BATTLE OF THE TURF BETWEEN RBI AND CCI - AN ANALYSIS

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I. INTRODUCTION

The Banking Sector is considered as the lifeline of the Liberalized and Globalised Indian Economy. It holds the key to the smooth functioning of various industrial giants, small and medium scale industries by acting as a major source of credit, it also plays a pivotal role in structuring international trade and commerce. Banking sector also acts as lifeline for individuals (retail customers) by catering to their credit and other financial needs. Lately Consolidation has been the buzzword in the Indian Banking industry especially amongst the public sector banks. The public sector banks account for nearly 80% of the total net income and profit of the banking industry.

The trends towards globalisation of all national & regional economies has increased the intensity of mergers, in a bid to create more focused, competitive, viable, larger players in banking industry. Liberalization of the earlier state controlled, sluggish Indian economy has made mergers more necessary and acceptable.[1]

Consolidation of Banks has gained popularity in India after the 1997 Narshiman Committee Report. The report recommended mergers of banks especially public sector banks. It further said that "*Mergers of public sector banks should emanate from management of banks with*

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[1]Dr. Manoj Dash, *Consolidation in Indian Banking* (Dec. 3, 2009), http://www.indianmba.com/Faculty_Column/FC248/fc248.html.

Government as the common shareholder playing a supportive role."[2] Such mergers, however, can be worthwhile if they lead to rationalisation of workforce and branch network. It further provided that the rationale behind bank mergers shall not be bailing out weak banks rather it should be mergers between strong banks that would make for greater economic and commercial sense and would have the force multiplier effect.

The recent global economic downturn has again brought into spotlight the banking sector and its reforms. In recent past the policymakers in India has also shown commitment towards reforming the banking sector as an endeavor to ensure the growth of Indian economy as well as keeping it free from the clutches of economic disasters. India's mantra for banking reforms would be consolidation, competition & convergence to enable Public Sector Banks to become stronger, bigger and globally competitive. The logic behind is to create a few solid banks capable of operating and competing internationally.

To a large extent, this consolidation is based on a belief that gains can accrue through expense reduction, increased market power, reduced earnings volatility, and scale and scope economies. Whether or not bank mergers actually achieve the expected performance gains is the critical question. If consolidation does, in fact, lead to value gains, then shareholder wealth can be increased. On the other hand, if consolidating entities does not lead to the promised positive effects, then mergers may lead to a less profitable and valuable banking industry.[3] The negative effects of the mergers may result in a less competitive banking industry that will bring it within the purview of anti-trust/ Competition laws.

After the enforcement of Competition Act, 2002 (hereinafter the Act) and the proposed notification of provisions relating to *control of*

[2]Committee on Banking Sector Reforms (Narasimham Committee II), Chapter V, para 5.13-5.15 (Dec. 10, 2009)., http://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/24157.pdf.

[3]Steven J. Pilloff & Antony M. Sontemero, *The Value Effects of Banks Merger & Acquisitions* (Dec 5, 2009),http://fic.wharton.upenn.edu/fic/papers/97/9707.pdf.

combinations under the Act will make mergers of two or more banks or acquisitions of one bank by another subject to approval by the Competition Commission of India ("**CCI**"). Earlier, under the Monopolies and Restrictive Trade Practices Act, 1969 mergers and amalgamations of banks were exempted from any kind of scrutiny. The inclusion of bank mergers within the purview of the CCI has given birth to a new conflict i.e. the tussle of jurisdiction between CCI and Reserve Bank of India ("**RBI**").

This article is an effort to examine the tussle of jurisdiction between the Sectoral Regulator in the Banking Industry i.e. the Reserve Bank of India and the Indian anti-trust watch dog i.e. the Competition Commission of India on issues pertaining to consolidation of banks. In the aforementioned endeavor it tries to determine the motivations behind bank mergers. It also analyse the relevant provisions of the Competition Act, 2002 consequently establishing the grounds on which bank mergers can be regulated under the Competition Act. It also analyses the functions of RBI and CCI. Finally, it suggests a model relationship to be adopted between Sectoral Regulators and CCI in India, keeping in mind the Indian scenario and also drawing inference from foreign jurisdictions.

II. PART I

A. Motives behind consolidation of banks

Over a period of time the Indian Banking Sector has seen many positive developments. The policy makers, which comprise the RBI, Ministry of Finance and related government and financial sector regulatory entities, have made several notable efforts to improve regulation in the sector. The sector now compares favorably with banking sectors in the region on metrics like growth, profitability and non-performing assets ("**NPAs**"). A few banks have established an outstanding track record of innovation, growth and value creation.

