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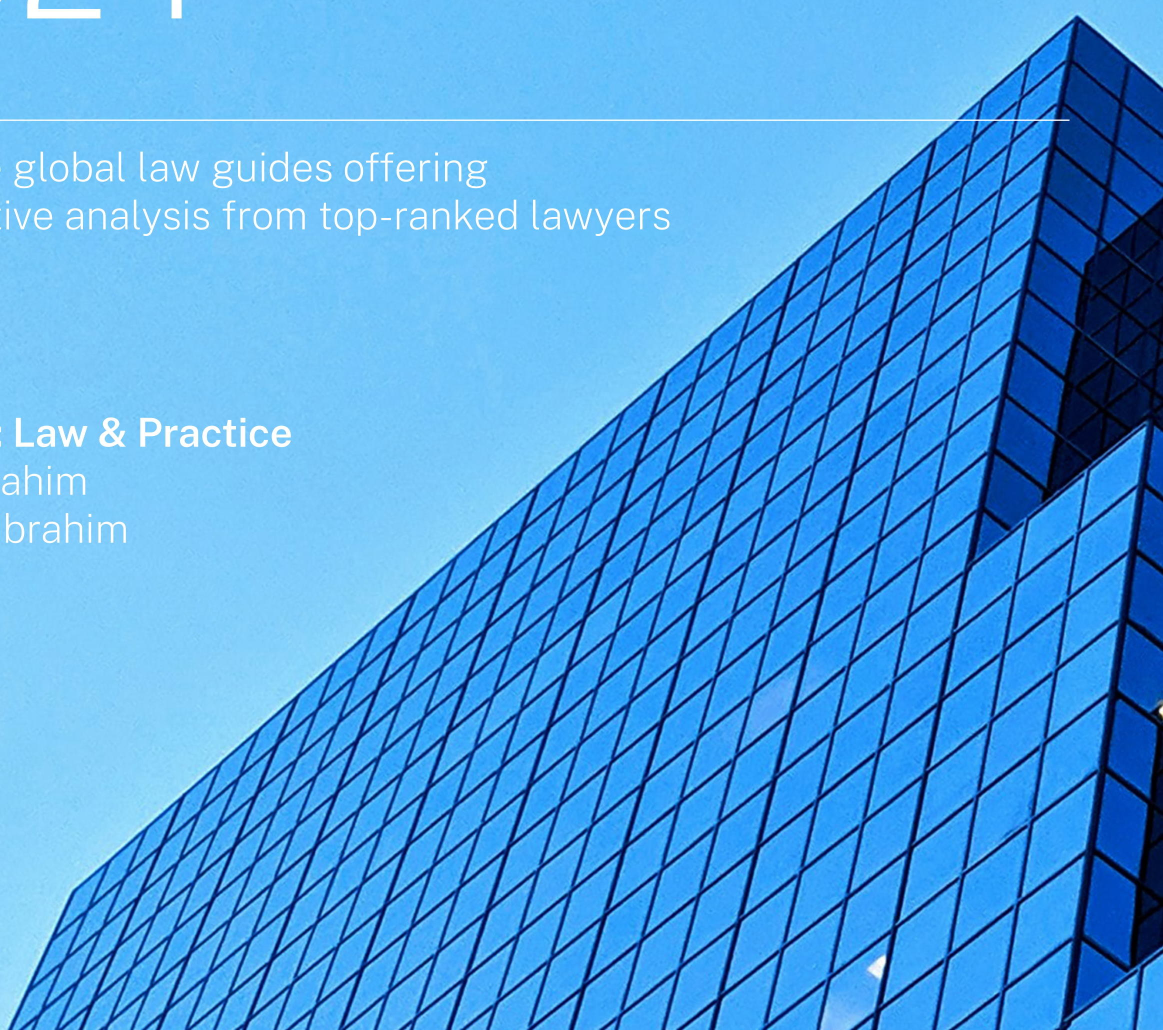

Pakistan: Law & Practice

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PAKISTAN

Law and Practice

Contributed by:
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Contents

Chima & Ibrahim was established in 1990 and specialises in advising multinationals on corporate and commercial law, with particular expertise in M&A, projects, private equity, capital markets, financings and competition. The firm counts Pepsi, VEON, Nestlé, Toyota, Cargill, Philip Morris, Citibank, Jazz, Nokia and Ericsson among its clients. It has advised on prominent cross-border M&A transactions, such as the acquisition by Jazz of the entire shareholding in Warid and the merger of Warid into Jazz; Maybank's USD1 billion acquisition of a shareholding in MCB Bank; Toyota's USD60 million acquisition of shares in Indus Motor; Philip Morris's acquisition of a majority shareholding interest in Lakson Tobacco; etc. The boutique firm has ten lawyers, four of whom are partners. The two senior partners, Khalid Ibrahim and Salman Chima, are both ranked in Band 1 in Chambers and Partners' Asia-Pacific Guide. The firm is based in Lahore and has offices in Islamabad.

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1. Trends

1.1 M&A Market

The COVID-19 pandemic had a significant impact on the M&A market in Pakistan. Not surprisingly, transaction values were at their lowest in nearly a decade during 2020 and 2021. Things have improved since then, with nearly 100 (high-value) mergers, acquisitions and joint ventures reported to the competition regulator in 2022.

