

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 5

2024

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Merger in Banking Sector: An Analysis of Conflicting Regulatory and Competition Issues

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ABSTRACT

The wave of globalization and liberalization during the 1990's has brought sea in economic reforms across industries, which were associated with idea of restructuring and maintaining financial stability. The banking sector in India has witnessed large scale forced mergers with vision to either achieve scale of economies or promote universal banking. Increased competition in the global market induced banking companies to volunteer for mergers as a strategic choice to enter new markets, gain complementary capabilities etc. which demanded regulatory laws and policy governance to intervene so as to tackle unfair completion and abusive practices. With the establishment of the Competition Commission in 2002, debates over exemptions from its scrutiny were raised amidst existing norms of the Reserve Bank of India in granting approvals. In the light of series of proposed Banking Regulation (Amendment) Bills, as well as recent deliberations over Competition Amendment Bill, 2023 it thus, became imperative to study the paraphernalia of existing regulatory regime with judicial mandate to critically analyze the key areas of turf between the economic regulator and the commission in assessing combinations and mergers. Doctrinal approach of investigation was adopted with secondary resources of data and literature. The analysis suggested that, procedural intricacies involved in regulation of mergers and combinations need to be uniformly aligned under a single code balancing distinct responsibilities of both the regulators.

Keywords: merger, combination, banking companies, competition, relevant market.

I. INTRODUCTION

Mergers and amalgamations are forms of business transactions where there is a combination of two or more corporate entities, and in the process one or more such corporate entities may lose their corporate existence because they merge with the surviving entity or a new entity might be created. However, the term “merger” is not defined in any of the Indian law. The legislative provisions governing mergers of companies are contained in sections 390-396A of the

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Companies Act, 2013. However, under these provisions, a scheme of amalgamation is referred to as an ‘arrangement’ by which assets and liabilities of one company (the transferor) is transferred to the other company (the transferee) and if the scheme is approved by the prescribed majority.

There are other analogous terminologies which are often misunderstood in the context of the mergers and acquisitions. Though the terms “merger” “amalgamation” “acquisition” and “takeover” have specific meanings, they are generally used interchangeably. The term ‘amalgamation’ has also been defined under Section 2 (1B) of the Income Tax Act, 1961. It is also worth noting that the terms “Merger and Acquisition” are often used interchangeably, although they are different.

Consolidation of banks through Merger and Acquisitions is not a new phenomenon for the Indian banking system, which has been going on for several years. Since the beginning of modern banking in India through the setting up of English Agency House in the 18th century, the most significant merger in the pre-Independence era was that of the three Presidency banks founded in the 19th century in 1935 to form the Imperial Bank of India (renamed as State Bank of India in 1955)². To understand the trend of merger in the Indian banking sector, the phase can be divided into two phases i.e. a) pre-liberalization phase and; b) post liberalization phase since 1991. In the “pre-liberalization” era, the Government (GOI) has nationalized the 14 largest commercial banks in 1969, followed by second wave of nationalization with six more commercial banks followed in 1980. The purpose was to grant government more control of “credit delivery.” Years followed after, saw a major merger between two nationalized banks in 1993 i.e. the New Bank of India and Punjab National Bank in 1993.

Recent approval of mega consolidation scheme involving 10 PSBs speaks of the futuristic vision of the Government in ensuring cost benefits as well as enhancing competitiveness at global scale³. Additionally, in the rapidly digitalizing banking landscape, technological integration across entities, with larger database and wider human resource make PSBs gain competitive advantage through leveraging analytics.⁴

Table 1: Consolidation of PSBs with effect from 1st April, 2020

² INDIA, R. B. O. (2006). REPORT ON CURRENCY AND FINANCE 2005-06. <http://rbidocs.rbi.org.in/rdocs/Publications/PDFs/86735.pdf>

³ Samueal, S., & Singh, R. R. (2023, May). Mega banking mergers: An analytical study on consolidation of banks in India. In *AIP Conference Proceedings* (Vol. 2773, No. 1). AIP Publishing.

⁴ PIB, Cabinet approves Mega Consolidation in Public Sector Banks {PSBs} with effect from 1.4.2020, March 04, 4:09PM, 2020, <https://pib.gov.in/PressReleasePage.aspx?PRID=1605147>

Banks Merged	Anchor Bank
United Bank of India & Oriental Bank of Commerce	Punjab National Bank(PNB)
Syndicate Bank	Canara Bank
Allahabad Bank	Indian Bank
Andhra Bank & Corporation Bank	Union Bank of India

Source: <https://www.firstpost.com/business/ten-public-sector-banks-merger-to-come-into-effect-from-1-april-says-nirmala-sitharaman-8118381.html>

II. REGULATORY ISSUES AND CHALLENGES

In the fast moving technology oriented economy, competition amongst financial institutions steep up. In such scenario “mergers and acquisitions” are seen to be immediate and best strategy to effectively sustain in the markets and scale up. Also, it is usually believed that, mergers decrease the scope of competition by downsizing number of players in the sector and this fewer no. of banks lead to reduced access to customer satisfaction. This in turn brings back the question of whether one major bank can enjoy a dominant position to the detriment of others. It is one of the effective strategies to penetrate new market and further market dominance

From the perspective competition law, there are few but key concerns. Of the three elements of competition, mergers and cartels are two prominent events and play greater role than abuses of dominant positions.

