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Co-operation between Competition Agencies and Regulators in the Financial Sector - Note by India

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More documents related to this discussion can be found at:

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Please contact Mr Chris PIKE if you have any questions about this document
[Email: Chris.Pike@oecd.org]

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India

1. Financial sector is the backbone of any economy considering that a healthy financial sector is expected to support the economy and stimulate growth. Accordingly, it is critical that financial sector is regulated effectively by the financial regulators. In India, independent financial regulators regulate the key financial areas of banking, capital markets and commodities markets, insurance, and pension funds.

- The Reserve Bank of India (RBI), the apex monetary authority of the country was established in 1935 in accordance with the Reserve Bank of India Act, 1934. The basic functions of RBI include regulating the issue of Bank notes and keeping of reserves with a view to securing monetary stability in India and generally to operate the currency and credit system of the country;
- The Securities and Exchange Board of India (SEBI) was established in 1992 in accordance with the provisions of Securities and Exchange Board of India Act, 1992. The basic functions of SEBI include protection of interests of investors in securities and to promote the development of, and to regulate the securities market and related matters. The Government of India had created a Forward Markets Commission (FMC) to regulate commodity futures market in India. However, the FMC has been merged with SEBI in 2015;
- Insurance Regulation and Development Authority of India (IRDAI) is an autonomous body set up under the IRDA Act, 1999. IRDAI's mission is to protect the interests of policyholders and to regulate and develop the insurance industry; and
- The Pension Fund Regulatory and Development Authority (PFRDA), set up under the PFRDA Act, 2013, is mandated to regulate new pension scheme, subscribed by employees of GOI, State Governments and by employees of private institutions/organizations and unorganized sectors.

2. A perusal of the preambles of the aforesaid financial regulators indicate that their primary functions relate not only to regulate the concerned activities but also to work on development of the sector. This pursuit of regulation and development of sector at times lead to overlaps in their functions and those of the competition regulator, i.e., the Competition Commission of India (CCI). This interface between the competition regulator and the financial regulators to some extent has been captured in the Competition Act, 2002 (Act) in accordance of which the CCI has been set up. Though, the provisions of the Act apply in equal measure to the financial sector enterprises, certain specific provisions have been included in the Act to address the jurisdictional overlaps in the most efficient manner. Further, the Act encourages a cooperative approach between the financial regulators (or for that matter any sectoral regulators) and the CCI.

3. Certain provisions of the Act relating to anti-competitive agreements and unilateral abuse of dominance were notified in 2009 and provisions relating to mergers and acquisitions (combinations) were notified in 2011. In its short journey so far, CCI has had extensive engagements with the financial sector regulators. The CCI is pleased to share its experience with the OECD.

4. The discussions in this paper are classified as under:

1. Applicability of the provisions of the Act on the enterprises operating in the financial sector and specific provisions in the Act relating to financial sector;
2. Details of cooperation between the GOI, the financial regulators and the Commission on applicability of enforcement functions of the Act on the enterprises engaged in banking sector; and
3. Advocacy initiatives of the Commission relating to financial sector including the competition assessment of several important legislations relating to financial sector.

1. Applicability of the provisions of the Act on the enterprises operating in the financial sector and specific provisions in the Act relating to financial sector

5. The Act envisages provisions relating to anti-competitive agreements and unilateral abuse of dominance as enforcement issues and the Commission investigates and decides on such issues on an ex-post basis. As regards the mergers and acquisitions, the enterprises desirous of entering into a combination transaction are required to seek the approval of the Commission on an ex-ante basis before consummation of the transaction if the transaction meets the thresholds prescribed in the Act. The provisions of the Act apply to all the enterprises regardless of the same being a private sector enterprise, a public sector enterprise or even a department of a government. The only exceptions from the purview of the Act are the sovereign functions of the government relating to defense, currency, atomic energy and space.

