MERGERS AND THEIR EFFECTS ON MINORITY SHAREHOLDERS

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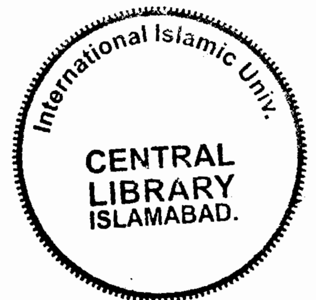

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TABLE OF CONTENTS

DEDICATION.. vi
ACKNOWLEDGEMENTS.. vii
ABSTRACT.. viii
ACRONYMS x

CHAPTER I
CONCEPTUAL BACKGROUND OF MERGERS
1 DIFFERENT WAYS OF AMALGAMATIONS........................ 1
1.1 Takeover 2
Forms of Takeover 3
1.1.1 Friendly Takeover 3
1.1.2 Hostile Takeover 3
1.1.3 Reverse Takeover 3
1.2 Mergers 4
1.3 Difference between Mergers and Takeover 6
1.4 Difference between Mergers and Consolidation 8
2 TYPES OF MERGERS 8
2.1 Horizontal Mergers 9
2.2 Vertical Mergers 10
2.3 Conglomerate Merger 11
2.3.1 Pure and Mixed Conglomerate Mergers................. 12
2.3.2 Product Extension Merger 12
2.4 Other Types of Mergers 14
2.4.1 Agreed Merger 14
2.4.2 Un – Opposed Merger...................................... 14
2.4.3 Defended Merger 14
2.5 Reverse Merger 15
2.6 Classification of Merger with Regard to Ways of Financing. 15
2.6.1 Purchase Merger 15
2.6.2 Consolidation Merger 15
2.7 Short – Form Mergers... 16
3 MOTIVES OF MERGERS 16
3.1 Motives that Add Shareholder's Value......................... 16
3.1.1 Economies of Scale 16
3.1.2 Increased Revenue/ Increased Market Share............ 16
3.1.3 Synergy.. 17
3.1.4 Taxes 17
3.2 Motives that do not Add Shareholder's Value.................. 17
3.2.1 Overextension 17
3.2.2 Managers Hubris 17
3.2.3 Manager's Compensation 17

		3.2.4	Empire Building	17
4	PROCESS OF MERGER			17
5	EVALUATION OF MERGER			19
	5.1	Analysis of Merger		22
		5.1.1	Defining Market's Description	22
			5.1.1.1 Product Market	23
			5.1.1.2 Geographic Market	23
		5.1.2	Identification of Relevant Firms and Their Market Shares	23
		5.1.3	Justification of Potential Adverse Effects	23
		5.1.4	Barriers to Entry	24
		5.1.5	Efficiency Defence	24
		5.1.6	Failing Firm Argument	24
	5.2	Data Required for Investigation of Mergers		25
	5.3	Sources of relevant Information		26
	5.4	Pre-Merger Information Requirements		26

CHAPTER II
IMPACT OF MERGERS ON COMPETITION AND PUBLIC INTEREST

1	ANTI-COMPETITIVE EFFECTS OF HORIZONTAL MERGERS		29
	1.1	Unilateral Effects	29
	1.2	Coordinated Effects	30
2	ANTI COMPETITIVE EFFECTS OF VERTICAL MERGERS......		31
	2.1	Reduction of Competition at the Supply level...................	31
	2.2	Reduction of Competition at the Retail Level	31
	2.3	Increasing Entry Barriers	32
3	EFFECTS OF CONGLOMERATE MERGERS		32
	3.1	Mergers Involving Potential Reciprocity	32
	3.2	Mergers that Eliminate Potential Competition	33
	3.3	Mergers giving Unfair Advantage to the Acquired Firm.....	33
4	PROCOMPETITIVE EFFECTS OF MERGERS.......................		34
	4.1	Staff Reductions	35
	4.2	Economies of Scale	35
	4.3	New Technology	35
	4.4	Improved Market Access	36
5	PROTECTION OF PUBLIC INTEREST		36
	5.1	Merger Control to Safeguard Public Interest....................	40
	5.2	Job Losses	42
	5.3	Mergers Generate Other Jobs	45
	5.4	Effects of Mergers on Women Workers	46
6	IMPACT OF MERGERS ON WORKING CONDITIONS		49
	6.1	Merger and the Working Time	50
	6.2	Managing Downsizing as a Consequence to Mergers	51

6.3 What should be the Policies on Worker's Displacement 52

7 MERGERS AS A FACTOR OF STRESS-RELATED ILLNESSES AND DE-MOTIVATION 53

8 WELFARE IMPLICATIONS.................. 53

CHAPTER III

PAKISTAN'S EXPERIENCE IN MERGERS AND PROTECTION OF MINORITY SHAREHOLDERS

1 PROCEDURE OF MERGERS IN PAKISTAN......................... 57

1.1 Scheme of Arrangement.. 58

1.2 General Practice in Pakistan..................................... 58

2 MERGERS AND THE RIGHTS OF MINORITY SHAREHOLDERS... 60

2.1 Legal Instruments to Protect Minority Shareholders... 61

2.1.1 Protection of Minority Shareholders in a merger via Securities and Exchange Ordinance, 1969................................. 61

2.1.2 Companies Ordinance 1984........................ 62

2.1.3 Securities and Exchange Commission of Pakistan Act, 1997.............................. 64

2.1.3.1 Securities and Exchange Commission of Pakistan (SECP)...................... 65

2.1.3.2 Code of Corporate Governance "Code" (2002)........................... 67

2.1.3.3 The Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002........... 70

2.1.4 Substantive Judicial Protection................. 70

2.1.4.1. The Lipton Case........................ 71

2.1.4.2. The Atlas Autos Case.................... 73

2.1.4.3. Dewan Salman Fibre Case 74

2.1.4.4. The Kohinoor Case...................... 76

2.1.4.5. Pfizer Case.............................. 77

2.1.4.6. Pak-Water Bottlers Case............... 78

3 MERGER CONTROL UNDER PAKISTAN COMPETITION LAW 82

3.1 Exclusions from the Purview of Section 5 of MRTPO, 1970 83

3.2 Critical Review of Merger Control under MRTPO, 1970...... 83

3.3 The New Competition Law on Merger Control................ 84

CHAPTER IV

MERGER LAWS IN OECD COUNTRIES

1 EU COUNTRIES 90

1.1 Applicable Legislation and Responsible Authorities 90

	1.2	Regulation on the Control of Concentrations between Undertakings	90
	1.3	Notification	90
	1.4	Qualifying Mergers	91
	1.5	Summary of Information Required on Notification	92
	1.6	Merger Control Process	93
	1.7	Criteria for Evaluation of Mergers	95
	1.8	"Fix-it First" Loop	96
	1.9	Decisions	97
	1.10	Enforcement Powers and Penalties	97
2	IRELAND		98
	2.1	Legislation	98
	2.2	Notification	98
	2.3	Qualifying Mergers	99
	2.4	Information Required for a Notification	101
	2.5	Time Limit	102
	2.6	Criteria for Evaluation of Mergers	103
3	UNITED KINGDOM		108
	3.1	Applicable Legislation and Responsible Authorities	108
	3.2	Notification	108
	3.3	Qualifying Mergers	109
	3.4	Summary of Information Required on Notification	109
	3.5	Merger Control Process	110
	3.6	Pre-Merger Notification	111
	3.7	Criteria for Evaluation of Mergers	112
	3.8	"Fix-it First" Loop/Decisions	113
	3.9	Enforcement Powers and Penalties	114
4	UNITED STATES OF AMERICA		114
	4.1	Applicable Legislation and Responsible Authorities	114
	4.2	Notification	115
	4.3	Qualifying Mergers	115
	4.4	Merger Control Process	115
	4.5	Criteria for Evaluation of Mergers	116
	4.6	"Fix-it First" Loop/Decisions	121
	4.7	Enforcement Powers and Penalties	121
5	GERMANY		121
	5.1	Applicable Legislation and Responsible Authorities	121
	5.2	Notification	122
	5.3	Qualifying Mergers	122
	5.4	Summary of Information Required on Notification	122
	5.5	Merger Control Process	123
	5.6	Criteria for Evaluation of Mergers	124
	5.7	"Fix-it First" Loop	125

5.8 Decisions.......... 126
5.9 Enforcement Powers and Penalties.......... 127
6 AUSTRALIA.......... 127
6.1 Applicable Legislation and Responsible Authorities.......... 127
6.2 Notification 127
6.3 Qualifying Mergers.......... 128
6.4 Summary of Information Required on Notification.......... 128
6.5 Merger Control Process.......... 129
6.6 Criteria for the Evaluation of Mergers.......... 130
6.7 "Fix-it First" Loop.......... 130
6.8 Decisions.......... 130
6.9 Enforcement Powers and Penalties.......... 130

CHAPTER V
ANALYSIS OF MERGER CONTROL IN SELECTED COUNTRIES
1 THE RATIONALE FOR MERGER.......... 132
2 INTERNATIONAL EVIDENCE ON MERGER OUTCOMES.......... 137
3 ANALYSIS OF THE OPERATION OF THE MERGERS ACT 139
3.1 Unnecessary Notifications 139
3.2 Transparency in the Operation of the Mergers Act.......... 141
3.3 Resource Issues.......... 142
3.4 Opportunity for Third Parties to Comment.......... 143
3.5. Danger of "False Positives".......... 43
4 MERGERS AND THE COMPETITION ACT.......... 143
4.1. Effectiveness.......... 144
4.2 Transparency.......... 144
4.3 Efficiency.......... 145

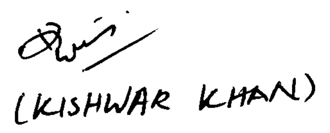
CHAPTER VI
TOWARD A MORE RATIONAL TREATMENT OF MERGERS
1 INTRODUCTION OF MERGER GUIDELINES CONCERNING THE PROTECTION OF MINORITY SHAREHOLDERS'.......... 146
2 DEALING WITH COMPETITION CONCERNS.......... 147
3 RECOMMENDATIONS TO IMPROVE EFFECTIVENESS.......... 149
4 RECOMMENDATIONS TO IMPROVE TRANSPARENCY.......... 151
5 RECOMMENDATIONS TO IMPROVE FAIRNESS AND EFFICIENCY.......... 154
6 SUMMARY OF RECOMMENDATIONS 154

DEDICATION

I dedicate this work

to my Parents, whose endless love and prays

are just a treasure for me.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ABSTRACT

MERGERS AND THEIR EFFECTS ON MINORITY SHAREHOLDERS

by

Basharat Rashid

There are different types of market structures from perfectly competing firms none of which can influence the market individually, to an oligopoly, in which the market consists of a few firms, each having some power over the market price but constrained by the rivalry of the others. Then, there are monopolies, in which a single firm sets the price unilaterally. Sometimes, market structures become more concentrated overtime as a few firms succeed and grow while others fail. Some of the firms may grow not because of their own competitive efforts but because of a merger. There are varieties of motives behind mergers such as to improve economic efficiency, to expand into different geographic markets and, of course to acquire market power. A firm's exercise of market power can have variety of implications for consumers and other producers in the market.

Mergers in Pakistan, is a relatively recent phenomenon and overwhelmingly involve international corporations, but seldom a few large established Pakistani family/feudal owned conglomerates. The result is that a research gap is there regarding mergers in Pakistan with reference to procedures, practices and implications.

My work, in this thesis is an attempt to explore this important emerging phenomenon. An effort has been made to compress as much information as is possible into this dissertation so that many of the questions about mergers activity that may arrive in a reader's mind are answered. The thesis begins with the introduction of mergers and different ways of combinations. Motives which give rise to mergers, various types of

ACRONYMS

ARC:	Act against Restraints of Competition
CEO:	Chief Executive Officer
CLC:	Civil Law Cases
CLD:	Company Law Digest
CCG:	Code of Corporate Governance
DM:	Deutsche Mark
EEC:	European Economic Community
EOGM:	Extra Ordinary General Meeting
ECU:	European Currency Unit
FCO:	Federal Cartel Office
ILO:	International Labour Organization
MMC:	Monopolies and Mergers Commission
MRTPO:	Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance
NOC:	No Objection Certificate
NBFCs:	Non Banking Finance Companies
OECD:	Organisation for Economic Cooperation and Development
OFT:	Office of Fair Trading
SECP:	Securities and Exchange Commission of Pakistan

CHAPTER - I

CONCEPTUAL BACKGROUND OF MERGERS

Companies generally extend their businesses through mergers, consolidation, or purchase of assets etc. The intention to increases the size of business may be for a number of reasons, such as enlarging the plants and production facilities, or to increase property or investment holdings.

There are different forms of mergers which have different effects on stakeholders. These effects are then examined and analyzed by various responsible agencies. Generally, the merger regulation is covered in the competition law, the test for legality of a transaction is that it must not create or strengthen a dominant market position[1]. Rights of shareholders and scheme of mergers are evaluated by Securities and Exchange Commission. With reference to competition legislation, it is understandable that the more broadly relevant market is defined; say on geographic basis, single market player's dominance becomes less likely the concept of market dominance is well established in Pakistan. The competition regulation is an instrument to deal with mergers and acquisitions.

Considering this background, this Chapter is an attempt to look into the conceptual aspects of mergers such as the types, motives and process.

1. DIFFERENT WAYS OF AMALGAMATIONS

There are several ways in which companies may merge or combine their businesses. These may be through purchase of: a) securities; b) operating assets; and c) significant shares of outstanding securities. In another case, two firms may form a single

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[1] To prevent instances of abuse of market dominance, mergers may be approved subject to certain conditional ties.

firm by exchanging their securities. These transactions are brought about through agreements between firms and enterprises. In some cases, however, the takeovers may be unsolicited or even hostile.[2]. Companies use different ways for combinations, the notable include takeover, acquisition and mergers[3]. These terminologies are explored in the paragraphs to follow with reference to there specific definitions and their relevance for minority shareholders.

1.1 Takeover

Takeover occurs when a company acquires control of another company through purchase of all or as many shares that allow it control of another company. In corporate terminologies, the takeover refers to "one company - which is the acquirer, purchasing another company - the target".[4] As far as mode of occurrence is concerned, a takeover is like a merger, but unlike merger a new company is not formed. It is understandable that assets of a company may be acquired directly or indirectly after getting control of company's management. This indirect way of control may even take place without the willingness of a company.[5]

In case, where shares are closely held by a relatively small number of persons, then takeover is affected by agreement with the majority shareholders. Takeover maybe through purchase of shares quoted on the stock exchange, by means of takeover bid or as

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[2] M.A. Weinberg and M.V.Blank, *"Takeover and Mergers"*, Fourth Edition, Sweet and Maxwell, London 1979". Page No. 3 -11.
[3] http://investopedia.com , last visited on 03 February, 2007.
[4] http://en.wikipedi.org , last visited on 03 February, 2007.
[5] UNCTAD,'Handbook on Competition'. Also available at http://www.Unctad.org, last visited on 07 February, 2007.

a result of an explicit agreement between the acquirer and the controllers of the acquired company.[6]

FORMS OF TAKEOVER

There are several forms of takeovers, these are described below.

1.1.1 Friendly Takeover

Friendly takeover occurs with the consent of the management of the acquired or the target company. Shares of the acquiring company or cash are offered to the shareholders of the acquired company. Generally, shareholders agree to receive the shares instead of cash. This allows them to become shareholder of a stronger company than before.

1.1.2 Hostile takeover

This is in sharp contrast to the friendly takeover i.e., a company is acquired without the consent of its management. This kind of takeover occurs if the shares of the target company are purchased from the stock exchange.

1.1.3 Reverse Takeover

It occurs when a smaller corporate entity takes over a large one, or when a big private company purchases a small public company, or when a small public company buys a functioning private company whose management controls the public company.

Some takeovers are opportunistic and they occur when the target company is quite reasonably priced. The acquiring company may realize that purchasing the target company will not be profitable in the long run. [7]

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[6] See for "takeover bids" Supra Note No. 2.

[7] Example of large holding company 'Berkshire Hathaway' is quoted for opportunistic takeovers - it purchased many companies opportunistically.

Most takeovers are strategic i.e., their effects go well beyond the primary objective- the profits. For example, an acquiring company may plan to purchase a company because of its distribution efficiency in new areas, which the acquirer can use for its own products without taking the risk and time to establish the same. A target company may be attractive for the acquirer because of its competitiveness to eliminate competition in the relevant market, to make gain market power for increasing prices and to increase market share as well.

Critics often charge that takeovers result in elimination of competition thus reducing choices available to consumers, raising likelihood of price increase, job loss, etc. This is why takeover is often a contested form of mergers.[8]

1.2 Mergers

Merger means combination of two or more things into one. In the corporate law, it is defined as an "arrangement of two companies whereby the assets of the two companies vested under the control of one company"[9]. Mergers may occur by combination of the companies of the same size. In this case, these are voluntary and come through stock swap or cash payments to the target company. Through stock swap, shareholders of both the companies share the risk involved in the deal. "A merger can resemble a takeover, but result in a new company"[10]. Usually, mergers occur in friendly setting where the executives from both the companies participate in due diligence process to ensure a successful combination of all the parts.

Merger does not necessarily result in the survival of one of the two companies. In merger, greater and lesser things meet, and the later loses its separate existence and sinks

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[8] Geoffrey Morse, "*Charlesworth and Morse Company Law*", 12th Edition London, Stevens and Sons, 1983. Page No. 590.
[9] Supra Note No.2, Page No. 34.
[10] www.wikipedia.org/wiki/merger, last visited on 7th September, 2007.

into the former. "Through this method firms increase their size and expand into existing or new economic activities and market"[11]. As a result of such fusion, the identity of one or more is lost and a single enterprise revives.

Mergers evaluation is quite tricky for the courts. On the one hand, mergers have highly desirable competitive objectives e.g., by enabling small market participants to pool their resources, to facilitate research or product development and thus become more competitive that might not be possible otherwise. On the other hand, those controlling joint venture can create significant competitive hazards such as abuse of their dominant market position.[12] Mergers should, therefore, be deemed positive when they raise the desired results and negative when they directly or indirectly outweigh the transactional benefits[13].

Recognizing the above conflicting concerns, the courts and competition agencies attempt to have a balance between allowing desirable joint ventures and prohibiting those, which harm competition. The balance is sought through a broad rule of reason inquiry that undertakes detailed scrutiny of the whole range of probative market factors: e.g. the purpose of the merger, the industry structure, the competitiveness of the merger participants, the scope and duration of the venture, resulting efficiencies, impact of the merger on other competitors in the market, etc.[14]

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[11] OECD, *"Glossary of Industrial Organization Economics and Competition Law", compiled by R.S.Khemani and B.M. Shapiro,* see Section No. 130.
[12] William C. Holmes, *"1989 Anti Trust Law Hand book",* Anti Trust Law Library 1989 Page No.337.
[13] Terry Calvani and John Sieg Fried, *"Economic Analysis and Anti Trust Laws",* Little, Brown and Company. Boston and Toronto, 1969 .Page No. 72.
[14] Supra Note No..14, Page No. 33.

There are various grounds on which merger can be challenged e.g., a) when the joint venture exercises joint monopoly or attempt to monopolize; b) when it unreasonably restrains trade; and c) when it resorts to unfair methods of competition.

1.3 Difference between Mergers and Takeovers

In a general sense, both the terms are similar corporate actions, as: both the actions combine separate firms into single legal entity. The goal of most mergers and takeovers/acquisitions is the same, that is, to improve company performance and shareholder's value in the long run. Motives behind both may also be the same that is to boast up economies of scale, greater sales revenue and market share. However, the business rational and financing methodology for mergers and takeovers may be substantially different.

a. In a takeover, the control over the assets of the largest company passes to the acquirer, while in a merger, the shareholding will be spread among the shareholders of the two companies with equal control[15].
b. Merger involves a mutual decision made by two equals. On the other hand, a takeover or an acquisition is a purchase of a smaller company by a much larger one. It does not necessarily have to be a mutual decision[16] In a purchase deal, when the management of both the companies agree that such combination will be for the best interest of both the companies, it will be considered as a merger deal. But when the purchase deal is unfriendly towards the target company - that is, when the target company is not willing

[15] Supra Note No. 2 Page No.5.
[16] http://www.investopedia.com/terms/a/acquisition.asp , last visited on 17th February, 2008.

to be purchased out - it will always be deemed as an acquisition / takeover. So the real difference between the two lies in determining how the purchase is communicated to and received by the target company[17].

c. The combined business through merger boasts up shareholder's value for both groups of shareholders, while a larger company can initiate a hostile takeover of a smaller firm. The acquiring company finances the purchase of the target company buying it outright for its shareholders. The acquiring usually offers cash price per share or the acquiring firm's shares to the target firm's shareholders[18].

d. A takeover bid may take the form of an offer to purchase shares for cash, or of a share for share exchange used for affecting a merger, it always take the form of a share - for - exchange offer. This way, the accepting shareholders in the offeree company become shareholders in the new company[19].

Mergers of equals happen very often. Buying of other companies is quite usual. In this case, acquiring firm allow the target firm to proclaim that their action is a merger of equals. This gives positive impression because, being bought out often carries negative connotations. By proclaiming the takeover deal as a merger, the managers want to make the takeover more palatable[20].

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[17] ibid.
[18] ibid
[19] Supra Note No.2, page No. 3 - 20.
[20] http://ad investopedia.com, last visited on January 7, 2007.

1.4 Difference between Mergers and Consolidation

Although, both these terms are often used interchangeably but they refer to two distinct legal proceedings. After a merger, only one of the two firms survives. For example, corporation "A" and corporation "B"; so "B" ceases to exist as a separate entity, and "A" will continue to exist as surviving corporation. Consequently, corporation "A" will acquire all of the "B"s property and assets without the necessity of formal transfer. Hence, firm "A" will survive with the "B" preexisting legal rights and obligations[21].

On the other hand, in consolidation, several concerns are dissolved and completely new company is formed. For example, corporation "A" and corporation "B" are combined and form an entirely new organization, corporation "C"[22]. The difference between both the terms is clear as, in merger, one corporation swallows the other, but the shareholders of the swallowed company receive shares of the surviving firm, while, in a consolidation both companies join together to create a new firm.

The consequences of merger and consolidation are almost the same. When a merger or consolidation takes place, the surviving firm - in case of merger, or a newly formed corporation - in case of consolidation – will issue shares or pay some reasonable consideration to the shareholders of corporation that ceases to exist[23].

2. TYPES OF MERGER

Mergers can be mainly divided into three categories based on their likely impact on the competitive process.

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[21] Kenneth W. Clarkson and Assistance, *"West's Business Law",* Text Cases Legal Ethical and Regulatory and International Environment, 7th Edition, West Educational Publishing, page No. 754.
[22] Microsoft Encarta encyclopedia standard,,2005.
[23] Supra note 22, page No.755.

2.1 Horizontal Mergers

It is amalgamation of firms selling competing products or services may be in the same geographic areas[24]. So this transaction takes place between two or more firms that are actual or potential competitors –they sell the same products or close substitutes. As the term horizontal itself signifies that the involved enterprises are at the identical level in the chain of production. Example of horizontal mergers is combination of two manufacturers of polymerization process and products[25]. Manufacturers involved in such a merger produce the same or close substitutes of each other's goods or services and compete directly with each other, e.g. sugar and artificial sweeteners.

Horizontal mergers, by definition, tend to reduce number of competitors in an industry or relevant market. This fact creates the greatest concern from an antimonopoly point of view. But on the other hand, horizontal mergers are likely to give the greatest scope for economies of scale as well[26].

Governments regulate horizontal mergers for their possible negative effects on competition. As stated above, they reduce the competitors in an industry, possibly making it easier for the industry players to form cartels to reap higher profits[27]. But, sometimes, it may have a marginal or no effect on market. So when two very small companies merge horizontally, the result would be less noticeable. And such small horizontal mergers are very common.[28] On the other hand, large horizontal merger would

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[24] Supra Note No.14, page No. 298.

