

Publisher

Tom Barnes
tom.barnes@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Senior business development manager

Adam Sargent
adam.sargent@gettingthedealthrough.com

Published by

Law Business Research Ltd
Meridian House, 34-35 Farringdon Street
London, EC4A 4HL, UK

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. The information provided was verified between November 2020 and January 2021. Be advised that this is a developing area.

© Law Business Research Ltd 2021
No photocopying without a CLA licence.
First published 2012
Tenth edition
ISBN 978-1-83862-662-4

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



Foreign Investment Review 2021

Contributing editor

Oliver Borgers
McCarthy Tétrault LLP

Lexology Getting The Deal Through is delighted to publish the tenth edition of *Foreign Investment Review*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on the European Union, France, Italy, Pakistan, Spain, Sri Lanka and Uzbekistan.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Oliver Borgers of McCarthy Tétrault LLP, for his continued assistance with this volume.



London
January 2021

Reproduced with permission from Law Business Research Ltd
This article was first published in January 2021
For further information please contact editorial@gettingthedealthrough.com

Contents

| | | | |
|--|-----------|---|------------|
| Australia | 5 | Laos | 80 |
| Deborah Johns Gilbert + Tobin | | Dino Santaniello Tilleke & Gibbins | |
| Austria | 12 | Myanmar | 86 |
| Isabella Hartung and Julia Schönhuber Barnert Egermann Illigasch Rechtsanwälte | | Nwe Oo and Ross Taylor Tilleke & Gibbins | |
| Cambodia | 17 | New Zealand | 89 |
| Jay Cohen and Nitikar Nith Tilleke & Gibbins | | Ben Paterson and Lance Jones Russell McVeagh | |
| Canada | 21 | Pakistan | 99 |
| Oliver Borgers, Dominic Thérien, Jonathan Bitran and Erin Keogh McCarthy Tétrault LLP | | Sarjeel Mowahid and Ahmed Reza Mirza ABS & Co | |
| China | 33 | South Korea | 107 |
| May Liu Global Law Office | | Joo Hyoung Jang, Rieu Kim, Kyunghun Kim and Youjin Hwang Barun Law LLC | |
| European Union | 39 | Spain | 112 |
| Charles Pommiès, Dominic Long and Jonathan Benson Allen & Overy LLP | | Juan Manuel de Remedios and Laura del Olmo White & Case LLP | |
| France | 45 | Sri Lanka | 117 |
| Orion Berg and Camille Grimaldi White & Case LLP | | Nirosha Peiris Tiruchelvam Associates | |
| Germany | 51 | Switzerland | 123 |
| Roland M Stein and Leonard von Rummel BLOMSTEIN Partnerschaft von Rechtsanwälten mbB | | Stephan Erni, Astrid Waser and Eric Olivier Meier Lenz & Staehelin | |
| India | 58 | Thailand | 131 |
| Hardeep Sachdeva and Priyamvada Shenoy AZB & Partners | | Jirapong Sriwat and Apinya Sarntikasem Nishimura & Asahi | |
| Italy | 68 | United Arab Emirates | 136 |
| Francesco Salerno and Kathleen Lemmens Gianni & Origoni | | Silvia Pretorius Afridi & Angell | |
| Japan | 74 | United Kingdom | 142 |
| Koki Yamada and Dai Iwasaki Tokyo International Law Office | | Tim Cowen and Claire Barraclough Preiskel & Co LLP | |

United States 148

Paul Marquardt, Chase Kaniecki, Nathanael Felix Kurcab,
Nora McCloskey and Elise Lane
Cleary Gottlieb Steen & Hamilton LLP

Uzbekistan 154

Mahdi Magdiev
Winfields

Vietnam 159

Phuong Thi Minh Tran and Nam Ngoc Trinh
Tilleke & Gibbins

Pakistan

Sarjeel Mowahid and Ahmed Reza Mirza

ABS & Co

LAW AND POLICY

Policies and practices

1 | What, in general terms, are your government's policies and practices regarding oversight and review of foreign investment?

Pakistan has an open foreign investment regime. Protections afforded to foreign investors are no less than the treatment to national investors. The Board of Investment (BOI) is the apex agency to promote, encourage and facilitate foreign investment. The general approach of the government is reflected in the Investment Policy 2013, which consolidates the major requirements under several laws regarding foreign investment across all sectors. The BOI has declared food and beverages, auto and auto parts, information technology and IT-enabled services, logistics and value-added textiles as priority sectors. All sectors and activities are open for foreign investment except for restricted industries, including arms and ammunition, high explosives, radioactive substances, securities, currency and mint, and consumable alcohol. Policies provide a regulatory framework for investments in the specific sectors and specify incentives including tariff and tax incentives, limits on foreign control and the right to private ownership, etc.

As per currency control, transfer of securities (including shares of a company incorporated in Pakistan) to a non-resident requires the permission of the State Bank of Pakistan (SBP). However, no prior SBP permission is required if a purchase of securities is made through funds credited to what are called special convertible rupee accounts (SCRAs). SCRAs may be opened by a non-resident with any bank operating in Pakistan. Funds transferred in foreign currency from outside Pakistan to an SCRA are credited in Pakistani rupees. The SCRA can be used not only to remit funds into Pakistan but also to repatriate overseas dividends, capital gains and the proceeds of disinvestments. The most common business vehicle used by foreign companies to conduct the business of investing in Pakistan is a branch office in Pakistan along with an SCRA as the channel for fund transfers.

