

MERGERS AND MARKET DOMINANCE: CASES AND COUNTRY EXPERIENCES

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By

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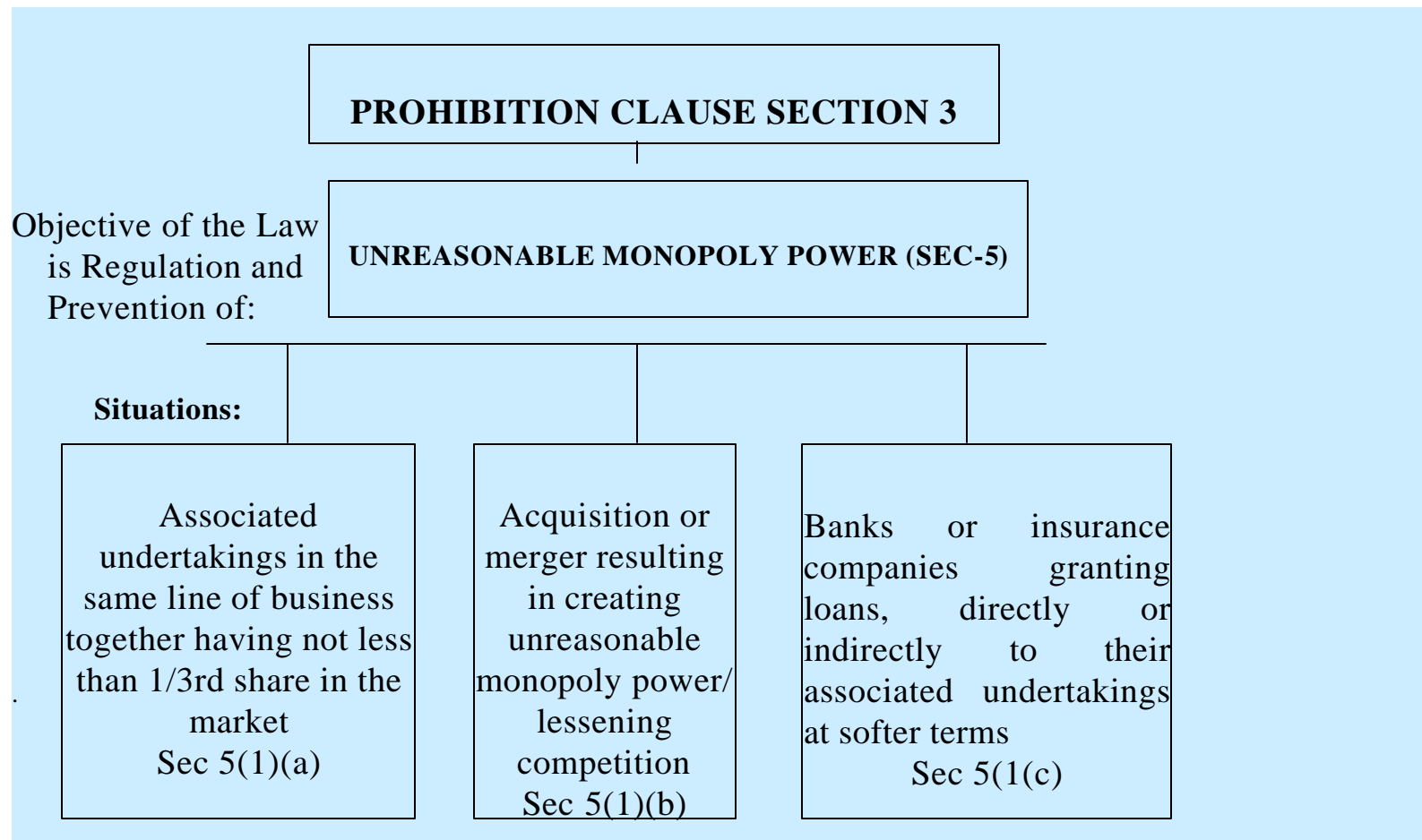
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MERGERS AND MARKET DOMINANCE

Some technical issues:

1. Effects;
2. The cases, competition agencies seek to identify;
3. Type of analysis required for anti-competitive cases.

MONOPOLIES AND RESTRICTIVE TRADE PRACTICES (CONTROL AND PREVENTION) ORDINANCE, 1970



SECTION 5. CIRCUMSTANCES CONSTITUTING UNREASONABLE MONOPOLY POWER.

