Chapter 4
Challenges faced by CCI and Industry

4.1 Introduction

CCI commenced merger review in June 2011 with the notification of the Combination Regulations and the enforcement of substantive provisions of the Act dealing with combinations including sections 5 and 6 of the Act. The original draft was modified over the period from 2002 to 2011, based on stakeholder feedback (Sanyal and Chatterjee, 2012). CCI's efforts to remain responsive to industry requirements and to improve procedural and substantive aspects based on its own experience are evident from the fact that the Combination Regulations have been amended five times since then.[20] (A summary of changes made so far is available in Appendix II). As regards continuing challenges faced by CCI and industry, the fact that these exist, can be gathered from articles / blogs of law firms dealing with merger filings or from academic work of experts and serving bureaucrats. Much of the criticism centres around delays in clearance and lack of clarity procedural and substantive matters. Delays have been linked to the internal capacity constraints in terms of shortage of staff and lack of experience and it has been suggested that Defect letters seeking information are used by CCI to buy time to cope with the tight regulatory and statutory deadlines[21] to complete review of cases (AZB & Partners, 2016). Some of the criticism is directed towards absurdities in the legal framework as for example differentiation between treatment of acquisitions and mergers when it comes to the *De Mnimis* exemption (Bhattia, 2016) and the 30-day deadline for filing cases, despite the existence of a suspensory regime (AZB & Partners, 2016). As regards clarity and need for guidance, while acknowledging that CCI may need time to establish jurisprudence through 'live cases' before it clarifies its stand on grey areas in merger review such as whether it has jurisdiction over certain transactions, it has been said that even though the EU took four years to publish jurisdictional guidelines, at least its orders on settled cases made it

[20] Amended in 2012, 2013, 2014, 2015 and 2016.
[21] CCI must: (a) form its *prima facie* opinion on AAEC within 30 working days; and (b) decide the case and issue its order within 210 days of notification.

clear as to why jurisdiction existed or not (Reeves and Harison, 2011). The need for more detailed orders to help understand CCI's rationale for decision making and formal guidance on various issues dealing with notification thresholds and substantive aspects such as control, non-compete clauses, penalties and gun jumping has been frequently highlighted by commentators (Sharma, 2013, Uberoi, 2012, Shroff *et al*., 2016). This is particularly so because CCI has not issued formal guidance notes on these subjects.

However, as had been brought out in Chapter 2, there is a lack of any comprehensive and systematic analysis that may help understand the definite nature of these challenges; whether they emanate from internal capacity issues or the external environment and to what extent can they be addressed by amendments to legal framework for merger review. In terms of an exhaustive compilation of problem areas, the feedback received by CCI when it invites competition law firms to provide suggestions for regulatory reform, as a precursor to its periodic exercise of amendments to the Combination Regulations, could serve as a valuable source of information in this regard. With CCI's permission the latest stakeholder feedback has been studied to lay down the ground work for the evaluation of the Indian regulatory framework for merger review.

4.2 Challenges faced by CCI

It is important to understand challenges faced by CCI to be able to grasp the environment in which the law relating to merger review is implemented and to what extent CCI has the capacity or leeway to follow the RPs. To appreciate the challenges faced by CCI, it would be important to understand the rocky beginnings of competition law in India in general and merger review in particular. Post liberalization of the economy introduced in the 1990s and as a part of market reforms, the MRTP Act was scrapped and modern competition law comparable with that of advanced jurisdictions was sought to be brought in. There was in fact, no effective merger review before the relevant sections of Competition Act, 2002 were enforced. It has been stated that,

> 'The Monopolies and Restrictive Trade Practices Act, 1969 ('MRTP Act') was India's first antitrust legislation which established a *quasi* judicial body for

> investigating cases of unfair and restrictive trade practices named the Monopolies and Restrictive Trade Practices Commission ('MRTP Commission') which was also the precursor to the Commission. The concept of combination control was not explicitly recognized in the MRTP Act, nor was it expanded upon…. the MRTP Act …contained provisions which implicitly dealt with combinations at an elementary level. …The jurisdiction of the Central Government over combinations was overriding on the jurisdiction of the MRTP Commission.' (Sanyal & Chatterjee, 2012, pp.429-430).

The Competition Bill, 2001 became an Act in January 2003 and in the same year the CCI was also established. The *vires* of the Act was however legally challenges on the ground that a body with 'near judicial powers' should be 'manned by judges' (Dhall, 2016). Dhall recounts that, while the government prevailed in that CCI was a market regulator like SEBI and TRAI and world over competition regulators are not managed by judges, it did however, introduce the Competition Appellate Tribunal (COMPAT) headed by a judge. Further, apart from the 'judicial challenge,' the other major obstacle was industry, which resisted the setting up of the regulator. Apart from powerful lobbies not wanting to give up their monopolistic power there was a genuine concern about bureaucratic delays in relation to approval of M&As. Thus, right from the inception of merger review law in India, the government ensured that there was a *De Minimis*[22] exemption. Also, Indian merger notification thresholds are fairly high. (FAQs / Appendix III) and the Act requires them to be revised periodically[23]. Yet, industry finds merger review onerous and as critics like Dhall (2016) have pointed out, despite CCI striving to clear deals within the regulatory time line of 30 working days,

> 'there have been concerns among merging entities, investors, private equity players [etc.]…. Parties have been vocal about the time taken in clearing even non-problematic cases, the unnecessarily large volumes of information sought by the Commission, the inability often to appreciate the commercial dynamics of a

[22] Refer footnote 9.

[23] The thresholds are to be revised every second year based on wholesale price index or fluctuations in exchange rate in accordance with Section20(1) of the Act.

> transaction, a tendency to micro-manage the terms of a merger deal and impose the Commission's thinking in it, and absence of a truly constructive dialogue between the merging parties and the Commission. Such worries threaten the Commission's reputation, and the 'ease of doing business' drive that the government seems committed to.'

