MERGER UNDER COMPETITION LAW AND BANKING LAW

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Abstract

This paper deals with the subject of merger of banks or combination under Reserve Bank (RBI) of India and competition commission of India (CCI). Mainly the topic dealt by author is whether RBI as well as CCI can work together as uniform organization to study the merger of banks. In India there are separate laws which deal with the merger aspect of the banks. Still the author wanted to study that why not CCI and RBI work together.

As RBI is the oldest organization for operation of the banks in India before and after independence. And the CCI is at a very nascent stage for the merger of banks, as it is formed after the Raghavan Committee which recommended to establish the CCI. Both are very enormous regulators in their own premises.

But the author has put a question in this paper that why cannot these two giant organizations work together.

1. Introduction

The banking system in India is significantly different from that of other Asian nations because of country's unique geographic, social, and economic characteristics. India has a large population and land size, a diverse culture, and extreme disparities in income, which are marked among its regions. There is high level of illiteracy among a large percentage of its population but, at the same time, the country has a large reservoir of managerial and technologically advanced talents. About 30 and 35 percent of the population resides in metro and urban cities and the rest are spread in several semi-urban and rural centres. The country's economic policy framework combines socialistic and capitalistic features with a heavy bias towards public sector investment. India has followed the path of growth-led exports rather than the "export led growth" as

compared to other Asian economies, with emphasis on self-reliance through import substitution.[1]

The competition act was enacted in 2003 creates healthy competition in the market and to promote and sustain competition.

Preamble sets out the key objective of the Act:

"An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."

Which means that it establishes the commission of competition which is a regulatory body which has the power to give orders and directions to the anti- competitive entities and also have power to impose penalties. The preamble also prevents adverse effects of the competition on the relevant parties. It gives freedom to the parties to carry on their role as competitors in the market. And lastly but mainly it protects and assures the interest of the consumers of the ill effects of the unfair competition.[2]

The Supreme Court in case *CCI and others v SAIL and others*[3] explains objective of the Act in the following words:

"The main objective of the competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantage of perfect competition are three-fold: allocative efficiency, which ensures the effective allocation of the resources, product efficiency, which means that cost of production are kept at a minimum and dynamic efficiency, which promotes innovative practices."

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[1] Deolalkar, G. H, *The Indian Banking Sector on the road to progress, available at:* http://aric.adb.org/pdf/aem/ external/financial market/India/india_bnk.pdf (last visited on 29th feburary,2021)

[2] Dr S.C. Tripathi, *Competition Law*, 98-99, (Central Law Publications, 2015)

[3] *CCI and others v. SAIL and others,* (2010) SCC 744.

The case *Shri Pravahan Mohanty v HDFC Bank Limited, Chennai and others*,[4] offers the appropriate explanation to the objective of the Act:

"Under the competition Act, 2002, one of the key elements is economic development in India and the other item is the protection of consumers. Maintaining and sustaining competition in the markets in India is only for the benefit of the consumers. All these items are mentioned in the preamble to the competition Act. The preamble also talks of having freedom of trade for all the participants in India. Freedom of trade means freedom of choice, lower switching costs and proper information system for the consumer to make the right choice. Freedom of trade amounts to protection of consumers and participants in the market from anti-competitive agreements, protection from cartels, from anti-competitive trade practices, control of markets, collusive bidding, refusal to die, tie in arrangement etc. and abuse of dominance. Abuse of dominant position involves the above- named factors, unfair and discriminatory practices and prices, denial of market access, supplementary obligation and protecting other markets. Freedom of trade, equality before in law and liberty of thought are also incorporated in the Constitution of India. Therefore, the competition law expands the scope of the constitutional guarantees. These are all incorporated in section 3 and 4 of the competition Act."

The High- Level committee on Competition Policy was constituted by the central government under the chairmanship of Mr. S.V.S. Raghavan determine to achieve a fair market competition with an objective to frame a policy on competition law with aim curb monopolistic market across the India. The committee submitted its report on 22nd may, 2002 to the central government. After this report parliament enacted a law of competition law which came to be known as Competition Act, 2002.

