Chapter 3
International Best Practices in Merger Review

3.1 Introduction

The most authoritative compilation of international best practices in procedural aspects of merger review is the ICN's Recommended Practices. The Notification and Procedures subgroup is one of three subgroups comprising the ICN's Merger Working Group. This working group encourages 'convergence towards RPs especially in the context of review of multi-jurisdictional mergers. The idea is to enhance effectiveness of merger review regimes, minimize costs and regulatory burdens.' The subgroup's main focus has been development and assistance in the implementation of Guiding Principles and Recommended Practices for Merger Notification and Review Procedures. To begin with they prepared eight Guiding Principles that provide a 'road map' for agencies creating and reforming their merger regimes. 'The Guiding Principles outline eight precepts on which merger regimes should be based: (i) sovereignty; (ii) transparency; (iii) non-discrimination on the basis of nationality; (iv) procedural fairness; (v) efficient, timely and effective review; (vi) coordination; (vii) convergence; and (viii) protection of confidential information.' These were adopted in ICN's first annual conference in September 2002.Concurrently, the subgroup developed the RPs which are intended to be adaptable to the varying developmental stage and legal backgrounds of different jurisdictions. 'They consist of short, 'black letter' statements followed by explanatory comments' (ICN, 2005b, p.1).

Thus, over the period from 2002 to 2006, members of ICN adopted thirteen non-binding RPs on merger notification and review procedures. Members are free to implement these as they deem fit through legal means or practical application. 'The members' willingness to adopt practices [even if] at odds with many of their own merger review procedures, together with a legitimacy gained from close public-private partnership in drafting the Practices, resulted in the Recommended Practices quickly becoming an important baseline throughout the world for sound merger review policy.' (ICN, 2016, p.1)

The ICN Merger Working Group (ICN MWG) recently conducted a review to gauge if and to what extent member jurisdictions' merger regulations/procedures conform to these RPs. The review was responded to by 80 out of 100 member countries surveyed (ICN, 2016). Though India is not one of the jurisdictions that responded, these responses could be helpful in the evaluation of India's position vis-à-vis the RPs and its peers. ICN's eight guiding principles (ICN, 2005b) are reproduced in the Figure 1 below:

Guiding Principles for Merger Notification and Review

*1. **Sovereignty.** Jurisdictions are sovereign with respect to the application of their own laws to mergers.*
*2. **Transparency.** In order to foster consistency, predictability, and fairness, the merger review process should be transparent with respect to the policies, practices, and procedures involved in the review, the identity of the decision-maker(s), the substantive standard of review, and the bases of any adverse enforcement decisions on the merits.*
*3. **Non-discrimination** on the basis of nationality. In the merger review process, jurisdictions should not discriminate in the application of competition laws and regulations on the basis of nationality.*
*4. **Procedural fairness**. Prior to a final adverse decision on the merits, merging parties should be informed of the competitive concerns that form the basis for the proposed adverse decision and the factual basis upon which such concerns are based, and should have an opportunity to express their views in relation to those concerns. Reviewing jurisdictions should provide an opportunity for review of such decisions before a separate adjudicative body. Third parties that believe they would be harmed by potential anticompetitive effects of a proposed transaction should be allowed to express their views in the course of the merger review process.*
*5. **Efficient, timely, and effective review.** The merger review process should provide enforcement agencies with information needed to review the competitive effects of transactions and should not impose unnecessary costs on transactions. The review of transactions should be conducted, and any resulting enforcement decision should be made, within a reasonable and determinable time frame.*
*6. **Coordination**. Jurisdictions reviewing the same transaction should engage in such coordination as would, without compromising enforcement of domestic laws, enhance the efficiency and effectiveness of the review process and reduce transaction costs.*
*7. **Convergence**. Jurisdictions should seek convergence of merger review processes toward agreed best practices.*
*8. **Protection of confidential information**. The merger review process should provide for the protection of confidential information.*
Source: (ICN, 2005b)

Figure 1: ICN Guiding Principles for Notification and Review of Mergers

3.2 The Recommended Practices

The RPs (ICN 2005a) as mentioned above, fall into thirteen categories which are described briefly as follows:

3.2.1 RP I: Nexus to Reviewing Jurisdiction

This has various facets including that:

A. *Local Nexus*: Competition authority should assert jurisdiction to review/control only those M&As wherein sufficient nexuses exists with their own jurisdiction.

B. *Materiality of nexus*: The merger notification thresholds of a jurisdiction should ensure 'materiality' in terms of sales or asset levels of the merging entities within their territory or in other words, they should exclude review of transactions which on account of non-material nexus are unlikely to have competitive concerns in their jurisdiction. This is recommended *inter alia* to reduce the burden on both filing parties and the competition authority. While threshold based on worldwide assets and turnover of parties may be used as 'ancillary' thresholds, these should not trigger notification in the absence of sufficient local nexus. Thresholds should relate to relevant business activities that are the subject matter of the M&A.

C. *Two party test:* The thresholds should apply to the business activities of at least two parties to the transaction and/or to the activities of the acquired business. This again means that only transactions that are likely to have a competitive impact should be reviewed. Basing notification requirement on just one party's particularly the acquirers size (in terms of assets and sales) could lead to unnecessary filing (lacking competitive impact) if the acquired business is not sizable. Therefore, thresholds should in this case be set very high or not at all. It has been acknowledged that capturing such transactions within notification thresholds may be important for those jurisdictions where non-notifiable transactions cannot be reviewed.

3.2.2 RP II: Notification Thresholds

The second RP requires,

A. *Simplicity & clarity*: Notification thresholds be 'clear and understandable,'

B. *Objectivity:* The notification thresholds be comprehensible to domestic and foreign entities in terms of simple, uncomplicated, 'bright-line' tests. This means that the criteria for notification should primarily be objective and measurable such as assets and sales rather than subjective such as market shares. It is recommended that market shares may be used as a supplementary criterion for e.g., to assess information requirements or competitive impacts. The objective criteria should be defined unambiguously in terms of 'measurement tool' such as assets or turnover, geography to which they apply e.g. national or worldwide assets/turnover and the relevant time period as well as documentary basis (such as, annual income statements and balance sheets). It is recommended that guidance is given on issues such as inclusions and exclusions (taxes, transfers etc.) and geographic allocation of income and assets. Attempt should be made to have internationally consistent criteria and basis of data so as to facilitate multi-jurisdictional filing.

C. *Non-burdensome criteria*: Notification thresholds should be based on readily available information in the 'ordinary course of business' of the parties. If not, adequate guidance should be available to the parties to be able to comply with a jurisdiction's specific requirements. The currency in which values are to be reckoned and methodology should be clear to filing parties.