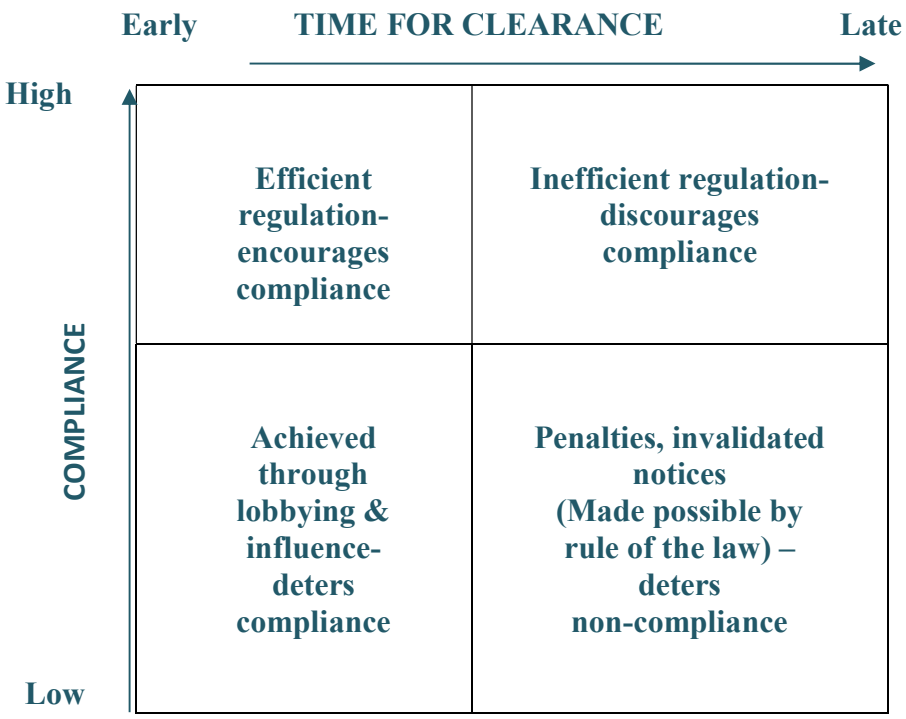
In a similar vein, industry commentators have often highlighted capacity constraints in the face of continuously increasing number of filings as a major problem (AZB & Partners, 2016) and suggested that CCI should therefore strive to focus only on cases where there are genuine competition concerns and identify and deal with these early (Dhall, 2016).

On the other hand, a former Chairperson of CCI, Chawla (2014b) had while in office commented that there are internal as well as external challenges faced by CCI. The former included 'capacity building' and the latter, 'attempts [by industry] to create legal hurdles in the implementation of the law.' An account from Gulati (2016), a serving bureaucrat who headed the Combination Division of CCI provides more insights into the industry vis-à-vis CCI dynamic and the challenges faced by CCI. Gulati accepts the fact that CCI as a relatively young merger regime faces internal challenges by way of human resource capacities and limited experience. The latter also means that in the absence of industry data, CCI has to rely mostly on parties for sector and market data apart from information about merging parties and the merger transaction itself. She has commented that parties tend to play these information asymmetries to their advantage by withholding information and yet criticizing the regulator for delays when it seeks to fill gaps by calling for information from merging parties / third parties or it seeks to penalize parties by statutory fines or invalidation of their notices for failure to comply in accordance with the Act and the Combination Regulations. In the author's words,

> 'The Regulator is in fact made to jump through several hoops before a complete picture of the competitive significance of the transaction emerges …[t]he regulator's efforts to do its job in the face of these obstacles is not helped by constant pressure by way of vested interests projecting the regulator's labours as being unnecessary or deliberately obstructive or anti-industry….It is in fact very

> difficult for a young competition authority struggling to progress on a steep learning curve and stymied by resource availability, to counter powerful forces who lobby privately and in the media, often attempting to disparage the competition authority's efforts to carry out its mandate. Grey areas or lack of legal clarity are often quoted as a deterrence to compliance but ironically, attempts by CCI to make the rules explicit are not always welcomed…' (p.91).

The resistance to clarity is attributed by Gulati to the desire of lobbying power centres to retain ambiguity as it offers them leg room for exerting influence. The clearer the rules, the more transparent the functioning of CCI, the lesser would be the discretion available to 'interpret the rules differentially on a case by case basis' (p.91). The same author highlights that, regulatory literature in fact emphasizes the importance of explicit rules to overcome weak regulatory capacities and lack of conducive institutional environment. Further, it is emphasized that the very motivation to lobby is intricately related to poor compliance culture and regulatory environment and that credible, efficient, non-discriminatory and consistent regulation would allay 'fear of delays and harassment' removing the need for as well as the gains from lobbying (p.92). This is explained in the matrix in Figure 2 which maps the grouping of low vs. high compliance and possible outcomes in terms of early and late clearance, along with the impact thereof on future compliance. Thus, if high compliance is met with positive outcomes on account of efficient regulation and low compliance deterred, through penalties and detrimental outcomes, as a result of a rule based approach, the overall compliance culture would improve. In contrast, inefficient regulation leads to delays even when parties comply effectively. This coupled with faster clearance despite low compliance with rules on account of lobbying/external influence, would harm the overall compliance culture. This suggests that, CCI would need to ensure efficient, predictable and credible regulation through enunciation of clear rules for merger review, by consistently and credibly following the rules and by maintaining complete transparency in its functioning. The RPs and ICN's eight guiding principles for merger review could serve as a useful benchmark to this end.



