The Merger Control Review

Fourth Edition

Editor
Ilene Knable Gotts

Law Business Research

The Merger Control Review

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This article was first published in
The Merger Control Review, 4th edition
(published in July 2013 – editor Ilene Knable Gotts).

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Ilene Knable Gotts

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – gideon.roberton@lbresearch.com

ISBN 978-1-907606-73-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ACCURA ADVOKATPARTNERSELSKAB

ADVOKATFIRMAN CEDERQUIST KB

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EDITOR'S PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. This book provides an overview of the process in 45 jurisdictions as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

As shown in further detail in the chapters, some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions either already vest exclusive authority to transactions in one agency or are moving in that direction (e.g., Brazil, France and the UK). The US and China may end up being the exceptions in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are a few jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, Turkey recently issued a decision finding that a joint venture ('JV') that produced no effect in Turkish markets was reportable because the JV's products 'could be' imported into Turkey. Germany also takes an expansive view, by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the UK and Venezuela), the vast majority impose mandatory notification requirements.

Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction

to close as long as notification is made prior to closing. Many jurisdictions can impose a significant fine for failure to notify before closing even where the transaction raises no competition concerns (e.g., Austria, the Netherlands, Romania, Spain and Turkey). Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; and Hungary, Ireland and Romania have a 30-calendar-day time limit from entering into the agreement for filing the notification. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Serbia) for mandatory pre-merger review by federal antitrust authorities. Most jurisdictions have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., United States, Ukraine, Greece, and Portugal).

Most jurisdictions more closely resemble the European Union model than the US model. In these jurisdictions, pre-filing consultations are more common (and even encouraged), parties can offer undertakings during the initial stage to resolve competitive concerns, and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japanese Federal Trade Commission ('the JFTC') announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU model. For instance, in Austria the obligation to file can be triggered if only one of the involved undertakings has sales in Austria as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan) there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees are even to be provided with a redacted copy of the merger notification and have the right to participate in Tribunal merger hearings, and the Tribunal will typically permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EU and Germany), third parties may file an objection against a clearance.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The US is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period for challenging a notified transaction.

As discussed below, it is becoming the norm in large cross-border transactions raising competition concerns for the US, EU and Canadian authorities to work closely with one another during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian

authority has worked with Brazil's CADE, which in turn has worked with Chile and with Portugal. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia and Slovenia similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and EU on some mergers and entered into a cooperation agreement with the US authorities in 2011, and the US has also announced plans to enter into a cooperation agreement with India.

Some jurisdictions (e.g., the EU and Ireland currently) have as their threshold test for pre-merger notification whether there is an acquisition of control. Such jurisdictions will often consider relevant joint control (e.g., the EU) or negative (e.g., veto) control rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey). Minority holdings and concern over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, seem to be gaining increased attention in many jurisdictions, such as Australia. Some jurisdictions will consider as reviewable acquisitions in which only 10 per cent interest or less is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise 20 per cent of a target; and Japan and Russia, at any amount exceeding 20 per cent of the target). This past year, several agencies analysed partial ownership acquisitions on a stand-alone basis as well as in connection with joint ventures (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also the subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the merger worldwide even though less than 10 per cent of each of the undertakings was attributable to Germany. Thus, it is critical from the outset for counsel to develop a comprehensive plan to determine how to navigate the jurisdictions requiring notification, even if the companies operate primarily outside some of the jurisdictions.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. As discussed in the last chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EU or US. Moreover, the need to coordinate is

particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past year imposed a variety of such behavioural remedies (e.g., China, EU, Netherlands, Norway, South Africa, Ukraine and the US). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
July 2013

Chapter 30

PAKISTAN

Mujtaba Jamal[1]

I INTRODUCTION

With the establishment of the Competition Commission of Pakistan ('the CCP') *vide* the Competition Ordinance 2007 and subsequently the Competition Act 2010 ('the 2010 Act'), the merger control regime in Pakistan has seen major developments, with great efforts being made to bring the merger control regime in line with international best practices.