[25] Kishwar Khan/research paper/contribution from Pakistan for global forum on competition/feb.04, page No.1.

[26] . Supra note no 1, Page No. 3 -15

[27] www.specialinvestor.com/Terms/76.htm/ , 16 February, 2007.

[28] For example, a small drug store horizontally merge with another small drug store- the effect of this on the relevant industry would be negligible.

effect throughout the market or sometimes even throughout the whole economy. Such large horizontal mergers are often perceived as anticompetitive[29].

For example, in the USA, the attempts by Staples Inc., which is a superstore retailer of office supplies, to acquire office Depot another giant retailer of office supplies. In many areas of the country, this horizontal merger resulted in the reduction of number of strong competitors.

After merging, Staples as the only superstore in the area raised prices up to thirteen per cent. The Federal Trade Commission of USA blocked the merger. The elimination of strong competition between two leading firms resulted in unilaterally anticompetitive effects[30].

2.2 Vertical Mergers

It is a combination of firms operating at different stages/levels of production. From different stages of production, it implies that firms involved from raw materials to the finished products, for instance,. "Major manufacturers' buyout a warehousing chain in order to save on warehousing costs, as well as making profit directly from the purchased business".[31] Another example is that of a merger between a steel manufacturer and an iron ore producer.[32] Vertical mergers represent integration which means ownership or control of a firm at different stages of production process, e.g., petroleum refining firms owing "downstream"- the terminal storage, retail gasoline distribution facilities, a "dram" the crude oil field wells and transportation pipelines[33].

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[29] http://www.learnmergers.com , last visited on 16 February, 2007.
[30] http://www.ftc.gov/be/compguide/mergers.html , 16 February, 2007.
[31] www.investopedia.com , last visited on 16 February, 2007.
[32] Supra No. 9, Section 22.
[33] R.Suryanarayanan, "*Commercial's Company Law*", Ready Reckoner, 2001, Page No. 242.

Vertical merger is an amalgamation between firms, which previously had, or could have had, a supplier – customer relationship[34]. Here the object is usually to ensure a source of supply or outlets for products or services[35]. A vertical merger may harm competition by making it difficult and in some cases impossible for other producers in the same line of business to access important distribution facility or network[36]. Such acquisition may eliminate potential entrants into other markets as well. Telecommunication could be cited as an example.

Similar is the case of merger between Time Warner, Inc. Federal Trade Commission (FTC) opined that the merger would allow Time Warner – Turner affiliate cable companies to exercise monopolistic practices against competitors.[37] The same way, Time Warner could refuse to sell its video programming to other competitors, or offer to sell the programming at discriminatory prices. The Time Warner – Turner affiliates could also distort competition of video programming by refusal to carry programming of other competitors. In order to prevent anticompetitive effects, the FTC allowed this merger after prohibiting the discriminatory access terms[38].

2.3 Conglomerate Merger

Merger between firms in different lines of businesses is called a conglomerate merger e.g. merger between a cement manufacturer and a sugar producing firm.[39] These firms are

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[34] Micheal B. Metzger, ID., Jane P.Mallar, J.D, A.James Barnes, J.D, Thomas Bowers, J.D, Micheal J. Philips, J.D, L.L. Micheal J.Philips, "*Business Law and the regulatory Environment*". Concepts and Cases, Lusk Series. 6th Edition 1986. IRWIN Homewood, Illinois 60430, 1986, Page No. 1177.
[35] Supra note No.2, Page No. 3-15.
[36] http//www.ftc.gov/bc/compguide/mergers.html last visited on 28 February, 2007.
[37] The companies were producers of video programming and producer of CNN and other programs, respectively.
[38] http://www.ftc.gov/bc/compguide/mergers.htm , last visited on28 February, 2007.
[39] Supra note no. 11, Section 37

neither competitors nor potential or actual customers or suppliers of each other[40]. In practical terms, these mergers are not horizontal nor are vertical in nature. Such mergers are motivated to achieve control over distribution channels that otherwise could be used by rival entrants for their product supply. Through conglomerate merger, an entrant with a very different and unrelated product is assisted, and an entrant with a close substitute is foreclosed[41].

As explained elsewhere, firms intend to merge to increase their market share, to attain cost synergy, to diversify and to reduce exposure to risk. But, if a conglomerate becomes too large as a result of acquisitions, the efficiency of the entire firm may get hurt. This was observed during the conglomerate merger phase of the 1960S[42].

2.3.1 Pure and Mixed Conglomerate Mergers

Principal categories of conglomerate merger include pure and mixed conglomerate mergers. In pure conglomerate merger there is no economic relationship between the firms involved i.e., they do not have something in common. Mixed conglomerate mergers, on the other hand, involve firms that are looking for product or market extension. This type of conglomerate merger is a combination of both pure conglomerate merger and horizontal merger.

2.3.2 Product Extension Merger

In product extension merger two companies sell different but related products in the same market. The manufacturer of one product acquires a different but

[40] http: home.uchicago.edu/posher/meshki . htm ,last visited on 17 February, 2007.
[41] http://ideas. repec.org/p/th/bereco/1899 html ,last visited on 28 February, 2007.
[42] http://www.investopedia.com/terms/c/conglomerat merger. asp , last visited on 16 February, 2007.

complementary product - this allows him to offer a full range of related products. In such merger the acquiring firm diversifies its operation by purchasing a company in a new product market, for example, a conglomerate with interests in the aerospace and electronics industries purchases a chain of departmental stores[43].

In geographic market-extension, two companies sell the same product in different markets. One firm competes in a geographic area in which the other does not compete with the same product[44]. It is noted that in pure conglomerate merger, nothing in common between the companies not only in production but also marketing, research, development, technology, etc[45].

Conglomerate mergers are further classified according to the purpose of the dominant firm:

(a) The dominate party may itself be a "fully – fledged conglomerate company", i.e. a holding company's managers exercise control over a number of subsidiaries. Thus, the holding company maintains a profitable group through controlling management and allocations of financial resources.

(b) The dominant party may be a "financial conglomerate", i.e. the group may be comprised of financial engineering by the holding company, usually by exchanging its highly priced listed securities of companies in a large number of industries.

(c) Diversification is the most common type of conglomerate merger. It consists of a company which derives all or the greater portion of its revenue from a particular industry. It acquires subsidiaries which operate in other industries to obtain stability of earnings by

[43] Supra note no. 2, Page No.1178.
[44] Supra note No.11, Page No. 316.
[45] Supra note No.11, Page No. 6.

spreading activities in different industries and to utilize spare resources of capital or management[46].

2.4 Other Types of Mergers

Mergers may also be classified with respect to the degree of cooperation between the boards of directors of the companies involved[47].

2.4.1 Agreed Merger

When the directors of subsidiary company accept the offer in respect to their shareholdings and recommend other shareholders to accept the same. These directors while agreeing with the offer may approach the holding company to suggest the acquisition.

2.4.2 Un-Opposed Merger

When the directors of this subsidiary company do not oppose the offer, nor recommended its rejection.

2.4.3 Defended Merger

When the directors of the subsidiary company oppose the bid and recommend the shareholders to reject the offer. They may take further defensive action by resisting the offer with the intention to stop the takeover or merger. They may persuade the bidder to improve its terms[48].

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[46] Ibid. Page No. 107.
[47] Ibid.
[48] Ibid.

2.5 Reverse Merger

Normally a big company merges with a small company and, consequently, the small company ceases to exist. But where it is proposed to revive a sick company by merging it with a big or profitable company, the sick company will merge itself with the profitable company to survive. This is called a reverse merger[49]. e.g., a reverse merger occurs when a strong private company buys a publicly listed company, usually one with no business and limited assets. The private company reversibly merges into the public company, and consequently, a new public company's tradable share is formed.[50]

2.6 Classification of Merger with regard to Ways of Financing

2.6.1 Purchase Merger

Such merger occurs when one company purchases another with cash or through issuance of some debt instruments. Because of its taxation considerations, the acquiring company prefers it. The acquiring company writes up the acquired assets to the actual purchase price, therefore, the difference between book value and the purchase price depreciate annually thus reducing the payable taxes. [51]

2.6.2 Consolidation Merger

Such merger occurs when two or more companies merge together and a brand new company is formed. The companies forming such a new company cease to exist as they are combined under the new entity.[52].

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[49] R.Suryanarayanan, "*Commercial's Company Law*", Ready Reckoner, 2001, Page No.242.
[50] Supra Note. No.2.
[51] Ibid.
[52] Ibid.

2.7 Short- Form Mergers

It is a merger of a substantially owned subsidiary corporation into its parent company which owns at least ninety per cent of its outstanding shares of each class of stock of subsidiary company. Procedure of this merger requires approval of merger plan from the Board of Directors of the parent company. A copy of plan is sent to the shareholders of the subsidiary company as well[53].

Regardless of their category or structure, all mergers and acquisition have a common goal of creating synergy to increase the value of the combined companies as compared with the sum of the two companies separately. The success of a merger or an acquisition depends on whether this synergy is achieved or not[54].

3. MOTIVES OF MERGERS

Motives and causes of mergers are classified into two broad categories with regard to shareholder's value.

3.1 Motives that Add to Shareholders' Value:

3.1.1 Economies of Scale:

After consummating a merger, a new and a bigger company can easily save costs. It increases revenue by reducing staff members and duplicate departments while saving the revenue. In this way economics of scale improve.

3.1.2 Increased Revenue/ Increased Market Share

This motive assumes that the company will be absorbing a major competitor and thereby increase its power to control prices.

[53] Supra Note No.22, Page No.755.
[54] Supra Note No. 2.

3.1.3 Synergy

A company may merge with a small company having new technology with a motive to make better use of complementary resources.

3.1.4 Taxes

A big and successful company can purchase a loss making company to use its tax write offs. But there may be some limitations on the ability of profitable companies to acquire loss making units.

3.2 Motives that do not add Shareholders' Value

3.2.1 Overextension

Merger tends to make the organization fuzzy and unmanageable because of its bigger size.

3.2.2 Managers Hubris

Managers expect that they will get improved synergy through merger but infact it results in overpayment for the target company.

3.2.3 Managers' Compensation:

In merger, managers may have to leave the office with a compensation package. In some cases, managers were paid based on the total amount of profit of the company instead of profit per share. It harms the interest of owners and shareholders of the company and gives the managers a perverse incentive to buy companies to increase total profit.

3.2.4 Empire Building:

Managers get more power through a merger to build an empire.[55]

4. PROCESS OF MERGERS

In general, the merger procedures involve careful process of research and consultations. The relevant competition agency is bound to follow the rules of natural and constitutional

[55] Supra Note. No.8.

justice in decision making.[56] All the countries have their own laws to regulate mergers[57]. The procedures vary from country to country but the basic requirements of the all laws are more or less similar.

a. First of all, the board of directors of each firm must approve the plan.

b. The shareholders of each corporation is also required to approve the plan at their meeting. Some statutes require approval by simple majority. Whereas, most statutes require approval by two-thirds of the shareholders. In some cases, a company's by-laws can dictate another requirement, e.g., the holders of non-voting stock must also approve.

c. After the approval by Board of Directors and shareholders of both firms, the plan is filed with the relevant authority- Securities and Exchange Ccommission and the competition agencies[58].

d. When the notification, the merger plan arrives at the authority, the first is to ensure that it is a merger which does not attract anti–trust laws of the state[59].

e. After the authority is satisfied with the merger plan, it issues a certificate of merger to the surviving company[60].

f. When the statutory formalities are satisfied, in some countries, a notice is published in the newspapers and on websites to invite third parties to make submissions within the prescribed time[61].

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[56] http://www.Tca.ie/Speeches/presentations/merger.procedures , last visited on 23rd February, 2007.
[57] Supra Note No. 20, Page No.755.
[58] ibid
[59] http://www.tca.ie/speeches/presentations/merger.procedures, last visited on 16th February, 2007.
[60] .Supra Note. No 54.

When the plan is filed with the authority, two possible determinations may be made, either to allow the merger or carry-out investigation. "In investigation not only the actual effects of the merger on the market will be considered, but also must take into account the market evolution and international competition"[62]. If the authority is not satisfied, then issues statement of objections to the notifying parties. Finally, having considered the parties' reply and oral submissions, and after considering other proposals, the authority makes a final decision.

At present, the process of restructuring of a company through a merger is lengthy. This process involves various difficult and time taking steps. The most difficult step is to locate the parties with whom to conduct a transaction. It is hard to find qualified potential buyers. In big markets there are professional "middlemen" who facilitate merger transactions. These professional middle-men are known as intermediaries, investment bankers and business brokers. These professionals place their advertisement in media. They provide the services to the companies very costly. Most merger transactions involve intermediaries on one or both sides[63]

Merger procedure and its decision is itself a very sensitive and complicated step, that's why most of the companies who want to merge hire the services of intermediaries and experts.

5. EVALUATION OF MERGER

Merger often create the potential for abuse of the market power especially when it takes place between large firms. Firms may abuse the market power through increasing prices,

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[61] http://www.tca.ie/speeches/presentations/merger.procedures,last visited on 16th February, 2007.
[62] http://www.taveruertschauz.com/pdfiles/mergercontrol,last visitd on 16th February, 2007.
[63] www.wikipedia.org/wiki/merger, last visited on 17th September, 2007.

deterring entry or to eliminate competitors. The may also resort to predatory pricing to oust the competitors.

The deal makers primarily argue in support of mergers that through such combination efficiency is improved. Efficiency effects may result from several different factors. Through economies of scale, the merged firm may be able to reduce its cost of production and distribution. Firms gain access to the patent rights and technical expertise of superior managers; assets may also be concentrated because of these benefits mergers tend to increase efficiency.

Although, there may be other considerations, the basic decision to allow or prohibit a merger rests on evaluation of the adverse effects on the market versus the social benefits of improved efficiency. Merger can be evaluated by comparing the cost saving and the deadweight loss. If the deadweight loss is greater than the efficiency gain, the merger is generally not allowed. But if the resource saving is more than the deadweight loss, there may be a net public interest arising from the merger[64].

An initial and key inquiry in any merger case - whether horizontal, vertical or conglomerate - is proper delineation of the relevant market within which the competitive effects of the transaction are to be assessed. So, the agency starts from product market dimension of the relevant market. The "next - best substitute" product is also considered until it reaches the point where a "hypothetical monopolist" could profitably impose a small but significant and non-transitory increase in price[65].

[64] Ibid.
[65] Supra Note No.2, Page No. 309.

The U.S Justice Department Merger Guidelines indicate that, in assessing the probable effect of a merger, the Department focuses on the existing concentration in the relevant market, the increase in concentration as a result of the proposed merger, and other non - market share factors.[66]

To interpret market concentration data, The U.S Justice Department uses a statistical index known as the Harfindahl-Hirchman Index (HHI). "The HHI is calculated by adding the squares of the individual market shares of the firms in the relevant market to arrive at a statistical measure of concentration".[67] A relevant market consisting of four firms, each controlling 25 per cent market share, would have an HHI of 2,500 ($25^2 + 25^2 + 25^2 + 25^2$). This approach emphasizes the presence of larger, and therefore more competitively significant, firms in the relevant market. For example a market consisting of four firms with the market shares of forty per cent, thirty per cent, twenty per cent, and ten per cent would have an HHI of 3,000. The Department is unlikely to challenge mergers in markets with a post-merger HHI under 1,000, and may challenge mergers in markets with a post-merger HHI of over 1,800 if the challenged merger increases HHI by more than 100 points[68]. The smaller the HHI, the less concentrated the industry[69]. The HHI is used in the analysis of horizontal mergers in which parties combine their productive capacities in a relevant market to operate as a single firm.

According to present merger policy of USA, horizontal mergers between large direct competitors may be challenged by the government. On most occasions, the courts

[66] Taxmann's "*Companies Act with Sebi Rules / Regulations/ Guidelines and Corporate and Sebi Laws*", Dec, 2005, Page No. 1114.
[67] Kishwar Khan / research papers/contribution from Pakistan Global Forum on Competition / Feb.04.
[68] Supra Note No. 67, Page No.1174.
[69] Ibid Page. No.662.

have supported the government in preventing such mergers. The outcomes of proposed vertical and conglomerate mergers are less certain. During the 1960S and 1970S, the government was successful in challenging mergers involve large firms. During late 1970S and 1980S, anti trust enforcement agencies showed less interest in preventing vertical and conglomerate mergers. At present, unless it appears that such mergers would substantially increase horizontal market power, they are unlikely to be challenged as mentioned above[70].

5.1 Analyses of Merger

First of all it is determined whether the merger raises anti-competitive concerns or not. This can be achieved without a full analysis, and in most cases, competition agencies do not take further action. But if there is a possibility of competitive harm, a complete examination is carried out with respect to the following:

a. Defining markets;
b. Market shares of firms in the relevant market;
c. Potential adverse effects from the merger;
d. Analysis of market entry and exit conditions;
e. Analysis of potential efficiencies arising from merger;
f. Failing firm argument[71].

5.1.1 Defining Markets

First of all a relelvant market is defined to narrow down the scope of enquiry and analysis. A market is generally defined as consisting of all products that are close substitutes of each other from customers' point of view[72]. There are two components of a market: product and geographic.

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[70] Supra Note No 62, Page No 640.
[71] Supra Note No 66.
[72] Supra Note No. 66.

5.1.1.1 Product Market

A product market is defined as a product or group of products and a geographic area in which it is sold such that a firm is the only seller of those products that area could raise by a small but, significant and non-transitory amount above prevailing price levels. Substitutability for the final use is considered by the competition agencies and courts to determine whether the firm has a dominant market share or not. It is important to assess whether sufficient number of buyers would switch to other products in response to price increase by a potential monopolist. Switching to other products makes a price increase less profitable for the monopolist. This analysis is carried out for substitutes of these substitutes.

5.1.1.2 Geographic Market

Geographic market definition is based on the ability of customers to purchase from different locations. So substitutability of products and locations are primarily determined by the response of customers to the price rise of products by the monopolist.

5.1.2 Identification of Relevant Firms and their Market Shares

Merger analysis generally relates to future outcomes of a merger. Firms that could easily begin to sell their products through product substitution are also included in the relevant market. Analysis will take market shares of the firms already producing in that market and calculate their future significance. Generally, a market share exceeding 35% calls for inquiry.

5.1.3 Justification of Potential Adverse Effects

Merger that creates or enhances a dominant position is included in the harmful category of mergers. Mergers of new and potentially more efficient competitors may also raise concerns.

5.1.4 Barriers to Entry

Competition agency will proceed the analysis and determine the efficiency of new firms to enter the market in response to the anticompetitive activity. It will be noted that how quickly new firms can enter to make the price rise unprofitable for existing sellers. Firms must be likely to enter quickly enough so that customers are not harmed by the loss of competition. Entry must also be of sufficient scale to counteract the loss of competition.

5.1.5 Efficiency Defence

A merger, which is harmful for competition, may be allowed if the benefits to public are of greater value than the loss of competition in the market.

5.1.6 Failing Firm Argument

A special form of efficiency defence called failing-firm defence due to which a merger may be allowed is that one of the firms faced with imminent extinction. In order to use this defence the following factors need to be established:

a. The acquired firm has no reasonable grounds for survival;

b. The acquiring company is either the only firm interested in acquiring the failing firm, or if other companies also interested in the failing firm's acquisition, then it must be proved that the acquiring company will not harm the competition;

c. All other strategies for saving the company have been tried and have failed[73].

[73] Henry N. Butler, *"Leagle Environment of Business, Government. Regulation and Policies Analysis"*, South Western Publishing Company, 1987. Page No.661.

Identification of the efficiency of a merger is technically very complicated and challenging. Quantifying the expected harm from the loss of competition is even more problematic. So the merger must be least anticompetitive means of achieving efficiencies.

5.2 Data Required for Investigation of Mergers

Relevant information is the most important factor for accurate merger evaluation. Data relating to the following parameters is required:

a. Pre-merger costs of the merging parties.
b. Pre-merger mark-up over costs.
c. Identitfication of views, and reaction of buyers and competitors.
d. End uses, physical and technical characteristics of relevant products and their substitutes.
e. Costs of switching to substitutes.
f. Costs to competitors of adapting production and distribution systems.
g. Transportation costs.
h. Trend of production and sales of the relevant product.
i. Costs and the time required for sufficient entry into the relevant market.
j. Relevant laws and regulations affecting market conditions.
k. Possibility and impact of foreign competition.
l. Dynamic and static efficiency of the industry including innovation.

The above information is used to determine the likely competitive effects of the merger.[74]

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[74] Supra Note No. 67.

5.3 Sources of relevant Information

The above mentioned information is gathered from the:

a. The merging parties;
b. Actual and potential competitors;
c. Buyers and customers;
d. Suppliers;
e. Public and governmental agencies.

A comprehensive inquiry may also require access to private, confidential and commercially sensitive information. Information assessed from the buyer's view is most reliable than the information derived from the competitors. Interest of competitors regarding a merger outcome need to be weighted. For example, if a merger reduces competition, it is in their own interest that the merger be approved. On the other hand, if merger increases competition in the form of more efficient firm, competitors will prefer a merger not to take place. That's why the information derived from them may be biased, While, buyers are interested in preserving competition in efficiency gains.

5.4 Pre-merger Information Requirements:

The following information needs to be obtained:

a. Name and addresses of firms involved in merger;
b. Description of the transaction and copies of relevant documents such as merger deed;
c. Timing of the transaction;

d. Copies of financial reports;

e. Details of the structure of the merging firms;

f. Expected benefits and reasons for the merger.

Analysis of above identified information clearly determines the reasons and outcomes of the merger from several stakeholders' viewpoint i.e., the merging parties, competitors and customers.

CHAPTER - II

IMPACT OF MERGERS ON COMPETITION AND PUBLIC INTEREST

Merger is a legal process authorizing firms to amalgamate in order to achieve efficiency goal and for other lawful benefits. But, is well evidenced that mergers are brought about to increase market share for the exercise of monopoly power. Therefore, mergers may seriously harm competition in a relevant market.

Market concentration affects the likelihood for one firm or a small group of firms to exercise market power so as to restrict output in order to maintain certain price increase. Prior to challenge a merger, the competition agency needs to assess other factors that pertain to competitive effects, as well as entry and exit. A merger may adversely affect the competition through different ways, these are explored in this Chapter in detail.

Competition laws prohibit anticompetitive conduct comprising abuse of monopoly power and certain restrictive trade practices e.g., restrictive agreements by two or more firms. When merger increases the likelihood of such conduct, it will fall under the anti-competition law., There are two conditions for a merger to be challenged for having anti-competitive effects;

a. substantial concentration in the market after merger ,

b. barriers for new entrants to provide effective competition.[1]

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[1] www.ftc.gov/bc/compguide/mergers.htm, Last visited on 13th May, 2007.

The dramatic increase in the number of mergers leads to a debate about their economic and practical consequences on public. When looking at mergers we must be particularly aware of the affects of the increased concentration and market power resulting from these mergers. Pre-merger control is the only way to prevent the creation of market structures featuring a small number of players possessing the ability to exert undue market power to the detriment of national economy and consumers. The effects of mergers are discussed in the paragraphs to follow.

1. Anti-competitive Effects of Horizontal Mergers

Horizontal mergers are the most likely to create anti-competitive concerns as they reduce the number of independent competitors in a particular market. The anti-competitive effects of horizontal mergers are further divided into two broad categories of unilateral and coordinated effects.

1.1 Unilateral Effects

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When a merger enables a single firm to increase prices unilaterally i.e., without coordinating with its competitors, it has created a unilateral effect. If a merger removes closest competitor, then a firm with large market share may increase prices unilaterally[2]. This firm can also creates barriers for new entrants. That is why a horizontal merger is likely to be the most attractive to the firms involved and most harmful to competition. If the firm raises its prices, a large percentage of the sales that would have been lost are now kept within the same firm.