(Source: Gulati,2015, p.96)

Figure 2: Compliance-Outcomes Matrix

4.3 Amendments to Combination Regulations

Given that it draws from industry experience with merger regulation, it is felt that the most authoritative source of the challenges faced by industry would be their feedback in response to CCI's call for suggestions to amend the law relating to merger review. The amendments made so far reflect CCI's desire to improve its working, its sensitivity to industry demands, as well as the need to plug procedural difficulties and loopholes in the law. Thus, for example, when it was realized that the requirements relating to authentication of notices were too onerous especially for foreign companies, CCI progressively relaxed these by amendment to the Combination Regulations.[24] When CCI found that merging parties are often lax about providing required information in time, it amended the regulations to tighten the rules relating to invalidation of incomplete notices[25]. When it was observed that

[24] Appendix V.

[25] *Vide* amendment in July 2016 (Appendix II). A provision for hearing parties before invalidation was introduced in January 2016 based on feedback from stakeholders.

some of the triggers for notification such as a communication of intent to a state or central government department or a statutory authority (other than public announcement under SEBI guidelines), were unnecessary and inconveniencing industry, these were removed[26]. At the same time, in recognition of the fact intensive nature of merger review, CCI specifically excluded time taken for obtaining information from third parties (up to 15 working days) from the 30-working day period the regulations provide for arriving at a *prima facie* opinion on AAEC[27]. Clever structuring of transactions to escape notification has been tackled by amending regulations. For example, it 2014, a rule was introduced to the effect that, the notification requirement shall be determined with respect to the substance of the transaction and structure of transaction(s) having the effect of avoiding notice shall be disregarded[28]. Similarly, when it was found that the wording of a regulation that required parties to notify all transactions that were interconnected or interdependent on each other was causing confusion, the superfluous language was removed by amendment in January 2016.[29] Further, the exemptions available under Item I of Schedule I of the Combination Regulations[30] have been progressively expanded, clarified and simplified for the benefit of stakeholders. Thus, by learning from feedback and its own experience, CCI has already made tremendous progress. However, the latest feedback received indicates that some concerns remain.[31]

4.4 Challenges faced by Industry

The feedback obtained from industry has been analyzed based on Indian merger regime's unique stage of development as well as relevant RPs in Table II. It would emerge that while there are areas where India can easily align with RPs, there are also certain recommended practices which cannot be implemented immediately given the relative newness of merger

[26] *Vide* amendments made in July 2015 and January 2016 (Appendix II).
[27] *Vide* amendments made in July 2015 (Appendix II).
[28] *Vide* amendments made in March 2014 (Appendix II).
[29] January 2016 amendments (Appendix II). As interconnected subsumes interdependent, the words 'or interdependent on each other' were omitted.
[30] These include for example minority shareholding not leading to control, intra group acquisitions, creeping acquisitions not leading to change of control etc.
[31] Feedback from stakeholders received in 2016-17 accessed with permission from CCI.

review in India or the regulatory environment in which the CCI functions. This would is discussed in detail in Chapter 5.

Table II: Analysis of Stakeholder Feedback in terms of RPs.

S. No	Stakeholder Issue	Analysis of Issue	Relevant RP & extract thereof
1.	**Nexus to Reviewing Jurisdiction-Thresholds**		
	The application of the 'combined entity' thresholds in the Act is not clear; for instance, if 'A' acquires asset 'B' from seller 'C', how are the combined entity thresholds to be applied? The combined entity is strictly, the acquirer and the asset being acquired i.e., 'A' + 'B' and this will represent the assets / turnover that the parties will 'jointly' have after the Combination. However, the practice being followed is to treat the acquirer and the seller as the combined entity, as opposed to the acquirer and the assets of the seller which are being acquired. **To clarify the position, the Act may be amended to allow for interpretation of 'enterprise' definition, so as to include business undertaking or assets.**	i. This would be in consonance with the RPs and the practice in other jurisdictions such as EU and FTC. In the US, notifiability of the merger/acquisition hinges upon the 'size of transaction' test. In order to determine whether a transaction meets the size of transaction test, the value of the voting securities and assets, which the acquirer will hold as a result of the acquisition, is computed. ii. **However, it is important to keep in mind that unlike other jurisdictions such as FTC, CCI does not have the power to review non-notifiable transactions.** Therefore, if notifiability is assessed on the basis of size of the acquirer plus target (instead of the seller enterprise), combinations where large sellers are selling small businesses, which may need to be assessed by the CCI, would escape CCI scrutiny. For e.g., in. PVR/DUL, Combination No. C-2015/07/288 (wherein PVR was acquiring cinema assets of DLF utilities Ltd. ultimately owned by DLF)[32], if only the cinema business was considered, in contrast to the assets / turnover of seller enterprise, the transaction would not have required notification with CCI. However, this case was very critical as it involved merger of cinema assets of two major players making the combined entity a potentially dominant player. This case was approved subject to modification wherein	**RP I.** Nexus to Reviewing Jurisdiction: ***Thresholds should relate to relevant business activities that are the subject matter of the M&A.***

[32] Refer Appendix III

S. No	Stakeholder Issue	Analysis of Issue	Relevant RP & extract thereof
		parties restructured the deal to meet CCI's directions. **Thus, it may be useful to incorporate a dual "size" test as in USA so as to ensure that only "large" transactions are notified; or that smaller transactions between large parties are notified[33].**	
2.	**Clarity on definition of Turnover**		
	The definition of turnover be amended. At present, the definition of turnover in Section 2(y) of the Act reads as follows: "*"Turnover" includes value of sale of goods or services*". It is recommended that the words "including exports" be added to the definition. Accordingly, the revised definition will read as follows: "*"Turnover" includes value of sales of goods or services, including exports*." It is recommended that a description of "turnover" should be included in Section 5 of the Act. Accordingly, it is proposed that Explanation (d) should be inserted in Section 5 of the Act and it should read as follows: Explanation (d):	i. It is a fact that based on current practice, foreign firms' exports to India are taken as turnover in India but an Indian firms turnover is taken as appearing in the annual financial statement whether or not it pertains to India. However, as the definition of turnover impacts not only merger notification but also penalties imposed under Section 27(b) and 43 A of the Act, CCI has been hesitant to change the definition in The Act or issue a guidance. ii. Also, stakeholders desire clarity on the relevant time period. This clarity exits for assets by way of explanation (c) to Section 5 of theit Act wherein it has been stated that, '*the value of assets shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation, and the value of assets shall*	**RP II.** *Notification Thresholds:* ***Guidance should be given on issues such as inclusions, exclusions (taxes, transfers etc.) and geographic allocation of income and assets. Objective criteria should inter alia be clear about relevant time period****.*