3.2.3 RP III: Timing of Notification

The third RP states that parties should be allowed to file merger notifications based upon 'good faith intentions' without undue delay. This also implies that:

A. *Standard Criteria:* While purely speculative filings would waste the competition authority's time and resources the RPs encourage filing based on standardized and internationally harmonized criteria (triggers) such as definitive documents, public announcements etc. This implies that to the extent possible parties to a multi-jurisdictional merger may file based on same trigger in all jurisdictions. In case of

jurisdictions that insist on definitive agreements as the trigger for filing RPs encourage competition authorities to provide confidential prenotification consultation to discuss the transaction in advance in the interest of timely review.

B. *No filing deadline in suspensive regimes*: Non-imposition of deadlines for filing after trigger event when there is already an embargo on consummation of the transaction till it is reviewed by competition authorities. There is no need to impose a deadline to file, as it is in parties' own interest to file as early as possible as in any case they have to wait for review to be completed before consummating the M&A transaction.

C. *Appropriate Triggers*: Triggering event should not be defined in a manner that creates uncertainty as to timing of notification or forces parties to file prematurely before they have finalized contours of the transaction.

3.2.4 RP IV: Review periods

This RP is about predictable and timely review periods.

A. *Timely Review:* Merger review should be completed in a reasonable period taking into account the 'complexity of the transaction' and its likely competitive impact, 'availability and difficulty of obtaining information and timeliness of response' to information requests sent to the parties. The RP stresses the importance of timely review especially in suspensive regimes that do not allow consummation till the case has been approved by the competition authority. Delays can jeopardize the deal in various ways (including lead to it falling through) and affect merger efficiencies (e.g. key employees may leave due to uncertainty created by pending approval). As parties prefer the certainty of approval even in non-suspensive regime and will ordinarily not consummate till the competition authority has approved, timely review is equally important in such jurisdictions. Further, in case parties do consummate the deal in non-suspensive regimes, it would be very difficult for the competition authority to 'obtain post-closing remedies,' as time passes.

B. *Expedited review and clearance for notified transactions lacking significant competitive concerns:* As most notified transactions generally do not raise substantial competition concerns, jurisdictions are encouraged to have procedures that allow for

expedited clearance of such transactions. In many jurisdictions, the initial review period is called Phase I wherein non-problematic transactions are cleared in a defined short time frame and only those transactions that are likely to have ca significant competitive impact are taken to Phase II, involving more detailed and hence prolonged inquiries.

C. *Finite time periods for preliminary review (Phase I) and detailed review (Phase II):* Not only should review periods be definitive and honoured by the competition authorities including those jurisdictions that follow non-suspensive regimes, 'jurisdictions should facilitate coordinated review and clearance' by having similar waiting / review periods for Phase I, normally 6 weeks or less and phase II, normally 6 months or less, from date of notification.

3.2.5 RP V: Requirement for Initial Notification

It is recommended that information requirements be the minimal required to establish notifiability as per jurisdictional thresholds, to assess preliminary competition concerns so as to decide whether to go for further review or to close the transaction. Further it is recommended that,

A. *Less information be sought where there are low thresholds:* Keeping information requirements to the minimum is especially important for jurisdictions that have low notification thresholds and those who review transactions with limited local nexus or limited value. This implies that where notification is triggered easily and a large number of transactions of limited competitive significance are likely to be reviewed, information requirements should be minimal to reduce burden on filing parties.

B. *Flexibility*: Jurisdictions should consider allowing flexibility in information required upon filing through various means such as, (i) shorter forms for transactions that are unlikely to have significant competition concerns; (ii)advance ruling certificates in lieu of formal filing; (iii) especially for authorities with significant information requirements, procedures that allow discretion to the competition authority to waive requirement to supply information or (iv) abbreviated initial information requirements coupled with discretion to call for detailed information if required.

Flexibility should mean that if parties can demonstrate lack of competition concerns based on information available in ordinary course of business then the competition authority should not insist on information in the prescribed format. Authorities that normally demand supplementary information should provide guidance on types of information sought such as customer lists etc.

Agencies / authorities that use prescribed formats should allow flexibility for international differences such as fiscal year. Also, voluntary provision of information by Parties should be permitted to aid agency investigation into competitive concerns.

C. *Pre-notification guidance:* It is recommended that agencies provide parties with guidance on whether transactions are notifiable and on information requirements so that 'legal and factual issues relating to the notification' are settled at the earliest. This would help both sides. Pre-notification guidance is especially valuable in case of jurisdictions that can provide discretionary waivers on information, as this reduces burden on filing parties.

D. *Limiting translation and formal authentication requirements:* It is recommended that agencies minimize translation burdens on filing parties especially with respect to supporting documents such as annual reports and transactional materials and accept summaries excerpts instead to the extent this does not interfere with their inquiry. Notarization, consularization and authentication requirements should be reasonable and not unduly burdensome.

3.2.6 RP VI: Conduct of Merger Investigation

The hallmarks of a sound ''merger control regime' are '[e]ffectiveness, efficiency, transparency and predictability' and must be ensured at all stages of the review process. To this end, the following are recommended:

A. *Focused & timely review*: Agencies should adopt procedures and practices that facilitate focused inquiry and early resolution of competition concerns. This requires cooperation and communication between competition agencies and parties.

B. *Discussions with parties*: Merger review rules and procedures should allow for meetings and discussions between the agency and parties at important junctures

during the investigation. This would include for example, a meeting before the agency decides to proceed to Phase II inquiry. Similarly, early identification of possible competition concerns and discussion with parties is encouraged keeping of course in mind that quite possible some competition issues may only come to light at later stages of the inquiry.

C. *Early communication of reasons for Phase II inquiry: W*ithout prejudice to subsequent change in approach as regards alternative theories of harm, [16] the competition agency should communicate in sufficient detail to the parties why they are proceeding to Phase II investigation/detailed inquiry at the earliest and not later than the beginning of the Phase II investigation. This is important in the interest of 'transparency' and 'predictability' of the review process. It is also efficiency enhancing as merging parties can focus on helping the agency resolve competition concerns and thereby avoid delays in settlement of the case.

D. *Early completion even in absence of definitive timelines*

This is applicable for agencies where rules don't provide for definitive review period and can be achieved by coordination and discussion with parties. This would include for example, that agencies which fix time lines based on complete response from parties should abstain from repeatedly making information requests 'in seriatim.' Similarly, while third party information is important and should be demanded a definite timeline should be imposed on third parties and undue delay in obtaining such information should not penalize the merging parties unfairly. Especially in situations of hostile takeover such delays can be critical.

In case there is no competition issue or the same can be settled early, agencies should not necessarily await the prescribed time line and allow early termination of review period.

E. *Minimizing burden of information requirements*

Agencies should through appropriate internal procures limit information requests from merging parties and third parties to that required for their inquiry. Rules and procedures should allow case teams to modify information requests if required by

[16] These include for example unilateral effects (of market power of large firms) and harm cause by coordination between businesses in oligopolistic situations, created or strengthened by M&As.

parties and if found acceptable. Similarly, as long as it does not impede the inquiry parties, should be allowed to provide information in the form they maintain it in the ordinary course of business and not be required to provide information that they cannot reasonably access. Translation requests should be kept to a minimum. Review mechanisms (preferably internal) should exists to settle disputes between parties and case teams about reasonableness and completeness of information sought and given respectively.