The introduction of the Competition Act, 2002 was primarily to target and eliminate practices which create any “*appreciable adverse effect(AAE)*” on market and thereby promote competition while safeguarding larger consumer interest and free trade. This objective too is applicable across industries including banking sector and thus, any combination (mergers, amalgamations, acquisitions etc.) if result in AAE, the general norm would be to declare such combination void under section. Being fragmented at different levels of operation, high concentration ratio among banks is visible at the local level. Also, restructuring and combination of national level banks are becoming a frequent strategy. But, there are certain arrangements, (as specified in Schedule I of the Combination Regulations,2011) which are not essentially in the nature of causing any AAE and thus, do not require to be filed. For e.g. a merger or amalgamation of two enterprises where one of the enterprises has more than fifty per cent (50%) shares or voting rights of the other enterprise, and/or merger or amalgamation of enterprises in which more than fifty per cent (50%) shares or voting rights in each of such enterprises are held

by enterprise(s) within the same group. Also, a combination referred to in section 5 of the Act taking place entirely outside India with insignificant local nexus and effect on markets in India⁵.

(A) Legal Issues:

1. **No Definition:** The Competition Act does not define the terms “merger” or “amalgamation,” However, regulation 2(b) of Combination Regulation, 2011, defines it to be “a proposed combination or the combined entity, if the combination comes into effect.
2. **Mergers which do not fall within ambit of ‘combinations’:** The competition regime has no provision for governing mergers which do not fall within the scope of ‘combinations, yet has the ability to potentially affect completion adversely. In other words, enterprises with lower asset value and turnover remain excluded from the clutches of the regulator.⁶
3. **No tentative Limitation period:** There is a prescribed time limit provided for issuing any direction in relation to mergers.
4. **Interpreting Appreciable Adverse Effect:** As per the Competition Act, a combination is “void” in the event of it causing appreciable adverse effect in the relevant market. This “effects test” involves an assessment of any possible pro- and anti-competitive effects of the combination.
5. **Understanding ‘Relevant Market’ is Trickier:** It is observed that, to comprehend the adverse effect of combination, the idea of ‘relevant market’ is a requisite. The 2002 defines relevant market u/section 2(r) as “market determined by the commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets”. However, owing to the complexities of banking sector, diverse nature of services being rendered as against the preferences of consumers, and technological differences it is often difficult to demarcate between “relevant product market” and relevant geographic market.”
6. **Limited Enquiry Period:** The CCI has been given ample scope and opportunity to crack down any combination having anti-competitive practices either taking a *suo moto* cognizance or from other sources; however, its hands are tied up if he does not set into

⁵ PROVISIONS RELATING TO Combinations, https://www.cci.gov.in/public/images/publications_booklet/en/provisions-relating-to-combinations1652177374.pdf

⁶ Mergers & Acquisitions Under the Competition Act, 2002, <https://articles.manupatra.com/article-details/Mergers-Acquisitions-Under-the-Competition-Act-2002>

inquiry within 1 year of the alleged combination.

7. **Threshold Limits serve little purpose:** Although clear guidelines set for threshold limits, these only trigger the investigation process and do not as such render mergers bad. But, in the context of dynamic economy of India and its fluctuating currency rates, these values do not hold much value. It therefor becomes important to detail other criteria like market share, net turnover, asset valuation etc.
8. **Harmonious interpretation of Sections 31 and 43A of the Competition Act:** It is often misunderstood that, initiation of inquiry in tune with section 43 A after an inquiry u/section 20 being held suffers from double jeopardy. An inquiry u/section 20 on “AAEC”, is a preliminary phase into consideration of “combination” proposal whereby section 31 secures its order on that basis. But, section 43A is a penal provision regulating “non-furnishing of information” as contravening act. So, it is therefore observed that, “*Sections 31 and 43A of the Act operate in two different fields. The Commission has the power to approve a combination under Section 31 and such approval neither obliterates nor condones the contravention, for which penalty is to be imposed under Section 43A⁷.*”
9. **Confirming to the pace of IBC-related proceedings:** Since the Insolvency and Bankruptcy Code 2016 (IBC) was passed, the CCI has examined a number of mergers and acquisitions that were made public as a result of IBC proceedings. In making these decisions, the CCI also took into account the economic health of the businesses as well as any actual or possible AAE that may have been brought on by the particular merger or purchase. IBC-related processes are time-sensitive, and the CCI is aware of the importance of clearing these transactions promptly. However, the CCI's limited authority in IBC-related transactions simply means that it certifies that the notified transaction does not create an AAEC.

III. LEGISLATIVE MANDATE: CONFLICTING JURISDICTION

So far in India, there was no need for a merger policy particularly one with a view to protect competition. However, in the wake of liberalization measures compelling businesses is to recognize their enterprises to survive and compete in the new environment, it was considered necessary to make provisions for merger control towards avoiding its anti-competitive effects and provide for an appropriate competition policy for the country.