[33] Under the US merger control thresholds, transactions valued at > US$ 323 million are notifiable. Transactions of lesser value, i.e., transactions valued from US$80.8 to US$323 million are notifiable, if persons with sales/assets ≥ US$161.5 million acquires a person with sales/assets of ≥ US$16.2 million, or vice versa. Thus, large transactions are notifiable. Further, smaller transactions are notifiable, if they take place between large persons; Thus there are two tests:' Large Size of Transaction' test, or, 'Smaller Size of Transaction' test coupled with 'Size of Parties Test' (Hine and Dubrow, 2017).

S. No	Stakeholder Issue	Analysis of Issue	Relevant RP & extract thereof
	"*the value of turnover shall be determined by taking the book value of the turnover as shown in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of the proposed Combination falls*".	*include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout- design or similar other commercial rights, if any, referred to in sub-section (5) of section*' **It seems logical that the same clarity be extended to turnover and CCI begins to work on guidance on inclusions and exclusions for assets and turnover**	
3.	**Notification within 30 days of trigger event**		
	As the requirement to notify a Combination to the CCI is mandatory and the regime is suspensory, the requirement to notify the CCI within 30 days of signing the binding agreement has been onerous on the parties. It serves no real purpose and deciding cases of delayed filing puts unnecessary burden on the CCI and its resources. Therefore, it is suggested that the requirement to notify the CCI within 30 days be removed through an amendment of the Act.	The 30-day deadline puts pressure on parties to make hurried filings which may be incomplete and hence it is counterproductive as the 210 day dead line commences for CCI. In multi-jurisdictional cases, at times a different market definitions and scope of overlaps emerges when parties go through rigours of inquiry from more advanced jurisdictions like USA and EU. **The 30-day deadline does not serve any purpose as such, and it does give rise to avoidable potential penalty cases on account of falling foul of the deadline.**	**RP III.** Timing of Notification: ***No filing deadline in suspensive regimes -it is in parties' own interest to file as early as possible as in any case they must await review and clearance from competition authority*.**
4.	**Less onerous information requirements for simpler cases**		
	The present revised Form I, while helpful for a proper competition assessment in cases with horizontal or vertical overlaps creates an onus on the parties to provide information even in	Being a new regime, CCI still lacks adequate experience (to form its view based on limited information from parties and lacks a comprehensive sector/party data base. Hence CCI could continue to obtain and retain	**RP V.** Requirement for initial notification: ***shorter forms for transactions that are***

S. No	Stakeholder Issue	Analysis of Issue	Relevant RP & extract thereof
	situations where a merger notification is required purely because of a technicality. For instance, a private equity investment exceeding 10%, where the investor is also acquiring certain veto rights; and certain internal restructurings which are again technical in nature also require a merger notification to be filed with the Commission. A shorter form with less information be introduced.	information filed in Form I. However, it could have an internal procedure to provide early clearance to non-problematic transactions such as those not involving overlaps between parties. Continuing with Form I requirements, would serve the purpose of creating a much-needed data base on parties and sectors, and help in reducing requests for information over time. By allowing non-problematic transactions a quicker clearance CCI would be able to focus on more important transactions rather than spending much time on competitively insignificant ones. CCI would need to develop its own internal guidelines as to which type of notifiable transactions to afford expedited review to. **Thus, while present information requirements may be retained, faster clearance for simpler transactions may be facilitated by CCI developing guidelines on types of cases than can be cleared on fast track basis. This would also free its limited human resources for more important cases.**	***unlikely to have competition concerns*** **RP XII.** Competition agency powers**:** ***Optimization of resources would imply that agencies focus on cases that have potential competitive impact on its jurisdiction***.
5.	**Pre-filing Consultation (PFC)**		
	The Commission may consider communicating their view in writing in order to provide more sanctity to the consultation process and comfort to the parties.	At present free PFC is available to parties which is confidential, non-binding and informal and provided by the staff of the Combination Division. Given its limited experience in terms of settled cases and jurisprudence, CCI and its merger division may not be comfortable with giving formal, written guidance. As explained in Chapter 2. this is a dilemma faced even in advanced jurisdictions in their early days. Hence till such time that sufficient experience and guidelines exist on procedural issues, substantive assessment of cases and information requirements, PFCs would have to continue to be informal. However, in time, a searchable data bank of PFCs organised by issues (where CCI is confident)	**RP V.** Requirement for initial notification**: Pre-notification consultation should be provided to clarify legal and factual issues on notification requirement and to provide discretionary waivers on information to be filed**