6. The Act does not allow any special treatment to the enterprises engaged in financial sector as regards the enforcement provisions. The CCI has received complaints about the issues relating to the financial sector which have been examined and disposed off suitably. Some of the instances of the financial sector issues examined by the Commission are as under:

- In 2009, CCI came across a case relating to capital markets. One of the top stock exchanges was accused by a newer exchange of indulging in exclusionary practices by offering trading in currency derivatives segment at zero transaction cost. The opposite parties in the said case asked for matter to be referred to SEBI, the financial regulator and even submitted that SEBI is seized of certain matters forming part of the investigation. Another issue of overlap between the role of SEBI and CCI was the fact that the particular scheme of pricing etc. may have been approved by financial regulator and CCI may find the same to be anti-competitive and against the provisions of the Act. However, the Commission delineated the competition issues involved and after detailed investigation, found the conduct to be exclusionary and directed the stock exchange to cease and desist from its conduct and also imposed a penalty of around INR 550 million (around US$ 8.50 million). The SEBI did not oppose the regulatory action by CCI;
- In 2010, CCI looked at the practice of levying of foreclosure charges by banks and non-banking financial companies (NBFCs) on prepayment of loans taken. While recognizing that some consumer issues may be involved, CCI closed the matter without finding any contravention relating to concerted action or unilateral abuse of dominance;
- In 2011, CCI looked at the practice of charging differential interest rates by banks from old and new customers of housing loan products and closed the same

without finding any contravention relating to concerted action or unilateral abuse of dominance; and

- In 2014, the Commission took *suo moto* investigation against 4 public sector insurance companies for rigging a tender invited by one of the State Governments of India for implementation of a health insurance scheme. The Commission found the companies guilty of indulging in anti-competitive practices and penalized those to the extent of a collective sum of around INR 6,700 million (around US$ 103 million).

7. On the regulation of mergers, the Commission has been off and on receiving notices in respect of merger and acquisition transactions involving enterprises engaged in insurance, banking and capital market areas. They have been examined and disposed-off in accordance with the general principles of competition law.

8. Having discussed instances where the provisions of the Act have been applied on the enterprises engaged in financial sector, we may now turn to the areas where the specificities of financial sector have been recognized and concessions given to the financial sector enterprises (from the applicability of the law) is the regulation of combinations.

9. The definition of the term 'combination' in Act includes acquisition of shares, even when it may not amount to acquisition of outright control. This could lead to a number of transactions undertaken by public financial institutions, foreign institutional investors, banks etc., becoming notifiable, which would not have otherwise raised any competition concerns considering the intent of the acquirers and nature of business activities of such institutions. In order to provide required relief to such institutions, the Act exempts share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement. These institutions are only required to file the details of the acquisition including the details of control, the circumstances for exercise of such control and the consequences of default arising out of such loan agreement or investment agreement, as the case may be.

2. Details of cooperation between the GOI, the financial regulators and the Commission on applicability of enforcement functions of the Act on the enterprises engaged in banking sector

10. Section 49 of the Act provides that Central Government (of India) (GOI) may, in formulating a policy on competition (including review of laws related to competition) or any other matter, and a State Government may, in formulating a policy on competition or on any other matter, as the case may be, make a reference to the Commission for its opinion on possible effect of such policy on competition and on the receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Government, or the State Government, as the case may be, which may thereafter take further action as it deems fit. The Act also empowers the GOI (Section 54) to exempt any class of enterprises from the application of the Act, or any provision thereof, and for such period as it may specify in such notification.

11. CCI, GOI and financial regulators have engaged with each other in accordance with the referral framework provided in the Act for seeking exemptions from application of the Act. The Indian banking system comprises Scheduled Commercial Banks (SCBs),

Cooperative Credit Institutions, and other Financial Institutions. The SCBs comprises of public sector banks (PSBs), private sector banks, foreign banks, regional rural banks (RRBs), and urban and rural cooperative banks. As per industry reports, the value of assets of public sector banks is estimated to be around US$ 1.52 trillion in FY 2017. There are reports which indicate that public sector banks control more than 70 percent of banking system assets. The PSBs in India number 21, with the State Bank of India (SBI) being the biggest amongst them.

12. Different classification of banks give rise to different classes of mergers or amalgamations requiring cooperation between the competition regulator and financial regulators. We may now turn to discussions on cooperation in respect of issues relating to mergers amongst various classifications of banks.

