14.02.2017

Notice given by Sarva Haryana Gramin Bank and Punjab National Bank

Order under Section 43A of the Competition Act, 2002 ("Act")

1. The Competition Commission of India ("**Commission**"), in its Special Meeting held on 10.02.2014, took cognizance of information received in respect of amalgamation of Gurgaon Gramin Bank ("**GGB**") (sponsored by Syndicate Bank) and Haryana Gramin Bank ("**HGB**") (sponsored by Punjab National Bank) into Sarva Haryana Gramin Bank ("**SHGB**") and designation of PNB as the sole sponsor bank of SHGB ("**Combination**"). The Combination came into effect from 29.11.2013 vide a Gazette of India Notification dated 29.11.2013 issued by the Department of Financial Services, Ministry of Finance, Government of India ("**DFS**") under sub-section (1) of Section 23A of the Regional Rural Banks Act, 1976 ("**RRB Act**") ("**Notification**").

2. Accordingly, letters were sent to the SHGB and the DFS on 17.02.2014 directing them to intimate the reasons as to why an inquiry under sub-section (1) of Section 20 of the Act should not be commenced. The Commission received replies from SHGB and DFS on 20.02.2014 and 21.03.2014 respectively.

3. The Commission considered the replies of the DFS and SHGB in its Special Meeting held on 12.05.2014 and decided that the Combination meets the thresholds prescribed under the Act and is notifiable. Accordingly, vide letter dated 28.05.2014, SHGB and DFS were directed, under sub-section (1) of Section 20 of the Act read with Regulation 8 of the Competition Commission of India (Procedure in regard to the transaction of business relating to Combinations) ("**Combination Regulations**"), to file a notice in respect of the Combination. SHGB and the DFS filed additional responses on 13.06.2014 and 28.08.2014 respectively. The matter was again considered by the Commission in its meeting held on 15.09.2014 and 20.10.2014 and the Commission

decided to seek certain additional clarifications from the DFS on certain issues relating to the Combination and on certain other related issues. Accordingly, a letter was issued to the DFS on 21.10.2014. The DFS submitted its reply on 01.12.2014. The Commission considered the reply given by DFS in its meetings on 12.01.2015 and 04.08.2015. After considering all the replies filed by SHGB and the DFS, the Commission decided that the Combination is notifiable. Accordingly, vide letters dated 26.08.2015, SHGB and PNB (hereinafter collectively referred to as the "**Parties**") were directed, under sub-section (1) of Section 20 of the Competition Act, 2002 ("**Act**") read with Regulation 8 of the Combination Regulations, to file a joint notice in Form I in respect of merger of GGB and HGB and PNB's acquisition of sole sponsorship of SHGB.

4. On 01.10.2015, the Parties, in compliance of the directions of the Commission, filed a notice in relation to the Combination. However, as the same was not complete, the Commission decided to invalidate the same. The Parties, subsequently, filed a fresh notice on 01.12.2015 in this regard.

5. On 24.05.2016, the Commission considered and assessed the Combination and approved the same under sub-section (1) of Section 31of the Act.

Proceedings under Section 43A of the Act

6. In its meeting held on 24.05.2016, the Commission observed that in terms of sub-section (2) of Section 6 of the Act, an enterprise, which proposes to enter into a combination, is required to give a notice to the Commission, disclosing the details of the proposed combination, within thirty days of execution of any agreement or other document for acquisition. Further, as per sub-section (2A) of Section 6 of the Act, no combination shall come into effect until 210 days have passed from the day on which the notice has been given to the Commission under sub-section (2) of Section 6 of the Act or the Commission has passed orders under Section 31 of the Act, whichever is earlier.

7. Considering the facts on record, the Commission noted that SHGB and PNB not only failed to notify the Combination in terms of sub-section (2) of Section 6 of the Act within the time stipulated under the provisions of the Act but also consummated the same before the expiry of statutory timelines as provided in sub-section (2A) of Section 6 of the Act. Accordingly, the Commission decided to initiate proceedings against the Parties under Section 43A of the Act.

8. A show cause notice, under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**"), was issued to the Parties on 15.06.2016, to explain, in writing, within 15 days of the receipt of such communication, as to why penalty, in terms of Section 43A of the Act, should not be imposed on the Parties for failure to file a notice in respect of the Combination and consummating the same before expiry of statutory timelines, under sub-section (2) of Section 6 read with sub-section (2A) of Section 6 of the Act ("**SCN**"). The Parties filed its response to the SCN with the Commission on 14.07.2016 ("**Response to SCN**"), after seeking extension of time.

9. In its meeting held on 21.09.2016, the Commission considered the Response to SCN and decided to grant an oral hearing to the Parties. The authorized representative of the Parties was heard on 23.11.2016. The Commission noted that, *vide* its written and oral submissions, the Parties, *inter alia*, made the following submissions:

9.1. That the decision of amalgamation of RRBs in the State of Haryana into single Bank i.e. SHGB has been taken by the DFS in exercise of its statutory functions under the RRB Act. The DFS, while discharging statutory powers under RRB Act, in exercise of such statutory function, cannot be termed as an "enterprise" under clause (h) of section 2 of the Act since this "activity" is not covered in terms of explanation (a) to clause (h) of section 2 of the Act. The decision taken by the Central Government in exercise of statutory function, as aforesaid, is akin to a policy decision taken in public interest which is outside the purview of the Act.