[2] www.ftc.gov/bc/compguide/mergers.htm. Last visited on 13th May, 2007.

However, it would depend on the elasticity of substitution of the relevant product[3].

Merging firm with differentiated products may increase the price of one or both products above the pre-merger level in a unilateral way. However, this requires consumers' preference for the product in question. Availability of close substitutes may restrict their freedom to increase price and reap the benefits of merger.

1.2 Coordinated Effects

A horizontal merger increases the possibility of remaining market players to coordinate their behavior and thus distort competition. Their behaviour may make it impossible to attain price, quantity and quality that would have been there under competitive situation. in this case, monopoly or oligopoly profits are earned by the firms. They may have agreements over prices and geographic market distribution.

If merging parties are not actual competitors but are potential competitors, even then special concerns arise. A potential competitor may enter the market if prices rise sufficiently. This behavior affects competition by firms who already exist in the market. Therefore, merger between actual competitor and potential competitor removes the competitive discipline by the potential entrant. For instance, potential competition is hurt when a dominant domestic

[3] Kishwar Khan, *"Mergers and Market Dominance; Cases and Country Experiences"*, Research Paper/ Contribution from Pakistan for Global Forum on Competition/February 04, Page No.1to 15

firm is merged into an important multinational firm producing the same product or product range[4].

As explained above, a merger may reduce competition by engaging in such coordinated interactions that harm consumers. Coordinated interaction is comprised of actions by a group of firms that are profitable as a result of the accommodating reactions of the others[5].

2. ANTI-COMPETITIVE EFFECTS OF VERTICAL MERGERS

Vertical mergers may harm competition in a variety of ways as explained in the paragraphs to follow.

2.1 Reduction of Competition at the Supply level

Vertical mergers may reduce competition at the supply stage. They may foreclose competitors from a share of the relevant market. For example, a customer of a particular product acquires a supplier or distributor firm of that particular product. Consequently the competitors of the supplier firm will be foreclosed to compete with it for sales to the acquiring firm.

2.2 Reduction of Competition at Retail Level

Vertical mergers may reduce competition at retail level, for instance when a manufacturer acquires a retail outlet for its products to foreclose its

[4] Ibid.
[5] http://www.learnmergers.com, last visited on 9th Feb, 2007.

competitors from competing with it for sales to that retail outlet. After the merger the retailer carries only the acquirer's brands thus reducing competition.

2.3 Increasing Entry Barriers

Vertical mergers may create barriers for new entrants. If a major customer of a product acquires a captive supplier of that product, potential producers of that product are then restricted from commencing production due as a result of merger[6].

3. EFFECTS OF CONGLOMERATE MERGERS

If mergers are conglomerate then they are not likely to generate antitrust consequences because there is no impact on market concentration.[7].Nevertheless, there are three kinds of conglomerate mergers that can be challenged.

3.1 Mergers Involving Potential Reciprocity

A conglomerate merger may create a risk of potential reciprocity if the acquired firm produces the product, and the suppliers of the acquiring firm – due to an underlying wish to stronger the relationship with the acquirer – thereafter purchase the products of acquired firm rather than of its competitors[8].

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[6] William C. Holmes, "*1989 Anti Trust Law Hand book*", Anti Trust Law Library 1989.

[7] Henry N. Butler, "*Legal Environment of Business, Government. Regulation and Policies Analysis*", South Western Publishing Company, 1987. Page No.652.

[8] Micheal B. Metzger, ID. , Jane P.Mallar, J.D, A.James Barnes, J.D, Thomas Bowers, J.D, Micheal J. Philips, J.D, L.L. Micheal J.Philips, "*Business Law and the regulatory*

3.2 Mergers that Eliminate Potential Competition

Conglomerate mergers may also eliminate potential competition. If the existing competitors perceive the acquiring company as a potential entrant in the acquired company's market, the acquiring company's entry by a conglomerate merger may result in a loss of the moderating future influence. When the acquiring company enters the new market by acquiring a well established existing competitor rather than by starting a new competitor external expansion, the competition among other competitors of the acquired firm and the acquired firm is weakened. Competition agencies need strong argument to prove that such merger would necessarily eliminated potential competition[9].

3.3 Mergers giving Unfair Advantage to the acquired Firm

When a large firm acquires another firm having significant market position, then it may get an unfair advantage over its competitors through its ability to draw on the greater resources and the expertise of its new owner. This may entrench the acquired firm in its market by deterring existing competitors from actually actively competing with it for market share and by creating entry barriers for new competitors after the acquisition[10].

Conglomerate mergers do not usually raise anti-monopoly question because, economists have reached no conclusion on the benefits and anti-competitive effects of conglomerate mergers. No study has found major gains or

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Environment". Concepts and Cases, Lusk Series. 6th Edition 1986. IRWIN Homewood, Illinois 60430, 1986 .Page No.1178.

[9] Ibid.

[10] Ibid.

consists, so perhaps the best policy is to keep a watchful eye. But, it may do so when it is feared that the firm may abuse its market power, such as by exerting pressure on firms from which some companies in the group purchase supplies to place business with other companies in the group, and it is also argued that a decision by a company to enter a new field by acquisition competitors in that field in so far as the acquiring company might otherwise have entered the field directly[11].

The threat to competition from a vertical and conglomerate mergers is minimal than that posed by horizontal mergers. On the other hand vertical transactions lessen the sources of supply or sales outlets for other competitors, while conglomerate merger can raise the risk of an already dominant firm becoming even more entrenched. But these transactions can have positive or pro-competitive effects as well. Firms, through merging with other firms may increase competitors in the relevant market. For example, a small producer acquires the distribution outlets and thereby become a stronger company to compete with other. In this way it enhances overall competition[12].

4. PROCOMPETITIVE EFFECTS OF MERGERS

1990S witnessed a wave of amalgamations leveling various economies through domestic and cross-border mergers. There are two opinions regarding effects of merger activity on job market. Some argue that merger of companies generally

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[11] M.A. Weinberg and M.V.Blank and A.L. Greystoke, " *Takeovers and Mergers" Fourth Edition, Sweet and Maxwell, London, 197,* Page No.111.
[12] William C. Holmes, "*1989 Anti Trust Law Hand book*", Anti Trust Law Library 1989, Page No.317.

results into job losses. Through mergers, the job opportunities are first reduced and then limited. The proponents of mergers, on the other hand, argued that mergers facilitate synergies between merging firms and thereby generate competitiveness in the market[13].

The companies, through mergers hope to get benefit from the following:

4.1 Staff Reductions

As discussed above, mergers lead to job losses. Finances are saved from reducing the number of staff in accounting, marketing and other departments. Some times employees leave the office with a compensation package.

4.2 Economies of Scale

"Because, size matters",[14] the combined company can often reduce duplication of operations, thus, lowering costs and thereby increasing profits. Through merger, companies, whether small or big, come together and make single large unit - such bigger unit can save on costs. Mergers also improve purchasing power to buy equipment and office supplies with good bargaining position than before.

4.3 New and Improved Technology

Merge companies may be able to acquire new technology and thus become more competitive. A smaller company may have a unique technology, which

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[13] The employment effects of M & A in Commerce Page No. 33 Repost for discussion on the effects of M & A, Geneva, ILO, 2003. Also available at http://www.ilo.org/public/english/dialogue/sector/ tmbf01.htm

[14] www.investopedia.com , 13th May 2007.

makes it attractive for large companies to acquire such small company in order to maintain or develop a competitive edge.

4.4 Improved Market Access

Merger increases marketing and distribution by getting new sales opportunities. Companies can get access to new markets and grow revenues. This, in turn, improves raising capital for investments.

Achieving synergy is easier said than done. It is not automatically realized right after merger. Sure, merger may improve economies of scale, but it is not always the case. Sometimes a merger does just the opposite. One plus one is the special alchemy of a merger or and acquisition, but in many cases one and one add up to less than two. Synergy opportunities exist only in the minds of the dealmakers, and there are very rare opportunities for a merger to improve market efficiencies. The dealmakers and corporate leaders try to present an image of enhanced value, because they have much to gain from a successful merger deal[15].

Finally, even if competition is eliminated, the competitive effects in other market and its position in the international competition still can lead to the acceptance of the merger[16].

5. PROTECTION OF PUBLIC INTEREST

Rule of reason requires the competition agency to make an assessment of merits and demerits of any practice with respect to public interest

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[15] ibid

[16] http://www.Taverniertschanz.com , last visited on 27th May, 2007.

considerations. A discussion of mergers would not be complete without discussion of public welfare.

A merger is regarded as contrary to the public interest if the competition agency is satisfied that a merger:

a. has lessened substantially or is likely to lessen substantially the degree of competition.

b. has resulted or likely to result in a monopoly situation which will be contrary to the public interest.

The question arises here as to what do we mean by a 'monopoly situation' that is contrary to the public interest? A monopoly situation is not considered detrimental to public interest if competition agency is satisfied that any or more of the following circumstances exist:

a. That the monopoly situation, through mergers, has resulted in or is likely to result in a more efficient use of resources in any business trade or industry that would be the case if merger did not exist;

b. That the monopoly situation is or is likely to be necessary for the production, supply or distribution of any commodity or service;

c. That the termination or prevention of such monopoly situation would deny to consumers or users of any commodity or service,

other specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them;

d. That the termination or prevention of monopoly situation would be likely to have a serious and persistently adverse effect on the general level of unemployment of any area in which a substantial proportion of the business to which the monopoly situation relates is situated;

e. That the termination or prevention of the monopoly situation would, be likely to cause a substantial reduction in the earning of any export business or trade. [17]

The following example will clarify the above mentioned arguments. In Rothmans of Pall/British American Tobacco Merger, while the authority found that the merger would create a virtual monopoly situation, it was, nevertheless, noted that an amalgamation had certain public interest benefit. The Commission authorized the merger with certain conditions aiming at alleviating possible adverse effects on the monopoly situation to be created in the industry. The conditions were as follows:

a) That all the surplus product making equipment of British America Tobacco Zimbabwe Ltd. be disposed of with in a reasonable period of time and at fair and realistic prices to third parties interested in entering the same industry; and

[17] UNCTAD, '*Handbook on Competition Legislation*', TD/B/COM point 2/CLP/33, 28 February 2003. Trade and Development Board, Intergovernmental Group of Experts on Competition Law and Policy, 2-4 July 2003. Note by UNCTAD Secretariat, Page No.71.

b) That upon consumption of the mergers the ex-factory price of all the brands presently being produced by the merging parties not higher than those charged immediately prior to the merger, and that future price increases be justified and subject to surveillance by the competition authority.

The merged parties accepted the above conditions and signed the undertaking to that effect. Merger between large firms have long been a public policy concern. Hence mergers that substantially decrease competition or create monopoly are strictly prohibited. Firms are required to report any proposed merger to the relevant competition authority for evaluation of merger's likely effect on competition. The authority determines on the basis of careful evaluation whether to permit or oppose the merger.[18]

The principal classical controversy is whether merger operations result in an efficiency increase, or in a market power increase or both. In simple terms, from the social point of view if the efficiency increase prevails, they are good, if the market power prevail, they are bad. For both, the net welfare gain needs careful assessment. Thus, the argument is between those who consider mergers as a necessary and vital part of the competitive process and those who consider these operations only as means to reach dominant position in the economic system.

The key policy issue is how to preserve the socially beneficial mergers operations and vice versa. Neither a total ban on all mergers, nor a total liberal policy is likely to be a first best policy option. The existence of both an efficient

[18] Horizontal merger; An equilibramium analysis by Josef Farrell, Caral Shapiro. The Economic Review Col. No. 1, March 1990, Page No.17.

capital market and the opportunity to exchange shares helps creating a competitive market in ownership which makes it possible to pressurize ill-managed companies to act efficiently thus avoiding any hostile takeover. Relative to this possibility the deal choice has been to prevent all those actions that can curb managerial discretion, while allowing the friendly mergers, which often are its most egregious manifestation through a set of measures. [19]

Mergers have a verity of consequences for companies and communities. These effects can be internal to a company but mergers also affect states, regions and communities. The negative impact of mergers is often the best known because they frequently cause concern when large companies merge. There are also possible positive effects of merger that are often unknown or misunderstood. However, the key point remains that mergers can have positive and negative consequences for both companies and communities, often at the same time.

5.1 MERGER CONTROL TO SAFEGUARD PUBLIC INTEREST

When a merger is referred to a competition authority, it investigates and reports whether it qualifies for investigation and, if it does, whether it operates or may be expected to operate against the public interest. The investigation authority is charged to take into account all matters that appear to it to be relevant in considering the public interest but in particular it must have regard to the desirability of maintaining and promoting competition, the interests of

[19] Mergers Market and Public Policy by Giuliano Mussati, Published in 1995. Springer. http://books.google.com.pk/books?vid=ISB No 792336437, 13th May, 2007.

consumers, efficiency and innovation, the balanced distribution of industry and employment, and exports. The investigators must reach definite conclusion and if it finds the merger operates against the public interest, it must specify the particular adverse consequences, consider what action should be taken and may make recommendations for action either by the government or by the companies concerned.

If the authority has concluded that the merger qualifies for investigation and that it operates against the public interest and then it should be ordered to break the merger; to prohibit proposed merger from taking place; or to regulate the behavior of enterprises after they have merged. So a merger should be controlled in the public interest and should not go against the community[20].

According to the Allied coatings and compounds ltd companies are often formed for different commercial reasons, it was not for the court to pass judgment over the commercial wisdom of the businessman in creating such purpose companies as long as they did not infringe any law of the land. Courts do not have the access to the materials which necessitated the creation of such special companies and unless the scheme is shown to be contrary to any law the court should not come in the way of business rejecting bonafide scheme.[21]

Courts should base their merger legality test on whether it harms public interest or not. Courts have comprehensive jurisdiction in justifying a merger

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[20] John H Farrar Nigel Furrey and Brenda Hannigan, "*Company Law*" Butterworth London 1985 Page No.512 – 514.

[21] Re (1999) 2 comp LJ 38 (AP); ITW Signade India Ltd. Re, (1999) 2 comp LJ 38 (AP); A. Ramaiya, "*Guide to the Companies Act*", 16th Edition, 2004 Page No.3254.

scheme.[22] If there is nothing against law or public interest, the court would sanction the scheme[23].

5.2 Job Losses

As already mentioned, mergers may lead to job losses. An interesting case study is cited here - a study on the efficiency effects of bank merger in the United States, which summarize nine case studies, reports that all nine mergers resulted in significant cost cutting in line with pre-merger projections, although only four of the mergers were clearly successful improving cost efficiency, the largest being generally associated with staff reductions. All of the merged firms indicated that the actual savings not often exceeded expectations.

The European banking sector witnessed job losses since beginning of the 1990s. The nature and quality of employment also changed in the later few years. Employment reductions particularly affected branch networks and administrative functions. Older workers, women workers and traditional skills, who were not easily transferable to new centralized functions, were most badly affected by these changes. Product standardization has generated new function requiring high volume sales to customers without the necessity of traditional qualifications. When new jobs are created, they often require management and its skills or other specialized abilities that the above groups of workers do not

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[22] Hindustan liver employees Union V.Hindustan Liver Limited. (1995) 83 competition cases 30 (SC). R. Suryanarayanan, "Commercial's Company Law", Ready Reckoner, Commercial Law Publishers (India) Pvt. Ltd. 2001 Page No.243.
[23] Highway Cycles industries Ltd. Re, (1999) 34 CLA 55 (P&H)
Ibid Page No. 3258.

possess. Mergers have been found to accelerate such corporate practices because enterprises tend to review their entire cost structure around mergers with a view to identify the maximum savings possible. The working conditions of subcontractor workers performing such outsourced functions often differ to those of staff in direct employment[24].

The American Bank mergers are common place and usually involve reduction of expenditure. The consolidation of Union National Bank and Penn Bank Corporation led to 12 per cent staff cuts. Several factors that favoured merger trends were capacity, cost-cutting and profit seeking initiatives.

Employment levels declined approximately 5 per cent between1984 and 1994, because of the deployment of technology based distribution channels and greater automation. The 1995 merger between Chemical Bank and Chase Manhattan led to the elimination of 12,000 jobs of a total of 75,000 in the combined bank. Similarly, the 1998 acquisition of Bank of America by Nations Bank included plans for the lay off of 18,000 workers by 2002.

Employment in insurance, on balance, remained largely stable, with growth in the sector, compensating for technology based productivity gains. There were however, substantial job losses in individual countries and specific companies[25]. However, overall figures indicating lower job loss in insurance as

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[24] UNI. Europa Study, analysis of responses, 2000. Report for discussion at the tri partite meeting. Geneva, 5-9 feb, 2001. ILO.
http://www.ILO.org/public/english/dialogue/sector/tmbfo1.htm Last visited on 28th May, 2008.
[25] Disappearance of approximately 300,000 banking jobs due to merger between 1999 and 2000... report published by International Labor Organization Geneva, February, 2001, for detail

compared to banking can not be taken at face value since in neither industry national statistics differentiate between full-time, part-time and temporary jobs.

There are growing concerns at the massive job losses and increased potential for social instability brought about by such wholesale restructuring. The financial sector is at the centre of this process, as both an agent and a beneficiary of change. Conservative estimates indicate at least 130,000 finance jobs may have disappeared in Western Europe as a result of mergers over the past ten years, and similar numbers are projected to vanish with increasing merger.

The failure to conclude lengthy and highly published merger negotiation frequently resulted in the damaging loss of talented staff to competitors owing to uncertainty and job insecurity. As for the effects in terms of profitability and growth, many studies point to the absence of substantial efficiency gains. A comparative study, directed by Mueller (1980), shows various countries concerning full legal mergers concluded that the chances of success are limited and that the costs of the changes in the organization are often greater than the benefits claimed by the promoters[26].

Information systems constitute another area which is usually deeply affected by merger-related job losses. IT specialist are frequently expected to

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visit http://www.ILO.org/public/english/dialogue/sector/tmbfo1.htm , Last visited on 28th May, 2008.

[26] See for further detail "*Mergers, Markets and Public policies*". By Guiliano Mussati, Page No.83 1995, Springer. http://books.google.com.pk/books?vid=ISB 28th May, 2007.

work extra hard to harmonize systems. Once the systems harmonization is complete, however, banks feel the staff reduction in this area.

A study by the USA Office of Advocacy, small business administration, provides an excellent analysis of the employment impact of mergers in the United States. The focus of Small Business Advocacy (SBA) reports cover the 1990-94 period, is on business acquisition activity by firm size and industry, many of its findings are pertinent in the context of this report. The main conclusions are that mergers activity differed by industry.

5.3 Merger Generates other Jobs

As might be expected, job growth in investment banks and firms specializing in merger has been inversely proportional to losses elsewhere in the financial services sector, although the increase formed in no way compensate for overall reductions. In Australia, for instance, growth in this sub-sector of financing services grew by about 36 percent between 1991 and 1996, and a further 14 percent between 1996 and 1997. Even in restructuring financial service organizations, job in IT and making functions as well as in call centers have increased as a result of the shift in strategies.

As might be expected, job in growth areas-with the exception of those in call centers tend to have a better-paid better-educated workforce with greater proportions in associate professional and managerial occupations. There is an inverse relationship in growth between full-time and part-time employment, with full time jobs on the decline. Japanese employment also stands to gain in some measure from the new Japanese inclination for merger. The value of all

perceived to have lower status. There are suggestions that women usually move into areas where they may be able to exercise high level of skills and expertise but have little effective organizational discretion. Clearly given these gender characteristics, the integrations of merged organizations must have different outcomes for men and women workers, as cost cutting tend to fall disproportionately on the functions in which women are disproportionately represented.

Before the current wave of mergers in finance, a feminization trend has been developing in many countries since the 1980, focusing on branch management and administrative functions. In Finland, for example, the proportion of female branch managers in some banks was approximately 7% in 1983, but by 1992 had risen to 37 percent. The initial large scale influx of women into branch management took place during period of growth and expansion into new business. Women remained handicapped relative to men regarding professional status pay and possibility for career progression in the context of mergers.

In addition, merger often involve office closures and the relocation of jobs. In a case involving a recently acquired insurance company, call centers had been closed and the consumer's advisors had been offered the opportunity to move to a call centre in another town. Some had done so, but were finding that having to work at a distance from their homes undermined the very reason

they had chosen call centre employment in the first place which was to be able to be able to manage work and child care at the same time.

ILO Report 1993 highlights social effects of structural change in Banks[28]. According to this report employment gains and losses in the financial sector do not affect men and women equally. Most research shows that women, including women managers, are disproportionately affected by merger induced job losses in the financial services sector. Ample evidence points to the fact that the bulk of job losses through restructuring affects middle-management position, and the teller and clerical functions in which women workers are most represented[29].

A career in finance and particularly in banking was traditionally considered a male preserve. In many parts of the world banking remains male-dominated, with reports of gender ratios among bank employees of 75:25. In some countries, however, the proportion of women workers in the financial sector has recently raised in response to officially sponsored employment equity initiatives. Despite the general increase in the number and proportion of women employed, work in banks still tend to be highly gender-segregated, with women concentrated in the lowest tier of the employment hierarchy.

Table: Occupational groups by gender in four British Columbian banks proposing to merge, 1996.[30]

[28] ibid

[29] The employment impact of mergers and acquisitions in the banking and financial service sectors, International Labor Office (ILO), Geneva, 5-9 February, 2001. http://www.ilo.org/public/english/dialogue/sector/tmbf1.htm , 29th May, 2007.

[30] The employment impact of proposed bank mergers. See http://www:bankmergerszc.gov.bcca/empimpact.html , 29th May, 2007.

Occupation	Employees	Men%	Women%
Upper Level Managers	48	87.5	12.5
Middle & Other Managers	4076	43.3	56.7
Professionals	625	28.0	72.0
Supervisors	451	9.1	90.9
Clerical Workers	4146	11.8	88.2

One of the result of bank mergers is usually the closure of branches and the removal of whole layer of middle management, where most women are now concentrated. Mergers and acquisitions clearly affect women workers to a higher degree than their male counterparts. It is the lower tier occupations and middle management positions that mostly disappear in the restructuring and rationalization that follows most mergers.

6. IMPACT OF MERGERS ON WORKING CONDITIONS

The firm is a nexus of implicit and explicit contracts which can be termed as a "psychological contract" because it is based on assumptions regarding mutual responsibility between employer and employees. So mergers can thus appear a deliberate strategy to violate internal norms. This contract is often violated by mergers, like merger deal is decided and planed by Board of Director who do not consult with or inform their workers. It means workers have no control over the decisions of their employers. That is why mergers have been described as a legitimate means for breaking contracts in order to restructure.

Another important consequence of restructuring is the growth of non-standard forms of employment like part time, temporary or contingent work. An ILO report identifies two basic pressures to expand non-standard employment.

The first is the pressure to shift labour from a fixed costs of employment and labour legislation does not cover non-standard forms of work. The second is shifting of work from high cost internal labour markets to more competitive, lower cost external labour markets. The third is the introduction of a system of high performance work organization. In 1990s, a study in the United States confirmed that the companies relied on temporary or contingent workers for the flexibility to respond quickly and effectively to changing market conditions.

6.1 Merger and the Working Time

The link between market concentration and patterns in regular working time is difficult to identify because working time agreements depend upon the national context and are not limited to the sector concentration etc.

Companies adjust their working hours to customer requirements extending opening hours on at least one day a week and even opening some branches on traditionally closed days such as Sundays. So mergers can provide an opportunity for management to opt for more customer friendly working hours. However, the rapid development of new technology often accelerated by mergers has the opposite effect of reducing the need for longer working time.