This is reflected in their market valuation. However, improved regulations, innovation, growth and value creation in the sector remain limited to a small part of it. The cost of banking intermediation in India is higher and bank penetration is far lower than in other markets. India's banking industry must strengthen itself significantly if it has to support the modern and vibrant economy which India aspires to be. While the onus for this change lies mainly with bank managements, an enabling policy and regulatory framework will also be critical to their success.[4] Value creating M&A will play a very important role in the development of banking sector.

The bank merger phenomenon has been widely accepted as the way to achieve performance improvement, especially when merger activities focus on geography, economics of scale, and activity lines.[5]

Consolidation (Mergers and Acquisitions) activity results in overall benefit to shareholders when the consolidated post-merger firm is more valuable than the simple sum of the two separate pre-merger firms. The primary cause of this gain in value is supposed to be the performance improvement following the merger.[6] Several types of efficiency gains may flow from merger and acquisition activity. Of these, increased cost efficiency is most commonly mentioned. Many mergers have been motivated by a belief that a significant quantity of redundant operating costs could be eliminated through the consolidation of activities.[7]

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[4]Mckinsey, *Indian Banking 2010- towards a High Performing Sector* (Feb. 21, 2010), http://www.mckinsey.com/locations/india/mckinseyonindia/pdf/india_banking_2010.pdf.

[5]Viverita, *The Effect of Mergers on Bank Performance: Evidence From Bank Consolidation Policy In Indonesia* (Dec. 5, 2009), http://www.wbiconpro.com/112-Viverita.pdf.

[6]*Id.*

[7]BARTON CROCKETT, FIRST BANK CLAIMS WELLS OVERSTATES DEAL SAVINGS, (American Banker 1995).

There are a number of reasons governing the need of consolidation of banks in India. They can be summarized as following:

The emergence of titans has been one of the noticeable trends in the banking industry at the global level. These banking entities are expected to drive the growth and volume of business in the global segment. In the Indian banking sector also, consolidation is likely to gain prominence. Despite the liberalization process, state-owned banks dominate the industry, accounting for three-quarter of bank assets. The consolidation process in recent years has primarily been confined to a few mergers in the private sector segment, although some recent consolidation in the state-owned segment is evident as well. These mergers have been based on the need to attain a meaningful balance sheet size and market share in the face of increased competition, driven largely by synergies and location based and business-specific complementarities. Efforts have been initiated to iron out the legal impediments inherent in the consolidation process. As the bottom lines of domestic banks come under increasing pressure and the options for organic growth exhaust themselves, banks in India will need to explore ways for inorganic expansion. This, in turn, is likely to unleash the forces of consolidation in Indian banking.[8]

Secondly, as pointed out by the Deputy Governor of Reserve Bank of India, consolidation is required to meet the growing Capital needs of the Banks He said, "*Consolidation in banks is necessary and the issue facing the sector is to meet the growing capital needs of banks"*[9]

Thirdly, Consolidation is required for customers also. Intermediation costs in India remain high because there is relative inefficiency in the system. Whether it is the small and medium enterprise segment or the mass-market retail segment or even the agricultural segment – all are

[8]Dr. C Rangarajan, *The Indian Banking System- The Challenges Ahead* (Feb. 21, 2010), http://rbidocs.rbi.org.in/rdocs/Bulletin/DOCs/67729.doc.

[9]Thompson Reuters, *Consolidation in Banks needed- RBI Deputy* (Dec. 4, 2009), http://in.reuters.com/article/topNews/idINIndia-40340320090615.

under-served. India has sub-scale banks that cannot invest and serve their customers.

Fourthly, Consolidation of banks may lead to increased revenue efficiency. Scale of economies may help larger banks to offer more products and services and scope of economies may allow provider of multiple products and services to increase the share of targeted customer activity.

Fifthly, to create bigger and stronger banks in place of small banks, the merger of banks in the same geographical areas reduces the number of competitors in that particular area an in turn provides increased income and revenue to the surviving entity by increasing loan rates and decreasing deposit rates.

The above mentioned benefit in turn exposes the bank mergers and acquisitions to the scrutiny and review of the competition authority as The Competition Act 2002 is designed to prohibit mergers with anti-competitive effects.

