

Press Release

IIMA Misra Centre for FME undertook[[1]](#footnote-1) a study “*Merger control of IRPs: Do acquisitions of distressed firms warrant competition scrutiny*?” (supported by The Insolvency and Bankruptcy Board of India (IBBI) through its "IBBI Research Initiative, 2019").

**June 30 | Ahmedabad:**

**SUMMARY:**

In July 2019, the Competition Law Review Committee Report had recommended that Insolvency Resolution Plans (IRP) which result in combinations should be green-channelled. This would mean that IRP combinations would be automatically approved without any merger scrutiny. The theoretical basis of this recommendation is the ‘failing firm defence’ which allows parties to enter into mergers if they show that the exit of a firm from the market will be more harmful to competition than the merger. This study assesses the advisability of green channelling IRPs through the lens of competition law. It examines the IRPs which have been scrutinised by the CCI and examines whether they are treated differently from other mergers. We use the European Union as a point of comparison to describe how the failing firm defence is being implemented and to show that there can be anticompetitive effects to green-channelling IRPs without a full competition assessment. We conclude that while the failure of a firm is an important consideration when assessing mergers, it cannot be the sole determinant of their desirability. The report can be assessed from: https://www.ibbi.gov.in/uploads/publication/dc195510e9141a689e41ad181ab66cea.pdf.

**KEY INSIGHTS/FINDINGS FROM THE SURVEY:**

After the IBC’s provisions relating to corporate insolvency took effect in August 2016, the CCI has been notified of sixteen IRPs which contained combinations. Prof Ram Mohan and Ms Raj in this study, analysis all the sixteen IRPs which contained combinations discusses CCI’s approach to assessing IRPs and potential areas of conflict between insolvency law and competition law in the context of IRPs.

1. From an analysis of cases which use the failing firm defence in the EU, we find that there are conditions apart from the potential liquidation of a firm which need to be fulfilled to warrant the use of the defence.
2. Parties to the merger, inter alia, need to show that there was no less anti-competitive alternative to the merger.

This level of inquiry cannot happen through green channelling where only the first test on the failing firm defence is confirmed – that the firm will exit the market in the absence of the merger. India’s merger control regime is largely being suspensory in nature, the study find:

1. Firms need to undergo a wait for the CCI’s approval before the merger is implemented.
2. Green channelling moves India away from a suspensory regime and towards a voluntary merger regime such as those in the United Kingdom and New Zealand.
3. Detangling of assets of entities after they have been merged is a new type of challenge that India will face if it moves towards a voluntary regime.
4. In the context of insolvency, the prospect of competition remedies being issued after an IRP takes effect reduces the stability associated with the IRP.

The study concludes by recognising the tension between the insolvency and competition regimes in the context of merger regulation for IRPs.

1. Green channelling satisfies the need for expediency in the context of insolvency proceedings but the EU’s experience demonstrates that even mergers of failing firms can be anti-competitive.
2. This tension can be addressed by reducing the time allowed for the competition scrutiny of an IRP rather than completely doing away with the process.

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1. The study was undertaken by Prof. M P Ram Mohan and Vishakha Raj of the Business Policy Area of IIMA. [↑](#footnote-ref-1)