In Australia, the Finance Sector Union (FSU) reported that merger increased overall work load. Most of workers usually worked overtime without any compensation. Close to a million hours of overtime are worked each week reflecting the fact that almost 40% of full time workers put in more than 45

hours per week (or more than the normal weekly working time) 69% of these workers receive no pay for the overtime. These rates highlight the incredible pressure on workers to complete tasks, achieve targets and sell products. However, usual weekly hours are on average two hours then the consecutively agreed norm.

6.2 Managing Downsizing as a Consequence to Mergers

While mergers are driven largely by financial considerations, the success vitally depends on the motivation of retained workers to contribute to the achievement of merger objectives. The high proportion of failed mergers may not be unrelated to the manner in which staff is often relegated to cost variables rather than being made active partners in the change process. Social plans, guarantees against forced departures and the involvement of staff in merger related decision making are critical motivating factors.

Sometimes restructuring process produced other perverse effects for the employer. Job insecurity and work intensification has become common in downsized organizations. All stakeholders have a vested interest in determining practices best able to mitigate the impact of downsizing on workers and the future profitability of their enterprises. No universal solutions exist to successfully merge and downsize. Each organization must develop programmes that address the concerns of all its stakeholders, remembering that constant communication with employees is critical.

6.3 What Should be the Policies on Workers' Displacement

Post merger employer situation development is largely based upon employer obligations towards their workers in terms of consultation, information, notification, compensation and redeployment under the laws, culture and practices of the countries concerned.

There should be a strong relation and cooperation among the social partners, with strong industrial relations frame works encouraging co-ordination in decisions with important human resource implications. State regulations must provide procedures for informing and consulting employees and their representatives before hard decisions are taken. Trade unions accused the employers who ignore such regulation of providing prior information and of consulting their workers before mergers.

International Labour Organization framed some standards relevant to workers' displacement. According to these standards, workers should not be terminated without any valid reason, and that workers should be informed on time by the company before deciding a merger deal. These standards impose a direct duty on the employer that he should consult with the representatives of the workers in order to mitigate the adverse effects of mergers.[31]

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[31] International Labour Standards Relevant to Workers' Displacement the Termination of Employment, Convention 1982, Convention No. 158 and 166. Available at http://www.ilo.org/public/english/diaglogue/sector/tmbf1.htm. Last visited on 3rd May, 2007.

7. MERGERS AS A FACTOR OF STRESS-RELATED ILLNESSES AND DE-MOTIVATION

Mergers create anxiety and stress due to job's insecurity, workload and low standard jobs as their working world is turned upside down, their jobs come under threat and their career prospects and professional competence are called into question. It is much easier for managers to convince shareholders about merits of proposed mergers than it is to pursue their own staff.

A number of studies highlight close association between restructuring and mass layoffs. Layoffs and other restructuring processes create feelings of loss of control, betrayal and unfairness. Poor morale due to lay offs of friends and colleagues and increased job insecurity of retained staff. Terminations destroy the firms' social fabric. As structures are altered, relationships disrupted and communication flow modified, making it more difficult for retained staff to do their work. Survivors find that they have to work harder to cover staffing shortfalls that are resulted in workloads and the stress related to job insecurity. Job insecurity may make employees feed pressured into agreeing to extra effort into their jobs to demonstrate organizational loyalty; but such working conditions are neither sustainable nor conducive to the achievement of corporate objectives.

8. WELFARE IMPLICATIONS

Economists have articulated the welfare implications of mergers. Merger can reduce industry competition and result in higher prices for consumers. But on

the other hand, mergers may give rise to efficiency gains that reduce the cost of production or distribution.

Some economists argued that firms which don't participate in a merger may benefit more than the participants. When a merger occurs, the new firm will typically reduce its production below the combined out put of its constituent firms. Each wave of merger activity was accompanied by experimentation with a new form of enterprise structure: the horizontal trust, the vertically integrated firm, the conglomerate etc.[32]

Mergers may lead to more competitive companies. With more competitive companies mergers may also improve local business environments. As companies merge, they often create larger operations that are better able to invest in community resources. Most observers also agree that merger is beyond the control of community and government leaders. As such, the state has every incentive to provide a business environment to encourage merged companies to remain or expand.

Merged companies may have employment growth in the long terms despite short terms reductions. Though many merger do result in staff reductions in the short terms not all merged companies out staff. Infact, there have been notable exceptions, in which company actually increased its employment in the state. Different styles of work can help to create new ideas and efficiencies, but when cultures clash, it can be difficult to overcome.

[32] Robert F. Bruner, "*Applied Mergers and Acquisition*", John Wiley and Sons inc. 2004 Page No. 89.

Mergers can also estimate an increase in employment of a company, as synergies among the activities of companies or create growth opportunities. Public target companies reduced employment after the merger, while private target companies, increased employment after a merger. [33]

One study found that sixty per cent of surveyed UK chamber of commerce executives thought that mergers had a negative effect on their locality. Most of the remaining respondents thought mergers had little regional effect. However, when attempting to determine effects on the economy, it is essential to take into account the effects, rather than focusing only on negative effect of mergers[34]. Profit creating opportunities arise from new product and processes, new logistics, new market (Domestic and foreign), new forms of organization, and so on. If this is relevant to mergers, then we should observe at the centre of individual transactions some kind of economic turbulence[35].

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[33]Neal Young, Jan. 2000, win, loss or draw the effect of mergers and acquisitions on Minnesota economy. http://www.deed.state.mn.us/businessdev/PDF/meg& acq/pdf , 30th May, 2007.
[34] ibid
[35] Robert F. Bruner, "*Applied Mergers and Acquisition*", John Wiley and Sons inc. 2004, Page No.85.

CHAPTER III

PAKISTAN'S EXPERIENCE IN MERGERS AND PROTECTION OF MINORITY SHAREHOLDERS

Countries have their own peculiar legal arrangements for processing of mergers. It is a legal method to combine so as to expand the business, but subject to some restrictions e.g. a merger must not be made for elimination of competition. Some mergers are harmless for competition in a market; others however may distort competition by increasing market power. Such mergers are challengeable and competition agencies seek to identify and prevent these.

Regulation encourages us to maintain close and constant relationship of corporate sector with law. This has not only multiplied the scope for potential conflicts, but has also increased the regulatory burden for companies, legal representatives, competition agency.

At the same time we are re-assured by the fact that cooperation and coordination between regulatory authorities has to a very significant role in reducing the risk of conflict. Indeed, it is clear that extensive cooperation between competition agencies has become a crucial aspect of the regulatory scrutiny of commercial transaction.

Though functionally mergers in Pakistan have to comply with intrusive procedural and substantive statutory requirements and are arguably potentially subject to intense court scrutiny, the role of the judiciary and the case law relative to mergers and minority shareholder protection in Pakistan is vague and incomplete. Therefore, in reality the ability to ascertain as to what level mergers in Pakistan, are

monitored by state and judiciary, against unfairness and majority shareholders indulging in corporate opportunism, is subject to debate.

In order to effectively meet the challenges presented by mergers we need to constantly review – and, if necessary, develop and refine – our legal instruments. We must, at the same time, pursue and enhance active cooperation between regulators and a critical dialogue with the business community and the legal profession. Only with such constant vigilance will we preserve the economic benefit for every one of us – not just in Pakistan but worldwide – that derive from open and competitive market across the world.

1. PROCEDURE OF MERGERS IN PAKISTAN

In Pakistan, most, mergers materialize only if they have been sanctioned by the appropriate court of law. Mergers of majority companies are governed under Section 284 and Section 287 of the "Compromises, Arrangements and Reconstruction" portion of the Companies Ordinance, 1984, and are subject to the approval of courts[1].

Therefore, a Pakistani company when undertaking a merger, not only has to fulfill all of its inter-se legal formalities that have been mandated both by relevant law Ordinances such as the Companies Ordinance 1984 and the Memorandum and the Articles of Association, but also has to fulfill all the discretionary procedural requirements that have been requested by the courts, in addition to mandated procedural laws such as Companies Court Rules 1997. It is the responsibility of the

[1] In USA, mergers do not require court approval to a legal existence except in a very limited cases, such as where other legal and pertinent issues are implicated like when possible antitrust violations are encountered.

court to overview vigilantly that the company fulfills all aforementioned requirements and not to grant a merger if non-compliance is encountered.

Non-Banking Finance Companies "NBFC's are regulated by the Security and Exchange Commission of Pakistan. Under Section 282 (L) of the Companies Ordinance, NBFC's merger requires the sanction of the SECP to be effectual. In addition, Banking Company mergers are not governed by the Companies Ordinance at all.[2]

1.1 Scheme of Arrangement

The preparation of the scheme of arrangement for amalgamation "Scheme" by a company is the most important step towards undertaking a merger. The document forms of the scheme of amalgamation consist of the summarized rationale of the merger.

Under Section 252 of the Companies Ordinance, all companies have to appoint an auditor or auditors. The Code of Corporate governance 2002 "CCG" all listed companies have to employ both internal and external auditors.

1.2 General Practice in Pakistan

Before shareholders' meeting related to the merger, the company files a preliminary petition in the Court. This petition is substantiated with necessary information about directors, shareholders, board's approval of the merger, financial

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[2]Section 48 of the Banking Companies Ordinance (LVII of 1962) governs Banking mergers. Banking Company mergers require the approval of State Bank of Pakistan to go into effect.

statements, NOC's from creditors, etc. There is an application attached to the merger petition as required by law[3] that the court has to pass and order for holding an "extra ordinary general meeting" (EOGM) of the company.[4] Court fixes a date as to when an EOGM is to be held, in any case, shareholders must be provided with 21 days notice for the said meeting. Hence the court directs such notice. The shareholders are to receive the notice in person in case of an unlisted company's involvement.[5] When a listed company is involved the personal notice to the shareholders and general notice to the public via publication in the newspaper both are provided. In addition, in case of listed companies involvement, the court directs the company to provide notice to the SECP, and relevant Stock Exchanges as well.[6]

Chairman of the company is required to attend, monitor and oversee the EOGM's for legal compliance and to register shareholders' objections. Subsequent to the EOGM within 7 days, the Chairman has to submit report of his findings to the court. In turn, the related company files a petition with the court asking for confirmation of a compromise /arrangement in the form of petition in Form No.19, within 7 days of the filing of the report by the chairman.[7]

Form 19, along with information contained in the initial merger petition also mentions the proposed merger terms and compliance report about the original court

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[3]Section 284 of the Companies Ordinance, 1984.

[4] Extraordinary General meeting – see under Section 159 of Companies Ordinance, 1984.

[5] Section 159(7), 158(3) of the Ordinance.

[6] Sikendar A. Shah, "Mergers *and the rights of Minority Shareholders in Pakistan",* CMER Working Paper No. 04-31, Commissioned by LUMS – City Group Corporate Governance Initiative, Lahore University of Management Sciences. Also available at: http://www.ravi.lums.edu.pk/cmer,last visited on 3, May 2007.

[7] The Companies (Court) Rules, Rule 60 (1997) Gazette of Pakistan, Extraordinary, Part II 26th March, 1997.Section R.O. 187 (1)/97 dated 26 March 1997.

orders for EOGM,- this includes quorum requirements, votes and percentage by which the resolution was passed. Main point about the voting is also mentioned - if the merger resolution was voted for by a majority representing three-fourths in value of members present.

Afterwards, the court fixes a date for hearing the petition in Form 19. The court directs the company to provide constructive notice to the public at large of such hearing. This is done by publication in the newspaper. This notice has to be provided at least 10 days before merger's hearing.

In case of court's satisfaction at hearing, the merger is sanctioned in Form 21. But in case of objections, on the proposed merger, for instance, dissenting minority shareholders, then the court entertains such objections before granting approval to the merger.

The Registrar of Companies is provided with all the above documents and applications from the court. The representations are also taken into consideration by the court.

2. MERGERS AND THE RIGHTS OF MINORITY SHAREHOLDERS:

The courts have the power to adequately monitor mergers for prevention of coercion and suppression of minority shareholders but still the case law is not very rich. Functionally, the level of protection for minorities is via the judiciary, but in fact, situation is different i.e., the minority shareholders do not find explicit recognition from the courts. This may be due to multiple reasons deep rooted in the

legal and judicial system; an attempt to explore the same has been made in the paragraphs to follow.

2.1 Legal Instruments to Protect Minority Shareholders

The role of Securities and Exchange Commission of Pakistan is crucial to protect minority shareholders in case of mergers via Securities and Exchange Ordinance, 1969, Companies Ordinance 1984, etc. The role of SECP and the relevant pieces of legislation are discussed below.

2.1.1 Protection of Minority Shareholders in a merger via Securities and Exchange Ordinance, 1969

The SECP protects minority shareholders of listed companies and regulates the brokers, members, directors and officers of a Stock Exchange under the Section15-A, Section15-B of the Securities and Exchange Ordinance 1969. It also has the authority to inflict punitive and impose criminal penalties in certain situations. Under Section 34(4) and Section 34(5) of the Securities and Exchange Ordinance, the SECP has the power to make new regulations for the Stock Exchanges. In this way, SECP prevents any artificial stock price movement, so that those who intend to suppress the market value of shares can be defeated.

Due to certain limitations identified in meetings with SECP staff, SECP remains at times unable to detect those stock brokers who have developed several tactics to defraud shareholders specially those who hold minority interests in listed companies. These reasons are said to include the lack of technical and human expertise. Brokers' informally corroborate with each another and buy shares of

particular companies, with an agreement between themselves not to sell these shares within a specified time to artificially increase the price of shares. Such brokers aim is to induce those people who primarily happen to consist of minority shareholders, who buy or sell shares following the market price and do not look at the functioning of the company, to buy the related stock. Once the shareholders bought the stock at artificially inflated price, the brokers dump their shares in the market. This results into a disaster for minority shareholders, who trusted the market price of shares as indicative of the shares value they witness a share decline in the value of their investment.

2.1.2 Companies Ordinance, 1984

Section 284 to Section 288 of the Companies Ordinance discuss, about adequate notice and full disclosure of all relevant information to all minority shareholders to make an informed decision on the merger. This,in addition to ascribing the courts with the power to overview mergers, in complete transparency and hence sanctions those mergers, which are being undertaken from the interest of shareholders as a whole and not to oppress the rights of minority shareholders.

Section 284 of the Companies Ordinance lays out the procedural requirements of all "Compromises, Arrangements and Reconstruction", which is inclusive of mergers. Section 284 (2) which is relative to the protection of minority shareholder, states that if a majority in number representing three-fourths of the members present and voting either in person or, where proxies are allowed, by proxy at the meeting agree to any compromise or arrangement, the compromise or

arrangement shall, if sanctioned by the court, be binding on all the members. The court would not approve such scheme even if it is approved by three fourth majority of the share holders, where the majority shareholders of a company had voted in a manner coercive or oppressive to the minority or where the majority shareholders had not voted in the interest of the shareholders as a class. The fact that objecting shareholders constitute a small minority in proportion to the majority would be wholly irrelevant in such circumstances.[8]

This provision is subject to debate and interpretation. This provision clearly indicate (assuming the meeting's quorum requirement is met) that if dissenting minority shareholders vote against the merger in the meeting and such minority shareholders in quantity constitute the majority of those present at the meeting, the merger cannot take place, irrespective of the fact that the value of the interest of voting minority in aggregate is minuscule. This will grant veto power to minority which will give them power to protect their rights. In fact some argue that if such interpretation of the provision is accurate, then it is vesting unwarranted power in the hands of minority which generates the potential to unfairly coerce majority shareholders or of being damaging to the company itself.

Section 284 (4) of the Companies Ordinance lays down that all employees who do not conform to their respective duties[9] are subject to a penalty. However, objectively speaking, the deterrence value of such penalty is ineffectual, as the penalty of Rs.500/- per violation is diminutive.

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[8] Lahore CLD 2002, (1314).

[9] Employees duties are laid out under section 284(4) i.e. inadequate disclosure that adversely impact the minority shareholders.

Also under Section 285 of the Ordinance, the courts have a lot of discretion to make modifications to the procedures of mergers in order to attain all the objectives of functioning of merger, such as by according safeguards to minorities. Section 285(1) states that the court, after sanctioning a compromise or any arrangement, may, at the time of making such order or at any time thereafter, give such direction in regard to any matter or make such modifications in the compromise or arrangement for the proper working of the compromise and arrangement.

Also under Section 286 (a) of the Ordinance, if there is conflict of interest in a merger, the directors and Chief Executive are required to disclose their material interest in order to avoid such conflict. However, under Section 286(4) fines for non-compliance are diminutive and hence pragmatically ineffectual in nature.

Finally, according to Section 287 of the Companies Ordinance, which solely deals with the procedural formalities of a merger, the Court is responsible for the provision to be made for any persons who, within such time and in such manner as the court directs, dissent from the compromise or arrangement.

2.1.3 Securities and Exchange Commission of Pakistan Act, 1997

Securities and Exchange Commission of Pakistan Act, 1997 regulates mergers and related issues through its administrative body SECP and Code of Corporate Governance 2002.

2.1.3.1 Securities and Exchange Commission of Pakistan (SECP):

The Securities and Exchange Commission of Pakistan (SECP) came into being via the enactment of SECP Act of 1997. It is a semi-autonomous body. Its commissioners are nominated by the Federal Government mostly from the private sector.[10] SECP is an institute that replaced the Corporate Law Authority "CLA", which had been a Division of Ministry of Finance.

SECP has the legal capacity to employ consultants, bankers and stock brokers etc.[11] It has power to monitor and regulate the financial sector. The SECP is monitored by a Board which consists of the Chairman of the SECP, Secretaries to the Government from the Law, Finance and Commerce Division, a State Bank officials and Private Sector professionals. The Commission is required to provide annual reports, accounts and confirm all relevant legal formalities that are required of corporate institution to achieve truthful disclosure of its activities via transparency.

Though the SECP Act does not expressly mention that it is the duty of the SECP to protect minority shareholders in mergers; this can be implied from the Act if the text is observed in totem i.e., the Act talks about protection of investors regardless of fact that they are minority shareholders or vice versa. This is explained below.

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[10] Securities and Exchange Commission Act 1997, Section 5(1).
[11] Securities and Exchange Commission Act 1997, Section 5(2).

Under Section 20 (4) (j) of the SECP Act, the SECP shall be responsible for the performance of "regulating substantial acquisition of shares and the merger and take over of Companies." Also it is the duty of the SECP under Section 20 (6) (b) to strive "to maintain the confidence of investors in the securities markets by ensuring adequate protection for such investors". The protection of such "investors" by the SECP clearly includes minority investors, for minorities are a subset of investors. Notwithstanding the aforementioned statutory interpretation relative to minority shareholders protection as being one of the objectives of the SECP in the context of mergers, the case law shows that the duty of the court and administrative or enforcement agencies is to make sure that merging companies are making such decision in the interest of the shareholders as a whole including minorities and not solely for the benefit of the majority shareholders. The Board of the SECP after consultation with the Commission advises the Federal Government on regulation of companies and corporate sector and protection of the interests of investors[12].

SECP has the capability via its legislatively ordained broad enforcement and investigative authority, to achieve its objective of protection of investor's interest inclusive minority shareholders in mergers. For example, an investigating officer of the SECP can in particular circumstances make forcible entry of any place or building.[13] SECP has the power to call individuals for examination[14], and impose fines and refer matters to the courts for criminal penalties.[15]

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[12] Section 21 (a) (ii) of the SECP Act, 1997.
[13] Section 31 SECP Act.
[14] Section 32 SECP Act.
[15] Section 30, "Enforcement & Investigations" Section of the SECP Act.

SECP provides itself by specifying a couple of cases where it managed to convince the courts that the merger as presented was inequitable and could not be sanctioned. By filing its objection to the merger with the court, SECP had successfully argued that adequate protection of the shareholders and specially the minority shareholders was being undermined. Under Section 288 of the Companies Ordinance 1984, it is the court's duty to take into consideration the representation of the registrar who is an employee of the SECP, for passing an order related to mergers. In case of Kohinoor Raiwand Mills Ltd. V. Kohinoor Gujar Khan Mills[16], the court denied merger where SECP filed objections that the swap ratio determination made by the company relative to merger, was prejudicial to the interest of the minority shareholders and the shareholders as a class. Subsequently, the swap ratios were improved and a new scheme of arrangement was presented to the involved shareholders. This scheme was finally approved by the court. Again in re: Pfizer Laboratories Ltd. And another[17], the SECP credits itself for convincing the court that the share valuation was incorrectly determined and was therefore inadequate. The court did not sanction a merger by concluding that the share valuation was inadequate and the interest of the minority shareholders was being undermined.

2.1.3.2 Code of Corporate Governance - "Code" (2002):

Corporate Governance has recently taken center stage in Pakistan's business community. The principal source of Corporate Governance Law is the court of Corporate Governance ("Code"), which was first drafted by Institute of Chartered

[16] 2002 CLD 1314.
[17] 2003 CLD 1209.

Accountants of Pakistan ("ICAP") in 1998[18]. The SECP promulgated the code in 2002.[19] The SECP is the chief enforcer of the code as it enforced the code on all listed companies through Section 34 (4) and Section 35 (5) of the Securities and Exchange Ordinance of 1969.[20] The aim of the code is good Corporate Governance with objective of achieving transparency, fairness and smooth business dealings. Proper implementation of the Code of Corporate Governance "CCG" therefore will formalistically have as a by-product proper minority interest protection in mergers, which is also a component of good corporate governance.

To achieve it's objective the CCG had elaborated procedural requirements for proper corporate governance, such as qualification and eligibility to act as directors and the responsibility, powers and functions of the board of directors[21], stringent qualification and tenure requirements for the Chief Financial Officer and the Company Secretary,[22] a detailed director's report prepared under Section 230 of the Companies Ordinance consisting of all relevant financial documents[23], disclosure of interest by a director holding company shares,[24] prohibition on auditors holding company shares and the audit committees elaborate composition and reporting procedures[25].

Certain provisions of CCG explicitly deal with protection of minority shareholder. Section (i) of the CCG states that "all listed companies, shall encourage

[18] Journal of Legal Technology Risk Management Vol.1, Fall 2006, No. 1, Article on Corporate Governance in an emerging market: A Perspective on Pakistan, P.22 By Haroon H. Hamid and Valeria Kozhich, electronic copy available at: http://ssrn.com/abstract=976499 last visited 19 June, 2008.
[19] Ibid. Page No.25.
[20]Section 34(4) of Securities And Exchange Commission Act 1997.
[21] Code of Corporate Governance Section iii-xiv (2002).
[22] Code of Corporate Governance Section xv-xviii (2002).
[23] Code of Corporate Governance Section xix (2002).
[24] Code of Corporate Governance Section. xxvi (2002).
[25] Code of Corporate Governance Section xxvii- xliv (2002).

effective representation of independent non-executive directors, including those representing minority interest, on their Board of Directors for the purpose, listed companies may take necessary steps such that: minority shareholders as a class are facilitated to contest election of directors by proxy solicitation". In addition, Section. (xxix) of the CCG states that" where the offer price to minority shareholders is lower than the price offered for acquisition of controlling interest, such offer price shall be subject to the approval of the Securities and Exchange Commission of Pakistan."[26]

The fact that the code's definition does not mention minority share holder interest and that the provision itself is voluntary in nature, creates problems for minority equity investors. Minority shareholder representation by independent directors is one of the main methods for a minority shareholder investing in an emerging market to protect its interests in a corporation. The voluntary nature of this provision indicates that minority shareholder protection is not yet valued highly in the Pakistani corporate sector[27].

Currently, the CCG applies only to the approximately 700 existing listed companies. However, a Report from SECP indicates that it is planning to enforce the CCG on all companies by incorporating the pertinent provisions of the CCG directly into the Companies Ordinance, subject to the condition that the present application of the CCG on listed companies provides positive results.

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[26] "Divesture of shares by sponsor/controlling interest."

