
THE MERGER CONTROL REVIEW

THIRD EDITION

EDITOR
ILENE KNABLE GOTTS

LAW BUSINESS RESEARCH

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This article was first published in The Merger Control Review, 3rd edition
(published in August 2012 – editor Ilene Knable Gotts).

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THE MERGER CONTROL REVIEW

THIRD EDITION

Editor

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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ISBN 978-1-907606-40-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: +44 844 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

ADVOKATSKO DRUZHESTVO ANDREEV, STOYANOV & TSEKOVA IN
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DILLON EUSTACE

ELIG, ATTORNEYS-AT-LAW

ENS (EDWARD NATHAN SONNENBERGS)

GIANNI, ORIGONI, GRIPPO, CAPPELLI & PARTNERS

Acknowledgements

HOUTHOFF BURUMA

KING & WOOD MALLESONS

LCS & PARTNERS

LUTHRA & LUTHRA LAW OFFICES

MARVAL, O'FARRELL & MAIRAL

MORAVČEVIĆ VOJNOVIĆ ZDRAVKOVIĆ IN COOPERATION WITH
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EDITOR'S PREFACE

Perhaps one of the most successful exports from the United States has been the adoption of mandatory pre-merger competition notification regimes in jurisdictions throughout the world. Although adoption of pre-merger notification requirements was initially slow – with a 13-year gap between the enactment of the United States' Hart-Scott-Rodino Act in 1976 and the adoption of the European Community's merger regulation in 1989 – such laws were implemented at a rapid pace in the 1990s, and many more were adopted and amended during the past decade. China and India have just implemented comprehensive pre-merger review laws, and although their entry into this forum is recent, it is likely that they will become significant constituencies for transaction parties to deal with when trying to close their transactions. Indonesia also finally issued the government regulation that was needed to implement the merger control provisions of its Antimonopoly Law. Many of the jurisdictions that were 'early adopters' have either refined their processes and procedures in substantial ways or have proposals pending to do so, typically to conform their regime with the pre-merger regimes of other jurisdictions (e.g., Brazil, Canada and the UK). This book provides an overview of the process in each of the jurisdictions as well as a discussion of recent decisions, strategic considerations and likely upcoming developments in each of these. 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 outliers 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. But, 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 on 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 by which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Brazil requires that the notification be made within 15 business days of execution of the agreements; and Hungary 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 and Serbia) for mandatory pre-merger review by federal antitrust authorities.

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 ('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 that in Brazil, and Brazil's CADE has worked with Chile and with Portugal. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Serbia, Montenegro and Slovenia similarly maintain close ties and cooperate on transactions. 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.

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). Jurisdictions will often require some measure of negative (e.g., veto) control rights, to the extent that it may give rise to *de jure* or *de facto* control (e.g., Turkey).

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 China and Brazil can be as important as the approval of the US or EU. This book should provide a useful starting point in this important aspect of any cross-border transaction being contemplated in the current enforcement environment.

Ilene Knable Gotts

Wachtell, Lipton, Rosen & Katz

New York

July 2012

Chapter 31

PAKISTAN

Mujtaba Jamal, Fareed Yaldram and Sara Hayat¹

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 Companies Ordinance, 1984 ('the 1984 Ordinance') and the 2010 Act, whereas the Companies (Court) Rules, 1997 ('the 1997 Rules') and the Competition (Merger Control) Regulations, 2007 ('the 2007 Regulations') 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 Securities and Exchange Commission of Pakistan ('SECP') and the CCP. 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 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 in number representing three-quarters in value of the

¹ Mujtaba Jamal is the founding partner, Fareed Yaldram is an associate and Sara Hayat is a junior associate of Mujtaba Jamal Law Associates.

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, SECP.

For the amalgamation of Non-Banking Finance Companies ('NBFCs'), approval of the SECP² 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')³ and approval of the State Bank of Pakistan ('SBP') is required for their amalgamation. The procedure for obtaining approval for the amalgamation of a NBFC or a banking company (under Section 48 of the 1962 Ordinance) is similar. Provided a scheme containing the terms of such amalgamation has been 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 it is 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 shall be submitted to the SECP or the SBP (in case of banking companies) for sanction and shall, if sanctioned by the SECP or the SBP by an order in writing passed in this behalf, be binding on the NBFCs or the banking companies concerned and also on all the shareholders thereof.⁴

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.

2 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).

3 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.

4 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 issued by their respective head offices.

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 undertaking⁵ shall enter into a merger which substantially lessens competition by creating or strengthening a dominant 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* meets the pre-merger thresholds, as defined by Regulation 4 of the 2007 Regulations;
- c* 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 will allow the concerned parties to proceed with the same (the CCP may set forth the conditions to which the intended merger is subject to). 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 for the imposition of 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).

No new legislation has been passed in 2011 pertaining to mergers in Pakistan; however, amendments were made to the 2007 Regulations, which have been discussed below.

