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Mergers Control & Assessment Process

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Merger Control Aims to Check Monopolies

Monopolies are generally considered to be anti-consumer for the simple reason that they can become complacent once they have eliminated the threats posed by competitors. Without competition their products or services can get away with being lower quality, inefficient, lacking innovation, and increasing prices. They can also put hurdles in the way of new entrants to the market. Monopolies, therefore, happen to be injurious not only for consumers interest but also an obstacle for economic growth of a country. In this article, we discuss mergers where two or more firms combine together to potentially result in a monopoly.

It is argued that merger would be good for consumers because it would enable businesses to operate more efficiently, bring the prices of products down, achieve economies of scale, facilitate transfer of technologies, broaden access to capital, increase productivity and enhance the domestic and global competitiveness of companies. But all these dreams fizzle out, once the merger takes place and the surviving firm attains the economic power (i.e. monopolistic position). It is rare that concentration of power in one's hands keeps him away from its cruel use. In most cases, economic power tends to capture social and political power and the latter is used to gain more economic power.

Types of Mergers

Merger control is said to cure the menace of abuse of dominant position when the creation of monopoly is taking shape. Mergers, which are mostly discussed and regulated, are 'horizontal mergers'. Horizontal mergers take place between two or more firms that are actual or potential competitors in the same industry or sector. This type of merger lessens competition and harm consumers in two ways: (i) by eliminating a competitor, enabling remaining firms to coordinate more easily on price, output, capacity, or other dimension of competition (coordinated interaction), or (ii) by letting the merged firms to raise prices and profitability (unilateral act) without fear of any reaction by competitors or consumers. This unilateral act is more injurious if product of the company is an essential item.

The other type of mergers which attract the attention of regulators are 'vertical mergers', between firms operating at different levels in the chain of production. This merger can make it difficult for competing firms to gain access to an important component or to an important channel of distribution.

Another type of merger which has the potential to create a hurdle in the way of entry into the market is called 'potential competition merger', involving an existing company buying another company that is planning to enter the market to compete with the existing company. Such a merger can prevent the actual or potential competition to be offered by new firm.

Merger Control – A Tricky Rule

Although doing trade, business and choosing a profession is citizens' fundamental right in Pakistan, yet it is a constitutional duty of the states to safeguard the interest of consumers at large. Therefore, to strike a balance between right to do business and the right of general public to have an access to quality consumer goods fairly priced, most of the countries on the globe have legislations to carefully control mergers.

After the review of pre-merger application, if CCP has no objection with regard to lessening of competition in the relevant market, it will issue a clearance within 30 days.

In Pakistan, Article 18 of the Constitution, while guaranteeing the fundamental right of doing trade, bestows duty upon the state to regulate the businesses. The Article 18 reads as follows:

'Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business: Provided that nothing in this Article shall prevent-(a) the regulation of any trade or profession by a licensing system; or(b) the regulation of trade, commerce or industry in the interest of free competition therein; or (c)…..

Pakistan, therefore, has Competition Act, 2010 (the Act) to regulate the businesses for the purpose of creating an environment of free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviour.

Under the Act, merger includes 'merger, acquisition, amalgamation, combination or joining of two or more undertakings or part thereof into an existing undertaking or to form a new undertaking'.

Merger Control Review Process

The Act empowers Competition Commission of Pakistan (CCP) to review mergers in order to determine the possibility of significantly lessening of competition by creating or strengthening a dominant position in the relevant market. An undertaking shall be presumed to be dominant if its share in the relevant market exceeds 40%. When an undertaking intends to merge and meets the pre-merger threshold, it will have to get clearance from the CCP. The filing of pre-merger application is mandatory and CCP expects parties not to complete or implement the transaction until clearance has been granted.

The intended merger trigger pre-merger review if gross value of assets of acquirer touch the limit of PKR 300 million (USD 1.95 million), or its annual turnover tends to cross the limit of PKR 500 million (USD 3.2 million) or combined value of assets, or turnover sums up to PKR 1 billion (USD 6.5 million) or more, or it is an acquisition of shares or assets of PKR 100 million (USD 0.65 million), or more, or place in the hands of the acquirer voting rights 10% or more in the post-merger emerging entity/company.

After the review of pre-merger application, if CCP has no objection with regard to lessening of competition in the relevant market, it will issue a clearance within 30 days. However, if the merger is likely to substantially reduce competition in the market, CCP will take the merger application to phase II review to conduct an extended review within 90 days with regards to impacts on competition in the market. If CCP determines that intended merger would not substantially prevent, restrict, or lessen competition in the market, it gives approval to the merger.

The Act also empowers the CCP to give clearance to the intended merger in certain cases even it crosses the presumed limit of creating a dominant undertaking, if the merger parties substantiate the positive effects outweighing the negative effects of the intended merger.

Conclusion

International Competition Network (ICN) is doing a good job on global level by assisting national competition agencies in revamping their laws, imparting training on competition issues, rotating its workshops, seminars and conferences across the globe to facilitate participants from underdeveloped countries.

However, there is a dire need of effectively controlling mergers of multi-national companies who have presence through their subsidiaries across the globe, because merger or no merger at national level would have the same consequences, if the holding or controlling companies merge outside the jurisdiction of national competition agency, as their subsidiaries will have to follow the same policies of the new controlling company.

The major area of concern is the mergers of multi-national pharmaceutical companies having monopolies in life saving drugs, as it may threaten the availability of drugs at affordable prices to a large number of patients across the world. To clear such type of mergers, a multi-nations' competition agency may be a possible solution to safeguard the interests of the consumers-villagers of the globe.

Mr. Khan is an international trade lawyer having almost 20 years of practical experience in the areas of international trade advisory. He has a large client base in a number of countries. He has expertise in WTO Laws, including but not limited to Trade Defence Laws, GATS and TRIPS etc. He also practices Anti-trust and Competition law. For developing the culture of Competition law compliance, he has been conducting 'Competition Law Compliance Programme' and 'Competition Law Training' for various companies. As a writer, he has contributed articles on international laws on trade, trade defence, competition, dispute settlement, preferential trade agreements, e-commerce, data protection and trade in services.