COUNTRY COMPARATIVE GUIDES 2021

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Pakistan

MERGERS & ACQUISITIONS

Contributing firm

RIAA Barker Gillette

Bilal Shaukat

Managing Partner | bilal.shaukat@riaabg.com

Shafaq Rehman

Partner | shafaq.rehman@riaabg.com

Adil Tirmizey

Partner | adil.tirmizey@riaabg.com

Warda Tahir

Associate | warda.tahir@riaabg.com

This country-specific Q&A provides an overview of mergers & acquisitions laws and regulations applicable in Pakistan.

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PAKISTAN
MERGERS & ACQUISITIONS

1. What are the key rules/laws relevant to M&A and who are the key regulatory authorities?

Where the shares which are the subject of acquisition belong to a listed company, Part IX (*Takeovers*) of the Securities Act, 2015 (the **"Securities Act"**) applies together with the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Regulations, 2017 (the **"Takeover Regulations**") which have been notified under the Securities Act. Certain transactions are exempt from the application of Part IX of the Securities Act including right issue, acquisition of voting shares in the ordinary course of business by banks and financial institutions as enforcement of security, a scheme of arrangement or reconstruction including amalgamation or merger or de-merger under any law for the time being in force, sales of shares in pursuance of a privatisation, and acquisition inter se amongst qualifying persons (such as relatives, major shareholders etc). The key regulatory authority is the Securities and Exchange Commission of Pakistan (the **"SECP"**). The provisions of the Pakistan Stock Exchange Regulations (the **"PSX Regulations"**), notified, *inter alia,* under the Securities Act are also relevant where M&A involve listed companies.

The SECP has been formed under the Securities and Exchange Commission of Pakistan Act, 1997. Its regulatory ambit includes the corporate sector, the capital markets, the financial sector (other than banking) and insurance companies as well as the service providers to the aforementioned. The SECP has separate divisions for the different sectors that it regulates. For the purposes of enforcement under the Securities Act, the relevant division is the Securities Market Division of the SECP.

Pakistani law also allows for schemes of arrangement. The Companies Act, 2017 (the **"Companies Act"**) provides the general framework for a scheme of arrangement for amalgamations and restructurings of companies and, *inter alia,* allows companies to enter into an arrangement with their members or creditors.

Schemes of arrangement under the Companies Act are sanctioned by the SECP or the relevant High Courts, depending on the size of the companies involved (which is determined based on, *inter alia,* turnover and number of employees). Separate legal frameworks are applicable to companies which undertake regulated businesses, e.g, the framework for banks has been provided in the Banking Companies Ordinance, 1962, and the framework for insurance companies has been provided in the Insurance Ordinance, 2000.

M&As involving foreign exchange and cross-border transfer of securities will be further subject to the Foreign Exchange Regulation Act, 1947, and the circulars and notifications issued thereunder from time to time. The relevant regulatory authority is the State Bank of Pakistan which undertakes the regulation under the Foreign Exchange Regulation Act, 1947, through its Exchange Policy Department.

The key anti-trust legislation is the Competition Act, 2010 (the **"Competition Act"**). The Competition (Merger Control) Regulations, 2016 (the **"Merger Control Regulations"**) have been notified pursuant to the Competition Act. The provisions of the Competition Act and the Merger Control Regulations are enforced by the Competition Commission of Pakistan (the **"Competition Commission"**).

Where companies the subject of a M&A are undertaking a regulated business, such as banking and insurance, sector specific requirements may exist and prior approval from the regulatory bodies is ordinarily required from the relevant regulatory authority. For example, an acquirer will require the prior approval of the State Bank of Pakistan if the acquirer will on any acquisition hold (beneficially or otherwise) five percent (5%) or more of the shares of a banking company. Similarly, in case of insurance companies, approval from SECP is required for any proposed transaction for the acquisition of a shareholding of more than ten percent (10%) in an insurance company, or, in the case of a non-life insurer, of the whole or any part exceeding ten percent (10%).

When an M&A involves sale of the government's assets to a private person, applicable privatization laws also become relevant. Some of the major recent M&As in Pakistan have involved disposal of the federal government's assets to private persons. The privatization of the federal government's assets are undertaken through the Privatisation Commission, a body corporate established under the Privatisation Ordinance, 2001.

2. What is the current state of the market?

The private sector M&A market in Pakistan has remained depressed over the last year on account of COVID-19. The government has, however, been attempting to push a major privatisation agenda. Last year it unveiled a plan to privatize more than two dozen state owned entities. Several M&As involving privatization of the federal government assets which had been in the pipeline last year unfortunately fell through on account of increased uncertainty due to COVID-19.