Preamble of the report

"A broad definition of competition is "a situation in a market in which firms or sellers independently strive for the buyers' patronage in order to achieve a particular business objective for example, profits, sales or market share"[5]

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[4] *Shri Pravahan Mohanty v. HDFC Bank Limited, Chennai and others,* MANU/CO/0020/2011.

[5] *Ibid,* Definition of competition provided by World Bank, 1999

Competition policy under this report has included that it is to achieve efficient allocation of resources, technical progress, consumer welfare and regulation of concentration of economic power. It is after all is a process of achieving an objective of promoting consumer policy.[6] A necessary condition for a trade is good competition.[7] The real offender here is the economic distribution i.e., income distribution which rules the market as it deems fit. In the cheapest market also, there is no guarantee that the goods will be sold where they are needed most. As the income distribution in any country can never be equal. Therefore, the that is why a competitive market is needed for keeping a check.[8]

There are two approaches to competition. One is that to "free and totally unfettered competition" and the second is that to have free competition but with support of regulation.[9] The legislature should promulgate to have a competition law for healthy trade practices.[10]"Competition policy, in this context, thus becomes an instrument to achieve efficient allocation of resources, technical progress, consumer welfare and regulation of concentration of economic power. Competition policy should thus have the positive objective of promoting consumer welfare."[11]

There are several obstacles to overcome inside a market, but have a protective policy for competition in the market for the numerous competitors is the need of the hour. Therefore, with the report of high- level committee a competition law is necessary for the future market and economics to guarded.

The definition clause can be related to the preamble as the whole Competition Act has emerged from the preamble itself. As the preamble talks about two to three words which are defined in the Act itself, they are practice and trade. By defining the section, it can be explained with the help of definition clause how the combination/merger provision

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[6] *Ibid*, para 1.2-1

[7] *Ibid*, para 1.1.2

[8] *Ibid*, para 1.1.4

[9] *Ibid*, para 1.1.7

[10] *Ibid*, para 1.1.8

[11] *Ibid*, para 1.2.0

can be understood. The definition of "*practice"*[12] is defined as relation to any trade by any enterprise or person. Now as practice is defined and it contain definition of trade, enterprise and person. Therefore, now definition of "person"[13] should be dealt which contains almost everything in its definition such as "an HUF, accompany, a firm, an association of person, a body of individual, government company, co-operative society and every artificial juridical person."

For understanding the concept exemption sovereign function, the power to exempt[14] clause by the central government has to be understood because it the provision under the Competition Act deals with exemption of any provision by notification from the said Act and also for a specific time period as it deems fit. The proviso[15] of the provision says that if any enterprise is engaged in any activity, which is relatable to the sovereign function, then the government by notification grant exemption in that respect. A hypothetical example can be taken as EXIM bank if doing any function related to foreign currency.

In case *Union of India V. Competition Commission of India and Others.*[16] *The honourable High court* said "to the question which was raised to the HC that what would constitute a sovereign function?". The HC replied "that only primary, inalienable and non- delegable functions of the constitutional government should quality for exemption within the meaning of 'sovereign functions' of the government under section 2 (h) of the Competition Act, 2002. welfare, commercial and economic activities, therefore, are not covered within the meaning of 'sovereign functions', and the State while discharging such functions is as much amenable to the jurisdiction of the competition regulator as any other private entity discharging such functions'".

The most important definition in the Competition Act is about relevant market.

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[12] Competition Act, 2002 (Act 12 of 2003), s. 2(m).

[13] *Ibid*. section 2(l)

[14] *Ibid*. section 54

[15] *Ibid*. section 54 proviso

[16] *Union of India v. Competition Commission of India and Ors*, AIR 2012 Delhi 66.