Foreign companies that want to set up their business in Pakistan are required to obtain registration with the BOI and the Securities and Exchange Commission of Pakistan (SECP) depending on the nature of business being set up in Pakistan.

Main laws

2 | What are the main laws that directly or indirectly regulate acquisitions and investments by foreign nationals and investors on the basis of the national interest?

The main laws regulating acquisition and investments by foreign nationals and investors are as follows:

- Foreign Exchange Regulation Act 1947 (FERA 1947);

- Foreign Private Investment (Protection and Promotion) Act 1976 (FIPPA 1976);
- Protection of Economic Reforms Act 1992;
- Foreign Exchange Manual (the FE Manual);
- Companies Act 2017 (CA 2017);
- Competition Act 2010 (CA 2010);
- Securities Act 2015 (SA 2015);
- Banking Companies Ordinance 1962 (BCO);
- Public Private Partnership Act 2017;
- Special Economic Zones Act 2012;
- the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Regulations 2017; and
- the Competition (Merger Control) Regulations 2016 (the Merger Control Regulations).

The list above is by no means exhaustive.

Scope of application

3 | Outline the scope of application of these laws, including what kinds of investments or transactions are caught. Are minority interests caught? Are there specific sectors over which the authorities have a power to oversee and prevent foreign investment or sectors that are the subject of special scrutiny?

The laws are discussed below.

Foreign Exchange Regulation Act 1947

The object of the FERA 1947 is to regulate, in the economic and financial interest of Pakistan, certain payments, dealings in foreign exchange, securities, and the import and export of currency and bullion. Under the Act, basic rules and regulations are issued by the government of Pakistan and the SBP in the form of notifications, which are published in the Official Gazette. The Act provides certain restrictions on payments by persons residing in Pakistan to persons residing outside Pakistan; however, these restrictions are subject to the general and special exemptions granted by the SBP. The Act further provides an enabling framework that empowers the SBP to permit any person to deal in foreign exchange, such as money changers and exchange companies.

Foreign Private Investment (Protection and Promotion) Act 1976

As its name reflects, the FIPPA 1976 deals with the protection and promotion of foreign private investment. This Act serves as an enabling statute for the government of Pakistan as it empowers the government to authorise investment in any industrial undertaking that does not exist in Pakistan or that is not being carried on in Pakistan on a scale adequate to the economic and social needs of the country. Furthermore, the government may, for the promotion of foreign private investment, authorise investment in an industrial undertaking that will contribute to the resources of Pakistan. The Act further empowers the government to

grant tax concession, etc, and also provides for repatriation by foreign investors.

Protection of Economic Reforms Act 1992

The purpose of this Act is to create a liberal environment for savings and investments, and provide further legal protection to economic reforms to create confidence in the establishment and continuity of the liberal economic environment. The Act entitles all citizens of Pakistan and all other persons to bring, hold, sell, transfer and take out foreign exchange within or out of Pakistan. The Act further provides immunity to all persons who hold foreign currency accounts in Pakistan against any inquiry from the Income Tax Department or any other taxation authority as to the source of financing of the foreign currency accounts.

Foreign Exchange Manual

The FE Manual is a detailed manual formulated by the SBP, which covers, inter alia: the approval process of authorised dealers in foreign exchange; regulations governing Nostro accounts of authorised dealers and their operations; regulations regarding purchase and sale of foreign currencies by the authorised dealers in the inter-bank market in Pakistan, as well as purchase from and sale to the SBP and their overseas branches and correspondents; regulation of non-resident rupee accounts of authorised dealers' overseas branches, foreign correspondents and non-resident exchange companies; regulation of inward and outward remittances; regulation of dealings in foreign currency notes and coins, etc, by authorised dealers; regulation of exports, imports, commercial remittances (other than imports) and private remittances; regulation of the import and export of currency notes and coin, foreign exchange, jewellery, gold and silver; regulations governing loans, overdrafts and guarantees to companies controlled by persons resident outside Pakistan, obtaining such loans in foreign currencies and giving of guarantees on behalf of residents of Pakistan in favour of non-residents; regulation of import and export of securities; and maintenance and reporting requirements for authorised dealers regarding returns of all foreign exchange transactions.

Companies Act 2017

The CA 2017 covers all matters starting from the incorporation of a company in Pakistan to its winding up. Part XII of the CA 2017 specifically deals with foreign companies that establish a place of business in Pakistan and provides the corporate compliances for such foreign companies. Moreover, the CA 2017 also lists down the rights of minority shareholders in a company and provides that any person who holds 10 per cent of the shareholding of a company is a minority shareholder. Minority shareholders can move to the high court for the winding up of a company where the company is conducting its activities in a manner that is oppressive to the minority members, and can also file a complaint directly to the high court where the affairs of a company are being conducted or are likely to be conducted in a manner that is oppressive or unfairly prejudicial to the public interest.

Competition Act 2010

The CA 2010 primarily deals with matters that can affect competition in Pakistan and also sets out the procedures relating to the review of mergers and acquisitions, enquiries, imposition of penalties, grant of leniency and other essential aspects of law enforcement. Specifically, the Act is applied when an undertaking (domestic or foreign) intends to acquire shares or assets of another undertaking, or two or more undertakings intend to merge the whole or part of their business. The following types of mergers are regulated by the Competition Commission of Pakistan (CCP) under the Merger Control Regulations: merger, asset acquisition, share acquisition and joint venture. It is noteworthy that regulation 28 of the Merger Control Regulations specifically provides for

transnational mergers. The term 'merger', as per the law, covers joint ventures, which means they are subject to the CCP's approval provided that they meet the notification thresholds.