F. *Confidentiality requirements*

Due consideration should be accorded to legal confidentiality requirements of parties and protection of the confidentiality of materials submitted by parties within the competition authority and in exchange with other agencies (even when parties waive confidentiality). Procedures adopted by agencies in this regard should be clear, transparent, certain and not unreasonably burdensome.

3.2.7 RP VII: Procedural Fairness

This is an essential attribute of all merger review procedures and encompasses transparency, timeliness etc.

A. *Opportunity to be heard*: In particular, this RP is about affording an opportunity to be heard to the parties to the merger as well as to interested third parties. This is regardless of whether the jurisdiction follows a prosecutorial[17] or administrative[18] merger review system. Foreign firms should be treated at par with domestic ones.

B. *Communication with parties*: It is recommended that parties be given 'sufficient and timely information' in case of an 'adverse decision.' By leading to 'well-informed enforcement decisions' this ensures public interest as well as that of the parties. Agencies should disclose 'factual, economic and legal' rationale for the decision subject to confidentiality requirements. Competitive concerns should be communicated to parties early in the process to allow them to respond and the same

[17] The competition agency upon investigation may decide to challenge a merger, however the decision to prohibit rests with an independent judicial authority (ICN, 2005a, p.19).

[18] In such a system the agency challenges as well as approves/prohibits the merger (ICN, 2005a, p.19).

should be done for remedies that the agency wishes to impose vis-à-vis competitive concerns.

C. *Third party views*: Various simultaneous means could be used by the agency to obtain third party views on the transaction. These could include (i) inviting public to give their views upon publication in public domain (ii) contacting affected third parties such as customers, competitors, suppliers etc., allowing third parties to comment on proposed remedies and taking formal part in proceedings through formal processes.

D. *Safeguards*: The entire process of merger review should incorporate safeguards to ensure fairness, transparency, efficiency and consistency. Consistent merger review processes develop and increase predictability and fairness and consequently credibility and acceptability of the merger review.

E. *Independent judicial review*: Review process should allow for independent judicial review of an adverse decision of an agency by an independent. This remedy must be available to parties in a time bound manner so as to possibly save the transaction from becoming unviable.

3.2.8 RP VIII: Transparency

The review process should have a high degree of transparency subject to confidentiality requirements.

A. *Review process available to public for credibility*: 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. This is 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. As regards 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. The 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.

3.2.9 RP IX: Confidentiality

This RP encourages respecting merging parties need for confidentiality of information submitted, while also balancing the requirements of transparency. Its elements include:

A. *Balancing commercial and public interest:* This RP is about affording due protection by either legal or procedural means to business secrets and other confidential information received from merging parties and third parties. If this is not done, it puts the parties' commercial interests at risk and would deter arties from sharing information required for merger review. At the same time, a balance must be struck vis-à-vis these commercial interests and pubic interest of maintaining transparency. Confidential information obtained from parties should be used only for merger

review 'and other authorized enforcement purposes' such as sharing the same with appellate authority. However, confidentiality of the information should be sought to be maintained. It can be shared with other competition authorities subject to laws and specified procedures ensuring again its confidentiality as regards anything other than review and enforcement. Waivers would be sought from parties as per procedure. Parties' requests for according confidentiality to information submitted by them can be subject to discretion of agency as per specified rules and procedures but parties must be given a chance to contest a decision not to grant confidentiality to certain information, prior to its disclosure.

B. *Transparency:* The agency's rules, policy and procedures regarding confidentiality, extent of public disclosure, sharing of confidential information with other government agencies should be transparently available in public domain.

C. *Deferring contact with third parties:* Certain jurisdictions routinely publish information on notified mergers on their website opening themselves to *suo motu* submission of third party information on the merger. However, seeking third party information about non-notified mergers must be subject to acceptance by parties as it can affect the transaction. Also, even if the agency does not make the fact of notification public, it may need to seek information from third parties and merging parties should be made aware of the fact and given a chance to request deferral of such contacts provided it does not impinge on timely completion of the review process.

D. *Third party information:* Third parties too must be made aware of need and possibility of disclosure of confidential information submitted by them in the interest of transparency and related procedures such as simultaneous submission of non-confidential version and clarity on confidential content and reasons for confidentiality should be in place. At times, safeguards must be put in place when third parties are willing to comment only on anonymous basis.

E. *Keeping parties informed about disclosure:* Competition agencies should restrict to extent possible disclosure of confidential information and give sufficient warning and opportunity to merging parties to safeguard confidentiality of their information if disclosure is imminent e.g., in case of judicial proceedings.

3.2.10 RP X: International Coordination

This RP encourages agencies to coordinate their review to address common competition concerns.

A. *Voluntary coordination to reduce burdens*: This can reduce duplication of effort and of burden on parties and increase effectiveness of review. When agencies try to follow best practices, 'convergence' of time tables and procedures takes place which can facilitate coordination. Inter-agency coordination is voluntary.

B. *Formal means:* Interagency coordination should be carried out as per applicable laws and doctrines. This includes national laws (such as rules regarding confidentiality) as well as cooperation treaties and agreements. MoUs and agreements etc. between agencies can facilitate coordination.

C. *Flexibility in coordination:* 'Scope and depth' of coordination would depend on specifics of the merger transaction. Means of coordination can include discussions between case teams, coordinating review timing including site visits, sharing analysis etc. However, coordination should not lead to delay in merger decisions unless agencies are trying to address common substantive issues or evolve common remedies.

D. *Parties should be encouraged to cooperate with inter-agency coordination through transparency of procures of coordination:* Parties cooperation can include notification timing and grant of confidentiality waivers that allow agencies to share information with each other. To facilitate this, agencies should make their processes transparent so parties know their policies and practices including those regarding sharing of information. Model confidentiality waivers can be developed and parties encouraged but not pressurized to grant waivers.

E. *Coordination regarding remedies:* Agencies should endeavour to ensure that they do not impose inconsistent remedies on the parties and should discuss cross border impact of remedies with each other and the merging parties. To avoid unnecessary duplication and costs, they should try and coordinate remedy timings and 'harmonise reporting requirements' (ICN 2005a, p.31)

3.2.11 RP XI: Remedies

This RP lays down best practices in design and implementation of merger remedies for cases that are found to be potentially anti-competitive and hence that cannot be approved without modification. It recommends that,

A. *Addressing identifiable competitive harm:* A remedy should address the competitive harm likely to arise from the merger but should not be designed to try to improve premerger competition. Before deciding on prohibiting the merger in its entirety, agencies should consider alternatives proposed by parties and may also take the initiative to propose 'alternative resolutions.' In doing so, all other RPs including those regarding transparency, procedural fairness and inter agency cooperation should be followed.

