CRITICAL ANALYSIS OF CORPORATE MERGERS IN PAKISTAN

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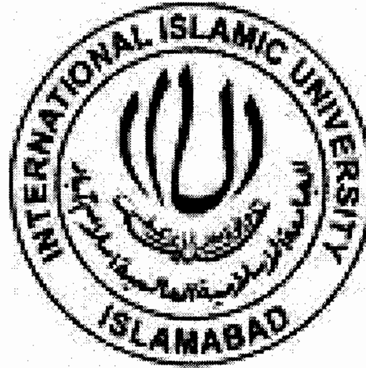

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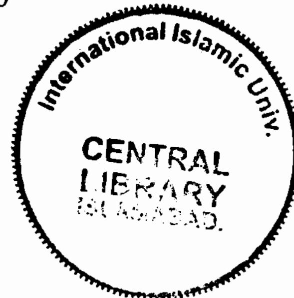

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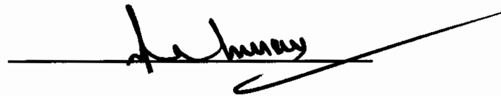

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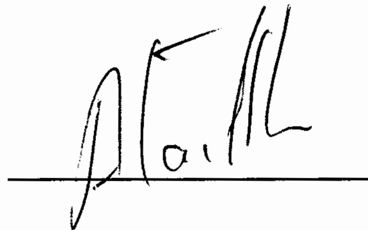

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It is pertinent to mention here that in spite of comments and recommendations of the individuals mentioned above, I am solely responsible for errors, omissions or imperfections of this work."

GLOSSARY OF ABBREVIATIONS

AoA	ARTICLES OF ASSOCIATION
BoD	BOARD OF DIRECTORS
BoI	BOARD OF INVESTMENT
CAT	COMPETITON APPEAL TRIBUNAL
CC	COMPETITION COMMISSION
CCA	COMPETITION COMMISSION ACT
CCP	COMPETITION COMMISSION OF PAKISTAN
CEO	CHIEF EXCUTIVE OFFICER
EA	ENTERPRISE ACT
EU	EUROPEAN UNION
EC	EUROPEAN COMMISSION
EOGM	EXTRA ORDINARY GENERAL MEETING
FSA	FINANCIAL SERVICES AUTHORITY
FSMA	FINANCIAL SERVICES AND MARKET ACT
FTA	FAIR TRADING ACT
FER	FOREIGN EXCHANGE REGULATIONS
HC	HIGH COURT
M&A	MEERGER AND ACQUISITION
MCA	MONOPLY CONTROL AUTHORITY
MRTPO	MONOPLIES AND RESTRICTIVE TRADE PRACTICES ORDINANCE
MoA	MEMORANDUM OF ASSOCIATION
NBFC's	NON BANKING FINANCE COMPANIES
NA	NATIONAL ASSEMBLY
OFT	OFFICE OF FAIR TRADE
Ord.	ORDINANCE
SBP	STATE BANK OF PAKISTAN
SC	SUPREME COURT
SE	STOCK EXCHANGE
SECP	SECURITIES AND EXCHANGE COMMISSION OF PAKISTAN

SSC	SENATE STANDING COMMITTEE
SH	SHARE HOLDER
TAB	TAKEOVER APPEAL BOARD
UK	UNITED KINGDOM
USA	UNITED STATES OF AMERICA

ABSTRACT

CRITICAL ANALYSIS OF CORPORATE MERGERS IN PAKISTAN

By

Asim Murtaza Cheema

Supervisor: Mr. Abdul Rehman Qureshi.

The economic dynamics of the world today are changing at a very rapid pace. In today's economy, mergers and acquisitions are used by majority of the companies in the world in order to expand their operations with the aim of increasing their profitability and smooth functioning.

These are the times of great changes in the global financial markets and big economies of the world. One of these changes is the corporate restructuring, which is an important part of the corporate finance world. Today, the mergers and acquisitions are considered as opening doors of opportunities. On the other hand, regulators, market players and even governments are taking exceptional measures to streamline the corporate restructuring.

In the recent years, the scale of mergers and acquisitions has increased to unprecedented heights, both at international as well as domestic level, which reflects the direct governmental intervention.

The world today is considered as a global village and in this globalised world the size of the company is considered as a key factor which will ensure its stronger capital base as well as its leading position in the global corporate competition.

Firms are engaged in mergers and acquisitions for a number of reasons which includes the utilization of unutilized market power, the diversification of risks, to achieve an economical scale of production, to acquire the complementary resources like patents, to utilize tax loopholes and a desire to limit competition.

Today, the Pakistani economy is facing a number of challenges. In order to combat these challenges and difficulties and to reduce the financial pressures, changes are required to be made at both micro and macroeconomic level. At international level, merger and acquisition strategies are used to combat such difficulties and in many cases, there are signs of direct governmental intervention. So the mergers and acquisitions can play a significant role in this regard because these strategies are used by the most developed economies of the world to get stronger capital base.

In Pakistan, mergers and acquisitions is a complex and time consuming process, which means that a number of steps have to be taken for a scheme of merger to be enforced and the process of merger and acquisition can take even more than a year.

The total deals done regarding mergers and acquisitions in Pakistan are negligible as there is an average of approximately ten merger transactions per year[1]. The process of merger is basically governed by Companies Ordinance 1984 but the provisions regarding mergers are found in a number of statutes and multiple authorities may be required to approve a particular merger.

On the other hand, the case law on the issue of merger and acquisition is vague and ambiguous and the courts are reluctant to establish clear cut law, guide lines and interpretation.

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[1]There are a total of 33 merger transactions that took place from October, 2007 to June, 2010.For details see www.cc.gov.pk/.

Pakistan, which is considered as a developing country and in dire need of foreign direct investment must have well developed regulators to strengthen and support its economy otherwise foreign direct investment cannot be made possible by way of merger and acquisition of domestic companies by the foreign companies. Similarly, lack of proper regulator ousts the possibility of domestic merger.

On the other hand, countries like Pakistan which are far behind from developed countries in the field of capital resources and technology will lack behind if the process of merger and acquisition is not properly regularized and made effective because merger and acquisition are the basic tools for the expansion and growth of corporate bodies which in turn make the economy stable.

The research work done relevant to the topic includes the research paper published by the "Center for Management and Economic Research" which is a research center of "Lahore University of Management Sciences" and is based in the department of economics.

The "Center for Management and Economic Research" has published a research paper "No.04-31 on mergers and the right of minority share holders in Pakistan". In this paper, some weak areas of our regulatory process are highlighted. The paper says that "The Securities and Exchange Commission of Pakistan" is not a powerful regulator due to many reasons including lack of expertise and human capital.

Similarly, the paper shows that the role of judiciary is well performed regarding the right of minority share holders as judiciary has settled some principles and interpreted the provisions regarding the protection of minority share holders but it is still inadequate as far as the other issues are concerned.

There were many sources available for doing this research. Some of them were primary and others were secondary. The primary sources include statutes, regulations and case laws. The main statutes include "The Companies Ordinance 1984, Banking Companies Ordinance 1962 Competition Commission Ordinance 2007, State Bank of Pakistan Act, 1956, Securities and Exchange Commission of Pakistan (SECP) Act 1977, Companies Act 2006(UK), Enterprise Act 2002(UK), The City Code on Takeover and Merger and Financial Services and Market

Act (FSMA) 2000". Similarly, there are some leading cases on the issue which will be discussed in this research work.

The secondary sources which were available for this research include books and articles written by domestic and foreign writers.

The research would mainly be relied on the study of relevant literature and different studies conducted. The relevant statutes, regulations and case laws available on the issue will be studied in detail. Similarly, the regulatory mechanism provided in United Kingdom will be discussed. This will give the difference of the regulatory mechanism provided in the two jurisdictions. Never the less, reference of other jurisdictions like United States of America and India may be given where it is deemed appropriate. The regulatory bodies like "*Securities and Exchange Commission of Pakistan (SECP)* and *Competition Commission of Pakistan (CCP)*" will also be discussed during the course of this research. By doing all this, the problems in our regulatory and legal regime will be highlighted and suggestions will be given at the end to solve these problems.

This research work is divided into five equal parts that means five chapters each of which focuses on specific area related to the research. The first part is basically reserved for introducing the topic and the general assessment of the significance of the topic. This part explains the process of merger and acquisition by defining the terms, giving the difference between the two, mentioning the different kinds of merger and acquisition and the motives for mergers and acquisitions.

In the second part, a detailed analysis of the regulatory and legal regime dealing with mergers and acquisition in Pakistan will be provided and the problems faced by these regimes and the defects in the regulatory mechanisms will also be discussed. Similarly, there will be a critical analysis of the role of superior judiciary in the process of merger and acquisition in Pakistan and whether the courts are playing their proper role for merger and acquisition or not.

In the third part, the regulatory and legal regime dealing with mergers and acquisitions in UK will be discussed and used as a model.

In the fourth part, a comparison of the regulatory and legal regime of the two jurisdictions will be provided which will sort out the areas which needs attention so that solutions can be suggested to solve the problems in these particular areas.

The last part of this research work is reserved for conclusions and recommendations for solving the problems faced by our jurisdiction.

The core theory of the research is that there must be a specific code or guidelines for the process of merger in Pakistan because the merger provisions in the Companies Ordinance 1984 are inadequate. This must be done to get rid of the complex and cumbersome procedure for the merger transactions.

The "Securities and Exchange Commission of Pakistan" must be given more independence authority and resources so that it can work more efficiently and solve the problems related to mergers and acquisition until a specialized body for the regulation of mergers and acquisition is created. The SECP must publish advisory opinions inclusive of those on mergers and acquisitions.

There must be a uniform process of regulation for all types of mergers and a single body must be responsible to regulate the process of mergers as in the United Kingdom.

Lastly, the research concludes that in principal, there must be a separate tribunal to take up the cases related to merger and acquisitions but looking at the current situation in Pakistan it is not suitable in the present circumstances because firstly, the case load of mergers is very low as there are just ten merger transactions on average per year.

Secondly, it will require a lot of finances to built and run such an institution and thirdly, the political appointments in the tribunals in Pakistan cannot be avoided which results in wastage of time and resources so in the present circumstances it is better to create a special wing within the "Securities and Exchange Commission of Pakistan" having all stake holders including ex-judicial members and technical members from the relevant fields to constitute a particular bench for a particular merger transaction whether it is related with merger of

"banking companies", "non banking finance companies" or "insurance companies" etc as per the model of Takeover Appeal Board in the United Kingdom.

CHAPTER: 01

MERGER AND ACQUISITION

The phrases "merger and acquisition" describes the forms of corporate restructuring. Phrases like merger, acquisition, takeover and amalgamation are used interchangeably to describe a situation where two or more firms combine into one firm in some respect to get the benefit of such combination. However, the terms merger and acquisition are different from each other in the technical sense.

1.1 MERGER

A merger is defined as "an arrangement whereby the assets of two or more companies become vested in, or under the control of, one company (which may or may not be one of the original two companies), which has as its shareholders all, or substantially all, the shareholders of the two companies[2]."

In other words, "it is a process of combination of two or more companies of almost the same size to form a new entity. During the process of merger, all companies except one ceases to exist as a legal entity and only one company survives in its own name."

The company which survives acquires all the assets and liabilities of the merged company or companies[3]. So in merger either a new company is incorporated or one existing company which is usually a bigger company survives and another existing company or companies, which are usually smaller in size, merged into it.

In Pakistan the word amalgamation is used to describe the term merger[4].
Merger can take place by one of the following two ways:

a) Merger by way of absorption.
b) Merger by way of consolidation.

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[2]L.M.Sharma, *Amalgamations, Mergers, Takeovers, Acquisitions*.1st.ed. (New Delhi: Company Law Journal,1997), 15.
[3]http://legal-dictionary.thefreedictionary.com/Corporate+merger (accessed October 26, 2009).
[4]See The Companies Ordinance, 1984, Part ix.

Absorption is "the process of combination of two or more companies into an existing company. In this case all companies except one lose their identity as a legal entity."

On the other hand, a consolidation is "a process of combination of two or more companies into a new company. In this case all companies are legally dissolved and an entirely new legal entity is created" so in this type of merger, the merging company or companies transfers its assets, liabilities and shares to the new entity for exchange of shares.