In response to the pandemic the government made available various support policies to encourage investors to undertake new projects. Investors have been exploring these supportive government policies which include tax benefits and amnesty for builders and developers in the construction sector, low-cost housing and State Bank of Pakistan's refinancing scheme which provides concessionary refinancing for setting up of new industrial units. Together with the aforementioned, establishment of public-private partnership and special economic zones for tech companies has also fostered investment in new projects as opposed to M&As.

There has also been a significant rise in venture capital funding particularly in areas of e-commerce and healthcare. The number of tech startups also rose and has been helped by an investor friendly e-commerce policy, tax advantages for start-ups and software companies as well as relaxation of foreign exchange structures for such enterprises. This trend is expected to continue, given Pakistan's estimated 32 million smart phone users and accompanying development of payment systems.

3. Which market sectors have been particularly active recently?

The major sectors where M&As took place include power, technology and financial services.

4. What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?

Transformations in the Global Markets

M&A of companies at the global level affect the subsidiaries of such companies in Pakistan leading to a direct or indirect change of shareholding of companies in Pakistan. Global market trends will continue to be a key influencing factor for M&A activity in Pakistan.

Coronavirus

The coronavirus pandemic caused great uncertainty within the market. As companies become more comfortable with this hiatus, some companies may seek to create alliances to adapt to the changes brought on by the pandemic and to salvage investment options to transform their businesses in the long-run while other companies may seek to release funds tied up in capital through asset sales to focus on their core businesses which they may need to adapt their businesses to the challenges posed by the pandemic.

Tech

Pakistan has been undertaking initiatives aimed at ease of doing business which has resulted in an start-up culture within Pakistan. As founders pitch in with innovative ideas, M&As involving tech start-ups are likely to continue to be common thereby allowing small tech companies access to capital and enabling them to speed up expansion. Series A investments however tend to be relatively common. The startup activity within the technology industry has been helped particularly by an investor friendly e-commerce policy. E-commerce and fintech have been two of the more popular sectors for start-ups, and have seen investment from venture capital firms.

5. What are the key means of effecting the acquisition of a publicly traded company?

One means of effecting the acquisition of a publicly traded company, i.e. a company listed on the Pakistan Stock Exchange, is through a public offer addressed to the shareholders holding voting shares in the listed company. "Voting Shares" means shares in the equity share capital of the target company carrying voting rights and includes any security which entitles the holder of such security to obtain or exercise voting rights and includes all depository receipts carrying an entitlement to exercise voting rights in the target company.

Another method of acquisition of a listed company is through a scheme of arrangement with the members of the company or any class of them. The power to sanction an arrangement under the Companies Act has been granted to the SECP but is currently being exercised by the company bench of the High Courts for all public interest companies, large sized companies and medium sized companies (other than public sector companies owned by the federal government).

Henceforth, unless stated otherwise, all responses have been provided on the assumption that the target company is a listed / publicly traded company.

6. What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

The financial statements, including quarterly financial statements, of listed companies are required to be made publicly available[1]. Further information is publicly available from the registrar of companies e.g. information with respect to the directors and shareholders, as well as key details of registered encumbrances of a company and the constitutional documents of a company can be obtained from the companies' registrar through a search report on payment of prescribed fee. The pending litigation of the target company may also be checked but the availability of such information will depend on the type of court / tribunal etc. where such litigation is pending. Key information with respect to a companies' assets may be available via publicly accessible registers, including the land register, land revenue boards, and register of intellectual property rights. Announcements related to the target company on the Pakistan Stock Exchange may also be viewed.

Pursuant to regulation 25 of the Takeover Regulations, the target company is required to ensure that the acquirer and the manager to the offer are provided with all relevant and material information which they require for the purposes of the due diligence. This obligation only arises after a public announcement of intention has been made.

[1] Section 223(7) & 237(2) of CA 2017

7. To what level of detail is due diligence customarily undertaken?

The level of detail will be contingent on, *inter alia,* the commercial considerations of the acquirer, the structure of the transaction, the size of the target company and the specific sector related laws.

Where the target company and acquirer are both local, relatively detailed legal due diligences are common particularly where the target company is undertaking a regulated business. Where the M&A relates to indirect acquisition of a subsidiary of the target company in Pakistan (which are not ordinarily listed), red flag legal due diligences are more common. The acquirer often outlines materiality and quantitative thresholds for the purposes of due diligence to save time and costs.

Ordinarily, the legal due diligence covers general corporate information, pending and threatened litigation proceedings and other disputes, regulatory compliance, land related documents, material contracts including financing documents and related security etc.