B. Competition act and its basic purpose

The basic purpose of the Competition law can be inferred from the Competition policy. The Competition Policy has been laid down in the Raghavan's Committee report. The object of the Competition policy is as follows:-

"Competition Policy, in this context, thus becomes instruments to achieve efficient allocation of resources, technical progress, consumer welfare and regulations of concentration of economic power. Competition policy should thus have the positive objective of promoting consumer welfare"[10]

The Raghavan's Committee defines free competition as total freedom to develop optimum size competition without any restriction. The main object behind the competition policy is to ensure development and growth of Indian market and protection of consumer interest by increasing fair competition and prohibiting anti-competitive practices.

[10]Raghavan's Committee Report (May 2000).

This object has also been incorporated in the Preamble of the Competition Act.

The Preamble of the Competition Act says *"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.*[11]

The preamble of the Act clearly lays down that the main object behind the formulation of the act is to establish a Commission to:

- to prevent practices having adverse effect on the Competition;
- to protect the interest of consumers;
- to ensure freedom of trade carried on by other participants in markets in India;
- And for matters connected therewith or incidental thereto.

As aforesaid, the Competition Act provides for the establishment of a commission known as the Competition Commission of India. The CCI will be a regulatory Authority that will regulate the behavioral patterns of the players of the market to ensure elimination of anti-competitive practices and growth of fair competition in the market. CCI is a Competition Law Enforcing Authority. It has also been assigned the task to take a proactive stand to promote competition.[12]

It can thus be concluded that the Competition Act seeks to achieve: -

1. Prohibiting trade practice causing adverse effect on the market and thus ensuring a fair and equitable market;
2. The protection and promotion of interest of Consumers;
3. The promotion of Competition in market;
4. To ensure freedom of trade to other participants in the market.

[11]Competition Act, Preamble (2002), http://www.taxmann.net/Companylaws/competitionAct/Contents.htm.

[12]D.P. MITTAL, COMPETITION LAW & PRACTICE, 338 (Taxmann Allied Services Pvt. Ltd., 2008).

C. Consolidation of banks and competition law

Earlier any kind of merger or acquisitions of banks was exempted from review under **Monopolies and Restrictive Trade Practices Act, 1963** but it has now been included under the **Competition Act, 2002**. Under the Act, CCI is authorised to inquire into agreements both horizontal and vertical - among banks; abuse of dominant position and mergers between banks above the prescribed thresholds.[13]

The Competition Act, 2002 aims at prohibiting anti-competitive practices adopted by enterprises or market players. The anti-competitive behaviour can be classified into three categories: -

1. Anti-competitive Agreements or Cartels
2. Abuse of Dominance
3. Combinations (mergers, amalgamations and acquisitions) above a specified threshold.

Consolidation in the banking industry is vulnerable to be tested on two out of the three grounds mentioned above. They are:

- The merger of two or more banks will come under the purview of examination by CCI, if it is above certain specified threshold limit.
- When an entity created out of bank mergers or acquisition can be classified as a dominant enterprise and has abused its dominance or is likely to abuse its dominance.

[13]Competition Commission of India, *Competition Issues in Banking Sector* (Dec. 8, 2009), http://www.cci.gov.in/images/media/presentations/12competion_bank-sector_cci_20080410174812.pdf.

D. Consolidation of banks and combinations under the competition law

The word 'combinations'[14] is an umbrella term which includes mergers, amalgamations and acquisition of control, shares, voting rights or assets. Combinations can be classified into horizontal, vertical and conglomerate combinations. If a proposed combination causes or is likely to cause appreciable adverse effect on competition, it cannot be permitted to take effect. The Combination of banks may lead to high degree of market concentration as when a bank acquires another bank or merges with another bank; the transaction reduces the number of competitors. This reduction can facilitate price-fixing and other anti-competitive collusion. It can also give resulting firm market power to raise prices unilaterally and extract an uncompetitive high price for a significant period of time. Hence Anti-trust law scrutinizes expansion of banks any mergers and acquisitions.[15] The Competition Law also aims at preventing combination which is likely to have an adverse effect on the market in the future. Certain combinations tend to create enterprises that subsequently abuse its dominance. Such anti-competitive combinations should be prevented from coming into existence.[16]

The combinations are regulated under Section 5 of the Competition Act, 2002. Section 5 of the Competition Act 2002,[17] defines Combinations as "*Acquisitions of one or more enterprises by one or more persons or merger or amalgamations of enterprises, with*

[14]Combination has been defined as the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises. Competition Act §5 (2002), http://www.taxmann.net/Companylaws/competitionAct/Contents.htm.