B. *Consulting merging parties and third parties*: The agencies, policies and procedures regarding remedies should be known to parties transparently including type of remedies preferred, standard terms of implementation etc. There should be enough time built into the merger review process to discuss remedies with the parties. Third parties should be consulted on the effectiveness of the remedies.

C. *Ensuring effective and easily administrable remedies through appropriate rules and procedures:* Remedies imposed to deal with competitive concerns may be structural (involving changes in market structure) such as divestitures or behavioural (constraints on conduct such as commitments regarding contractual clauses). Structural remedies are more easily administrable as they do not require long term monitoring of compliance. Compliance requirements should be defined precisely and unambiguously. In case of divestitures, it should be ensured that the prospective buyer of the assets is a 'viable and long-term competitor.' The timeliness of remedies is important so as to prevent merger efficiencies from being affected. For e.g. delay in divestiture can lead to asset dissipation.

D. *Ensuring proper implementation and monitoring:* Remedies should be defined in clear terms to provide guidance as regards compliance and its monitoring. Monitoring trustees can be appointed who are independent of parties to ensure

preservation of value of assets to be divested. The agency should put in place measures for inspection and reporting to ensure proper compliance. There should be a mechanism to ensure adjustment of remedies in case of unforeseen circumstances. In case of parties' failure to comply, enforcement by agency/courts must be possible. The policies and procedures regarding remedies including the above should be clear and available in the form of laws, rules and remedy agreements etc.

3.2.12 RP XII: Competition Agency Powers

This RP is about the competition agency having the authority and tools, resources, expertise and autonomy for effective enforcement. It includes:

A. *Power to obtain required information*: The agency should be empowered with ability to obtain necessary information as 'merger review is fact-intensive.' This includes ability to penalize parties with noncompliance with formal requests for information/document/testimony or its orders, remedies subject to appropriate procedural safeguards to govern the agency in it conduct of review (to ensure fairness, transparency etc.)

B. *Adequate human resources:* The agency should have adequate staffing and expertise including professionally trained staff to be able to effectively carry out its enforcement responsibilities and to this end the required financial resources. Optimization of resources would imply that agencies focus on cases that have potential competitive impact on its jurisdiction. Subject to confidentiality requirements, the agency should be able to consult independent experts too. Continuous legal and economic training of staff is critical.

C. *Ensuring objectivity through independence:* 'Objective application of competition standards in merger enforcement promotes consistency, predictability and legal certainty' and even a lack of 'perceived' objectivity 'would undermine public confidence' and harm enforcement. Thus, agencies must have sufficient autonomy to ensure objective application based on of law and precedents. The method of being perceived as fair include the agency being transparent in its functioning and open to timely, judicial review of its decisions.

3.2.13 RP XIII: Review of Merger Control Provisions

This RP lays down the importance of periodic review and reform of laws, rules and procedures. It includes the following elements:

A. *Periodic Review:* Laws and procedures relating to merger control should be reviewed regularly to achieve continuous improvement. This should encompass both procedural and substantive aspects of merger control. Certain jurisdictions build review into legislation. Some have a requirement to carry out periodic public consultation on efficacy of laws and procedures other, require periodic review of thresholds.

B. *Convergence towards best practices:* Review and reform to this end would enhance international cooperation, efficiency and eliminate avoidable costs of merger review in multi-jurisdictional cases.

3.3 OECD Recommended Practices on Merger Review

In 2005, the OECD Council adopted a set of non-binding best practices and recommendation on merger review which they hoped would catalyze convergence of merger review procedures, adoption of recognized best practices and greater inter-agency cooperation. These are divided into four sections namely, (a) Notification and Review Procedures; (b) Coordination and Cooperation; (c) Resources and Powers of Competition Authorities and (d) Periodic Review. OECD's recommendations echo ICN RPs, calling for efficient, time bound, effective, transparent, credible and non-discriminatory merger preview procedures. As stated in the document, 'the Recommendation encapsulates the key principles in the ICN Recommended Practices on Merger Review, which built on best practices from OECD and non-OECD economies' OECD (2005).

3.3.1 India position as per OECD CLP indicators

OECD has also developed some CLP indicators which have recently been 'used to measure the strength and scope' of 49 competition regimes including India. It has been found that India has scope for improvement in areas such as overall competition policy and also, (i)

merger law enforcement, which includes use of economic analysis, looking at merger efficiencies and actually blocking or imposing remedies on a merger case in past 5 years; (ii) procedural fairness, which includes ability of parties to present arguments in their defence and the publication of guidelines on procedural and substantive aspects of competition law enforcement; and (iii) advocacy which includes promoting competition through means other than enforcement such as reviewing regulation that may impact competition, where it scores worse than the average (Alemani *et al.*, 2016).

3.4 Indian Merger Review Provisions and the RPs

Though India is not included in the 2016 survey report ICN Recommended Practices Self Assessment 2016, an assessment has been carried out in Table I based on present statutory provisions, regulations and procedures as available in the public domain. Going by the law and procedures as available in the public domain, CCI is mostly aligned with the RPs. The significant areas of departure are (a) the 30-day filing deadline; (b) the fact that notification thresholds refer to the size of the target enterprise as a whole rather than the size of the business being acquired; (c) the lack of guidance (other than publication of the Act, Combination Regulations and Frequently Asked Questions (FAQs)) on procedural matters and decision making processes; (d) lack of discretionary waivers as regards filing of prescribed information; and, (e) the conduct of Phase II review by the same rather than separate case team. When we compare with the international situation as emerges from ICN's 2016 survey, it is seen that (a) The survey did not cover the notification deadline but it is a known fact that very few jurisdictions have such deadlines coupled with a suspensory regime; (b) 73% of jurisdictions have thresholds that consider only size of business being acquired; (c) 69% of the jurisdictions publish guidelines on procedural and substantive issues; (d) only about 50% jurisdictions appear to allow flexibility in information submitted at the time of notification; and (e) only 18% of jurisdictions had separate teams for preliminary and subsequent review (ICN, 2016. Thus, it appears that to be in conformity with the international best practices, India should focus on (a), (b) and (c) above.