8. What are the key decision-making organs of a target company and what approval rights do shareholders have?

The key decision making organ is the board of directors. The board of directors is entitled to exercise all such powers of the company which are not required to be exercised by the company through its shareholders in a general meeting pursuant to the Companies Act or the articles of association of the company.

The shareholders elect the board of directors. The shareholders have various approval rights under the Companies Act and may be granted further approval rights under the articles of association of the company. Section 183(3) of the Companies Act provides that the board of directors shall not except with the consent of the general meeting either specifically or by way of an authorization, *inter alia,* (a) sell, lease or otherwise dispose of the undertakings or a sizeable part thereof unless the main business of the company comprises of such selling or leasing; or (b) sell or otherwise dispose of the subsidiary of the company. Notwithstanding the foregoing, a listed company is not entitled to sell or otherwise dispose of the undertaking, which results in or may lead to closure of business operation or winding up of the company, without there being a viable alternate business plan duly authenticated by the board of directors.

Approval of the shareholders is also required for any amendments to the constitutional documents of the company including where the amendments seek to vary the rights of shareholders.

9. What are the duties of the directors and

controlling shareholders of a target company?

Directors

Section 119(1) of the Securities Act provides that during the *"offer period"* the board of directors of a target company shall not (a) sell, transfer, or otherwise dispose of or enter into an agreement for sale, transfer, or for disposal of the undertaking or a sizeable part thereof, not being 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 subsidiary; (c) issue any further shares; or (d) enter into any material contract. The term *"offer period"* has been defined in the Securities Act as the period from the date of public offer to the date of closure of public offer or earlier withdrawal of such public offer.

Further, pursuant to section 119(2) of the Securities Act, once the public announcement of intention has been made and till the acquisition is completed, the board of directors of the target company shall not 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.

Regulation 25 of the Takeover Regulations sets out the general obligations of the target company. These include an obligation to send 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.

For a scheme of compromise/arrangement under Companies Act, a statement is required to be sent to members/creditors, as the case may be, under Section 281(1)(a) of the Companies Act setting out any material interest of the directors including the chief executive of the company and the effect on those interests, of the compromise or arrangement if, and in so far as, it is different from the effect on the like interest of other persons.

These duties are in addition to the statutory duties to which directors of a company are ordinarily subject.

Shareholders

Shareholders do not have any specific duties within the context of M&As. Note however that under the Companies Act, shareholders do have a duty to act in good faith while exercising their powers as a shareholder at general meetings.

10. Do employees/other stakeholders have any specific approval, consultation or other rights?

We are not aware of any specific provisions that require mandatory consultations with employees or stakeholders within the context of M&As. Such consultation rights may arise in terms of the contract of employment with employees. Privatisations require specific approval from the Federal Cabinet. Do note that approval of shareholders may be required if *inter alia* the merger is being sanctioned by way of a scheme of arrangement and/or the acquisition involves the sale of a sizeable part of the undertaking. Please see responses to 8 and 27 for further details.

Pursuant to the labour laws, the termination of more than fifty percent (50%) of the workmen or closure of the whole of the establishment, except in the event of fire, catastrophe, stoppage of power supply, epidemics or civil commotion, requires the prior approval of the labour court / provincial government, as the case may be as per the legislation applicable in the relevant province / federal territory. The term *"worker"* includes any person employed in any industrial or commercial establishment to do any skilled or unskilled work.

11. To what degree is conditionality an accepted market feature on acquisitions?

Conditionality is fairly restricted under the Securities Act and withdrawals of public announcement and public offer are permissible in specified circumstances only.

Pursuant to Section 116 of the Securities Act, a public offer made by the acquirer may be made conditional upon minimum level of acceptances. Regulation 14(2) of the Takeover Regulation specifies that where the public offer is made conditional upon minimum level of acceptances, such minimum levels shall not be more than thirty-five percent (35%) of the remaining voting shares. The acquirer may accept acceptances even if such acceptances, put together, do not reach the specified minimum level. Once a public offer has been made and there are no competitive bids or the acquirer revises its offer upwards in case there is a competitive bid, the acquirer will be required to accept the acceptances up to the number of shares offered to be acquired provided they meet the minimum level of acceptances; or may accept the acceptances where the acceptances do not meet the minimum level of acceptances.