Relevant market[17], which means that it, contains two types of market i.e., geographical and product market or with reference to both. And it should be determined by the CCI. "A market is franchise conferring a right to hold a concurrence of buyers and sellers to dispose of the commodities in respect of which the franchise is given."[18]
The relevant market is used to recognize direct competition in the market through products and enterprise. It is market where competition takes place. It depends upon the customer to what extent the consumer shift to other product.[19]

Combination under the Competition Act is a very recent and upcoming provision which is yet to be a stable law under the competition Act. It is known by many other names such as merger or amalgamation. This provision was added by a statutory order[20] which by the order from Central Government, by notification in the official Gazette, appoint any such provision.[21] Therefore, combination[22] provision under the Competition Act is to regulate combination consisting acquisition, merger or amalgamation. But the combination only interferes with those types of acquisition which crosses the threshold limit as given under combination provision. The enforcement of the combination regulation[23] was also done simultaneously with the statutory order.
Combination as defined deals in three types of combination as per the section of the Act.
(a) the acquisition of control, shares, voting rights or assets.
(b) the acquisition of control by a person over an enterprise when such person has already control over another enterprise engaged in competing business.

[17] Competition Act, 2002 (Act 12 of 2003), s. 2(r).
[18] Halsburg's law of England, 4th Edn. Vol.29 p.313, in Dr S.C. Tripathi, *Competition Law*, 98-99, (Central Law Publications, 2015)
[19] *Supra* note 9 at 82
[20] S.O. 479(E), dated 4/3/2011
[21] Competition Act, 2002 (12 of 2003), section 1(3)
[22] *Ibid*. s. 5
[23] The Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011, Notification no.1-1/combination Regulation/2011-12/CD/CCI, dated 11th may, 2011, published in the official gazette Of India, Extra., Pt. III, Sec.4 (herein after referred to as combination regulation, 2011)

(c) Any merger or amalgamation between or amongst enterprises when the combining parties exceed the threshold limits.

As per the definition clause under the combination regulation defines combination[24] as a proposed combination or the combined entity, if the combination comes into effect.

The High-level committee report[25] assessed the issue of merger/combination, which suggested three types of mergers

(a) Horizontal merger: it takes place between the same competitors who are doing the similar business example merger between two banks.
(b) Vertical merger: it takes place between different competitors who are doing different business example merger between bank and financial institution.
(c) Conglomerate merger: it takes place when merger between two enterprise doing unassociated business.

Section 5 of the combination deals with few words that need to discussed before understanding the section.

Firstly "acquisition"[26] means act of acquiring or agreeing to acquire to acquire, directly or indirectly, shares, assets, voting rights of any enterprise and also having control over management or assets of any entity.

Then the definition of shares[27] from the above section comes into picture which can be defined as share capital of company carrying voting rights for any security, which entitle the holders to receive shares.

This provision has been brought into force by the statutory order[28] and it lays down provision for the combination which has an appreciable adverse effect on the competition in the market in India i.e., RPM and RGM. If the combination has an AAEC, then that combination is void.[29] It is not likely that a combination leads to

[24] Combination Regulation, 2011, regulation 2(b)

[25] *Supra* note 20 at 4.6

[26] *Supra* note 32, s. 2(a)

[27] *Ibid.* s. 2(v)

[28] S.O. 479(E), dated 4/3/2011

[29] Competition Act, 2002 (12 of 2003), s. 6 (1)

AAEC. To find out AAEC an inquiry by the commission is done for determining that whether a combination results in AAEC on competition in the relevant market in India. The factors for determining[30] AAEC are that whether a combination can result in removal of effective competitors, whether a combination leads to failing of a business, whether a combination leads to any adverse effect on the economic development, whether to what extent substitute are available in the market which will cause an adverse effect, whether a combination leads to significant increase in the market prices and profit margin, extent of barriers in the market to entry, what will be the potential and actual level of competition in the market through imports.