The primary statutes regulating mergers in Pakistan are the 2010 Act and the Companies Ordinance, 1984 ('the 1984 Ordinance'), whereas the Competition (Merger Control) Regulations, 2007 ('the 2007 Regulations') and the Companies (Court) Rules, 1997 ('the 1997 Rules') supplement the aforementioned primary statutes.

Under Pakistani law, there are various authorities that sanction or approve mergers. The primary authorities dealing with mergers are the CCP and the Securities and Exchange Commission of Pakistan ('the SECP'). The role of a High Court ('the Court') in granting approval of a merger under the company laws of Pakistan is also of critical importance.

Under the 2010 Act, clearance of a merger is required from the CCP if the transaction meets the criteria prescribed in the 2010 Act and the 2007 Regulations. The term 'merger' has been defined by the 2010 Act to mean the merger, acquisition, amalgamation, combination or joining of two or more undertakings or part thereof into an existing undertaking or to form a new undertaking (Section 2(1)(h) of the 2010 Act).

Section 11(1) of the 2010 Act stipulates that no undertaking[2] shall enter into a merger that substantially lessens competition by creating or strengthening a dominant

1 Mujtaba Jamal is an adviser at MJLA Legal.

2 The term undertaking has been defined in Section 2(1)(q) of the 2010 Act to mean, *inter alia*, any natural or legal person, governmental body including a regulatory authority, body corporate, partnership, association, trust or other entity in any way engaged, directly or indirectly, in the production, supply or distribution of goods or provision or control of services.

position in the relevant market. According to Section 11(2) of the 2010 Act, *inter alia*, 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 business, and they meet the pre-merger notification thresholds (provided in Regulation 4 of the 2007 Regulations), such undertaking or undertakings shall apply to the CCP for clearance of the intended merger and, according to Section 11(3), shall submit the pre-merger application ('the application') as soon as an agreement in principle is reached or a non-binding letter of intent is signed by the parties. The CCP reviews the application in two phases. In Phase I the CCP, *inter alia*, determines whether:

a the intended merger falls within the definition of a merger (as defined by the 2010 Act) (Regulation 10(1) of the 2007 Regulations);
b the intended merger meets the pre-merger thresholds, as defined by Regulation 4 of the 2007 Regulations; and
c the intended merger is likely to substantially prevent or lessen competition (Regulation 6(1) of the 2007 Regulations).

If the intended merger does not give rise to any competition concerns, the CCP usually allows the concerned parties to proceed with the merger (the CCP may set forth conditions to which the intended merger is subject). If the intended merger gives rise to competition concerns, the CCP will initiate Phase II of its review to determine whether the merger substantially lessens competition by creating or strengthening a dominant position in the relevant market (Section 11(8) of the 2010 Act). Failure to obtain clearance of a merger from the CCP may render the concerned undertaking liable to a penalty under Section 38 of the 2010 Act, or the CCP may pass one or more orders under Section 31 of the 2010 Act, which, *inter alia*, empowers the CCP to undo or prohibit a merger (but only as a conclusion of the Phase II review) (Regulation 13 of the 2007 Regulations).

Under the 1984 Ordinance, the Court plays a vital role in sanctioning mergers. According to Section 284 read with Section 287 of the 1984 Ordinance, the scheme of the proposed compromise or arrangement of a company (which can include a scheme of merger) must receive the sanction of the Court. To have a scheme of compromise or arrangement sanctioned by the Court, an application has to be made to the Court in a summary way by the company or any creditor or member of the company or, in the case of a company being wound up, by the liquidator, and the Court may order a meeting of the creditors or class of creditors, or of the members of the company or class of members, to be called. If a majority representing three-quarters in value of the creditors or class of creditors, or members, as the case may be, agree to the compromise or arrangement, it shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, or on all the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company. The Court generally sanctions the scheme of merger after hearing any objections to the proposed scheme, including any objections from the registrar of companies, the SECP.