The Takeover Regulations provide the general obligations of the acquirer which include that the acquirer shall announce its public announcement of offer only after careful and responsible consideration and the acquirer and its manager to the offer must be satisfied that it can and would continue to be able to implement the takeover offer in full. Further, the acquirer is required to ensure that firm financial arrangements for fulfilment of the obligations under the public offer have been made in the public announcement.[2]

There are restrictions on the withdrawal of public offer once made and acquirers are required to furnish security for performance of their obligations to the manager to the offer on or before the date of issue of public announcement of offer.[3] The security will be released by the manager to the offer either (a) after all payments to the shareholders have been made and completion of obligations of the acquirer under the Securities Act and the Takeover Regulations; or (b) on certification by the manager to the offer that the offer has been validly withdrawn. Before the public announcement of offer is made, the manager to the offer is also required to ensure that the acquirer is able to implement the public offer and that firm arrangements for funds and money have been made to fulfil the obligations under the public offer.

Pursuant to section 122 of the Securities Act read with regulation 22 of the Takeover Regulations, a public offer cannot be withdrawn unless:

1. a competitive bid has been made;
2. if the sole acquirer, being a natural person, has died or has been declared to be of unsound mind before the completion of the acquisition process;
3. in case the acquirer is a company and it has gone into liquidation or has been declared bankrupt before the completion of the acquisition process;
4. where the acquirer is an individual and he has been declared as an undischarged insolvent or has applied to be adjudicated as insolvent before the completion of the acquisition process; or
5. the acquirer has been declared by a Court of competent jurisdiction as a defaulter in repayment of loans to financial institutions.

A public announcement of intention is required to be made before the public offer. Before a public offer is made and after announcement of intention, the acquirer may undertake, *inter alia,* the due diligence of the target company. Pursuant to regulation 21 of the Takeover Regulations, in cases where a public announcement of intention has been made but a public offer has not been made, the public announcement of intention can be withdrawn if:

1. where the sole acquirer being a natural person, has died or has been declared bankrupt or has been declared to be of unsound mind;
2. where the negotiations to acquire voting shares of the target company have failed;
3. where the results of the due diligence carried out by the acquirer for the acquisition of shares of the target company are unfavorable;
4. in case the acquirer is a company and it has gone into liquidation or its board of directors have passed a resolution not to acquire the voting shares of the target company;
5. the time period for making the public announcement of offer and extension thereof, if granted, has lapsed; or
6. in case of regulated /licensed entity the requisite approval have not been granted by the concerned regulatory authority.

[2] Regulation 24

[3] Regulation 15(2)

12. What steps can an acquirer of a target company take to secure deal exclusivity?

Under the Securities Act, a person is prohibited from acquiring control of a listed company or acquiring interest beyond the prescribed thresholds under section 111 of the Securities Act (considered in responses below) unless such person has made a public offer to acquire voting shares of such listed company in accordance with the Securities Act. Pursuant to section 120 of the Securities Act, any person other than the acquirer who has made the first public announcement may make a competitive bid (by offering a higher purchase price) through a public announcement of offer for acquisition of at least same number of voting shares of the target company within twenty-one (21) days of the first public announcement of offer. Therefore, for acquisition pursuant to the Securities Act which results in a change in control or meets other prescribed thresholds under section 111 of the Securities Act, deal exclusivity cannot be secured in advance, although the acquirer can make upward revision to its offer in respect to the price or number of voting shares at any time up to seven (7) working days prior to the date of closure of public offer in an attempt to make its offer more promising or to counter or discourage a competitive bid.

If the acquirer will not be acquiring control of the target company on acquisition of voting shares and other prescribed limits under section 111 of the Securities Act are not met, the acquirer may acquire voting shares through a share purchase agreement. The acquirer and target may enter in to an exclusivity and confidentiality agreement for the purposes of enabling the acquirer to conduct due diligence on the target. The terms sheet or share purchase agreement may contain exclusivity clauses and/or be made subject to fulfilment of certain conditions or occurrence/non-occurrence of certain events.[4] The share purchase agreement may also provision for levy of liquidated damages, based on a genuine pre-estimation of the actual loss that will be suffered by the acquirer, on the target company which would be payable upon termination of the transaction by the shareholders where the termination results for reasons attributable to the respective shareholders and/or the target company.

[4] Various sections of the Securities Act, read with Regulation14 of the Takeover Regulations.

13. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

There are no statutory provisions with respect to break-up fees. Liquidated damages may be levied pursuant to agreement(s) between the acquirer and the shareholders as noted in response above.

Once a public offer has been made and there are no competitive bids or the acquirer revises its offer upwards in case there is a competitive bid, the acquirer will be required to accept the acceptances up to the number of shares offered to be acquired provided they meet the minimum level of acceptances; or may accept the acceptances where the acceptances do not meet the minimum level of acceptances.

