

Memorandum
Key Developments
In
Pakistan's Competition Law Paradigm



KARACHI | LAHORE | ISLAMABAD | FAISALABAD | KABUL | DUBAI

Memorandum

Developments in Pakistan's Competition Law Paradigm

1. Recent Developments in the Competition Law Paradigm

1.1. Establishment of the Acquisitions & Mergers Facilitation Office

1.1.1. The Competition Commission of Pakistan ("**Commission**") has established the Acquisitions & Mergers Facilitation Office ("**AMFO**") with an aim to provide guidance and facilitation to undertakings in complying with the Competition Ordinance 2007 ("**Ordinance**").

1.1.2. The purpose of the AMFO is to facilitate those parties which are contemplating a merger or acquisition (as defined in the Ordinance) and want to get informal and non binding view of the Commission. AMFO seeks to facilitate the parties involved in the transaction, in submission of pre-merger applications.

1.1.3. In this respect the AMFO looks to facilitate undertakings in the following manner:

- (i) Providing assistance in applying for merger clearance (filling of application forms and filing of documentation);
- (ii) providing information about the proposed acquisition or merger by approaching the Commission direct and not through third parties (such as lawyers or outside consultants)
- (iii) providing assistance to law firms, consultants and third parties who want to obtain the Commission's informal view about any specific matter in which they are advising their clients
- (iv) providing available pre-emptive identification of the key and potential competitive concerns that may arise due to the proposed transaction. The parties, after they have approached the AMFO will be informed in advance and through an informal mechanism to ensure that all competition concerns are addressed.
- (v) encouraging parties who are proposing an acquisition or merger to come direct to the Commission, thus preventing / saving the parties from the lengthy legal procedures and legal advisory fees. The aim is to reduce time and cost of compliance of acquiring / merging parties.
- (vi) providing a confidential service whereby complex transactions can come to CCP for a preview.

1.1.4. The issues referred to AMFO would be examined by the officers comprising it, on the basis of facts made available to them and the relevant law. They may call for further information from the concerned parties for the proper examination of the case.

1.1.5. The reply of the Commission would be of an advisory nature only and it is not to be treated as a binding decision of the Commission in any way.

1.2. Amendment in the Competition (Merger Control) Regulations, 2007

1.2.1. The Regulations apply to all the undertakings which are party to a merger or intended merger, whether incorporated in Pakistan or not and all or any of such undertakings doing business in Pakistan. Under the Regulations and the applicable competition law, undertakings intending to

proceed with a merger are required to seek approval of the Commission before proceeding with such mergers.

- 1.2.2. In terms of Regulations 4A of the Regulations certain transactions are exempted from filing of a premerger application to seek approval of the Commission before proceeding with such transactions.
- 1.2.3. By way of a notification dated May 29, 2009 the Commission has amended Regulation 4A by also exempting transactions concerning acquisition of securities of other undertakings with the intention to sell back such securities at a pre-determined price within a period of 6 months from the date of such acquisition.
- 1.2.4. However the abovementioned transactions are only exempted if they are carried out by undertakings that as a normal part of their business activities carry out dealings in securities for their own account or for the account of others. Such undertakings would include brokerage houses and dealers in securities.

2. Notable Recent Decisions by the Commission

2.1. Abuse of Dominant Position by Karachi Stock Exchange

- 2.1.1. The Islamabad Stock Exchange (Guarantee) Limited ("**ISE**") filed a complaint ("**the Complaint**") with the Commission against Karachi Stock Exchange (Guarantee) Limited ("**KSE**") under Section 30 of the Ordinance alleging the abuse of its dominant position by KSE refusing to (deal) share its trading platform with other stock exchanges of Pakistan. Subsequent to the Complaint by ISE, the Lahore Stock Exchange (Guarantee) Limited ("**LSE**") also became a party to the proceedings.
- 2.1.2. The issue put before the Commission was whether refusal by the KSE to share its trading platform with ISE and LSE amounts to an abuse of dominant position under the Ordinance.
- 2.1.3. The Commission took the view that the refusal to deal by KSE amounted to abuse of its dominant position and could not continue.
- 2.1.4. The Commission therefore passed an order directing KSE to within a period of six months from the date of its order take such measures along with the other stock exchanges of Pakistan to enter into an arrangement similar to that of unified trading system existing between LSE and ISE to ensure availability of and access to the best price of commonly listed securities (on all exchanges) to all investors including those LSE and ISE (regardless of geographical location). The Commission took the view that this was necessary to restore competition in the relevant market.
- 2.1.5. KSE was not penalized by the Commission but informed KSE that failure to comply with the direction of the Commission would attract a penalty of PKR 50 Million at the end of the six month period and thereafter an additional penalty of PKR 250,000 per day if the noncompliance continued.

