 practiced 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.

1.10 Conclusion

This chapter has provided a brief background on merger review including the existence of international best practices on regulation of mergers by competition authorities. It has highlighted the importance of efficient and effective merger review and it has laid down the rationale for the study as well as outlined the research design and methodology to be followed.