A practical perspective on the Pakistani merger regime

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Introduction

- The Pakistani merger regime, being its most active function, is a reflection of the competition regime at large: developing, self-aware, and receptive
- More than other regulators, the Competition Commission of Pakistan (**CCP**) invites the wisdom from more established jurisdictions
- A quality inherent to its function, the merger regime is not, like other regulators, beholden to the prosperity of any particular industry and is accordingly able to service its objectives with greater independence

Practical highlights of the competition regime

Pre-Merger Clearance Requirement
- Section 11of the Competition Act, 2010 (**Act**) stipulates the requirements for seeking clearance of a *"merger"*

When
- As soon as parties agree in principle or sign a non-binding letter to proceed

How
- 3 tier test applied by the CCP. In practice:
  - whether 'merger' creates or strengthens dominant position (Phase 1) - cleared
  - if a dominant position is created or strengthened then whether merger likely to substantially lessen competition (Phase 2) – cleared with or without remedies
  - If merger will lessen competition, are there any efficiencies resulting from the merger (Phase 2) – cleared with remedies
- Almost 200 Phase 1 clearance orders on CCP website which were all cleared because of no dominant position as a result of the merger. Only 6-8 Phase 2 orders. All mergers eventually allowed. Barring 1 phase 2 order, all phase 2 orders allowed with remedies / conditions.

Essential Elements which trigger compliance

- Does a transaction fall within the ambit of a 'merger'
- Is there nexus to Pakistan
- Does the 'merger' meet the financial or control thresholds
- Is the 'merger' exempted

Is it a 'merger'?

Merger is defined in the Act as follows:

"Merger means the merger, acquisition, amalgamation, combination or joining of two or more undertakings or part thereof into an existing undertaking or to form a new undertaking…"

Undertaking includes *inter alia* legal person, natural person, local entity, foreign entity, body corporate, regulatory authority, trust and so forth

Does it meet the financial or control thresholds?

- Financial and control thresholds of transactions (**Merger Thresholds**) are contained in Regulation 4 of the Competition (Merger Control) Regulations, 2016 (**Merger Regulations**). Either of the following will trigger the Merger Thresholds

<u>Financial Thresholds</u>:
- Turnover of Acquirer: ≥ US$ 8,000,000/-
- Gross Assets of Acquirer: ≥ US$ 8,000,000/-
- Transaction Value: ≥ US$ 800,000/-

<u>Control Threshold:</u>
- Turnover of Acquirer: ≥ US$ 8,000,000/-
- Gross Assets of Acquirer: ≥ US$ 8,000,000/-
- Ownership of shares (including existing) ≥ 10 %

The Merger Thresholds are very low by international standards and almost evert mid-size deal will potentially be captured

Is there a nexus to Pakistan?

- The scope of the Act states that: "*It shall apply to all <u>undertakings</u> and <u>all actions or matters that take place in Pakistan</u> and <u>distort competition in Pakistan</u>*"
- However, Regulation 1(3) of the Merger Regulations (formed pursuant to the Act) states that *"these regulations shall apply to all the undertakings which are party to merger or intended merger, <u>whether incorporated in Pakistan or not and all or any of such undertakings doing business in Pakistan</u>"*
- Due to the extra-territorial application of the Act, the merger regime, in addition to local mergers, regulates **"Foreign Mergers"** i.e. where the underlying transaction is effected outside Pakistan
- Broadly stated, if parties to a Foreign Merger: (i) either have a presence in Pakistan in the form of a branch or a subsidiary; or (ii) remotely generate revenue from Pakistan, such transaction is very likely to require pre-merger clearance of the CCP due to the low bar set by the Merger Thresholds
- The application of the Merger Thresholds to Foreign Mergers is not clear

Is 'merger' exempted?

- Exemptions for pre-merger clearance under the Merger Regulations in-principle cover the same type of transactions as other competition regimes. However, the narrowly worded provisions can yield absurd scenarios.
- By way of example, while transactions between holding companies and subsidiaries are exempted, the following transactions do not fall within the same exemption:

  (i) transaction inter se companies wholly owned by the same natural person;
  (ii) transactions inter se companies with identical shareholding patterns; and
  (iii) transactions inter se companies with identical shareholding patterns.

- Capital market transactions not clearly excluded (limited exemptions for banks, insurance companies and investment companies does not work) – impractical to seek prior clearance. Ad hoc solutions applied from time to time

Practical insights and Recommendations

- The CCP has, since its inception, approved almost every pre-merger clearance application submitted to it at the Phase I stage i.e. no competition concerns. Due to extremely low thresholds, CCP is burdened with large volume of Phase 1 applications.
  - Recommendation: Notification instead of a clearance? CCP may trigger Phase 2 (at its sole discretion). Otherwise, merger shall be deemed cleared
- Lack of clearly defined parameters establishing nexus to Pakistan has created uncertainty and confusion. CCP continues to process applications for foreign mergers
  - Recommendation: De-minimus test to establish clearer and substantial nexus to Pakistan which actually impact competition
- Low Merger Thresholds are not in line with economic realities
  - Recommendation: Clearer thresholds need to be defined which ensure that the pre-merger clearance requirement is triggered only with respect to transactions which can pose legitimate competition concerns
- List of exempted transactions to be expanded to include transactions where compliance is impractical or where there is unlikely to be a substantial competition concern

Thank you