Securities Act 2015

When a merger involves the acquisition of the voting shares and control of a listed company, in addition to the laws and regulations stated above, it will be governed by the SA 2015 and the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Regulations 2017. In this regard, regulation 29 of these Regulations provides that 'the rights of control shall be exercised in good faith and the oppression of minority or non-controlling shareholders shall be unacceptable.'

Banking Companies Ordinance 1962

Mergers and acquisitions of banking companies are governed by the BCO and regulated by the SBP.

Public Private Partnership Act 2017

This Act primarily provides a regulatory framework to attract domestic and foreign private investment in the development of public infrastructure projects.

Special Economic Zones Act 2012

This Act provides for the establishment of special economic zones and a concessionary framework for zone enterprises.

Definitions

4 | How is a foreign investor or foreign investment defined in the applicable law?

Foreign capital has been described under the FIPPA 1976 as 'investment made by a foreigner in an industrial undertaking in Pakistan', which can be in the form of foreign exchange, machinery or any other form the federal government may approve. Foreign private investment has, in turn, been defined under the Act as 'investment in foreign capital by a person who is not a citizen of Pakistan or who, being a citizen of Pakistan, is also the citizen of any other country or by a company incorporated outside Pakistan, but does not include investment by a foreign government or agency of foreign Government'.

Special rules for SOEs and SWFs

5 | Are there special rules for investments made by foreign state-owned enterprises (SOEs) and sovereign wealth funds (SWFs)? How is an SOE or SWF defined?

Currently, no rules exist that cater specifically to investments made by foreign state-owned enterprises and sovereign wealth funds. However, under the recently enacted Public Finance Management Act 2019, the federal government is empowered to establish sovereign wealth funds through an act of Parliament. Section 20(3), which is the enabling provision in this regard, also states that the objective of a sovereign wealth fund is to act as a holding institution for public assets, which is capable of bringing to bear sound management and exploitation of opportunities for the maximisation of returns from the public assets.

Similarly, the term 'foreign state-owned enterprise' is not defined under any law, rules or regulations. However, the term 'public sector company' has been defined in the CA 2017 as a company, whether public or private, that is directly or indirectly controlled or beneficially owned by the government, a statutory body, or any instrumentality or agency of the government or a statutory body (where not less than 51 per cent of the voting securities or voting power are held by the government) that otherwise has the power to elect, nominate or appoint the majority of its directors, and includes a public sector association not for profit,

licensed under section 42 of the CA 2017. The term 'government' as mentioned in the above reproduced definition only refers to the government of Pakistan and the respective provincial government, therefore, it does not include a foreign government.

Relevant authorities

6 | Which officials or bodies are the competent authorities to review mergers or acquisitions on national interest grounds?

The competent authorities are:

- the CCP;
- the SECP;
- the SBP; and
- the company bench of a high court.

7 | Notwithstanding the above-mentioned laws and policies, how much discretion do the authorities have to approve or reject transactions on national interest grounds?

There is not much room for discretion. The law is fairly comprehensive and grounds for intervention have been laid out through case law.

Competition Commission of Pakistan

Under section 11(1) of the CA 2010, there is a prohibition on all undertakings from entering into a merger that substantially lessens competition by creating or strengthening a dominant position in the relevant market. Therefore, the CCP is vested with the authority to prohibit a transaction when it is of the opinion that the transaction substantially lessens competition by creating or strengthening a dominant position in the relevant market.

Regulation 28 of the Merger Control Regulations explicitly provides for transnational mergers and the CCP is obligated, inter alia, to treat foreign undertakings no less favourably than domestic undertakings in similar circumstances; and endeavour in reaching, insofar as possible, consistent or at least non-conflicting outcomes.

Securities and Exchange Commission of Pakistan

The SECP takes into account the facts of the matter and compliance with the prescribed thresholds and conditions while sanctioning the merger. The SECP also ensures that the transaction is not oppressive for the shareholders, especially minority shareholders, and is being conducted in accordance with law.

Lastly, the superior courts of Pakistan have repeatedly held that any discretionary power that is to be exercised by a government body needs to be exercised in a reasonable manner and cannot be exercised arbitrarily.

PROCEDURE

Jurisdictional thresholds

8 | What jurisdictional thresholds trigger a review or application of the law? Is filing mandatory?

Competition Commission of Pakistan

The pre-merger clearance regime of the Competition Commission of Pakistan (CCP) is outlined below.

With the exception of asset management companies, when a pre-merger application is necessary, one of the following requirements must be met:

- the undertaking must have gross assets worth not less than 300 million Pakistani rupees (excluding goodwill);
- the undertakings involved in the transaction must have a combined value of 1 billion Pakistani rupees;

- the annual turnover of the undertaking in the preceding year must not be less than 500 million Pakistani rupees; or
- the combined turnover of the undertakings must not be less than 1 billion Pakistani rupees.

In addition:

- the transaction must relate to the acquisition of shares or assets worth 100 million Pakistani rupees or more; or
- the acquirer must acquire voting shares that entitle it to more than 10 per cent of voting shares.