Political uncertainty, high interest rates, and a weakening rupee slowed the trend in 2023 (with around 50 reported deals). However, the market is optimistic to see increased activity following the elections and the introduction of investment-friendly government policies and legislation in 2023 (as further discussed in **1.2 Key Trends**).

Acquirers looking to expand in Pakistan can take advantage of the conducive business environment the country continues to develop, and benefit from a skilled workforce.

1.2 Key Trends

While there was reduced M&A activity in 2023 compared to 2022, the market still saw plenty of movement with acquisitions in the financial services/fintech, tech, energy, pharmaceutical and food sectors. Some transactions of note in the technology and financial services/fintech sector are noted in **1.3 Key Industries**.

The government has also been making efforts to boost investor confidence, as noted below:

- The Board of Investment Policy 2023 intends to stimulate economic growth and seeks to improve the business climate through enhanced ease of doing business and improving investment protection. There is special focus on promoting investment in high-quality, export-oriented, technology-driven (especially high technology and digital technology) sectors.
- The Ministry of Planning, Development and Reform has issued "Pakistan Vision 2025" with one of its goals being to attain regional and global leadership in key target sectors, and to rank as a top ease-of-doing-business country.
- The Foreign Investment (Promotion and Protection) Act 2022 was enacted to attract large-scale foreign investment, through providing various incentives, such as tax reliefs, and ease of transfer and repatriation of foreign investments.
- The Special Investment Facilitation Council (established by the federal government) has been empowered to establish, facilitate, encourage and promote opportunities for investment and business in Pakistan. Its functions include improving ease of doing business, promoting an enabling environment for investment, monitoring programmes and projects, etc.
- Over the last few years, the State Bank of Pakistan (the "State Bank") has also liberalised its regulations making it easier for foreigners to acquire shares in companies in Pakistan, and for residents of Pakistan to acquire shares in companies abroad.
- The Pakistan Privatisation Commission has continued its efforts over the last 12 months to sell several state-owned companies, such as Pakistan International Airlines, Jinnah Convention Centre, First Women Bank, and several companies in the energy sector.

1.3 Key Industries

The technology and financial services/fintech sectors saw significant activity in 2023. Some transactions of note (involving Pakistani companies or having an impact in Pakistan) that have closed or are in the process of closing are listed below.

Technology

- The agreement to acquire 100% shareholding of Telenor Pakistan (Private) Limited by Pakistan Telecommunication Company Limited (telecoms).
- The acquisition of a shareholding of Careem Platform Inc by Emirates Telecommunications Group Company PJSC from Careem Networks FZ LLC (point-to-point delivery service).
- The acquisition of a shareholding of Integration Xperts (Private) Limited by Atlas Private Equity Fund (IT services).
- The acquisition of a shareholding of Ascertia Limited by Infocert S.P.A (IT services).
- The indirect acquisition of a shareholding of SWVL Inc, by Queen's GAMBIT Holding LLC (ride pooling).
- The acquisition of certain assets of Quixel Pakistan (Private) Limited by EG Scanning (Private) Limited (video games software).
- The acquisition of a shareholding of EON ONEBYTE (private) limited by Matrix Analytics, INC DBA EON from Muneeb Ali and Khushbakht Khan (software).
- The merger of Electronic Safety Services (Pvt) Limited with and into Security and Management Services (Pvt) Limited (security systems).

Financial Services/Fintech

- The acquisition of a shareholding of Seedcred Financial Services Limited by OPAY International Limited, etc (microfinance lending).
- The acquisition of a shareholding of Tez Financial Services Limited by Orientswiss SA (microfinance lending).
- The acquisition of a shareholding of Advans Pakistan Microfinance Bank Limited by MNT – Halan Pak B.V. (microfinance banking).
- The acquisition of a shareholding by HE Nasser Abdulla Hussain Lootah of Summit Bank Ltd (banking).
- A subscription of a shareholding of Qistbazaar (Private) limited by Bank Alfalah Limited (buy now, pay later service).
- The acquisition of a shareholding of Finja Private Limited by OPAY International (electronic money services).

The pharma/healthcare, energy, FMCG and insurance sectors also saw enhanced activity.

2. Overview of Regulatory Field

2.1 Acquiring a Company

Acquisition of shares is the dominant means of acquiring a company (although there are also asset deals on occasion). Typically, this would take the following forms.

Acquisition of Shares

A company's shares can be acquired either through purchase of shares from a shareholder or through an issuance of fresh shares by the company. Acquisitions usually involve acquiring more than 50% of the shares of the company, although management control through shareholder agreements (ie, without a majority shareholding) is also an option.

Shares are transferred or issued to the acquirer following receipt of funds, regulatory approval (if applicable to the relevant industry and under competition law), and compliance with corporate procedures and post-acquisition regulatory reporting. Foreign entities may acquire shares from local shareholders through remittance of funds from abroad, or where the acquisition is from another non-resident entity that holds shares on a "repatriable" basis, through settlement of sale consideration outside Pakistan.

In the case of a private company, the existing shareholders would have a right of first refusal in proportion to their shareholding. For listed companies, the acquirer may have to make a public offer where certain thresholds are met (see **4.2 Material Shareholding Disclosure Threshold**).