Rule of reason approach is also another way to evaluate combination in the market.[31] Rule of reason approach can be defined as "it is a legal approach by competition authorities or the courts where an attempt is made to evaluate the pro-competitive features of restrictive business practice against its competitive effects in order to decide whether or not the practice should be prohibited."[32]

There are two ways that the parties have to disclose the details of the combination; firstly, by way of notice to the commission[33] by the parties itself i.e., by the enterprise or by the person. It is mandatory to give notice to the commission within 30 days of the proposal approved by the BOD of the enterprise relating to merger or amalgamation under section 5(c), and also under section 5 (a) and (b), before the execution of any document or any agreement.

Secondly, if the notice under section 6 (2) is not provided to the CCI then the CCI can Suo motto collect information and details about the combination and inquire into the cause of AAEC in India. Thus, there is a condition for CCI to Suo Moto files the notice; it is that CCI cannot after the expiry of 1 year from date of combination inquire.[34]

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[30] *Ibid.* s. 20(4)

[31] *Supra* note 9

[32] Glossary of industrial organization economics and competition law, compiled by R.S. Khemani and D.M. Shapiro, commissioned by the Directorate for financial, Fiscal and enterprise affairs, OECD, 1993, *available at:* http://www.oecd.org/dataoecd/8/61/2376087.pdf, (last visited on March 29th , 2021)

[33] Competition Act, 2002 (12 of 2003), section 6(2)

[34] *Ibid.* s. 20(4)

After notice is provided to the CCI, then until 210 days have been passed from the day on which the notice was provided to the CCI or the order under the section 31 have been given, whichever is earlier.[35]After the notice is provided to the CCI, then prima facie opinion is formed for investigation to see if there is any AAEC.[36]

2. Merger Under Banking Sector

Merger takes place as strategic decisions to maximize the growth and enhance the markets productivity. The merger term is not defined anywhere particularly.
But it means "the act or instance of combining or uniting"[37]. Merger is the combination of two or more companies which can be merged together either by way of amalgamation or absorption. The combining of two or more companies, is generally by offering the stockholders of one company securities in the acquiring company in exchange for the surrender of their stock.[38]

Amalgamation[39] is also a form of merger that can be defined as amalgamation means the merger of one or more companies with another company or the merger of two or more companies to form one company in a such a manner that all properties and all liabilities of the amalgamating company or companies becomes the property of amalgamated company and also shareholders holding not less than [three-fourths] in value of the shares in the amalgamating company or companies. This definition is a little bit different from other definition of amalgamation because it is only for the purpose of taxation. The other definition of amalgamation[40] can be defined as amalgamation in the nature of merger and amalgamation in the nature of purchase, the former says that if all the condition given are fulfilled then only it will be amalgamation in the nature of merger, the condition are:

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[35] *Ibid.* s. 6(2A)

[36] *Ibid.* s. 30

[37] Definition of merger, black's law dictionary, Bryan A. Garner (Editor in Chief), 9th edition, pp 1078

[38] The Institute of Company Secretaries Of India, *Corporate Restructuring, Valuations And Insolvency* (Module 1 Paper 3), available at: www.icsi.edu, (last visited on March 3rd, 2021)

[39] Income Tax Act, 1961, s. 2(1B).

[40] Accounting Standard (AS) 14, para 3(e) and (f)

(a) All the assets and liabilities of the transferor company[41] become, after amalgamation, the assets and liabilities of the transferee company[42].
(b) Shareholders holding not less than 90% of the face value of the equity shares of the transferor company become equity shareholders of the transferee company by virtue of the amalgamation.
(c) The transferee company discharges the consideration for the amalgamation receivable by those equity shareholders of the transferor company who agree to become equity shareholders of the transferee company wholly by the issue of equity shares in the transferee company, except that cash may be paid in respect of any fractional shares.
(d) The business is intended to be carry on by the transferee company

And the former can be defined as when one or more of the conditions of the specified in the above sub paragraph are not specified.