Pre-merger applications apply as soon as any one, two or more of the concerned undertakings agree in principle or sign a non-binding letter of intent to proceed with the merger.

Asset management companies

For asset management companies, one of the following requirements must be met:

- the collective exposure for the company and all its collective investment schemes in a single entity must be more than 25 per cent of the total voting rights; or
- the total assets under management of the company must be worth 1 billion Pakistani rupees or more.

In addition:

- the transaction must relate to the acquisition of shares or assets worth 100 million Pakistani rupees or more; or
- the acquirer must acquire voting shares that entitle it to more than 10 per cent of voting shares.

Exemptions

The following transactions are exempted from the requirement to file a pre-merger notification:

- a holding company increasing its stake in its subsidiaries, or if such subsidiaries acquire or increase their equity investment in each other;
- a holding company merging, amalgamating, combining or entering a joint venture with its subsidiary, or the subsidiaries merge, amalgamate, combine or enter a joint venture with each other;
- a bank, insurance company or an investment company dealing in the trading of shares for its own account for the purpose of earning dividend income and capital gains (this exemption does not apply if the intention is to acquire a controlling interest in the investee company);
- shares acquired by succession or inheritance;
- shares acquired as a gift from one's spouse or immediate blood relative;
- shares acquired through a will;
- voting shares acquired by a person acting as securities underwriter in the ordinary course of business;
- voting shares allotted pursuant to a rights issue (provided that the voting securities acquired do not increase, directly or indirectly, the acquiring person's percentage share of outstanding voting securities of the issuer);
- an undertaking involved in the business of securities acquires securities of another undertaking and sells back the acquired securities for a predetermined price within a period of six months from the date of the acquisition;
- real property or goods acquired in the ordinary course of business if the person who intends to acquire the assets will 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
- unexplored real resource property acquired for the purpose of exploration or development.

While the above transactions may be exempt from pre-merger notification, they may still be subject to substantive review, if so, deemed appropriate by the Commission.

Securities and Exchange Commission of Pakistan

The pre-merger clearance regime of the Securities and Exchange Commission of Pakistan is outlined below.

Mandatory disclosures

In accordance with regulation 4 of the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Regulations 2017, takeovers that are exempted under section 109 of the Securities Act from the applicability of the provisions of the Securities Act still need to be disclosed to the Securities and Exchange Commission of Pakistan (SECP) within two working days of the acquisition of shares.

Section 110 of the Securities Act 2015 requires that any acquirer who acquires voting shares that, taken together, would entitle the acquirer to more than 10 per cent voting shares in a listed company shall disclose the aggregate of his or her shareholding to the SECP within two working days of the receipt of intimation of allotment of voting shares or the acquisition of voting shares, as the case may be.

Mandatory requirements for acquisition of shares

As per section 111 of the Securities Act 2015, prior to the acquisition by any person, directly or indirectly, of 30 per cent voting shares or the acquisition of additional voting shares if the acquirer already holds more than 30 per cent but less than 51 per cent or acquires control of a listed company shall make a public offer to acquire voting shares of the listed company.

National interest clearance

9 | What is the procedure for obtaining national interest clearance of transactions and other investments? Are there any filing fees? Is filing mandatory?

Competition Commission of Pakistan

The CCP requires the concerned undertakings to submit a pre-merger application under section 11(3) of the Competition Act 2010 (CA 2010) and it is mandatory to file the pre-merger notification unless the transaction is exempted under regulation 5 of the Merger Control Regulations. Furthermore, as per regulation 6(1), the CCP requires the concerned undertakings to submit a pre-merger application. The application is reviewed by the CCP and if it cannot decide whether to approve the application in the Phase I review, it may decide to conduct a Phase II review. The pre-merger application can be made online or physically in the form prescribed in the schedule to the regulations.

There are two forms: the long form (Schedule I) and the short form (Schedule II). Schedule I is a general pre-merger application form and Schedule II is a pre-merger application form for the acquisition of shares on the capital markets, conglomerate mergers or group restructurings.

The applicable fee structure is provided below. All amounts provided are in Pakistani rupees.

| Turnover of merger parties (undertakings) | Fee |
|--|--------------|
| Up to 500 million | 300,000 |
| More than 500 million, but not exceeding 750 million | 600,000 |
| More than 750 million, but not exceeding 1 billion | 750,000 |
| More than 1 billion, but not exceeding 5 billion | 1.05 million |
| More than 5 billion, but not exceeding 10 billion | 1.5 million |
| Exceeding 10 billion | 2.25 million |

| Assets under management of the applicant asset management company | Fee |
|---|--------------|
| Up to 5 billion | 300,000 |
| More than 5 billion, but not exceeding 7.5 billion | 600,000 |
| More than 7.5 billion, but not exceeding 10 billion | 750,000 |
| More than 10 billion, but not exceeding 50 billion | 1.05 million |
| More than 50 billion, but not exceeding 100 billion | 1.5 million |
| Exceeding 100 billion | 2.25 million |

In addition, the following primary information is required depending on the type of transaction:

- an executive summary of the notified merger specifying (1) the parties to the merger, (2) the nature of the merger, (3) the area of activities of the parties to the merger, (4) the relevant product and geographic markets in which the merger is likely to have an impact and (5) the expected time frame for completion of various stages of the merger;
- copies of all relevant agreements, analyses and reports provided to board of directors of relevant companies;
- market shares (pre- and post-merger), along with details of sales, production and volumes, as the case may be;
- relevant market studies and anticipated changes in the market post-merger;
- explanation of the relevant market (product-wise as well as geographical); and
- copies of business plans for the current year and the preceding five years.