For the amalgamation of non-banking finance companies ('NBFCs'), approval of the SECP[3] is required under Section 282(L) of the 1984 Ordinance. The procedure for the amalgamation of banking companies has been stipulated in Section 48 of the Banking Companies Ordinance, 1962 ('the 1962 Ordinance'),[4] and approval of the State Bank of Pakistan ('the SBP') is required for their amalgamation. The procedure for obtaining approval for the amalgamation of an NBFC or a banking company (under Section 48 of the 1962 Ordinance) is similar. A scheme containing the terms of amalgamation has to be placed in draft before the shareholders of each of the NBFCs concerned, or in the case of banking companies, each of the banking companies, and is required to be approved by a resolution passed by a majority representing two-thirds in value of the shareholders of each of the said NBFCs or the banking companies (as the case may be). If the amalgamation is approved by the requisite majority of shareholders, it is submitted to the SECP or the SBP (in the case of banking companies) for sanction and, if sanctioned by the SECP or the SBP by an order in writing passed in this behalf, becomes binding on the NBFCs or the banking companies concerned, and also on all the shareholders thereof.[5]

Section 68(1) of the Insurance Ordinance, 2000 ('the 2000 Ordinance') stipulates that no life insurance business of an insurer shall be transferred to any person or transferred to or amalgamated with the life insurance business of any other insurer except in accordance with a scheme prepared under this Section and sanctioned by the court (the word 'court', as defined by the 2000 Ordinance in respect of Part IX of the 2000 Ordinance, which includes Section 68, means the Court or, if so notified by the federal government, the civil court) having jurisdiction over one or other of the parties concerned.

No new legislation has been passed in 2012 pertaining to mergers in Pakistan.

II YEAR IN REVIEW

i Merger clearance by the CCP

During 2012, the CCP approved the application concerning the proposed acquisition of the Nutrition Business of Pfizer Inc by way of contracts, assets and liabilities of the business segment by Nestlé SA, whereby as part of the transaction, the business (contracts,

3 The Securities and Exchange Commission of Pakistan Act, 1997 ('the 1997 Act') grants the SECP the general power to regulate mergers of companies (Section 20(4)(j) of the 1997 Act).

4 According to Section 48(7) of the 1962 Ordinance, 'banking company' as used in Section 48, *inter alia*, means any banking company and includes the National Bank of Pakistan, the Agricultural Development Bank of Pakistan, the Industrial Development Bank of Pakistan, the House Building Finance Corporation, investment finance companies, venture capital companies, housing finance companies, leasing companies and branches of foreign banks doing business in Pakistan.

5 Provided that, in the case of foreign banking companies, notwithstanding the fact that the scheme of amalgamation is not approved by the requisite majority of shareholders, such approval may be granted by the SBP, upon a certificate being issued by their respective head offices.

assets and liabilities) of Wyeth Pakistan Limited relating to IFFO milk and GUM were to be transferred to Nestlé's designated entity in Pakistan (i.e., Nestlé Pakistan Limited). In view of the written undertaking by Nestlé to the effect that Pfizer (Wyeth) products would remain available for a period of three years from the date of the closing of the transaction in Pakistan, the CCP authorised the acquisition under Section 31(1)(d)(i) of the 2010 Act.[6]

ii Sanction of mergers by the Court

Under the 1984 Ordinance, the Court generally sanctions mergers so long as the requisite statutory requirements are met and the scheme is fair and reasonable. In the matter of *Metro Cash and Carry Pakistan (Private) Ltd*, 2013 CLD [Sindh] 7, while considering a scheme of arrangement under Sections 284 and 287 of the 1984 Ordinance, the Sindh High Court, Karachi, observed that a high court, while exercising its discretion in favour of a scheme of arrangement, has to ensure that all statutory requirements have been fulfilled, that all classes of shareholders have been fairly represented, and that the scheme of arrangement would be acceptable to an ordinary business person. The Court is not supposed to scrutinise the scheme of arrangement as an expert would do or with the intent to pick holes in it.

III THE MERGER CONTROL REGIME

i Competition law

The application for seeking clearance from the CCP is submitted on the application form ('the form').[7] Upon receipt of the completed form, the CCP conducts Phase I of the review of the application, which is completed within 30 days[8] (Section 11(5) of the 2010 Act and Regulation 10(4) of the 2007 Regulations). If the CCP fails to make a determination within the 30-day period, then the CCP has no objection to the intended merger (Section 11(7) of the 2010 Act).