Table I: India Assessment against ICN RPs

No.	Question	Examples of Conforming Criteria	India Position
RECOMMENDED PRACTICE I: NEXUS			
1.	Do the merger notification thresholds require a "local nexus" with your jurisdiction, e.g. having a material presence and/or activities in your jurisdiction? (*RP I.B.*)	(a) At least two parties have local activities (b) If a single party test is used, the acquired business is required to have local activities	(a) Single party can trigger notification. Under Section 5 of the Act, either the acquirer or the target, or one merging enterprise alone, can meet the jurisdictional thresholds (b) However, minimum target enterprise assets of Rs 350 crore or turnover of Rs 1000 crore in India (i.e., local activities) are required for requirement of notification. This however applies only to acquisitions and does not apply to mergers
2.	Do the merger notification thresholds require an appropriate level of materiality for the "local nexus"? (*RP I.B.*)	Material (i.e., significant) sales and asset levels within your jurisdiction	Yes. Under Section 5 of the Act, the acquirer and the target or the merging entities, must have minimum India assets and turnover values
3.	If the activities of the target trigger notification, are these activities limited to the	Sales and assets of the target only (i.e. excluding the seller)	No. The assets and turnover of the target enterprise rather than the target business are

No.	Question	Examples of Conforming Criteria	India Position
	business(es) being acquired from the target? (*RPI.B.*)		considered, both under the Act and for the *De Minimis* exemption
4.	If the local activities of the target alone trigger notification in your jurisdiction, are the applicable notification thresholds sufficiently high? (*RP I.C.*)		Yes. Discussed in Item 1. of this section
5.	If the local activities of the acquirer (rather than the target) alone trigger notification, does your agency lack jurisdiction to review non-notifiable transactions? (*RP I.C.*)		Yes. There is no provision to review non-notifiable transactions
6.	If the local activities of the acquirer (rather than the target) alone trigger notification, are your notification thresholds set at a very high level or do they contain objectively-based limiting filters? (*RP I.C.*)		Yes. Discussed in Item 1 of this section.
RECOMMENDED PRACTICE II: NOTIFICATION THRESHOLDS/PRE-NOTIFICATION GUIDANCE			
1.	Do the merger notification thresholds use objectively quantifiable criteria (and not subjective criteria, such as market share, which are disfavored)? (*RP II.B.*)	(a) Asset value (b) Sales (revenue or turnover) (c) Other objectively quantifiable criteria	Yes. The jurisdictional thresholds under the Act are based on assets and turnover values of the parties

No.	Question	Examples of Conforming Criteria	India Position
2.	Is the geographic scope for the measurement of the applicable criteria national (Note: Ancillary thresholds are also acceptable)? (*RP II.B.*)		Yes. The assets and turnover tests are national. Ancillary thresholds of worldwide assets and turnover are also used, but these have a minimum national component, i.e., there is a local nexus materiality threshold where worldwide activities are assessed. (Section 5 of the Act)
3.	Is a time period used for the measurement of sales, revenue or turnover? (*RP II.B.*)	(a) Calendar year (b) Fiscal year (c) Annual financial statements (d) Most recent available	Annual Financial Statements of the previous fiscal year in which the transaction takes place (FAQs on Merger Control)
4.	Is a specific point in time used for the measurement of the asset value? (*RP II.B.*)	(a) End of calendar year (b) End of fiscal year (c) Year-end balance sheet (d) Most recent available.	Annual Financial Statements of the previous fiscal year in which the transaction takes place (Explanation (c) to Section 5 of the Act)
5.	Does your agency provide guidance on how to calculate or determine whether your notification thresholds have been met? (*RP II.B.; RP II.C.*)	(a) Formal (e.g. published) (b) Informal (e.g. orally, by telephone)	Informal Pre-filing Consultation facility is provided by the officers of the CCI (CCI website)
6.	Are local currency values or a generally-recognized global trading currency used to establish financial thresholds? Is there specific guidance regarding currency conversion?	Guidance where to find applicable official exchange rates (e.g., central bank exchange rates)	Yes. Notes to the Combination Regulations state that the rate of conversion of foreign exchange currency into Indian Rupees and US Dollars

No.	Question	Examples of Conforming Criteria	India Position
	(*RP II.C.*)		will be the average spot rate of the last 6 months quoted by the Indian Central Bank, *viz.* the Reserve Bank of India (CCI website)
7.	If other local economic measures are used (e.g., minimum wage multiples), are they clearly defined (including applicable rules pertaining to currency conversion), transparent, and readily accessible by merging parties whether or not domiciled in the local jurisdiction? (*RP II.C.*)	Easily accessible guidance (e.g. on your agency's webpage) as to the current monetary value of minimum wage	Not applicable
8.	Are pre-notification consultations available to provide advice to merging parties regarding whether a transaction may be subject to an obligation to notify and/or the information required for a notification?		Yes. informal Pre-filing Consultation facility is provided by the officers of the CCI (CCI website)
9.	Are notification thresholds periodically adjusted?	Yearly adjustments	Yes. As per Section 20(4) of the Act, the Central Government must enhance or reduce thresholds every second year, based on wholesale price index or fluctuations in exchange rates
10.	If so, are they automatically adjusted (e.g., based on inflation or other economic indices)?	Inflation or GDP growth rates	The revision is not automatic. However, the adjustment of thresholds is based on wholesale price index

No.	Question	Examples of Conforming Criteria	India Position
			or fluctuations in exchange rates (Section 20(4) of the Act)
RECOMMENDED PRACTICE III: TIMING OF NOTIFICATION			
1.	Are the parties permitted to provide formal notification when there is a good faith intent to consummate a transaction? (*RP III.A.*)	Filing permitted based, for example, on: (a) signed letter of intent (b) agreement in principle (c) public announcement of intention to make a tender offer	Notification is mandatory within 30 days of execution of definitive agreements for acquisitions, board resolutions for mergers and public announcements made to SEBI for acquisitions of shares of listed companies. (Section 6 of the Act & Regulation 5 of Combination Regulations)
2.	If formal notification is not permitted until a definitive agreement is in place (a) are the parties afforded the opportunity for confidential prenotification consultations with the agency to present and discuss the proposed transaction in advance in order to facilitate timely submission and review of the formal notification? (b) are the standards for determining when a "definitive agreement" has been reached clearly defined so that the parties can		2(a) Yes. 2(b) Yes.

No.	Question	Examples of Conforming Criteria	India Position
	determine when their notification will be accepted for filing? (*RP III.A.*)		
3.	If the jurisdiction is suspensive (where parties are not permitted to close notified transactions pending the expiration of specified "waiting periods"), are parties permitted to file at any time prior to closing the transaction (e.g., the jurisdiction does not impose a filing deadline for pre-merger notification)? (*RP III.B.*)		No. There is a deadline of 30 days to notify a combination to CCI from defined trigger events: (i) execution of definitive agreements for acquisitions (Section 6(2)(b) of the Act); (ii) board resolutions for mergers (Section 6(2)(a) of the Act); and (iii) public announcements made to SEBI for acquisitions of shares of listed companies (Regulation 5(8) of the Combination Regulations).
4.	If the jurisdiction is a non-suspensive jurisdiction (where parties are permitted to close notified transactions pending review by the competition agencies), does it impose a filing deadline for pre-merger notification? (*RP III.C.*)	(a) Provision of a clear definition of what constitutes a "triggering event" for the purposes of calculating the filing deadline (b) Definition of a "triggering event" does not lead to a notification deadline occurring at an early	Not applicable as India has a suspensive merger control regime under Section 6(2A) of the Act. Parties cannot consummate a notified transaction until CCI approval has been received or a period of 210 days has passed since the date of the