There is another term used in contrast with the concept of merger that is 'demerger' which represents a situation when "a company splits into two, generating a second company separately listed on a stock exchange[5]."

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[5]http://en.wikipedia.org/wiki/Mergers_and_acquisitions (accessed November 09, 2009).

1.2 ACQUISITION

An "acquisition", which is also known as a "takeover or buyout", is the process of buying of one company by another. This process of buying and selling may be friendly or hostile. In the former case, the companies cooperate in negotiations whereas in the latter case, the target company is unwilling to be bought or the management of the target company has no prior knowledge of the offer. This second type of merger is generally described as raid.

In case of acquisition, usually a smaller firm is purchased by a larger one[6] but sometimes a smaller firm purchases a larger firm and acquires management control of this large firm and keeps its name for the combined entity. This type is usually known as "reverse takeover"[7].

So in simple words, "acquisition means the acquiring of ownership right in the property and assets of another company without any combination of companies. It means in case of acquisition two or more companies may remain independent separate legal entity but there may be change in control of companies."

As discussed earlier that the term takeover, merger and acquisition are used interchangeably but "takeover" is the general term used to define acquisition only.

A takeover may be defined as "a series of transactions whereby one company acquires control over the assets of another company either directly by becoming owner of those assets held by the other company or indirectly by the obtaining control of management of the other company." So in simple, "takeover is acquisition by one company of controlling interest of the other, usually by buying all or majority of shares."

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[6]L.M.Sharma, *Amalgamations, Mergers, Takeovers, Acquisitions*.1st.ed. (New Delhi: Company Law Journal,1997), 16.

[7]http://en.wikipedia.org/wiki/Mergers_and_acquisitions (accessed November 09, 2009).

The technique used for affecting a takeover is called takeover bid[8]. It is simply "an offer to acquire shares of a company with a view to obtain at least sufficient shares to give the offeror voting control of the company. It may take the form of an offer to purchase share for cash or share for share exchange or a combination of both[9] while a takeover bid is frequently used against the wishes of the management of the offeree company[10]." There are three type of takeover bid[11].

1. Negotiated bid
2. Tender offer
3. Hostile takeover

In case of negotiated bid, the management of both the firms come together and negotiates directly for the takeover so that if the management of both the firms reaches to an agreement, the proposal is placed before the shareholders of the companies. Otherwise, it stands terminated.

On the other hand, in a tender offer the acquiring company negotiates with the shareholders of the target company directly without any intervention of the management to sell their shareholdings to the acquiring company at a fixed price. In this case, the offered price is generally kept higher than the current market price in order to induce the shareholders of the target company.

In a hostile takeover, which is generally known as corporate raid, the acquiring company put efforts to get a controlling interest in the target company by purchasing shares at a stock exchange so that the management did not even know about such hidden activity.

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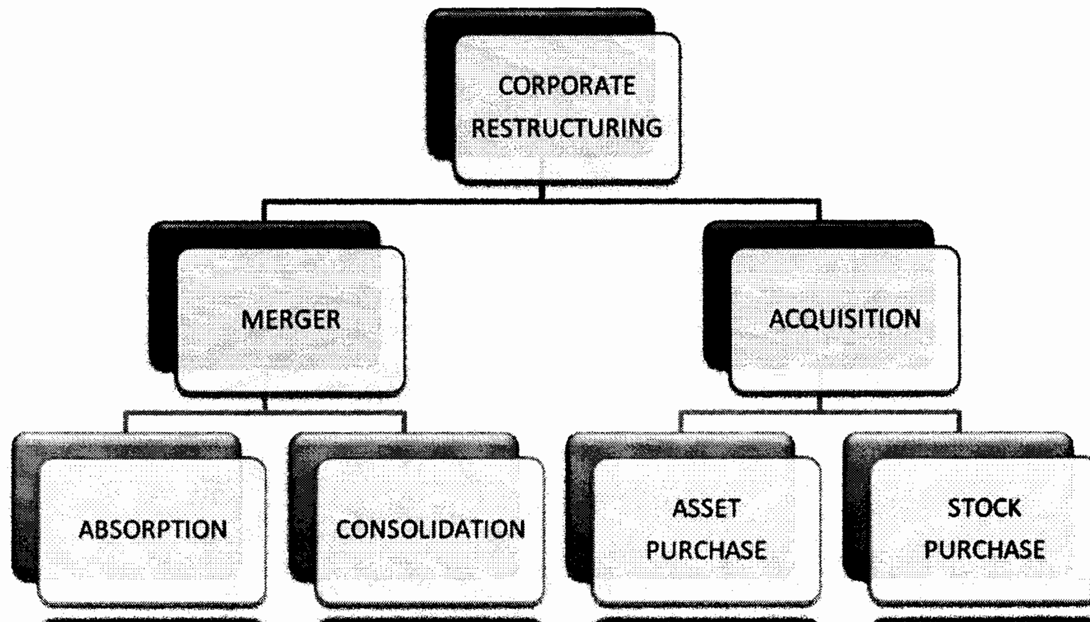
[8]L.M.Sharma, *Amalgamations, Mergers, Takeovers, Acquisitions*.1st.ed. (New Delhi: Company Law Journal,1997), 17.
[9]Ibid.
[10]Ibid.
[11]http://www.mbaknol.com/strategic-management/takeover-bid/ (accessed August 13, 2010).


CORPORATE RESTRUCTURING
MERGER
ACQUISITION
ABSORPTION
CONSOLIDATION
ASSET PURCHASE
STOCK PURCHASE

1.3 DIFFERENCES BETWEEN MERGER AND ACQUISITION

In order to differentiate between a merger and acquisition, two factors are of prime importance. Firstly, whether the purchase is friendly or hostile and secondly, how the purchase is communicated to and received by the board of directors of the target company or its employees and shareholders.

Some of the basic differences between the merger and acquisition are as follows:

1. An acquisition represents a sale and purchase transaction in which a company usually bigger in size (buyer) purchase a company which is usually smaller in size (seller). While in case of a merger there is a combination of companies of almost the same size.

2. A merger transaction involves two or more companies combining together into a single entity while in case of acquisition there is basically a single actor/company purchasing the controlling interest in the other company.

3. In an acquisition the transaction is frequently against the wishes of the management of the target company while in case of merger transaction it is generally by the consent of the management of all the companies involved in the transaction[12].

4. The merger and acquisition can be differentiated on the bases of the way of financing used by the company[13].In an acquisition, cash is used generally because the aim of this sort of transaction is to remove the shareholders of the target firm from the picture and to bring the target under the bidder control alone but acquisition may be done by share for share exchange or both while in case of merger the transaction is always done by share for share exchange offer so that the accepting shareholders of the transferor company becomes the shareholders of the transferee company.

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[12]L.M.Sharma, *Amalgamations, Mergers, Takeovers, Acquisitions.*1st.ed. (New Delhi: Company Law Journal,1997), 17.

[13]http://en.wikipedia.org/wiki/Mergers_and_acquisitions (accessed November 09, 2009).

5. An acquisition represents a direct or indirect control over the assets or stock of the target firm. So in case of a stock purchase transaction, the sellers' shares are not necessarily combined with the purchasers' stock but it is kept separate as a new subsidiary or operating division.

On the other hand, in case of assets purchase transaction, the assets purchased by the buyer becomes the additional assets of the acquiring company with the expectation of increase in the value of assets over time which results in enhancing the shareholder value[14].

[14]Andrew J.Sherman and Milledge A.Hart, *Mergers & Acquisitions From A to Z.* 2nd.ed. (New York: American Management Association, 2006),11.

1.4 KINDS OF MERGER:

There are four different types of merger depending upon the relationship between the merging companies as follows:

1-HORIZONTAL MERGER

"Horizontal merger is a type of merger between two or more companies in the same industry." In this case, two firms producing and selling identical products in the same geographic location merges together to eliminate competition between them[15].

Such type of mergers raises some basic competition problems because firstly, the elimination of competition between the merging companies could be significant depending on the size of the companies. Secondly, such unification of companies might create substantial market power and might enable the new entity to raise prices and to reduce output[16].

2-VERTICAL MERGER

"Vertical merger represents that type of merger in which there is a combination of two companies which are operating in the same industry but at different stages of production or distribution systems[17]."

Vertical merger takes two basic forms: backward integration, in which a company takes over its supplies or producers of raw material for example, where a motor car manufacturer takeover a manufacturer of sheet metal, and forward integration in which a company decides to take over the retailer of customer company for example, where the car manufacturer takes over a car distributing firm.

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[15]http://legal-dictionary.thefreedictionary.com/Corporate+merger (accessed October 26, 2009).

[16]Ibid.

[17]L.M.Sharma, *Amalgamations, Mergers, Takeovers, Acquisitions.*1st.ed. (New Delhi: Company Law Journal,1997), 19.

The vertical merger gives rise to two major benefits for a company. Firstly, it internalizes all transactions between the manufacturers and its suppliers or dealers thus converting somewhat adverse relationship into some sort of partnership[18].

Secondly, vertical merger helps the management to improve performance and efficiency by giving more effective way of monitoring[19] and also by ensuring a source of supply or an outlet for products or services.

So by all these means, the vertical merger helps in attaining many operations and financial economies because it helps the acquiring firm or transferee firm to get a strong market position as its production or distribution chains will be more integrated than that of its competitors.

3-CO GENERIC MERGER

"In these types of mergers the acquiring firm and the target firm are related to each other through some basic technologies, production processes or markets."

So in this case, the acquired firm represents an extension of product line, market participant or technologies of the acquiring firm.

These types of merger not only helps the company in extension of its current set of business to adjoining business but also leads to benefits by exploitation of strategic resources to enable the company to get higher return than it enjoyed earlier.

Co generic mergers are generally divided into two types;

a) MARKET EXTENSION
b) PRODUCT EXTENSION

[18]http://legal-dictionary.thefreedictionary.com/Corporate+merger (accessed October 26, 2009).
[19]Ibid.

In case of market extension merger which is also known as geographic extension merger , the buyer makes the same product as the target firm but in a different geographic market[20] for example, when an ice cream maker in England mergers with an ice cream maker in Pakistan.

On the other hand, product extension merger represents that type of co generic merger in which two companies selling different but related products in the same market, merge together[21]. So in this case, the firm that produce one product buys a firm that makes a different product which requires the application of similar manufacturing techniques for example, when a producer of detergent buys a producer of soap or bleach.

4-CONGLOMERATE MERGER

"This is a type of merger in which the merging entities are involved in unrelated type of merger. So in this case, the business of the two entities is neither horizontally nor vertically related to each other[22]for example, when a shoe producer buys an appliance manufacturer or a garment manufacturer."

The firms involve in conglomerate mergers in order to get enlarged debt capacity, reduction of capital costs, synergy of managerial functions and better utilization of financial resources. It helps the merging entities to secure overall stability and market power.

This type of merger may convert a large firm into a dominant one with a decisive competitive advantage or make it difficult for other smaller companies to enter into a relevant market[23].

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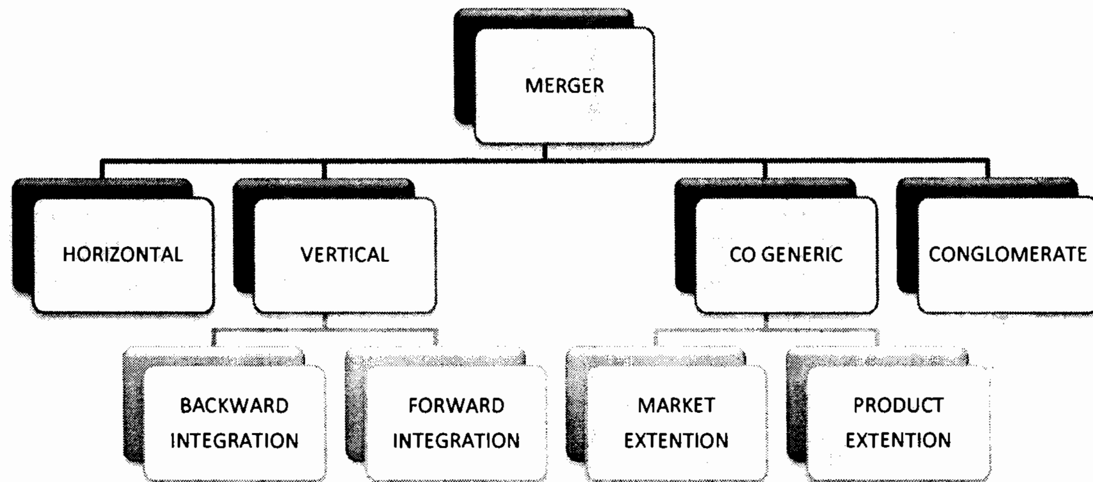
[20]http://www.investopedia.com/university/mergers/mergers1.asp (accessed December 04, 2009).