(1) Unreasonable monopoly power shall be deemed to have been brought about, maintained and continued if -

(a) there has been created or maintained any such relationship between two or more undertakings as makes them associated undertakings where they are competitors in the same market and together produce, supply, distribute or provide not less than one third of the total goods or services in such market;

SECTION 5. CIRCUMSTANCES CONSTITUTING UNREASONABLE MONOPOLY POWER.

(b) there has been any acquisition by one person or undertaking of the stock or assets of any other person or undertaking, or any merger of undertakings, where the effect of the acquisition or merger is likely to create monopoly power or to substantially lessen competition in any market, including any acquisition which creates any such relationship as is referred to in clause (a);

SECTION 5. CIRCUMSTANCES CONSTITUTING UNREASONABLE MONOPOLY POWER.

(c) any loan is granted by a bank or insurance company to any of the associated undertakings of amounts greater or on terms more favourable than for loans made available to other undertakings in comparable situations, or any loan is granted by a bank or insurance company to a person or undertaking not associated with it on the condition or understanding that the borrower or any of its associated undertakings will make any loan to a person or undertaking associated with the lender.

SECTION 5. CIRCUMSTANCES CONSTITUTING UNREASONABLE MONOPOLY POWER.

The Gateways Section 5(2):

No such relationship, acquisition, merger or loan as is referred to in sub-section (1) shall be deemed to have the effect of bringing about, maintaining or continuing unreasonable monopoly power if it is shown -

(a) that it contributes substantially to the efficiency of the production or distribution of goods or of the provision of services or to the promotion of technical progress or export of goods;

The Gateways Section 5(2):

(b) that such efficiency or promotion could not reasonably have been achieved by means less restrictive of competition; and

(c) that the benefits of such efficiency or promotion clearly outweigh the adverse effect of the absence or lessening of competition.

Salient Features: Monopolies and Restrictive Trade practices (Control and Prevention) Ordinance

In case contravention to Section 5 is established, the Law provides for following remedial orders:

- Break the association
- limit the total loans and investment in any undertaking;
- Undo the merger/acquisition; and
- To take necessary actions as it may consider necessary to restore competition in the market.

In case of non-compliance or providing false/ misleading information a penalty upto Rs.100,000 and additional Rs.10,000 per day can be imposed.

THE ORDERS ARE APPEALABLE IN THE HIGH COURT.

MERGER/ MARKET DOMINANCE SITUATIONS NOT COVERED IN THE LAW

- Vertical mergers are not actionable;
- 'Single firm' monopoly cases are not covered in the substantive provisions i.e., only associated undertakings are covered; and
- There is no mandatory pre-merger notification provision.

TRIGGERING THE MCA'S ACTION

MCA can initiate a case on the following conditions:

1. Suo -moto after getting information from some source;
2. If concerned undertakings asks for advice as per Section 10;
3. Upon receipt of a reference from the Government; or
4. A complaint from at least 25 persons under Section 14.

GENERAL PROBLEMS IN PROCESSING A CASE

- Insufficient Information from parties;
- Under-developed/ inadequate data sources; and
- Institutional limitations.

CASE STUDIES

1. Pencil manufacturers' case;
2. Acquisition of the Polka Group of Companies by Lever Brothers Pakistan Limited;
3. Merger of tea marketing companies;
4. Merger in cigarette industry;
5. Banking sector case;
6. Batteries' case;
7. Aminoplast moulding compound manufacturer's case;
8. Engineering industry; and
9. On going: Polyester staple fibre case.

Pencil manufacturers' case

Facts of the case: Crescent Pencils Limited and Indus Pencils Limited both had market share exceeding the threshold limit.

Analysis of the facts: Prima facie it was suspected that associated undertakings had more than threshold market share. Upon deep probe, the undertakings were able to establish that the legal requirements for dominance were not met.

MCA's Order: MCA agreed in its Order that the Directors of the two companies, though were related to each other but were not the same 'persons' as required in the definition of the associated undertakings in the MRTPO, 1970. The case was thus cleared.

Acquisition of the Polka Group of Companies by Lever Brothers Pakistan Limited

Facts of the case: After the acquisition of Polka Group by the Unilever, the market share of the undertaking increased to 65.45% in the organised sector producing ice-cream.

Analysis of the facts: The undertaking argued the case under gateways i.e., the efficiency grounds, prospective decrease in cost, availability of technical expertise, usage of international standards, etc.

MCA's Order: Merger was allowed on fulfillment of certain conditions and efficiency grounds, etc.

Merger of tea marketing companies

Facts of the case: Unilever, UK had majority shares in Lipton Pakistan Ltd. and 40% shares in the equity of Brooke Bond Pakistan Ltd. The merger was to create a dominant undertaking with more than 80% of the market share.