⁷ SCM Solifert Limited v. CCI

There are multiple laws regulating operations of banks and their conduct. However, the general rule regulating merger and amalgamation of companies is laid down under sections 230 to 234 of chapter XV in the Companies Law. The central government also has the power under section 44A(7) of the Banking Regulation Act, 1949 to provide for amalgamation of two or more banking companies under section 237 in public interest.”⁸ Further, the Banking Regulation Act, 1949 too has corresponding provisions u/section 44A whereby; in case of private sector banks licensed by RBI, both a) approval of Board of Directors⁹ along with; b) Shareholders’ majority voting by 2/3rd margin is required. However, for public sector banks, it is passed through Government. This is in line with Master Direction for Amalgamation of Private Sector Banks, 2016.

(A) The Reserve Bank of India:

The policy objective of the Reserve Bank of India (RBI) is to ensure that there is systemic benefits and advantage for “becoming” or merged entity. As regards private sector banks, amalgamations were induced by RBI in the larger public interest and processed u/section 45 of the BR Act, while, for nationalized and public sector banks, the Bank Nationalization legislations like the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and 1980 authorized the Government to prepare and make scheme under section 9(1)(c) for transfer or undertaking of a ‘corresponding new bank’ (i.e., a nationalized bank) to another ‘corresponding new bank’ or for transfer of whole or part of any banking institution to a corresponding new bank.

The Reserve bank of India under section 12 (B) (2) of the Banking Regulation Act, 1949) too has proposed some guidelines as “master directions” for streamlining the process of mergers among banks in the private sector. This intervention was passed came into effect on 21st April 2016 and suggests that, any such arrangement between two companies or involving one banking company with another non-banking financial entity, too will be covered.

In a welcoming feat, the central bank was given strict authority to control and manage the increasing bad debts, corruptive practices and administrative failures of cooperative banks under the Banking Regulation (Amendment) Act, 2020 by initiating a scheme for reconstruction of cooperative banks without requiring it to be placed under moratorium. Presently, the Central bank is entrusted with supervisory role over 1482 urban and 58 multi-state Cooperative banks

⁸ Sumit Kochar & Shreyika Walia, Mergers and Acquisitions in the Indian Banking Sector, (December 16, 2022), <https://www.ahlawatassociates.com/blog/mergers-and-acquisitions-indian-banking-sector>

⁹ RBI, RBI/DBR/2015-16/22, Master Direction DBR. PSBD.No. 96/16.13.100/2015-16. https://www.caalley.com/rbi_mc_md_24/MD229CB20F27183D442C9F27C6BD29075463.pdf

which aren't registered banks but cooperative societies.¹⁰ Also, as per circular dated May 24, 2021, it showed willingness to consider schemes, if the State Government makes proposal to amalgamate one or more District Central Cooperative Banks (DCCBs) with State Cooperative Banks (StCB)¹¹.

In a recent development, initiatives were taken for Urban Cooperative banks (UCBs) too. Those banks which could not pace up with competition were given option either to adopt voluntary merger or get converted into a “non-banking” society. As regards private sector banks, amalgamations were induced by RBI in the larger public interest and processed u/section 45 of the BR Act, while, for nationalized and public sector banks, the Bank Nationalization legislations like the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and 1980 authorized the Government to prepare and make scheme u/section 9(1)(c) for transfer or undertaking of a ‘corresponding new bank’ (i.e., a nationalized bank) to another ‘corresponding new bank’ or for transfer of whole or part of any banking institution to a corresponding new bank.

(B) The Competition Commission of India

Further, the Competition Commission too has a role to play in regulating the banking sector. Unlike the prudential regulatory measures, the Commission ensures that the banks compete among themselves in offering the best terms to the customers, for e.g. lower interest rates (on loans) or higher interests on various deposits or securities etc. And thus, CCI's role becomes important to check any collusion, and profit making through abusive practices at the cost of consumers' interests and such practices might include any merger schemes etc.¹²

The old Monopolies and Restrictive Trade Practices Act (MRTP), 1969 under section 23 read with section 20 regulated mergers, amalgamations and takeovers by providing for their approval by the Central Government but, it had become redundant post July 1991 when the new economic policy was announced and thus, the chapter III dealing with the restrictions on M&A activities was made inoperative. However, with the Raghavan Committee's suggestion, there was revival of the above provision for seeking approval of Competition Commission under “combinations” and then came the Competition Act, 2002.

¹⁰ PIB (2020). RBI to keep a tab on Urban Co-operative Banks, PIB, Ministry of Finance

¹¹ TaxGuru, Guidelines for Amalgamation of District Central Co-op Banks with State Co-op Bank (May 24,2021), <https://taxguru.in/rbi/amalgamation-district-central-co-operative-banks-dccbs-state-co-operative-bank-stcb-guidelines.html>

¹² Pradeep Mehta(2010).CCI has a role to play in bank mergers. The Financial Express, India, (January 10, 2010).

The provisions of sections 5 and 6 of the Competition (Amendment) Act, granted an overarching position to the CCI on “vetting M&A proposals” beyond a certain value/threshold. However, battling some pertinent issues, the Merger Control provisions of the Competition Act came into effect on 1st June, 2011” which is a significant achievement in the field of regulation of combinations between the enterprises. And to support the regulation of provisions of merger acquisition the government has framed the “CCI (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011(last amended in 2022)”. There is also another complimentary guideline known as “CCI (Manner of Recovery of Monetary Penalty) Regulations 2011”. Combinations beyond a certain threshold limits require the approval of the CCI as per mandate of sections 5 and 6 of the Act. Aiding the process, the combination regulations i.e. “the Competition Commission of India (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011” under Regulation 4 sets out thresholds limits for enterprises and groups, in terms of their assets and turnover, which when exceeded would trigger the need for notify the same to the CCI.

