

Comments by CUTS on the “Proposed Amendments to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011”

I. Background

In June, 2011 the Competition Commission of India (CCI) issued the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Regulations). These Regulations were procedural in nature that scrutinised combinations as mentioned under Section 5 and Section 6 of the Competition Act, 2002. CCI has amended the Regulations from time to time taking into account concerns of various stakeholders involved.

The CCI proposes to further amend the Regulations and has invited suggestions/comments from the public on the Proposed Amendments to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Draft Amendments).

Consumer Unity and Trust Society (CUTS), is an international research and advocacy organisation with more than 30 years of experience in competition, international trade, economic regulation, consumer protection and sustainable development issues. It has been also actively involved with the competition law and policy work in various developing countries. As an informed stakeholder, CUTS intends to raise certain issues which the Commission might take into consideration while finalising the Draft Amendments.

II. General comments

The approach adopted by CCI to periodically review effectiveness of its regulations and updating the same by soliciting comments from interested stakeholders is worth appreciating. This enhances transparency in regulation making process and aids in stakeholder buy-in. However, unfortunately CCI has not provided detailed reasoning/justification for the proposed amendments.

Any change in regulations must be prompted by the need to address challenges faced in existing regulatory scenario. While issuing draft regulations, the regulatory agencies must explain in detail such challenges and the proposals which are expected to address the same. Such detailed explanation aids the stakeholders in understanding the approach adopted by the regulators. However, CCI has, from time to time, failed to provide detailed rationale for the changes it proposes to make the regulations. For instance, in an earlier amendment, CCI did not find it essential to provide any reasoning as to the increase in filing fees¹.

It might be noted that sector regulators are making significant efforts in improving transparency and clarity in regulation making by justifying the need for regulation. As per the Resolution of Financial

¹ On March 28, 2014, the CCI increased the fees for Form I from ₹10 lacs to ₹15 lacs and Form II from ₹40 lacs to ₹50 lacs; available at http://articles.economicstimes.indiatimes.com/2014-04-02/news/48801339_1_competition-commission-transaction-vinod-dhall ; April 2, 2014, last visited on 15.04.21

Stability and Development Council (comprising financial sector regulators) dated October 24, 2013, it was decided that all regulations issued by financial sector regulators after October 31, 2013 and all other subordinate legislations (including circulars, notices, guidelines, letters, etc.) issued after December 31, 2013 must comply with the following requirements²:

1. No subordinate legislation may be published without a Board resolution determining the need for such subordinate legislation.
2. All draft subordinate legislation should be published with statement of objectives, the problem it seeks to solve, and a cost-benefit analysis (using best practices).
3. Comments should be invited from the public and all comments should be published on the web site of the regulator.

As regulations impose costs on stakeholders, it is essential to undertake an estimation of costs and benefits of proposed or existing regulations. The Pre-Legislative Consultation Policy (PLCP) of the Government of India requires every government department to conduct partial impact assessment of proposed legislations by conducting cost benefit analysis to enhance the efficacy of legislation³. Internationally, countries such as the US, the UK, Australia, Denmark and agencies such as OECD, DFID have also undertaken and developed methodologies to carry out regulatory impact assessment (RIA), which includes competition audits. Following the international good practices, the fair competition watchdog must also adopt RIA in regulation making and review. This would promote adoption of pro-competition policies, thereby helping in boosting efficiency and overall competitiveness of the Indian economy.⁴

Adoption of RIA in regulation making and review would entrust confidence upon the stakeholders that the regulators operate with clarity. CCI must take care of the below mentioned while proposing amendments to the Regulations:

1. Providing supporting evidence to the lacunae
2. Reasoning to the proposed amendments
3. Financial implications and estimated assessment of the impact of such legislation, including a detailed assessment of costs and benefits on different stakeholders
4. While seeking for public opinion, an explanatory note should be provided which explains the rationale and impact in a simplistic manner

CUTS has also been implementing projects on undertaking RIA (through cost benefit analysis) of select legislations in energy (<http://www.cuts-ccier.org/ADB-RIA/>) and financial (<http://www.cuts-ccier.org/BHC-RIA/>) sectors. We are actively involved in generating awareness of RIA in India and have conducted seminars and the training sessions in this regard, wherein representatives from CCI have participated (<http://www.cuts-ccier.org/BHC-RIA/events.html>). We would be happy to work with CCI to undertake RIA of proposed and existing regulations.

