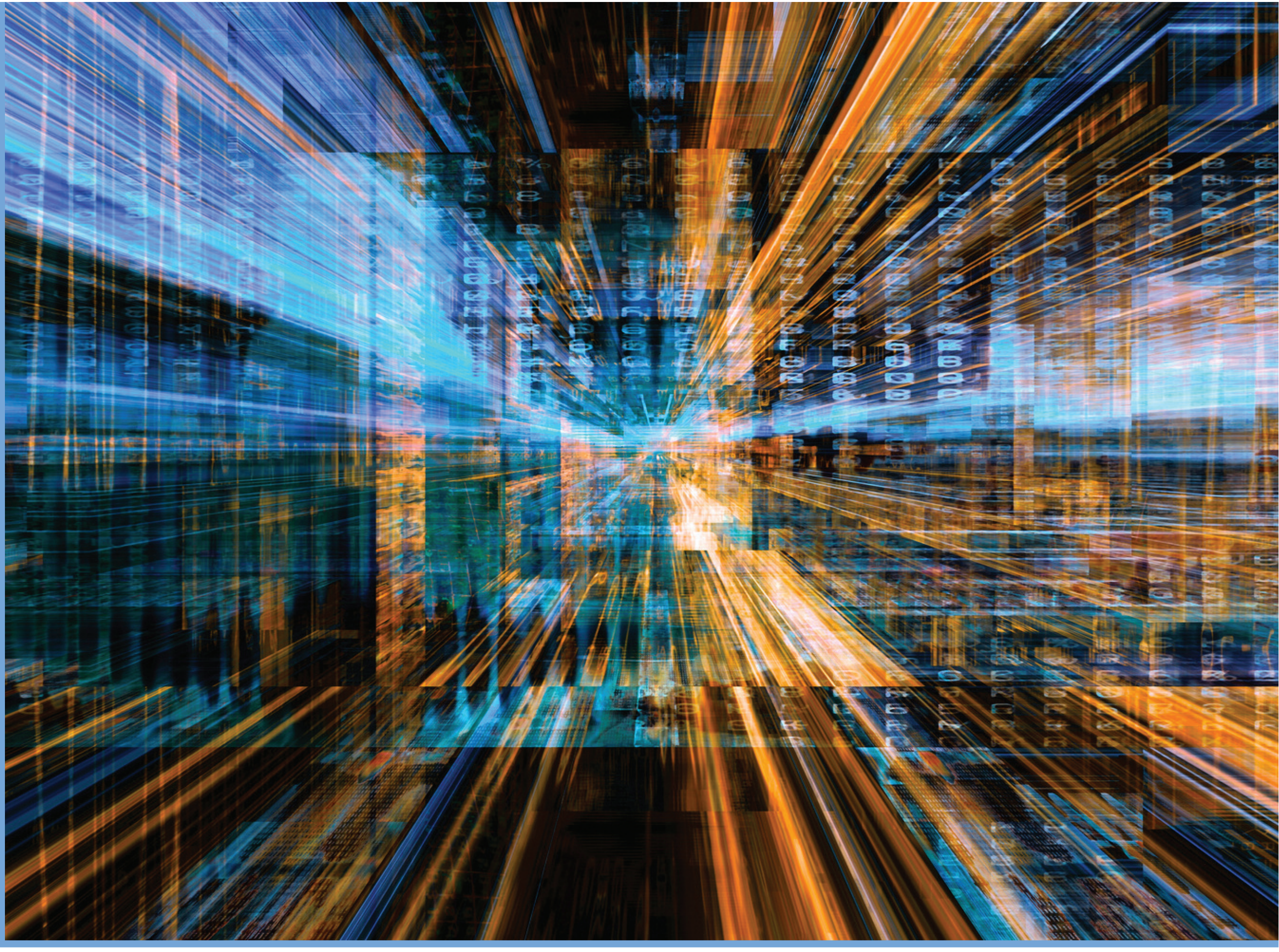

Merger Control Survey **2017**

Featuring contributions from

Al Busaidy Mansoor Jamal & Co
Ali Budiardjo Nugroho Reksodiputro
Andreas Neocleous & Co
Asters
Atsumi & Sakai
Bundeskartellamt
Competition Commission of Singapore
Cuatrecasas Gonçalves Pereira
ELIG Attorneys-at-Law
Gulapa Law
Herbert Smith Freehills
JunHe
LCS & Partners
MR Legal Inn
Nokia
OECD/Korea Policy Centre
US Department of Justice Antitrust Division