If the intended merger gives rise to competition concerns, the CCP will initiate Phase II of its review and may require the undertaking concerned to provide such information as is necessary for the CCP to make a decision (Section 11(6) of the 2010 Act). If the undertaking fails to provide the information requested, the application may be rejected. The CCP must complete Phase II of its review and give its decision within 90 days of the receipt of information requested from the concerned undertaking (Section 11(8) of the 2010 Act). If the CCP fails to make a determination within the 90-day period then the CCP has no objection to the intended merger (Section 11(9) of the 2010 Act). The 90-day period commences upon the party being notified that CCP has proceeded to Phase II and upon receipt of all information required by the CCP from the applicant.

6 www.cc.gov.pk/images/Downloads/nestle_order.pdf.

7 The form is attached as a Schedule to the 2007 Regulations.

8 The word 'days' refers to working days (see the 2007 Regulations).

During the Phase I or Phase II review, if the CCP is of the opinion that, under the circumstances, the intended merger may adversely affect competition in the relevant market and an interim order is necessary in the public interest, it may direct such undertaking to do, or refrain from doing or continuing to do, any act or thing specified in the order (Regulation 12 of the 2007 Regulations). To ensure that the review of the intended merger is conducted by the CCP within the timelines provided by the statute, it is advisable for the concerned undertaking to submit the relevant documentation (to be submitted with the form or any additional document or information requested by the CCP) to the CCP as soon as possible.

If the CCP approves the merger, it may impose conditions on the concerned undertakings for carrying out the merger and shall give notice of the decision to the concerned undertakings, and may also place its decision on its website (Regulation 16(1) of the 2007 Regulations). The CCP may, at the time of issuing a favourable decision for any intended merger, specify the validity period of the decision within which the intended merger must be carried into effect.[9] Where the CCP has granted clearance subject to conditions, the CCP may, within one year of its decision, review the same on its own or upon the application of the concerned undertaking (Regulation 17(2) of the 2007 Regulations).

If the applicant considers any part of the information in the application, or any document or correspondence submitted by the applicant to the CCP, to be confidential, the applicant shall, at the time of submitting that application, document or correspondence, submit to the CCP:

a a confidential version of that application, document or correspondence containing and clearly identifying the confidential information;

b a non-confidential version of that application, document or correspondence, in which the confidential information has been removed in the manner specified by the CCP; and

c a written statement explaining why the information is confidential (Regulation 19(1) of the 2007 Regulations).

The non-confidential versions of the application and their supporting documents may be shared with third parties, whether by placing on the CCP's website for public viewing or through other means (Regulation 20(1) of the 2007 Regulations). Even if the CCP allows any information to be treated as confidential, it may at any subsequent point in time require the applicant to resubmit the non-confidential version of the relevant application, document or correspondence with that item of information included. This may happen when it becomes necessary for the CCP to share the information with third parties in order to assess properly the intended merger (Regulation 20(3) of the 2007 Regulations).

9 In specifying the validity period, the CCP will consider that generally one year is a sufficient period for merger parties to act on the favourable decision and to carry the intended merger into effect. However, the CCP will take account of the circumstances of each merger situation when specifying the duration of any validity period (Regulation 16(2) of the 2007 Regulations).

The CCP has the authority to entertain complaints regarding mergers. The complainant is required to provide all the relevant information, including:

a a description of the relationship between the complainant and the merger parties or merged entity;

b a concise explanation of the reasons for, and details of, the complaint, including details of the merger to which the complaint relates, including when and how the complainant became aware of the merger situation, and (where possible) the relative market positions of the parties named in the complaint; and

c evidence directly related to the facts set out in the complaint (Regulation 23(1) of the 2007 Regulations).