Securities and Exchange Commission of Pakistan

Entry No. X(22) of the Seventh Schedule of the Companies Act 2017 provides a fee of 50,000 Pakistani rupees (online filing) and 100,000 Pakistani rupees (physical filing) for sanctioning compromise or arrangement including reconstruction, amalgamation or division under sections 279 to 282.

Furthermore, in a merger or acquisition of shares of a listed company, the public announcement of offer that is submitted to the Commission must be accompanied by a non-refundable fee of 500,000 Pakistani rupees, which shall be deposited in the account of the Commission.

10 | Which party is responsible for securing approval?

Competition Commission of Pakistan

The parties to the merger are equally responsible for the filing, although in practice the parties usually decide between themselves who should file the application. Generally, parties to the merger file a joint pre-merger application to the CCP.

Securities and Exchange Commission of Pakistan

Under the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Regulations 2017 (the Takeover Regulations), the acquirer is responsible for disclosing to the target company, the CCP and the SECP the acquisition of shares pursuant to sections 109 and 110 of the Securities Act 2015.

In the case of an acquisition that falls under section 111 of the Securities Act 2015, the acquirer is required to make the public offer and the target company is obligated to inform the SECP of the public offer. Such disclosure is required to contain the information provided in Schedule V of the Takeovers Regulations.

Review process

- 11 | How long does the review process take? What factors determine the timelines for clearance? Are there any exemptions, or any expedited or 'fast-track' options?

Competition Commission of Pakistan

There are two review phases by the CCP, Phase I and Phase II. As per regulation 9(5) of the Merger Control Regulations, there is a 30 working-day period for the clearance of Phase I review application. However, this time frame will not commence unless the non-conformity, if any, has been rectified by the applicant.

Generally, majority transactions get cleared in the Phase I review. The law clearly states that failure to make a determination within the prescribed period of 30 days for the Phase I review means that the CCP has no objection to the intended merger. In practice, the CCP says that this 30 working-day period only begins to run from the time a complete application is submitted. This means that, in many cases, when you file an application before the CCP, it will respond within two weeks and demand more information. Upon furnishing this information, the CCP will then commence the 30 working-day period.

Hence, normally, a decision is provided within four weeks of the initial filing. In exceptional scenarios, it may (and has) taken six weeks – for instance, if the CCP cites an initially incomplete application. However, very few cases involving mergers actually result in a formal investigation or inquiry, as most cases are cleared after a Phase I review.

Securities and Exchange Commission of Pakistan

There appear to be no timelines prescribed for sanctioning a scheme of arrangement under sections 279 to 285 of the Companies Act 2017. Moreover, no rules or regulations for the same have been framed as of yet.

However, under the Takeovers Regulations the acquirer is obligated to submit a public announcement of intention to the target company, the CCP and the SECP, which is published in a newspaper within two days of submission. Subsequently, the acquirer is required to make a public announcement within 180 days of making the public announcement of intention. On the 54th day from the date of public announcement of offer, the public offer shall stand closed. On the 46th day, the acquirer shall, through an advertisement in a newspaper, inform the shareholders of the target company of the commencement of the acceptance period. Lastly, the acquirer shall, within two days of the date of closure of the public offer, open a special bank account and deposit therein the consideration amount for the shares along with the security furnished by the acquirer.

- 12 | Must the review be completed before the parties can close the transaction? What are the penalties or other consequences if the parties implement the transaction before clearance is obtained?

Competition Commission of Pakistan

In the case of mergers, the review must be completed before the merger is consummated. Although no penalty has been imposed by the CCP on parties to a merger transaction, there are sanctions applicable to closing before clearance and they are essentially the same as sanctions for not filing. Closing or non-filing both violate section 11(12) of the CA 2010, which is read with sections 38 and 31 of the same Act.

Regulation 14(1) of the Competition (Merger Control) Regulations 2016 (the Merger Control Regulations) provides that if the merger has been commenced without obtaining clearance from the CCP and it substantially lessens competition by creating or strengthening a dominant position in the relevant market, the CCP may impose sanctions and penalties under the CA 2010. The CCP may pass an order to undo or

prohibit the merger (after the Phase II review) or penalties may also be imposed, which include fines of up to 75 million Pakistani rupees or up to 10 per cent of the annual turnover of the undertaking or entity involved.

Securities and Exchange Commission of Pakistan

If the correct process is not complied with the SECP is empowered to debar an acquirer and any person acting in concert from acquiring voting shares of a listed company for a period of three years. Also, if any member of the board of directors or the management of the target company fails to comply with the requisite process, the SECP can disqualify any such person from holding the office of director, chief executive, chief financial officer or company secretary in a listed company for a period of two years.

Involvement of authorities

- 13 | Can formal or informal guidance from the authorities be obtained prior to a filing being made? Do the authorities expect pre-filing dialogue or meetings?

Yes. Formal or informal guidance from the CCP can be obtained prior to the filing of the pre-merger application. However, the CCP does not expect pre-filing dialogue or a meeting. Lawyers and representatives of the concerned undertakings can meet officers of the CCP's mergers department to explain their transactions after filing of formal clearance applications – although such meetings are not mandatory or necessary in each case.