[15]MACEY, RICHARD SCOTT CARNELL & GEOFFREY P. MILLER, THE LAW OF BANKING AND FINANCIAL INSTITUTION 203 (Aspen Publishers, 4th ed, 2008).

[16]MITTAL, *supra* note 12, at 285.

[17]Competition Act §5 (2002), http://www.taxmann.net/Companylaws/competitionAct/Contents.htm.

reference to threshold criteria of the value of assets and turnover of the enterprise involved."[18]

It further lays down certain requirements including a threshold requirement based on assets and turnover of the combining enterprises or groups. It is as follows:

a) Where Enterprises are involved

1. *In India*- assets of the value of more than rupees one thousand crores or turnover more than three thousand crores; or
2. *In India or outside India*- five hundred million US dollars (including at least rupees five hundred crores in India) or turnover, fifteen hundred million US dollars including at least rupees fifteen hundred crores in India (in aggregate).

b) Where a group or an enterprise belonging to a group is involved

3. *In India*- assets of the value of more than rupees four thousand crores or turnover more than rupees twelve thousand crores; or
4. *In India or outside India*- two billion US dollars, (including at least rupees five hundred crores in India) or turnover, six billion US dollars including at least rupees Fifteen hundred crores in India.(in aggregate).[19]

Therefore, any bank having assets or turnover above the threshold mentioned in Section 5 of the Act has to compulsorily report any kind of merger and acquisition activity undertaken by it to the CCI. The requirement of mandatory reporting is laid down under Sec 6(2)[20] of the Act which provides that, "*Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, **[**shall**]** give notice to the Commission, in the form as may be specified, and the fee which may be determined, by*

[18]*Id.*
[19]MITTAL, *supra* note 12, at 299.
[20]Competition Act, (2002), http://www.taxmann.net/Companylaws/competitionAct/Contents.htm.

regulations, disclosing the details of the proposed combination, within [thirty] days of—

(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5 by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;

(b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section."

On notification CCI will inquire into and investigate the proposed combination to determine whether such combination is anti-competitive or not and also whether it is likely to be antic-competitive in the future or not.

E. Consolidation of banks and abuse of dominance under the competition act

The combination is anti-competitive if it creates a dominant enterprise that subsequently abuses its position. It is to some extent analogous to the agreement between the parties and suffers from same vices of enjoying dominant position and abusing of the combining parties

Section 6 of the Competition Act, 2002 prohibits a person or an enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India. Such a combination is void.

Section 6(1) of the Competition Act 2002,[21] says "*No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void."*

The above mentioned provision clearly lays down that any combination which has created an adverse effect or is likely to have an adverse effect in the Indian market in the future, is void. *The*

[21]Competition Act §6(1) (2002), http://www.taxmann.net/Companylaws/competitionAct/Contents.htm.

relevant market is required to be determined before holding any combination anti-competitive. Relevant market can be divided into two parts the relevant Geographical and Product market.

Relevant Product market is defined under Section 2(t) of the Competition Act 2002[22] as "*a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer by reason of characteristics of the products or services, their prices and intended use."*

On the other hand the *Relevant Geographical market is defined under Section 2(s) of the Competition Act 2002.*[23] It provides "*a market comprising the area in which the conditions of competition for supply of goods and provisions of services or demand of goods are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas."*

Therefore, any form of bank merger that is likely to be anti-competitive or have an adverse effect on the competition in the market will be prohibited under the Competition Act. Whether a merger or acquisition lead to market dominance of the merged or amalgamated enterprise will be determined on the basis of following factors:

- Where there is high degree of market concentration
- Where there are barriers to entry
- Where there is a lack of substitutes for a product supplied by the incumbent enterprises[24].

As stated by OECD, the mergers and acquisitions of banks can lead to the following situation which may be considered to be anti-competitive in nature. They being

- *Multi-market contacts*: banks that compete in many markets recognize the need to co-exist rather than compete.

[22]Competition Act, §2(t) (2002), http://www.taxmann.net/Companylaws/competitionAct/Contents.htm.
[23]Competition Act, §2(s) (2002), http://www.taxmann.net/Companylaws/competitionAct/Contents.htmon.
[24]MITTAL, *supra* note 12, at 300.