Approval from the CCI is mandated under the newly enacted Competition (Amendment) Act of 2023 if; a) the deal value for “any transaction in connection with acquisition of any control, shares, voting rights or assets of an enterprise, merger or amalgamation” exceeds INR 2,000 crore, and; b) such enterprise (i.e. the one being acquired / merged / amalgamated) has “*substantial business operations in India*” irrespective of the purchaser’s existence. Also, changes to definition of ‘control’ were widened to include the “ability to exercise material influence over the management, affairs, or strategic commercial decisions”¹³. While the ‘material influence’ standard remains a question of fact and is considered to be the lowest grade of control, an indicative list of rights were recommended by the Competition Law Review Committee(CLRC,2019) to clarify what constitutes ‘material influence’ taking into consideration CCI’s decisional practice¹⁴.

Earlier, such combination deals were required to be reported to the CCI based upon the value of the asset or turnover of the parties to the combination and takes into account, the geographical limits as to the operation of the business. Threshold limits for filing notice with the CCI is usually twofold; one at individual enterprise level and the other at the Group Level. In 2016, the set limits were revised for the purposes of section 5 with value of assets and turnover being

¹³Aayushi Singh & Pavitra Dubey, The Competition (Amendment) Act, 2023: A Game Changer for Mergers and Acquisitions, SCC Online,(June 05,2023), <https://www.sconline.com/blog/post/2023/06/05/the-competition-amendment-act-2023-a-game-changer-for-mergers-and-acquisitions/#fn26>

¹⁴ Government of India (2019).Report Of Competition Law Review Committee, MCA, <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>

enhanced by 100% vide Notification No.S.O.675 (E) and which is reflected in the following table;

Table 2: Deal Value Threshold (DVT) Test under 2016 Revision

Level		Assets		Turn Over
At Enterprise Level	India	>2000 INR Cr.	or	>6000 Cr.
	Worldwide with India Leg	>1bn USD, with at least >1000 Cr in India		> 3 bn USD, with at least >3000 Cr. in India
At Group Level	India	>8000 INR Cr.	or	>24,000 INR Cr.
	Worldwide with India leg	>4bn USD, with at least >1000 Cr in India		>12bn USD, with at least >3000 Cr.in India

Source: <https://taxguru.in/corporate-law/revised-thresholds-combinations-competition-act-2002.html>

This DVT is primarily set for new-age and digital markets, where the target entities may have minimal assets and turnover, but may possess significant potential in terms of data, technology, innovation, etc. However, absolute exemption is allowed for small targets under the “*De minimis test*” and as updated under the Competition (Amendment) Act, 2023. Thus, no filing is required, if the target entity has INR 3.5 billion assets *value in India* in India or it has a turnover from India of INR 10 billion or less. But, after the amendment, even if the exemption is available, a transaction may be notifiable to the CCI wherein the deal value thresholds are met. Although, its application is not restricted to any specific sector, blanket use of this DVT certainly increases administrative load for the commission as well as transaction costs for parties¹⁵.

The Combination Regulations supplement the requirement of ‘notification’ under sections 5 and 6 of the Act. Effect of these regulations has been tremendous because it saddles the economic regulator with all authority to exercise ‘*merger-control*’ in the Indian territory. Also u/section 32, it has been conferred with extra-territorial jurisdiction to deal with AAE on competition. The basic framework u/section 6 talks about procedural compliance of notification within deadlines. CCIs’ intervention under the provision is called for when the proposal for merger or amalgamation is approved by the BODs of the enterprises either on or after 1st June

¹⁵ Avaantika Kakkar, Kirthi Srinivas.(2023). Amendments to Indian Competition Law: Implications for M&A, Kluwer Competition Law Blog

2011. But if the proposed draft has been approved before June, question of CCIs' intervention does not arise. In a way, in absence of scrutiny from CCI, enterprises have a sense of relief for the enterprises who initiated such arrangements earlier. Strict Interpretation of section 6 suggest that, all combinations (mergers) be notified to CCI, however there is deviation. Schedule 1 to the CR provides for list/category of transactions that ordinarily not like to cause any "AAE" and thus, would be exempted from notifying it to CCI.

As per the mandate of section 20 of the Act, there would be enquiry into mergers/amalgamations. Such an action may be taken *suo moto*, or with prior information being received regarding such combination/merger possibly caused or has likelihood to cause appreciable adverse effect on competition. To understand "*appreciable adverse effect*", the law sets 14 factors which might operate singly or jointly. The commission while assessing the effect (AAE), needs to consider diverse concerns including; the market share of enterprises in a combination in the relevant marker, extent of barriers to entry, extent to which substitutes are available level of combination, degree of countervailing power present in market etc¹⁶. Also, AAE can also be judged from the benefits or "*relative advantage*" the merger has contributed and which outweighs adverse impact of the combination (if any).