Merger/Scheme of Arrangement

More complex transactions involving multiple companies are often carried out in this fashion, which requires (depending on the size of the companies) either a petition before the High Court or an application before the Securities and Exchange Commission of Pakistan (the "Securities Commission"). Requisite documents include the scheme of arrangement, resolutions of the respective boards, and resolutions of the members and creditors approving the scheme passed by a three quarters majority.

Once the High Court or the Securities Commission, as applicable, has sanctioned the scheme, and any other regulatory approval (as applicable to the relevant industry and under competition law) has been obtained, transfers envisaged by the scheme are implemented. Certain regulatory reporting is also carried out (eg, disclosures to the stock exchange, or the public in the case of a listed company).

2.2 Primary Regulators

The following regulators are involved in the pre-acquisition, closing of acquisition, and post-acquisition stages of M&A transactions.

Pre-acquisition

Pre-merger approval of the Competition Commission of Pakistan (the "Competition Commission") is required for transactions (ie, acquisitions, mergers, joint ventures, etc) between parties that are active in Pakistan and to which the Competition Commission prescribed thresholds apply.

If the transaction is a merger/scheme of arrangement, then the sanction of the High Court/Securities Commission is also required.

Additionally, industry-specific approvals may also apply. For example, telecoms companies will require the approval of the Pakistan Telecommunication Authority for a change in control or substantial shareholding, or for the transfer of a licence. Similarly, approvals are required for banking, insurance, oil marketing, power companies, etc, under their respective regulatory framework.

If the target is listed, takeover regulations may apply, in which case the Securities Commission and the Pakistan Stock Exchange (the "Stock Exchange") would be the relevant regulators.

The sale of state-owned entities/assets is regulated by the Privatisation Commission.

Closing of Acquisition

The Securities Commission is the primary regulator for companies, and parties are required to comply with the requirements of the Companies Act 2017 (the "Companies Act") for closing, such as regarding transfer instruments, board and shareholder resolutions, the issuance and transfer of shares, and the registration of transfers/shareholders.

In the case of listed companies where shares are in book entry form, the Central Depository Company will regulate investor accounts and the transfer of book entry securities.

If shares are being transacted by a foreign resident/entity, the State Bank regulates the (inward and outward) remittance of funds.

Post-acquisition

Companies will report the transfer/issuance of shares or the merger/scheme of arrangement to the Securities Commission.

Where a foreign resident/entity acquires shares, this has to be reported to the State Bank for the registration of the shares as “repatriable” (which allows dividends and disinvestment proceeds to be converted into foreign currency and remitted out of Pakistan).

There may also be industry-specific reporting requirements. For listed companies, reporting will be done to the Securities Commission and the Stock Exchange.

2.3 Restrictions on Foreign Investments

All sectors of the economy in Pakistan are open to foreign investment, except arms and ammunitions, consumable alcohol, currency and mint, high explosives, radioactive substances, and security printing. There are no minimum investment requirements (although some sectors, such as aviation and the media, have upper limits).

Through its general permissions, the State Bank has allowed that a non-resident (including a foreign national, company or firm (including a partnership) or trust or mutual fund or private fund incorporated, registered and functioning outside Pakistan, but excluding entities owned or controlled by a foreign government) can acquire shares in Pakistani companies subject to compliance with certain foreign exchange requirements for such acquisition.

Also see **2.6 National Security Review**.

2.4 Antitrust Regulations

The Competition Act 2010

The primary antitrust legislation in Pakistan is the Competition Act 2010 (the “Competition Act”) which seeks to ensure free competition and protect consumers from anti-competitive behaviour. Various activities are regulated by the Competition Act, such as abuse of dominant position, prohibited agreements, and deceptive marketing practices. The Competition Act also empowers the Competition Commission to evaluate and approve mergers which exceed the prescribed thresholds. It may be noted that a merger in terms of the Competition Act is broadly defined to include a merger, acquisition, amalgamation, combination or joining of two or more undertakings.

The Competition (Merger Control) Regulations, 2016

Empowered by the Competition Act, the Competition Commission has prescribed the Competition (Merger Control) Regulations, 2016. The regulations stipulate thresholds which, if met, would require pre-merger approval from the Competition Commission. Certain mergers are exempt from making a filing, such as holding companies increasing their stake in, or merging with, a subsidiary, or the merging of the subsidiaries.

A merger can be closed following Competition Commission approval (which may be issued with or without conditions). Approvals are normally granted after a short Phase I review if there are no competition concerns. Conditions are usually imposed after a more detailed Phase II review where the Competition Commission is of the view that the merger will create or strengthen a dominant position in the relevant market.

Not all transactions (including some that may seem at first glance to meet the prescribed thresholds) are required to be reported. Each transaction must therefore be closely assessed on its merits to see if filing is required.

Independently of the merger approval process, ancillary restrictions within merger documentation may require separate exemption/approval from the Competition Commission.

2.5 Labour Law Regulations

Labour rights emanate from the Constitution of the Islamic Republic of Pakistan (the "Constitution"), with laws and regulations spread across provincial and federal legislation.

The Constitution contains a chapter on fundamental rights, providing (among other things): i) protection against slavery, forced labour and child labour; ii) freedom of association and the right to form unions; iii) the right to conduct any lawful profession, trade or business; and iv) equality before the law and prohibition of discrimination on the grounds of sex alone.

Some legislation of note is listed below (with respective modifications, where applicable, in each province and the Islamabad Capital Territory).