2.2. Fixing of Minimum Price in the Cigarette Industry

- 2.2.1. The Commission has recently taken *suo moto* notice of certain advertisements made by the leading cigarette manufacturing companies of Pakistan i.e. Pakistan Tobacco Company Limited ("**PTC**") and Lakson Tobacco Company Limited ("**Lakson**"). The advertisements pertained to pack prices of cigarette brands being manufactured by the undertakings.
- 2.2.2. The Commission also took notice of an advertisement by the Federal Board of Revenue ("**FBR**") declaring that the FBR has fixed the minimum price of cigarettes in the country. It was also stated in the advertisement that the printing of retail price and sales tax on every cigarette pack is

mandatory under the law and that cigarette manufacturers and other persons associated with the cigarette business are to abide by the notified minimum prices. It was cautioned that violators of these mandatory provisions would face penal consequence in the form of imprisonment, fine or both.

- 2.2.3. The fixing of minimum price of cigarettes by FBR and cigarette manufacturers prima facie appeared to be in violation of Section 4(1) of the Ordinance read with Section 4(2) (a) of the Ordinance wherein fixing of prices is expressly prohibited. The Commission, therefore, took cognizance of the matter and sent letters to PTC and Lakson under Section 36 of the Ordinance asking them to explain the rationale behind the fixing of prices of cigarettes packs and printing the same of the said packs.
- 2.2.4. The Commission after completing a formal inquiry of the matter directed that the cigarette manufacturers in Pakistan enjoyed market power in the relevant market. In view of this PTC's and Lakson's printing of either the maximum and minimum retail price would have anti-competitive effects. The Commission in this matter took the view that if a choice was to be made, it had to be the maximum retail price. Simply put, imposing a maximum retail price of cigarettes promises lower prices for consumers, as competition on price is below the prescribed level and to this extent it protects consumers from anti competitive behavior. Printing the minimum retail price on cigarette packs, on one hand, may operate as a bench mark for the manufacturer to recover fixed price irrespective of the quality of goods. While on the other hand it may be used by manufacturers having market power to give retailers an incentive not to sell the products of lesser known or minor manufacturers at that price (i.e. effectively a quasi entry barrier); thus reducing competition in the relevant market.
- 2.2.5. Generally cigarette packs are sold at a higher price than the printed price; therefore, printing of maximum retail price would not only ensure that the consumer is better informed regarding the price beyond which the product can not be sold, it would also place him in a better bargaining position.
- 2.2.6. In this regard, the Commission drew support from the EU jurisdiction which regards maximum retail price as a more pro-competitive practice.
- 2.2.7. The final view taken by the Commission in this matter was that maximum price fixing was a more pro-competitive practice than minimum price fixing. The Commission accordingly advised the FBR to withdraw its direction of printing minimum prices on cigarette packs.

About Mandviwalla & Zafar

We routinely provide advice to our clients on the anti trust and competition law regime which has been put into operation in Pakistan. We have advised many local as well as multinational organizations on various aspects of the competition law applicable in Pakistan.

We have successfully obtained approvals of mergers and acquisitions from the anti trust and competition law authority, the Competition Commission of Pakistan for a number of our local and international clients. Our clients have come to rely upon our expertise to identify issues and practices that may give rise to anti trust related matters and devise effective solutions to circumvent the same before the interests of our clients may be affected.

We have assisted and represented our local and international clients belonging to the banking, pharmaceutical, telecommunications and other major economic sectors in anti trust proceedings, inquiries and other matters and have successfully safeguarded their interest in the same.