14. Which forms of consideration are most commonly used?

The most commonly used consideration in M&As transactions is payment in cash. Within the context of schemes of amalgamations, share swap arrangements are relatively common.

15. At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?

Under the Securities Act, the following requirements apply:

1. Certain transactions are exempt from public announcement and public offer requirements. These are listed in Section 109 of the Securities Act (please see response to question 1, above). Where any such transaction takes place, a mandatory disclosure is required to be made within two (2) days of the acquisition of shares to the target company, to the Pakistan Stock Exchange and the SECP.
2. Pursuant to section 110 of the Securities Act, any acquirer who acquires voting shares, which, taken together with voting shares, if any, held by the acquirer, would entitle the acquirer to more than ten percent (10%) voting shares in a listed company, shall disclose the aggregate of its shareholding in that company to the said company, the Pakistan Stock Exchange and the SECP within two (2) days. An acquirer may acquire additional voting shares within a period of twelve (12) months after acquisition of voting shares without making disclosure as aforementioned in case the total acquisition does not exceed an aggregate of thirty percent (30%); disclosure will again be required to be made within two (2) days after lapse of twelve (12) month period or if the aggregate shareholding will exceed thirty percent (30%);
3. Pursuant to Section 111 of the Securities Act, it is mandatory for a public offer to be made by an acquirer to acquire at least fifty percent (50%) of the remaining voting shares of the target company[5] if the acquirer will:
    1. acquire voting shares, which (taken together with voting shares, if any, held by such acquirer) would entitle such acquirer to more than thirty percent (30%) voting shares in a listed company; or
    2. acquire additional voting shares in case the acquirer already holds more than thirty percent (30%) but less than fifty-one percent (51%) of the voting shares of a listed company provided that such acquirer shall not be required to make a fresh public offer within a period of twelve (12) months from the date of the previous public offer; or
    3. acquire control of a listed company.

Information disseminated to the Pakistan Stock Exchange when announced by it becomes public.

Further disclosures are also required to be made to the target company and the SECP pursuant to the Securities Act and the Reporting and Disclosure (of Shareholding by Directors, Executive Officers and Substantial Shareholders in Listed Companies) Regulations, 2015, which requires, *inter alia,* reporting by any person who becomes a director, executive officer, or substantial shareholder (defined in relation to interest in or control of ten percent (10%) or more voting shares of a listed company of his/her beneficial ownership in the equity securities of the company or any subsequent change therein.

The Companies Act also requires a company to report any change of more than twenty-five percent (25%) in its shareholding, membership or voting rights.[6]

[5] Regulation 14 of the Takeover Regulations read with Section 112 of the Securities Act.

[6] Section 465(4) of the CA 2017.

16. At what stage of negotiation is public disclosure required or customary?

The Securities Act requires price sensitive information relating to a listed company or its subsidiaries which has come to such company's knowledge and which would be material to an investor's investment decision to be disclosed to the public including information which might reasonably be expected to materially affect the market activity and the price of its securities. Under the PSX Regulations, price sensitive information is required to be disseminated to the Pakistan Stock Exchange and the SECP. Examples of price sensitive information include information regarding any joint ventures, merger, demerger, restructuring, acquisition or any material contract entered into or lost, material change in ownership of the company; and all decisions of the board of directors of the company relating to cash dividend, bonus issue, right issue or any other entitlement or corporate action, buy back of securities or voluntary delisting. The parties to the transaction also have to be wary of the provisions on insider trading under Part X of the Securities Act.

Under regulation 5(b) of the Takeover Regulations, a target company is required to immediately inform the Pakistan Stock Exchange and the SECP when, *inter alia,* a firm intention to acquire control or voting shares of the target company beyond the limited prescribed in section 111 of the Securities Act (considered above) is notified to the target company or negotiations or discussions are about to commence in relation thereto; and when the target company is subject of rumor and speculation or there is unusual movement in its share price or traded volume and there are reasonable ground for concluding that it is the potential acquirer's actions which has led to the situation.

In addition to the above, pursuant to section 114 of the Securities Act, it is mandatory to make a public announcement of intention if the acquirer intends to acquire control or voting shares which may attract the provisions of section 111 of the Securities Act (considered above). Regulation 6 of the Takeover Regulations requires that such announcement should be made before the acquirer enters into negotiations for a share purchase agreement or even commences a due diligence process to evaluate the share price of the target company.

17. Is there any maximum time period for negotiations or due diligence?

A public announcement of offer is required to be made by the acquirer within one hundred and eighty (180) days of making the public announcement of intention which may be extended by the SECP by up to ninety (90) days if a reasonable request is made.