[21]Ibid.

[22]L.M.Sharma, *Amalgamations, Mergers, Takeovers, Acquisitions*.1st.ed. (New Delhi: Company Law Journal,1997), 19.

[23]http://legal-dictionary.thefreedictionary.com/Corporate+merger (accessed October 26, 2009).


MERGER
HORIZONTAL
VERTICAL
CO GENERIC
CONGLOMERATE
BACKWARD INTEGRATION
FORWARD INTEGRATION
MARKET EXTENTION
PRODUCT EXTENTION

1.5 MOTIVES FOR MERGER

There may be a number of motives for a particular merger. Some of the common motives of the merger are given below.

1-SYNERGY[24]

"It refers to a situation when the merged firms are more valuable than the sum of the individual combining firms." It is based on the formula that 2+2=5.

A merger which results in increasing the wealth of the stakeholder is said to contain synergistic properties. In other words, "it is the difference value between the combined firm and the sums of the value of the individual firms."

There are four basic types of synergies as follows:

A-operating synergy

There are a number of ways by which the merger may generate operating synergy for example; the operating synergy may be achieved by reducing the costs of research and development in the new setup.

On the other hand, the costs of selling, marketing and advertising may be reduced as a result of merger to give rise to operating synergy.

One other factor, which gives operating synergy is that the combining firm may have strength in different functional areas which can be used by the combined firm.

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[24]http://www.investopedia.com/university/mergers/mergers1.asp (accessed December 04, 2009).

B-financial synergy[25]

"Financial synergy means the increase in the value of the combined firm due to financial factors." Following are the ways by which financial synergy may be achieved.

Merger helps in elimination of financial constraints for the growth of a firm as a company may lack growth through internal development due to shortage of funds so the company can grow externally by acquiring another company by the exchange of shares.

Secondly, the surplus cash of a company may be utilized to acquire another company thereby increasing the market value of the share instead of distributing the surplus to the shareholders which is subject to tax deduction.

Thirdly, the merger helps the company to purchase the goods on credit, obtain bank loans and raise capital in the market easily because merger results in better creditworthiness.

C-managerial synergy

Merger also results in managerial effectiveness. This can be done by replacing the existing management team with a new one.

D-sale synergy

This type of synergy results when the merged entity benefits from the common distribution channels, advertising, sales administration, sale promotion and warehousing.

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[25]L.M.Sharma, *Amalgamations, Mergers, Takeovers, Acquisitions*.1st.ed. (New Delhi: Company Law Journal,1997), 22.

2-DIVERSIFICATION[26]

Another motive for the merger of the companies is to reduce risk and that is by way of diversification.

On the other hand, diversification into new areas and new products can also be motives for a merging firm to cover broaden economic areas which the individual firm cannot do at its own.

3-ACCELERATED GROWTH[27]

Growth is very important for enhancing the value of the company. A company may expand internally or externally. If the company cannot grow internally due to lack of physical or managerial resources or any other reason, then it can grow externally by way of combining operations with other company by way of merger which help to accelerate the pace of the company's growth.

4-INCREASED MARKET POWER[28]

Merger is the only route to obtain market power because increasing the market share of a firm and the increased market share give rise to more profitability of the firm due to economies of scale. This results in increase in the bargaining power of the firm with labors, suppliers and buyers.

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[26]http://www.mbaknol.com/strategic-management/takeover-bid/ (accessed August 13, 2010).

[27]Ibid.
[28]Ibid.

5-PURCHASE OF ASSETS AT A BARGAINING PRICE[29]

Merger provides opportunities to acquire assets particularly land, plant and equipment etc at a lower rate than would be incurred if they were purchased or constructed at current market prices because the desired assets could be obtained cheaper by acquiring a firm that already operated the assets.

6-INCREASED EXTERNAL FINANCIAL CAPACITY[30]

Merger also help in increased external financial capacity as the smaller firms may have expanded financial requirement and the firm has exhausted its bank credit and may not has access to long term debt and equity market.

So in this case, a larger firm with sufficient cash to finance such requirement of the smaller company can obtain good situation by making a proposal of merger to the smaller firm.

On the other hand, there may be a situation in which the smaller company is not facing the credit problem but the management may recognize that the continued growth of the company may require financing beyond its means so it leads to a merger.

7-INCREASED MANAGERIAL SKILLS[31]

Sometimes the firms are unable to utilize its potential fully to gain their target just because of the fact that the firm lack good managerial or technical expertise and the firm cannot hire management or develop the technology it needs so it combines with a compatible firm with needed managerial personal and technical expertise.

[29] http://www.mbaknol.com/strategic-management/takeover-bid/ (accessed August 13, 2010).
[30] Ibid.
[31] Ibid.

8-REDUCTION IN TAXABILITY[32]

It is also another motive for merger because a loss making firm have advantage of provision for set off and carry forward of losses against its future earning for calculating its tax liability.

On the other hand, when company merges through exchange of shares, the share holder can save tax because there is no actual sale but the share holder benefit from the profit arising from the exchange of shares.

9-ECONOMIES OF SCALE[33]

Economies of scale means that the combined firm can often reduces its fixed cost by removing duplicate department or operations; lowering the costs of the company by reducing staff and thus increasing profit margins.

Economies of scale is achieved when increase in the volume of products leads to the reduction in the cost of product per unit as merger may result in increase in product without corresponding increase in fixed costs.

10-VERTICAL INTEGRATION[34]

"It is the combination of companies business with that of its suppliers or customers to secure a source of supply for key material or to secure a distribution outlet or a major customer of a company's product or to improve profitability by expanding into high margin activities of suppliers and customers."

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[32]http://en.wikipedia.org/wiki/Mergers_and_acquisitions (accessed November 09, 2009).
[33]http://legal-dictionary.thefreedictionary.com/Corporate+merger (accessed October 26, 2009).
[34]http://www.mbaknol.com/strategic-management/takeover-bid/ (accessed August 13, 2010).

11-ACQUIRE GLOBAL COMPETITION STRENGTH[35]

This is also an important motive for the companies now a days because many companies are forced to consolidate due to the competition force resulting from globalization and deregulation as it is difficult for the smaller companies to compete with the multinational companies so the result is cross border mergers to enable to take up large projects and to compete more effectively with increased size.

[35]http://www.mbaknol.com/strategic-management/takeover-bid/ (accessed August 13, 2010).

1.6 HISTORICAL BACK GROUND

The mergers occurring today are considered as a part of the sixth merger movement starting from 2002 onwards[36].

Previously, there are five major waves of mergers or merger movements as briefly described below:

1-FIRST MERGER MOVEMENT

The first merger movement occurred between 1893 and 1904.During this time, small firms with little market share consolidated with similar firms to form power full institution which dominated their markets.

During this period, more than 1800 firms disappeared into consolidation which constituted 20% of the GDP in 1900[37].This fact shows that this was the greatest merger movement ever.

The mergers which occurred in this movement were basically horizontal mergers because the companies which merged were basically the mass producers of homogenous goods that could exploit the efficiency of large volume products.

2-SECOND MERGER MOVEMENT

The second merger movement started in 1920's and it is characterized by vertical mergers. This merger movement is associated with development of radio which enabled nationwide advertising and the development of auto mobiles which enabled effective geographic sales and distributions[38].

This wave ended with the stock market crash and the great depression in 1929.

[36]http://www.scribd.com/doc/18644138/Mergers-Reasons (accessed July 11, 2010).
[37]http://en.wikipedia.org/wiki/Mergers_and_acquisitions (accessed November 09, 2009).
[38]http://www.scribd.com/doc/18644138/Mergers-Reasons (accessed July 11, 2010).

3-THIRD MERGER MOVEMENT

This merger movement started in 1960 onwards and this was an era of conglomerate mergers. During this period, major conglomerate mergers took place in aerospace and oil companies[39].

4-FOURTH MERGER MOVEMENT

This is generally known as takeover wave. This merger movement was started in 1980 when the availability of high risk financing propelled this merger movement and there was some dismantling of the diversification of the previous merger movement of 1960's.

The basic reason of this high risk financing was the financial innovation and junk bonds which made all firms vulnerable to a takeover bid.

This merger wave ended in 1990 with the collapse of junk bond market and saving and loan banks[40].

5-FIFTH MERGER MOVEMENT

The fifth merger movement started in 1993 and this period is considered as an era of mega deals because the mergers which occurred during this period include merger of Citibank and Travelers, Vodafone and Mannesmann, Chrysler and Daimler Benz and AOL and Time Warner[41].

This era ended with the bursting of millennium bubble and the great scandals like Enron which resulted in revolution in corporate governance.

[39]http://www.scribd.com/doc/18644138/Mergers-Reasons (accessed July 11, 2010).
[40]Ibid.
[41]Ibid.

6-SIXTH MERGER MOVEMENT

The present era is considered as in the sixth wave of merger which started in 2002 onwards. The major factors of this merger wave include globalization, the availability of low interest financing and the tremendous growth of private equity funds.

CHAPTER: 02

REGULATORY REGIME IN PAKISTAN

2.1 PROCEDURE OF MERGER

In some jurisdictions of the world, the approval from the court of law is not required for the occurrence of the scheme of merger. The obvious example is of the United States of America where the courts have a very limited role to play during the process of merger and that also is restricted to the cases of antitrust violations.

On the other hand, the situation in Pakistan is completely different because in Pakistan, approval of the "scheme of merger" may be required in cases of merger and in such cases a merger transaction takes place only if it is sanctioned by a High Court as per the requirements of the Companies Ordinance 1984[42].This intervention of the court makes the whole process of merger complicated and lengthy and it also proves to be a redundancy in the whole process of merger because the company has to fulfill dual requirement.

In Pakistan, any company which seeks merger has to fulfill all its inter se legal formalities such as the method of share holder voting which are required by the relevant "Companies Ordinance 1984", "the articles of association", "the memorandum of association", but also the procedural laws of the Company Courts Rules 1997.In addition to all this, the procedural requirements of the courts go side by side[43].

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SCHEME OF ARRANGEMENT

The first step towards the realization of merger is the preparation of a "scheme of arrangement". The scheme use to be in documentary form and is to be presented before the share holders in extra ordinary general meeting of share holders[44].

The scheme of arrangement is a summarized document consisting of different types of information regarding the merger transaction including the information about the objective and reasons behind the merger, information regarding the appointment of an advisor to determine the fair share exchange ratio for the proposed scheme of merger and appointment of advocates to act as legal advisors for the proposed scheme of merger.

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[42]The Companies Ordinance, 1984, S.284 (1).

[43]http://ravi.lums.edu.pk/fcg/images/Sikander_Ahmed_Shah.pdf (accessed May 11, 2009).

[44]Ibid.

It may contain other details like details about merging companies and their status, the new (proposed) name of the company and details regarding charges of the merger transaction.

Under section 286 of the "Companies Ordinance 1984" when a meeting is scheduled with the creditors or members under section 284 of the "Companies Ordinance 1984", the notice to such members or the creditors shall also be accompanied with an explanatory statement which includes details like the information of the interests of the chief executive officers (CEO) and directors involved in the merger etc.

FILING OF THE MERGER PETITION

After the preparation of the "scheme of arrangement" by the respective companies, the next step towards the realization of the merger is the filing of the preliminary merger petition in the respective courts after which the share holders meeting is to be held.

The petition contains all types of the substantial information regarding the merger such as the information regarding the list of shareholders and directors, the record of the resolutions passed by the board of directors and record of the approval by the board of directors regarding the merger. It also includes information regarding the income statement, balance sheet and the swap ratio valuation. It may also contain no objection certificates from the creditors of the companies involved in the merger transaction.

An application is also filed along with the merger petition under the Companies Ordinance 1984[45]for permission to hold extra ordinary general meeting as a requirement of the Companies Ordinance[46].

