

## Chapter 10

### Conclusion and Way Forward

#### 10.1 Introduction

The recommendations for improvement in the regulatory framework for merger review in India that emerge from this study are based on evaluation of the Indian merger review scenario in terms of challenges faced by CCI and industry as well as by benchmarking Indian regulatory framework for merger review against the RPs. The challenges faced by CCI include limitations of capacity, relative inexperience, information asymmetries, threat of capture and less than conducive overall regulatory environment. Those faced by industry include delay in clearance of deals by CCI, lack of clarity and transparency on substantive and procedural matters, as well as specific issues with the legal framework. The validated recommendations have been summarized in the next section. They are categorized into three parts. Part I deals with recommendations that can be brought into effect immediately. Part II with those that may be implemented but with simultaneous changes in related aspects of the legal/procedural framework. The latter have been labelled Specific Recommendations and include recommendations on progressively enhancing transparency through increased guidance and e-governance. This Chapter also mentions the limitations of the study and the suggested way forward.

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

##### *10.2.1 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.

### *10.2.2 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), as proposed by industry, by way of (a) amendment to Section 23 of the Act and the Combination Regulations, and introduction of enabling provisions in the Combination Regulation, along with (b) introducing enabling regulations (in Combination Regulations) to extend timelines under Section 31(12) of the Act;
- (ii) Limiting thresholds to relevant business activities of the target by amending Section 5 of the Act as per industry feedback, combined with the power to review non-notifiable transactions within one year of their consummation, by amending Section 20(1) of the Act;
- (iii) Progressively increasing level of transparency by means of publication of guidance and improved e-governance by:
  - 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 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, CRR and Orders;
- (e) Searchable data bank of PFCs organized by issues; and
- (f) Discussion Forum and blog.

### 10.3 Limitations

As has already been brought out in Chapter 1, the limited experience that India has with modern merger review law and its enforcement in terms of less than 500 settled cases would imply that the study of challenges faced is not exhaustive. In particular, CCI has issued approval with modification/remedies in only 3 cases so far. As time passes and more cases including complex ones are reviewed, other problems and opportunities for reform would inevitably emerge. The other limitation of this study was the paucity of time. If more time had been available perhaps one could have studied the experience and practices followed by other jurisdictions in more detail. In the absence of time, the use of the ICN RPs is the best possible proxy as it represents the synthesis of this experience and best practices.

### 10.4 Way forward

It is sincerely hoped that this study would constitute a useful addition to the available body of knowledge on regulatory framework for merger review in India. It could be used by CCI to consider amendments to legal framework and procedures in conduct of merger review. Going forward, it would be advisable for stakeholders and CCI to continue to collate challenges and scan international best practices in search of solutions that can best be emulated or adapted to the Indian scenario. There are certain suggestions of industry that were not found appropriate for implementation at present even though some of these were in tune with RPs<sup>87</sup>. These should be taken up for consideration at a later stage when CCI's capacities, experience and regulatory environment have evolved further.

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<sup>87</sup> Discussed in Section. 5.4, Chapter 5.

## 10.5 Conclusion

The above recommendations would go a long way towards making merger review in India more efficient and effective. The implementation of these recommendations would be an appropriate step given (a) CCI and industry's present level of experience with merger review, in the context of India's unique challenges and (b) learning from the experience of other jurisdictions' (including advanced ones like USA and EU) as embodied in ICN's RPs, adapted to the Indian scenario.