As the public announcement of intention is required to be made before the due diligence is commenced to evaluate the share price of the target company, the acquirer will have between six (6) to nine (9) months, depending on whether an extension request is granted, to complete the due diligence and make a public announcement of offer.

18. Are there any circumstances where a minimum price may be set for the shares in a target company?

Yes. The law prescribes minimum offer price based on whether the shares of the target company are frequently traded or not. Shares will be deemed to be frequently traded if they have been traded for at least eighty percent (80%) of the trading days during the six (6) months prior to the date of public announcement of offer and their average daily trading volume in the ready market is not less than zero point five percent (0.5%) of its free float or one hundred thousand (100,000) shares whichever is higher.

Where the shares of the target company are frequently traded, the public offer shall be at a price which is highest amongst the following:

1. the negotiated weighted average price under share purchase agreement(s) for the acquisition of voting shares of the target

company;
2. the highest price paid by the acquirer for acquiring the voting shares of target company during six (6) months prior to the date of the public announcement of offer;
3. the weighted average share price of target company as quoted on the Pakistan Stock Exchange during the last six (6) months preceding the date of announcement of public offer;
4. the weighted average share price of the target company as quoted on the Pakistan Stock Exchange during four (4) weeks preceding the date of public announcement of intention; and
5. the price per share arrived at on the basis of net assets value carried out by a chartered account firm in the specified manner.

Where the shares are not frequently traded, the public announcement of offer shall be at the price which is highest amongst the following:

1. the negotiated weighted average price under share purchaser agreement(s) for the acquisition of voting shares of the target company;
2. the highest price paid by the acquirer for acquiring the voting shares of the target company during six (6) months prior to the date of public announcement of offer; or
3. the price per share arrived at on the basis of net assets value carried out by a chartered accounts firm in the specified manner.

19. Is it possible for target companies to provide financial assistance?

There is no enabling provision under the Securities Act which allows target companies to provide financial assistance for purchase of the target company's shares. Under the Companies Act, subject to certain specific exemptions, a public company and a private company being subsidiary of a public company are prohibited from giving financial assistance whether directly or indirectly for the purpose of, or in connection with, a purchase or subscription made or to be made, by any person of any shares in the company or in its holding company.

20. Which governing law is customarily used on acquisitions?

This depends on the parties to the acquisition. Where the acquirer is a non-Pakistani entity, it is common to use the laws of England and Wales and/or Singapore to govern the share purchase agreements. Where all parties are Pakistani, then it is common to use Pakistan law as the governing law of the agreements.

21. What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?

The general provisions with respect to dissemination of price sensitive information to the SECP and the Pakistan Stock Exchange will apply to the buyer if the buyer is a listed company.

The buyer will also have to make disclosures, if any as per applicable requirements considered above, in manner prescribed in the Takeover Regulations. If the thresholds set out in section 111 of the Securities Act are met, a public announcement of intention and public announcement of offer will also be made together with supporting documentation as prescribed in the Takeover Regulations.

If the transaction meets the thresholds prescribed in the Merger Control Regulations, then the pre-merger approval of the Competition Commission will be required before the acquisition is consummated. This will require submission of a pre-merger application which is to be in the prescribed form together with supporting documents such as copies of the final or most recent version of all documents bringing about the merger, whether by agreement between the merger parties, acquisition of a controlling interest or a public bid; copies of the most recent annual report and accounts (or equivalent for unincorporated bodies) for all the merger parties; and copies of all business plans for each merger party for the current year and the preceding five (5) years. Where any of the information shared with the Competition Commission is marked as confidential, only the non-confidential version of the application will be shared by the Competition Commission for public viewing.

Where the acquisition is proceeding by way of a scheme of amalgamation pursuant to the Companies Act, a petition will be filed with the SECP or the High Court, as the case may be, together with all supporting documents. The notice for calling the meeting may be required to be given by advertisement and will be accompanied by a statement (or will specify where such statement may be viewed) setting forth, *inter alia,* the terms of the compromise or arrangement and explaining its effect.

Where the transaction will involve the sale or disposal of the undertakings or a sizeable part thereof, as defined in the Companies Act, then, subject to certain exemptions, the consent of the general meeting either specifically or by way of an authorization will be required. The notices for call of general meetings of shareholders are required to be placed in newspapers in the prescribed manner and any such notice will be accompanied by a statement of material facts which will set out the prescribed information in relation to the sale / disposal of the undertaking or a sizeable part thereof.

22. What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?

The shares of a listed company are held in book entry form with the Central Depository Company which handles the electronic (paperless) settlement of shares on the Pakistan Stock Exchange in accordance with, *inter alia,* the Central Depository Company of Pakistan Limited Regulations. On transfer, the board of directors of the target company pass a resolution confirming the transfer of shares to the acquirer and thereafter the share register of the target company is updated.