Lead contributors

HERBERT SMITH FREEHILLS

IFLR
INTERNATIONAL FINANCIAL LAW REVIEW

Pakistan

LEGAL INN
ADVOCATES & CORPORATE COUNSELLORS
www.mrlegalinn.com

Mobeen Rana, MR Legal Inn

REGULATORY FRAMEWORK

1.1 What is the Applicable legislation and who enforces it?

The merger control regulations in Pakistan are the Competition Act 2010 (the Act) and the Competition (Merger Control) Regulations 2007 (CMCR 2007). The Act is a piece of federal legislation (an act of parliament) on the subject of anticompetitive practices.

The Act is enforced by the Competition Commission of Pakistan (CCP) – established by the Act as an autonomous regulator at the federal level.

JURISDICTIONAL TEST

2.1 What types of mergers and joint ventures (JVs) are caught?

The term 'merger' is defined by the Act and the CMCR, which covers mergers, acquisitions, combinations or the joining of two or more undertakings or parts thereof. When a merger meets or exceeds specified thresholds to substantially lessen competition by creating or strengthening a dominant position, it is caught by the competition regime. Any merger that meets or exceeds thresholds specified by CMCR 2007 has to receive clearance from the CCP. This is a mandatory requirement.

Joint ventures are covered within the definition of merger under the Pakistani competition law regime. However, joint ventures are only caught if thresholds specified by CMCR 2007 are met; the joint venture results in the creation of a new entity by two or more collaborators; the new entity is subject to joint control and performs the functions of an autonomous entity on a lasting basis; and it results in a substantial lessening of competition by creating or strengthening a dominant position. However, if the first and second conditions are met, then clearance has to be obtained for setting up a joint venture.

2.2. What are the thresholds for notification, how clear are they, and are there circumstances in which the authorities may investigate a merger falling outside such thresholds?

When the thresholds laid down in CMCR 2007 are met then filing a pre-merger clearance before the CCP is mandatory. Thresholds have been specified in relation to the value of gross assets of merging parties or their annual turnover linked with the value of the transaction or voting shares. Pre-merger clearance has to be obtained if the following thresholds are met:

- the value of gross assets of the acquirer undertaking is PKR300 million ($2.9 million) or combined value of parties to the acquisition transaction or merging entities is PKR1 billion; or
- the annual turnover of the acquirer in the preceding year was PKR500 million (or more) or the combined turnover of parties to the acquisition transaction or merging entities is PKR1 billion or more; and
- the transaction relates to shares or assets of the value of PKR100 million or more (for instance value of transaction threshold); or
- the acquisition results in the acquirer holding (post-merger) more than 10% of the voting shares.

In sum up, where either one of the first two thresholds is met then the CCP examines whether either one of third or fourth thresholds is met. Where this condition is satisfied, it becomes mandatory to file.

2.3 Are there circumstances in which a foreign- to-foreign merger may require notification, and is a local effect required to give the authority jurisdiction?

Foreign-to-foreign mergers meeting the relevant thresholds and the merger can affect competition within Pakistan then these have to be notified to the CCP. Usually, the CCP will only look to the effects on competition in the local market where foreign players have a local presence. A recent example of this is the merger between Nestlé (incorporated in Switzerland) and Pfizer (incorporated in Delaware, US), where Nestlé acquired Pfizer's nutrition food business. Nestlé Pakistan Limited is a wholly owned subsidiary of Nestlé in Pakistan. Pfizer's subsidiary also exists in Pakistan. Since products of both companies are available in Pakistan and since both had a local presence, the CCP required parties to file a clearance application.

There is no specific local effects test laid down by the CCP. However, the Act covers all matters that occur and distort competition within Pakistan. This has been interpreted to mean that only the effects in the local market have to be seen, even if the origin is elsewhere.