The court is to fix a date for holding this EOGM but the shareholders must be provided with 21 days previous notice under the Ordinance[47].This notice is to be received in person in case of unlisted company under section 159(7) while in case of listed one, both notices that is personal notice to the shareholders and general notice to the public via publication in the

[45]The Companies Ordinance, 1984, S.284 (1).
[46]See The Companies Ordinance, 1984, Part ix.
[47]The Companies Ordinance, 1984, S.159 (7).

newspaper etc is required[48].Further, the notices to the SECP and relevant stock exchanges are also required in cases of listed companies.

The next step is the appointment of a lawyer as a representative of the court to chair the process of EOGM for legal compliance and shareholders' objection. According to the Companies (Court) Rules, 1997, such chairperson is to submit a report to the "High Court" within seven days regarding the affairs of the EOGM[49].

After this report the respective company is to file a petition to confirm the "scheme of arrangement" in the form of petition in "form 19" and it must be within 7 days of the report of chairman[50].

In addition to the information provided in the initial merger petition, the petition under form 19 also contains the terms proposed by the merging entities regarding the merger. It also contains details regarding the EOGM to show that the scheme is passed by 3/4 majority to comply the requirements of the Companies Ordinance 1984[51].

After filing of the petition under form 19, the court fixes a day for hearing the petition after ordering constructive notice to the public at large by publication. This notice must be provided at least 10 days before the hearing[52].

The last step in the court process is the satisfaction of the court and if the court is satisfied after hearing the objections against the proposed merger then it sanctions the scheme of merger in form 21[53]. The court also provides notice of the document and application regarding merger to the registrar of companies under the Companies Ordinance[54].

[48]See The Companies Ordinance, 1984, S.158 (3) Read With S.159 (7).
[49]The Companies (Court) Rules, 1997, R.57.See Also CLD 2004 1 at 11.
[50]The Companies (Court) Rules, 1997, R.60.
[51]The Companies Ordinance, 1984, S.284 (2).
[52]The Companies (Court) Rules, 1997, R.61.
[53]Ibid., R.65.
[54]The Companies Ordinance, 1984, S.288.

2.2 RELEVANT AUTHORITIES

In Pakistan, the merger related provisions are scattered in several statutory documents and multiple authorities may be held responsible for a particular merger for example, in case of a merger of "Non Banking Finance Companies" the relevant authority responsible is "The Securities and Exchange Commission of Pakistan"[55].

On the other hand, in case of a company which is "Banking Company" the authority responsible to approve such a merger is The State Bank of Pakistan[56].

The High Courts are there to oversee the merger transaction generally as the merger transaction has to be sanctioned by the respective "High Court" but we see a more specific role of High Court in cases of merger of insurance companies because in that particular case the only authority to sanction and approve the transaction is the High Court unlike the NBFC's and banking companies.

Similarly, the "Competition Commission of Pakistan" is to play its role in cases of merger that fall under the "Competition Ordinance 2007" as the Competition Commission has been given the powers to approve the merger transactions that are not expected to result in reduction of competition[57].

All these authorities mentioned above, which are given the responsibility to approve the merger transaction in Pakistan are government authorities except that of High Courts.

[55]The Securities and Exchange Commission of Pakistan Act, 1997, S.20 (4)(j).Read With the Companies Ordinance, 1984, S.282-L (4).

[56]See The State Bank of Pakistan Act, 1956.

[57]See The Competition Commission Ordinance, 2007.

2.3 LEGISLATION REGARDING MERGER

Section 282(L), 284, 287,288, and 289 deals with merger of companies incorporated under the laws of Pakistan.

Competition Commission Ordinance 2007 contains registration requirements for certain merger agreements[58]. Competition Commission is to take action in case of monopoly[59].

Board of Investment and foreign exchange regulations contain certain exceptions and restrictions for non-resident for which general or special permission is required[60].

The foreign investors are allowed to maintain 100 % share holding in the social, agricultural, services and infrastructure sectors but there is an exception there that in case of insurance companies a maximum of 51 % share holding is allowed.

Similarly, 100% share holding is allowed in the manufacturing sector but the investment in security printing, alcoholic beverages or liquors, arms and ammunitions, high explosives, radioactive substances or currency and mint requires prior permission of the government[61].

On the other hand, in the foreign exchange industry the general or specialized permission of SBP is required for the issuance, transfer or creation of any interest in respect of Pakistani securities in favor of non- resident[62].

Regarding income tax laws, section 2(1A), 20(3), 57A, 97, 97A and clause 62 of the part IV of second schedule to the "Income Tax Ordinance 2001"[63] are relevant.

[58]The Competition Commission Ordinance, 2007, S.11.
[59]http://www.iclg.co.uk/khadmin/Publications/pdf/998.pdf (accessed July 11, 2010).
[60]http://www.scribd.com/doc/18644138/Mergers-Reasons (accessed July 11, 2010).
[61]http://www.iclg.co.uk/khadmin/Publications/pdf/998.pdf (accessed July 11, 2010).
[62]Ibid.
[63]http://www.scribd.com/doc/18644138/Mergers-Reasons (accessed July 11, 2010).

In Pakistan, the world "amalgamation" is used for merger and the term merger is defined in the "Income Tax Ordinance 2001" for the purposes of tax deduction which put a condition that for amalgamation, at least one company must be a "public company" or a company incorporated under the "Companies Ordinance 1984" or under any other law for the time being enforced.

Section 2(1A) of the "Income Tax Ordinance 2001" describes "amalgamation" as follows:

"amalgamation means the merger of one or more banking companies or non-banking financial institutions, 4[or insurance companies,] 5[or companies owning and managing industrial undertakings] 6[or companies engaged in providing services and not being a trading company or companies] in either case 7[at least one of them] being a public company, or a company incorporated under any law, other than Companies Ordinance, 1984 (XLVII of 1984), for the time being in force, (the company or companies which so merge being referred to as the 'amalgamating company' or companies and the company with which they merge or which is formed as a result of merger, as the 'amalgamated company')…."

Section 20 of the "Income Tax Ordinance 2001" deals with the deductions in computing the income chargeable under the head "income from business". This section guides for the treatment of merger related expenses.

Section 20(3) says that only legal advisory, financial advisory services and administrative expenses are deductible.

Section 20(3) is as follows:

"Subject to this Ordinance, where any expenditure is incurred by an amalgamated company on legal and financial advisory services and other administrative cost relating to planning and implementation of amalgamation, a deduction shall be allowed for such expenditure."

Section 57 (A) of the "Income Tax Ordinance 2001" deal with the issue of carry forward and setoff of losses sustained by the "amalgamating company". It says that in the year of amalgamation, the accessed loss of the "amalgamating company" for the tax years shall be set off against business or profits and gains of the amalgamated company.

The section is as follows:

"The assessed loss (excluding capital loss) for the tax year, other than brought forward and capital loss, of the amalgamating company or companies shall be set off against business profits and gains of the amalgamated company, and vice versa, in the year of amalgamation and where the loss is not adjusted against the profits and gains for the tax year the unadjusted loss shall be carried forward for adjustment upto a period of six tax years succeeding the year of amalgamation."

Section 97(A) deals with the taxability of the assets under "scheme of arrangement" or reconstruction as it says that "no gain or loss shall be considered to arise on disposal of assets from one company to another by virtue of operation of scheme of arrangement or section 48 of the Banking Companies Ordinance 1962 but subject to the condition mentioned in the section."

The section 97A is as follows:

"No gain or loss shall be taken to arise on disposal of asset from one company (hereinafter referred to as the 'transferor') to another company (hereinafter referred to as the 'transferee') by virtue of operation of a Scheme of Arrangement and Reconstruction under sections 282L and 284 to 287 of the Companies Ordinance, 1984 (XLVII of 1984) or section 48 of the Banking Companies Ordinance, 1962 (LVII of 1962), if the following conditions are satisfied, namely:—

(a) The transferee must undertake to discharge any liability in respect of the asset acquired;

(b) Any liability in respect of the asset must not exceed the transferor's cost of the asset at the time of the disposal;

(c) The transferee must not be exempt from tax for the tax year in which the disposal takes place; and

(d) Scheme is approved by the High Court, State Bank of Pakistan or Securities and Exchange Commission of Pakistan, as the case may be, on or after first day of July, 2007."

According to this section, the profits of the amalgamating companies are taxable if the abovementioned criterion is not fulfilled under the Income Tax Ordinance 2001[64].

[64]http://www.scribd.com/doc/18644138/Mergers-Reasons (accessed July 11, 2010).

2.4 LEGISLATION FOR PARTICULAR SECTOR

BANKING:

Section 48 of the "Banking Companies Ordinance 1962" deals with the procedure of "amalgamation" of two or more "banking companies" and requires the approval of 2/3 majority of shareholders of the company involved[65]. After that the "scheme of merger" must be passed by SBP[66].

Section 48 of the "Banking Companies Ordinance" states as follows:

"(1)Notwithstanding anything contained in any law for the time being in force, no banking company shall be amalgamated with another banking company, unless a scheme containing the terms of such amalgamation has been placed in draft before the shareholders of each of the banking companies concerned separately, and approved by a resolution passed by a majority in number representing two thirds in value of the shareholders of each of the said companies, present either in person or by proxy at a meeting called for the purpose.
(4) If the scheme of amalgamation is approved by the requisite majority of shareholders in accordance with the provisions of this section, it shall be submitted to the State Bank for sanction and shall, if sanctioned by the State Bank by an order in writing passed in this behalf be binding on the banking companies concerned and also on all the shareholders thereof;"

As section 48 deals only with the merger of banking companies so it is important to define that what companies are included in banking companies. In this regard section5(C) defines "banking merger" as follows:

"(c) 'Banking Company' means any company which transacts the business of banking in Pakistan and includes their branches and subsidiaries functioning outside Pakistan of banking companies incorporated in Pakistan"

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[65]The Banking Companies Ordinance, 1962, S.48 (1).
[66]Ibid., S.48 (4).

Section 503 of the Companies Ordinance1984 states that "the provisions of the Ordinance shall apply to banking companies except in so far as the said provisions are inconsistent with the provisions of the Banking Companies Ordinance 1962[67]."

NON BANKING FINANCE COMPANIES

"Non-banking financial companies, or NBFCs, are financial institutions that provide banking services but do not hold a banking license. These institutions are not allowed to take deposits from the public. Nonetheless, all operations of these institutions are still covered under banking regulations.

NBFC's do offer all sorts of banking services, such as loans and credit facilities, retirement planning, money markets, underwriting, and merger activities. The number of non-banking financial companies has expanded greatly in the last several years as venture capital companies, retail and industrial companies have entered the lending business[68]."

The merger of NBFC's is regulated by section 282(L) of the "Companies Ordinance 1984" which provides for the detailed procedure of such merger. This provision provides for a similar procedure as that of the merger of banking companies except that the "scheme of merger" must be approved by the SECP instead of SBP[69].

The relevant section is as follows:

"(4) If the scheme of amalgamation is approved by the requisite majority of shareholders in accordance with the provisions of this section, it shall be submitted to the Commission for sanction and shall, if sanctioned by the Commission by an order in writing passed in this behalf be binding on the NBFCs concerned and also on all the shareholders thereof."

[67]The Companies Ordinance, 1984, S.503 (b).
[68]http://www.investopedia.com/terms/n/nbfcs.asp (accessed January 25, 2010).

[69]The Companies Ordinance, 1984, S.282L (4).

The NBFC's includes "companies related with one or more of the businesses like leasing, housing finance services, investment finance services, venture capital services, discounting services, investment advisory services or asset management services."

INSURANCE COMPANIES

The merger of the "insurance companies" is regulated by the Insurance Ordinance 2000.Section 67-70 deals with the procedure of the merger of "insurance companies". In case of merger of "insurance companies", the application must be made to the "High Court" for approval of the "scheme of merger" as provided by S.68 (1) of the Ordinance which states as follows:

" *No life insurance business of an insurer shall be transferred to any person or transferred to or amalgamated with the life insurance business of any other insurer except in accordance with a scheme prepared under this section and sanctioned by the Court having jurisdiction over one or other of the parties concerned.* "

Section 2(xxxi) defines insurer as follows:

"Insurer means: (i) any company or other body corporate carrying on the business of insurance, which is a company or other body corporate incorporated under any law for the time being in force in Pakistan; and (ii) anybody corporate incorporated under the law of any jurisdiction outside Pakistan carrying on insurance business which carries on that business in Pakistan"

So according to this section, it is necessary for the "insurance company" to carry on insurance business in Pakistan.