Therefore, laws in India use the word merger instead of amalgamation[43]

Merger through absorption: Absorption is a combination of two or more companies into an existing company. All companies except one lose their identity in a merger through absorption

Merger through consolidation: A consolidation is a combination of two or more companies into a new company. In this type of merger, all companies are legally dissolved and a new entity is created. In a consolidation, the acquired company transfers its assets, liabilities and shares to the acquiring company for cash or exchange of shares.

3. Bank Merger Examination Under CCI

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[41] Companies Act 1956, s. 394 (4) (b), which defines as "transferor-company" includes anybody corporate, whether a company within the meaning of this Act or not

[42] Companies Act 1956, s. 394 (4) (b), which defines as "transferee-company" does not include any company other than a company within the meaning of this Act

[43] The Institute of Cost and Works Accountants of India, *Compendium on Business Valuation Management, Final Group - Iv Paper – 18*, (ICWAI, 2011)

There are number of cases under the banking sector which have to take approval from the CCI. The merger or amalgamation of banks takes place by the proper procedure under the BR Act, 1949 i.e., procedure of amalgamation which thoroughly explained in the previous chapter. Section 44A of the BR Act, 1949 deal with the merger procedure. Under the CCI there are very few sections which are dealing with services of banks these are section 2(u)[44] which deals with the services which are available to the potential users and section 6 (4) and (5)[45] which deals with that combination shall be excluded from any acquisition, financing facility or share subscription, by a bank if dealing with loan agreements or investment agreements.

The case study included in this paper are only those which deals with a notice provided to the CCI and then CCI will look into the adverse effect created by the combination. The combination of banks does not have many cases, as firstly because combination provision under the CCI is at a very infant stage, therefore there are not many cases of combination. Secondly, combination of banks is not included under the said Act because of the statutory order[46], which says that the section 45 of the BR Act, 1949, is to be exempted from the purview of the combination provision[47] the competition Act, 2002, in the interest of the public for next 5years by the power to exempt[48] under the said Act. The power of the CCI to regulate its own function[49] by the CCI when any rules are to be by the central government.

The case study to be dealt under this chapter deals with only those cases where a scheme of amalgamation[50] is formulated under the BR Act, 1949 and after the scheme is approved then a notice[51] to be filed under the CCI for the investigation by the CCI and afterwards an order to be provided by the CCI that the said combination is to be regarded approved or not after checking the AAEC on the market in India.

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[44] Competition Act, 2002 (12 of 2003)

[45] *Ibid.*

[46] S.O. 93(E), dated 8/1/2013

[47] Competition Act, 2002 (12 of 2003), section 5 and 6

[48] *Ibid.* s. 54(a)

[49] *Ibid.* s. 36

[50] Banking Regulation Act, 1949 (10 of 1949), s. 44A

[51] Competition Act, 2002 (12 of 2003), s. 6 (2)

In this chapter only three case illustration are dealt with;

Illustration 1:

Notice for acquisition filed by The Hongkong and Shanghai Banking Corporation Ltd.[52]
In this case HSBC has filed a notice under section 6(2)[53] on 27th march, 2012 to the CCI for a proposed combination between the HSBC and RBS. The combination is proposed under section 5(a).[54] In regards to the combination regulation 14[55] CCI wanted HSBC to require replace the defects and provide the appropriate information as per the notice require.

The scheme of amalgamation was structured as per section 44A[56] and the Scheme of Amalgamation is also approved by the RBI which agreed for the proposal to transfer the banking business under section 6[57] to the HSBC from RBS.

HSBC is a corporation which is incorporated under the company's ordinance of the Hong Kong special administration Region, and is a wholly owned subsidiary of HSBC Holding Plc. In India it has 50 branches across 27 cities. And it specifically deals with retail, private, commercial, global banking.

RBS is a corporation which is incorporated in the Netherlands, and is a wholly owned subsidiary of RBS Holding Plc. In India it has 31 branches across 24 cities. And it specifically deals with retail, private, commercial, global banking.