The instruments providing for sale of shares are chargeable to stamp duty in accordance with the stamp schedule of the respective province / federal capital. However, since the shares of listed companies are held in book entry form, the change in ownership of shares / transfer of shares comes into effect without endorsement of certificates and execution of transfer instruments, which is unlikely to attract any stamp duty. Recent amendments to the relevant stamp acts, as applicable in each province of Pakistan and the Federal Capital Territory, may however, result in the imposition of stamp duty on the transfer of shares by way of electronic instruments.

The Central Depository Company charges a transaction fee of 0.004% of the market value of the transaction subject to a minimum and maximum fee of PKR 5 and PKR 50,000 respectively.[7]

The capital gain on disposal of shares of a public company, unless exempted, is chargeable to tax in accordance with the Income Tax Ordinance, 2001.

Where the acquisition of the target is by a non-resident person, requirements for registration of shares to ensure repatriability of dividends and disinvesment proceeds will need to be complied with in terms of the Foreign Exchange Regulation Act, 1947, read with the Foreign Exchange Manual.

[7]
https://www.cdcpakistan.com/wp-content/uploads/2020/07/Schedule-of-Fees-for-IAS-Updated-July-2020-Final.pdf

23. Are hostile acquisitions a common feature?

No, hostile takeovers are not common but are possible under the prevailing laws. The acquisition of Adamjee Insurance Limited is often noted as one of the only hostile acquisitions in the corporate history of Pakistan.

The general composition of listed companies in Pakistan which usually includes a majority shareholder with controlling interest makes a hostile bid rather unlikely as such shareholder would most likely have appointed most of the members to the target company's board of directors; the shareholders normally attempt to ensure that the number of directors on the board of directors at the very least represents their proportionate shareholding. This renders the opposition by the board of directors of the target company to a bid highly unlikely.

24. What protections do directors of a target company have against a hostile approach?

As hostile acquisitions are not common, there are no strategies ordinarily utilized by directors to protect against a hostile approach. The target company's option to protect itself from a hostile takeover are fairly limited to requiring that the hostile acquirer complies with legal requirements applicable to takeovers as strategies such as the "poison pill" defense are difficult to implement due to the regulatory framework applicable in Pakistan. If the acquirer's actions contravene provisions of applicable law, the target company may consider pursuing strategies such as trying to draw the attention of the SECP, Competition Commission or other regulatory authorities or challenging the actions of the acquirer before the competent courts.

Any strategies will be subject to the restrictions and prohibitions set out in the applicable laws. Once an offer has been made, the target company is prohibited under the Securities Act, from selling, transferring, or otherwise disposing of or entering into an agreement for the sale, transfer, or for disposal of the undertaking or a sizeable part thereof, not being sale or disposal of assets in the ordinary course of business of the company or its subsidiaries; from encumbering any asset of the company or its subsidiary; from issuing any further shares; and from entering into any material contract. Under the Takeover Regulations, it is also required, *inter alia,* to provide all relevant and material information which the acquirer or manager to the offer require for the purposes of due diligence, send unbiased comments and recommendations on the public offer to the shareholders if so desired by the shareholder(s) or the acquirer(s), and to facilitate the acquirer in verification of securities tendered for acceptance.

The board of directors will also need to be mindful of its obligations under the Companies Act which imposes a statutory duty on directors to act in good faith in order to promote the objects 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. Due to directors duties a director cannot take measures to prevent a hostile takeover the benefit of an existing shareholder who may have elected such director.

25. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

Pursuant to Section 111 of the Securities Act, it is mandatory for a public offer to acquire voting shares of a listed company to be made by an acquirer if the acquirer will:

1. acquire voting shares, which (taken together with voting shares, if any, held by such acquirer) would entitle such acquirer to more than thirty percent (30%) voting shares in a listed company; or
2. acquire additional voting shares in case the acquirer already holds more than thirty percent (30%) but less than fifty-one percent (51%) of the voting shares of a listed company provided that such acquirer shall not be required to make a fresh public offer within a period of twelve (12) months from the date of the previous public offer; or
3. acquire control of a listed company.

The public offer is required to be made for at least fifty percent (50%) of the remaining voting shares of the target company.