- Industrial and Commercial Employment (Standing Orders) Ordinance 1968: this addresses worker classification, leave, payment of a bonus, termination, retrenchment, gratuities, etc, for workmen (ie, a skilled or unskilled person).
- Shops and Commercial Establishments Ordinance 1969: this addresses working hours, overtime, leave, holidays, termination, etc, for employees.
- Factories Act 1934: this addresses the registration of factories, and health and safety, working hours, holidays, etc, for workers employed at a factory.
- The Employees Old-Age Benefits Act 1976: this provides for certain old-age benefits (such as insurance and an old-age allowance) for persons who are employed in industrial, commercial and other organisations.
- The Companies Profits (Workers' Participation) Act 1968: this provides for the participation of workers in the profits of companies.
- The Provincial Employees' Social Security Ordinance 1965: this addresses the provision of social security benefits to certain employees or their dependents in the event of their sickness, maternity, employment injury or death.
- The Workers' Welfare Fund Ordinance 1971: this provides for the establishment of a fund providing housing and residential accommodation and other facilities for workers.
- Workmen's Compensation Act 1923: this provides for the payment of compensation for an injury caused to a worker by an accident arising during employment.
- Industrial Relations Act: this regulates the formation of trade unions and trade union activities, relations between employers and workers, and the settlement of any disputes.
- Payment of Wages Act 1936: this regulates the time and manner of the payment of wages, permissible deductions therefrom, and the adjudication of claims in respect thereof.
- Minimum Wages Ordinance 1961: this regulates and periodically fixes the minimum rates of wages for different categories of workers.

2.6 National Security Review

Foreign entities and foreign individuals can acquire shares in Pakistani companies, and foreign individuals can also be appointed directors/chief executive officers in such companies – in either case, on submission of an undertaking confirming that such action is subject to security clearance by the Ministry of the Interior (MOI). In the case of refusal of security clearance, which is very rare (and may be challenged before the courts in certain circumstances), the foreign shareholder is required to transfer the acquired shares, and the director/chief executive is required to resign from office.

Where such entities/persons are Indian nationals or of Indian origin, prior security clearance from MOI is required.

3. Recent Legal Developments

3.1 Significant Court Decisions or Legal Developments

Parties to M&As tend to avoid disputes, and matters are usually resolved commercially or by mediation, with only a few leading to arbitration. Thus, it is rare to find any M&A-related disputes before the courts.

The Competition Commission and Competition Act

The Competition Commission and the Competition Act have, over many years, faced various challenges before the courts, including on the constitutionality of the Competition Act (which establishes and empowers the Competition Commission).

The Islamabad High Court (Writ Petition No 4942 of 2010) in 2021 declared that parliament is the competent legislature to promulgate the Competition Act to regulate trade, commerce and intercourse across provinces and within any part of Pakistan. However, the Lahore High Court (2021 CLD 214) held that the Competition Act is validly legislated by parliament to the extent of interprovincial trade and commerce, and the Competition Commission can take cognisance of any anti-competitive behaviour within the territory of Pakistan if it affects national trade and commerce beyond the territorial limits of a province.

Market Intelligence Unit

The Competition Commission, in 2023, established a Market Intelligence Unit as a new department for proactive detection of violations of Chapter II of the Competition Act (ie, abuse of dominant position, cartelisation and prohibited agreements, deceptive marketing, and merger transactions) by use of modern detection techniques (such as software, tools, econometrics models, and price movement analysis).

Strategic Plan 2020–23

The Competition Commission observed in its Strategic Plan 2020–23 the various competition issues in Concession Agreements, and noted that merger control law may apply, either to horizontal mergers between competing concessionaires or to vertical acquisitions by monopolist concessionaires that could have a harmful effect on competition in the markets.

Also see **1.2 Key Trends**.

3.2 Significant Changes to Takeover Law

Takeovers are governed by the Securities Act 2015 (the “Securities Act”) and the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Regulations 2017 (the “Takeover Regulations”).

The Takeover Regulations are amended from time to time. The most recent amendments came in February 2024. While the changes have largely been clarificatory, there have been a few noteworthy changes:

- the requirement for valuation by a chartered accountant of frequently traded shares as part of calculations of minimum offer price has been removed;
- certain options for provision of security by the acquirer have been removed/replaced; and
- regulation regarding mode of payment for the voting shares by the acquirer has been replaced.

4. Stakebuilding

4.1 Principal Stakebuilding Strategies

For listed companies, an acquirer can (in aggregate) purchase voting shares of up to 30% without being required to make a public offer. However, acquirers are required to report acquisitions that take their aggregate holding to more than 10%.

Agreements for the purchase of shares of the principal sponsors prior to launching any public offer are a common strategy, given that a substantial number of listed companies are owned by sponsor groups who also have control of the board of directors.

For unlisted companies (private or public), the acquirer must enter into direct negotiations with the selling shareholders. For private companies, the Companies Act requires that the shares of the selling shareholder must first be offered to the existing shareholders on identical terms to the terms being offered to the acquirer.

4.2 Material Shareholding Disclosure Threshold

Where an acquirer's shareholding in a listed company exceeds 10% of the voting shares, disclosure of the aggregate shareholding must be made to the target company, the Stock Exchange, and the Securities Commission within two days of acquisition. For the following 12 months, no further disclosure is required if any subsequent acquisitions do not result in the shareholding exceeding 30% in aggregate.