As per RBI's report[58] there are 26 PSB's, 21 PSB's, 36 foreign banks operational in India. The proposed combination can be of concern in India. But the combined market share of both the banks, which is acquired by the HSBC, is not of great concern on the Indian market and it does not create any AAEC. Therefore, the combination is approved by the CCI under section 31(1)[59].

Illustration 2:

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[52] Combination registration no: C-2012/03/46, 19th april,2012

[53] Competition Act, 2002 (12 of 2003)

[54] *Ibid.*

[55] *Supra* note 54

[56] Banking Regulation Act, 1949 (10 of 1949)

[57] *Ibid.*

[58] Reserve Bank of India, Report on trends and banking in India (2010-11)

[59] *Supra* note 107

Notice given by Doha Bank QSC and HSBC Oman S.A.O.G.[60]

A notice was provided to CCI on 15th may, 2014 under section 6(2) [61]. This combination between HSBC Oman and Doha bank is pursuant to the scheme of amalgamation under section 44A[62] which is related to the transfer of its banking business and operation.

In the State of Qatar, one of the commercial banks is Doha bank. It is involved in many banking businesses such as international banking, investment banking, treasury, wholesale banking. It is spread across many different locations such as Dubai, Abu Dhabi and Kuwait. The RBI to operationalize itself in banking business gave In India Doha bank. RBI has allowed them to start with banking service from Mumbai.

In the Sultanate of Oman HSBC Oman operates as commercial bank. It is a Omani joint stock company.it is involved in many services such as commercial banking and retail banking, wealth management etc. In India HSBC Oman is located in Kochi and Mumbai. Holding company of HSBC Oman is HSBC Holding plc.

As per the combination between Doha bank and HSBC none of the parties have any relation to vertical related activity. Therefore, no chance of AAEC in the relevant market in India.

As the information and details provided by the notice to the CCI for the investigation. CCI have observed that there is no AAEC on the market by the combination of the parties.

Thus, the combination is approved by the CCI under section 31(1)[63].

Illustration 3:

Notice given by Kotak Mahindra Bank Ltd. and ING Vysya Bank ltd.[64]

A notice was received by the CCI on 15th December, 2015 under section 6(2)[65] which is filed by both the parties i.e., Kotak Mahindra Bank along with ING Vysya Bank Ltd. ING Vysya bank is going to merger into Kotak Mahindra Bank under the Scheme of Amalgamation under section 44A[66]. The merger scheme included that for every 1000

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[60] Combination registration no: C-2014/05/171, 12/6/2014

[61] *Supra* note 107

[62] *Supra* note 110

[63] *Supra* note 107

[64] Combination registration no: C-2014/2/231

[65] *Supra* note 107

[66] *Supra* note 110

shares of ING Vysya Bank, 725 shares of the Kotak Mahindra Bank will be allotted to ING Vysya Bank.

The parties were required to fill the forms and provide information to the CCI by the regulation 5(4) and regulation 19(2)[67]. The defect by the CCI was opined and the defect was removed the parties under regulation 14[68].

Kotak, accompany has 641 branches allotted across India. And it is incorporated under companies Act, 1956 with wide ranging banking business and financial services.

ING Vysya, a company having 573 branches across India. It is also incorporated under the companies Act, 1956 with many financial and banking services in India related to credit card services, retail banking and corporate banking.

It is submitted in the notice that relevant product market for banking services is advance and deposits. And the relevant geographical market is considered to be the whole country in relation to the banking services as it includes services such as mobile banking, net banking, ATM services all over the country. The CCI observed that by the nature of services provided and consumer preference provided by the bank. Therefore, a demarcation between the RPM and RGM is difficult because of the technological differences.

4. Conclusion

The proposed combination done will not in any way effect the competition in the relevant market in India. As there are bigger players in the market than that of the parties such as PNB, ICICI, SBI etc.

The CCI observed after thorough investigation that combination does not affect the market as AAEC. Therefore, the combination is approved.

[67] *Supra* note 54

[68] *Ibid.*