No.	Question	Examples of Conforming Criteria	India Position
		stage in the parties negotiations (e.g., before a signed definitive agreement) (c) Filing deadline is reasonable in view of the information requirements to be satisfied	notification of the transaction.
RECOMMENDED PRACTICE IV: REVIEW PERIODS			
1.	Is the initial review period subject to definitive and readily ascertainable deadlines? (*RP IV.C.*)		Yes. The initial review period in Phase I is 30 working days under Regulation 19(1) of the Combination Regulations. However, this is extended (clock stops) when there are gaps in information in the notification and Defect letters are issued to parties; and when third party information requests are issued (Regulations 19(2) and 19(3) respectively of the Combination Regulations).
2.	Is an extended review subject to determinable time frames? (*RP IV.C.*)		Yes. Section 6(2A) of the Act provides an outer limit of 210 days from date of the merger notification that is made to CCI. Beyond this period, if CCI has not issued an order on the combination, the

No.	Question	Examples of Conforming Criteria	India Position
			combination is deemed approved.
3.	Does the agency provide notifying parties with timely notice as to any deficiencies in their submissions and the specific details of any such deficiencies to facilitate the prompt submission of corrective filings? (*RP IV.C.*)		Yes. CCI issues Defect letters and additional information letters respectively as per the Act and the Combination Regulations, to correct any deficiencies in a merger notification and to obtain additional information, if required, to complete its analysis of a combination.
4.	Does the agency provide for expedited reviews of non-problematic transactions (e.g., can the agency grant early termination of a specified review deadline if the agency concludes that the transaction does not give rise to material competitive concerns)? (*RP IV.B.*)	(a) A two phase review (preliminary review period and extended review period) (b) Early termination of review periods (c) Abbreviated waiting period	Yes, (b). CCI can issue its order approving a combination under Section 31(1) of the Act, prior to outer limits set out in the regulatory and statutory time lines
5.	In jurisdictions with a two phase review, does the agency complete its initial review within 6 weeks of notification? (*RP IV.C.; RP IV.D.*)		Yes. The limit laid down in the Combination Regulations is 30 working days. There may be clock stops as discussed in item 1 of this section.
6.	In jurisdictions with a single review period or two phase review, does the agency complete its reviews in a determinable time period? (*RP IV.C.; RP IV.D.*)	Six months or less	Yes. The Act and the Combination Regulations provides for a two phase review period of 30 working days and 210 days. The

No.	Question	Examples of Conforming Criteria	India Position
			outer limit of 210 days as per the Act, runs continuously without exclusions for non-supply of information, except for limited exclusions of time where parties seek extensions during Phase II investigation (Section 31(12) of the Act). As a result, the CCI's review is to be completed within the statutory period of 210 days.
7.	Do the review procedures allow for a limited extension of the applicable waiting periods (with the parties' consent) to avoid initiation of second phase review or an adverse enforcement decision?		Yes, the regulatory review period allows for extensions of time for parties to offer modifications to a combination, prior to the initiation of a Phase II investigation (Regulation 19(2)). The time taken by the parties to submit 15 days for CCI to evaluate the offered modification is excluded from the Phase I 30 working day period (*Proviso* to Regulation 19(2)).
8.	May parties consummate a properly notified transaction upon the expiration of the specified waiting period (absent formal action being taken by the agency)? (*RP IV.C.*)		Yes. If 210 days elapse and CCI has not issued any orders approving the combination or otherwise, the combination is deemed approved and parties

No.	Question	Examples of Conforming Criteria	India Position
			may consummate the combination (Section 6(2A)).
9.	Are there different procedures providing for accelerated review of non-consensual transactions (i.e. hostile takeovers)? (*RP IV.E.*)	(a) Shortened review periods (or, where applicable, waiting periods) (b) Permitting the applicable initial review period to commence upon filing by the acquiring party only (c) Discretionary waivers of information requirements relating to the target in hostile situations	(a) No. (b) Yes (Regulation 5(8)). (c) Yes (Regulation 9(2)).
10.	Are there different procedures providing for accelerated review of transactions involving companies in financial distress which are subject to court supervised processes (e.g. bankruptcy or similar restructuring)?	(a) Shortened review periods (or, where applicable, waiting periods) (b) Permitting the applicable initial review period to commence upon filing by the acquiring party only (c) Discretionary waivers of information requirements relating to the company in financial distress (d) Discretionary derogations permitting the implementation of the transaction	(a) Compulsory bank mergers of failing banks are exempt from notification to CCI *vide* a government notification. Further, under Sections 6(4) and 6(5) of the Act, any share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment

No.	Question	Examples of Conforming Criteria	India Position
		during the review period	agreement can be consummated, subject to notice being filed in Form III with CCI within 7 days of consummation. (b) Yes (c) No. (d) No.
RECOMMENDED PRACTICE V: REQUIREMENTS FOR INITIAL NOTIFICATION			
1.	Is the initial notification narrowly tailored to obtain the information sufficient to determine whether (a) the agency has jurisdiction, (b) the transaction raises issues meriting further investigation and (c) alternatively, the agency should not investigate the transaction further?		Yes.
2.	Does the jurisdiction provide for flexibility with respect to the content of notifications, e.g., variation based on the complexity of the antitrust issues raised? (*RP V.B.*)	(a) simplified procedures (b) short/long forms (c) discretionary supplementation (d) discretionary waiver "If unable to answer any Item fully, give such information as is available and provide a statement of reasons for noncompliance …. If exact answers to any Item cannot be given, enter best estimates and	(a) No. (b) Yes. (c) No. (d) No.

No.	Question	Examples of Conforming Criteria	India Position
		indicate the sources or bases of such estimates. All financial information should be expressed in millions of dollars rounded to the nearest onetenth of a million dollars. Estimated data should be followed by the notation, "est.""	
3.	If the jurisdiction uses a discretionary supplementation system, does the agency provide guidance on the types of information commonly requested, e.g., business reports and plans, transaction documents, customer lists?		Not applicable.
4.	Are parties permitted to submit substantially responsive information in a different format prepared in the ordinary course of business or for submission to another jurisdiction?	"All references to "year" refer to calendar year. If the data are not available on a calendar year basis, supply the requested data for the fiscal year reporting period which most nearly corresponds to the calendar year specified. References to "most recent year" mean the most recent calendar or fiscal year for which the requested information is available."	Yes. Notes to Form II specify that parties to a combination, in providing the above information including supporting documents, as far as possible, are required to rely on the documents/data used in the ordinary course of taking business decisions. Further, the notification forms require figures of assets and turnover as per last audited annual accounts of the immediately preceding financial year. If annual

No.	Question	Examples of Conforming Criteria	India Position
			accounts for the immediate preceding financial year are not audited, firms may furnish details as per the most recent audited financial year's figures as well as unaudited accounts of current year certified by the Managing Director, Chief Executive Officer or Chief Financial Officer of the company or its auditor can be submitted.
5.	Are parties allowed to submit information beyond that required in the initial filing voluntarily, to help narrow or resolve potential competitive concerns? (*RP V.B.*)	"Any person filing notification may, in addition to the submissions required …, submit any other information or documentary material which such person believes will be helpful … in assessing the impact of the acquisition upon competition …"	Parties can submit additional information over and above legal requirements. However, after a point due to stringent legal deadlines, it may be difficult for CCI to consider fresh inputs.[19]
6.	Does the agency provide for the possibility of pre-notification guidance to parties on the notifiability of the transaction and the content of the intended notification? (*RP V.C.*)		Yes.
7.	If the jurisdiction uses the discretionary waiver		Not applicable as the Indian merger control

[19] Discussed in Case study 1.