[27] Journal of Legal Technology Risk Management Vol.1, Fall 2006, No. 1, Article on Corporate Governance in an emerging market: A Perspective on Pakistan, P.22 By Haroon H. Hamid and Valeria Kozhich, electronic copy available at: http://ssrn.com/abstract=976499 last visited on 19 June, 2008.

The CCG is mandatory for listed companies, although some of the most important provisions, such as the requirement to have independent directors, are still voluntary. An exciting feature of the CCG is that there is a "checklist" of what is mandatory and voluntary which makes it easy to determine a company's compliance with the CCG[28].

2.1.3.3 The Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002.

This ordinance aims to provide a fair and equal treatment to all the investors and seeks to promote a transparent and efficient system for substantial acquisition of voting shares and takeovers of listed companies; and other matters related with it. Since, this Ordinance is about all the investors' protection; therefore, it can be argued that it is inclusive of minority shareholders as well. First hand information collected from SECP indicates that so far no case of minority shareholders was taken up under this law.

2.1.4 Substantive Judicial Protection

The judiciary in Pakistan has understandably interpreted the statutory provisions and the well established principles of common law relating to mergers, to award a level of protection to the minority shareholders. This seems to be theoretically adequate but not adequate in practice. This viewpoint is explored with reference to case law in the next section.

[28] Ibid. Page No. 25.

2.1.4.1 The Lipton Case[29]

In this case the court had the prerogative of deciding whether a scheme of arrangement for amalgamation where Lipton Pakistan was going to merge into Lever Brothers Pakistan Limited, was fit to be sanctioned in compliance with the requirements of Section 284 and Section 287 of the Companies Ordinance. The court extensively analyzed what were the factors, to reach the determination that the scheme of arrangement qualified for sanction.

The court extracted these factors from the case of in re Alabama[30] where the court stated that what the Court has to do is to see, first of all, that the provision of that statute have been complied with and, secondly, that the majority has been acting bona fide. That Court also has to see that the minority is not being overridden by a majority having interest of its own clashing with those of the minority whom they seek to coerce. Further than that, the Court has to look at the scheme and see whether it is one as to which persons acting honestly and viewing the scheme laid before them in the interests of those whom they represent, take a view which can be reasonably taken by businessmen.

The Lipton court found that the statutory requirement, of the requisite resolutions concerning mergers, was undertaken and such resolutions were passed by the statutory majority in value and in number in accordance with section 284 (2) of the Ordinance at the meeting or meetings duly convened and held. As previously

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[29] In re: Lipton (Pakistan) Ltd. and another, 1989 CLC 818.

[30] New Orleans, Texas and Pacific Junction Company (1891)1 Chancery Division 213, Page No.238, 239 C.A.

discussed the interpretation of this factor arguably and favorably provides minorities with the power/discretion to potentially veto mergers.

The next factor enumerated by the Lipton court and extracted from the in re. Alabama opinion was that the Court should satisfy itself that those who took part in the meeting are fairly representative of the class and that the statutory meeting did not coerce the minority in order to promote the adverse interest of those of the class whom they purport to represent.

The Lipton court found that these aforementioned factors were conformed with. The court found no evidence or allegation of any undue influence or coercion exercised by the majority on the minority members and the fact that the minority of the members who did not vote in favor or against the acceptance of amalgamation at the meetings held under the order of the Court did not appear before the court and put forward their objections.

Unfortunately when courts have been involved actively in determining the fairness of a merger, they have hinged their determination of fairness and reasonableness of the merger on the sole determination of the adequacy of the exchange ratio valuation, which is itself based somewhat on a mathematical formula. This is an extremely incomplete, potentially erroneous, simplistic and narrow venue of determining fairness, as it does not take into account a multitude of factors i .e. synergy[31].

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[31] Sikandar Ahmad Shah, LUMS, Lahore, City Group Corporate Initiative. http://www.ravi.lums.edu.pk/cmer. last visited 20 June, 2008.

Though the guidance that the Lipton ruling provided courts deciding merger cases was general and vague, it did provide the requisite foundations for the development of concrete, tenable and clear guidelines and standards for such courts. Subsequently some courts have elaborated upon and have done such augmentation, because at present there is consensus among the courts that if a court believes that the merger put forward was being undertaken in the interest of the company as a whole and the decision to merge was made in good faith, without any evidence of the majority shareholders having any opportunistic motives, even though only the minorities in the related company are being adversely impacted by such decision, the court would sanction the merger.

2.1.4.2 The Atlas Autos Case[32]

The court approved the merger because the procedural requirements of Section 287 and 284 were conformed to i.e. notice, and specifically "the proposed scheme of amalgamation had been approved by an overwhelming majority both in number and in value of the members of both the companies." With regards to the duty to protect minority shareholders, the court stated that "no objection had been received. The small minority of the members who had not attended the extraordinary general meeting of the two companies in which the motions for approval of the amalgamation was passed, have also not appeared before the court. In fact, no objection has been received from any quarters.

[32] Atlas Autos Ltd. and another v. Registrar Joint Stock Companies, 1991 CLC 523.

The court while indulging in the fairness analysis held that because the exchange ratio adopted in the scheme for allotment of shares to the shareholders is recommended by Chartered Accountants on the basis of the financial studies carried out by them and their recommendations had been accepted by the Directors of the two Companies the exchange ratio was adequate. The problem with this holding of the court is that as in the Lipton case, the court assumed that the adequacy of the exchange ratio is the complete measure of fairness, and that chartered accountant and directors of the companies will always look out for the interest of shareholders, inclusive of the minority shareholders. This assumption is seldom wrong, as directors most often breach their fiduciary duties to shareholders as a whole, since they almost always have vested interests and conflict of interests with regard to a merger transaction, such as a change in compensation, status and/or rights.

2.1.4.3 Dewan Salman Fibre Case

The next relevant case on mergers and minorities was Dewan Salman Fibre Ltd., Islamabad v. Dhan Fibres Ltd., Rawalpindi[33], where Dhan Fibres was to merge into Dewan Salman Fibres Limited. Both these companies were in the business of manufacturing fibers. All the members of Dewan Salman present and voting unanimously approved of the scheme. From Dhan Fibers only one member voted against the scheme who had argued that the ratio of exchange of shares was unjust.

The court rejected this objection by firstly citing the Lipton case: the task of the auditor was to act as an expert and not as an arbitrator; and, as an expert, he was

[33] PLD 2001 Lahore 230 Dewan Salman Fiber Ltd., Islamabad v. Dhan Fibers Ltd., Rawalpindi. PLD 2001 Lahore 230.

to certify what, in his opinion, was the fair value of the shares and thereafter stating that the shareholders are the best judges of their interests and better informed with the market trends than the Court which is least equipped in the valuation of such trends[34].

The court never went into a detailed analysis of why the merger or specifically the exchange ratio was unjust, an occurrence that is indicative of the position of the Dewan court being more akin to the Brooke Bond court, where the court did not see judiciary having much discretion while overseeing mergers[35].

In fact, at other junctures the Dewan court contrary to its own opinion, takes a position which is more like the Lipton opinion. For example the Dewan court stated equally important would be the determination that the majority, acted bona fide and in the interest of the general body of shareholders and that the minority was neither coerced not victimized.

It can therefore be concluded that the Dewan case was unclear on the standard of law to be applied when mergers and minority shareholders are involved. This is consistent with the fact that concerned Pakistani courts generally wanted to keep the case law vague or brief on the issue, because of the conflicting public interests involved and the general fact that courts in Pakistan are typically not well equipped in the field of corporate law. Mostly the courts implicitly assume that what is in the interest of the shareholders as a whole, will be in the interest of the minority shareholders. Therefore historically, unless there has been an explicit show of bad

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[34] Ibid, Page No.3.
[35] Ibid, Page No.4.

faith by the majority shareholders relative to merger, the courts have generally sanctioned mergers.

2.1.4.4. The Kohinoor Case

Three petitioner companies, Kohinoor Raiwand Mills Ltd. "KRM", Kohinoor Gujjar Khan Mills Ltd. "KGM" and Kohinoor Textiles Mills "KTM"[36], sought sanction of the court to a scheme of arrangement relative to a merger, with KTM as the surviving entity, which had been approved by their shareholders in general meetings, when a control group managed all these three companies. Some minority shareholders of KRM, one of those being Asian Securities Ltd., filed objections with the court arguing that the control group was forcing the merger of KRM for their overall interest and not for the interest of the shareholders of KRM as a whole. The court refused to sanction the merger as it felt that the share ratio valuation of KRM under the merger arrangement was inadequate and unfair on the shareholders of KRM, inclusive of the minority shareholders.

The court held that where a majority of shareholders has voted in a manner which is coercive or oppressive to the minority or where the majority shareholders of a company have not voted in the interest of the shareholders as a class, the Court will not approve a proposed scheme, even though approved by the requisite three-fourth majority.

The court further added that whatever the court reaches the conclusion that a scheme is unfair or unconscionable, and to which material objections have been

[36] Kohinoor Raiwand Mills Limited v. Kohinoor Gujar Khan Mills 2002 CLD1314.

raised by any shareholder either in a general meeting or before the Court, it will become a duty of the Court not to approve the scheme. The fact that the objecting shareholder constitutes a small minority in proportion to the majority will be wholly irrelevant in such circumstances.

2.1.4.5 Pfizer Case

The next relevant case on mergers and minorities was the Re: Pfizer Laboratories Ltd. and another[37], where the court refused to approve the scheme of arrangement under which Parke Davis Company Ltd. was to merge into Pfizer Laboratories Ltd., because as in the Kohinoor case, this court felt that the undertaken valuation analysis was inadequate and was undertaken keeping the interest of the majority shareholders in mind. Consequently the scheme was hence unjust and oppressive in nature on the minorities and therefore could not be approved.

This court's legal analysis, interpretation and holding conformed with the Kohinoor case. New case law was cited that merger decisions must be undertaken for the benefit of the shareholders as a whole, in a bona fide manner and must be reasonable with the court having relatively expansive jurisdiction in determining what is reasonable. The court cited the Anglo-Continental Supply Co Ltd[38] case, where it was stated that" before giving its sanction to a scheme of arrangement the court will see firstly that the provisions of the statute have been complied with, secondly that the class has been fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority

[37] In re: Pfizer Laboratories Ltd., 2003 CLD 120, Page No 45.
[38] (Re 1992) 2 Ch. 723.

and thirdly that the arrangement is such as a man of business would reasonably approve.

The Pfizer opinion was ground breaking in one respect when the opinion stated that "shareholders have a fiduciary responsibility to act in the interest of the shareholders as a whole. Earlier case law had only expressly singled out the corporate entity via its directors and officers, as owing a fiduciary duty to the minority shareholders. This court attached such fiduciary obligations directly to the shareholders. In addition, the majority breaching such a fiduciary duty, can be easily adjudged by courts under the standard laid out by this court, for this court has textually defined what could constitute fraud on the minorities in a very expansive manner.

2.1.4.6 Pak-Water Bottlers Case

The case of Pak-Water Bottlers (Pvt.) Limited and two others[39] is the relevant contemporary case dealing with the issue at hand. Interestingly, though the background of this case was similar to the Pfizer case, the holding of this court was to the contrary. Even though the Pak-Water court did not expressly contradict the rationale of the Pfizer opinion, it conveniently ignored, as well as at times, superficially distinguished that opinion. The court eventually sanctioned the scheme of amalgamation that was presented, under which the merger of Messrs Pak Water Bottlers and Northern Bottlers (Pvt.) into Nestle Milkpak Limited had been proposed.

[39] Pak-Water Bottlers (Pvt.) Limited and 2 others, 2003 CLD 1634.

The objection raised had challenged the correctness of the stock ratio valuation and after highlighting the fact that Nestle was the principal majority shareholder in both Pak-Water Bottlers and Northern Bottlers Corporations, had claimed the merger as being of an unfair nature.

By undertaking a comparative analysis, it is pertinent to point out that in the United States, when a company, which acts via its officials or shareholders, has a vested interest/self interest or in other words, the company is involved on both sides of the transaction like in a merger, then what is termed as the "Duty of Loyalty" is triggered with regard to the company. A duty which the company must as an agent, fulfill. As a result the burden of proof shifts from the dissenter, to the interested company and its directors and officials, to prove that the transaction i.e. merger is fair and therefore such directors and officials are not awarded any deference as to the appropriateness of their decisions, undertaken under what is termed as the business judgment rule, with regard to the related transaction.

The Pak-Water case did not really acknowledge any such duty of loyalty. It held that even when Nestle was an interested party to the transaction, it were the dissenters who had the complete burden of proving that the merger was unfair. This is apparent when the court stated "the objector ... has not been able to establish that valuation of shares was done to protect the interest of the majority shareholders.

The court was further critical of awarding minority shareholder protection when it stated that "the purpose of the provisions of sections 284 to 287 of the Companies Ordinance will stand defeated if a merger is denied on the sole ground

that it is opposed or is otherwise not liked, as in the present case, by a small number of shareholders. Even if the alleged nexus between the holding and subsidiary companies is assumed yet that factor does not under any provision of law require that majority shareholders should concede the will of the minority shareholders? As noted earlier, the only legal requirement being that the scheme is not oppressive, unreasonable and unjust.

The Court further added by favorably cited the case of Re: Messrs Pakland Cement Ltd.[40], "that the onus was on the objector to show that the scheme was malafide and unfair. Further that unfairness should not be enough unless it was patent, obvious and convincing... a court should not go into the commercial merits or viability of the decision reached by the majority.

Finally the court held that as the three enumerated factors determining stock ratio valuation had been considered, the valuation was adequate as "no rule of law or property demands that valuation or determination of swap ratio cannot be made by Chartered Accountants of the companies sought to be amalgamated. It is pertinent to point out that this case is similar to the Atlas Case and unlike the Pfizer case in the respect of shielding work product of company accountants from review and scrutiny.

Pakistani case law addressing minority shareholder rights and protection in mergers is not much rich. However, it is reasonable to state that case law in aggregate has shown to perhaps move in a direction, where increased court scrutiny,

[40] 2002 CLD 1392.

paternalism and involvement has been witnessed, especially in determining the reasonableness and fairness of a merger.

It would be naive based on field research, to assume that the legal analysis and reasoning of all related courts is solely based on the merits and the rule of law, in a third world country like Pakistan, where corruption and nepotism and other extraneous factors have adversely and wholly impacted the judiciary.

Factors such as lack of legal expertise, training and resources relative to the judiciary, also adversely impact upon the quality of legal opinions, specifically in specialized fields, such as corporate law. Frequently, because of the pressure exerted upon the judiciary, through familial affiliations, politicians, armed forces, bureaucrats or even the influential parties implicated in the case, the ruling of the case is greatly influenced[41].

Merger in Pakistan is a recent phenomenon and overwhelmingly involve international corporations, but seldom a few large established Pakistani family/feudal owned conglomerates. Though functionally mergers in Pakistan have to comply with intrusive procedural and substantive statutory requirements and are arguably potentially subject to intense court scrutiny, the role of the judiciary and the case law relative to mergers and minority shareholder protection in Pakistan, is vague, incomplete and nascent. Therefore in reality the ability to ascertain as to what level mergers in Pakistan, are monitored by state and judiciary, against unfairness and majority shareholders indulging in corporate opportunism, is subject to debate.

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[41] Paper on mergers by LUMS, Lahore, city group corporate initiative, see for detail http://www.ravi.lums.edu.pk/cmer ,last visited on 3rd,May, 2007.

3. MERGER CONTROL UNDER PAKISTAN'S COMPETITION LAW

Section 5 of the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance (MRTPO), 1970 (recently repealed and replaced by the Competition Ordinance, 2007) deemed acquisitions, mergers, amalgamations and combinations of undertakings, resulting in market share exceeding 1/3rd of the total market as 'monopoly power'. Section 5 dealt with the associated undertakings' acquisitions and mergers. The underlying intention was to deny the enterprises the potential to abuse their 'market power' unless they establish that they qualify under certain 'gateway' provisions of the law- contained in Section 5 (2). There was no provision for 'pre-merger control' by the enterprise concerned; hence the Monopoly Control Authority (MCA) mostly relied on third party information including media reports.

Determination of market share, both for the MCA and the enterprises was not an easy task particularly in the absence of clear segregation of markets and product differentiation, presence of unorganized production and selling market, smuggling of identical/similar products or their substitutes, non-availability of reliable data.

Several competition laws provide indicative rather than rigid threshold bases/criteria. These may be market share, turnover, and/or aggregate assets. Combination or otherwise of similar indicative thresholds or, for that matter, number of competitors left in the market place in the post-merger situation deserves consideration. Further, the incorporation of the provision for pre-acquisition and pre-merger control and preparation of 'Pre-Merger Guidelines' for the MCA and the

entrepreneurs concerning market share determination, product lines and differentiation deserved serious consideration.

While the law took cognizance of acquisitions and mergers resulting in market dominance, there was no concept of 'single monopoly firm' in the erstwhile law. Hence, MCA could not intervene in such situations in cases even where market size exceeded the prescribed threshold and there could be likelihood for abuse of 'public interest'.

3.1 Exclusions from the Purview of Section 5 of MRTPO, 1970

Under the provisions of Section 5, above circumstances did not constitute unreasonable monopoly power in following cases:-

a. That it contributes substantially to the efficiency of production or distribution of goods or provision of services or promotion of technical progress or export of goods.
b. That such efficiency or promotion could not reasonably be achieved by means less restrictive of competition, and
c. That the benefits of such efficiency or promotion clearly outweigh the adverse effects of absence or lessening of competition.

3.2 Critical Review of Merger Control under MRTPO, 1970

The Law did not provide for pre-merger control. Consequently, while the enterprises were in the process of taking necessary steps under the relevant provisions of Companies Ordinance, 1984 they have been mostly not seeking any

approvals/clearance from the MCA under the provisions of Section 5 of MRTPO, 1970. It was only in those circumstances where MCA obtained from press or other means that action under section 5 was initiated. In several cases such action was initiated even when the approval under the Companies Ordinance 1984 had already been given by the Courts/ Securities and Exchange Commission of Pakistan.

The Law also was not concerned with the interest of minority shareholders. What has been important in the context of Competition Law has been/continues to be the acquiring of 'market power' in terms of 'market share exceeding the prescribed threshold enabling the enterprise which gives it the potential to abuse its 'market power'.

The Law also did not prescribe the timing for initiating the proceedings under section 5. It also did not provide any period limitation during which the Authority should complete its investigations and decide on the proposed acquisition or merger. Thus, it left the enterprise in a limbo / un-certainty as to the timing and type of expected/forthcoming decision of the Authority.

Finally, the Law was silent on which type of acquisitions or mergers needed not to be investigated and which must undergo the investigation process.

3.3 The New Competition Law on Merger Control

The Competition Law was promulgated only some months ago and notified through the Gazette of Pakistan on 2nd October 2007, takes cognizance of the above difficulties and uncertainties contained in the MRTPO. The relevant provisions i.e.

Section 11 of the Ordinance is modeled after the OECD/World Bank Model Competition Law and caters for pre-merger control.

The Law provides for the following.

1) Mergers substantially lessening competition by creating/strengthening 'market power' are prohibited unless otherwise approved by the Competition Commission.
2) Undertakings intending to acquire shares/assets of other undertakings or merging in whole or part, and falling within the prescribed pre-merger notification requirements require clearance from the Commission of the intended acquisition/merger.
3) Undertakings are required to make pre-merger applications to the Commission as soon as they agree in principle or sign a non-binding letter of intent to proceed with the merger.
4) Undertaking shall not proceed with the intended acquisition or merger until the clearance is given by the Commission.
5) The Commission, within 30 days of the submission of application, decides as to whether the intended merger meets the prescribed thresholds and the presumption of dominance. If the Commission decides that no further investigation is necessary and the intended merger falls within the qualifying limits, the proposed merger would be approved.
6) If the Commission determines that the intended merger meets the thresholds and the presumptions of dominance, it shall initiate the second

review and require such information from the undertaking as it considers necessary to enable the Commission to make the necessary determination.

7) Failure to make the determination with in 30 days for the first phase review means that the Commission has no objection to the intended merger.

8) As part of the second review, the Commission within 90 days is required to review the merger to assess whether it substantially lessons the competition by creating or strengthening a dominant position in the relevant market and gives its decision on the proposed merger. In case of undertaking not providing the required information to the Commission, the application may be rejected.

9) Where no decision is made by the Commission within 90 days, it would be deemed that the Commission has no objection to the intended merger.

10) In case the Commission, after the second review, determines that intended merger substantially lessens competition by creating or strengthening a dominant position, it may nevertheless approve the transaction if

    a. It contributes substantially to the efficiency of production or distribution of goods or to provision of services;

    b. Such efficiency could not be reasonably achieved by less restrictive means of competition;

    c. The benefits of such efficiency clearly outweigh the adverse effects of the absence or lessening of competition; or

d. It is least anti-competitive option for the failing undertaking's assets when one of the undertakings is faced with actual or imminent financial failure.

The burden of proof lies with the undertaking to benefit from the 'gateway' provisions.

11) Where the Commission determines that the transaction under review does not qualify the prescribed criteria of 'efficiency', it may

a. Prohibit the consummation of transaction;

b. Approve the transaction subject to certain conditions to be given in the Order;

c. Approve such transaction on the condition that the undertakings concerned enter into legally enforceable agreements specified by the Commission in its Order.

12) Where a transaction is consummated without the permission of the Commission, it may, after due process of giving opportunity to the undertaking:

a. Authorize the merger with conditions;

b. Open a second phase review;

c. Undo or prohibit the merger after the second review.

13) Where a merger is approved subject to conditions, the Commission may, within one year, review the Order of its approval of merger on its own or on the request of the concerned undertakings on the ground that it is

satisfied that the circumstances of the relevant market or the undertakings have so changed as to warrant review of the conditions imposed.

14) If the Commission determines that the approval was based on false or misleading information submitted by the undertaking, or the conditions prescribed in the relevant order have not been fully complied with, the Commission may:

   a. Undo such merger or acquisition;

   b. Prescribe modifications or additions in the original order.[42]

The provisions of the new Law ensure the efficiency, transparency and certainty in the merger control mechanism. However, it is silent from minority shareholders' protection. It is understandable because the law deals with behavior of companies in the market and it does not relate to the procedure of merger.

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[42] Section 11 of the Competition Ordinance, 2007.

CHAPTER IV

MERGER LAWS IN OECD COUNTRIES

Merger laws are being enforced in several of the OECD countries but with variations in the kinds of systems used by different countries. A review of selected countries is described below with reference to their systems and practices. These include the United Kingdom, the United States, Canada, Germany, Australia as well as the EU. There are compulsory pre-merger notification systems in a number of countries such as Ireland, Canada, Germany and the EU and there are also statutory voluntary schemes in the United Kingdom and a few other countries. Variations also exist as to the specified thresholds, the time limits involved, the information sought and penalties for non notification where applicable. The test involved in deciding whether or not a merger should be blocked is its effect on competition. In the EU the concern is whether the proposed merger establishes or strengthens a dominant position in the market. In the United States, Australia and the UK, the main concern is whether the merger would result in a significant reduction in competition. Most countries have at least two institutions involved in the merger control area and some have a third. In the UK and Ireland there is also political involvement in the process as the final decision on a notified merger rested with the relevant Government Minister.

1. EU COUNTRIES

1.1 Applicable Legislation and Responsible Authorities

The European Economic Community (EEC) Treaty does not contain any explicit provision on merger control. In the early years of EEC antitrust enforcement, however, the Commission took the view that mergers and acquisitions, referred to as "concentrations", fell under the prohibition of abuses of a dominant position.

1.2 Regulation on the Control of Concentrations between Undertakings.

The Merger Regulation was reviewed in 1993. A Green Paper was published by the Commission in February 1996 on the Mergers Regulation concerning the review of the thresholds, multiple notifications, joint venture, the method of calculating turnover for credit and financial institutions and some procedural issues as well.