Moreover, the CCP has also issued guidelines that provide a formal mechanism for seeking advice from the CCP, which entails a fee of 100,000 Pakistani rupees. The guidelines provide that the CCP shall endeavour to give advice within 30 days. However, in complex matters it may extend the time period.

Although, there seem to be no formal rules or regulations for seeking advice from the SECP, guidelines are published from time to time that comprehensively explain its procedures. However, informal guidance from the SECP can be obtained depending on the nature of the matter.

- 14 | When are government relations, public affairs, lobbying or other specialists made use of to support the review of a transaction by the authorities? Are there any other lawful informal procedures to facilitate or expedite clearance?

The teams of the requisite bodies comprise experts that are well aware of the law and the procedure for mergers and acquisitions, which means government relations, public affairs, lobbying or other specialists are not usually made use of to support the review of a transaction by the authorities. No other lawful, informal procedures to facilitate or expedite clearance exist, but ensuring compliance with the requirement of any and all applicable laws, rules and regulations would ensure timely approval.

- 15 | What post-closing or retroactive powers do the authorities have to review, challenge or unwind a transaction that was not otherwise subject to pre-merger review?

Under regulation 14(1) of the Merger Control Regulations, if the merger has been commenced without obtaining clearance from the CCP (ie, without a pre-merger review from the CCP) and it substantially lessens competition by creating or strengthening a dominant position in the relevant market, the CCP may impose a penalty as per section 31 of the CA 2010, which includes the undoing and prohibiting of the merger in question.

Moreover, once a favourable decision is made, it cannot be revoked unless, under regulation 18(1) of the Merger Control Regulations, the CCP has reasonable grounds for suspecting that information on which it has based its decision was materially incomplete, false or misleading, or

has reasonable grounds for suspecting that any of the merger parties failed to adhere to one or more terms of a commitment. The CCP may, under section 11(14) of the CA 2010, after affording the concerned undertakings an opportunity to be heard, undo such a merger or acquisition or prescribe modifications or additions to the original order.

SUBSTANTIVE ASSESSMENT

Substantive test

16 | What is the substantive test for clearance and on whom is the onus for showing the transaction does or does not satisfy the test?

The substantive test for clearance by the Competition Commission of Pakistan (CCP) is whether or not the merger is likely to substantially prevent or lessen competition of the relevant market. When determining this, the CCP assesses the strength of competition in the relevant market and the probability that the merger parties in the market after the merger will behave competitively or cooperatively, taking into account any factor that is relevant to competition in that market. In taking the relevant market into account, the CCP may be guided by the principle that the relevant geographical market comprises the area in which the merger parties are involved in the demand and supply of the goods or services, in which the conditions of competition are sufficiently homogeneous and can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

Additional factors include the actual and potential level of import competition in the market; the ease of entry into the market, including tariff and regulatory barriers; the level and trends of concentration, and history of collusion, in the market; the degree of countervailing power in the market; the dynamic characteristics of the market, including growth, innovation and product differentiation; the nature and extent of vertical integration in the market; whether the business or part of the business of a merger party or merger has failed or is likely to fail; and whether the merger situation will result in the removal of an effective competitor.

17 | To what extent will the authorities consult or cooperate with officials in other countries during the substantive assessment?

Regulation 28 of the Competition (Merger Control) Regulations 2016 (the Merger Control Regulations) explicitly deals with the issues related to the transnational mergers, including consultation and cooperation with officials in other countries during the review process. Such cooperation includes 'timing of notifications and voluntary waivers of confidentiality rights'. However, such cooperation is limited to the fact that it must not compromise effective enforcement of the domestic law.

Other relevant parties

18 | What other parties may become involved in the review process? What rights and standing do complainants have?

When conducting the review process, the CCP takes into account the entire situation and factors in the views of customers and competitors. In accordance with regulation 28(e) of the Merger Control Regulations, third parties with a legitimate interest have a right to express their view under the merger review process. Such third parties may include competitors, customers and government agencies if they have a legitimate interest in the concerned merger.

Similarly, under the Companies Act 2010 (CA 2010) the existing shareholders can also raise objections with respect to the transaction being sanctioned by Securities and Exchange Commission of Pakistan.

Prohibition and objections to transaction

19 | What powers do the authorities have to prohibit or otherwise interfere with a transaction?

Under regulation 14(1) of the Merger Control Regulations, if the merger has been commenced without obtaining clearance from the CCP (ie, without pre-merger review of the CCP) and it substantially lessens competition by creating or strengthening a dominant position in the relevant market, the CCP may impose a sanction, in accordance with section 31 of the CA 2010, which includes undoing and prohibiting the merger.

20 | Is it possible to remedy or avoid the authorities' objections to a transaction, for example, by giving undertakings or agreeing to other mitigation arrangements?

Yes. If, during the Phase I review, the CCP determines that the intended merger substantially lessens competition, it may proceed to carry out a more detailed assessment under the Phase II review. If, after a Phase II review, the CCP determines that the intended merger substantially lessens competition it may approve the merger on certain conditions, including that:

- the intended merger contributes substantially to the efficiency of the production or distribution of goods or to the provision of services, and:
 - such efficiency could not reasonably have been achieved by a less restrictive means of competition; or
 - the benefits of such efficiency clearly outweigh the adverse effects of the absence of lessening competition; or
- it is the least anticompetitive option for failing the undertaking's assets when one of the undertakings is faced with actual or imminent financial failure. However, the burden of proof shall lie with the undertaking seeking the approval.