Further section 503 (1) of the Companies Ordinance 1984 states that "the provisions of the Ordinance shall apply to insurance companies except in so far as the said provisions are inconsistent with the provisions of the Insurance Act 1938."

2.5 ROLE OF COMPETITION COMMISSION

"Competition Commission of Pakistan" was established on October 2, 2007 under "Competition Commission Ordinance 2007".Prior to "Competition Commission Ordinance 2007", Pakistan had antimonopoly law namely "Monopolies and Restrictive Trade Practices (control and prevention) Ordinance (MRTPO) 1970"and "Monopoly Control Authority" was the body to administer this law. The new law seeks to prohibit abuse of market dominance and certain types of mergers of under takings that substantially reduce competition[70].

CCP has cleared 33 merger transactions under section 11 of the CCP Ordinance since its inception[71].

Unfortunately, Competition Commission Ordinance 2007 was among the 37 Ordinances passed by the then president and the Supreme Court in its land mark judgment dated July 31, 2009 allowed the government a time period of 120 days to rectify these Ordinances through parliament. Never the less, the Ordinance was repromulgated in November 2009, just few hours before its expiry with proposed amendments by the ministry of law.

The Ordinance was to be presented before the president before March 27, 2010 but the Ordinance lapsed without repromulgation on its expiry[72].

The matter had been taken up by the Senate Standing Committee on Finance to finalize the draft of Competition Commission Bill 2010 passed by the National Assembly after the opposition of the Competition Commission for the proposed amendments as recommended by some senators.

The Competition Commission showed disagreement to the 14 objections raised by the SSC on finance. The main objection was regarding the right of appeal to the "Supreme Court"[73], power of CCP to enter and search[74]and reduction in fine and penalty[75] [76].

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[70]http://www.mca.gov.pk/ (accessed April 4, 2010).

[71]http://www.cc.gov.pk/index.php?option=com_content&view=article&id=76&Itemid=137 (accessed June 14, 2010).

[72]http://www.dawn.com/wps/wcm/connect/dawn-content-library/dawn/the-newspaper/front-page/19-ordinance-lapses-outbursts-by-ccp-chief-irk-legislators-830-hh-01 (accessed April 17, 2010).

The Senate Standing Committee approved the Competition Commission Bill 2010 with certain amendments including the replacement of the High Court with independent Appellate Tribunal, with three members bench headed by the SC retired judges along with two experts which will be bound to give decision within 6 months, for appeals against CCP decision as the NA had approved HC for it.

Further, it approved adjustments in penalties amount as it was recommended to increase the fixed amount from 50m to 75m while reducing the limit of turnover from 15% to 10%.

Similarly, it allowed surprise searches of business enterprise on the basis of reasonable grounds. After this approval, the Bill will be referred to the NA for assent on changes. In case the NA rejects it, it will be referred to the joint session of the parliament and it is feared that if this happens CCP Ord. will lapse again[77].

Now coming back to the role of CC, it is pertinent to mention here that the CC has the authority to take cognizance of the merger which give rise to unreasonable monopoly [78] which occur when the effects of merger give rise to substantial lessening of competition in any market which is prohibited by the Ordinance[79].

The Competition Commission Ordinance 2007 defines merger as follows[80]:
"merger means the merger, acquisition, amalgamation, combination or joining of two or more undertakings or part thereof into an existing undertaking or to form a new undertaking;. and expression 'merge' means to merge, acquire, amalgamate, combine or join, as the context may require;"

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[73]The Competition Commission Ordinance, 2007, S.42.
[74]Ibid., S.34.
[75]Ibid., S.38.
[76]http://www.dailytimes.com.pk/default.asp?page=2010\05\05\story_5-5-2010_pg5_9(accessed May 5, 2010).
[77]http://www.thenews.com.pk/print1.asp?id=237809 (accessed May 6, 2010).
[78]The Competition Commission Ordinance, 2007, S.11.
[79]Ibid., S.4.
[80]Ibid., S.2 (h).

The Competition Commission of Pakistan strongly prohibits a merger which lessens competition under section 11[81] and made it mandatory on the merging entities to apply for the clearance from the "Commission" of the intended merger[82].

The Competition Commission orders on the application received for the merger within 30 days of the receipt of application via powers conferred to it under section 31 of the Competition Ordinance[83] to determine "whether the intended merger meets the threshold and the presumption of dominance as determined in S.3."

After that the commission may require to provide such information as is necessary for the determination by the CC. It will decide the matter within 90 days of receiving such information.

The CC may prohibit the transaction of merger if it determines that it substantially lessens the competition[84].Similarly, if CC determines that the approval was based on false or misleading information or the conditions prescribed by the CC in relevant order have not been fully complied with, it may undo such merger[85].

The CC has been given the powers to initiate proceedings in case of contravention of the provisions of the Ordinance[86]. It has also been given the powers to impose penalties in cases of contravention[87].

The CC has been given the powers of civil courts for the purposes of a proceeding or enquiry under this Ordinance[88]. It also has the powers of entry and search premises including force able entry[89].

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[81]The Competition Commission Ordinance, 2007, S.11 (1).
[82]Ibid., S.11 (2).
[83]Ibid., S.11 (5).
[84]The Competition Commission Ordinance, 2007, S.11 (11) Read with Section 31(d).
[85]The Competition Commission Ordinance, 2007, S.11 (14).
[86]Ibid., S.28 (a).
[87]Ibid., S.30.
[88]Ibid., S.33.
[89]Ibid., S.34-35.

The Competition Commission has been given powers to impose maximum penalty of 50m or an amount not exceeding 15 % of the annual turnover of the undertaking[90].Moreover, in case of continuous violation , it may impose a penalty of a further sum which may extend to one million for every day after first such violations[91].

The CC also says that "failure to comply with an order of the Commission constitute criminal offense punishable with imprisonment which may extent to 1 year or with fine which may extend to 25 million[92]."

According to the Ordinance, "any person aggrieved by the orders of any member or authorized officer, may have an appeal to an appellate bench of the commission within 30 days."

Similarly the Ordinance states that "the commission shall constitute an appellate bench of not less than two members[93].Similarly, any person aggrieved by the order of the Commission comprising of two or more members or of the Appellate Bench may, within 60 days of the communication of the orders, prefer an appeal to the SC[94]."

[90]The Competition Commission Ordinance, 2007, S.38 2(a).
[91]Ibid., S.38 (3).
[92]Ibid., S.38 (6).
[93]Ibid., S.41.
[94]Ibid., S.42.

2.6 TIME FRAME FOR SCRUTINY

According to the sections 284, 287 and 289 of the "Companies Ordinance 1984", it is the statutory requirement of the company to file a preliminary petition in the High Court and that step must be taken before any share holder meeting is held. Along with this preliminary merger petition, an application is also filed to seek an order of the respective "High Court" to pass an order to hold an extra ordinary general meeting of the share holders.

After passing an order for holding an EOGM, the court appoints a chairman for holding a meeting and to submit a report of the findings within 7 days of the holding of the meeting[95].

After completion of these steps, the company files another petition with the High Court to confirm the compromise in a specified form, within 7 days of such report[96].

The High Court fixes a date for hearing the merger petition to finally approve the scheme after hearing the objections to merger, if any. The court, after hearing the petition, may order for dissolution of the transferor company. Similarly, it may pass an order for any person who has an objection on the merger.

During all this process in the court, no specific time period is fixed. However, it may be completed within a period of 6 months but if there are some objections to the merger it may take more than a year to complete the process.

Besides the High Court, the Competition Commission has also the concurrent jurisdiction to scrutinize the scheme of merger because it is the statutory duty of the CC to prevent the merger of two or more companies which lessens competition in the market and leads to monopoly[97]. In case of any competitive concern, the CC requires a show cause in respect of contravention and if the CC is not satisfied with the reply to show cause notice it gives an opportunity to the company to hear them before passing any order[98].

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[95]The Companies (Court) Rules, 1997, R.57.
[96]Ibid., R.60.
[97]The Competition Commission Ordinance, 2007, S.11.
[98]Ibid., S.30.

As we discussed earlier that in case of merger involving banking companies, NBFC and insurance companies, the approval of the scheme by the relevant regulators is also required in addition to all other steps. This approval by the relevant regulators may extend from 3 months to 2 years.

2.7 ROLE OF JUDICIARY

As discussed earlier that the judiciary plays a vital role in the sanction of merger and amalgamation. Under this head, we are going to analyze the role of judiciary in the process of merger. The word merger and amalgamation has been used interchangeably by the Pakistani judiciary as neither of the words is defined in The Companies Ordinance 1984.

We will first discuss that what should be the role of judiciary in general then we will refer to the role actually played by the judiciary with some examples.

The first and foremost duty of the court, while sanctioning a "scheme of merger" is to look whether the provisions of the relevant statutes[99] have been fully complied with and to determine the facts that the majority has been acting bonafide specially the directors[100]. The court has to see that the interests of the minority[101] have not been overridden by the interests of the majority and whether there is any coercion on the part of the majority to illegally deprive the majority of their lawful rights.

On the other hand, the court has to look at the scheme and determine that whether it is in the interest of those whom it represents, by taking a view which can be reasonably taken by a business man. At the same time, the court must look that the merger should not be against the public interests. In simple words, the court must not act as a rubber stamp to sanction a "scheme of merger" approved by majority of members.

Similarly, the court must also look at the interests of the creditors[102] of both the companies and determine also that the exchange ratio for the allotment of Transferee Company's share is fair and based on principles of valuation[103].

It is also a well settled principle that the court will not approve a merger where the aim was just to avoid tax.

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[99]Lahore CLD 2002, 1314.
[100]Lahore CLD 2002, 1314. See Also The Companies Ordinance, 1984, S.284.
[101]Lahore CLD 2002, 1314.
[102]Karachi CLD 2006, 976.
[103]Lahore CLD 2002, 1314. See Also The Companies Ordinance, 1984, S.287.

Regarding the commercial merits of the scheme, it is not the duty of the court to investigate into the "commercial merits or the demerits of a scheme" approved by majority when no malafide is evident on the part of the majority[104] and when the provisions of the relevant statutes had been fully complied with. It means the court must test the merger from the point of view of the an ordinary share holder acting in a "businesslike manner" and keeping in mind the circumstances prevailing at all the time of the meeting which was called to discuss the scheme and once the scheme is approved, the court is not having right to retreat[105] specially, when there is no objection from any corner[106].

The Pakistani case law regarding the matters of merger has generally been vague and ambiguous but at the same time it is reasonable to state that in aggregate, the case law in Pakistan has shown a move in the positive direction because an increased court scrutiny, paternalism and involvement has been witnessed in determining the fairness and reasonableness of a merger.

Our judiciary has not been able to deliver up to the mark in cases related to specialized fields or corporate law such as cases related to merger mainly due to lack of training, technical expertise and resources related to judiciary.

Another factor related to the failure of the judiciary in the past years is the fact that in corporate cases such as that of merger, the influential parties including politicians were involved or having interests in it so they used to put hurdles in legislation regarding corporate sector as well as greatly influence the ruling of the cases but after the ongoing judicial reforms in the country, the situation has been changed altogether.

Although the judiciary has interpreted the available statutory provisions and established the principles of common law pertaining to merger mentioned above but these efforts are not adequate in practice, in the merger proposals that have been brought before the judicial forum. Some of the cases are discussed below.

[104]PLD 2001 Lahore, Case No. 001L39. See Also Lahore CLD 2003, 1634.
[105]Lahore CLD 2003, 1713.
[106]PLD 1997 Karachi, 230.

1. LIPTON CASE

The first case that we will discuss is the Lipton Pakistan Ltd and another[107].As we have discussed earlier that the courts have tried to best interpret the statutory provisions and principles of law but at the same time both the legislation and the judiciary has been seen as hesitant to take clear stance regarding the merits and demerits of the case. These are the reasons that the case law is extremely vague in outlining the role of courts to determine the merits and demerits based on fairness.

In the instant case, the court at one stage decided that the courts cannot act as a rubber stamp but it has the duty to reject a "scheme of merger" if the court is of the opinion that there is an objection to the scheme from a reasonable man's view but at the other stage of the case the court stated that if the object and background of the "scheme of merger" is a reasonable one then the court should not override the collective wisdom of the members of the company.
We can easily determine from the above case that both the statements cannot adequately define or determine the word reasonable.