The most common query in proposed combination which remains prominent is the likelihood that such combination/merger results in removal of effective and vigorous competitors from the market and also that, how far the parties into the arrangement are able to sustainably increase prices/profit margin. In a notice jointly (Combination Registration No. C-2019/03/651) filed under section 6 (2) of the Competition Act, 2002 by the Bandhan Bank Ltd., GRUH Finance Ltd. (HDFC controlled) and Housing Development Finance Corporation Ltd. (HDFC Ltd), the CCI noted that, the "combined market share" of the parties was very insignificant (i.e. within 25-30 percent) to raise any competition concerns, be it in its broader and narrower business segments/ sub-segments in the presence of other competitors. With similar core values, business ethics, there were horizontal overlapping business- segments like provision of bank accounts and of loans. This merger therefore promised to diversify its loan portfolio while expanding into new markets and created one of the largest rural cum semi-urban lending platforms in India. Moreover, the combination was not "*likely to cause any AAEC*" neither in the micro-loans segment nor in any of the possible alternative business segments or their respective sub-segments in India. Therefore, HDFC Ltd. was allowed regulatory approval from RBI to acquire only up to 9.89 percent equity stake in Bandhan Bank, to which the CCI approved the proposed

¹⁶ Javeed, A. (2021). Competition Commission of India: Role and Efficacy in Regulating ECommerce in India.

combination on 15th April 2019 u/section 31(1) of the Act.¹⁷

Regulatory concern also delves into the nature and extent of innovation the combinations brings into with vertical integration (if any) in the market. Further, for the purpose of combinations “*relevant market*” refers to;

a) *relevant product market* and for services like banking, it is in the form of “advances and deposits”

b) *relevant geographical market* which is the whole of India and banking services include, net /mobile banking, ATM services etc.

For a ‘combination’ to come into effect and to facilitate faster approval of transactions, the Act earlier provided for a period of 210 days from the date of notification to the CCI, however, this timeline has been condensed to 150 days after which, if no prima facie opinion/decision is taken on the part of CCI, the combination would be deemed approved and no separate order shall be required to be passed by the CCI. The CCI may accept *suo motu* modifications or propose modifications before forming a prima facie opinion¹⁸. Apart from these well thought about approval process, the 2002 law provided for liability mechanism for non-furnishing of information on combinations. Section 43A of 2023 version imposes at least 1% of the higher of assets, total turnover or the deal value.

However, there are complex technical issues in understanding the baking industry in the context of products it serves to consumers and the geographical market it penetrates into, including domestic as well as international market under different driving forces. In this context, it is pertinent to cite recent call for amendments wherein, certain concepts/phrases like “*relevant product market,*” enterprise, group, control etc. need to be adequately explained and clarified. Hopefully, some aid must be provided to interpret those in the context of different sectors/industry as well including banking.

IV. RBI AND CCI: CONFRONTATIONS AND CO-EXISTENCE

All mergers and amalgamation although may seem to come under both these sectoral regulators, however their role is divided to their respective jurisdictions; while sectoral regulator RBI will watch for prudential aspects, the CCI will deal with the competition aspects of it. The overall

¹⁷ OECD, Annual Report on Competition Policy Developments in India - 2019 , Directorate for Financial and Enterprise Affairs, COMPETITION COMMITTEE, DAF/COMP/AR(2020)45

¹⁸ PwC, What’s New, Regulatory Insights, Provisions of Competition (Amendment) Act, 2023 and rules pertaining to combinations under the Competition Act, 2002 notified – MCA September 11, 2024, [https://www.pwc.in/assets/pdfs/news-alert/regulatory-insights/2024/pwc_india_regulatory_insights_11_september_2024_provisions_of_competition_\(amendment\)_act_2023_and_rules_pertaining_to_combinations_under_the_competition_act_2002.pdf](https://www.pwc.in/assets/pdfs/news-alert/regulatory-insights/2024/pwc_india_regulatory_insights_11_september_2024_provisions_of_competition_(amendment)_act_2023_and_rules_pertaining_to_combinations_under_the_competition_act_2002.pdf)

financial health and stability remains the perennial concern for RBI in its parental capacity, but the CCI is concerned with behavior in the market and ultimately the interests of depositors / customers. So, for technical matters and advice the RBI is well equipped with diverse regulatory framework which is updated time to time to accommodate industry requirements amidst competitive environment. However, the CCI's control over any merger agreement is limited to extending understanding mostly the ramifications of "appreciable adverse effect" due to any such arrangement.

In recent happenings, allegation has been hurled at CCI for delays in granting clearances for combinations notified to it. The corporate affairs ministry which is the administrative ministry of the CCI has taken note of lack of quorum in CCI to investigate mergers and also increasing instances of it invoking the '*doctrine of necessity*' for examining combinations¹⁹. This common law doctrine believes in "*which is otherwise not lawful is made lawful by necessity*" and thus, enables the government by entrusting it with overarching powers to take necessary measures to deal with exigencies. This challenge came at a time when the CCI was over burdened with pending applications (presently 15), including multiple global transactions and transactions he ambit of the Insolvency and Bankruptcy Code, 2016.²⁰ These approvals under review accounted for a value over 10,000/-crore.²¹

In the face of vacancy causing the regulator non-functional, and thereby delaying the process of grant or reject of approval, it has been requested to the central government to pass an ordinance for an interim arrangement for 6 months. Such an imminent arrangement required suspension of quorum requirement u/section 22(3) for the purpose of deciding on the transactions applied to the regulator. Under this dispensation clause of "necessity", panel of 2 members would be considered to be the quorum and exact contours would be provided in the guidelines to be notified.