9.2. That the power of the Commission to initiate an inquiry under sub-section (1) of Section 20 of the Act, is limited to examine whether a combination has caused or likely to cause an appreciable adverse effect on competition in India and can be exercised only within a period of one year from the date on which such combination has taken effect. Since the Commission, in exercise of the said powers under sub-section (1) of Section 20 of the Act, has already examined the said amalgamation and found that the same is not likely to cause any appreciable adverse effect on competition in India, the initiation of a separate inquiry in terms of section 43A of the Act for allegedly a belated filing of notice under sub-section (2) of Section 6 of the Act is akin to initiating prosecution for the same offence twice, which is barred under Article 20(2) of the Constitution of India as such action suffers from the vice of double jeopardy and is not legally permissible and may be *ultra vires* the provisions of Article 20(2) of the Constitution of India.

9.3. That the amalgamation in question was even otherwise exempt from filing notice under sub-section (2) of Section 6 of the Act, in terms of category (9) of Schedule-1 read with Regulation 4 of the Combination Regulations, which exempts intra-group mergers and amalgamations, since the two Regional Rural Banks in the State of Haryana before the amalgamation and the new entity i.e. single Regional Rural Bank created as a result of the amalgamation, namely, SHGB continued to be owned and controlled by the enterprises i.e. Union of India, State of Haryana and Sponsor Bank, in the same ratio of 50:15:35. The enterprises to which the new entity SHGB belongs to and is controlled by continue to be within the same group in the absence of any change in control.

9.4. That the SHGB and PNB cannot be considered as "parties to the combination" or "person or enterprise who or which proposes to enter into a combination" in terms of sub-section (2) of Section 6 of the Act because (a) SHGB was not in existence when the Notification of the said amalgamation was issued by the DFS of the Central Government, (b) PNB did not and could not have taken the decision to become the sponsor bank for SHGB since it had no such powers under the RRB Act, which power vested only with the Central Government /DFS under the said Act.

9.5. That SHGB and PNB are government undertakings providing banking services to the farmers in rural areas of the Haryana and thereby contribute to the economic development of the poor farmers in the state and that the decision of amalgamation was taken by the DFS in public interest and in the interest of development of area served by the RRBs.

9.6. That the Parties provided prompt responses to each notice received from the Commission and that there is no negligence on the part of either SHGB or PNB and both have given their full cooperation during the Commission's inquiry under sub-section (1) of Section 20 of the Act.

9.7. That this is the first case where a presumed violation of the provisions of the Act has been alleged either on SHGB or PNB and neither is a repeat offender under the Act and that there was no *mala fide* intention of either SHGB or PNB to evade the compliance with the provisions of the Act.

10. With respect to the above submissions of the Parties, the Commission observed as under:

10.1. As regards the submissions of the Parties on the aspect of the DFS being an enterprise or not, it may be noted that the SCN is in respect of the responsibilities of the Parties to file notice which are not obliterated by the fact of the decision being taken by the DFS. As the inquiry is not against the DFS, the submissions of the Parties in this regard are not tenable.

10.2. It has been submitted that initiation of a separate inquiry in terms of Section 43A after an inquiry under sub-section (1) of Section 20 of the Act suffers from a vice of double jeopardy. In this regard, Commission observed that initiation of sub-section (1) of Section 20 inquiry into the combination and approval of the Combination does not exempt the Parties from penalty proceedings under Section 43A of the Act. The Hon'ble Competition Appellate Tribunal ("**COMPAT**"), while adjudicating the issue of whether the approval of the combination by the Commission can confer immunity to the

appellants from being penalized under Section 43A of the Act in an appeal filed in relation to an order passed, under Section 43A of the Act, by the Commission in SCM Soilfert Limited and Deepak Fertilizers and Petrochemicals Corporation Limited [1] ("**SCM Case**") has observed, "*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 43A.*"

10.3. As regards the Combination being an intra-group transaction, it may be noted that the HGB and GGB were two independent banks engaged in provision of banking services before the amalgamation and were not part of the same group. Further, the exit of sponsor bank of GGB i.e. Syndicate bank and acquisition of sole sponsorship of SHGB by PNB also tantamount to change in control and is notifiable.

10.4. Parties have submitted that SHGB and PNB can't be considered as "parties to the combination in terms of sub-section (2) of Section 6 of the Act because SHGB was not in existence when the notification of the said amalgamation was issued by DFS. In this regard it may be noted that sub-section (2) of Section 6 of the Act refers to the person and enterprise, on whom the duty of giving a notice to the Commission falls in case of proposed combination and not after the consummation of the combination. If the arguments of the Parties were to be accepted, it would mean that the onus of filing a belated notice would fall on none, this certainly can't be the intent of the Act. The Act expressly covers cases of belated filing for assessment of the Commission. The Commission is of the considered opinion that in cases of consummated combination specially pertaining to amalgamation wherein at least one of the original parties cease to exist, the onus of filing the notice would squarely lie on the resultant entity. In the present case it would be SHGB and PNB.

10.5. The Commission, however, noted that the structure of a Combination is unique to the extent in as much as the decision in respect of the same was taken by the Central

[1] Appeal No. 59/2015, COMPAT Order dated 30.08.2016

Government (and not only the Parties) and that the Combination was effected immediately subsequent to the issuance of the Notification.

11. In view of the foregoing, the Commission 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. Section 43A of the Act reads as under:

"If any person or enterprise who fails to give notice to the Commission under sub section (2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one percent of the total turnover or the assets, whichever is higher, of such a combination."

12. While determining the quantum of penalty, the Commission, considered the specificities of the case and explanation given by the Parties and deemed it appropriate to impose a penalty of INR 1,00,000/- (INR One lakh only) on the Parties. The Parties shall pay the penalty within sixty (60) days from the date of receipt of this order.

13. The Secretary is directed to communicate to the Parties accordingly.