- *Barriers to entry*: Contestable markets are highly competitive. However, entry restrictions exist in the form of:
  1. *Regulatory barriers*: minimum capital requirements; restraints on lines of business; licensing of branches or subsidiaries; restrictions on entry of foreign banks etc.
  2. *Exit barriers* in the form of measures to prevent bank insolvencies, especially the too big to fail factor
  3. Substantial state ownership of banks would mean that foreign firms cannot take over domestic banks of any substance
- The impact of electronic banking developments on proper market definition and assessment of barriers to entry must be carefully considered in bank merger cases;
- Competition problems in bank mergers are most commonly encountered as regards loans to small and medium sized businesses;
- Barriers to entry in banking could well be high enough to prevent a sufficiently rapid neutralization of any anticompetitive effects that may be expected from bank mergers in sufficiently concentrated markets.
- Efficiencies could be relevant in bank mergers, but competition officials should be skeptical of claims linked to supposed economies of scale especially in dealing with mergers where all the parties are sufficiently large that each has probably exhausted virtually all available economies of scale.[25]

[25] *Id.* at 6.

III. PART II

A. The tussle of jurisdiction between RBI and CCI

As stated earlier, the Act grants power to the CCI to investigate bank mergers & acquisition to determine whether it is anti-competitive or not. Therefore, CCI has the statutory authority to examine consolidation of banks but the recent stand of RBI has sparked off a new controversy. This controversy pertains to the tussle of jurisdiction between the prudential regulator i.e. RBI and the apex Competition Authority CCI regarding the competition related aspects of bank mergers or acquisition. RBI being the sectoral or prudential regulator has sought exemption from the Ministry of Finance for review bank mergers and acquisition by the CCI under Competition Act, 2002.

In a note addressed to the Ministry of Finance, RBI has stated that the aforementioned exemption should be granted following the urgency and unique nature of bank mergers, especially forced mergers.[26] RBI has based its argument on the fact that it is well versed with the banking sector and is in a better position to be the final authority to decide about M&A activities involving banks.

Whereas on the other hand CCI has disagreed with RBI's proposal and has stated that RBI should restrict itself to prudential regulation and leave competition issues to CCI. It has further stated that the public sector banks already have unfair advantage over the private banks on account of certain entry barriers etc.[27]

The basic objective of any economic regulation is to reduce transaction costs and address information asymmetries, externalities

[26]Anindita Dey, *Exempt Bank M&A from Competition Act: RBI* (Dec. 9, 2009), http://www.business-standard.com/india/storypage.php?autono=370748.

[27]Dr. P.K Vasudeva, *Competition Regulator- Needless debate over Turf* (Dec. 9, 2009), http://www.sarkaritel.com/news_and_features/infa/november2009/27competition_regulator.htm.

and distributional issues. The need for achieving these objectives is heightened in the case of 'natural monopolies'. In other words, sectors where market characteristics prevent competition become attractive for specific regulations, to prevent inefficient use of resources and protect consumers. Competition law also aims at preventing market power, thereby ensuring efficiency and consumer welfare. In essence, therefore, sectoral regulations are specific, while competition law is generic, but both are intended to be complementary. However, the intended complementarities between sectoral regulation and competition law may suffer on account of legislative ambiguity or interpretational bias. Since the basic objectives of both are consumer oriented, overlaps cannot be avoided by drafting skills alone.[28] The functions and objectives of both the prudential regulator and CCI have to be taken into consideration.

B. RBI and its functions

RBI is the apex body of the Indian banking sector. It was created under The Reserve Bank of India Act, 1934 and commenced on April 1, 1935. The Act, 1934 (II of 1934) provides the statutory basis of the functioning of the Bank.

The Bank was constituted for the need of following:

- To regulate the issue of banknotes
- To maintain reserves with a view to securing monetary stability and
- To operate the credit and currency system of the country to its advantage.

The major functions of RBI can be summarized as follows:

i. It is a bank of issue. (It issues currency)
ii. It is banker to government.
iii. Banker's bank and lender of the last resort.

[28]Amitabh Kumar, *Do We Require More Sectoral Regulators? (*Dec. 9, 2009), http://www.cci.gov.in/images/media/articles/sectoral_regulators_13_5_2005_FE_20080409114858.pdf.

iv. Controller of Credit
v. Custodian of Foreign reserves
vi. It performs supervisory functions which include supervision and control over commercial and co-operative banks, relating to licensing and establishments, branch expansion, liquidity of their assets, management and methods of working, amalgamation, reconstruction, and liquidation.
vii. It performs promotional functions which include a variety of developmental and promotional functions, which, at one time, were regarded as outside the normal scope of central banking. The Reserve Bank was asked to promote banking habit, extend banking facilities to rural and semi-urban areas, and establish and promote new specialised financing agencies.[29]