2. DEWAN SALMAN FIBRE CASE

In this case the Dhan fibers was to be merged into Dewan Salman fibers limited[108].In this case, all the members of Dewan Salman unanimously approved the scheme while from the Dhan fiber one member voted against this merger by arguing that the exchange ratio of shares was unjust[109].

The court overruled this objection by referring to the fact that the task of auditors was to act as an expert and not as an arbitrator and as an expert what he has to do is only to clarify that what is the fair value of share in his opinion. The court also stated that the share holders are

[107]Karachi CLC 1989, 818.
[108]PLD 2001 Lahore, 230.
[109]http://ravi.lums.edu.pk/fcg/images/Sikander_Ahmed_Shah.pdf (accessed May 5, 2009).

the best judges of their interests and better informed with market trends then the courts which are least equipped in the matter of valuation of such market and business trends[110].

3. THE ATLAS AUTO CASE

The next prominent case is the atlas autos case[111] in which the courts while analyzing the fairness held that "as the exchange ratio adopted in the scheme for allotment of shares of atlas autos limited to the share holders of panjdharya limited is recommended by the charted accountants on the basis of the financial studies carried out by them and their recommendations has been accepted by the board of directors of both the companies, the exchange ratio was adequate." The flaw in this ruling like in earlier case of Lipton case[112] is that the court is assuming the adequacy of exchange ratio as a sole measure of fairness. Similarly, the presumption that the chartered accountants as well as the directors of the companies involved in the merger will always work in the interests of the share holders. This presumption may prove to be wrong as the directors always have vested interests and conflict of interests regarding merger transaction including the change in compensation as well as their status of rights and privileges which may force them to breach of fiduciary duty towards those whom they represent.

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[110] http://ravi.lums.edu.pk/fcg/images/Sikander_Ahmed_Shah.pdf (accessed May 5, 2009).

[111] Karachi CLC 1991, 523.

[112] Karachi CLC 1989, 818.

CHAPTER: 03

REGULATORY REGIME IN UNITED KINGDOM

3.1 PROCEDURE OF MERGER

The procedure of corporate merger has been explained in detail in part 26 and part 27 of the Companies Act 2006 and in appendix7 of the City Code on Takeover and Merger.

The first step towards the merger of companies in UK is the preparation of a draft of the proposed terms of the scheme and that draft has to be adopted by the board of directors of the merging companies[113]. This draft includes all the necessary terms and conditions regarding the merger.
After the draft has been adopted by the board of directors of the merging companies, the directors of the merging companies have to send a copy of the draft terms to the registrar[114]. The registrar of the companies has to publish in the gazette, notice of the receival by him of the copy of draft[115] and that notice must be published one month before the holding of share holders meeting to approve the scheme[116].

The next step is the application by the merging companies in the courts to order a meeting of the creditors, or class of creditors or of the members of the company or class of members to be summoned in such manner as the courts directs[117].

Every notice summoning the meeting which is sent to a creditors or members must be accompanied by a statement which includes details like the material interests of the directors of the merging companies, the details regarding the effect of the merger on the rights of the debenture holders etc[118].

The scheme of merger must be approved by "a majority in number representing 75% in value of each class of members of each of the merging companies" who are present and vote either in person or by proxy at a meeting[119].

[113]The Companies Act 2006, Part 27, S.905 (1).
[114]Ibid., S.906 (1).
[115]Ibid., S.906 (2).
[116]Ibid., S.906 (3).
[117]The Companies Act 2006, Part 26, S.896.
[118]Ibid., S.897.
[119]The Companies Act 2006, Part 27, S.907.

If the scheme is approved by a majority representing 75% of the value, the transferor company must make an announcement as early as possible after the meeting but not later 8:00 am on the business day following the share holders meeting, stating that the scheme has been passed by the requisite majority along with the details of the voting results regarding the share holders meeting[120].

Further, an expert report is required in a written form on the draft terms of the scheme by each of the merging companies. However, the court may appoint joint expert on behalf of all the merging companies on an application by these companies for the same purpose[121].

After the approval of the majority of the shareholders, an application is to be made to the court by the companies etc to sanction the "scheme of merger". The court after taking into consideration all the matter may sanction the scheme of merger[122]. The transferor company, as soon as possible after getting the sanction from the court has to make an announcement stating the decision of the court[123].

The copy of the order of sanctioning of the "scheme of merger" by the court has to be sent to the registrar of companies because the order of the court sanctioning the merger will have no effect unless and until a copy is delivered to the registrar of companies[124]. It is also the obligation that the transferor company or the transferee company to make an announcement declaring that the scheme has been finally effective[125].

The court may make subsequent order to facilitate the reconstruction or amalgamation and every such order must be followed by delivery of a copy of such order to the registrar of companies within seven days of its making[126].

It is pertinent to mention here that, "in case of a merger by formation of new company, the articles of the transferee company or a draft must be approved by the ordinary resolution of the transferor company or each of the transferor companies[127]."

[120]The City Code on Takeover and Merger, Appendix 7, S.5 (a).
[121]The Companies Act 2006, Part 27, S.909.
[122]The Companies Act 2006, Part 26, S.899.
[123]The City Code on Takeover and Merger, Appendix 7, S.5 (b).
[124]The Companies Act 2006, Part 26, S.899 (4).
[125]The City Code on Takeover and Merger, Appendix 7, S. 5 (c).
[126]The Companies Act 2006, Part 26, S.900 (6).

3.2 RELEVNT AUTHORITIES AND LEGISLATION

In the United Kingdom, the whole process of merger and acquisition is basically regulated by the "City Code on Takeover and Merger". This code contains all the detailed rules and regulations pertaining to the M&A activity in United Kingdom. A panel has been established for the administration and enforcement of the provisions of the City Code on Takeover and Merger. The details regarding the working and structure of the Panel will be discussed in a bit detail in the latter part of this chapter.

Until recently, the Panel on Takeover and Merger used to operate on a non statutory basis but in 2006, it has been given a statutory status and now it operates within the frame work of the statutory provisions[128]which gave it enforcement powers[129]in addition to the rule making powers[130]. This additional enforcement powers includes the extensive rights to require information[131]and payment of compensation[132].The principal sanction under the Panel use to be either public or private censure as it did not has much resort to penalties.

On the other hand, there are other laws which also regulate the M&A activity in UK including the Companies Act 2006. The Act contains the provisions for the governance of the "scheme of arrangement" and the compulsory acquisition procedures etc.

Similarly, the "Financial Services and Market Act 2000", which is commonly known as FSMA, is also relevant because it regulates the investment business and securities markets. At the same time, the prospectus rules made by the "Financial Services Authority" may be relevant to a securities exchange offer. Likewise, the listing rules and the disclosure and transparency rules by the "Financial Services Authority" may also be considered as important because they may affect the freedom of action of the target.

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[127]The Companies Act 2006, Part 27, S.912.
[128]The Companies Act 2006, Part 28.
[129]The Companies Act 2006, Part 28, S.952.
[130]Ibid., S.943.
[131]Ibid., S.947.
[132]Ibid., S.954.

Last but not the least, the antitrust regulations may play a pivotal role in the merger and acquisition transaction taking place in United Kingdom specially the larger transactions including the cross border mergers.

After the promulgation of Enterprise Act 2002, there are now two authorities responsible for this job namely the Office of Fair Trade and the Competition Commission.

3.3 PRINCIPAL SOURCES OF LIABILITY

In the United Kingdom, litigation regarding the "merger and acquisition" activity is a rare phenomenon as the bidder risks enforcement action in case, he fails to comply with the City Code on Takeover and Merger[133] [134] but the fact is also important that the principal sanction until now has been a public or private censure[135].

Previously, there was no scope for private action in the City Code on Takeover and Merger but after the changes introduced in 2006, such claim is admissible and recognized although the new regime discourage that course.

Under the new regime, if a misrepresentation in the offer documentation is proved on part of the bidder and its directors they will be held liable for that and such an act may amount to criminal conduct[136].

On the other hand, market abuse by way of misleading information, market manipulation or insider trading may result in financial penalties and may in some cases of extreme nature, amounts to criminal conduct and resultantly may lead to an order of restitution[137].

[133]The City Code on Takeover and Merger, S.11 (b)(iv).
[134]The City Code on Takeover and Merger, S.10 (d).See Also The Companies Act, 2006, S.952 & S.955.
[135]The City Code on Takeover and Merger, S.11 (b)(i)&(ii).
[136]The Companies Act 2006, Part 28, S.953.
[137]The City Code on Takeover and Merger, S.10 (c). See Also The Companies Act, 2006, S.954.

3.4 TIME FRAME FOR THE PROCESS

The City Code on Takeover and Merger contains detailed rules covering the timetable for a bid as it sets a maximum period of 88 days for the formal launch of takeover offer for a bidder to achieve the required level of acceptance, with a further period of 21 days for the satisfaction of other conditions regarding the process[138]. However, if the transaction is carried out by way of "scheme of arrangement", then the timetable is influenced by the requirement for court hearing and generally it is possible to reach the conclusion within a period of 3 months if there is no substantive antitrust issue or other regulatory issue which leads to a delay in the process.

[138]See The City Code on Takeover and Merger, Sec. N, R.30-34.

3.5 ROLE OF COMPETITION COMMISSION

In the United Kingdom, Competition Commission is the body created under the "Competition Act 1998" to check the competition issues[139].The Commission replaced the "Monopolies and Merger Commission"[140] in 1999, following the "Competition Act 1998". The Enterprise Act 2002 is the law which introduced a new regime for the assessment of mergers and markets.

In UK, "the Competition Commission is one of the independent public bodies which ensure healthy competition between companies which result in the benefit of customers, companies and resultantly the whole economy."

The CC has the powers to exercise its jurisdiction in three areas:

Firstly, it exercises jurisdiction in case of merger[141], where large companies will gain more than 25% of the market share and where the merger seems to result in lessoning of competition in one or more markets in the United Kingdom.

Secondly, it exercises its powers in the areas of market when it appear that competition may be prevented, restricted or distorted in a particular market in the UK[142].

Thirdly, it exercises its powers in regulated sector[143].

The Competition Commission has a system of independent, thorough and open investigation of a matter related to competition and if investigation concludes that the situation restricts competition in UK in a substantial manner, it works for implementation of appropriate remedies for example, in case of a merger investigation, the CC can stop a merger transaction from going on.

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[139]The Competition Act, 1998, S.45.
[140]Ibid., S.45 (3).
[141]The Enterprise Act, 2002, Part 3, S.22.
[142]Ibid., Part 4, S.131.
[143]Ibid., Part 4, S.168.

The inquiries of the CC are always initiated after a referral from another authority which in most cases is Office of Fair Trade. On the other hand, the investigation issues can be referred to it by the sector regulators for communication, water, air port, postal services, gas and electricity etc or by the secretary of state for business, enterprise and regulatory reforms.

The CC is having a staff of about 150 persons[144] which includes business advisors, economists, administrators, lawyers and other staff for information services, human resource and finance.

The competition commission has a panel of about 50 appointed members[145] and in any inquiry the decision making body is constituted of at least three individuals from the panel of appointed members[146] .These members are having the support of specialist staff team in each inquiry. These inquiry groups are usually headed by CC chairman[147] or one of the deputy chairmen.

Members are appointed after open competition for a period of eight years term[148]. These members are selected and appointed by the government[149] on the basis of their ability, experience and diversity of skills in competition economics, finance, law and industry. All the members work part time except the chair person.

[144]The Competition Act, 1998, Schedule 7, S.9.
[145]Ibid., S.2 (1).
[146]Ibid., S.15 (2).
[147]Ibid.
[148]The Enterprise Act, 2002, Schedule 11, S.5 (a).
[149]The Competition Act, 1998, Schedule 7.

3.6 RELATION SHIP BETWEEN OFT AND CC

There are two administrative bodies in United Kingdom which are basically responsible for the merger review. One of the bodies is OFT [150] which is government agency with the prime responsibility for enforcement of competition law as well as the welfare of the consumers. This prime body has been given the powers to investigate all the issues related with competition and this is the body where all inquiries related to merger usually begin.

Although, OFT is considered as a primary body for regulation of competition issues but in case of merger, the OFT is deprived to take the final decision which prohibits or impose conditions on parties so if a transaction comes to the OFT and the issue is not resolved through negotiation of understandings then in such a case the OFT has to refer it to the CC for going into in depth investigation[151].