In all these drama, the CCI's action however, remain unquestionable in the context of section 15 which does not invalidate any act/proceeding of the commission because of any defect in appointments to post of chairperson or member or any kind of irregularities noticed in the procedure. Amidst critical detailing, the amended regulations (Combination Regulations, 2011)

¹⁹ The Economic Times, Competition Commission set to invoke 'doctrine of necessity' principle to examine M&A deals, February 02, 2023, <https://economictimes.indiatimes.com/news/economy/policy/competition-commission-set-to-invoke-doctrine-of-necessity-principle-to-examine-ma-deals/articleshow/97559487.cms>

²⁰ The Economic Times, Industry participants flag lack of quorum at CCI amid pending deal approvals, January 16, 2023, <https://cfo.economictimes.indiatimes.com/news/industry-participants-flag-lack-of-quorum-at-cci-amid-pending-deal-approvals/97017919>

²¹ Surabhi, CCI set to start clearing M&A deals this week, February 6, 2023, <https://www.financialexpress.com/industry/cci-set-to-start-clearing-ma-deals-this-week/2972137/>

of 2024, makes the following key components meaningful in assessing mergers;

- a) details of parties, value of the proposed combination
- b) executive summary of the proposed arrangement
- c) economic and strategic purpose with rationale and the manner of executing the combination

In case a combination takes place in a series of fragmented transactions, and one or more interconnected steps signify combination, then only single notice is to be filed with the CCI however showing the details comprising of the combination.²² Such occasions where the authority has treated multiple transactions as inter-connected steps of a “single combination” include;

- a) case of TPG Asia VI SF Private Limited and Manipal Health Enterprises Private Ltd.(Combination Registration No. C-2014/12/234);
- b) Piramal Enterprises Ltd.(Combination Registration No. C-2015/02/249);
- c) Sapphire Foods India Pvt.Ltd, Sapphire Mauritius and others (Combination Registration No. C-2015/06/285)

Another innovative and readymade stand undertaken under combinations regulation is concept of “*Green Channel*.” In an effort to make the review more transparent, accountable, the CCI in 2019 amended the “Procedure in regard to the transaction of business relating to combinations Regulations, 2011” to introduced a “deemed approval system” for some combinations. It is an automatic system of approval for combinations whereby the CCI facilitates the ease of doing business in the merger regime. In cases where there are no horizontal, vertical or complementary overlaps, parties can avail of the green channel, which allows them to get automatic approval on filing of notices. This is new regulation under the Regulation 5A and Schedules III and IV.²³ This initiative has made India the first country to have such a scheme for notifiable combinations. The Green channel's implementation aims to cut down on the time and expense associated with getting the CCI's permission for mergers and acquisitions²⁴. The green channel allows for a more streamlined approach, enabling parties to conduct their transactions quickly and effectively²⁵. This automatic system of approval for

²² CCI, FAQs, <https://www.cci.gov.in/faqs>

²³ IBBI(2019), Insolvency and Bankruptcy Code - A Miscellany of Perspectives

²⁴ ICSI(2023), Mergers and Acquisitions: Strategies and Execution, Chartered Secretary- the Journal of Governance Professionals, 53(8),pp 1-72, https://www.icsi.edu/media/webmodules/CSJ/August/CSJ_August10082023.pdf

²⁵ Fair Play, 42 (July-September 2022), https://www.cci.gov.in/images/publications_fairplay/en/volume-42-july-september-20221666260876.pdf

combinations under this ‘route’ allows for a more streamlined approach, enabling parties to conduct their transactions quickly and effectively. The CCI has received a total of 111 notices since January 1st, 2020.²⁶ This trend indicates that the corporate sector has faith in the initiative, and both domestic and international stakeholders have provided positive comments.

Further, a sector-wise distribution of combination notices filed reflect that, major merger cases that undergo review are from Pharmaceutical and Health Care sector as well as Finance and Markets²⁷.

Exemptions from the CCI:

The CCI regulates combinations to ensure, if any reduction in no. of players in the sector stifles completion and if terms and conditions of agreement/transaction put adverse impact. Earlier, questions were raised over jurisdiction and autonomy of sectoral regulators over the CCI and thus, the CCI was denied supervision over banking mergers. In its report on “Banking laws (Amendment) Bill, 2011, the Government then reserved some space for CCI’s intervention/consideration as a special case and with certain caveats.

Further, to push forward any fast-tracking consolidation amalgamation of nationalized banks (public sector) is exempted by virtue of MCA’S Notification No. 2828 (E). However, combinations beyond a certain threshold limits still remain a compulsory filing with the CII. Apprehending the fact that, banking operations in segments like; deposits, home loans, and card business, might lead a rise to significant market power and raise anti-competitive concerns that, the Government thought to exempt it for 10 years in future, but not for indefinite period. This shows that, the commission is under constant assessment.