PRE-NOTIFICATION AND FILING

3.1 Is filing mandatory or voluntary and must closing be suspended pending clearance? Are there any sanctions for non-compliance, and are these applied in practice?

The filing is mandatory as per the Act and CMCR 2007. The CCP expects parties not to complete or implement the transaction until clearance has been granted. The closing does not have to be suspended pending clearance but as good practice parties themselves wait for the decision of the CCP.

Section 11(12) of the Act sets out that sanctions can be imposed where parties have consummated a merger without complying with the pre-merger clearance procedure. Sanctions include the CCP's power to undo a merger or prohibit it altogether. However, this can only be done after issuance of a show-cause notice and opportunity of a hearing at the end of the phase II review (if any). Penalties under the Act also include fines of up to PKR75 million or up to 10% of the annual turnover of the undertaking or entity involved.

3.2 Who is responsible for filing and what, if any, filing fee applies?

Parties to the merger are equally responsible for the filing, although in practice the parties usually decide between themselves who should file the application. The party filing the application is supposed to issue a notice of filing to all other parties to the merger, with a copy of such notice to the CCP.

Filing fees are required and vary with turnover of parties to the merger. The minimum filing fee is PKR200,000 and depending upon the size of the parties to the transaction can go up to PKR1.5 million.

3.3 What are the filing requirements and how onerous are these?

Filing requirements are relatively onerous and local legal practitioners specialise in this field. A Schedule to the CMCR 2007 carries the relevant form that has to be filled out along with supporting evidence for purposes of a filing. The information that needs to go into a filing includes (but is not limited to):

- corporate information about the parties and their holding and subsidiary companies;
- details of the transaction and consideration involved;
- nature of the merger and the markets on which it will have an impact;
- copies of all relevant agreements, analyses, reports provided to board of directors of relevant companies;
- market shares (pre- and post-merger) along with details of sales, production, volumes as the case may be;
- relevant market studies and anticipated changes in the market post-merger;
- explanation of the relevant market (product-wise as well as geographical);
- copies of business plans for the current year and the preceding five years;
- cooperative effects of any joint ventures and justifications; and any ancillary restraints being imposed or anticipated and their necessity.

3.4 Are pre-notification contacts available, encouraged or required? How long does this process take and what steps does it involve?

N/A

CLEARANCE

4.1 What is the standard timetable for clearance and is there a fast-track process? Can the authority extend or delay this process?

The CCP is bound under the Act and CMCR 2007 to decide pre-merger applications within 30 days. No objection in 30 days means, as per the law, that the CCP has no objection to the merger. Normally, the CCP will issue a clearance within 30 days. If the CCP wants to take the merger application to a phase II review, it shall take this decision within 30 days of filing and communicate this to the parties. However, a phase II review has only been initiated in four cases since the CCP's inception in 2007.

When a phase II review is initiated by the CCP (and this happens very rarely) the CCP then has another 90 days within which to conduct an extended review. If no decision is made within 90 days of starting of the phase II review, then as per the law the CCP shall be deemed to have had no objection and the proposed merger shall be deemed cleared.

4.2 What is the substantive test for clearance, and to what extent does the authority consider efficiencies arguments or non-competition factors such as industrial policy or the public interest in reaching its decisions?

The substantive test for clearance is whether the merger will result in a substantial lessening of competition by creating or strengthening a dominant position of the undertaking in the relevant market. The term relevant market has been defined by the Act in a way similar to the European jurisdiction, with a focus on a product and a geographic market. Price, characteristics and intended uses are the criteria used to determine substitutability when defining the relevant market.

Even if the CCP determines after a phase II review that a merger substantially lessens competition it can still allow the merger if it can be shown that:

- the merger contributes substantially to economic efficiencies related to production or distribution of goods or provision of services;
- the said efficiency could not reasonably have been achieved by a less restrictive means of competition;
- in a cost-benefit analysis, the benefits of such efficiency clearly outweigh adverse effects on competition; and
- the undertaking adopted the least anticompetitive option for a failing undertaking's assets when faced with actual or imminent financial failure.