13. To provide a context to this engagement with the regulators/government in the banking sector, it will be in order to first understand briefly the evolution of the Indian Banking Sector. All large Indian banks are nationalized, and all Indian financial institutions are in the public sector. Financial Sector Reforms set in motion in 1991 have greatly changed the face of Indian banking. The banking industry has moved gradually from a regulated environment to a deregulated market economy. The pace of changes gained momentum in the last few years. RBI issued 23 licenses to new players - two were given universal banking licences (April 2, 2014), 11 were issued payments banks licences (August 19, 2015) and 10 were given licences for small finance banks (September 16, 2015). To bridge the gap in financial inclusion RBI introduced differential banking. In 2013 RBI constituted a committee headed by Dr. Nachiket Mor to recommend on innovative solutions to accelerate financial inclusion in sustainable and cost effective way. One key recommendation in its report submitted in 2014 was to introduce specialised banks/ payment banks to cater the lower income groups and small businesses. Most of the recommendations of the Report have been achieved (See Annex 1).

14. According to a World Bank index, India has one of the world's most fragmented banking industries, possibly next only to the U.S., among major nations. China has four banks among the world's top 10, while India may have only one in the top 100. So some consolidation can only help. Today, for a loan size of say USD 900 million, not a single bank in the country can take the portfolio on the book. Relative to the growth in size of the corporate sector, the banking sector has fallen behind over the years, so now the major borrowers of banks are entities whose needs can no longer be met by individual banks while staying within their prudential lending norms (less than 1% of portfolio to a single company; 5% to a group). So, banks need to consolidate to have enough size to serve their corporate clients more effectively. Such mergers of banks may be necessary in the public interest and to ensure the stability of the financial system or could be dictated by some other strategic or social or economic policy considerations (for example, to merge some public-sector banks to prepare the merged banking entity to take care of the financing of strategic offshore investment by these banks in sectors like energy and infrastructure, like the way Chinese State-owned banks operate) of the Government. In this background competition in the banking sector may not be the top priority of the policymaker.

2.1. Mergers of Failing Banks

15. First classification of banks mergers can be called as failing bank mergers. RBI is the regulator of banks and is vested with the powers to apply to the GOI for suspension of business by a banking company and to prepare scheme of reconstitution or amalgamation

16. First instance of engagement between CCI and the financial regulators was when, in 2011, CCI received a reference from RBI seeking blanket exemption to banking sector from application of provisions relating to regulation of combinations. CCI communicated that there is no regulatory overlap between the CCI and the financial regulator. It was pointed out that while the financial regulator is driven by considerations of securing monetary stability, safety of depositor's funds and prudential regulation of banks, its purposes do not include the assessment of adverse effect on competition. Competition in the banking sector improves access to finance for investment through lower interest rates for loans and lesser collateral requirements as banks fight for customers. Studies in the banking sector have found a negative relationship between an increase in the level of concentration and savings deposit rates. Studies have also found a positive relationship between an increase in concentration and an increase in interest rates and accompanying conditionalities. The role of switching costs in the banking sector cannot be undermined; customers would continue to be tied to their banks due to the fixed transactional and informational costs needed to change a bank. It is therefore important to constantly expose banks to competition as they have an incentive to extract more rents from customers due to switching costs once they are dominant.

17. However, the Commission took note of the possible concern of the RBI that in instances where the viability of a bank is in danger and such mergers and amalgamations of failing banks are required to be handled in an expeditious manner to avoid any run-down ripple effect on the economy. The Commission consented to exempt mergers and amalgamations of failing banks alone from the purview of the Act. In accordance with the concurrence of the Commission, GOI issued a notification to exempt failing bank mergers from notification requirements under the Act.

18. The RBI, in 2013, made a case for granting exemption to all 'compulsory' or 'strategic mergers' of public sector banks, regional rural banks or cooperative banks. It (RBI) argued that in accordance with its mandate, it may at times, require merger and amalgamations of banking companies in public interest and to protect the interest of the stakeholders of the banks. The Commission noted that while the considerations of RBI in these transactions may relate to financial stability or may even have a strategic intent, these may not include competition considerations as envisaged in the Act. Further, the Commission noted that such mergers do not seem to have element of urgency for granting exemption from the application of the Act. . Similarly, the GOI is empowered to require the mergers between RRBs and between PSBs under applicable laws.