RBI also has the power to decide bank M&A under Section 44A (4)[30] of the Banking Regulations Act, 1949. It provides "*If the scheme of amalgamation is approved by the requisite majority of shareholders in accordance with the provisions of this section, it shall be submitted to the Reserve Bank for sanction and shall, if sanctioned by the Reserve Bank by an order in writing passed in this behalf, be binding on the banking companies concerned and also on all the shareholders thereof."*

The Reserve Bank of India has the statutory right to approve or reject any scheme of amalgamation or merger of a bank and no such scheme shall come into effect unless sanction of RBI has been obtained. The prudential regulator if having a statutory power shall get primacy to examine Bank M&A. Prudential regulation is largely centered on laying and enforcing rules that limit risk-taking of banks, ensuring safety of depositors' funds and stability of the financial sector Thus regulation of M&As by RBI would be determined by such

[29]*India Finance and Investment Guide, RBI* (Dec. 9, 2009). http://finance.indiamart.com/investment_in_india/rbi.html.
[30]The Banking Regulations Act, 1949, No. 10, Acts of Parliament, 1949, § 44A (4).

benchmarks.[31] The RBI may or may note examine a bank merger or acquisition on the touchstone of anti-trust laws.

Further, CCI has stated that the incumbents play a very major role in the sectoral regulations. The members of the prudential regulators are from the concerned industry only and they have a sense of loyalty towards their former employers and this may sometimes result in approval of anti-competitive mergers.

C. Competition commission of India and its functions

CCI is the apex body having statutory validity to govern, regulate with any anti-competitive behaviour of the enterprises. The CCI is established under Section 7 (1)[32] of the Competition Act, 2002 by the Central government. It provides that "*With effect from such date as the Central Government may, by notification, appoint, there shall be established, for the purposes of this Act, a Commission to be called the "Competition Commission of India."*

The rationale behind the establishment of the CCI is curbing of negative aspects of competition which can be inferred from the Statement of Object and reason for the introduction of the Competition Bill. It says: -

"*The Bill also aims at curbing negative aspects of Competition through the medium of CCI. CCI will have principal bench and Additional benches and will also have one or more merger benches. It will look into violations of the Act, a task which could be undertaken by the Commission based on its knowledge or information or complaints received and references made by the Central Government, State Government or Statutory Authorities. The Commission can pass orders for granting relief or any other appropriate relief and compensation or an order imposing penalties etc….."*[33]

[31]Business Standard, *Letters: Bank on the CCI* (Dec. 9, 2009), http://www.business-standard.com/india/news/letters-bankthe-cci/375867/.
[32]The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), §7(1).
[33]Statement of Object and Reasons of The Competition Bill, 2000.

Section 18 of the Act lays down the functions and duties of the CCI. It provides that "*Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by other participants, in markets in India"*

It is evident from the aforementioned provisions that the CCI has been constituted with the intention of and purpose of eliminating practices having adverse effect on competition and to protect the interest of consumers in India. Further it exercises jurisdiction over all sectors including the banking and financial sector. The CCI can examine a transaction on being referred to it by the parties or by the government; it also has the power to take up a matter suo moto[34].

The guiding principles of the CCI are:

1. To be in sync with markets; have a good understanding of the market force.
2. To minimize cost of compliances by the enterprises and cost of enforcement by the commission
3. To maintain confidentiality of business information; to maintain transparency in the commissions own operations
4. To be a professional body equipped with requisite skills.
5. To maintain a consultative approach.[35]

[34]Competition Act, Section 20(1) (2002), which provides that "The Commission may, upon its own knowledge or information relating to acquisition referred to in clause (*a*) of section 5 or acquiring of control referred to in clause (*b*) of section 5 or merger or amalgamation referred in clause (*c*) of that section, inquire into whether such a combination has caused or is likely to cause an appreciable adverse effect on competition in India."

[35]Competition Commission of India, Guiding Principles (Dec. 10, 2009), http://www.cci.gov.in/index.php?option=com_content&task=view&id=120.

IV. PART III

A. The foreign experience

a) United Kingdom

This interplay of jurisdiction between the sectoral regulators has been encountered in the UK previously. The interplay in UK was not directly between The Competition Authority and prudential regulator of the banking sector rather it was between The Competition Authority and Sectoral Regulators, especially in the public utility services.