No.	Question	Examples of Conforming Criteria	India Position
	mechanism, do the prenotification consultations provide the parties with the opportunity to seek a waiver of the obligation to produce requested information? (*RP V.C.*)		regime does not have a discretionary waiver mechanism.
8.	Does the agency limit translation requirements for supporting documents? (*RP V.D.*)		Yes (Notes to Form I).
9.	Does the agency accept informal authentication by written representations by counsel or senior officials of the parties? (*RP V.D.*)		Yes (Notes to Form I).
10.	If formal authentication is required in the jurisdiction, can notification be perfected on the basis of an appearance by a duly authorized person residing in the jurisdiction?		No. Authentication is required in a written Declaration.
RECOMMENDED PRACTICE VI: CONDUCT OF MERGER INVESTIGATIONS			
1.	Is the agency available for consultation with the merging parties to inform them of any significant legal or practical issues that arise during the course of the investigation? (*RP VI.B.*)	For example, prior to: (a) Notification? (b) Decision to initiate a second stage inquiry? (c) Imposition of conditions? (d) Challenge transaction? (e) Prohibit transaction?	(a) (b) (c) (d) and (e)Yes. However consultation at stages other than (a) is not formally built into regulation other than provision for hearings under Regulation 24.
2.	Does the competition agency provide the merging	At the minimum, a short and plain (either oral or	Yes. Prior to initiation of a Phase II

No.	Question	Examples of Conforming Criteria	India Position
	parties, no later than at the beginning of a second stage inquiry, an explanation of the competitive concerns that motivate an in-depth review? (*RP VI.C.*)	written) statement of the competitive concerns	investigation, parties may submit a response to CCI's show cause notice as to as to why a Phase II investigation should not be conducted (Section 29(1)).
3.	Where investigation periods *are not* subject to definitive deadlines, does the agency have procedures to ensure that the investigation is completed without undue delay? (*RP VI.D.*)	For example, timing agreements comprising (a) scheduled meetings between the agency and the merging parties; (b) timetables for possible modification / compliance with information requests; (c) dates for depositions or interviews of company representatives; (d) dates for exchange of economic information and theories; (e) dates for discussions among economists; (f) dates by which the parties may submit briefing memoranda (g) or other formal submissions; (h) anticipated timing of recommendations to senior agency officials; (i) timetable for submission of, and	Not applicable.

No.	Question	Examples of Conforming Criteria	India Position
		reactions to, proposed remedies; and (j) the date before which the parties will not close the transaction.	
4.	If the investigation is tolled or otherwise measured by reference to the merging parties' date of compliance with compulsory notification requirements, are there limits on the number or scope of requests? (*RP VI.D.*)		Not applicable, as the Phase II investigation is not measured by reference to the parties' compliance with requirements. However, the Phase I inquiry (30 working days) is tolled by reference to parties' compliance with CCI's information requests (Regulations 14(3) and 19(2)). There are no limits on the number or scope of such requests barring the overall deadline of 210 days
5.	Does the legal framework prevent tolling of investigation periods based upon the issuance or pendency of third- party information requests? (*RP VI.D.*)		Yes. As per the Act, the overall 210 day period is not subject to tolling based on pendency of third-party information.
6.	Where investigation periods *are* subject to definitive deadlines, are there procedures enabling the agency to grant early termination of applicable waiting periods? (*RP VI.D.*)	When the agency concludes that a transaction does not give rise to material concerns by reason of, either (a) as originally proposed; or (b) as modified pursuant to commitments	Yes. CCI can issue its order approving a combination under Section 31(1) of the Act prior to the commencement of Phase II investigation.

No.	Question	Examples of Conforming Criteria	India Position
		made by the merging parties	
7.	Are there procedures that aim at avoiding the imposition of unnecessary or unreasonable costs and burdens on merging parties and third parties in connection with merger investigations? (*RP VI.E.*)	For example (a) requests related only to aspects of the transaction that raise potential competitive concerns; (b) proposed formal requests should be subject to appropriate internal review procedures prior to issuance; (c) agency staff responsible for conducting the investigation permitted to promptly discuss with the parties and modify information requests; (d) parties permitted to submit information and documents as maintained in the ordinary course of business; (e) parties not required to supply information that is not in their custody, control or not reasonably accessible to them; and (f) translations required only for documents relevant to legal or factual issues raised by the transaction	(a) Yes. (b) Yes. (c) Yes. (d) Yes. (e) Yes. (f) Yes. (Combination Regulations and CCI website)

No.	Question	Examples of Conforming Criteria	India Position
8.	Are there timely review mechanisms to resolve disagreements between the case team and a (merging or third) party as to whether a request is reasonable or unduly burdensome or whether the merging party has adequately complied with the request? (*RP VI.E.*)	For instance: (a) resort to an independent tribunal; or (b) internal review procedures within the agency.	Yes, (b). Regulation 24.
9.	In responding to information requests, are parties free to not disclose materials and information that are subject to applicable legal privileges and related confidentiality doctrines in the requesting jurisdiction? (*RP VI.F.*)		No. However confidentiality may be sought.
10.	Does the agency maintain policies pertaining to the handling of privileged materials and information in connection with exchanges of such materials and information with other competition agencies? (*RP VI.F.*)	For instance, exchange pursuant to a voluntary waiver	Yes. Section 57 of the Act

No.	Question	Examples of Conforming Criteria	India Position
RECOMMENDED PRACTICE VII: PROCEDURAL FAIRNESS			
1.	Are merging parties given the opportunity to respond to material competition concerns prior to the agency making a final adverse enforcement decision on the merits? (*RP VII.B.*)	Administrative systems: (a) Before a decision to prohibit a transaction? (b) Before a decision to clear a transaction subject to conditions? Prosecutorial systems: (c) Before a decision to institute a legal action to challenge or prohibit the transaction?	The Indian merger control regime follows an Administrative system: (a) Yes. (Section 29 of the Act) (b) Yes. (Section 31 of the Act) Prosecutorial system: Not applicable.
2.	Are merging parties provided with sufficient information on the basis for the agency's material competition concerns? (*RP VII.B.*)	Including: (a) Legal basis? (b) Economic basis? (c) Factual basis?	(a) Yes. (b) Yes. (c) Yes. (Sections 29 and 31 of the Act)
3.	Are merging parties provided with such information in a timely manner? (*RP VII.B.*)	Prior to enforcement decision: (a) Opportunity to respond to concerns? (b) Opportunity to consider and propose remedies?	(a) Yes. Parties may submit a response to CCI's show cause notice as to as to why such an investigation should not be conducted (Section 29(1)). (b) No. However, parties may submit amendments to modifications proposed by CCI during a Phase II