A person aggrieved by any order passed by any member or authorised officer of the CCP in respect of a merger may file an appeal before the Appellate Bench of the CCP in accordance with the Competition Commission (Appeal) Rules, 2007 (Regulation 26 of the 2007 Regulations). A person aggrieved by an order passed by the Appellate Bench of the CCP may prefer an appeal to the Competition Appellate Tribunal (Section 42 of the 2010 Act). An appeal from an order of the Competition Appellate Tribunal may be made to the Supreme Court of Pakistan (Section 44 of the 2010 Act). Despite the remedy of appeal, the conditions imposed by the CCP on a proposed merger have been challenged before the courts in judicial review proceedings, under Article 199 of the Constitution of Pakistan, 1973.[10]

ii Company law

Section 284(2) of the 1984 Ordinance does not stipulate the time limit within which the Court must decide whether the scheme of compromise or arrangement is to be sanctioned. Section 284(3) of the 1984 Ordinance, however, does stipulate that a certified copy of the order of the Court under Section 284(2) of the 1984 Ordinance must be submitted to the registrar within 30 days of the order being made. Similarly, where the Court makes an order under Section 287 of the 1984 Ordinance, every company in relation to which the order is made is required to deliver a certified copy thereof to the registrar for registration within 30 days of the order being made. Rule 60 of the 1997 Rules, *inter alia*, stipulates that where the proposed compromise or arrangement is agreed to, with or without modification, as provided by Sub-Section 2 of Section 284, the company or its liquidator, as the case may be, shall within seven days of the filing of the report of the meeting (held under Section 284(1) of the 1984 Ordinance) present a petition in Form No. 19 to the Court for confirmation of the compromise or arrangement. Rule 62 of the

10 In the matter of the acquisition of the shares of M/s Agritech Limited by M/s Fauji Fertiliser Company Limited, the conditions imposed by the CCP on the proposed merger were challenged before the Islamabad High Court in judicial review proceedings. The Islamabad High Court dismissed the writ petition filed; however, the judgment of the Islamabad High Court was challenged before the Supreme Court of Pakistan. The Supreme Court converted the petition into an appeal, set aside the judgment of the Islamabad High Court and remanded the matter to the CCP to reconsider whether conditions ought to be imposed on the merger.

1997 Rules stipulates that where the Court sanctions the compromise or arrangement, the order shall include such directions in regard to any matter and such modifications in the compromise or arrangement as the judge may think fit to make for the proper working of the compromise or arrangement. The order shall direct that a certified copy of the same shall be filed with the registrar of companies within 14 days from the date of the order, or such other time as may be fixed by the Court.

Once the proposed merger is filed in the Court (to obtain its sanction), it becomes part of the public record. Furthermore, the petition for seeking approval of the Court is widely advertised; and notices are published in the newspapers and are also sent to concerned parties such as the SECP. Before approving the transaction, the Court provides an opportunity for any interested person to come forward with objections or reservations. The superior courts of Pakistan have repeatedly held that, while reviewing a merger, it is the function of the Court to ensure that it is fair and reasonable. A scheme of merger may not be approved if the scheme is contrary to law or if it was patently unfair to the members or creditors or any class of them, or is contrary to the public interest or public policy.

iii NBFCs and banking companies

Section 282(L) of the 1984 Ordinance, which deals with the amalgamation of NBFCs, does not prescribe any time limits for the SECP to approve the amalgamation. Similarly, Section 48 of the 1962 Ordinance does not stipulate the time within which the SBP may sanction the scheme of amalgamation of banking companies.

iv Insurance companies

The 2000 Ordinance contains provisions pertaining to the amalgamation of life insurance businesses. Section 68(3) of the 2000 Ordinance, *inter alia*, stipulates that before an application is made to the court to sanction any scheme for the amalgamation of a life insurance business with the life insurance business of any other insurer, notice of the intention to make the application together with a statement of the nature of the amalgamation or transfer, as the case may be, and of the reason, shall be sent to the SECP at least 60 days before the application is made (certified copies of documents mentioned in Section 68(3) are also to be provided to the SECP). Before sanctioning the scheme, the Court must be satisfied that no sufficient objection to the scheme has been established (Section 69(1) of the 2000 Ordinance).

v Takeover law

The law regulating takeovers in Pakistan is the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002 ('the 2002 Ordinance'). According to Sections 3(1)(g) and 3(2) of the 2002 Ordinance, except for the requirement of disclosure upon an acquirer who acquires voting shares, the provisions of the 2002 Ordinance do not apply to, *inter alia*, a merger under any law that is in force at present.