1.3 Notification

In order to ensure that control is effective and that undertakings enjoy legal certainty, the merger control arrangements include the principle of mandatory prior notification by the undertakings concerned. A special form must be used to notify mergers in one of the official languages of the Community. Article 4(2) of the Regulation indicates that the obligation to notify rests with the acquirer and not with the seller. The following persons or undertakings are required to notify a concentration with a community dimension:

responsibility, except that the Member States may take steps to safeguard legitimate interests such as public security, media, etc.

1.5 Summary of Information Required on Notification

In notifying a merger the following information must be submitted:

a) details of the notifying party, the parties to the merger, an address for service in Brussels, and the details of representatives;

b) a brief description of the nature of the merger, its legal form, the economic sectors involved, and the economic and financial details of the merger, including the parties' turnover for the last three financial years world-wide, Community-wide and broken down by Member State, profits before tax, number of employees, etc.;

c) full details of the pre-merger structure of ownership and control, the parent, subsidiary and sister companies;

d) details of personal and financial links between each party concerned and other undertakings active on the same markets;

e) data on each of the relevant product markets affected by the merger for the last three financial years broken down by Member State and other relevant geographical markets, values of markets, market shares, turnover, prices, value, imports, exports, and the most important aspects of business strategy;

f) information on the general conditions in each of the affected markets, including barriers to entry, vertical integration of the parties, research

and development, distribution and service systems the competitive environment, co-operative agreements, trade associations, and the world-wide context of the merger; and

g) a description of the expected effects of the mergers on consumers and technical progress.

This information must be accompanied by the most recent annual accounts of all the parties, the most up-to-date drafts of the merger document and any reports or studies prepared in respect of the merger. If the Commission finds that the notification is incomplete, it will require the information which should have been provided to be supplied within a period fixed by it and the time limits will then begin to run only after receipt of the missing information.

1.6 Merger Control Process

The Commission is required to take a decision on the notified concentration within one month following receipt of the notification or of additional information requested. The period may be increased to six weeks if a Member State informs the Commission that the proposed concentration would be likely to lead to or strengthen a dominant position in a distinct market in a Member State, in which case the

Commission must decide whether to deal with the case itself or to refer it to that Member State with a view to the application of its national competition law. The Commission is under an obligation to conduct a preliminary

examination to decide whether or not to initiate proceedings. The outcome of this preliminary examination may take three forms:

1) The Commission may conclude that the concentration does not fall within the scope of the Merger Regulation and record that finding by means of a decision;
2) The Commission may find that the concentration falls within the scope of the Merger Regulation, but does not raise serious doubts as to its compatibility with the Common Market. In that case, the Commission shall decide not to oppose it and declare it compatible with the Common Market;
3) The Commission may find that the concentration falls within the scope of the Merger Regulation and raises serious doubts as to its compatibility with the Common Market. In that case, the Commission shall decide to initiate proceedings (Art. 6(1)(C)).

The Commission must take the decisions referred to above within one month of the day following the receipt of the notification or, if the information accompanying the notification was incomplete, on the day following receipt of the complete information. The Commission must inform the undertakings concerned of its decision as quickly as possible. If the Commission decides not to initiate proceedings within the stated deadline then it finds that the merger is compatible with the Common Market. On the other hand if the Commission finds that the notified merger raises serious doubts as to its compatibility with

the Common Market and decides to initiate proceedings it shall examine the merger in accordance with Article 2 of the Regulation in order to ascertain if it is compatible or not with the Common Market. The assessment of whether the merger is compatible with the Common Market depends on:

1) Whether the merger creates or strengthens a dominant position; and
2) Whether the creation or the strengthening of the dominant position significantly impedes effective competition in the Common Market or a substantial part of it.

Recital 15 of the Regulation provides that mergers which, because of the limited market share of the undertakings concerned, are not liable to prevent effective competition, may be presumed to be compatible with the Common Market, particularly where the market share of the undertakings concerned does not exceed 25% either in the Common Market or in a substantial part of it.

Should the Commission find a merger to be incompatible with the Common Market it will issue a decision to this effect. Such a decision must be taken within the four month deadline. If the Commission fails to take a decision within the four months deadline, then the merger shall be deemed compatible with the Common Market.

1.7 Criteria for Evaluation of Mergers

Merger control is necessary for both economic and political reasons. All mergers falling within the scope of the Regulation are assessed on the basis of clearly defined criteria. The basic concept is that of "dominant position", and

the assessment process takes various aspects of competition into account. These include the need to preserve and develop effective competition within the Common Market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or outside the Community.

In reaching a decision, the Commission is required to consider:

a) the market position of the undertakings concerned and their economic power;
b) the alternatives available to suppliers and users;
c) their access to supplies or markets;
d) any legal or other barriers to entry;
e) supply and demand trends for the relevant goods or services;
f) the interests of the intermediate and ultimate consumers; and the developments of technical and economic progress, provided that it is to consumers advantage and does not form an obstacle to competition.

1.8 "Fix-it first" loop.

Four months after the initiation of proceedings, the Commission must take its final decision on the merger. During that period the parties are free to propose adjustments to the merger so as to avoid a negative decision. There is also the possibility for parties to a proposed concentration to hold pre-notification talks with the Mergers Task Force division within the Commission in order to obtain

informal and confidential guidance concerning issues relating to the merger such as jurisdiction, calculating the turnover, other procedural matters, etc.

1.9 Decisions

When the Commission finds that a merger is compatible with the Common Market it will issue a decision to this effect. The Commission can also take a favorable decision in respect of a notified merger which has had modifications made to it, or indeed it may attach conditions or obligations to its decision in order to ensure that the undertakings will comply with the commitments they made in the modifications to the original plan. The commission may revoke its favorable decision where it finds that its decision was based on incorrect information provided by one of the undertakings concerned or if this information was obtained by deceit.

1.10 Enforcement Powers and Penalties

If a merger is put into effect against a decision by the Commission, the Commission may impose fines not exceeding 10% of the aggregate turnover of the undertakings concerned, on the persons or undertakings involved. If a merger is put into effect prior to a negative decision being taken by the Commission, then the Commission may require by decision that the undertakings or assets brought together by the merger be separated or the cessation of joint control or any other action considered necessary in order to restore effective competition. Should the undertakings decide not to take the action outlined in the Commission's decision then the Commission may impose

the fines referred to above, and in addition they may decide to impose periodic penalty payments of up to ECU 100,000 for each day of delay calculated from the date of the decision.

2. IRELAND

2.1 Legislation

Mergers and take-over are subject to regulation under the terms of the Mergers, Take-over and Monopolies (Control) Act, 1978 as amended by provisions contained in the Restrictive Practices (Amendment) Act, 1987, the Competition Act, 1991 and the Competition (Amendment) Act, 1996.

2.2 Notification

There is a compulsory pre-merger notification in Ireland for mergers where the value of the assets of two or more undertakings is at least (IR) £10 million or has sales of at least (IR) £20 million. All proposed mergers involving a newspaper or news papers, must be notified to the Minister regardless of whether the thresholds specified in the legislation apply or not, under the Mergers, Takeovers and Monopolies (Control) Act (Newspapers) Order 1979.

In 1995, eleven such proposals were notified pursuant to this Order and they were all allowed to proceed. The Central Bank Act 1989 requires that a merger involving banks must also be notified to the Central Bank. Responsibility for deciding whether a merger involving firms above a certain size is allowed to go ahead rests with the Minister for Enterprise and Employment. "Failure to notify a qualifying merger under the Mergers Acts

means that the transaction is automatically void and this could thereafter affect the title to the transferred shares."[1] The possible penalties for failure to notify are £1,000 on summary conviction and a £100 daily fine; or on indictment, £200,000 and a £20,000 daily fine. There is no penalty of imprisonment and to date no prosecutions have been brought. Mergers have also been examined by the Competition Authority under the Competition Acts as part of notified agreements seeking a certificate or licence where the arrangements involved the acquisition of shares or assets along with other contractual agreements or restrictions.

2.3 Qualifying Mergers

A merger or take-over is considered to be proposed when an offer is made capable of being accepted.[2] A merger is defined as occurring when "two or more enterprises, at least one of which carries on business in the State, come under common control"[3]. That is deemed to happen where one enterprise acquires the power to appoint or dismiss the majority of the board of directors, etc. of the second enterprise or has, following the merger, over 25% of the voting rights. It seems to be the case that practitioners, and popular understanding of the Act, treat the 25% as being a lower as well as upper limit although the Authority reads the Act to mean that control can exist at levels

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[1] Massey, P. and O'Hare, P., 'Competition Law and Policy in Ireland', Oak Tree Press, Dublin, 1996, Page No.235.
[2] Section 1(2) of the 1978 Act.
[3] Section 1:3 (a) Mergers, Take-Overs and Monopolies (Control) Act, 1978, as amended by Section 15(2) of the 1991 Act.

below 25%. An enterprise is defined as "a person or partnership engaged for profit in the supply or distribution of goods or the provision of services."[4] "Effective control of an enterprise may be possible with less than the stipulated 25% of the voting rights where the management of a company is entrusted to a shareholder, holding less than 25% of the voting rights, by means of contractual rights." [5]In the EU Commission's decision on CCIE/GTE [6], the major shareholder with 81 per cent had relinquished its veto right concerning all board and shareholder decisions to the minority shareholder (with only19 per cent) and the Commission considered this to constitute sole control by the 19% shareholder. The Authority notes that there is a proposal for a Newspapers Bill which would specify that control of a newspaper, however acquired, constituted a notifiable merger. The reasoning behind this provision appears to be the widespread assumption that the Mergers Act does not in fact catch all instances of 'common control'.

The Act does not apply to a proposed merger. The Act "shall apply to a proposed merger if in the most recent financial year the value of the gross assets of each of two or more enterprises to be involved in the proposal is not less than a certain amount or the turnover of each of those two or more enterprises is not less than a certain amount".[7]

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[4] Section 1.11 - Mergers, Take-overs and Monopolies Act, 1978 as amended by Section 24 of the 1981 Act and Section 15(1) of the 1991 Act.
[5] Massey, P. and O'Hare, P., 'Competition Law and Policy in Ireland', Oak Tree Press, Dublin, 1996, Page No.236.
[6] CCIE/GTE [1992] 5 CMLR 202.
[7] Section 2. (1)(a) Mergers, Take-overs and Monopolies Act, 1978.

The Minister can also state that the Act applies to mergers of a particular type even if the financial thresholds are not reached or exceeded as has been done with regard to newspapers in the Mergers, Take-over and Monopolies (Newspapers) Order, 1979 (SI No 17 of 1979), which states that "notwithstanding Section 2(1) of the Act, the Act shall apply to proposed mergers or takeovers involving enterprises, at least one of which is engaged in the printing or publication of newspapers."[8] Section 2 also provides that the Act "shall not apply to enterprises coming under common control where this occurs solely as a result of a testamentary disposition or intestacy".[9]

2.4 Information Required for a Notification

Full details of the proposal must be provided within one month of the offer made capable of acceptance, which would result in the enterprises being under common control, to the Minister. The Department of Enterprise and Employment has issued a note which outlines in general terms, the information required by the Minister in order to examine a notification. It includes:

a) details of each of the enterprises to be involved in the proposal;
b) details of the proposed transaction;
c) estimated market shares and details of any further acquisitions planned;
d) reasons for the proposal;

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[8] Page No. 52 para 6.9 - A Guide to Irish legislation on Competition.
[9] Section 2(3) Mergers, Take-overs and Monopolies Act, 1978.

e) details of any changes planned in the operation of any of the enterprises as a result of the proposal;

f) details of any other agreement being entered into in conjunction with the proposal;

g) where non-Irish enterprises are involved;

h) details of any legal sanctions or clearances necessary in other jurisdictions,

i) details of any investigations or prosecutions by other national authorities in relation to competition matters.

2.5 Time Limit

Mergers are sensitive to time delays in processing, that is why it is imperative that the proposal be considered as quickly as possible. "Section 7 provides that the Minister shall as soon as practicable inform the enterprises if he or she has decided not to make an order prohibiting the transaction or within 30 days of the commencement of the relevant period - that is, after all relevant information has been supplied - refer the notification to the Authority for investigation. This is not a binding time limit obviously, but it is also made devoid of any significance by the provision of other, specific time limits within which the Minister must take specified steps, in default of which the merger obtains a default permission. The basic limitation period after which default permission

arises is three months."[10] If a proposed merger is not referred to the Competition Authority for investigation within thirty days of the commencement of the relevant period then it is approved.

Section 8(1) of the 1978 Act, as amended by Section 17(3) of the 1991 Act, provides that, "As soon as practicable after a reference to it under Section 7, the Authority shall investigate the proposal so referred and shall before such date, not being less than 30 days after the reference, if any, as the Minister specifies, furnish the Minister with a report of its investigation."[11] The criteria used by the Authority in assessing mergers, which have been referred to it, are set out in Section 8(2) of the Mergers, Takeovers and Monopolies (Control) Act , 1978 as amended by Section 17(4) of the Competition Act, 1991 which provides that :

2.6 Criteria for Evaluation of Mergers

A report of the Authority under subsection (1) shall state its opinion as to whether or not the proposed merger or take-over concerned would be likely to prevent or restrict competition or restrain trade in any goods or services and would be likely to operate against the common good.

This provision is further elaborated upon in subsection (4) (2) (b) of the Competition Act, 1991 which requires the Authority, in the course of

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[10] Massey P. and O'Hare P., 'Competition Law and Policy in Ireland', Oak Tree Press, Dublin, 1996, Page No. 239.
[11] Section 8(1) - Mergers, Take-overs and Monopolies (control) Act, 1978 as amended by Section 17(3) of the Competition Act, 1991.

completing its report on a proposed merger, to give its views on the likely effect on the common good with respect to the following:

i. continuity of supplies or services;
ii. level of employment;
iii. regional development;
iv. rationalization of operations in the interests of greater efficiency;
v. research and development;
vi. increased production;
vii. access to markets;
viii. shareholders and partners;
ix. employees; and
x. consumers.

The Authority also gives its views on whether the proposed merger should be allowed to proceed or not and it can also suggest conditions which might be attached to a positive recommendation in order to reduce or eliminate the adverse effect on competition of the proposed merger.

After receiving the report from the Competition Authority, the Minister must publish it within two months with due regard to commercial confidentiality. When the Minister has received the report, there are three options available to him/her - allow the proposed merger or take-over to proceed, allow it to proceed subject to certain conditions or prohibit it completely.

Section 9 allows the Minister to make an Order prohibiting the proposed merger or take-over absolutely or except on conditions specified in the order.[12] In addition Section 9 states that the order must specify the reasons for making it and in the case of a conditional order, it may have retrospective effect. Under the Act every order under this section must be laid before each House of the Oireachtas as soon as possible after the order being made. "If a resolution annulling the order is passed by either such house within the next twenty one days on which that house has sat after the order is laid before it, the order shall be annulled accordingly."[13]

Section 12 of the 1978 Act, [14] provides that where the Minister makes an order under Section 9(1), it can be appealed to the High Court on a point of law within one month of the order coming into effect by any enterprise referred to in the order. A decision of the High Court cannot be appealed to the Supreme Court.

Section 13(1) provides for an Order to be enforced by the Minister or Director of Consumer Affairs seeking an injunction in the High Court or by prosecution. Section 13(2) states that a person who contravenes a provision of an order under Section 9(1) is guilty of an offence while Section 13(3) provides for a fine or imprisonment to be imposed on a person found guilty of an offence under this section.

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[12] Section 9(1) - Mergers, Take-overs and Monopolies (Control) Act, 1978 as amended by Section 18 of the Competition Act, 1991.
[13] Section 9(5) Mergers, Monopolies and Take-overs (Control) Act, 1978.
[14] as amended by Section 14(7) of the Competition Act, 1991.

Section 15 of the 1978 provides for the Minister to furnish an Annual Report to each house of the Oireachtas outlining the number and nature of investigations under section 8, while allowing the Minister to omit from the Annual Report any information which in the Minister's opinion could materially harm the legitimate interests of an enterprise.

Section 10 of the Competition (Amendment) Act, 1996 amends Section 5 of the 1978 Act by providing, for a notification under that section to be accompanied by whatever fee the Minister may prescribe by regulations.

Under Section 11.(1) reference miscellaneous amendments, the 1978 Act "is amended by the deletion in section 1(1) of the definition of "monopoly".

The great majority of mergers are cleared without being referred to the Competition Authority, and indeed since 1978 only a few mergers have been referred for a more detailed consideration and analysis. Furthermore, statistics available within the Department of Enterprise and Employment indicate that since the Mergers, Take-Overs and Monopolies (Control) Act, 1978 came into effect about fifty percent of all notifications to the Minister were considered not to be notifiable. The Mergers Act does not require the Minister to disclose details of mergers notified or to publish reasons for not referring a merger to the Authority.

In considering for purposes of the Mergers Act whether a merger is likely to prevent or restrict competition the Authority is answering the same question as when a merger is notified to it under the Competition Act:

Before a merger can be found to offend against Section 4(1) of the Competition Act, it must be shown that it would, or would likely to, result in an actual diminution of competition in the market concerned. A reduction in the number of competitors or the fact that a merger will result in the merged entity having a larger share of the market than that previously held by either of the merged undertakings individually are not, of themselves, sufficient to establish that such diminution of competition has occurred or would be likely to occur. A merger would, in the Authority's opinion, offend against Section 4 where it resulted in, or would be likely to result in, a lessening of competition in the relevant market such as would allow, for example, the merged undertaking or all of the remaining firms in the market to raise their prices. Other factors, such as the ease with which new competitors could enter the market, would also be relevant in assessing the merger in the Authority's view.[15]

In considering a merger under the Competition Act the Authority has maintained that mergers and takeovers were also capable of preventing, restricting or distorting competition and, consequently, they came within the definition in Section 4 of the Act which stated that ... all agreements between undertakings, decisions by associations of undertakings and concerted practices were covered by the Competition Act with no exceptions. The Authority went to say that while mergers could frequently result in a reduction in the numbers of competitors in a market, this did not necessarily mean that competition would

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[15] Competition Authority Decision No. 6 of 4 August 1992, Para No. 78.

be restricted. Such an interpretation of Section 4(1) of the Act would result in a prohibition of mergers.[16]

3. UNITED KINGDOM

3.1 Applicable Legislation and Responsible Authorities

The enforcement of merger control involves three authorities: the Secretary of State for Trade and Industry, the Director General of Fair Trading and the Office of Fair Trading (OFT), and the Monopolies and Mergers Commission (MMC). The OFT is the primary authority involved in regulating the voluntary notification system. The Director General and the OFT, under the Fair Trading Act 1973, are charged with monitoring merger activity, which includes mergers that have already taken place and proposed mergers as well. The merger legislation is governed by the Fair Trading Act 1973 which gives power to the Secretary of State for Trade and Industry, on the advice of the OFT, to refer a merger a "qualifying merger" for investigation to the MMC.

3.2 Notification

The merger control system operating in the UK is a voluntary one and it does not require notification either pre or post merger completion. The main concern

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[16] Ibid., Para. No. 77. While mergers should continue to be subject to the provisions of Section 5 of the Competition Act, 1991, there should be no right of private action for third parties in respect of mergers. Section 13 of the Mergers Act should be amended as the Director of Consumer Affairs' powers of enforcement in respect of Orders appear to be a historical anomaly.

of this system is to determine the likely impact on the public interest of the proposed mergers on a case by case basis.

3.3 Qualifying Mergers

A "qualifying merger" is defined as "one where two or more enterprises cease to be distinct" i.e. share acquisitions which confer the ability to materially influence a company's policy, outright changes in ownership or control, or where arrangements are in progress or intended which would lead to that result and at least one enterprise is carried on in the UK or under the control of a UK body corporate and either the assets being taken over exceed £70 million[17] or the merging enterprises together supply or consume at least 25 per cent of similar goods or services in the UK or a substantial part of it.

3.4 Summary of Information Required on Notification

If the option of voluntary notification is exercised, merging firms must fill in a pre-merger notification form which requires, in particular, details of the transaction, financial information about the merging companies, the timing of the merger, the reasons for it, expected benefits, description of the main products and services supplied by each enterprise, the market share if 25% or more, horizontal effects of the merger, including details of substitute products, competitors, customers and suppliers, and vertical links between companies.

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[17] Increased from £30 million to £70 million in 1994.

As regards other proposals and confidential guidance, there is no prescribed form for notification but it is usual for the following information to be supplied by the parties:

a. most recent annual reports and accounts;
b. details of the nature, history and organization of parties;
c. details of value of assets being taken over;
d. data or market shares in overlapping markets;
e. principal benefits expected from the merger and absence of public interest detriments.

3.5 Merger Control Process

The OFT endeavors to advise the Secretary of State, on whether a merger should be referred to the MMC, within 39 days of the receipt of a completed submission and within 19 working days for requests for confidential guidance. Before advising the Secretary of State to refer a merger to the MMC, the OFT seeks the advice of any interested department as well as the Department of Trade and Industry for mergers it considers to be against the public interest. For any mergers which the OFT considers to require further investigation, the OFT prepares a document for discussion by the Mergers Panel, which is an interdepartmental committee made up of representatives from the OFT, the Department of Trade and Industry, the Treasury, the MMC and representatives from other government bodies where relevant. The views of the Mergers Panel are taken into account by the Director General before making a

recommendation to the Secretary of State. Other options are also available to the OFT, as an alternative to a reference to the MMC, such as the acceptance of an undertaking to divest some assets or part of a business by the merging parties or the acceptance of undertakings concerning the behavior of the merged entity as a condition of clearance.

3.6 Pre-merger Notification

There is a pre-merger notification process whereby parties to a publicly-announced proposed merger may notify it to the OFT, which involves the provision of full details, in a standard form, and the payment of a fee in advance. A pre-notified merger can be referred to the MMC up to 20 days after notification (but this limit can be extended to 45 days). Any referral to the MMC by the Secretary of the State is publicly announced, stating whether it was done on the advice of the Director General, along with the reasons for the reference. The report of the MMC is also published, but with confidential commercial information omitted from it. Where the Secretary of State accepts an undertaking from the parties to the proposed merger in lieu of the reference to the MMC, the advice of the Director General is published too. There are generally no set time limits and no fees for a decision on a referral to the MMC, but they are usually taken within four to six weeks. The MMC must present its report to the Secretary of State within six months or as specified by the Secretary of State.

The MMC cannot initiate any merger investigations it self, only consider those referred by the Secretary of State. The MMC is obliged to consider, initially, whether the merger requires investigation; if so, whether it operates or could operate against the public interest; and consequently, to state what action should be taken to remedy it, including any relevant recommendations. If the MMC finds that the merger does not operate against the public interest, the Secretary of State cannot overrule that finding. If it finds that it does operate against the public interest, the Secretary is not obliged to, but usually does, accept its recommendations. A qualifying merger can be referred by the Secretary of State to the MMC up to six months after its completion. Often, parties to mergers voluntarily inform the Director General of Fair Trading before the completion of the merger.

3.7 Criteria for Evaluation of Mergers

Whenever the OFT becomes aware of a merger (proposed or completed), then it has to decide whether the merger could be against the public interest. Firstly, it determines whether competition is restricted and then considers whether the merger qualifies for further investigation. Two tests are used as part of the consideration. These are the "share-of-supply" test where the companies involved are in the same market and the merged company would, post merger, have over a 25% share of that market and the "alternative assets" test where the company being acquired holds over £70 million gross assets world-wide. Other factors are taken into account concerning the effect of the merger if it passes

one or both of the tests. Defining the relevant economic market and the market shares of the participants, the relevant goods or services and the relevant geographic market, the substitutability of other products and services and any barriers to entry to the market are all part of the consideration process.