As discussed earlier, the CC is a specialized body of independent status having round about 50 members to serve the commission on a part time basis. These members are specialized persons from different areas including the bar, academia, accountancies and business consultancies, corporate leadership and other such specialized areas.

For any particular inquiry, there are usually four or five members appointed for that inquiry by the chairman and which has the support of a professional fulltime staff.

Under the new regulatory regime, the decision of CC is generally final but the CC can take a matter only when it is referred to it by the OFT or by the secretary of state[152] for trade and industry or by sectoral regulators as discussed earlier.

[150]The Enterprise Act, 2002, Part 1, S.1.
[151]The Enterprise Act, 2002, Part 3, S.22. See Also S.33.
[152]The Enterprise Act, 2002, Part 3, S.45 (2).

3.7 ENTERPRISE ACT AND THE NEW REGULATORY REGIME

Previously, the cases of merger review in the United Kingdom were dealt under the Fair Trading Act 1973 but the provisions of the Enterprise Act 2002 came into force in June 2002 which made a number of substantial changes.

The most important change brought by the "Enterprise Act 2002" is that the Act changed the legal standards of review. Previously, the Fair Trading Act required from the regulators to determine whether a transaction " operates or may be expected to operate against the public interest" which left a room for the decision not based only on the competition law concern but also on the other factors like the effect on employment, political concerns and local infrastructure.

On the other hand, the new regulatory regime demands from the regulators to determine whether a transaction "may be expected to result in a substantial lessoning of competition". Now this new regulatory regime clearly states that the test is the substantial lessoning of competition and not on the public interest which created a loose hole as the focus is exclusively on competition.

Regarding the time limit for completing a merger review, the new regime under the Enterprise Act 2002 has established more predictable time limits. Now the initial decision by the OFT regarding a merger review is to be done within 30-40 days deadline. However, the law requires the Competition Commission to make a decision within a time limit of 24 weeks[153] of the initial reference[154].

After the new regime, subject to any appeal, the decision of Competition Commission is final rather than going back to the secretary of state for additional deliberation. Previously, under the Fair Trading Act the Competition Commission was responsible to advise the secretary for trade and industry of its findings and recommendations and the authority vested with the secretary for the final decision for prohibition or remedy.

[153]The Enterprise Act, 2002, Part 3, S.39 (1).

[154]This time may be extended up to eight weeks under section 39(3), part 3, EA 2002. See also section 50 and 51 of part 3 of EA 2002, when case is referred by secretary of state.

In the new regulatory regime, Enterprise Act 2002 gave power to the Competition Commission to make final decision regarding merger referred to it, subject to appeal under standard of judicial review.

The Competition Commission has been given the power under the new regime to negotiate and implement any undertaking which it finds necessary.

The "Enterprise Act 2002" also made the "Office of Fair Trade" an independent corporate body supervised by a six member board which resulted in the elimination of governmental role in merger investigation except in limited cases which are related to public interests like media and defense transactions where the government ministry still has some powers to intervene.

One of the important characteristics of the new regulatory regime is that under the EA, the decisions of both the OFT as well as CC regarding merger are subject to judicial review by the newly created Competition Appeal Tribunal[155] (CAT) which provides an independent forum to not only the parties involved but also for the competitors and other third parties interested[156] to challenge the decision of the regulator.

In the previous regime, the civil courts were having the jurisdiction to take up any challenge in merger cases. Such courts were not specialized in the competition areas.

Another important element of the new regulatory regime is that the EA has an increased level of transparency as it requires the OFT to publish decisions along with its reasoning and conclusion where it does not make a reference. Similarly, under this regime, the CC has to publish not only its provisional findings but also the proposed remedies so that the comments by the interested parties can be taken before these findings and remedies are adopted[157].

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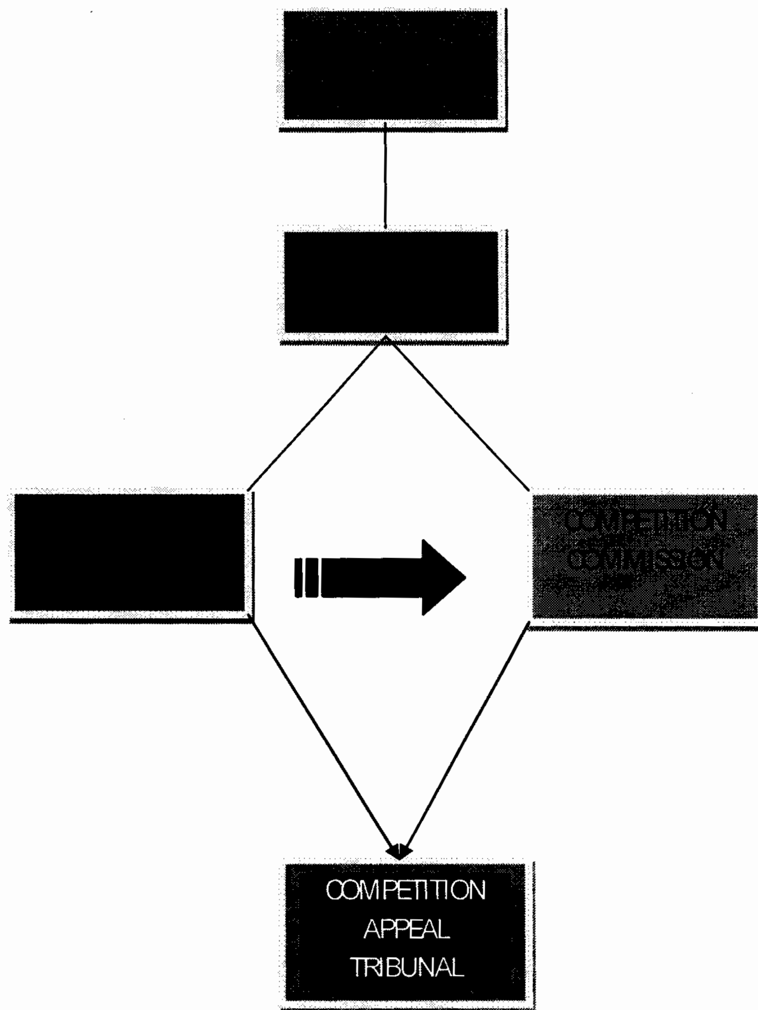
[155] The Enterprise Act, 2002, Part 2, S.12.
[156] The Enterprise Act, 2002, Part 2, S.17.
[157] The Enterprise Act, 2002, Part 3, S.38-39.

Another factor showing transparency is that under the new regulatory regime a person may not be at the same time, a member of the Competition Commission and a member of the tribunal[158].

[158]The Enterprise Act, 2002, Schedule 11, S.3 (c).


COMPETITION
COMMISSION
COMPETITION
APPEAL
TRIBUNAL

3.8 PANEL ON TAKEOVER AND MERGER

The "City Code on Takeover and Merger", which is administered by the Panel on Takeover and Merger, was first introduced in 1968[159]following a number of controversial takeovers which resulted in a number of unfair practices to the shareholders. Since 1968, the Panel and the Code have become a vital and established part of the takeover practice in United Kingdom.

Before May 2006, the panel was operating on a non statutory basis but pursuant to the part 28 of the "Companies Act 2006" the Panel, which is to administer[160] the City Code on Takeover and Merger got the statutory status[161] and now having the force of law for making and enforcing the rules of the Code. However, the operation of the panel in practice did not have significant changes after getting the statutory status because the Code had always been mandatory for all transactions and the Panel had always had a number of sanctions available to it.

The City Code on Takeover and Merger is not concerned with the commercial or financial advantages or disadvantages of a transaction[162] but it is to ensure fairness to shareholders[163] during the course of a transaction coming under the Code and its operations.

The Penal on Takeover and Merger is also to cooperate with other regulatory bodies like "London Stock Exchange" and "Financial Services Authority" (FSA) etc.

The Panel is also having the full support of the courts in its operations which ensures that the panel is having complete decision making powers during the course of a takeover transaction. On the other hand, the Panel is having a number of options to enforce the provisions of the City Code on Takeover and Merger including private reprimand, public and private censure which will be discussed later on in detail.

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[159]The City Code on Takeover and Merger, S.1.
[160]Ibid.
[161]Ibid.
[162]Ibid., S.2 (a).
[163]Ibid.

POWERS OF THE PANEL

As we discussed earlier that the panel on takeover and merger got the force of law after getting the statutory status in 2006 but even before that, the panel used to exercise high degree of support from all quarters and its compliance had been very strong. The Panel enjoys a number of statutory powers of enforcement.

The statutory powers include the power of the Panel to require documents and information[164] from any person coming under its operations where such documents are reasonably required by the Panel for the exercise of its functions[165].

The panel can require from a person, pending its inquiry for the determination of the fact that whether or not his conduct is or is likely to breach the rules, to either restrain from acting or to continue to act in a particular manner and if there is a breach of its provisions or rules regarding the offer considerations it can require a person to pay a compensation to the shareholders affected by a particular act[166] of breach. The Panel while exercising its powers can seek the assistance of the courts under section 955 of the "Companies Act 2006" to enforce the breach of the Code[167].

The Panel on Takeover and Merger is also having a number of disciplinary powers[168] for its proper functioning including the power of public or private censure, reporting of the offenders conduct, withdrawal/ suspension of an exemption and cold shouldering.

[164]The City Code on Takeover and Merger, S.9 (b).
[165]The Companies Act 2006, Part 28, S.947.
[166]The City Code on Takeover and Merger, S.10 (c).
[167]Ibid., S.10 (d).
[168]Ibid., S.11 (a).

THE STRUCTURE OF THE PANEL

The Panel on Takeover and Merger, which is having the overall responsibility for financing, policy and administration of the panel and the code's functions[169], operates through two basic committees namely the Executive Committee and the Code Committee.

The members of the Panel on Takeover and Merger are appointed from among the business community of the United Kingdom. The Panel is to appoint its chairman[170], two deputy chairman[171] and round about 20 other members[172] while the additional members are appointed by a number of professional bodies.

The day to day working of the panel is to be carried out by the Executive Body[173] which is basically responsible for the administration of the City Code on Takeover and Merger.

The function of the Executive Committee is to give guidance on the interpretation of the City Code to deal with the issue of compliance, to investigate breaches and to give ruling on the disputes[174].

There is a Hearing Committee which is having the function to hear appeals against the rulings of the Executive Committee and deals with the disciplinary proceedings instituted by the Executive Committee[175]. This Hearing Committee consist of a chairman, up to two deputy chairman and up to 8 other members[176] designated by the Panel and other individuals appointed by professional bodies as mentioned above[177].

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[169]The City Code on Takeover and Merger, S.4 (a).
[170]Ibid., S.4 (a)(i).
[171]Ibid., S.4 (a)(ii).
[172]Ibid., S.4 (a)(iii).
[173]Ibid., S.5.
[174]Ibid.
[175]Ibid., S.4 (a)(c).
[176]Ibid., S.4 (a).
[177]Ibid., S.4 (c).

On the other hand, the Code Committee is having the rule making function of the Panel and it is held responsible to keep the City Code under review and to propose consultation on the Code and to make necessary amendments to the Code from time to time[178]. This Committee consists of up to 12 members designated by the Panel[179].

There is also a Takeover Appeal Board[180], the function of which is to hear appeals against the rulings of the Hearing Committee[181] in certain limited cases. This Appeal Board is an independent body having chairman and deputy chairman appointed by the masters of the rolls and who normally have held high judicial offices[182]. The other members of the Appeal Board are to be appointed by the chairman on the basis of their relevant experience and knowledge of the takeover and the Code[183].