IV OTHER STRATEGIC CONSIDERATIONS

The 2010 Act, as well as the 2007 Regulations, envisage cross-border coordination. Section 49 of the 2010 Act stipulates that the CCP may, with approval from the federal government, enter into agreement with competition agencies in any part of the world for the exchange and assistance in the performance of its functions under the 2010 Act. Similarly, Regulation 27 of the 2007 Regulations stipulates that where the merger situation is subject to merger review in more than one jurisdiction, the CCP shall, *inter alia*:

a consider actions by which they can eliminate or reduce the impediments to cooperation and coordination;

b 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;

c give the merging parties the opportunity to consult with the concerned competition authority at key stages of the investigation with respect to any significant or practical issue that may arise during the course of investigation;

d give an opportunity to third parties with a legitimate interest in the merger review, as recognised under the reviewing country's merger laws, to express their view under the merger review process;

e treat foreign undertakings no less favourably than domestic undertakings in similar circumstances; and

f endeavour to reach, insofar as possible, consistent or non-conflicting outcomes.

Whereas the CCP has jurisdiction in respect of transnational mergers, it is the Court that, *inter alia*, takes special consideration to safeguard the rights of minority shareholders while providing sanctions for a potential merger. It is well within the jurisdiction of the Court, where it feels that the majority shareholders of a company have voted for a potential amalgamation or merger in a manner that is coercive or oppressive to the minority, or where the majority shareholders have not voted in the interests of the shareholders as a class, to not approve the merger. The pre-merger sanction instituted under Section 284 read with Section 287 is there to, *inter alia*, protect the rights of minorities who cannot adequately safeguard their own interests.[11]

Section 284 (read with Section 287) of the 1984 Ordinance may be relied upon to enter into a wide range of compromise or arrangements, which may be used to ensure the wellbeing, survival, progress or rescue of a company.[12] The superior courts have allowed a company suffering from financial loss[13] to benefit from a scheme of merger and have also approved schemes under Section 284 of the 1984 Ordinance to allow a

11 *Kohinoor Raiwind Mills Limited through Chief Executive v. Kohinoor Gujar Khan Mills and others*, 2002 CLD [Lahore] 1314.

12 *Caravan East Fabrics Limited v. Askari Commercial Bank Limited, Al-Baraka Islamic Bank Limited*, 2006 CLD [Karachi] 895.

13 *Nishat Mills Limited v. Nishat Apparel Limited*, 2009 CLD [Lahore] 1172.

company to repay and clear its outstanding liabilities.[14] Furthermore, the superior courts in Pakistan lean in favour of keeping a company alive, by allowing a valid compromise or arrangement rather than allowing the company to go into liquidation.[15]

Where hostile transactions are concerned, as stated above, the Court generally looks at the merger in its totality. A hostile transaction may be challenged before the Court (during pendency of proceedings for seeking sanction of the scheme of merger) if the scheme is not fair and reasonable, or is against public interest or policy. Where a hostile transaction will result in the lessening of competition by creating or strengthening the dominant position of an undertaking, the CCP has the power (as discussed above) to prohibit such a merger.

V OUTLOOK AND CONCLUSIONS

There is no pending or draft legislation in Pakistan pertaining to mergers.

The emphasis in Pakistan has been to encourage and facilitate mergers, while maintaining appropriate checks to ensure adequate protection of rights and the smooth running of the economic system.

14 *In re Messrs Pakland Cement Limited through Director Shamim Musheq Siddiqui*, 2002 CLD [Karachi] 1392.

15 Ibid.

Appendix 1

ABOUT THE AUTHORS

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Mr Mujtaba Jamal, a law graduate of the London School of Economics and a barrister-at-law, is an experienced corporate and commercial lawyer having advised Fortune 500 companies on joint ventures, corporate governance, shareholders' rights, corporate restructuring and mergers, acquisitions and takeovers, and merger control and abuse of dominance. Mr Jamal also holds an EMBA degree from the Lahore University of Management Sciences and has attended Harvard Business School for executive education. Mr Jamal has been consistently ranked among the leading corporate and commercial lawyers in Pakistan by *Chambers Asia Pacific*, *Chambers Global* and *The Legal 500 Asia-Pacific*.

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