2.2. Mergers of Regional Rural Banks

19. Subsequently, in 2014, the CCI came across instances of amalgamation of RRBs without its approval. The RRBs are joint ventures between the GOI, the respective State Government and one of the SCBs (designated as a sponsor bank). The mechanism ensures that the RRB is able to work in accordance with the requirements of each State and has necessary professional expertise (coming from the sponsor bank). RRBs have been established in India to supplement credit structure and with a view to enlarge

institutional credit for the rural and agricultural sector. Their operations (of the RRBs) are confined to the notified districts of the State.

20. The GOI made a policy decision to have only one RRB in each State, and in pursuance, started merger of different RRBs in accordance with the mechanism provided under the RRB Act. The Commission, initiated *suo-moto* proceedings against the erring RRBs and required them to file a notification. It levied a penalty for non-filing.

21. In 2015, the Department of Financial Services, Government of India moved for exemption to mergers and amalgamation of RRBs. The CCI held the views and conveyed to the GOI that the exemption in public interest should be granted only in very compelling cases which involve an element of urgency. However, GOI has recently exempted the mergers and amalgamation of regional rural banks from application of provisions of the Act.

2.3. Mergers of PSBs

22. The GOI has been active on reforming the PSBs. The SBI recently completed amalgamation of its subsidiaries and a separate bank by the name of Bhartiya Mahila Bank (BMB) to consolidate its position and now ranks number 1 in India and is amongst the top 50 global banks. This was the first consolidation move in the Indian banking system and reduced the number of PSBs in India from 26 to 21.

23. The CCI deliberated on whether the SBI merger of its associate banks required a notification or not. Considering that the SBI was the holding company, the merger was an intra-group transaction and hence was not likely to result in any change in control and corresponding change in competition dynamics. However, there was an alternate view that the banks may be competing at the operative level and therefore the transaction may lead to change in competition dynamics at that level. On an overall basis, CCI however decided to review only the part of transaction which related to BMB while considering the transaction between SBI and its subsidiaries as exempt.

24. Apart from this transaction, the GOI is keen on amalgamation of other PSBs. Steps have been initiated to fast track the mergers of PSBs with focus on improving the health of the banks and allow them to reach a state where they can be competitive. With this in view, GOI has exempted the instances of merger of PSBs from the requirements of competition law for a period of 10 years.

3. Competition assessment of several important legislations relating to financial sector

25. CCI, on the references made by GOI and/or on *suo-moto* basis, has undertaken competition impact assessment of several important legislations. CCI was asked by the GOI to review the draft Financial Resolution and Deposit Insurance Bill, 2017 relating to resolution of failures of financial service providers. The CCI has offered its comments. It (CCI) noted that blanket exemption proposed to be provided to all risk-category service providers namely, low, moderate, material, imminent and critical from competition scrutiny may not be tenable. Since M&As have the potential to alter market configuration to the detriment of competition and consumer welfare, a blanket exemption, regardless of the risk profile of the service provider would ignore an important aspect emanating from the resolution. The GOI has addressed the concerns of CCI in the FRDI Bill, 2017 by limiting the exemption only to the critical class of service providers.

26. As a suo moto initiative, CCI reviewed the provisions of securitization law in India considering that the most critical issue relating to the financial sector is the recovery of bad loans and securitization law has a very important role to play in this regard. In order to ensure faster recovery and resolution of bad debts, GOI had passed Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Sarfaesi) Act and this has been amended in 2016 to enable creation of infrastructure to effectively deal with the problems on non-performing assets.

27. The Commission constituted teams comprising of the officers of the Commission and academicians from the premier educational institutions in India with an objective to undertake competition assessment of the Sarfaesi Act and certain other laws. The study groups prepared a draft competition assessment reports for their respective laws. Thereafter, the Commission organized a workshop with support from OECD wherein the representatives of OECD discussed tool kits developed for the purposes of competition assessment. The OECD representatives shared their experiences with the workshop participants. The workshop participants presented their competition assessment reports and obtained views of the experts participating in the workshop. As a follow up exercise, the competition assessment reports were finalized and submitted to the GOI. These are under consideration of the GOI.