3.8 "Fix-it first" loop/Decisions.

Enterprises considering a merger or acquisition can seek confidential guidance as to the likelihood of the merger being referred by the Secretary of State to the MMC. These are examined by the OFT using the same criteria as that for public mergers, but no details of the request for guidance or the outcome can be revealed by either party before or after the merger proposal becomes public[18].

As an alternative to a reference to the MMC or the making of an order, the Secretary of State can accept statutory undertakings from the parties to the proposed merger. Statutory undertakings given in lieu of a reference must include provisions for the division of or the divestiture of part of the undertaking and the Director General oversees the process to ensure compliance with the provisions or to suggest amendments to them. Following the receipt of a report from the MMC, the Secretary of State may accept undertakings from the parties after consultations between the Director General and the parties. Such undertakings, or an order, could include the termination of the merger or require the parties to dispose of shareholdings or interest in shares or limit the

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[18] 'Fair Trading', Consumer & Competition News From The OFT, issue no. 11, Autumn 1995, Page No.9.

exercise of voting powers for those shares, or the sale of assets or subsidiaries, or prohibiting discrimination or regulating the company's charges or prices.[19]

3.9 Enforcement Powers and Penalties

Enforcement of decisions, orders and undertakings is by civil action.

4. UNITED STATES OF AMERICA

4.1 Applicable Legislation and Responsible Authorities

Section 7 of the Clayton Act, 15 U.S.C. s 18, prohibits stock acquisitions, asset acquisitions, mergers and other combinations the effect of which may be to lessen competition substantially or to tend to create a monopoly. The primary focus of enforcement of Section 7 is on horizontal mergers, which involve firms within the same product and geographic markets, defined according to principles of substitutability of supply and demand. Section 7 has also been applied to mergers between potential competitors, vertical mergers (the combination of firms which have or could have supplier-customer relationships but which are not competitors) and conglomerate mergers (firms that are not actual or potential customers and do not have an actual or potential customer-supplier relationship). [20]

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[19] "Merger Cases in the Real World A Study of Merger Control Procedures", OECD 1994, Appendix 6, Part II, Page No.150-190.

[20] Tann, Josephs; Jr 6 '*US Taxation of International Mergers and Acquisition', available at http://www.encyclopedia.com/doc/igi-18468613.html last visited on May 18, 2007.*

The Hart-Scott-Rodino Antitrust Improvements Act 1976 sets out thresholds for notification of mergers. The Federal Trade Commission and the Department of Justice both have enforcement responsibility for the Clayton Act and the Hart-Scott-Rodino mergers legislation, with responsibility for pursuing any given violation being allocated by agreement between the two agencies.

4.2 Notification

Under the Hart-Scott-Rodino Antitrust Improvements Act 1976, a proposed acquisition of voting securities or assets by a party involved in any activity affecting interstate or foreign commerce cannot be finalized until it has been pre-notified as required and the waiting period associated with it has elapsed for firms which come within the specified thresholds.

4.3 Qualifying Mergers

These thresholds specify that if one party has total assets or net annual sales of $100 million or more and the other party has total assets or net annual sales of $10 million or more and if following the merger, the acquiring party holds more than $15 million worth of assets or voting securities of the acquired party, then pre-merger notification is required. Where the acquiring party obtains voting securities of $15 million or less, but this comprises 50% or more of the voting securities of the acquired party, then this is notifyable as well.

4.4 Merger Control Process

There is a waiting period of 30 days, or 15 days for cash tender offers, before the acquisition can be completed, but the period can be extended by the Federal

Trade Commission (FTC) or the Department of Justice where further information or documentation is requested (called a "second request"). A second request extends the waiting period by another 20 days after the parties have furnished the information (or 10 days for cash tender offers). The FTC and the Department of Justice are the main enforcement authorities. The parties to a merger have a right of appeal initially to the Federal Trade Commission and within 60 days of the Commission's final order, to the appropriate federal court of appeals.

4.5 Criteria for Evaluation of Mergers

In 1992 the Department of Justice and the FTC jointly issued revised Horizontal Mergers Guidelines outlining their enforcement policy concerning horizontal acquisitions and mergers. The guidelines, which set out the specific standards and framework used by the relevant agencies in analyzing whether mergers, were subject to Section 7 of the Clayton Act which says that mergers were prohibited if their effect substantially lessen competition, or tend to create a monopoly, to Section 1 of the Sherman Act which says that mergers were prohibited if they constituted a contract, combination or conspiracy in restraint of trade, or to Section 5 of the FTC Act which lays down that mergers are prohibited if they constitute an unfair method of competition. These guidelines updated the previous ones issued in 1984 by the Department of Justice and those in 1982 by the FTC.

Non-horizontal mergers were defined in the 1984 guidelines as mergers between firms that did not operate in the same market (previously these were called vertical and conglomerate mergers). They were considered to be less likely than horizontal mergers to be anti-competitive. Some of them were capable of affecting competition adversely by removing a firm, the acquired firm, from a market and thereby lessening competition. These mergers were examined using similar standards to those applied to horizontal mergers, but with emphasis on such factors as the harm to "Perceived Potential Competition", the harm to "Actual Potential Competition" and the relation between the two; market concentration; conditions of entry generally; the acquiring firm's entry advantage; the market share of the acquired firm; efficiencies; barriers to entry collusion and the evasion of rate regulation.

The Guidelines outlined the criteria that the FTC and the Department of Justice would apply when determining whether a proposed merger was likely substantially to lessen competition. The emphasis would be on the probable actions of consumers or producers and whether certain actions were in their economic interest. The main focus of the investigation under the antitrust laws would be on one aspect of the proposed merger's potential sources of gain, i.e. market power. The primary issue was that mergers should not be permitted to create or enhance market power or to facilitate its exercise. Market power was expressed in terms of a seller or sellers with the ability profitably to maintain prices above competitive levels for a significant period of time resulting ultimately in a transfer of wealth from buyers to sellers or a misallocation of

resources and in terms of a buyer or buyers with the ability to depress the price of a product to a level below the competitive price resulting in a reduction in output.

Both agencies examined proposed mergers under a number of headings including:

- ③ impact of merger for market concentration;
- ③ potential adverse competitive effects;
- ③ balancing of competitive concerns with efficiency gains that reasonably cannot be achieved by the parties through other means; and
- ③ whether the merger would cause either party to the transaction likely to fail and consequently its ouster from the market.

Mergers are also investigated for other potential adverse competitive effects resulting from other market factors - lessening of competition through coordinated interaction among market players. Other market factors such as the availability of information on market conditions, transactions and competitors; the extent of firm and product heterogeneity; pricing or marketing typically employed by firms in the market; the characteristics of buyers and sellers and of typical transactions all form part of the investigation.

Agencies also considered the ability of competitors to replace the lost competition resulting from price increases of differentiated products by the merging firms by repositioning their product lines. A unilateral price rise following the merger would be doubtful if buyers who purchased products from

both of the merging parties were to change to another supplier. In a merger between two firms with undifferentiated products and where capacity is the main defining competitive characteristic in the market, it could be to the advantage of the merging firms to unilaterally raise price and reduce output. The merger would result in a larger sales base and the elimination of a competitor. Likewise with a post-merger entity holding 35% market share, it might be profitable to raise price and reduce joint output below the pre-merger level. This situation succeeds if demand is inelastic or if competitors did not respond to the merged firm's price increase and output reduction by an increase in their own outputs.

Entry to the market was considered as part of the analysis of mergers by the FTC and the Department of Justice. All aspects of entry would be taken into consideration including such factors as planning, construction, licenses, marketing, customer surveys, etc. Where entry was easy, then any post merger price increases by a merged entity would not be profitably sustainable and consequently, would deter any anti-competitive mergers. Three tests - timeliness, likelihood and sufficiency - were used in determining whether entry to a market was easy to achieve or not. Entry will not be sufficient if the entrant is unable, because the required assets are unavailable, to respond to the sales opportunities. In cases where the resulting sales opportunities are localized, the entrant's product must be able to respond to this, or in the case of a unilateral price increase, sufficiently close to the product in question to make the price increase unprofitable to the merged entity.

The antitrust laws were designed to prohibit only those mergers which presented a threat to competition. Many of the efficiencies achieved through a merger benefit both the merging firms and consumers. All claimed efficiencies would be examined by the relevant agencies for benefits resulting in increased competitiveness or lower prices for consumers. The benefits of some claimed efficiencies are difficult to prove and they would be rejected if equivalent or comparable savings could be achieved by the parties through other means. The `failing firm' defence issue was outlined in the 1984 Department of Justice guidelines, wherein it stated that it `was a long-established, but ambiguous, doctrine under which an anti-competitive merger might be allowed because one of the merging firms was "failing". Because the defence could have immunized significantly anticompetitive mergers, the Department would construe its elements strictly. An anticompetitive merger in which one of the merging firms was alleged to be failing was unlikely to be challenged when: (i) The allegedly failing firm probably would be unable to meet its financial obligations in the near future; (ii) it would probably not be able to reorganize successfully under Chapter 11 of the Bankruptcy Act; and (iii) it has made unsuccessful good faith efforts to elicit reasonable alternative offers of acquisition of the failing firm that would both keep it in the market and pose a less severe danger to competition than does the proposed merger.' [21].

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[21] From the Note by the US Delegation on United States Merger Guidelines to the OECD, April 1992.

4.6 "Fix-it first" loop/Decisions

The Antitrust Division of the US Department of Justice has stated its belief that working out sensible solutions to competitive problems is better for the business community and the economy than halting a proposed transaction altogether. Merger enforcement involves the review of and, if necessary, challenge to proposed transactions that threaten to lessen competition by concentrating economic power. Many of the challenged mergers are abandoned or restructured by the parties without court proceedings.

4.7 Enforcement Powers and Penalties

Infringements of these Acts are civil matters, with civil sanctions ranging from fines through civil action for injunction or damages to orders for divestment, available to the enforcement bodies.

5. GERMANY

5.1 Applicable Legislation and Responsible Authorities

In Germany, competition is mainly protected by the Act against Restraints of Competition (ARC) and the law against unfair competition. Pursuant to the ARC, mergers must be prohibited if they are likely to create or strengthen a market-dominating position (pure competition standard). Notifyable merger projects must not be completed until they have been authorized by the Federal Cartel Office (preventive merger control). Legal transactions violating this prohibition are null and void and may be punished by a fine.

5.2 Notification

The system in Germany is comprised of both pre-merger and post-merger notification requirements if the specified thresholds are met.

5.3 Qualifying Mergers

Pre-merger notifications are required for a merger involving an enterprise with annual sales of DM 2 billion or more or a merger involving two enterprises each having at least annual sales of DM 1 billion. Post-merger notifications are required within three months of the completion of the merger where the parties involved have a combined annual sale of at least DM 500 million. Mergers are defined as the acquisition of 25 or 50 per cent or the majority of shares with or without voting rights, all or a substantial part of the assets of another enterprise, agreements with another enterprise or any combination of enterprises resulting in the control (direct or indirect) of another enterprise.

5.4 Summary of Information Required on Notification

Although there are no official forms for notification of mergers, section 23(5) of the Act against Restraints of Competition requires the following information for each of the enterprises involved in the merger:

③the firm name or other designation, and the place of establishment or the seat;

③the type of business conducted;

③the market shares, including the basis for their determination or estimation, where

③they reach at least 20 per cent, for all participating enterprises together, within the territory of application or a substantial part thereof of the Act, and the total sales revenues; instead of sales revenues, total assets are stated for banks and building loan savings banks, and premium revenue in the case of insurance enterprises.

③in the case of an acquisition of shares in another enterprise, the amount of the shares acquired and the total participation held.

In addition, the Federal Cartels Office may request each participating enterprise to provide information regarding market shares, including the basis for their determination or estimation, as well as total sales revenues with regard to a particular type of goods or commercial services realized by the enterprise during the last business year preceding the merger. Information may also be requested on affiliated enterprises.

5.5 Merger Control Process

The time scale involved in the initial examination of pre-merger notifications by the Federal Cartel Office (FCO), an independent government agency which acts as both investigator and adjudicator, is one month (following the receipt of the complete notification) before a decision is taken to investigate the merger. The FCO has a further three months before deciding to issue a prohibition of the merger, but extensions of the time can be agreed between the parties. The acquisition cannot be finalized during this time. The FCO has one year to prohibit a post-merger notification. There is a right of appeal by the parties,

within one month of the issue of the order, to the Berlin Court of Appeal. The Court proceedings can take up to one year to be completed and a further year if the appeal is referred to the Federal Supreme Court. Another option by the parties following a prohibition order, if they do not appeal to the Court or have lost the appeal, is to apply for special permission to the Federal Minister of the Economy. This must be done within one month of the issue of the order or the termination of the court proceedings. The Minister refers the matter to the Monopolies Commission and then has up to four months following receipt of the Commission's opinion in which to take a decision.[22]

5.6 Criteria for Evaluation of Mergers

An enterprise has market dominance in a specified, clearly defined and relevant market if it has no competitor at all (monopoly), is not exposed to any substantial competition, nor has a dominant market position in relation to its competitors.

In determining whether a dominant market position exists, all the conditions of competition that are relevant to the market affected by the merger must be taken into account. The absolute market share is of special significance, for when an enterprise has a market share of at least one-third, there is a presumption, which can be rebutted, of market dominance. The company's resources are examined in a second step. Market dominance exists when a

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22 "Merger Cases in the Real World A Study of Merger Control Procedures", OECD. April, 1994, Appendix 6, Part II, Page No.150-190.

firm's scope of action can no longer be adequately controlled by its competitors. It is further strengthened when the conditions of competition deteriorate further as a result of a merger.

Mergers of large firms: If the enterprise participating in a merger recorded a combined turnover of at least DM12 billion and at least two of the participants had turnovers of at least DM 1 billion each, it is presumed that the merger will create or strengthen a dominant market position, whatever the markets on which the enterprises are active.

In the case of joint ventures, the presumption of market dominance applies only if the joint venture operates in markets with turnovers of at least DM750 million.

5.7 "Fix-it first" loop

If requested by a party to a merger, a formal hearing must be held which is chaired by the Head of Division in charge of the case. Such hearings are not open to the public. Before issuing a prohibition order, the FCO submits a "statement of objections" to the participating parties containing the facts and reasoning for the envisaged prohibition. The participating parties may the comment on the statement and submit further materials. Alternatively, the parties may submit undertakings. In deciding whether a merger will give rise to or will strengthen a market-dominating position, and whether the disadvantages resulting from market dominance will be outweighed by an improvement in the conditions of competition, the cartel authority may take certain undertakings

into account. Merger control thus requires the assessment of future likely effects of a merger.

5.8 Decisions

The Federal Cartels Office is both investigator and adjudicator whose decisions are subject to judicial review by the Court of Appeal of Berlin and the Federal Supreme Court, if applicable. Special permission may be sought from the Minister of the Economy by the parties to a merger which has been forbidden by the FCO. In such cases, the Monopolies Commission has to give its opinion on the merger before the Minister decides on the request.

The Federal Cartel Office may take the following action in the event of competition concerns arising after investigating a notified merger:

a) In the case of compulsory or voluntary pre-merger notification: prohibit the merger project.

b) In the case of a consummated merger: prohibit the merger and order divestiture after a prohibition order has become final; or

c) In the case of a merger project: accept undertakings by the parties involved aimed at restructuring the merger in some way so as to avoid market dominance or to ensure improved competitive conditions that outweighed the negative effects of market dominance in another market than in the one in which market domination would be created or strengthened.

Under (c) therefore, such undertakings may consist of the voluntary divestiture of an enterprise or activity, reduction in the acquisition of stock to a level below the statutory thresholds or abandonment of the acquisition. This solution must be reached during the four-month period allowed for consideration of merger proposals.

Undertakings can only relate to structural remedies and not to remedies which imply a permanent regulation of the market behavior of the merging parties.

5.9 Enforcement Powers and Penalties

Penalties for failure to notify include fines and invalidity of the transaction.

6. AUSTRALIA

6.1 Applicable Legislation and Responsible Authorities

In Australia, the Trade Practices Act 1974 is the relevant legislation pertaining to mergers, administered by the Trade Practices Commission.

6.2 Notification

While there is no statutory pre-merger notification scheme, a system of informal pre-notification can take place if the parties require guidance on the Act's operation. The parties may seek authorization from the Trade Practices Commission, an independent statutory authority, concerning a merger or acquisition which might breach the Trade Practices Act. This could occur if there was a substantial lessening of competition following the merger.

6.3 Qualifying Mergers

There is no set threshold above which guidance or authorization for a merger should be sought.

6.4 Summary of Information Required on Notification

Under the procedure for authorization, the parties seeking authorization must complete the appropriate Form F. The Trade Practices Commission will reach a decision on the basis of the following types of information:

1) Details of the parties, their subsidiaries and affiliates; the merger proposal (including the price, date and manner in which the merger is to be consummated and any collateral arrangements associated with the merger);
2) Details of the products and services marketed by the parties and the relative importance to each of the parties of those products and services;
3) An analysis on both geographical and functional levels of the markets which each of the parties serve by State and Territory and on a federal level, including information concerning the relative market shares of each of the participants in each of the markets identified;
4) Barriers to entry (including information concerning the likely cost and any impediments to market entry or expansion by new or existing competitors, whether from within Australia or overseas, and also information concerning the extent to which market entry or expansion is

precluded by agreements or arrangements between the parties, their suppliers or customers);

5) Details of the major suppliers to the applicant and the target and their major customers;

6) Details of the public benefits expected to result from the merger.

6.5 Merger Control Process

Where a proposed acquisition has been notified to the Commission, the Commission may grant authorization for the merger to take place if it is satisfied that the proposed acquisition would result or be likely to result in benefits for the public. There is a waiting period, by the notifying parties, of 45 days for a decision by the Commission where a proposed notification has been made to it or longer if additional information is sought by the Commission. If no decision is made within that time period authorization is deemed to be granted.

The Commission has substantial investigation powers that permit it to require persons to product documents or to give testimony (refusal is subject to penalties imposed by the Court).

Where the Commission decides not to grant clearance to the acquisition the parties are allowed 21 days to lodge an appeal with the Trade Practices Tribunal. The Tribunal has 60 days (or longer in special circumstances) in which to make a decision on the matter. If a party is dissatisfied with the

Tribunal's decision, it may appeal to the Federal Court, but only concerning issues of law.

6.6 Criteria for Evaluation of Mergers

The Trade Practices Commission must decide whether the merger would lead to a substantial lessening of competition in a market.

6.7 "Fix-it first" loop

The Commission may request parties proposing a possibly illegal merger to modify the transaction or to give formal undertakings as to divestiture.

6.8 Decisions

The Trade Practices Commission (and, on appeal, the Trade Practices Tribunal) has the power under the Trade Practices Act 1974 to grant immunity from court action for a merger that could otherwise be in breach of the Act. The Commission cannot initiate the process - the parties must apply to the Commission. The parties must satisfy the Commission that the conduct results in a benefit to the public such that it should be allowed to occur.

6.9 Enforcement Powers and Penalties

Under the Trade Practices Act, penalties of up to A $10 million for corporations and up to A $500, 000 for an individual can be imposed by the Federal Court where a merger infringes the Act. The divestiture of acquired shares or assets or the declaration of the acquisition as being void can be ordered by the Court. An undertaking to divest other shares or assets not part of the acquisition may also

be accepted by the Court. An injunction may also be sought from the Court by the Commission or the Minister. Individuals and corporations cannot seek injunctions, but they can bring an action for damages, divestiture or ancillary orders.[23]

From the above discussion, it appears that the merger process in these countries is not so different from that prevailing in Pakistan. It generally differs with reference to notification's timing requirements, threshold criteria and involvement of courts.

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[23] Ibid. Page No. 4141.

CHAPTER V

ANALYSIS OF MERGER CONTROL IN SELECTED COUNTRIES

1 THE RATIONALE FOR MERGER

An effective merger control regime is an essential element of competition law and policy. Mergers and acquisitions constitute an integral part of the competitive process, since they constitute one mechanism by which the control of assets can be transferred to more efficient management. Merger controls are designed to prevent firms eliminating competitors by taking them over and achieving a dominant position, which they can later abuse.

Mergers and take-over take place for a large number of reasons and there is probably no single dominant motive for mergers. One motive for mergers is a desire to lessen competition and indeed to establish a dominant if not an outright monopoly position. Seen in this light merger controls are a necessary precautionary measure. Indeed the principal purpose of a merger control regime is to guard against anti-competitive mergers. Controls exist to prevent firms reducing the degree of competition in the market by eliminating competitors (horizontal mergers), while takeovers of suppliers/customers (vertical mergers) may present an opportunity to deny competitors access to raw materials or distribution outlets. Conglomerate mergers, involving firms in different sectors, may not have a direct effect on competition, but the parent

may use profits in one industry to cross subsidize attempts to dominate another industry.

It is recognized, however, that many mergers occur for quite legitimate reasons and do not have any anti-competitive effects. Mergers may be prompted by a desire to achieve economies of scale or other efficiencies. Economies of scale arise where unit costs are reduced due to an increase in firm size. Mergers can also achieve efficiencies in respect of administration, marketing and other ancillary activities, since the size of such operations in the merged firm may well be less than the combined size of such operations in the two firms prior to the merger. As against this, however, larger firms may well suffer from increased levels of internal bureaucracy with consequent negative effects on performance. The perspective emerging from US studies is that the motivations for most mergers are financial synergies and cost rationalization.

Mergers and takeovers enable the transfer of the control of businesses and assets to new owners who believe that they can operate them in a more efficient or profitable way. The threat of takeovers may ensure that businesses are managed efficiently, since the owners or shareholders could accept a take-over offer if they are not satisfied with the profits being generated by the managers of the business. The possibility of takeovers may therefore be viewed as providing an incentive to business managers to operate the business in the most efficient way possible and, indirectly, consumers and the economy as a whole benefit. The management of a company is never sure if it will continue in

its position following a take-over by another firm. Generally, the new owners will install a management of its own choosing or amalgamate the two companies under the one management that of the acquiring company.

It is sometimes argued that takeovers, in some instances, have become just a challenge for those involved in "the market for corporate control" and have little to do with the market for goods and services.[1]Such acquisitions are simply for the benefit of the new managers, to increase their own power and importance. Takeovers are usually seen as the prerogative of large companies, seeking to acquire successful smaller companies to boost their growth and profits, but there have been exceptions to this where a smaller firm acquired a much larger one.[2] Many acquisitions result from contested or so called "hostile" bids for particular companies by cash rich empire builders or conglomerates expanding for its own sake or in response to investor's demands.

It is frequently argued in support of mergers in Ireland that only firms which are so large as to be dominant in the domestic market will be capable of competing with larger foreign firms in international markets. On that basis it is argued that the establishment of dominant firms should be permitted and indeed encouraged and that domestic competition considerations should be subordinated to the need to promote 'national champions'. In practice such arguments are not confined to Ireland. They are frequently advanced in much

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[1]Kay, J. `Poor odds on the take-over lottery', Financial Times, 26 January, 1996.
[2] One example was the take-over of 'mothercare' by 'Habitat', a company about one third its size.

larger economies. They have been advanced at EU level, on the grounds that Europe needs very large firms to compete with US and Japan.

Arguments that large firms will be better equipped to compete on world markets are undermined by evidence that dominant or monopoly firms frequently prove to be inefficient and thus less capable of competing internationally. Recent research in the UK shows that increased market power, as measured by increased market share generates reduced levels of productivity while greater competition leads to higher rates of total factor productivity growth.[3] There are domestic examples of dominant firms which are insulated from competition in their home market and not very successful at competing internationally.[4] The notion that just by merging two (or more) weak firms together that the resulting merged entity will automatically be a larger and thus a successful company, does not always follow. An alternative school of thought holds that firms exposed to very strong competition in their domestic market will be better equipped to compete internationally[5].