Analysis of the facts: Issue of computation of market share was raised: unorganized sector, smuggled tea, other substitutes of tea, etc.

MCA's Order: MCA allowed the merger subject to certain conditions: the company will develop tea cultivation at 600 hectares by the year 2004 in areas identified in Mansehra District – as a first step towards indigenous tea production.

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Merger of tea marketing companies

- MCA monitored the implementation of its Order during the stipulated time period;
- Undertaking is facing certain difficulties in achieving the targets of tea cultivation;
- Last year the undertaking approached the MCA with a revised plan of developing tea gardens and sought extension in timeframe till 2006 stating that due to unforeseen draught/floods over last few years, the targets envisaged initially could not be achieved.
- MCA felt it difficult to allow the extension as it would amount to revision of its own order, as under the Law, Authority has no powers to review its own Order.

Merger in cigarette industry

Facts of the case : The Premier Tobacco Industries Ltd. was merged into Lakson Tobacco and post-merger market share exceeded the threshold.

Analysis of the facts: During the merger proceedings, Lakson raised the following points:

- The market was earlier dominated by the Pakistan Tobacco Company Limited (PTCL). As a result of the merger, the Lakson is better able to compete a big giant i.e. the PTCL. The competition conditions have, therefore, improved;

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Merger in cigarette industry

- In cigarette industry, the consumer is brand captive and do not bother as to who is the manufacturer - the brands compete with each other even produced by the same manufacturer.
- Market of each brand is separate one and should not be added together to compute the market dominance of an undertaking producing a number of brands.
- The issue of smuggled cigarettes, counterfeits and cigarettes produced by unorganized sector was raised.

MCA's Order: After careful evaluation of the facts, the case was cleared while agreeing with the above mentioned arguments of the undertaking.

Banking sector case

Facts of the case: The undertaking, Indus Bank made loans and advances to its associated companies on favourable terms i.e., less than the prevalent market rate of interest, than those made available to other undertakings in the comparable situation.

Analysis of the facts: Prima facie the situation attracted the law, a *suo-moto* action was taken In response to the show cause notice, the undertaking raised the issue relating to common directorship and that the dealings were as per regulations set by the State Bank of Pakistan.

MCA's Order: The status of undertakings being “associated” could not be established and the case was cleared.

Batteries' case

Facts of the case: Exide Pakistan Limited acquired the business of the Automotive Battery Company Limited. This acquisition raised its market share to 58%.

Analysis of the facts: MCA took a *suo moto* action. The case was discussed with reference to the determination of market/ market share considering usage of second hand batteries, presence of large unorganized sector, smuggling; and efficiency gains/ usage of improved Japanese technology after acquisition.

MCA's Order: MCA kept on monitoring the financial health of the acquired entity, which was a 'failing' unit earlier and price pattern over a period of time. The case was cleared on the grounds that the acquisition has brought about advantages which were not possible without it.

Aminoplast Moulding compound manufacturer's case

Facts of the case: Dyno Pak Limited and Visionite (Pvt) Limited both associated undertakings had a combined market share of 50-60%.

Analysis of facts: A *suo-moto* show cause notice was issued and in response, the undertakings established that:

- They are not enjoying unreasonable monopoly power due to dumping of imported products below international market price - they cannot charge monopoly prices.
- Associated undertaking was set up in the tax concession area to reap benefits as announced by the Govt. They were also involved in the exports.

MCA's Order: MCA agreed with the submissions and cleared the case.

Engineering Industry

Facts of the case: The market share of the Abbas Engineering Industries Limited and Abbas Steel Industries (Pvt) Limited exceeded the threshold in the production of wire rods.

Analysis of facts: A *suo moto* show cause notice was issued and in response the undertakings submitted that their earlier estimates of market share were based on self collected data and infact it did not cover the entire country. They also raised the issue of un-organized sector, in the presence of which real market size can not be determined.

MCA's Order: MCA cleared the case, since it was not a horizontal merger, the undertakings were producing differentiated products which were catering to the needs of different types of customers.

On going Polyester staple fibre case

Facts of the case: A merger case of companies namely Dewan Salman and Dhan Fibre (PSF), both producing polyester staple fibre. With that merger a dominant undertaking having around 60% market share has emerged.

Analysis of the facts: In response to MCA's *suo-moto* action, the undertakings raised two issues:

- All types of man made and natural fibres should be used to serve as a denominator for working out the market share about the 'product' which formed the basis of computing market share;
- South Asian market should be taken into account while working out market share and looking into competition conditions.

The matter is under adjudication.

THANK YOU