III. Specific comments

Given below are specific comments by CUTS on the proposed amendments to Regulations:

² Department of Economic Affairs, Handbook on adoption of governance enhancing and non-legislative elements of the draft Indian Financial Code, December 26, 2013, available at http://finmin.nic.in/fslrc/Handbook_GovEnhanc_fslrc.pdf last visited on 15.04.22

³ Pre-legislative Consultation Policy (PLCP), February 5, 2014; available at <http://lawmin.nic.in/ld/plcp.pdf> , , last visited on 15.04.21

⁴ Pradeep S Mehta, Bipul Chatterjee, ed, Report on the Working Group on Business Regulatory Framework, Planning Commission of India, 2011; available at http://planningcommission.gov.in/aboutus/committee/wrkgrp12/wg_brf2103.pdf , , last visited on 15.04.21

Sl. no.	Combination Regulations, 2011	Proposed amendments by CCI	Suggestions	Rationale
1.	<p>5. Form of notice for the proposed combination.-</p> <p>(8) The reference to the “other document” in clause (b) of sub-section (2) of section 6 of the Act shall mean any binding document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets :</p> <p>Provided that if the acquisition is without the consent of the enterprise being acquired, any document executed by the acquiring enterprise, by whatever name called, conveying a decision to acquire control, shares or voting rights shall be the ‘other document’.</p> <p>Provided further that where such a document has not been executed but the intention to acquire is communicated to the Central Government or State Government or a Statutory Authority,</p>	<p>In sub-regulation (8) of Regulation 5, for the second proviso, the following shall be substituted, namely:-</p> <p>“Provided further that where a public announcement has been made in terms of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 for acquisition of shares, voting rights or control, such public announcement shall be deemed to be the ‘other document’.”</p>	<p>It is suggested that CCI could follow a principle based definition.</p> <p>3</p>	<p>Currently, CCI has provided reference to SEBI Takeover Code for the purpose of definition of ‘other document’. In future amendments, it might provide specific reference to some other regulations. This could cause inconsistency and would be troublesome for merging parties. Such a practice can be avoided if broad level principles defining the attributes of “other document” are provided. Following principle based definitions in the legislation would lay out broad but well-defined principles that entities would be expected to follow. These set principles (such as manifestation of good faith intention) would then be established criteria for the regulatory institutions to decide the nature of ‘other document’ provided under Regulation 5. The principles could be followed by certain illustrations to provide clarity. In mature jurisdiction such as European Union (EU), the Regulation lists the following principles as triggering mandatory notifications for ‘all concentrations with a Community dimension’:- <i>“the conclusion of an agreement; announcement of a public bid, acquisition of control (or) Other manifestation of good faith intention to do so. A good faith intention, for instance, to conclude an agreement, for instance on the basis of an</i></p>

	the date of such communication shall be deemed to be the date of execution of the other document for acquisition.			<i>agreement in principle or a letter of intent , or , in the case of a public bid, where they have publicly announced the bid.”</i> Therefore, it is submitted that CCI could follow a principle based approach while defining ‘other document’.
2.	8. Failure to file notice.- Where the Commission decides to commence an inquiry, referred to in sub-regulation (1), the Commission, without prejudice to any penalty which may be imposed or any prosecution which may be initiated under this Act, shall direct the parties to the combination to file notice in Form II, as specified in Schedule II to these regulations, duly filled in, verified and accompanied by evidence of requisite fee.	In sub- regulation (2) of Regulation 8, for the words “in Form II, as specified in Schedule II to these regulations, duly filled in, verified and accompanied by evidence of requisite fee”, the following shall be substituted, namely:- “as directed by the Commission.”	It is suggested not to make any amendments in Regulation 8 sub-regulation (2).	As per the proposed amendment, the Commission has the discretion to decide the format of the notice and the amount of fees to be submitted by the merging parties and no principles have been provided to guide the CCI in this matter. This creates ambiguity and uncertainty amongst the stakeholders. The regulator is also not required to provide reasons to justify the difference, if any, of format and fees amongst similarly placed parties. This would not only result in the possibility of biased decision making but would also result in lack of accountability. The existing Regulations provided clarity and maintained transparency by specifying the format and amount in the regulations rather than empowering the CCI to take decisions regarding the same. Lack of a particular standard regarding requisite fees and notice might increase the probability of making unfair decisions. There would be lack of transparency as any format could be prescribed and any amount could be charged to the parties without providing any adequate reasoning. Such an attempt would adversely affect the

				parties undergoing such mergers.
3.	14. Scrutiny of notice.- (2) The Secretary shall issue an acknowledgement of the receipt of notice.	In sub-regulation (2) of Regulation 14, the following shall be inserted, namely:- “Notwithstanding the above, the Commission may invalidate a notice filed under Regulation 5 or Regulation 8 of these regulations when it comes to the knowledge of the Commission that such notice is not valid or complete as per sub-regulation (1) and inform the parties accordingly.”	It is put forth that CCI should insert a provision to ensure that the merging parties are entitled the right to be heard, before invalidation of notice.	The proposed amendment does not follow the principles of natural justice. <i>Audi Altrem Partem</i> otherwise known as ‘Right to be heard’ is a basic right which provides the opportunity to the parties to present sufficient evidence before any order is passed. It ensures fair trial and hence the parties must be heard and given an opportunity to remove such defects or lacunae (if any) in the forms before the Commission invalidates such applications.