A merger or take-over may provide a means of preventing company collapse. There are unlikely to be large numbers of such cases as acquiring

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[3] S.J. Nickell, (1996), Competition and Corporate Performance, Journal of Political Economy, Vol. 104 No. 4

[4] Irish Distillers, for example, emerged following a series of mergers during the 1960s. It was, until relatively recently, the only producer of Irish whiskey. The bulk of its revenue and profits are generated in the domestic market and it has a very small share of the world market. It was ultimately acquired by a French drinks company following an attempted hostile take-over by a combination of UK firms.

[5] See, for example, M.E. Porter (1990), The Competitive Advantage of Nations, London, Macmillan. Porter shows that strong domestic competition plays a key role in developing world beating industries

firms normally seek healthy acquisition targets. Nevertheless take-over of so-called failing firms do occur and frequently such mergers may be permitted even though they might lead to a significant diminution of competition. Mergers which have an adverse effect on competition have been permitted under US law under the 'failing firm defence doctrine' in the US since the 1930s.[6] The US Department of Justice Merger Guidelines 1984 outline the main features of the 'failing firm' defence.

'The "failing firm defense" is a long-established, but ambiguous, doctrine under which an anti-competitive merger may be allowed because one of the merging firms is "failing". Because the defense can immunize significantly anticompetitive mergers, the Department will construe its elements strictly.

The Department is unlikely to challenge an anticompetitive merger in which one of the merging firms is allegedly failing when: (1) The allegedly failing firm probably would be unable to meet its financial obligations in the near future; (2) it would probably not be able to reorganize successfully (3) it has made unsuccessful good faith efforts to elicit reasonable alternative offers of acquisition of the failing firm that would both keep it in the market and pose a less severe danger to competition than does the proposed merger.'[7] The failing

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[6] See F. M. Scherer and D. Ross (1990); 'Industrial Market Structure and Economic Performance', 3rd Edition, Houghton, Mifflin, Page No. 186
[7] US Department of Justice Merger Guidelines - 1984, Section 5.1.

firm issue has arisen in respect of a number of mergers considered by the Competition Authority, and has been accepted or rejected on a case-by-case basis.

2 INTERNATIONAL EVIDENCE ON MERGER OUTCOMES

There has been considerable empirical research into the effects of mergers indicating that mergers tend to produce mixed results. The outcomes of mergers are as varied as the reasons for them in the first place and the benefits are not easy to quantify. Nevertheless there is a considerable amount of evidence to suggest that many mergers yield poor results and frequently fail to live up to expectations expressed at the time of the merger. It is not for the State to protect private firms and their shareholders against poor investment decisions. Merger controls do not exist to second-guess commercial decisions but to prevent mergers which reduce competition. The costs of a stricter approach to anti-competitive mergers may, however, be considerably overstated if the fact that many mergers fail to live up to expectations is not recognized and taken fully into account.

A study of post-merger company performance which covered almost 6,000 US mergers concluded between 1950 and 1976 found that failures tended to outweigh successes. It found, for example, that around 47 per cent of acquired business units were subsequently sold off. While these units had enjoyed profits above their industry norms prior to the merger, they recorded

negative profits in the year prior to sell-off, indicating a serious decline in performance.[8] A more recent study of 300 large US mergers over the past ten years found that in the three years following the transactions, 57% of the merged firms lagged behind their industries in terms of total returns to shareholders[9]. In the UK, The Director General of Fair Trading, Mr. John Bridgeman, cautioned companies against random takeovers, pointing out that the costs of takeovers could exceed any gains[10]. He also stated that management skills were not easily transferred from one area to another one and stressed the uncertainties involved in takeovers. Writing in the Financial Times in early 1996 John Kay noted that there was a wide range of academic studies of post-merger performance which point to the conclusion that, 'taken as a whole, merger activity adds little or no value.[11]'

If a takeover is contested by the management of the company being acquired or if there are other likely bidders for the company, then the bids and the premiums will be higher. The shareholders of the acquired company obviously benefit from this. The position of the shareholders of the acquiring company is different, with the benefits being less evident. There seems to be a market expectation that acquisitions benefit the acquiring company, but the indications are that the immediate benefits and the increase in value of their

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[8]Supra Note No.6.
[9] The study was conducted by Mercer Management Consultancy of New York. See The Economist, 4 January 1997.
[10]S. Wagstyl, 'OFT chief urges caution on takeovers', Financial Times, 31/1/96.
[11] J. Kay, Down-payment required to curb bid fever, Financial Times, 26 September 1996.

shares is, at best, very small.[12] A number of studies indicate that shareholders in (normally larger) acquiring firms appeared to lose out over the longer term as the share-price tended to decline following the merger.[13]

Many large businesses have found post merger that the hope for economies did not materialize or that the benefits accrued to only one of the merging companies, usually the shareholders of the company being acquired. This has resulted occasionally in a re-assessment of the company's position with the focus being returned to the core business and the possibility of selling off those parts which were considered to be unprofitable. Demergers have become more common now as large conglomerates realize that growth via mergers was not sustainable indefinitely.

3 ANALYSIS OF THE OPERATION OF THE MERGERS ACT

3.1 Unnecessary Notifications

It is clear from an analysis of notifications made to the Minister that a large number of merger agreements notified do not come within the scope of the Act. Indeed in recent years the number of non-notifiable agreements has consistently outnumbered the number of notifiable agreements. The data shows that around fifty per cent of all notifications made to the Minister were deemed not to be

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[12] Rose, H. 'The market for corporate control', Financial Times, 2/2/96.

[13] E.P. Magenheim and D.C. Meuller, [1988], Are Acquiring Firm Shareholders Better Off After an Acquisition, in J. Coffee, L. Lowenstein and S. Rose-Ackerman (eds.), Knights, Raiders and Targets: The Impact of the Hostile Takeover, New York, Oxford University Press.

notifiable.[14] The second feature of the data is the fact that the vast majority of notified mergers are cleared at the first stage of the process, i.e. without referral to the Competition Authority. In fact only a handful of all mergers have been referred for a more detailed analysis while very few Orders have ever been made preventing a notified merger.

The fact that most of the mergers notified to the Minister are not notifiable raises the obvious question as to why the parties involved attempted to notify them. Notification involves various costs for business. Such costs include the cost of legal and other advisors as well as the internal costs in the form of management and staff time involved in compiling and preparing information required as part of the notification. Even if the initial notification was not comprehensive, it would still involve costs. The thresholds for notification relate to turnover or value of the assets of the firms involved. This should provide a clear indication to firms as to whether or not there was a need to notify a merger. The relatively high level of what are, in effect, unnecessary notifications is therefore puzzling. It may indicate that the penalties for failure to notify, where there is a legitimate requirement to do so, are so severe as to prompt firms to adopt an extremely cautious attitude. The existence of any potential doubt about the transfer of title may well prompt business to adopt an extremely cautious approach on the grounds that it is better to notify in order to be sure.

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[14] This includes a small number of notifications that were withdrawn or did not proceed.

3.2 Transparency in the Operation of the Mergers Act

As noted previously the Mergers Acts do not require the Minister to disclose details of mergers notified or to publish reasons for not referring a merger to the Authority. It could be argued that the fact that such a small number of mergers have been referred indicates a relatively lax approach to merger control with little evidence that many anti-competitive mergers are challenged. Such a conclusion may be mistaken. A low referral rate should not be automatically be interpreted as indicating a lax approach to merger control. Only a small proportion of mergers which could have been referred to the MMC for detailed scrutiny under the UK legislation are in fact referred. Similarly most notifications under the EU Regulation are cleared following a preliminary examination. Nevertheless the lack of information and transparency in the operation of the Mergers Acts gives rise to some problems.

While the legislation sets out criteria which the Competition Authority must apply in considering a merger which has been referred to it by the Minister, it does not set out any criteria to be applied by the Minister. Nor is the Minister required to give any reasons for approving a merger without referring it to the Authority. There have been no official statements of the overall policy approach applied by the Minister in considering mergers at the initial notification stage. This lack of transparency makes it difficult to assess the strictness with which the Acts are applied. This lack of clarity may also on occasion give rise to some confusion. There was considerable surprise expressed in the news media by the decision not to refer the acquisition of

Budget Travel by Thompson Holidays given the large market share of the merged firm particularly given earlier decisions to refer the Statoil acquisition of Conoco where the merged firm had a much smaller market share.[15] There has been some increase in transparency in recent years. Generally, Competition Acts provides that, where a merger is referred to the Competition Authority, the Authority's report must be published by the Minister within a specified time. This at least has the benefit of indicating whether or not the Minister has accepted the advice of the Authority. However, this provision has had only limited effect because, as already noted very few mergers are referred to the Authority for investigation.

3.3 Resource Issues

The resources devoted to merger evaluation in the Competition Authority are relatively limited. The number of individuals involved is quite small and the Authority e.g. MCA does not have any specialist legal or economic staff with a detailed knowledge of competition law devoted to the task. The resources devoted by the Authority to evaluating such notifications contrasts starkly with the substantial resources, in terms of specialist lawyers, economists and other advisers, typically employed by the parties to a merger notification. This gives rise to some risk that competition issues are not always adequately taken into account in the first stage of the merger process.

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[15] Assessing the competition implications of any merger can be a complex process and no two cases are alike. The lack of transparency in the process may have created an impression of policy inconsistency where arguably none existed.

3.4 Opportunity for Third Parties to Comment

Except for the small number of mergers which are notified to the Authority, no details are given of mergers notified under the Mergers Acts. This means that in the vast majority of cases mergers are approved without any third parties being given an opportunity to comment on the proposal. Combined with the limited resources devoted to merger evaluation within the Department, it increases the risk that competition issues are not fully taken into account in merger decisions.

3.5. Danger of "False Positives"

A failure to identify and take action to prevent a merger which has a significant adverse effect on competition may impose considerable costs on consumers and on other businesses. The process of notifying mergers under the Mergers Acts entails significant costs for the parties concerned. The rationale for imposing such a burden on business is that there is a need to protect the public interest by ensuring that competition is not significantly reduced as a result of a merger. Some strengthening of the current review procedure appears justified to ensure that this is the case.

4. MERGERS AND THE COMPETITION ACT

Merger controls are an essential element of most competition law regimes. Mergers take place for a wide variety of reasons. Many mergers occur for perfectly good business reasons. Some mergers, however, have the aim and/or the effect of reducing and possibly eliminating competition. Merger controls are

required to prevent such mergers. It is clear that current aspects of the Irish merger control regime are not entirely satisfactory, from the point of view of both competition agencies and business. The problems with the current regime may be classed under the following headings:

4.1. Effectiveness

From a policy perspective, competition considerations have not been addressed in an adequate manner. Also the lack of qualified economists dedicated to merger control in the Department of Enterprise and Employment gives rise to the danger that inadequate attention is paid to competition issues in the assessment of mergers. This is undesirable from the point of view of consumers, competing firms and the economy generally since permitting anti-competitive mergers may impose a significant cost.

4.2 Transparency

In a transparent process, decisions would be made according to publicly known criteria and the reasoning behind them would be open to public scrutiny. At present the Irish merger control system lacks transparency in some aspects. The Competition Act lays down criteria under which mergers referred by the Minister to the Competition Authority must be examined, and the Authority's reports are published, with the removal of parts which are considered to be commercially sensitive or confidential. Thus decisions on mergers which are referred to the Competition Authority are open to public scrutiny. However, the great majority of mergers are cleared without reference to the Competition

Authority. The fact that a notification is made is not published; neither is the reason for a positive or negative decision. Interested third parties, such as customers or competitors, have no opportunity to comment on the proposed transaction. Thus, where the vast majority of mergers are concerned, the process cannot be said to be transparent.

4.3 Efficiency

An efficient process produces maximum output for minimum input. Signs of an inefficient process would be duplication of effort, unnecessary work, decisions which are frequently appealed through the courts thus imposing unnecessary costs on business and government, etc. There are signs of inefficiency in the Irish merger control process: unnecessary notifications, duplication of effort between the Department of Enterprise and Employment and the Competition Authority when mergers are referred, inefficient use of whereby offending mergers may be amended before a final decision to block them is reached. Cost to business. The fact that many mergers are notified unnecessarily under the Mergers Act means that there is an unnecessary cost burden for business under the current regime.

CHAPTER VI

TOWARDS A MORE RATIONAL TREATMENT OF MERGERS

From a public policy perspective the rationale for merger control is to identify and to regulate those mergers which allow a firm (or firms) to acquire undue market power. Such monopoly power allows a firm to adversely affect the interests of consumers and other firms. Therefore, mergers having anti-competitive effects are regulated to avoid negative implications for investment and the economy at large.

While achieving that aim, it must be recognized that many mergers take place for legitimate business reasons; therefore, a merger control regime should not place unnecessary obstacles in the way of such mergers. Legal provisions dealing with merger regulation need to be fair, transparent and should have predictable outcomes. Concerning these aspects, a number of recommendations have been chalked out in this Chapter.

1. INTRODUCTION OF MERGER GUIDELINES CONCERNING THE PROTECTION OF MINORITY SHAREHOLDERS'

During the course of study, it has been observed that in case of Pakistan, there is an elaborate system of merger regulation. Two organizations, namely the recently instituted Competition Commission and the Securities and Exchange Commission of Pakistan are administering the merger procedures. These procedures are spelled out in various rules and regulations considering a broad range of issues relating to competition and investment. Though elaborate

enough, this merger control system does not seem to be sufficient to explicitly cater to the protection of minority shareholders.

The major recommendation emerging from this research work is that the SECP may issue 'Merger Guidelines Concerning the Protection of Minority Shareholders'. Such guidelines may be reviewed regularly and be modified according to the circumstances and requirements.

Considering that the courts are final authority to approve a merger, therefore strengthening of merger review at the courts' level is another alternative to protect the minority shareholders. In that case, this aspect will have to be included in the checklist of items to be evaluated by the courts.

2. DEALING WITH COMPETITION CONCERNS

Compared with vertical mergers, horizontal mergers are more frequently seen to pose problems from a competition perspective than other types of mergers notwithstanding that the former may also pose problems from a competition perspective. Vertical mergers involve firms integrating into upstream (input) or downstream (final product) markets. Such mergers may be prompted by a desire to block rivals' access to essential raw materials or to block access to retail outlets, forcing competitors to establish their own distribution network, thereby raising their costs. Mergers between firms in different industries would appear less likely to pose a threat to competition, although there may be the risk that the merged firm will use profits in one sector to finance predatory pricing in another. There are ample possibilities that reciprocal buying arrangements

between various divisions in a conglomerate, might also pose a threat to competition.

It is important to note that, for a number of reasons, competition issues may not always receive sufficient attention in the consideration of mergers. This may generally arise, particularly in Pakistan's context, because of the lack of transparency in the process, the lack of any clearly defined policy guidelines on mergers, the lack of opportunity for third parties to have their views heard and the lack of resources within the Competition Agency.

It may be argued that there is no need for a more pro-competition approach to mergers. Various claims are made to support such arguments. It is often asserted that the domestic firms need to be allowed establish a dominant position on the domestic market in order to compete internationally. However, there is considerable evidence that dominant firms tend to be inefficient and rather than be better equipped to compete internationally, lack of competition on the domestic market reduces firms' ability to compete internationally. For this reason alone such arguments need to be treated with a degree of caution.

It may also be argued that if only a small number of mergers are anti-competitive there is no real problem. A diminution of competition imposes costs on consumers and reduces overall economic welfare which the competition policy is designed to prevent. It is, therefore, recognized in virtually all developed economies that there is a need to control mergers in order to prevent those mergers which will have anti-competitive effects.

On the contrary, a related argument is that there is no need to worry about mergers since any anti-competitive practices, particularly those involving an abuse of a dominant position, could be dealt with under the Competition Law. This argument, however, ignores the reality that, in some circumstances, attempting to prevent abuse of a dominant position after it has been established may have only a relatively limited effect. It is, therefore, widely recognized that it is better to prevent the establishment of a dominant position in the first place rather than to try and police it subsequently.

Of course many would argue that, from a public policy perspective, competition should not be the only or indeed the decisive factor in deciding whether or not to approve a merger. There may, on occasion, be other policy considerations which may outweigh any competition problems posed by a particular merger. On the balance, it is believed that the consequences for competition should be fully taken into account before a decision is taken. In this context, the bottom line is that mergers which reduce competition are likely to result in higher prices to consumers. Therefore, there should be a clear demonstration that any such disadvantage to consumers would be more than offset by other factors.

3. RECOMMENDATIONS TO IMPROVE EFFECTIVENESS

In Pakistan's context, various options could be considered. Firstly, the current regime could remain largely unchanged. The Securities and Exchange Commission of Pakistan and the Competition Commission could recruit a small number of specialist staff for a specialist merger unit which would conduct a

preliminary assessment of the competition implications of a proposed merger in order to decide whether it should be referred to the Commission for a more detailed analysis and investigation or cleared after preliminary analyses. The proposed specialist unit could be funded out of notification income paid by the intending parties to the merger.

The alternative is for a more radical change in the system that would require that mergers notified to the Competition Commission must wait its decision before the Merger requests are lodged before the Courts. The new Competition Law requires the Commission, at the first stage of investigation, to decide within thirty days of receipt of all relevant information, whether the merger required a more detailed second stage investigation. The Commission should, however, be required to make public its decisions as to whether or not a second stage investigation was required. If it decided that a more detailed examination was required this would have to be completed within a further sixty rather than ninety days provided under the present law. On completion of the second stage the Commission should report to the Minister of Finance and the Minister would be obliged to publish the Commission's report. The Minister would retain the power to make an Order prohibiting a merger or permitting it on specified conditions following a report of a second stage investigation by the Commission.

In a number of respects such a regime would be akin to the operation of the EU Merger Task Force. Some additional staffing would need to be provided

to enable the Commission to establish a specialist merger unit with one member having specific responsibility for that unit. The unit should be self-financing. The proposal would increase efficiency. As the Commission would carry out the first stage investigation it would mean that the Commission would be familiar with the key issues from the outset of a second stage investigation. It would also mean that the Commission would be in a position to explore with the parties possible means for overcoming its concerns prior to deciding to instigate a second stage investigation. Where the parties agreed amendments to a proposal with the Commission, the Minister could make a conditional Order reflecting the terms of the agreement, thus ensuring that such undertakings were honored.

4. RECOMMENDATIONS TO IMPROVE TRANSPARENCY

Greater transparency could be provided were the Commission to issue broad policy guidelines indicating when a proposed merger would be likely to be referred to the Commission. Such guidelines could be established in consultation with the business and professional community and other stakeholders. It would also be preferable to seek third parties' views/comments before making a merger notification. While confidentiality of the issues involved in mergers may be recognized, as is the practice in several countries, a merger that is notified to the Commission may be made public as this does not appear to pose major problems. Indeed, in countries like Ireland, in a number of cases parties to mergers announce details of their intention to merge well in advance of any notification under the Mergers Laws which suggests that claims

that even the very fact of notification needs to be kept confidential may be somewhat exaggerated. There is some risk that the maintenance of total confidentiality impedes the ability of the Commission to obtain all the relevant information and that decisions are taken purely on the basis of information supplied by the parties to a merger who have obvious incentives to paint it in a favorable light.

The Alternative proposal discussed above would provide greater transparency. A decision to undertake a second stage investigation would represent a signal to the parties that an adverse recommendation might be made. If the Commission were required to inform the parties of the concerns which had prompted it to decide on a second stage investigation, this would afford the parties a better opportunity to state their case. If such a regime were to be instituted the Commission would be required at the outset to issue clear guidelines setting out the circumstances in which it would consider a second stage investigation was likely to be required.

Such changes should not be seen as a threat to the vast majority of merger transactions since most mergers do not pose any real competition concern. Problems would only arise in the case of mergers which would, or would be likely to, result in an actual diminution of competition in the market concerned. A reduction in the number of competitors or the fact that a merger would result in the merged entity having a larger share of the market than that previously held by either of the merged undertakings individually are not, of

themselves, sufficient to establish that such a diminution of competition has occurred or would be likely to occur. Concerns only arise with mergers which result in, or would be likely to result in a lessening of competition in the relevant market such as would allow, for example, the merged undertaking or all of the remaining firms in the market to raise their prices. Merger control regimes in other countries apply either a dominance test or a significant lessening of competition test. The appropriate criterion to apply is whether the merger would result in a significant lessening of competition which could occur in the absence of a single dominant firm.

Among the factors which need to be considered in order to decide whether a merger would result, or would be likely to result in a diminution of competition are the actual level of competition in that market, the degree of market concentration and how it is affected by the merger, the ease with which new competitors may enter the market and the extent to which imports may provide competition to domestic suppliers. In a market where market concentration following a merger would be relatively low, no further consideration of a proposed merger is required. In a highly concentrated market a merger which resulted in even a relatively small increase in the market share of one of the larger firms may merit closer examination, while at the same time recognizing that in a small economy such as Pakistan market concentration ratios in many sectors might be high relative to those which exist in much larger economies. Even if the market were highly concentrated following a merger it

would be unlikely to reduce competition unless there were significant barriers to entry and there was little likelihood of increased competition from overseas suppliers. An otherwise anti-competitive merger could be permitted in the case of a failing firm, subject to a strict definition of the concept of a failing firm.

5. RECOMMENDATIONS TO IMPROVE FAIRNESS AND EFFICIENCY

Under the existing regime, where the Competition Authority makes an order, difficulties may arise because the parties may not have had an opportunity to respond to the case for prohibiting the merger. It is a considered view that this can only be overcome if the parties are allowed an opportunity to respond to the Commission before taking a decision. The proposal to amend the legislation so that mergers After a proposed merger is notified to the Commission it must first of all decide whether an in-depth investigation is required, and if so it would have to inform the parties of the reasons for doing so. The parties are afforded an opportunity to respond to the Commission's findings before taking a decision in order to satisfy basic principles of natural justice.

6. SUMMARY OF RECOMMENDATIONS

Steps should be taken to improve effectiveness and efficiency, promote greater transparency, and ensure that concerns of minority shareholders and those relating to competition are fully taken into account in the assessment of mergers.

Introduction of merger guidelines relating to the protection of minority shareholders could be a crucial step towards promoting transparency and to boost confidence of investors.

From Competition perspective, effectiveness and transparency could be achieved in one of the following two ways:

1. Increased resources at the disposal of Commission:

    - The Commission should increase the resources devoted to dealing with merger notifications by recruiting economic and legal staff to ensure that competition issues are fully dealt with;

    - The Commission should issue clear policy guidelines setting out, in particular, the circumstances in which a notified merger would be referred to the Competition Commission;

    - The Commission should publish details of all mergers notified at the time of notification, so that third parties can make submissions to the Commission

2. Alternatively the 'Mergers Law' should be amended to provide that mergers should be first notified to the Competition Commission notwithstanding the provisions of any other law.

• The Commission would be required to decide within 30 days of receiving a completed notification whether a more detailed second stage investigation was required;

• The Commission would be required to publish guidelines indicating when a second stage investigation would be likely to occur;

• The Commission would publish notice of all mergers notified to allow submissions from third parties at the first stage;

• Any second stage investigation would have to be completed within 30 days of the announcement by the Commission that such an investigation was to be undertaken;

• Following a second stage investigation the Commission would have to decide within thirty days whether or not to issue an Order either prohibiting or giving conditional approval to the proposed merger;

• The basic test to be applied to mergers should be whether the merger would be likely to result in a significant reduction in competition;

• The parties to a merger should be allowed an opportunity to respond to the Commission's final report before a final decision is taken.

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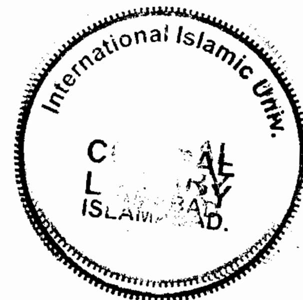
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