Economic efficiencies play an important role in the review process. This has been commanded by the Act itself and is reflected in the CCP's practice. Even if the CCP determines after a phase II review that a merger substantially lessens competition it can still allow the merger if it can be shown that:

- the merger contributes substantially to economic efficiencies related to production or distribution of goods or provision of services;
- the said efficiency could not reasonably have been achieved by a less restrictive means of competition;
- in a cost-benefit analysis, the benefits of such efficiency clearly outweigh the adverse effects on competition; and
- the undertaking adopted the least anticompetitive option for a failing undertaking's assets when faced with actual or imminent financial failure.

4.3 Are remedies available to alleviate competition concerns? Please comment on the authority's approach to acceptance and implementation of remedies?

Yes, the CCP is quite accommodating when it comes to listening to the merging parties about solutions that would allay the regulator's concerns. Divestment undertakings as well as behavioural remedies can be suggested to the CCP to persuade it to grant clearance. However, these are likely to be necessary only after conclusion of a phase II review where the CCP thinks the merger will substantially lessen competition.

RIGHTS OF APPEAL

5.1 Please describe the parties' ability to appeal merger control decisions – how successful have such challenges been?

Where an adverse order is passed by a single member of the CCP, an appeal lies within 30 days of passing of the order before the Appellate Bench of the CCP. When an order is passed by two or more members of the CCP then the appeal lies within 60 days of communication of the order before the Competition Appellate Tribunal (CAT). Appeals against decisions of the CAT can be filed before Supreme Court within 60 days of the order.

Judicial review petitions before a High Court can be filed under article 199 of the Constitution of Islamic Republic of Pakistan, 1973. A direct petition can also be made under article 184(3) to the apex court of the land (for example the Honourable Supreme Court of Pakistan). In practice, it is usually more convenient and common to first approach one of the High Courts.

YOUR JURISDICTION

6.1 Outline any merger control regulatory trends in your jurisdiction.

The CCP has taken the position that as long as a foreign-to-foreign merger is likely to affect competition within Pakistan and the transaction falls within the jurisdictional thresholds for merger clearance then pre-merger clearance should be obtained. However, the CCP is bound by the requirement of the law that one or both parties should be doing business in Pakistan. In practice, the CCP will only act regarding foreign-to-foreign mergers if merging undertakings have a local presence – whether through branch offices, subsidiaries or operations.

In the past year, two phase II merger reviews received clearance from CCP; one in the financial services market and the other in the telecom market. The first of these involved the merging of three stock exchanges in the country (in the cities of Islamabad, Karachi and Lahore) into one national stock exchange, now called the Pakistan Stock Exchange (PSX). Members of the three stock exchanges have been given membership of PSX. This amalgamation was envisaged by a law focusing on de-mutualisation of each of the three stock exchanges that existed as companies limited by guarantee. However, the three stock exchanges applied for clearance from the CCP. The clearance, however, was never in any doubt. The other major merger review case involved the acquisition of a competitor in telecom services market. Warid (which had a market share of 10%) was acquired by the relevant market's biggest player Mobilink, which, at the pre-merger stage, had a share of 29%. This will result in a post-merger share of 39% – virtually touching the 40% threshold in the law where dominant position is presumed. The merger received clearance with conditions and involved the passing of, till now, the most detailed order in a merger review case.

Mobeen Rana
Partner, MR Legal Inn

Lahore, Pakistan
T: +92 322 7373922
E: mobeenrana@mrlegalinn.com
W: www.mrlegalinn.com

About the author

Mobeen Rana is a barrister and partner at MR Legal Inn and his practice focuses on corporate and commercial laws. In his corporate law practice he has acted for clients including World Bank Group, Standard Chartered, Franzen Landbouv, International Industries, Johnson Controls, Boeing, Reuters and China National Heavy Machinery Corporation. He is licensed to appear before the domestic courts, tribunals and regulatory bodies.

Rana has obtained his law degrees from University of London and the Honourable Society of Lincolns Inn, London and previously worked with World Bank Group and the New York office of Grunfeld Desiderio Lebowitz Silverman & Klestadt (GDLSK). He has creditable citations for one of the leading lawyers in Pakistan including from Legal 500, Thomson Reuters Practical Law and Martindale & Hubbell Network.