If the CCP determines that the intended merger under review does not meet the aforementioned criteria, it may: (1) prohibit the consummation of the transaction; (2) approve the transaction subject to the conditions laid out in its order; or (3) approve the transaction on the condition that the undertakings enter into legally enforceable agreements specified by the CCP in its order.

Challenge and appeal

21 | Can a negative decision be challenged or appealed?

Yes, a negative decision can be appealed. In accordance with regulation 27 of the Merger Control Regulations, 'the person aggrieved by any order passed by any Member or authorised officer of the Commission in respect of a merger situation may file an appeal before the Appellate Bench of the Commission in accordance with the Competition Commission (Appeal) Rules, 2007.'

Section 480 of the Companies Act 2017 provides a right of appeal against an order passed by an officer of the CCP within 30 days of such order to the registrar appointed by the Commission and also provides for an appeal against the decision of the registrar to the Appellate Bench of the Commission.

Confidential information

22 | What safeguards are in place to protect confidential information from being disseminated and what are the consequences if confidentiality is breached?

Any confidential information should be clearly identified as confidential by the applicant when being provided to the CCP. If the applicant

fails to specify any part thereof as confidential, the CCP may treat the application as non-confidential. In addition, the CCP requires the applicant to submit a written statement explaining why the information is confidential.

The CCP and its officials are also obligated to take all reasonable measures to protect itself from unauthorised use or disclosure of information given to it in confidence in connection with the performance of its functions or exercise of its powers. If an official breaches this obligation, he or she will be guilty of an offence that shall be punishable with imprisonment for a term that may extend to one year or a fine that may extend to 1 million rupees, or both.

RECENT CASES

Relevant recent case law

23 | Discuss in detail up to three recent cases that reflect how the foregoing laws and policies were applied and the outcome, including, where possible, examples of rejections.

Uber and Careem case (31 January 2020)

One of the major mergers approved in 2020 by the Competition Commission of Pakistan (CCP) was the Uber and Careem merger. The decision of the CCP with regard to the merger was made on 31 January 2020.

In the case, the pre-merger application was submitted jointly by the merger parties in accordance with section 11 of the Companies Act 2010 (CA 2010) and the Competition (Merger Control) Regulations 2016 notifying the CCP of Uber's acquisition of Careem through Uber's subsidiary Augusta, pursuant to an asset purchase agreement. As per the agreement, the transaction was an asset sale and purchase, whereby the acquirer, an acquisition vehicle indirectly wholly owned by Uber, will acquire 100 per cent of the assets of Careem in Pakistan. The CCP first conducted a Phase I review, where it was determined that 'the proposed transaction was likely to substantially lessen competition through the creation or strengthening of a dominant position in the relevant market, in terms of Section 3 of the Act, and required a more detailed assessment during the Phase II Review.' This is one of the few mergers for which the CCP conducted a Phase II review. During the Phase II review, the CCP:

- reviewed submissions of the merger parties, sent several requests for information to them and reviewed responses;
- sent requests for information to stakeholders and reviewed responses;
- conducted hearings with merger parties and stakeholders; and
- conducted an independent third-party survey of consumer preferences in the relevant market. This survey was conducted in Islamabad–Rawalpindi, Lahore and Karachi to gauge the response of consumers to the transaction.

Ultimately, the CCP granted Uber approval but it was subject to conditions ensuring a level playing field for new entrants and competitors in the app-based ride-sharing market. These conditions will remain applicable to Uber for up to three years after the merger or until the occurrence of 'meaningful market entry of competitors'.

Pakistan Mobile Communications Limited and Warid Telecom (Private) Limited case (18 March 2016)

One of the major mergers recently approved by the CCP involves two telecoms giants: Mobilink and Warid. In this case, a joint pre-merger application was filed by International Wireless Communications Pakistan, Pakistan Mobile Communications Limited (Mobilink), Warid Telecom Pakistan LLC and Bank Alfalah Limited, which sought approval from the CCP to acquire 100 per cent shares of Warid Telecom (Private)

ABS & Co

Advocates and Corporate Counsels

Sarjeel Mowahid Minhas

sarjeel@absco.pk

Ahmed Reza Mirza

ahmed.mirza@absco.pk

9 Fane Road
Lahore, 54000
Pakistan
Tel: +92 42 3732 4148
www.absco.pk

Limited (Warid) by Mobilink (collectively, Merge Co) by way of a share swap agreement.

It is important to note that major competitors (ie, Telenor Pakistan Private Limited and Telenor ASA, Norway) were made necessary parties to the proceedings.

The CCP conducted the Phase I review and determined that proposed transaction was likely to raise significant competition concerns, which required a more detailed assessment in a Phase II review. The CCP conducted a Phase II review and authorised the proposed merger under section 31(1)(d)(i) of the CA 2010, subject to conditions. In its order, the CCP stressed the importance of protecting the confidential information provided with regard to the merger.