Proposed acquisitions in listed companies beyond 30% shareholding (in aggregate) or for control, trigger a public offer (see **6.2 Mandatory Offer Threshold**).

A listed company has to notify the Securities Commission of any change in the beneficial holding of a director, CEO or substantial shareholder (ie, a shareholder holding at least 10% of the shares) within seven days of receipt of such information.

Unlisted companies must report any change of more than 25% in shareholding or membership or voting rights, within 15 days of such change, to the Securities Commission.

4.3 Hurdles to Stakebuilding

The reporting thresholds noted in **4.2 Material Shareholding Disclosure Threshold** are statutory obligations and cannot be modified or removed through shareholder agreement or changes in company by-laws.

For private companies, shares of the selling shareholder must first be offered to the existing shareholders on identical terms to the terms being offered to the proposed acquirer.

The regulatory approvals discussed in **2.2 Primary Regulators** and the disclosures noted in **4.2 Material Shareholding Disclosure Threshold**, also operate as hurdles to stake-building.

4.4 Dealings in Derivatives

The State Bank has allowed a limited number of derivative products to derivative market participants with certain reporting and disclosure obligations. The products are foreign currency options, forward rate agreements and interest rate swaps.

In parallel, certain banks are licensed by the State Bank to undertake derivative transactions, largely to enable market participants and/or corporates to hedge their exposures in the financial markets.

The Stock Exchange allows trades of deliverable future contracts, single-stock cash settled futures, stock index futures contracts, and index options. Short sales and/or blank sales effected to manipulate the price of listed security or derivative contracts are prohibited.

4.5 Filing/Reporting Obligations

Banks are required to submit prescribed reports and related statements to the State Bank in respect of their derivative transactions from time to time, including disclosing the risks, losses, profit variations of their derivative business and any extraordinary situations, according to the financial disclosure requirements in force.

The Stock Exchange also has certain reporting requirements – for example, while opening any deliverable futures contract, the Stock Exchange has to notify the name of the issuer, date of opening, date of settlement of the said contract and other relevant details.

4.6 Transparency

In the case of public offers, the acquirer is first required to make a public announcement of intention in the newspapers, with notice to the target company, the Stock Exchange and the Securities Commission. Certain prescribed information must also be provided.

This is to be followed by a public announcement of the offer within 180 days of the public announcement of intention (extendable by the acquirer by up to 90 days with intimation to the Securities Commission). The acquirer is required to provide, among other things, their reasons for acquiring shares or control, and details regarding the future plans of the target company (including if it will continue to be listed post acquisition).

The acquirer is also generally obliged to disclose any information which may be necessary to enable the shareholders of the target company to make an informed decision.

Also see **7.2 Type of Disclosure Required**.

5. Negotiation Phase

5.1 Requirement to Disclose a Deal

The target, if a listed company, is required to immediately notify the Stock Exchange and the Securities Commission in the following circumstances:

- in the case of a public offer –
  - (a) on notice by the acquirer of a firm intention to acquire;
  - (b) when negotiations or discussions are about to commence for the acquisition; or
  - (c) on notice from a director, chief executive and/or a majority shareholder that they individually or in concert with each other

or their family members or associates are entering into negotiations for sale of their shareholding; and
- when the target company is the subject of rumour and speculations or there is an unusual movement in its share price or traded volume and there are reasonable grounds to conclude that the potential acquirer's actions have led to this situation.

A listed company is also required to immediately disseminate to the Securities Commission and Stock Exchange any price-sensitive information, which includes information regarding any joint venture, merger, acquisition, purchase or sale of significant assets, etc. In limited circumstances such disclosure can be delayed, provided the information can be kept confidential.

The pre-acquisition approvals listed in **2.2 Primary Regulators** may also be noted. These apply to all companies and involve disclosures to the regulators prior to approval and the consummation of the transaction.

5.2 Market Practice on Timing

Parties must comply with legal requirements regarding the timing of disclosures.

Regarding the Competition Commission pre-merger approval process, parties are required by the Competition Act to submit a pre-merger application as soon as they agree in principle, or sign a non-binding letter of intent to proceed with a merger. However, the Competition Commission permits, and it is also common practice for, the parties to submit executed definitive documents with their application, with closing subject to the approval of the Competition Commission.

5.3 Scope of Due Diligence

In most cases, the acquirer conducts due diligence on the target company to get a sense of the business and to identify any "red flags". Representations and warranties, as well as indemnifications sought from the seller in sale purchase agreements are usually dependent on the extent of this due diligence. General due diligence encompasses legal, business, technical and financial checks, and may include reviews of corporate and regulatory/statutory compliance, contracts, disputes and litigation, employment, financings, intellectual property, real estate, etc.

The use of virtual data rooms is now common and makes the process very efficient. Effective due diligence also relies on the support/provision of information by the senior management and shareholders of the target company.

Highly regulated businesses tend to require much deeper due diligence. Commercial considerations and the size and complexity of the transaction further dictate the scope of due diligence.

5.4 Standstills or Exclusivity

Acquirers do often ask for "exclusivity" while the transaction is being negotiated. Other than in transactions involving multiple bidders (such as in privatisations), the seller generally agrees to give the acquirer a period to exclusively conduct due diligence and to negotiate transaction documents.