4. Conclusion

28. To sum up the experience of CCI as regards cooperation with the financial regulators, it may be said that CCI and the financial regulators have been mindful of each other’s concerns and differences in mandate. However, in practice the prudential regulation and competition regulation may lead to jurisdictional overlaps and therefore may create a situation of contradiction/conflict. The financial regulators have attempted to gain exemption from the application of competition law for their respective sectors. The CCI, while considering such requests have engaged with the stakeholders and considered such requests positively in cases which demand an urgent action for preserving the financial stability such as failing banks. However, the GOI, considering the scale of bad loans has decided that its priority for the time being is to ensure financial health of the sector and in accordance with the same objective exempted the PSB and RRB mergers from application of competition law. This approach also has a lot of merit and in fact may be considered as a competition driver because a sector which is saddled with non-performing assets may not be characterized by effective competition. Instead, if a sector undergoes consolidation and results in a few but strong players, the competition between those may be truly effective. However, the fact that the exemptions have been given only for the mergers and acquisitions and CCI continues to look into anti-competitive agreements and unilateral conduct cases, the exemptions are more likely to do more good than harm.

29. Apart from the issue of exemptions to financial sector, as detailed above, CCI has been engaged in providing comments on legislations and undertaking competition assessment of existing legislations *suo moto*. The experience of CCI in this regard has been good with its concerns being addressed in the bill relating to resolution of insurance companies.

Annex 1 Nachiket Mor Committee Recommendations

The ***Committee on Comprehensive Financial Services for Small Businesses and Low Income Households*** under the chairpersonship of Dr. Nachiket Mor submitted its final report on December 31, 2013. The Reserve Bank of India (RBI), on September 23, 2013, had appointed the Committee to propose measures for achieving financial inclusion and increased access to financial services. The key recommendation of the committee (which it proposed to be achieved by January 2016) and its impact on banking sector can be briefly summarised as under:

	Key Recommendations	Impact
1.	By January 2016 (i) provide each Indian resident above the age of 18 with an individual, full-service electronic bank account, (ii) set up widely distributed Electronic Payment Access Points offering deposit and withdrawal facilities at reasonable cost,(iii) provide each low-income household convenient access to formally regulated providers that can provide suitable: (a) credit products, (b) investment and deposit products, and (c) insurance and risk management products at a reasonable price, and (iv) to provide every customer the legally protected right to be offered suitable financial services. Thus, the first recommendation is to provide universal banking services.	RBI has adopt multiple strategies for achieving this goal. Appropriate relaxation in banking licenses guidelines, provisions of new product and supporting measures. Key changes are: i. opening of banking outlets in unbanked villages with population less than 2000[1]. ii. SCBs were asked to draw up board-approved Financial Inclusion Plans(FIPs) this will include opening brick and mortar rural branches, employment of more BCs . iii. Opening Basic Saving Banks Deposit Accounts (BSBDAs) including through BC-ICT; issuance of Kisan Credit Cards (KCC) and General Credit Cards (GCC) and other specific products aimed at the financially excluded segments.
2.	Wide-spread payment network and universal access to savings: The Committee recommended that every resident receive a Universal Electronic Bank Account at the time of registering for an Aadhaar card. It recommended that RBI prohibit banks from refusing to open an account and that Aadhaar be made the universal basis for authentication.	This is effected by relaxation in the KYC requirements and the related documentations. Small accounts can now be opened with self-certification in the presence of bank officials. Aadhaar, the unique identification number allotted by the Unique Identification Authority of India (UIDAI), Government of India was allowed to be used as one of the eligible documents for meeting KYC requirement for opening a bank account. In September 2013, e-KYC was also allowed.
3.	The Committee proposed the setting up of Payments Banks whose primary purpose will be to provide payments services and deposit products to small businesses and low income households.	In 2014 RBI released guidelines on eligibility and licensing of payment banks. In August 2015 RBI issued licenses to 11 payment banks. These were Aditya Birla Nuvo, FinoPayTech, National Securities Depository, Reliance Industries, DilipShantilal Shanghvi, Tech Mahindra, Vodafone M-pesa, Airtel M Commerce, Department