By virtue of section 54(a) of the Competition Act, the Ministry of Corporate Affairs has exempted reconstitution/ mergers etc. (undertaken under the 1970 Act or 1989 Act) from the applicability of Sections 5 and 6 of the Act for next 10 years i.e. till 30.08.2027 on grounds of “public interest.” In an subsequent notification (u/section 23(A) of the RRBs Act, 1976), amalgamations of 2 or more Regional Rural Banks(RRBs) were exempted from merger control regime of CCI for 5 years and which restriction recently came to an end on 09.08.2022. However, prior to this notification, it is not voluntary but, Govt. induced merger which required approval of CCI.

But so far, there is no such exemption being applied for private banks and it may lead to lead to

²⁶ CCI, Green Channel, <https://www.cci.gov.in/combination/green-channel>

²⁷ CCI, Annual Report 2022-23, <https://www.cci.gov.in/public/images/annualreport/en/annual-report-2022-231703571209.pdf>

concentration and distortion of competition through unilateral effects on some select products markets for banking services and for next 10 years consumers will have to resort to seeking remedies under antitrust provisions of section 3 and 4 of the Act.²⁸ Thus, with the introduction of notifications on ‘exemption’, since 2017, the Government has shown its willingness to remedy the jurisdictional conflict between RBI and the CCI. This approach, intends to create a harmonious, cohesive policy regime.

V. JUDICIAL RESPONSE TO BANK MERGERS

The judiciary has been very keen in the issue of consolidation across the banking sector. It has ruled on instances of mergers involving shareholders interest employees’ perspective and on the adequacy of legislations and regulations for voluntary and compulsory amalgamations.

*In case of Bank of Madura Shareholders’ Welfare Association v. Governor, Reserve Bank of India*²⁹, the court opined on the sufficiency of the Act and said that Section 44A of the Banking Regulation Act is a “self-contained” provision and thus, a “complete code” on the amalgamation of banking companies. The scheme of amalgamation of two banking companies should contain in it the complete details regarding the proposed merger of the two companies. Further, on the regulating powers of the RBI it held; the RBI is also vested with the power to grant its approval to the scheme of amalgamation of banking companies.

*In Re: Scheme of Amalgamation of IndusInd Enterprises and Finance Ltd. with IndusInd Bank Ltd.*³⁰ observed that, “it is very clear on the bare reading of the section, that the section applies when one banking company is to be amalgamated with another banking company. Section 44A of the Banking Regulation Act, 1949 does not apply where a non-banking finance company is proposed to be amalgamated with a banking company. No sanction of the Reserve Bank of India is necessary for amalgamation of non-banking finance company with banking company”.

In the *New Bank of India v. Union of India*³¹ the Supreme Court held that the Central Government had the powers to frame such a scheme and the Court would be entitled to interfere with such a scheme only if it comes to the conclusion that either the scheme is arbitrary or irrational or based on extraneous considerations. In all cases of mergers, the Central Government will have to formulate a suitable scheme for continuation and other service

²⁸ M.M.Sharma, Central Government exempts nationalized banks and rural banks from CCI approval for mergers etc., (October 07,2017), <https://www.competitionlawyer.in/central-government-exempts-nationalized-banks-from-merger-control-process/>

²⁹ (2001) 3 CLJ, 212 Madras

³⁰ (2004) 120Comp Cas 457 (Bom)

³¹ 1996 (8) SCC 407

conditions, applicable to the employees of the transferor bank consequent upon merger.

VI. COMPETITION COMMISSION ON BANK MERGERS

The commission has been set up to discourage, curb and penalize anti-competitive practices in the market. Also, there are instances where the CCI has proved its authority as the regulator of markets by reprimanding banking companies for not notifying the deals as well as penalizing them with hefty fines, until the time lobbying among banks for exemption from CCI's clutches were given a nod.

On amalgamation of Private Banks, example of merger between **Kotak Mahindra Bank Ltd and ING Vysya Bank Ltd** is a case study. The scheme of amalgamation was proposed under section 44A of Banking Regulation Act, 1949. Both the banks being an incorporated entity u/Companies Act, 1956, were scattered across India with 641 and 573 branches respectively. ING offers retail and corporate banking, credit card services, securities depositories services to customers. It also provides portfolio management, and investment advisory. It was functioning among top two or three consumer banks in Germany, however with zero branch presence. The agreement allowed Kotak to significantly increase the number of branches it has in southern India. While ING's clientele of small and medium-sized firms (SME) is its area of expertise, Kotak's strength is in the retail sector. Further, in an all-stock transaction, the combined entity was therefore expected to capitalize on ING's expertise in digital banking. Under the merger plan, ING Vysya stockholders will receive 725 Kotak shares for every 1,000 shares they now own, according to the order. The competition regulator in this case considered several relevant markets including those for deposits, home loans, agricultural banking, and card businesses. While operating in the same industry, the merger had no adverse effects on competition because of ING Vyasa's negligible market presence in the country. Additionally, the small market shares of both banks and the fact that there are large players in both marketplaces would limit the parties' ability to compete³². They were taken into account following the global best practices for analyzing mergers in the banking industry.