5 The term undertaking has been defined by Section 2(1)(q) of the 2010 Act, to, *inter alia*, mean 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.

II YEAR IN REVIEW

i Merger clearance by the CCP

As per the CCP's Annual Report, 2011 ('the 2011 Report'), the majority of the mergers reviewed by the CCP in the financial year 2010 and 2011 received a 'no objection certificate'. Only three proposed mergers were submitted to Phase II in the 2010 and 2011 financial year.⁶ A Phase II review was conducted where:

- a it was necessary to determine whether the post-merger entity would behave co-operatively or competitively in the market;
- b the merger raised the possibility of having coordinated effects on the relevant market; or
- c there was the possibility of strengthening a dominant position.

The CCP approved the mergers after conducting the Phase II review and imposed conditions in two of the three Phase II reviews, to ensure that the mergers did not result in violations of the provisions of the 2010 Act.

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 *Jubilee Spinnings Weaving Mills Limited v. Jubilee Energy Limited*, 2011 CLD [Lahore] 10, while considering a scheme of merger under Sections 284 and 287 of the 1984 Ordinance the Lahore High Court, Lahore referred to the rights of secured creditors to object to a merger and stated that, in a merger proposed by the members of the company, for the objecting creditor to be successful he must show the courts that the transaction is *mala fide*, fraudulent, contrary to the public interest or the interests of the creditors as a whole or any class of them to which the objector belongs. In such a scenario, the scheme could be sanctioned after safeguarding the legitimate interests of the objector or any class of creditors to which it belongs. Since the Court has the power to reject the scheme on the ground that it is fraudulent, unjust or unfair, it certainly has the power to sanction the scheme subject to such conditions as would remove the grounds of unjustness and unfairness.

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 days⁸ (Section 11(5) of the 2010 Act and Regulation 10(4) of the 2007 Regulations). If the CCP fails to make

6 Pages 38 to 45 of the 2011 Report, available at www.cc.gov.pk.

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

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

a determination within the period of 30 days 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: (1) upon the party being notified that CCP has proceeded to Phase II; and (2) upon receipt of all information required by the CCP from the applicant.

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 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;

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).

- 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 properly assess the intended merger (Regulation 20(3) of the 2007 Regulations).

The CCP has the authority to entertain complaints in respect of mergers. The complainant is required to provide all the relevant information including, *inter alia*:

- 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

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.

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 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 the 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 was 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 co-ordination. 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 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 which 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 of 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 well-being, survival, progress or rescue of a company.¹² The superior courts have allowed a company suffering from financial loss¹³ to benefit from a scheme of merger and have also approved schemes under Section 284 of the 1984 Ordinance to allow a 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. However, *vide* SRO No. 980(I)/2011 dated 21 October 2011 and SRO No. 164(I)/2012 dated 21 February 2012, substantial changes have been made to the 2007 Regulations. The category of transactions exempt from filing the application under Regulation 4A of the 2007 Regulations have been increased to include, *inter alia*, transactions in which: (1) real property or goods are acquired in the ordinary course of business (if the person who intends to acquire the assets shall not, as a result of the acquisition, hold all or substantially all of the assets of a business or of an operating segment of the business); and (2) unexplored real resource property acquired for the purpose of exploration or development. Similarly, the prescribed fee rates for filing the application (Regulation 5 of the 2007 Regulations) have also been revised.

The emphasis in Pakistan, therefore, 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.

11 *Kohinoor Raiwind Mills Limited through Chief Executive v. Kohinoor Gujjar 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.

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

15 *Ibid.*

Appendix 1

ABOUT THE AUTHORS

MUJTABA JAMAL

Mujtaba Jamal Law Associates

Mr Mujtaba Jamal, a law graduate of the London School of Economics, and a barrister-at-law, is an experienced corporate/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 (LUMS) and has attended an executive education course at Harvard Business School. Mr Jamal has been consistently ranked among the leading corporate/commercial lawyers in Pakistan by *Chambers Asia Pacific*, *Chambers Global* and *The Asia-Pacific Legal 500*.

FAREED YALDRAM

Mujtaba Jamal Law Associates

Mr Fareed YalDRAM is an associate at Mujtaba Jamal Law Associates and an advocate of the High Court. Mr YalDRAM assists senior lawyers in the areas of dispute resolution, arbitration and competition law. He completed his LLB (Hons) from the University of London (with distinctions in Company Law and Islamic Law) and is a barrister-at-law (Lincoln's Inn, London).

SARA HAYAT

Mujtaba Jamal Law Associates

Ms Sara Hayat holds an LLM from Durham University in International Trade and Commercial Law. She has a special interest in company law and scored distinctions in both her LLB and LLM in this subject.

MUJTABA JAMAL LAW ASSOCIATES

57-B, Gulberg II

Lahore

Pakistan

Tel: +92 42 35778700-02

Fax: +92 42 35778703

mjla@mjla.com.pk

www.mjla.com.pk