Acquirers also require standstill obligations (in terms of definitive agreements) to limit the target company to conducting business in the ordinary course without making any substantial changes. The longer the period required to close the transaction, the more critical such obligations become. For listed target companies, there are also statutory prohibitions on certain activities during the period of a public offer.

5.5 Definitive Agreements

There is no requirement for a definitive agreement for the acquisition of shares through a public offer. However, an acquirer is free to enter into definitive agreements (eg, with substantial shareholders of the listed company).

The acquisition of shares of unlisted companies involve definitive agreements.

6. Structuring

6.1 Length of Process for Acquisition/ Sale

Unlisted Companies

For unlisted companies, the length of time for acquiring/selling a business is dependent on various factors, including the type of transaction (an acquisition of shares or a scheme of arrangement which requires Securities Exchange/court approval), the scope of due diligence, negotiations, and regulatory approvals (industry specific and/or competition related, as discussed below).

If the Competition Commission finds no presumption of dominance or other competition concerns, a notifiable transaction will likely be approved in the Phase I review stage (within 30 working days of receiving a complete application).

If the Competition Commission is unable to conclude that the merger does not raise competition concerns, it will initiate a Phase II review (a period of 90 working days from the date of notice by the Competition Commission and receipt of further information from the parties).

There are usually no fixed time periods specified for the issuance of regulatory approvals, and the timing depends on how diligently the matter is pursued. If there is to be an amalgamation through a scheme of arrangement, that is expected to take three to six months, subject to the availability of the court, or the Securities Commission, as the case may be.

Public Offer

In the case of a public offer, an acquirer has 180 days (extendable to 270) from the date of public announcement of the intention to buy to make a public announcement of the offer. The acquirer conducts due diligence during this time. Time taken for any regulatory approval, whether industry specific and/or competition related, is also to be factored in.

The transfer of securities can be implemented on the 76th day following the public offer.

6.2 Mandatory Offer Threshold

There is a mandatory offer threshold when acquiring shares of a company whose shares are listed on the Stock Exchange. In terms of the Securities Act, a public offer is to be made where a person, directly or indirectly, intends to:

- acquire voting shares, which (taken together with the voting shares already held by such person) would entitle such person to more than 30% of the voting shares in a listed company; or
- acquire additional voting shares where the acquirer already holds more than 30% but less than 51% of the voting shares of a listed company, provided that such acquirer will not be required to make a fresh public offer within a period of 12 months from the date of the previous public offer; or
- acquire control of a listed company.

6.3 Consideration

Cash is the most common method of payment for shares.

For listed companies:

- consideration for the voting shares can be paid wholly in cash or in the form of certain prescribed securities together with a wholly cash alternative;
- the Takeover Regulations also prescribe a mechanism to establish the minimum offer price for the shares; and
- the acquirer is required – within a period of ten days from the date of the closure of the public offer – to complete payment of consideration to the shareholders who have accepted the public offer.

For other companies, shares can be acquired through various methods, such as cash, in-kind payments, or share swaps. The parties are also free to agree on payment structures and timing.

6.4 Common Conditions for a Takeover Offer

Various conditions for public offers are noted in the Takeover Regulations, including:

- the appointment of a manager to the public offer;
- public announcements of intention and public offer, and the circumstances of their withdrawals;
- minimum acceptance conditions (discussed in **6.5 Minimum Acceptance Conditions**);
- the mechanism to determine the minimum offer price;
- furnishing of security by the acquirer to secure obligations;
- modes of payment for consideration for voting shares;
- the general obligations of the acquirer (including making a public offer only after careful and responsible consideration), the board of the target company, and the manager;
- disclosures;
- equality of treatment of shareholders; and
- compliance with the offer timetable.

6.5 Minimum Acceptance Conditions

In addition to any voting shares already held or acquired by the acquirer through an agreement, the acquirer must make a public announcement of offer to acquire at least 50% of the remaining voting shares of the target company. Where the public offer is conditional upon minimum levels of acceptance, such minimum level cannot be more than 35% of the remaining voting shares.

6.6 Requirement to Obtain Financing

There is no obligation for the acquirer to obtain financing for the public offer. However, the acquirer must ensure that firm financial arrangements for fulfilment of the obligations under the public offer are in place, and suitable disclosures in this regard have been made in the public announcement.

An acquirer can potentially allow a public announcement of intention to lapse if unable to obtain financing (by not following up with a public announcement of offer). Withdrawal has to be notified and reasonable cause or reason has to be given.

6.7 Types of Deal Security Measures

Deal security measures are common in acquisitions, and may take the shape of break-up fees, non-solicit and confidentiality clauses, standstill provisions, etc. “Material adverse effect” clauses also operate to allow a party to walk away in specified situations. Acquirers may also require clauses ensuring seller and/or target company assistance for regulatory approvals.

6.8 Additional Governance Rights

An acquirer is legally entitled to representation on the board of directors of the target company in proportion to its shareholding. It is not uncommon, however, for the shareholders to agree to give the acquirer extra representation on the board. Acquirers of majority shareholdings are also well placed to appoint their own nominee to be the chief executive officer (who is also a deemed director).

The right to appoint the majority of the board without a majority shareholding is considered "control" and in the case of listed companies, this will trigger the requirement to make a public offer – in addition to requiring approval by the Competition Commission (where the prescribed thresholds are met).

