Chapter 9
Results of Validation

9.1 Introduction

This chapter summarizes the results of attempts to validate the recommendations emerging from the study by using case studies and expert opinion.

9.2 Case Studies

The case studies confirm the importance of following the RPs in terms of transparency and greater consultation with parties in the conduct of merger review. While Case Study I highlights the importance of being able to review small value transactions in the Indian context and the need to build in flexibility into merger review timelines especially when parties are keen on more intense interaction, Case Study II on the other hand, demonstrates problems created by having notification thresholds that diverge from the internationally accepted norm and the RPs (RP 1), coupled with lack of enough information in the public domain to enable parties, especially foreign parties, to understand the substantive and procedural aspects of Indian merger review. It stresses the importance of following RP VIII on transparency and confirms recommendations dealing with this subject. Seen together the two case studies imply that it would be best to allow the size of the transaction to determine notification thresholds (RP1), but this should be combined with the size of the parties test as well as the power to review non-notifiable mergers as in USA. The aspect of allowing parties to suggest remedies and interact intensively with the Commission during merger review is clear from Case Study I. Thus, it makes sense to build flexibility into the review timelines by introducing enabling regulations to allow parties to enter into timing agreements with the Commission on the lines of USA's regulatory framework and in keeping with the RPs. The need to have more guidance on Indian merger review procedures available in the public domain is evident from Case Study II involving foreign investors who seem to have made a genuine mistake on account of their interpretation of the Indian legal framework compelling them to appeal against CCI's penalty order.

9.3 Expert opinion

Expert opinion was valuable in understanding the viewpoint of the regulator and the industry. These converged on most points but also diverged on certain matters which are mostly those relating to transparency and certainty of merger review procedures. However, given the findings of this study, it is clear that no matter how desirable it is in theory, the regulator's level of conformity with RPs on procedural fairness in conduct of merger review[84] and transparency[85] would go hand in hand with in the growth its capacity, experience and confidence level and thus a graded approach would be in order.[86]

The points of convergence included firstly, the need to do away with the 30-day deadline for filing. The CCI Member felt that this provision is not in conformity with international best practices and leads to hurried filings which later cause problems for CCI. He felt that in the absence of the time limit, parties were more likely to engage with CCI through PFCs and this would improve the quality of notices. The expert from the legal fraternity pointed out that, 'this legal provision has resulted in several transactions which are filed after the 30-day trigger being prosecuted for technical gun-jumping on account of being belated filings. This anomaly in terms of international best practices is an unnecessary burden to industry and the regulator, in terms of administration and costs. Merging parties have every incentive to file as early as possible - in order to get approval as quickly as possible as time is of essence in any M&A transaction.'

On the issue of having a pull and refile option, the CCI Member felt that this provision is very useful and is already is available to parties on an informal basis but agreed that formalizing it through amendments in the regulatory framework would afford greater certainty to parties. The legal expert too felt that this would be useful as it would allow the parties to restructure deals to remove competition concerns pointed out by the Commission and allow Commission more time so as to complete review in Phase I itself, rather than getting into a prolonged Phase II inquiry. In her opinion, the context of multi-jurisdictional

[84] RPs VI and VII.
[85] RP VIII.
[86] Refer also, Section 2.6, Chapter 2.

mergers wherein parties have relatively minor presence in India, given the present 30-day deadline which compels parties to file very early in India, this would also allow parties to resubmit their case when markets and overlaps have been thrashed out and remedies agreed upon with other jurisdictions. CCI would find it much easier to clear the deal at that stage. She felt that this option would help parties avoid invalidation of hurriedly filed / substantively incomplete notices and this would be 'industry friendly'.

As regards the clarity on the definition and contents of turnover, both experts were strongly of the opinion that the Act should include an appropriate explanation as in the case for assets and that CCI should issue guidance on the subject. As opined by the legal expert, 'The principles of statutory interpretation dictate that the turnover will be read in consonance with the explanation to assets. However, for ease of reference and for the avoidance of any doubt, it would be good to clarify the application of turnover would be the same as the relevant year for assets under the Competition Act, 2002 (as amended). Further, guidance on turnover would be critical as a one size fits all approach will not work and each industrial / economic sector will have different modes of computation and attribution of turnover.'

On the issue of allowing parties to formally propose remedies both experts felt that this would be in the interest of more effective and industry friendly merger review. The CCI Member was of the opinion that remedies proposed at any stage of the proceedings i.e. Phase I or II should be duly considered by CCI and he felt that regulations should be introduced under Section 31 (12) of the Act to make timing agreements with parties possible. The legal expert too opined that parties are keen on much more interaction with CCI in terms of submissions, hearing and would be willing to provide more time to CCI within the statutory framework. She felt that the present time lines were unrealistic given the multiple formalities involved in Phase II investigations. In her opinion interpreting Section 31(12) to exclude extensions sought by the parties at any stage of the proceedings would be legally correct and also a positive move that would allow CCI to (i) increase the level of cooperation and coordination with parties, (ii) to consider remedies even in Phase I and (iii) to enter into timing agreements with parties rather than hurriedly impose

modifications on parties due to the 'ticking clock.' She also recommended that that 'the initial remedy package should invariably be volunteered by the parties and evaluated by the CCI as opposed to vice versa, given that the parties are best placed in terms of knowledge of deal contours and industry to offer the remedy package. The regulator can then evaluate if the remedy package addresses competition concerns adequately. The time period and the number of negotiations between the parties and the regulator will need to form a part of the framework to provide clarity to industry as well as a defined framework which is consistently applied across the board.'