S. No	Stakeholder Issue	Analysis of Issue	Relevant RP & extract thereof
		should be made available online. (Reference, RP V, discretionary waivers by staff would not necessarily be acceptable by the Commission at this stage of CCI's experience with merger review).	
6.	**Continuing Defects**		
	Under the Regulation 14 of the Combination Regulations, if the Commission directs the notifying parties to file any additional information, the time taken by the parties to the Combination in filing such additional information is excluded from the 30 working days period that is available to the Commission to form its *prima facie* opinion. However, **there is no guidance under the Act or under the Combination Regulations in respect of a situation where the Commission considers the responses of a defects letter to be a "continuing" one.**	Discussions with experts and perusal of CCI orders suggests that while there are times when parties give, incomplete information even in response to defects leaving the Combination division with no choice other than to call for the same through 'continuing' Defect letters[34], parties appear to think that this provision penalises them by causing delay.[35] Regulation 14(6) of the Combination Regulations states that the notice would be subject to invalidation in case. ('*In case the parties fail to remove the defects or fail to furnish the required information including documents(s), within the time specified, the notice filed ... shall not be treated as a valid notice.*'). This has been clarified in Notes to Forms too. Hence, the Combination division should be clear about information requirements and if parties do not provide information the case should be put up for invalidation. However, continuing defects that reflect inefficiency on the part of the case team (because of not	**RP VI.** Conduct of Merger Investigation: **Extendable timelines and in seriatim requests should not cause delays.** **RP XII**. Competition Agency Powers: **Agencies should have the power to penalise parties for noncompliance with formal requests for information/testimony/documents etc.**

[34] In FRL/BRL Combination No. C-2015/05/281 the order makes it evident that information requirements are genuine and delay was caused by parties seeking extensions and giving incomplete information. Para. 6 of the CCI order states that, 'As the above stated information relating to the retail stores was not provided in the notice filed with the Commission, in terms of Regulation 14 of Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ('Combination Regulations') communication dated 11th June 2015, was sent to furnish the requisite information; response to the same was filed by the Parties on 14th July 2015 after seeking extension of 29 days. As there were inconsistencies in data provided by the Parties vide their letter dated 14th July 2015, another letter was issued to them on 28th July 2015, response to which was furnished by on 7th August 2015 after seeking an extension of 8days. Due to inconsistencies found in the data submitted by the Parties on 7th August2015, vide their email dated 13th August 2015, Parties revised the store level information for some cities'.

[35] In ABCIL/Grasim Combination No. C-2015/03/256, CCI issued 9 letters in continuation from march 19, 2015 to July 20, 2015. The Case was filed on March 10, 2015 and cleared on August 31, 2015 though it did not go into Phase II. It is not clear from the order as to what were the gaps in information.

S. No	Stakeholder Issue	Analysis of Issue	Relevant RP & extract thereof
		appreciating information gaps/requirements in one go) should be deterred. This requires that at the very least, CCI issues internal guidance on the subject and it is in the interest of transparency that these be made public eventually. ii. CCI being a young agency in a developing country faces problems on the fronts of experience and internal capacity but also an adverse regulatory environment wherein delays are criticised heavily even if on account on noncompliance. This makes it all the more important to publish guidance and enforce the law and carry out review efficiently including holding ones' staff responsible for unnecessary delays. **Thus, CCI should issue guidelines on subject of Defect letters, continuing defects and invalidation.**	
7.	**Clarity on review Process/Discussion with parties**		
	A. **Status of review:** Parties would like to know status of review even during phase I stage of 30 working days. At present, there is no formal mechanism to enable parties to know status of their case.	A. Parties at present resort to phone calls to find out and they are not assured of a response. There is no clear policy on informal interaction between case officers and parties. Given the environment in which regulation takes place in India, a more formal process involving less inter personal interaction is preferable. **CCI could consider allowing its Registry to receive calls to update parties on status of case. Parties could also have password protected access to their case status on CCI website.** However, for substantive issues discussion between case officers and parties is a must and CCI already has a formal process for setting up meetings on its website.	**RP VI.** Conduct of Merger Investigation: ***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***

S. No	Stakeholder Issue	Analysis of Issue	Relevant RP & extract thereof
	B. **Third party information:** Regulation 19(3) of the Combination Regulations empowers the Commission to call for information from any third party in relation to its inquiry as to whether a Combination has caused or is likely to cause appreciable adverse effect on competition in India. It is suggested that the Combination Regulations be amended to reflect intimation to the transacting parties that the Commission has reached out to third parties to enable further transparency in the merger control review process and computation of timelines.	B. While in theory it would appear reasonable for parties to know at what stage their case is, the present Indian regulatory environment and experience suggests that if parties know that CCI has reached out to their customers /competitors/ experts, the parties could seek to influence the same. Hence**, while parties may be told that their case is under review and investigation details of when CCI has sought third party information may harm the independence and reliability of the investigation.** Even in FTC, agency staff are not supposed to reveal this information to the parties. (Egge and Cruise, 2013).	
8.	**The Call for Guidance**		
	A. **Gun jumping**: Lack of clarity on what CCI considers premature integration of a Combination or 'gun jumping' in contravention of Section 6 (2) and 6(2A) of the Act which forbid consummation of a Combination until CCI has approved the same or 201 days have elapsed from date of notification B. **Exemptions-Item 1 Schedule I:** Lack of clarity about notifiability on acquisition of **instruments that are optionally convertible to shares**.	A. So far CCI has not issued any guidance on the subject of gun jumping though it has imposed penalty for gun jumping in 14 cases as per information available on their website, which would serve as guidance. CCI should attempt to provide broad guidance with reference to settled cases and international best practices. B. CCI should clarify this through its FAQs as the law as it stands makes acquisition of 'any security that entitles holder to receive shares with voting rights' notifiable subject to other related provisions and exemptions. For optionally convertible instruments CCI could either issue guidance or advise parties to seek PFC.	**RP VIII.** Transparency **Jurisdictional thresholds, decision making procedures, principles and criteria for substantive review should be available in public domain. Transparency demands that apart from laws and rules, case laws, enforcement polices and administrative practices should be publicly available. Transparency can be enhanced by**

