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## **Global Forum on Competition**

### **ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES**

#### **Contribution from Pakistan**

-- Session I --

*This contribution is submitted by Pakistan under session I of the Global Forum on Competition to be held on 17 and 18 February 2011.*

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## CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Pakistan --

### 1. General Points

#### 1.1 *Brief overview of the merger control regime, with particular reference to the following issues*

##### 1.1.1 *Merger control regime existing in Pakistan*

1. Section 11 of the Competition Act, 2010 (Act), provides that no undertaking shall enter into a merger which substantially lessens competition by creating or strengthening a dominant position in the relevant market.

2. Section 11(2) of the Act provides that where an undertaking, intends to acquire the shares or assets of another undertaking, or two or more undertakings intend to merge the whole or part of their businesses, and meet the pre-merger notification thresholds stipulated in regulations prescribed by the Commission, such undertaking or undertakings shall apply for clearance from the commission of the intended merger.

3. Section 11(2) of the Act provides that the concerned undertakings shall not proceed with the intended merger until they have received clearance from the Commission.

4. The Commission issued "Competition (Merger Control) Regulations, 2007", which lays down regulations covering notification thresholds, and the procedure for filing merger clearance application as well as procedure for the Commission to adhere to in reviewing the merger. Pakistan has two-phase merger clearing process: Phase-I has to be completed in 30 days. And in merger cases which require in-depth inquiry, Phase-II is initiated, which has to be completed within 90 days. So far, only two cases have gone to Phase-II.

- The criteria (turnover, market shares etc.) used for establishing jurisdiction over merger operations;

The merger parties will be required to make application for clearance from the Commission under sub-section (2) of section 11, in case either of the following notification thresholds are met:

- the value of gross assets of the undertaking, excluding value of goodwill, is not less than three hundred million rupees (equivalent to US\$ 3.488 million) and/or the combined value of the undertaking and the undertaking(s) the shares of which are proposed to be acquired or the undertakings being merged, is not less than one billion rupees (equivalent to US\$ 11.628 million); or
- annual turnover of the undertaking in the preceding year is not less than five hundred million rupees (equivalent to US\$ 5.814 million) and/or the combined turnover of the

undertaking and the undertaking(s) the shares of which are proposed to be acquired or the undertakings being merged is not less than one billion rupees (equivalent to US\$ 11.628 million); and

- the transaction relates to acquisition of shares or assets of the value of one hundred million rupees (equivalent to US\$ 1.163 million) or more; or
  - in case of acquisition of shares by an undertaking, if an acquirer acquires voting shares, which taken together with voting shares, if any, held by the acquirer shall entitle the acquirer to more than 10% voting shares;
  - in the case of an asset management company carrying out asset management services, its collective exposure for itself and in all of its collective investment schemes in a single entity is more than 25% of total voting rights; or
  - the value of total assets under management of an Asset Management Company is one billion rupees (equivalent to US\$ 11.628 million) or more;
- If a notification system is in place, whether this is voluntary or mandatory; whether notification fees are payable; whether there are special requirements for merger notification;

Pakistan has a mandatory pre-merger clearance regime, if the merger meets the notifications thresholds. Parties have to pay fee, and have to apply on a prescribed form.

- The substantive test used to assess mergers

Section 11(1) of the Act lay down the substantive test, which is “substantially lessening of competition by creating or strengthening a dominant position in the relevant market.”

- Special provisions for cross-border mergers

Regulation 27 of the Competition (Merger Control) Regulations, 2007 provides that where a merger is subject to review under merger laws in more than one jurisdiction, the commission shall:

- without compromising effective enforcement of the domestic law, seek to cooperate its reviews of transnational mergers in appropriate cases;
- consider actions by which they can eliminate or reduce the impediments to cooperation and coordination;
- encourage merging parties to facilitate coordination among competition authorities, in particular with respect to timing of notifications and voluntary waivers of confidentiality rights, without drawing any negative inferences from a party’s decision not to do so;
- give the merging parties, the opportunity to consult with the concerned competition authority at key stages of investigation with respect to any significant or practical issue that may arise during the course of investigation;
- give an opportunity to third parties, with a legitimate interest, in the merger review as recognized under reviewing country’s merger laws, to express their view under the merger review process;
- treat foreign undertakings, no less favorably than domestic undertakings in like circumstances; and
- endeavor in reaching, in so far as possible, consistent, or at least non-conflicting outcomes.