On amalgamation of Rural Banks, the case of combination i.e. **Combination Registration No. C-2016/02/377** in between Marudhara Gramin Bank ("MGB") and Mewar Aanchalik Gramin Bank ("MAGB") resulting into a single RRB called "Rajasthan Marudhara Gramin Bank" (RMGB) with its head office at Jodhpur is good example of expansion of market.³³ Noting that,

³² Business Standard, CCI clears proposed merger between Kotak Mahindra and ING Vysya (Feb 20 2015), https://www.business-standard.com/article/news-ians/cci-clears-proposed-merger-between-kotak-mahindra-and-ing-vysya-115022001133_1.html

³³ Cyril Amarchand Mangaldas, MCA's Merger Control Exemption for Regional Rural Banks, (August 16, 2017),

this scheme is u/section 23A of the RRB Act; the relevant market remains the “*Banking services in the state of Rajasthan*”, and thus, cannot be exempted from the applicability of Section 5 of the 2002 Competition Act. Although such amalgamation was undertaken at the behest of the Central Govt., it does not mean that the responsibility to notify/intimate the Competition Commission is eliminated.

The CCI’s took cognizance on information received in respect of amalgamation deal between Haryana Gramin Bank and Gurgaon Gramin bank resulting into “*Sarva Haryana Gramin Bank (SHGB)*” under the designation of PNB as the sole sponsor bank of SHGB is another significant event. The Haryana Gramin Bank (sponsored by Punjab National Bank) is a RRB established in 2005 with head office at Rohtak and 16 branch offices across 16 districts of Haryana, and the GGB(sponsored by Syndicate Bank) was operationalized under the RRB since with head office at Gurgaon and providing banking services in notified areas covering 7 districts.

In 2014, when the Sarva Haryana Gramin Bank and Punjab National Bank were served with an inquiry u/section 20(1) of the Competition Act, 2002 and parties were required to remove defects and furnish certain additional information/document(s) pertaining to market shares of the Parties and their competitors. It was observed that, “the failure to file the Combination and consummating a part of the Combination before the approval of the same by the Commission attracts penalty under Section 43A of the Act”. Thus, for failure of compliance u/section 6(2), a penalty was imposed and it was extended to 1% of the total turnover or the assets, whichever is higher, of such a combination. After considering the peculiarities of the case and explanations received from parties, a meager penalty of 1 lakh was levied.

VII. CONCLUSION AND SUGGESTION

In the era of expansionist ideology and growth, synergy through combinations remains a thoughtful and strategic arrangement for all industries alike. The on-going turf between the sectoral regulator, the Reserve Bank of India and the Competition Commission is certainly becoming a question of integrity and competency. But it must be apprised that, the RBI does not have the requisite expertise to prohibit or regulate any kind of anti-competitive practices/behavior, while CCI is not a domain expert in baking matters or expertise to remit on “prudential regulation.” Hence, a coherent coexistence is desirous for better governance of the industry with blend of healthy competition and regulation.

Competition issues in the banking sector would arise as a result of regulatory barriers (in terms

of capital requirements or licensing, for example) or substantial state ownership of banks where foreign firms are prohibited from taking over any kind of domestic banks). This may be aided further by the availability of switching fees and asymmetric credit risk information that is not disclosed with the new entrant. Another issue would be economies of scale and branch networks, which would be more of a worry in the case of PSB mergers because they have large capital and client bases, allowing PSBs to establish themselves completely and obtain a deep position in the market. Furthermore, worries about competitiveness may develop in terms of loans made to small and medium-sized businesses. Also, if such bank mergers occur in sufficiently concentrated markets, any anti-competitive effect may be neutralized, particularly due to the presence of nationalized banks in the market.

It is to be appraised that, there are niche players in the era of emerging new banking models who are assigned with specific tasks for e.g.; Universal banks and Full scale banks like the ICICI, HDFC, Axis (sanctioning credit, loans, deposits, asset management, investment advisory, insurance etc.); Small finance banks doing only micro loans and Payment banks (retail payments). In this scenario of diversified role assignment, combination may design a space for accommodating new models like SME or MSME focused banks (SIDBI, DBS, IDBI etc.). On a negative perspective, combinations remain warranted in the industry so as to avoid non-performance owing to bad capitals of weaker banking institutions and at the same time, public sector banks in India refuse to learn lessons and continue to be languishing at the bottom in terms of financial performance earth a significant number of them remain under scrutiny of the RBI's prompt corrective action (PCA) framework. Moreover, to ensure better governance and healthy competitive market, it is wise to analyze timely amendments to competition law alongside parallel sector specific regulations to control anti-competitive behaviors of banking companies.

The alarming issue with combinations being the concentration in one geographic area as a 'market,' invites regulation because it breeds anti-competitive practices. At the same time, other regulatory risks like streamlining human resources as well as Information technology issues during the execution of these processes need to be considered. Therefore, in this emerging trend dynamics of merger in the banking industry and interplay of diverse factors/markets, consistency and timely compliance to guidelines and directions is the legally requisite behavioral attribute for the entities to remain dutiful and help promote healthier synergy and competition.

Author Contribution: This paper is my original contribution. The manuscript was solely conceived, designed and analyzed at the behest of authors' own understanding and perception.

Conflict of Interests: The author has no conflicting interest to declare.

Funding Acknowledgements: The work does not involve any specific fund/*grant*/ other support from any funding agency.

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