Parties also tend to include veto rights over certain shareholder decisions in transaction documents.

6.9 Voting by Proxy

Members/shareholders of a company may participate, speak and vote in meetings through a proxy (who must be a member/shareholder, unless the articles of association of the company allow otherwise). Only one proxy per member is allowed. Additionally, companies are allowed to conduct shareholder and board meetings through video-conferencing, which means that physical participation is not required.

6.10 Squeeze-Out Mechanisms

Section 285 of the Companies Act creates a right (but also an obligation in certain situations) for a company acquiring 90% or more of the shares of another company to also acquire shares from the remaining shareholders on the same terms. Thus, Section 285 creates drag-along as well as tag-along rights where 90% or more of a company's shares come to be acquired by the transferee company. The object is that when a small minority remains in a company, the option should be available to both parties to buy out or sell out.

Historically, Section 285 is clubbed with provisions of the Companies Act relating to mergers, amalgamations, and compromise schemes (with creditors or members), but it may be available on a standalone basis as well.

The Takeover Regulations provide that the right to govern listed companies must be exercised in good faith and that the oppression of minority or non-controlling shareholders is unacceptable. The Companies Act also empowers the court to make orders where the affairs of the company are conducted in a manner that is oppressive to the members/shareholders.

6.11 Irrevocable Commitments

For listed companies, agreements for the purchase of shares of the principal shareholders prior to launching any public offer are common. It is also possible to enter an agreement with the principal shareholder(s) that they will accept the public offer bid price when that is made, in accordance with the Takeover Regulations. One object of such agreements is to make it binding on the principal shareholders to sell their shares on the agreed terms, even if a competing offer is made by another party.

These regulations also require the acquirer to make a public announcement of intention before (among other things) entering negotiations for a share purchase agreement or commencing a due diligence process to evaluate the share price of the target company.

Additionally, the target company is required to make the requisite disclosures when negotiations or discussions are about to commence with another party acquiring control or voting shares of the target company that trigger a public offer.

7. Disclosure

7.1 Making a Bid Public

An acquirer has 180 days (extendable to 270) from the date of the public announcement of intention to make a public offer. The acquirer is required to make a public offer in the newspapers, with notice to the target company, the Stock Exchange, and the Securities Commission.

A competitive bid is to be made within 21 days of the public offer in the same newspaper. At least four days prior to publication in the newspaper, notice is given to the acquirer under the first offer, the target company, the Stock Exchange, and the Securities Commission.

In the case of competitive bids, the acquirer under the first offer has the option to either revise or withdraw the offer by public announcement.

7.2 Type of Disclosure Required

Various disclosures are required to be made by the bidder when making a public offer. These include, among others:

- reasons for acquiring shares or control;
- details regarding the future plans of the target company (including if it will continue to be listed post acquisition);
- an overview of the important features of any agreements with the present management, promoters or existing shareholders of the target company;
- justifications for the offer price;
- details of financial arrangements;
- a brief history and the major areas of operation of the acquirer;
- the names and addresses of sponsors or persons having control over the acquirer and the board of directors;
- details of any agreement or arrangement with directors of the target company; and
- details of any agreement through which shares were purchased.

The acquirer is also generally obliged to disclose any information which may be required for the shareholders of the target company to make an informed decision.

The acquirer is to ensure that the identities of all persons interested in the acquisition, including the persons who make arrangements for all the funding requirements and who will exercise ultimate control over the target company, are disclosed to the public and the target company.

7.3 Producing Financial Statements

Certain financial information regarding the bidder (if a company) is required to be disclosed in the public offer document. This includes the bidder's brief, audited financial details for a period of at least five years, including income, expenditure, profit before depreciation, interest and tax, depreciation, profit before and after tax, provision for tax, dividends, earnings per share, return on net worth, and book value per share. A bidder may also consider sharing its financial statements in light of the general obligation to disclose any information which may be required for the shareholders of the target company to make an informed decision.

Financial statements for companies incorporated in Pakistan are to be prepared in accordance with the Companies Act, provided that any company that intends to unreservedly comply with the international financial reporting standards issued by the International Accounting Standards Board will be permitted to do so.

7.4 Transaction Documents

In the case of public offers, various documents must be submitted to the Securities Commission along with the public announcement offer, and these include a copy of any agreement for the acquisition of shares and/or control of the target company. The public offer document also requires details of any agreement:

- through which shares are purchased;
- between the acquirer and directors of the target company; and
- with management, promoters, or existing shareholders of the target company.

The pre-acquisition approvals listed in **2.2 Primary Regulators** may also be noted. These apply to all companies and involve disclosures to the regulators, including submission of transaction documents.

8. Duties of Directors

8.1 Principal Directors' Duties

The Companies Act requires directors of a company to:

- act in accordance with the articles of the company;
- act in good faith in order to promote the objectives of the company for the benefit of its members as a whole, and in the best interests of the company; its employees, the shareholders, the community and for the protection of environment;
- discharge duties with due and reasonable care, skill and diligence, and exercise independent judgement;
- not be involved in a situation where they may have a direct or indirect interest that conflicts, or possibly could conflict, with the interest of the company;
- not achieve or attempt to achieve any undue gain or advantage including for relatives, partners, or associates, and if found guilty of making any undue gain, to pay an amount equal to that gain to the company; and
- not assign the office.