Acquisition of Pfizer Nutrition by Nestlé SA (9 October 2012)

This transaction involved the acquisition of the nutrition business of Pfizer Inc (Pfizer), incorporated in Delaware, United States, by Nestlé, incorporated in Switzerland. This was a foreign-to-foreign merger. As with the above-mentioned transactions, the CCP initiated a Phase II review of the transaction and granted its approval subject to conditions.

UPDATES AND TRENDS

Key developments of the past year

24 | Are there any developments, emerging trends or hot topics in foreign investment review regulation in your jurisdiction? Are there any current proposed changes in the law or policy that will have an impact on foreign investment and national interest review?

In November 2020, the Prime Minister, Imran Khan, approved the formation of a working group of experts to reform Pakistan's current investment regime to bring the arbitration procedure in line with international standards. The Engineering Development Board of the Ministry of Industries and Production has also introduced two major investment policies, namely the Electric Vehicle Policy 2020–2025 and the Mobile Device Manufacturing Policy 2020, which have recently been approved by the Economic Coordination Committee of the Federal Cabinet of the Government of Pakistan.

Coronavirus

25 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

To help local and foreign investors intending to invest in Pakistan through mergers, acquisitions and joint ventures during the covid-19 situation, the CCP launched an online merger and acquisition application filing system. Moreover, the CCP also started translating online applications, along with the applicable regulations, into various languages, including Chinese, Turkish, Arabic and French, with the collaboration of the relevant embassies. A video-link system was also launched to clear the backlog of various pending cases.

Banks, microfinance banks and development finance institutions (DFIs) deferred the payment of principal on loans for obligors by one year provided that the mark-up amount continues to be serviced. For borrowers and obligors whose financial conditions require relief beyond the extension of principal repayment for one year, the State Bank of Pakistan (SBP) relaxed the regulatory criteria for restructuring and rescheduling of loans. The loans that are rescheduled or restructured within 180 days of the due date of payment will not be treated as defaults. Banks are also not required to suspend the unrealised mark-up against such loans. This applies to banks, microfinance institutions and DFIs.

In addition to the relief given in January 2020, the SBP enhanced the existing limit on advance payment of US\$10,000 per invoice to US\$25,000 to facilitate manufacturing and industrial concerns and commercial importers for the import of raw materials, spare parts and machinery.

Previously, exporters could only dispatch shipping documents directly to foreign buyers if the export consignment was worth up to US\$100,000. Now, exporters can dispatch the shipping documents directly to the foreign consignees or their agents without any limit. However, this is subject to the condition that the exporter's export overdues are less than 1 per cent and the exporter had exports of at least US\$5 million during the previous three years.

Other titles available in this series

| | | | |
|-------------------------------|--|--|-------------------------------------|
| Acquisition Finance | Distribution & Agency | Investment Treaty Arbitration | Public M&A |
| Advertising & Marketing | Domains & Domain Names | Islamic Finance & Markets | Public Procurement |
| Agribusiness | Dominance | Joint Ventures | Public-Private Partnerships |
| Air Transport | Drone Regulation | Labour & Employment | Rail Transport |
| Anti-Corruption Regulation | e-Commerce | Legal Privilege & Professional Secrecy | Real Estate |
| Anti-Money Laundering | Electricity Regulation | Licensing | Real Estate M&A |
| Appeals | Energy Disputes | Life Sciences | Renewable Energy |
| Arbitration | Enforcement of Foreign Judgments | Litigation Funding | Restructuring & Insolvency |
| Art Law | Environment & Climate Regulation | Loans & Secured Financing | Right of Publicity |
| Asset Recovery | Equity Derivatives | Luxury & Fashion | Risk & Compliance Management |
| Automotive | Executive Compensation & Employee Benefits | M&A Litigation | Securities Finance |
| Aviation Finance & Leasing | Financial Services Compliance | Mediation | Securities Litigation |
| Aviation Liability | Financial Services Litigation | Merger Control | Shareholder Activism & Engagement |
| Banking Regulation | Fintech | Mining | Ship Finance |
| Business & Human Rights | Foreign Investment Review | Oil Regulation | Shipbuilding |
| Cartel Regulation | Franchise | Partnerships | Shipping |
| Class Actions | Fund Management | Patents | Sovereign Immunity |
| Cloud Computing | Gaming | Pensions & Retirement Plans | Sports Law |
| Commercial Contracts | Gas Regulation | Pharma & Medical Device Regulation | State Aid |
| Competition Compliance | Government Investigations | Pharmaceutical Antitrust | Structured Finance & Securitisation |
| Complex Commercial Litigation | Government Relations | Ports & Terminals | Tax Controversy |
| Construction | Healthcare Enforcement & Litigation | Private Antitrust Litigation | Tax on Inbound Investment |
| Copyright | Healthcare M&A | Private Banking & Wealth Management | Technology M&A |
| Corporate Governance | High-Yield Debt | Private Client | Telecoms & Media |
| Corporate Immigration | Initial Public Offerings | Private Equity | Trade & Customs |
| Corporate Reorganisations | Insurance & Reinsurance | Private M&A | Trademarks |
| Cybersecurity | Insurance Litigation | Product Liability | Transfer Pricing |
| Data Protection & Privacy | Intellectual Property & Antitrust | Product Recall | Vertical Agreements |
| Debt Capital Markets | | Project Finance | |
| Defence & Security | | | |
| Procurement | | | |
| Dispute Resolution | | | |

Also available digitally

[lexology.com/gtdt](https://www.lexology.com/gtdt)