Earlier the role of competition authority was very limited. The Fair Trading Act, 1973 excluded the public sector utility services such as gas, electricity, posts, and telecommunication etc from the scope of monopoly references by the Director General of Fair Trading. In all these sectors the reference could only be made by the ministers.[36] So in effect the regulation was more political than legal in nature. The Competition Act of 1980 increased the power of the Competition Authority whereby the minister could refer to the Monopolies and Mergers Commission disputes relating to possible abuse of monopoly position amongst others.[37]

During the 1990s the government created sectoral regulators to regulate the activities of the public sector enterprises providing public utility services. The regulators like Director General of Telecommunication, assisted by Often, and various others such as

[36]Fair Trading Act, §50(2) (1973), http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1973/cukpga_19730041_en_5#pt4-pb2-l1g51.

[37]Competition Act, §11 (1980), http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1980/cukpga_19800021_en_1#pb2-l1g11.

Ofgas, Offer etc. These were created with the aim of restraining monopoly until it could be replaced by competition.[38]

Under The Competition Act, 1998, the prudential regulators are bestowed with authority and power to enforce the Act's prohibition. These concurrent powers permit these regulators to enforce prohibition activities in their own sectors; the sectors are very widely defined. The Scheme of the act is that the prohibition should be applied in the same way by the sectoral regulators as by the office of Fair Trading, rather than being shaped by the different context of the utility service. [39]

In UK the sectoral regulators have been given the power under the Competition act to enforce anti-competitive prohibitions provided under the Competition Act in their own sectors. Therefore, although the sectoral regulators have the power to determine anti-competitive activities and impose prohibition but that has to be in consonance with the Act. Therefore, effectively it is the Competition Authority who has final jurisdiction although it is exercised through the medium of Sectoral regulators.

b) Australia

Australia has a unique structure where both competition authority and the sectoral regulators have been brought under one roof i.e. Australian Competition and Consumer Commission ("**ACCC**"). The Australian Competition and Consumer Commission is an independent statutory authority. It was formed in 1995 to administer the *Trade Practices Act 1974* and other acts. The ACCC promotes competition and fair trade in the market place to benefit consumers, business and the community. It also regulates national infrastructure industries. Its primary responsibility is to ensure that individuals and businesses comply with the Commonwealth's competition, fair trading and consumer protection laws.

[38]POSSER TONY, THE LIMITS OF COMPETITION LAW- MARKETS & PUBLIC SERVICES 44 (Oxford University Press, 2005).
[39]*Id.* at 53.

The ACCC is the only national agency dealing generally with competition matters and the only agency with responsibility for enforcing the Trade Practices Act and the state/territory application legislation.

In fair trading and consumer protection its role complements that of the state and territory consumer affairs agencies which administer the mirror legislation of their jurisdictions, and the Competition and Consumer Policy Division of the Commonwealth Treasury.[40] Australia has put the question of tussle of jurisdiction between the Sectoral Regulators and Competition Authority to rest by making an institution which is combination of both and aims at fulfilling their objectives.

c) United States of America

The USA is also a unique example due to its federal structure. In USA industrial regulators are granted a monopoly in enforcing all or part of competition law in their relevant sectors. The Department of Justice and Federal Trade Commission often advice the industry specific regulators on matters that may affect competition. This advice may be voluntary or, in some circumstances, required by statute. For example, the US antitrust agencies, like any private person may file comments offering their competition expertise in regulatory proceedings before independent agencies. In contrast, some states require the regulator to seek advice from the competition agencies in particular types of proceedings.[41]

The Position in USA is akin to that in UK, where the sectoral regulators have the authority of enforcing either a part or whole of competition law.

[40] *Australian Competition and Consumer Commission, Roles and Activities* (Dec. 11, 2009), http://www.accc.gov.au/content/index.phtml/itemId/54137#h2_14.

[41] Dr. Gamze Ascyoglu Oz, *The Role of Competition Authorities and Sectoral Regulators: Regional Experiences* (Dec. 11, 2009), http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p17_en.pdf.

The French law provides for mandatory consultation between certain sectoral regulators and the competition authority. After experimentation with complete exclusion of utility and public service sectors from competition law, Germany has settled for a division of labour between the two, by suitably amending the laws to minimize parallel competencies. In South Africa, sectoral regulation was initially excluded from the jurisdiction of the competition authority. It was subsequently brought within its domain as experience showed that competition issues could not be handled by sectoral regulators.[42] Further, In Denmark, sectoral regulator has to ask a vinculative opinion from the CA, In Italy and Sweden**,** Competition Authorities have the primary role and receive opinion from the other Sectoral Regulators and in Netherlands there is explicit coordination between the Sector Regulators and the Competition Authorities.[43]