**2. Specific questions**

**2.1 Co-operation among competition authorities (international, regional and bilateral)**

2.1.1 *Have there been instances in which a conflict arose between your jurisdiction and a foreign jurisdiction over the regulation of a cross-border merger? How was the conflict resolved?*

5. None, so far.

2.1.2 *Are there bilateral agreements in existence between your jurisdiction and foreign jurisdictions in the field of competition law? Have these agreements been used in practice in cross-border merger cases? Were there No Agreement in existence yet on the co-operation framework which hindered the efforts of your jurisdiction to regulate the relevant cross-border merger(s) effectively?*

6. No agreement in existence yet.

2.1.3 *If the law so permits, to what extent are the relevant authorities in your jurisdiction prepared or willing to take foreign interests into account when dealing with cross-border merger operations? Have there been any such cases in practice?*

7. The Commission may consider foreign interest, if it is not in direct conflict with the local interest.

2.1.4 *Does your regime have an active involvement in the work and deliberation of international organisations (e.g. the OECD or the ICN) in the area of merger control? Has there been any effort made to implement domestically the principles or recommendations produced by these organizations?*

8. The Competition Commission of Pakistan regularly contributes to the workings of OECD, ICN and UNCTAD, and draw lessons from their work products.

2.1.5 *Does your regime belong to a regional organization in the field of competition law? Does this organization have rules or other instruments dealing with the regulation of cross-border merger operations either at domestic or regional level? Have there been any cases in your jurisdiction involving these regional rules?*

9. No regional organization of the South Asian countries yet.

**2.2 Jurisdictional issues (e.g. notification, information exchange, enforcement and extra-territoriality)**

2.2.1 *If your jurisdiction requires merger notification, are the current notification.*

10. The present threshold levels are adequate and appropriate for mergers notifications.

2.2.2 *Have attempts been made in your jurisdiction to obtain information from parties involved in cross-border mergers who are located outside your jurisdiction? Were such attempts successful? Were results achieved unilaterally by the relevant authority in your jurisdiction, or with the help of the relevant foreign competition authorities?*

11. None, so far.

2.2.3 *To what extent does your jurisdiction consider or rely on the actions and decisions taken by foreign competition authorities in relation to cross-border mergers when conducting investigations or adopting final decisions? Have there been any cases in which such reliance included a decision by your jurisdiction not to regulate the cross-border merger in question?*

12. The Commission normally draws guidance from the decisions of European Union, United States and developed jurisdictions, but their decisions only hold persuasive value and not authoritative. So far no cross-border merger has been decided by the Commission.

2.2.4 *Is political intervention possible in the area of cross-border merger control in your jurisdiction and what are the grounds for such intervention? Please provide examples where appropriate.*

13. No.

2.2.5 *Does the legislation in your jurisdiction provide for non-competition considerations, for example industrial or investment policy, to be taken into account when regulating cross-border merger operations? What are these considerations? Please provide examples where appropriate.*

14. Only competition concerns are taken into consideration.

2.2.6 *Do cross-border mergers provide particular challenges to enforcement actions that are unique to your jurisdiction? If yes, what are these challenges?*

**2.3 Remedies (types, consultation, monitoring and enforcement)**

2.3.1 *If it is not possible in your jurisdiction for the competition authority to adopt structural remedies, can e.g. behavioural remedies be applied? Please provide examples where appropriate.*

15. Yes, it is possible to impose structural remedies i.e. divestiture.

2.3.2 *Were there any specific issues or difficulties encountered during the negotiations conducted with the merging parties over these remedies or in their implementation?*

16. No.

2.3.3 *To what extent does your jurisdiction co-ordinate with other national competition authorities in discussing an appropriate remedy in light of enforcement actions in other countries?*

17. Pakistan has only one Competition Authority.