S. No	Stakeholder Issue	Analysis of Issue	Relevant RP & extract thereof
	C. Regulation 4 of the Combination Regulations provides that since the categories of combinations mentioned in Schedule I of the Combination Regulations are not likely to cause an AAEC, a notice need not formally be filed for such combinations. **Item 1, Schedule I** of the exempts acquisition of non-controlling stakes of up to 25% either "solely as an investment" or "in the ordinary course of business". Further, through the recent amendments to the Combination Regulations, it was also clarified by way of an explanation to Item 1 that an acquisition of less than 10% of the total shares or voting rights of the target without any special rights and without the right to appoint a member or nominee on the board of directors of the target shall be treated as being "solely as an investment". A few issues need to be clarified in this regard: The Commission may consider clarifying the position with respect to acquisitions of stakes made between 10% and 25% which are made "solely as an investment" without any special rights or board seat. For instance, whether an acquisition of a further 5% stake of Company B by Company A, which already has 12% stake in Company B, solely as an investment without any special rights	C. Schedule 1 under Regulation 4 of the Combination Regulations details transactions which 'are ordinarily not likely to cause an appreciable adverse effect on competition in India, notice under sub-section (2) of section 6 of the Act need not normally be filed.' Thus, these are in the nature of exemptions. The explanation to Item 1 Schedule 1 of the Combination Regulations added in January 2016 would help parties understand what would qualify for exemption as 'solely as an investment'. Prior to the amendments to the Combination Regulations on 7 Jan 2016, the ingredients of the Item 1 exemption and their interpretation by VVI, were as follows: • Acquisition is <25% shares/voting rights • No control is acquired • Acquisition is solely for investment or in the ordinary course of business. The 3rd requirement of Item 1, viz. whether the acquisition is solely for investment/in the ordinary course of business, would not apply if the acquisition is a strategic investment; if either the acquirer and the target enterprise are competitors; or if the acquirer had obtained a seat on the board of directors of the target enterprise. Pursuant to the amendments to the Combination Regulations in January 2016, the above 3 requirements of the Item 1 exemption have remained. However, in relation to the "solely for investment/in the ordinary course of business" criterion, an explanation was introduced wherein	**'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.**

S. No	Stakeholder Issue	Analysis of Issue	Relevant RP & extract thereof
	or board seat will require a notification to the Commission. In addition to the term "solely as an investment", an explanation of the term "in the ordinary course of business" would also be helpful. The Commission may consider clarifying whether Combination between enterprises in the same line of business will now get the benefit of the explanation to this item. The Commission's consistent decisional practices while interpreting the terms "Solely as an investment" or "in the ordinary course of business" under Item 1 has been that combinations between enterprises in the same line of business will not get the benefit of this exemption. For instance, in the Moon B.V. order (C-2014/08/202) and SCM Soilfert order (C-2014/05/175). It is not clear whether the insertion of the explanation in Item 1 overrules consistent decisional practice of the Commission. For instance, suppose Company A owns 50% stake in Company B which is engaged in the production of cars. Company A then acquires 9% stake in Company C (without a board seat or any special rights), which is also engaged in the production of cars. Would this acquisition of a stake in Company C trigger a notification to the Commission?	the following was considered to be solely as investment: • an acquisition of <10% shares/voting rights; and • acquisition of only ordinary shareholders rights; and • acquirer is not a member of the board of directors, does not have a right/intention to nominate a director and does not intend to participate in the affairs or management of the target enterprise. Thus, in cases where the acquisition is <10% shares/voting rights in the target enterprise and there are no board nomination or management rights, the acquisition can avail of the Item 1 exemption. This will also be the case if the parties are competitors The manner in which the regulation is worded implies that where the acquisition is of >10% shares/voting rights in the target enterprise, even if there are no board nomination or management rights, if the acquirer and target are competitors, the exemption will not be available and this is correct. However, it would apparently be wrong to presume that an acquisition of more than 10% shares would not qualify for exemption as solely as an investment. This would depend on the facts and circumstances of the case. For example, a 12% acquisition by a firm in a completely unrelated line of business without control, board seats or intent to participate in management would still qualify for exemption under item 1.	

S. No	Stakeholder Issue	Analysis of Issue	Relevant RP & extract thereof
		This aspect needs clarification. It is also suggested that the term ordinary course of business be deleted as to the extent investment is by investment companies whose normal business it is to invest, the definition of solely as an investment takes care of their requirement. Thus, the term 'ordinary course of business' is redundant and creates confusion. **These issues should be clarified by guidance notes on CCI website. CCI has sufficient experience to be able to commit to a guideline.**	
	D. **Other Exemptions**: Similarly, stakeholders have raised issues w.r.t other exemptions under Schedule I of the Combination Regulations,	D. **All items under Schedule 1 should be clarified with examples. Advise give during PFCs and settled case law should be used to frame guidelines. These should be put up for public comment on CCI website, analysed and converted into guidance notes to guide both CCI and stakeholders.**	
	E. **Interconnected transactions**: Each step of a composite Combination necessarily requires to be notified to the Commission in a single merger notification, notwithstanding the fact that individual steps (on a standalone basis) may be able to avail of an exemption. Hence CCI may provide formal guidance on the scope of the meaning of 'inter-connected' transactions under the Combination Regulations.	E. **In this case too, CCI could use its past orders and PFCs to attempt a broad non-exhaustive guidance.** Given that it may be difficult to cover every type of transaction and structure there should be enough caveats and a disclaimer to the effect that guidance is subject to case specifics which can be discussed in PFCs. Yet a beginning should be made in the interest of internal clarity and stakeholder confidence.	