V. PART IV

A. Conclusion

Competition law and policy is crucial in ensuring competitive practices and prohibiting anti-competitive practices in the market. The competition law is generally enforced through a Competition Authority. If a country has selected *markets* as the primary basis for organizing its economic system and if it wants those markets to function well it needs to protect the competitive process.[44] Competition Authorities plays a vital role in creating and ensuring a competitive market by regulating the behaviour of market players including state owned enterprises. The state owned enterprises are

[42]*Id.* at 17.
[43]P.P. BARROS, THE RELATIONSHIP BETWEEN SECTORAL REGULATORS AND COMPETITION AUTHORITIES - INCENTIVES FOR ACTION 6 (Lecce, 2004).
[44]W. Blumenthal, *The Relationship Between Competition Agencies and Other Units of Government, Remarks before the Ministry of Commerce, Asian Development Bank and OECD,* International Seminar: Review of Anti-Monoply Law (May 19, 2006).

also regulated by a sectoral regulator and hence it leads to tussle of jurisdiction between the sectoral regulator and competition authority.
Therefore, establishing a relationship between competition authorities and sectoral regulators becomes imperative for the proper functioning of the market and in turn the growth of the economy. Establishing a proper relationship is a challenge which has been found out various jurisdiction of the world.
Establishing the proper relationship between the competition agency and regulators is a significant and ongoing challenge in most countries. The issue has been discussed and debated in international fora in recent years. No single solution has emerged. Different jurisdictions have different approaches and even within a single jurisdiction the approach to the relationship can vary. In one jurisdiction a competition agency has statutory powers for some aspects of sector regulation. In another, sector regulators and the competition authority exercise concurrent jurisdiction. In yet another, a formal agreement establishes a framework for cooperation between the sectoral regulators and the competition authority.[45]
In a country like India, the public sector banks play a very vital role in the economy. The public sector banks like many enterprises are regulated and governed by a Sectoral/ Prudential regulator. Therefore, establishing a relationship between the sectoral regulators and competition authority becomes all the more imperative to ensure a competitive market. At present no specific relationship between the RBI and CCI exist and this has lead to a tussle of jurisdiction between the two with regards to issue pertaining to competition related aspects of consolidation of banks. Therefore, in order to avoid such conflict, the competition considerations and regulatory functions can be reconciled through the following mechanism:

[45]W. Blumenthal, *Presentation to the International Symposium on the Draft Anti-Monopoly Law of the People's Republic of China* (Dec. 11, 2009), www.ftc.gov/speeches/blumenthal/20050523SCLAOFinal.pdf.

Competition law and sectoral law may operate in parallel, with overseeing competition considerations and sectoral regulators dealing with regulatory considerations. This refers to the conventional *ex ante* and *ex post* control and supervision of the markets. Therefore, the sectoral regulator shall be vested with *ex ante* control powers whereas the CCI shall be given the *ex post* authority. For example, reviews of company documents for compliance, licensing requirements clearly require an *ex ante* control whereas anticompetitive practices in the relevant market may require an *ex post* review. Or for example approval of prices should be within the *ex ante* authority of the regulator unless the prices are claimed to be excessive or predatory which then may require an *ex post* review by the Competition Authority.[46]

Therefore, RBI should perform the *ex-ante* regulation of the banking sector and the CCI shall have the *ex-post* authority that is when it comes to determining whether the consolidation of bank merger is anti-competitive or not it shall be the authority of CCI. Therefore, the RBI shall examine bank mergers and acquisitions on the touchstone of prudential norms and if it is approved by RBI than it should be the duty of CCI to govern it on the touchstone of competitiveness. This distinction between the *ex ante* and *ex post* functions of the authorities would only be successful if a clear cut demarcation of what constitutes an ex ante function and ex post function is laid down. Another important requirement is establishment of a channel of continuous communication between the sectoral regulators and CCI whereby all the relevant information is exchanged. Hence what is required today is a comprehensive relationship incorporating the aforementioned suggestions to ensure a co-operative and coordinated effort to make Indian economy free anti-competitive practices.

[46]Laurence I, Relationship between antitrust agencies and sectoral regulators – Subgroup 2 "Who should regulate, and how should they regulate?" Bonn/ICN/7th June in Dr. Gamze Ascyoglu Oz, *The Role Of Competition Authorities and Sectoral Regulators: Regional Experiences* (Dec. 11, 2009), http://www.unctad.org/sections/wcmu/docs/c2clp_ige7p17_en.pdf.