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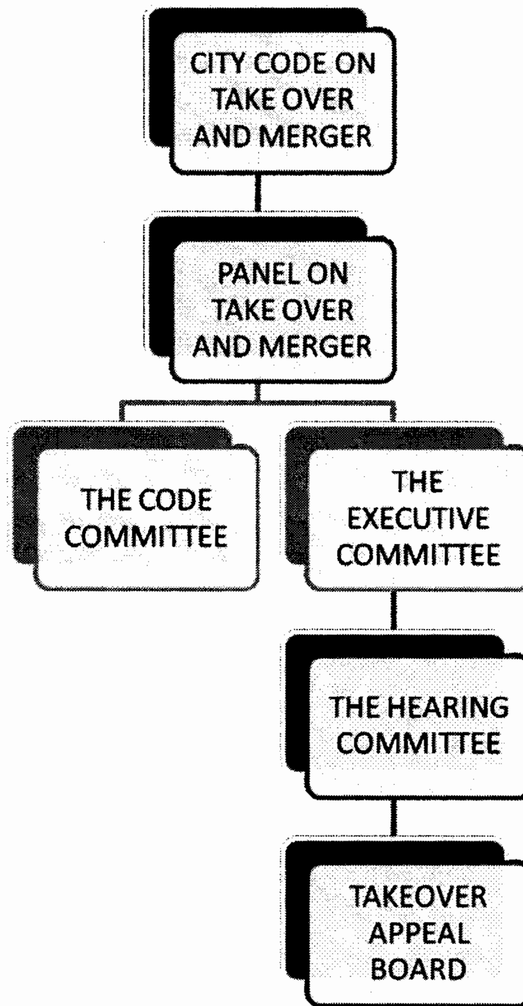
[178]The City Code on Takeover and Merger, S.4 (b).
[179]Ibid., S.4 (a).
[180]Ibid., S.8.
[181]Ibid., S.8 (a).
[182] www.simmons-simmons.com/display.../takeover/.../Takeover_Panel.doc (accessed May 30, 2010).
[183]The City Code on Takeover and Merger, S.8 (a).


CITY CODE ON TAKE OVER AND MERGER
PANEL ON TAKE OVER AND MERGER
THE CODE COMMITTEE
THE EXECUTIVE COMMITTEE
THE HEARING COMMITTEE
TAKEOVER APPEAL BOARD

CHAPTER 04

COMPARISON OF THE TWO JURISDICTIONS

4.1 PROCEDURE

The process of merger in Pakistan is cumbersome and lengthy as described earlier. The main reason for this lengthy procedure is the fact that a company which desire to have a merger transaction has to fulfill multiple requirements which not only make the whole process a complicated one but also result in redundancies. The company has to fulfill all the procedural requirements mentioned in the Companies Ordinance 1984, besides the detailed procedural requirements of the Company Courts Rules 1997 along with the discretionary procedural requirements of the courts. Moreover, approval from the relevant regulator is also required.

On the other hand, in United Kingdom although the mergers can only take place after it get the sanction of the court of law in addition to the requirements of the "Company Act 2006" which fact seems to be similar as that of the situation in Pakistan but the system in United Kingdom is more streamlined and there is no procedural delay due to the efficacy of the judicial system and regulators unlike Pakistan where the process of court is slow which ultimately results in unwarranted delay in the whole process.

4.2 REGULATORY REGIME

The regulatory regime in Pakistan is fragmented and the provisions that control merger transaction can be found in a number of statutes. Similarly, multiple authorities may be responsible for a merger transaction. There is no separate comprehensive chapter covering the detailed aspects of merger transaction occurring in Pakistan in the "Companies Ordinance 1984".

In Pakistan, as discussed earlier, SECP regulates the merger transactions regarding NBFC's and SBP is responsible to sanction a merger involving banking companies in addition to that a sanction may also be required from the respective High Court under the Companies Ordinance 1984.

However, in case of merger of "insurance companies", we can see that there is no supervisory authority like SECP or SBP and the only sanction required is the sanction from the High Court. The regulatory system is complex and no merger transaction can take place without the sanction from the courts.

On the other hand, if we look at the regulatory regime in United Kingdom we can see that the merger transactions are covered by a separate comprehensive chapter in the Companies Act 2006 with detailed provisions. This chapter covers all the aspects of the merger transaction.

Similarly, there is a special code for the regulation of merger and takeover transaction called The City Code on Takeover and Merger. It covers all the practical aspects of the merger and takeover transaction. This is the body in United Kingdom to regulate all types of merger. This body operates within the framework of the statutory provisions which gave it enforcement powers in addition to the rule making powers. This additional enforcement powers includes the extensive right to require information and the payment of compensation.

4.3 COMPETITION REGIME

In Pakistan, until recently the competition regime was not very powerful. Before 2007, the competition related issues were covered by the "Monopolies and Restrictive Trade Practices Ordinance 1970" and MCA was the authority to administer the law which was not totally effective.

In October 2007, a new competition regime was introduced in Pakistan under the "Competition Ordinance 2007" and CCP was the body established under the Ordinance to regulate the competition affairs.

The new law seeks "to prohibit abuses of market dominance, certain types of anti competitive agreements, deceptive market practices and merger of undertaking that substantially reduce competition."

This new regime in Pakistan has been working efficiently as it has cleared 33 merger transactions since its inception.

The Competition Commission has been given effective powers under the Competition Commission Ordinance 2007. This body can prohibit any transaction of merger if it substantially lessens the competition. Similarly, it has the powers to undo a merger transaction if it finds that the approval was based on a false or misleading statement or information or an order of the Competition Commission is not complied with.

The Competition Commission has also been given the powers to initiate proceedings in case of contravention of the provisions of the Ordinance and to impose penalties on contravention. Another important power given to the Commission is the power to enter and search premises by force able entry.

On the other hand, in United Kingdom "the Competition Commission is one of the independent public bodies which ensure healthy competition between companies which result in the benefit of customers as well as the economy as a whole. The Competition Commission has been given powers to regulate the merger transaction when large companies with more

than 25% of the market share are involved and when the merger seems to result in lessoning of the competition in one or more markets of the United Kingdom."

The Competition Commission in United Kingdom has the powers to in depth and thorough investigation of a matter relating to competition and if it concludes that a particular merger transaction restricts competition in the relevant market in a substantial manner, it work for appropriate remedies and can even stop a merger transaction from going on. This body is having a highly specialized staff of about 150 persons which includes highly qualified business advisors, economists, administrators, lawyers and other staff.

The body consists of about 50 appointed members to constitute decision making bodies. These members are appointed by the government on the basis of their ability, experience and diversity of skills in competition, economics, finance, law and industry.

4.4 TIME FRAME

In Pakistan, the time consumed to complete the merger transaction is not much appreciable as a company interested in a merger may has to file an application to the "High Court" for sanctioning a scheme of merger but the judicial system is not very efficient because of the backlog of cases and due to this reason sometimes the merger transaction may prolong for years as there is no time limit fixed for the court to complete the transaction.

On the other hand, if we look at the CC for the investigation of a merger transaction we can see that the role of the CC is to some extent satisfactory as a time limit has been prescribed in the Competition Commission Ordinance 2007 to give its decision regarding a particular transaction[184].

In the United Kingdom, although the sanction from the court is also required but a transaction can be completed within a period of three months if there is no substantial antitrust issues or other regulatory issues which leads to a delay in the process. This is obviously due to the efficiency of the court process unlike Pakistan.

Regarding the time limit for completing a merger review, the new regime under the EA has established a more predictable time limit as the initial decision of OFT regarding a merger review has to be completed within 30 to 40 days deadline. However, the law requires the CC to make a decision within a period of 24 weeks of the initial reference.

[184]See The Competition Commission Ordinance, S.11 (5)&(8).

4.5 JUDICIAL COMPETENCY

In Pakistan, the judiciary which also has to play a vital role in case of merger by sanctioning a scheme of merger has not been able to deliver up to the mark in cases related to specialized fields or corporate law in particular. This fact is mainly due to lack of training, legal expertise and resources related to the judiciary. Similarly, there is no other special organ established to take up or deal with the cases related to merger transaction unlike United Kingdom.

In the United Kingdom, the situation is completely different from that of Pakistan as their judicial system is well established having special judges for specialized fields or sectors with full expertise and resources.

In addition to the competent courts dealing with the corporate cases including merger cases, there is also a well established body namely the panel on takeover and merger with highly qualified persons having relevant competency in the field of takeover and merger.

This Panel is also having the full support of the courts in its operations which ensures that the panel is having complete decision making powers during the course of a takeover or merger transaction.

This Panel, whose work is to administer the Code has a Takeover Appeal Board, the function of which is to hear appeals against the rulings of the Hearing Committee.

This Appeal Board is an independent body having chairman and deputy chairmen, who have held high judicial offices and are appointed by the masters of the rolls while other members are appointed by chairman on the basis of their relevant experience and knowledge on takeover and the Code.

CHAPTER 05

CONCLUSION & RECOMMENDATIONS

The procedure of merger in Pakistan is same in some respects to the United Kingdom because in both the jurisdictions generally, a merger materializes when it gets the sanction of the court of law but the procedure is more efficient due to clearly and widely defined provisions in the United Kingdom which results in a streamlined system.

Looking at the regulatory regime, we can easily judge that the regulatory regime in the United Kingdom is well developed regarding the merger as we can see that there is a special code namely The City Code on Takeover and Merger which discusses the detailed procedure and practical aspects of the merger transaction. Similarly, there is special chapter to deal with merger transaction in the Companies Act 2006.

One other important aspect of this frame work is that the legislation provides heavy fines and punishments for violations of the merger provisions.

In this regard, the situation in Pakistan is not much appreciable as the frame work lacks detailed provision and there is no special legislation on the subject unlike United Kingdom. Secondly, the legislation is fragmented as we discussed in detail.

In Pakistan the time taken in the process of merger is not much appreciable as it may take months to decide a merger petition and that is due to multiple reasons including lack of technical expertise, backlog of cases and approval from the relevant regulator. In the United Kingdom, there are specialized judges having command and competency on the subject of corporate transactions and merger cases and a specialized body to regulate, which make the whole process an efficient one unlike Pakistan where a company bench is to deal with the matter, having no grip on the practical aspects of the merger transaction. Similarly, there is no centralized body to regulate merger transaction which results in overall delay in the process.

Similarly, in the United Kingdom there is a special mechanism to decide the cases of merger as we can see that there is a Takeover Appeal Board comprising of judicial and technical members having waste experience in the relevant field.

Regarding the competition regime, the role of Competition Commission in both the countries is almost satisfactory but certain reforms are still required to be made in the competition regime in Pakistan. On the other hand, the new proposed amendments may result in the hindrance of the proper and active working of the Commission in Pakistan as it will reduce the independence of the Commission.

After having the detailed discussion on the subject of merger we recommend the following measures to be taken by the government to solve the problem;

Firstly, there must be a clear cut and comprehensive legislation regarding the merger transaction in the Companies Ordinance 1984 by way of addition of a comprehensive chapter in the Ordinance 1984.

Secondly, there must be a special code like the City Code with exclusive jurisdiction regarding all types of merger whether related to banking companies, NBFC's or other types of companies, supervised by a body like the panel on take over and merger which is to work as a special wing within the "Securities and Exchange Commission of Pakistan".

It is further recommended that the government must work on the capacity building of the judicial organ specially in the specialized fields such as corporate law and until that time a special board as per the model of Takeover Appeal Board in the United Kingdom must be created within the special wing mentioned above consisting of ex-judicial members having vast experience in the corporate sector and other technical members from the relevant fields to constitute special benches for deciding particular cases before it reaches a judicial organ.

Similarly, a time period must be fixed both for the proposed Appeal Board in specific and the judicial organ in general to decide the cases of mergers within the specified time limit.

Thirdly, the penalties, fines, and fees must be reduced to the possible limits except in cases of fraud, criminal breach of trust and such other heinous crime and violations in which case the penalties must include the disqualification of the directors involved in the violation from commercial activity as punishment. The reason behind the reduction in the penalties, fines and fees is to encourage the economic activity and to reduce deterrence to its minimum because it produces good results for developing countries like Pakistan.

Similarly, the fines in case of violations must go to the government instead of going to the regulators as in the case of the Competition Commission of Pakistan because it is necessary to show an adequate level of transparency on part of the regulators.

Regarding the amendments in the Competition Commission Ordinance 2007, it is recommended that the proposed tribunal must not be established because it will result in wastage of resources without any meaningful result as the case load is much less to justify a separate tribunal. Instead, the authority may be delegated to the respective High Courts which are easily accessible and now all efforts are being made for early disposal of such cases.

In the end, I would also like to suggest that, regulatory bodies like the SECP must play their role for the awareness and guidance of all its stakeholders, particularly the general public by publishing advisory and guidance material. Besides, some mechanism should also be devised which may compel the sponsors of huge local and multinational companies, particularly those, emerging as a result of mergers to allocate a sizable portion of their capital for public floatation. This will not only encourage public participation and will lead the management to follow the least corporate practices but also ensure complete transparency and proper disclosure in their books and accounts.

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