S. No	Stakeholder Issue	Analysis of Issue	Relevant RP & extract thereof
	A specific issue which arises while dealing with inter-connected transactions is the level of information which needs to be provided for each step of the composite Further, due to various reasons, a transaction comprising multiple steps may undergo changes in the structure and ultimate effect. Additionally, this change in structure may take place subsequent to the approval of the Commission – the Combination Regulations presently do not provide any guidelines for such a situation. In light of the above, it is suggested that this regulation be amended to provide flexibility that at the option of the party notifying the Combination with the CCI, a merger notification can also be filed at the notifiable step of an inter-connected transaction (subject to all the steps being kept in a suspensory state until the CCI approval is obtained), as this would lead to a more definite merger notification and allow the Commission for a more accurate competition impact assessment.		
	F. **Form II**: Stakeholder have also requested guidance notes on Form II on line with CCI guidance on Form I issued in July 2015.	F. Form II of CCI is unwieldy and repetitive and need to be streamlined. In fact, it should contain only questions relating to incremental information over and above that already available in Form I. These additional questions should be explained as in the case of Notes to Form I.	

S. No	Stakeholder Issue	Analysis of Issue	Relevant RP & extract thereof
	G. **Non-Compete obligations**: In the recent past, the Commission has amended the scope of the non-compete obligations in several transactions. Stakeholders have sought guidance on this subject.	G. CCI has enough experience and case law to provide guidance to parties on the scope of non-compete clauses it considers as ancillary to a merger and what would be its stand in cases where such clauses are considered excessive. **Guidance should be issued.**	
	H. **Penalty:** Stakeholders have ought guidance on factors taken into consideration while levying a penalty for non-notification under Section 43(A) of the Act such as nature of transgression, duration, gravity and mitigating factors.	H. It is felt that given that CCI has 14 settled 43(A) penalty cases it is time it came out with penalty guidance. This is very important in the interest of transparency and credibility of its working. Other relatively young jurisdictions such as Malaysia have come out with such guidance[36]. **Guidance should be issued**.	
9.	**Remedies**		
	A. **Allowing parties to propose remedies/modifications**: The Commission may consider a mandatory consultation with parties before issuing proposal for modification. In a Phase II investigation, the onus to propose the modification is on the CCI. This is in contrast to the position in mature jurisdictions such as the EU and the USA where the onus is on the parties to propose modifications. It is in the interests of both the CCI and the parties that the proposal for modification is based in submissions/suggestions made by the parties as the parties are best placed to assess whether a modification is suitable and implementable.	i. The proposal is to provide for mandatory consultation with parties prior to CCI proposing modifications to a Combination under Section 31(3) of the Act (This is done during Phase II of the case, after CCI has formed an opinion that the Combination cannot be approved without remedial measures legally termed as modifications). As per the Combination Regulations, prior to the issue of show cause notice under Section 29(1) of the Act, i.e., prior to commencing Phase II investigation of a Combination, parties have the ability to offer modification to CCI under Regulation 19(2) to the Combination Regulations. Thus, there should be a sincere dialogue with parties to let them know about possible competition concerns as early as possible as only then can they offer useful modifications. Parties too should take this opportunity	**RP XI**. Remedies: ***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.***

[36] http://www.mycc.gov.my/sites/default/files/handbook/Guildline-on-Financial-Penalties.pdf

S. No	Stakeholder Issue	Analysis of Issue	Relevant RP & extract thereof
	Therefore, it is suggested that the Act may be amended or suitable provisions may be added to the to provide for written/oral submissions by parties setting out their proposal for modification before the CCI issues its proposal for modification. The CCI can retain the right to either accept the parties' proposals in entirety or partially or even the reject the parties' proposals in entirety.	seriously. In the EU for example remedies/modifications offered by the parties at this stage are often broader and all encompassing (i.e., harsher on the parties) because the agency has not gone into a detailed investigation. Parties offer these remedies at this stage to get early clearance. ii. In addition, parties are free to make submissions to CCI including offering modifications, before CCI issues modifications to parties under Section 31(3) of the Act. This has also been done in the PVR/DUL case where the parties offered modifications to CCI after initiation of Phase II investigation. (Please refer to Para. 64 of the Order (Appendix III.) and Case study I). However, to ensure adequate time to examine parties' submissions, CCI could allow parties 15 days to make a submission after it has published the Combination under Section 29(3) as in any case, it will wait for 15 days to receive public comment and has the opportunity to seek clarifications from parties subsequently under Section 29(4). To incorporate this, an amendment would be required to the Combination Regulations by way of inserting a sub regulation after Regulation 24 of Combination Regulations which deals with affording the parties an opportunity to be heard. Alternatively, the Act can be amended by insert in Section 23(A).	***Third parties should be consulted on the effectiveness of the remedies.***

S. No	Stakeholder Issue	Analysis of Issue	Relevant RP & extract thereof
	B. **Market testing remedies**: Some stakeholders have suggested market testing of remedies implying that remedies be put up on CCI website for public comment.	B. While this is a good practice (followed by EU), the statutory merger review timelines in India do not allow the time for this. (Please see Appendix V). Unlike advanced jurisdictions, in India the 210 days runs nonstop regardless of delays caused by gaps in information or noncompliance by parties. This gives barely enough time to the CCI to complete the procedural formalities of the Phase II process and very little time to arrive at modifications let alone market test them. **Thus, the Act itself needs to be amended to allow more time to CCI.**	
10.	**Invalidation**		
	In the interest of promoting transparency and provide certainty to the parties, it is suggested that before each invalidation, the parties are compulsorily given an opportunity to be heard and the Commission and the Commission provide reasons for invalidating the notice. Additionally, it is submitted that the Commission should stipulate a time period to arrive at its conclusion regarding the invalidation of the notice	Invalidation of a notice is resorted to in exceptional cases when the notice is grossly incomplete/ not as per regulations and information gaps cannot be made good by a defect letter or when parties do not address defects in reasonable time (Regulation 14). Opportunity for hearing is given be in cases where the CCI feels that parties may be able to justify why the notice need not be invalidated. As filing a complete notice is a statutory requirement and Notes to Forms have made filing requirements very clear, compulsory hearing does not seem justified. So far 25 notices have been invalidated/withdrawn which is around 5% percentage of notices filed.[37] **There seems to be no justification for compulsory haring before invalidation of a notice**	**RP XII.** Competition Agency Powers: ***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***

[37] As on 31.3.2016, CCI received 385 notifications. CCI Annual report 2015-16.