26. If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?

The Takeover Regulations restrict oppression of minorities and provides that the rights of control shall be exercised in good faith and the oppression of minority or non-controlling shareholders shall be unacceptable. The Takeover Regulations further require that all shareholders of the target company are to be treated equally and all shareholders of the same class are to be treated similarly. All acts of the acquirer are required to be in good faith and in the best interest of the target company and its shareholders considering the long term viability of the target company.[8]

Certain rights have been extended to minority shareholders under the Companies Act. Minority shareholders are entitled to receive notices of and participate in general meetings and have voting and dividend rights. Where any alteration to the articles of association is proposed and such alteration affects the substantive rights or liabilities of members or of a class of members, such alteration is required to be carried out only if a majority of at least three-fourths of the members or of the class of members affected by such alteration, as the case may be, exercise the option through vote personally or through proxy vote for such alteration.

The percentage of shares the minority shareholders that are acting together hold in aggregate will be key in determining their rights and entitlements under the Companies Act. The quorum requirement for public company, unless the articles of association provide for a larger number, is not less than ten (10) members present personally, or through video-link who represent not less than twenty-five percent (25%) of the total voting power, either of their own account or as proxies. An ordinary resolution can be passed by a simple majority of such members of the company entitled to vote as are present in person or by proxy and a special resolution can be passed by a majority of not less than three-fourths of such members of the company entitled to vote as are present in person or by proxy. The board of directors is required to call a general meeting of the shareholders on requisition made by members representing not less than one-tenth of the total voting power as on the date of deposit of requisition.

Other examples of rights and entitlements of minority shareholders are that a company may be wound up by the court if the conduct of the business is in a manner oppressive to the minority members (i.e. members holding at least ten percent (10%) shareholding in such company). Pursuant to Section 286 of the Companies Act, if any shareholder(s) holding not less than ten percent (10%) of the issued share capital of a company complain that the affairs of the company are being conducted, or are likely to be conducted, *inter alia*, in a manner oppressive to the shareholders or any of the shareholders, such shareholder(s) may make an application to the Court by petition for winding up of the company.

[8] Regulations 28, 29 and 24(10) of the Takeover Regulations.

27. Is a mechanism available to compulsorily acquire minority stakes?

Yes, there are mechanisms which may be utilized to compulsorily acquire minority stake. However, these mechanisms may attract the provisions with respect to minority shareholders' protection under the Companies Act. These protections ordinarily only apply where the minority shareholder(s) hold at least ten percent (10%) of the total shareholding of the company. The Takeover Regulations also prohibit oppression of minorities and may subject a contravening person to penalties under the Securities Act for oppression of minorities.

Schemes of arrangement can be used to squeeze out minority shareholders. Under the Companies Act, schemes of arrangements under the Companies Act can be sanctioned if a majority representing three-fourths in value of the members present and voting agree to such arrangement and upon being sanctioned, the scheme of arrangement will be binding on, *inter alia*, all the members.[9] The SECP also has power to make provision for persons who dissent from the arrangement.[10]

Section 285 of the Companies Act provides that where a scheme or contract involving the transfer of shares or any class of shares in any company ("the transferor company") to another company ("the transferee company") has, within one hundred and twenty (120) days after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than nine-tenths in value of the shares whose transfer is involved (other than shares already held at the date of the offer by, or by a nominee for, the transferee company or its subsidiary), the transferee company may, subject to certain conditions, be entitled and bound to acquire those shares on the terms on which, under the scheme or contract, the shares of the approving shareholders are to be transferred to the transferee company.

Another method to compulsorily acquire minority stakes is through voluntary delisting of the company through buy back of shares from minority shareholders. The detailed requirements for delisting have been set out in the PSX Regulations. The company once allowed delisting under the PSX Regulations will not be allowed to relist on the mainboard any of its securities which have been de-listed for a period of at least five (5) years from the date of delisting[11].

Section 85 of the Companies Act allows companies to consolidate shares. Technically, in certain circumstances, controlling shareholders may consider using the way of statutory consolidation of shares whereby shares are consolidated at such a ratio that the number of shares held by minority shareholders is less than one share. Fractional shares are not taken into account at the time of voting and may be consolidated and disposed of by the board of directors.

Section 124 of the Securities Act empowers the SECP to make regulations with respect to squeeze outs. However, the Takeover Regulations which have been enacted pursuant to the Securities Act do not set out any provisions with respect to squeeze outs.

[9] Section 279(2) of CA 2017.

[10] Section 282(3)(e) of the CA 2017.

[11] PSX Regulation 5.16.9(b)

Contributors

Bilal Shaukat
Managing Partner

bilal.shaukat@riaabg.com

Shafaq Rehman
Partner

shafaq.rehman@riaabg.com

Adil Tirmizey
Partner

adil.tirmizey@riaabg.com

Warda Tahir
Associate

warda.tahir@riaabg.com