The following obligations under the Securities Act and the Takeover Regulations should also be noted:

- once the public announcement of intention has been made, the board of directors of the target company cannot appoint any person who represents or has an interest in the acquirer as an additional director or against a casual vacancy on the board of directors, until acquisition is completed;
- the board of directors of the target company, during the offer period, cannot –
  - (a) sell, transfer, or otherwise dispose of or enter into an agreement for the sale, transfer, or disposal of the undertaking or a sizeable part thereof, not being the sale or disposal of assets in the ordinary course of business of the company or its subsidiaries;
  - (b) encumber any asset of the company or its subsidiaries;

(c) issue any further shares; or
(d) enter into any material contract;
- if any director of an acquirer that is a public company is faced with a conflict of interest as a result of a proposed acquisition, the acquirer's board of directors is to establish an independent committee to assess the proposed public offer;
- directors of an acquirer company are responsible for any announcement, offer letter, advertisement or publicity material issued to shareholders;
- the board of directors of the target company is to send its unbiased comments and recommendations on the public offer to the shareholders, if so desired by the acquirer(s) or shareholder(s) of the target company; and
- the board of directors of the target company is to facilitate the acquirer in the verification of securities tendered for acceptance.

8.2 Special or Ad Hoc Committees

It is not uncommon for companies to establish special or ad hoc committees. Listed companies are even required by law to establish certain committees (eg, an audit committee, and a human resource and remuneration committee).

In the case of a public offer, if the acquirer is a public company, its board of directors is required to establish an independent committee to assess the proposed public offer where any of its directors have a conflict of interest.

A director of a public company is required to recuse themselves from any matter before the board where they may have a direct or indirect interest that conflicts or may possibly conflict with the company. If more than one director is conflicted and a resolution cannot therefore be passed, the matter would then go for consideration before the members of the company, and not to any committee.

8.3 Business Judgement Rule

Decisions of the board of directors in a takeover are rarely challenged and a court is also unlikely to review such decisions unless there are genuine claims of irregularity, impropriety, or conflict of interest.

8.4 Independent Outside Advice

Seeking advice from consultants and experts is a matter of course and prudent practice for all parties to an M&A deal. For example, an acquirer will appoint independent consultants to conduct the legal, business, technical and financial due diligence of the target company, following which, the board of directors will make a decision.

During a takeover, an acquirer is also required to have a manager of the offer and has to disclose the names of its financial advisers.

Each party will also hire consultants (legal and financial, in particular) to advise them through the M&A deal.

8.5 Conflicts of Interest

Directors of public companies are obliged to avoid conflicts of interest and to recuse themselves from decisions on matters where they are conflicted. Also see **8.1 Principal Directors' Duties** and **8.2 Special or Ad Hoc Committees**. The Securities Commission regulates such matters and on occasion will investigate any issues they identify.

9. Defensive Measures

9.1 Hostile Tender Offers

There is no prohibition on a hostile tender offer. However, given that a substantial number of listed companies are owned by sponsor groups who also have control of the board of directors, hostile takeovers are extremely rare.

9.2 Directors' Use of Defensive Measures

Defensive measures are not prohibited but would be more easily implemented in private companies, as shareholders of a public company cannot generally be prevented from selling their shares to a third party (unless there is a shareholders' agreement that prevents such sale in specified circumstances).

9.3 Common Defensive Measures

See **9.2 Directors' Use of Defensive Measures**.

9.4 Directors' Duties

Directors must act in good faith and in the best interests of the company, its employees, and the shareholders. In the case of public offers, they are also obliged to provide unbiased comments and recommendations to the shareholders. See also **8.1 Principal Directors' Duties**.

9.5 Directors' Ability to "Just Say No"

Shareholders of a public company cannot generally be prevented from selling their shares to a third party. See all the responses in this section.

10. Litigation

10.1 Frequency of Litigation

It is rare to find any M&A-related disputes before the courts.

10.2 Stage of Deal

If at all, litigation is more likely to emanate before the completion of the takeover, acquisition or merger.

10.3 "Broken-Deal" Disputes

There were instances of deals being stalled or suspended because of the COVID-19 pandemic, but there is no record of these having led to litigation.

11. Activism

11.1 Shareholder Activism

Shareholders holding not less than a 10% shareholding in a company can take any of the following actions:

- petition the court if a company's affairs are being conducted in an unlawful or fraudulent manner, or in a manner not provided in its memorandum, or in a manner oppressive to the members or creditors or the shareholders with such shareholding, or in a manner that is prejudicial to the public interest;
- seek a winding-up of the company if the company is conducting business in an oppressive manner;
- apply to the Securities Commission to investigate the affairs of the company;
- propose auditors for the company;
- seek the fresh election of directors in the case of any material irregularity;
- requisition a meeting of the shareholders (or call it themselves if the directors are inactive); and/or
- seek to have a meeting declared invalid.

Shareholder activism is rare. Most listed companies are held by formidable sponsor groups that control the board. Thus, unless a shareholder holds at least a 10% shareholding, it is not easy to take action.

11.2 Aims of Activists

Activism tends to have positive outcomes, and may improve company performance, address inefficiencies, and push minority nominees onto the board.

11.3 Interference With Completion

Interference with completion by shareholder activists is rare in Pakistan.

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