S. No	Stakeholder Issue	Analysis of Issue	Relevant RP & extract thereof
			fairness, transparency etc.)
11.	**Intra-Group transactions**		
	A. **Exemption for internal restructuring**: It has been suggested that this exemption be revisited as certain transactions, which are in the nature of internal restructuring of where there is, in essence, no change in control are notifiable.	A. Item 9 of Schedule I to the Combination Regulations provides for intra-group mergers: A merger is exempt under Item 9 if one of the enterprises has more than 50% shares/voting rights of the other enterprise, or, more than 50% shares/voting rights in each of the merging/amalgamating enterprises are held by enterprises in the same group and the merger/amalgamation does not result in a transfer from joint control to sole control. Item 8 provides for intra-group acquisitions: An acquisition of shares/voting rights is exempt under Item 8 if the acquirer and target enterprise belong to the same group; and the target enterprise is not under joint control of enterprises belonging to different groups. Thus, Item 8 exempts all intra-group acquisitions of shares/voting rights, provided the target enterprise is solely controlled by the acquirer group – there is no stipulation that the target must be more than 50% held by group enterprises. However, Item 9 provides an additional condition that the merging enterprises must be more than 50% held by enterprises in the same group. CCI may consider revisiting the language of Item 9 to align both exemptions such that intra-group mergers & amalgamations and acquisitions are both exempt as long as all parties to the transaction belong to the same group; and there is no transfer from joint control to sole control or there is no change in control.	**RP XIII.** Review of Merger Control Provisions: ***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***.

S. No	Stakeholder Issue	Analysis of Issue	Relevant RP & extract thereof
	B. It has been pointed out that while for notification purposed under Section 5 of the act thresholds are reckoned by using three criteria to define a group, the exemption under Item 9, Schedule I, uses only the shareholding criteria. This needs amendment.	B. A "group" has been defined in Explanation (b) to Section 5 of the Act as meaning: "two or more enterprises which, directly or indirectly, are in a position to — (i) exercise twenty-six per cent. or more of the voting rights in the other enterprise; or (ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise". Further, the Government of India issued Notification No. 673(E) dated 04.03.2016 which stated as under: "*In exercise of the powers conferred by clause (a) of Section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, hereby exempts the 'Group' exercising less than fifty per cent of voting rights in other enterprise from the provisions of Section 5 of the said Act for a period of five years*." The statutory definition of "group" includes all enterprises exercising 26% or more of the voting rights in an enterprise. However, the Notification increased the shareholding of enterprises that would constitute a "group" to 50% or higher. The effect of the Notification is that, if an enterprise is in a position to exercise between 26% to less than 50% voting power in another enterprise (and has no power to appoint majority of Board of Directors and cannot control the management or affairs of the other enterprise), then the two enterprises would not constitute a "group" for the purposes of calculating thresholds under Section 5 of the	

S. No	Stakeholder Issue	Analysis of Issue	Relevant RP & extract thereof
		Act. However, for all other purposes under the Act, including the determination of intra-group exemptions under Schedule I, the 26% shareholding limit under the Act will apply. The suggestion is that since group is determined with reference to other parameters such as Board nomination rights and controlling rights, these parameters may also be used for assessing the Item 9 intra-group merger exemption – which relies on a more than 50% shareholding exemption. **CCI may consider revisiting the language of Item 9 to align the exemption with the group definition under the Act, as this would also align the exemption with Item 8 as mentioned above.**	
12.	**Pull and refile**		
	<u>Pull and refile option</u>: While parties ae being allowed at present to withdraw a notice and file later, introducing a formal regulation is in order.	Such an option is available in USA. The cost of refiling is borne by parties. At times this is required especially in multi-jurisdictional mergers as parties' fine tune relevant markets and overlaps in discussion with mature jurisdictions like USA and EU much after they have filed in India. This would also help CCI also when it wishes to wait for other jurisdictions where parties are largely present to evolve remedies as there are limited options available to CCI. Pull and Refile may also avoid invalidation of notices or cases going to phase II as is explained in detail in the Chapter 5.	**RP XIII.** Review of Merger Control Provisions: **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.**

4.5 Conclusion

It clear that CCI as a young regulator in a developing country faces the expected challenges of capacity, inexperience and a less than conducive regulatory environment on account of threat of capture, lack of public support and information asymmetries. The analysis of stakeholder comments makes it evident that there are areas where the Act and Combination regulations can be amended to resolve problems faced by stakeholders and to bring merger review law in India in closer conformity with international best practices as reflected in the RPs. This includes the 30-day filing deadline, local nexus being defined in terms of size of business being acquired, allowing parties to propose remedies in Phase II cases and to pull and refile. However, at times apparently simple issues are in fact intricately linked with the context in which CCI functions in terms of capacity, experience and regulatory environment etc. and thus need more careful examination before recommendations can be made. The need for clarity on interpretation of the law and notification procedures, such as on turnover, intra-group transactions etc. and the need for greater certainty and transparency by way of issue of guidance on subjects like gun jumping, interconnected transactions, control, non-compete clauses, penalties, Schedule I exemptions etc., stands out both in critiques in the public domain as well as the above analysis. CCI's own working could benefit from internal guidelines on subject such as fast tracking of cases and continuing defects. Once these have been put to test over a few months to a year the same should be fine-tuned and placed in the public domain. Along with guidelines, more information on status of cases should be automatically available to parties in keeping with best practices on transparency and e-governance. Thus, it would appear from the discussion in this chapter that heeding to industry feedback and adhering to RPs where practicable, could help increase the effectiveness of merger review in India and help CCI become a more credible regulator.