No.	Question	Examples of Conforming Criteria	India Position
			investigation (Section 31(6)).
4.	Are third parties permitted to express their views on a merger during the merger review process? (*RP VII.C.*)		Yes. Third parties may submit their views when an online summary of the combination is placed on CCI's website or CCI may ask any person or member of the public for written objections to a combination, as a part of the statutory process under Section 29(3) of the Act, or through *suo motu* requests/communications.
5.	Does the review system provide safeguards ensuring that the review (procedurally and substantively) is fair, efficient, and consistent? (*RP VII.D.*)	For example: (a) designated "scrutiny" unit? (b) economics section? (c) internal operational guidelines? (d) supervision of staff? (e) separate review of preliminary findings? (d) separate investigation and enforcement units? (e) collegiate decision-making?	(a) Yes. (b) Yes. (c) Yes. (d) Yes. (e) No. (f) Yes. (g) Yes.
6.	Is there an opportunity for external review of decisions? (*RP VII.D.*)	For example: (a) judicial review?	Yes. Under Section 53A of the Act, parties can appeal CCI decisions to the appellate authority, the Competition Appellate Tribunal. Further,

No.	Question	Examples of Conforming Criteria	India Position
			judicial review of CCI decisions can be made to High Courts of the country on administrative and constitutional grounds.
RECOMMENDED PRACTICE VIII: TRANSPARENCY			
1.	Is the following information made readily available to the public?	(a) Available online via the agency website (e.g. for download) (b) Available by telephone if someone calls up the agency to ask for information (c) Written material available to pick up at the agency or sent by post, if requested	
	(a) Information regarding the jurisdictional scope of the merger law? (*RP VIII B.*)	(i) the definition of transactions caught by the merger regime (ii) the relevant thresholds above which a transaction must be notified (and any exceptions)	(i) (a) & (b) (ii) (a) & (b)
	(b) Procedural information? (*RP VIII B.*)	(i) how, where and when (i.e. deadline) to file a notification (ii) whether there are filing fees (iii) whether the transaction must be suspended and cannot be implemented while your authority is	(i) (a) & (b) (ii) (a) & (b) (iii) (a) & (b)

No.	Question	Examples of Conforming Criteria	India Position
		investigating, either only domestically (in your jurisdiction), or worldwide	
	(c) The competition agency's decision-making procedures? (*RP VIII B.*)	(i) timetable and major steps (ii) rights of merging parties and third parties (iii) mechanisms to appeal decisions (iv) penalties and sanctions	(i) (a) & (b) (ii) (a) & (b) (iv) (a) & (b) (v) (a) & (b) (Act, Combination Regulations and FAQs)
	(d) The principles and criteria that the competition agency uses to review whether the transaction creates competition concerns (*RP VIII B.*)	(i) the substantive standard by which the merger is assessed (SLC, Dominance) (ii) guidelines (iii) published decisions (iv) notice of what noncompetition factors may be taken into account	(i) (a) and (b), (Act and Combination Regulations) (ii) No. (iii) Yes. (a) & (b). (iv) Not applicable
2.	Are any of the following methods employed by the competition agencies to promote transparency? (*RP VIII C.*)	(a) Publishing general guidelines and notices on substantive law and procedure	(a) Only procedural guidelines.
		(b) Publishing individual enforcement decisions	(b) Yes.
		(c) Publishing individual non-enforcement decisions or at least those that set a precedent or represent a shift in	(c) Yes

No.	Question	Examples of Conforming Criteria	India Position
		enforcement policy or practice	
		(d) Issuing press releases on important decisions	(d) Yes.
		(e) Issuing statements explaining actions or non-actions that signify a change in enforcement policy	(e) No.
		(f) Delivering speeches	(f) Yes.
		(g) Publishing information materials	(g) Very limited. (CCI website)
3.	If guidelines are issued, are they reviewed periodically to reflect current practice? (*RP VIII C.*)		Very limited guidance has been published but these are reviewed for relevance.
4.	Does the agency have a website? (*RP VIII C.*)		Yes.
RECOMMENDED PRACTICE XII: AGENCY POWERS			
1.	Does the agency have the power to: (*RP XII A.*)	(a) Sanction non-compliance with formal requests for documents, testimony or other information? (b) Seek sanctions for noncompliance with legal requirements, decisions, and orders? (c) Accept conditions to closing	(a) Yes. CCI has investigative tools and powers under Section 36(2) of the Act to compel parties and third-parties to produce relevant information, enforce attendance of any person, receive evidence on affidavit, etc.

No.	Question	Examples of Conforming Criteria	India Position
			(b) Yes. Section 43 empowers CCI to impose fines for non-compliance with information requests/requisitioning documents, enforcing attendance of persons, etc. Further, Section 42(2) of the Act empowers the CCI to impose fines for non-compliance of its orders approving/prohibiting a combination and imposing fines for gun-jumping and non-notification of combinations. (c) No. Conditions or remedies to approving a combination are to be suggested by CCI in Phase II (Section 31(3)). However, parties may submit amendments to these conditions, which may be approved by CCI (Sections 31(6) and 31(7)). Further, parties may submit conditions to CCI in Phase I (Regulation 19(2)).

No.	Question	Examples of Conforming Criteria	India Position
RECOMMENDED PRACTICE XIII: PERIODIC REVIEW			
1.	Has the jurisdiction reviewed the substantive and/or procedural aspects of its merger review process within the last few years? (*RP XIII A.*)	Review in the last 5 years or after new legislation enters into force	Yes. The Combination Regulations have been reviewed and amended on an annual basis since enforcement in 2011.
2.	Does the agency enter into such review on a periodic basis?		Yes.
3.	Has a recent review incorporated (or is it intended that a new review will incorporate) international best practice (e.g. according to ICN principles and recommendations)? (*RP XIII B.*)		Yes.

3.5 Conclusion

It may be seen that the RPs lay the foundation for transparent, fair, effective and credible enforcement of merger review laws. However, certain aspects of the recommendations such as, publication of detailed guidelines on procedural matters and considerable flexibility in information submitted at the time of notification may not always be appropriate or feasible for newer regimes, which are still evolving and lack experience in terms of jurisprudence. India’s position seems to be more or less in conformity with the RPs barring a few exceptions which include the lack of transparency, guidance and some legal incongruities. An OECD assessment too finds that there is scope for improvement in the Indian competition regime, including merger review. A finer assessment of India’s position would emerge by studying challenges faced by CCI and industry and analysing these in terms of the RPs.