[1] As on June 30, 2016, as reported by SLBCs, 4,52,151 villages have been provided banking services; 14,976 through branches, 4,16,636 through BCs and 20,539 by other modes viz. ATMs, mobile vans, etc. thereby achieving 92.2% of the target

		of Posts, Vijay Shekhar Sharma and Cholamandalam Distribution
4.	It further proposed the setting up of Wholesale Banks which will lend to corporates and purchase securitised retail and small-business loans. These banks will only accept deposits larger than Rs 5 crore and will require minimum entry capital of Rs 50 crore	This recommendation is under consideration by the RBI. It has proposed setting up wholesale and long-term finance (WLTF) banks to finance industrial and infrastructure projects with higher capital and non-reliance on savings deposits. RBI has released a discussion paper "Wholesale & Long Term Finance Banks" on 7th April, 2017 in this regard[2].
5.	The Committee recommended a number of steps to be taken to help banks manage their credit exposures effectively, including allowing banks to purchase portfolio insurance. Universal reporting of information with credit bureaus should be mandatory for all loans, especially kisan credit cards and general credit cards. Further, it recommended that banks price farm loans based on risk and that any waivers be provided by the government through direct benefit transfer and not through interest subsidies or loan waivers.	RBI on 1st July, 2015 released a Master Circular on Exposure Norms that provided a framework of the rules/regulations/instructions issued by the Reserve Bank of India to Scheduled Commercial Banks relating to credit exposure limits for single/ group borrowers and credit exposure to specific industry or sectors and the capital market exposure of banks. The exposure ceiling limits is 15 percent of capital funds in case of a single borrower and 40 percent of capital funds in the case of a borrower group[3].
6.	The Committee proposed that a State Finance Regulatory Commission be set up into which all state level financial regulators will be merged	The recommendation has not been considered yet.
7.	It recommended that the Non-Performing Asset reporting provisions and other regulations for NonBanking Finance Companies (NBFCs) be aligned with those of banks	On March 27, 2015 RBI released in pursuance of this recommendation Master Circular titled "Non-Systemically Important Non-Banking Financial (Non-Deposit Accepting or Holding) Companies Prudential Norms (Reserve Bank) Directions, 2015"[4].
8.	Priority Sector Lending: The Committee suggested that investment by banks in bonds and equities and provision of guarantees to PSL beneficiaries be counted towards meeting the banks' PSL targets. It recommended the removal of the cap on interest rate on loans at the base rate plus 8% per annum. It also recommended that the	RBI on 23 April, 2015 released a notification related to Priority Sector Lending-Targets and Classification. In this guideline the recommendations were agreed upon by the RBI[5]. Separate targets of 8 per cent3 for small and marginal farmers (within the agriculture target of 18 per cent) and 7.5 per cent for micro enterprises to be achieved by 2017. After a

[2] https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=40092 (paper was open for comments until May 19, 2017)

[3] https://www.rbi.org.in/scripts/BS_ViewMasCirculardetails.aspx?id=9875#2

[4] https://rbi.org.in/scripts/NotificationUser.aspx?Id=9773&Mode=0

[5] https://rbi.org.in/scripts/NotificationUser.aspx?Id=9688&Mode=0

	PSL target be revised from 40% to 50% of credit provided.	review in 2017, these targets will be made applicable to foreign banks with 20 branches and above from 2018[6].
9.	It proposed the setting up of a unified Financial Redress Agency (FRA) that will handle customer grievances across all financial products in coordination with their respective regulators.	This recommendation is under consideration. In the Budget Speech of 2015-16, the Union Minister of Finance and Corporate Affairs Shri Arun Jaitley had announced the creation a sector-neutral Financial Redressal Agency (FRA) to address the grievances of retail consumers against all Financial Service Providers (FSPs). It is planned that FRA will be set-up through an executive order[7].
10.	It proposed that firms be made liable to ensure suitability of products issued to customers and that RBI frame regulations regarding the same.	Accordingly on July 6, 2017 RBI issued a circular to all types of banks including SCBs, RRBs, Payment Banks and Small Finance Banks The Circular was related to Customer Protection – Limiting Liability of Customers in Unauthorised Electronic Banking Transactions[8].

[6] https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/05CH16B7354EA474114124B7A5557D852F9036.PDF

[7] http://pib.nic.in/newsite/PrintRelease.aspx?relid=155911

[8] https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOTI15D620D2C4D2CA4A33AABC928CA6204B19.PDF