On the subject of thresholds being linked to size of target business rather than seller/target enterprise, the CCI Member felt that this would be an appropriate amendment to make. In his opinion at present CCI receives a large number of cases involving inconsequential transactions wherein the acquisition's size is very small. This wastes the time of the Combination Division which is already under staffed and overburdened. If such transactions were to be excluded from review, the Combination Division could instead focus on more competitively significant cases. He was not in agreement with the notions of having a dual test as in FTC or with introducing the power to review non-notifiable transactions. He felt that even if some competitively significant transactions do escape review, these can be caught later under the Antitrust provisions of the Act. He felt that the number of such transactions are likely to be negligible and thus they do not justify introducing dual test or a provision to review non-notifiable transactions. On the other hand, the legal expert felt that India should introduce a dual test as well as the power to review non-notifiable transactions. She stated that, 'this would adequately balance industry interests with regulatory concerns of ensuring free and fair competition in the marketplace. However, if the CCI were to use its right to review a non-notifiable transaction, by way of natural justice, the merging parties should be given a right of hearing in a time-bound manner before proceeding to have to file a merger notification in relation to a non-notifiable merger.' She also felt that the possibility of such reviews be restricted to one year after consummation of a merger and that such review should be subject to the same timelines as a notifiable merger implying that once the Commission asks parties to file notice for a non-notifiable merger, review must follow statutory and regulatory guidelines. She suggested

that in order to give certainty and reassure to industry who would certainly be anxious if such a provision is introduced, guidance should be issued clarifying what sort of non-notifiable transactions would be reviewed. For e.g., it could be where combined market share post the merger is or is likely become more than 50% and the number of effective competitors is less than two.

On the matter of increasing the level of transparency on procedural and substantive aspects of merger review, both experts were in agreement. The CCI member felt that in theory guidance on various matters such as Schedule 1 exemptions, penalties and gun jumping, should be based upon settled cases as well as international best practices should be issued. However, he expressed some reservation about internal capacities. He also pointed out that and CCI's orders too should provide more clarity about such issues as well as substantive matters such as the manner of arriving at market definitions. He felt that internal/published guidance would expedite review as it would lay down a consistent manner of interpreting and applying the law. The legal expert was of the same view and felt that more and more guidance would be a welcome step that would go a long way towards enhancing transparency and certainty of the merger review process.

The two experts differed on the matter of guidance on continuing defects. Member, CCI felt that the problem could be solved through more pre-filing consultation and removal of 30-day deadline as these would address quality of notices filed. He felt that it is not possible to issue guidance on continuing defects. However, the legal expert opined that continuing defects hurt industry as they create uncertainty about timelines and in the interest of transparent and credible merger review, it should be made clear as to under what circumstances would be clock be stopped, continued and restarted when there are defects in the notice. She also stated that, 'in relation to continuing defects, it would be very useful if continuing defects were communicated to merging parties within a maximum of one week from date of receipt of the information. This would enable the parties to address the continuing defects in a time bound manner and provide greater transparency in the time for the merger review.'

On the issue of improved e-governance both experts agreed with all the items in the questionnaire. However as regards popularity of e-filing of notices, the legal expert was doubtful. She explained that industry is reluctant to do so because 'given the level of strategic information that a merger notification contains and the fact that the possibility of hacking - even in the most secure of sites -cannot be completely ruled out.

Finally, while CCI Member recommended that CCI should attempt to move forward with confidence to create an industry friendly, world class merger review regime, the expert from the competition law fraternity stated that, 'consistency would be the key to any acclaimed merger control regime and guidance notes setting out the position undertaken by the CCI would vastly aid this endeavour.'

9.4 Conclusion

This chapter details the results of attempts made towards validation of research findings by way of case studies and expert interviews. Both case studies and expert views highlight need for amendments to regulatory framework. The expert views converge on most points substantiating research findings and recommendations. However, the points of divergence draw attention to the need for a cautious and graded approach to following the RPs while amending the legal framework and issuing guidance, in keeping with regulatory environment, internal capacities and the concerns of industry. As regards the first area of divergence i.e., limiting thresholds to size of target business, accompanied by additional safeguards by way of dual test and the power to review non-notifiable transactions, on balance it is surmised that the recommendation is a sound one. This follows from Case Study I which highlights that competitively important transactions could involve small targets businesses and thus, the need for additional legal safeguards to ensure scrutiny of such transactions. The opinion of the legal expert also confirms the same. As regards the matter of issue of guidance on continuing defects, CCI could start with internal guidelines to act as a self-disciplining measure and place the same in public domain once confident about their practicality. Finally, on the matter of e-filing, clearly industry concerns on security of their data would have to be allayed by putting in place stringent internet / data security measures and through advocacy and outreach.