

Merger Control

The international regulation of mergers and joint ventures in 75 jurisdictions worldwide

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Legislation and jurisdiction

1 What is the relevant legislation and who enforces it?

There is no consolidated legislation in Bangladesh dealing with mergers and acquisitions. A number of statutes and by-laws regulate acquisitions and mergers in Bangladesh.

The most relevant legislation are the Companies Act 1994 (the Companies Act), the Securities and Exchange Ordinance 1969 (the SEC Ordinance), the Bangladesh Securities and Exchange Commission Act 1993 (the SEC Act), the Foreign Exchange Regulation Act 1947 (FERA), the Competition Act, 2012 (the Competition Act) and the by-laws made under these statutes.

The relevant regulatory authority in respect of the Companies Act is the Registrar of Joint Stock Companies and Firms (RJSC), in respect of the SEC Ordinance and SEC Act is the Bangladesh Securities and Exchange Commission (SEC), in respect of FERA is Bangladesh Bank (the central bank of Bangladesh) and in respect of the Competition Act, 2012 is Bangladesh Competition Commission.

Please note that there are also other sector specific laws which deal with mergers and acquisitions in specific areas (for example, the Insurance Act 2010 for the insurance companies, Bangladesh Telecommunication Regulation Act 2001 for the telecoms sector, etc).

2 What kinds of mergers are caught?

All kinds of mergers are caught.

3 What types of joint ventures are caught?

All kinds of joint ventures are caught (such as wholly foreign-owned joint ventures, wholly locally owned joint ventures and joint ventures between local and foreign entities).

4 Is there a definition of 'control' and are minority and other interests less than control caught?

Changes in control as well as minority and other interests less than control are caught for the purposes of mergers and acquisitions.

5 What are the jurisdictional thresholds for notification and are there circumstances in which transactions falling below these thresholds may be investigated?

Under section 18 of FERA, except with the general or special permission of the Bangladesh Bank, no person resident in Bangladesh shall do any act whereby a company, which is controlled by persons resident in Bangladesh ceases to be so controlled. 'Control' has not been defined in FERA.

Under section 19A(1) of FERA, the government or the Bangladesh Bank may, at any time, cause an inspection to be made of the books of accounts and other documents of any person, firm or busi-

ness organisation or concern required to submit to the Bangladesh Bank any return, statement or information under the FERA and, where necessary, direct all such books of accounts and other documents to be seized.

Certain disclosure obligations are triggered under the Securities and Exchange Commission (Substantial Acquisition of Shares, Takeover and Control) Rules, 2002 (2002 Rules) whenever a person intends to own, acquire or control 10 per cent or more voting shares in a company listed with any stock exchange in Bangladesh. The threshold is termed a 'substantial acquisition of shareholding' and the disclosure formalities apply to the intended owner or acquirer of voting shares. The acquirer is required to publish a public notice through a merchant bank registered by the SEC.

Under Rule 11(2) of the 2002 Rules, an attested copy of the public notice, brochure or other document has to be filed with the SEC through the merchant banker at least two days prior to publishing the same to the public.

According to Rule 10 of the 2002 Rules, a performance bond has to be submitted to the SEC, which is to be issued as assurance of the proposed purchase or acquisition. The performance bond is to be issued in the manner and format prescribed by the SEC and to be issued by a bank, financial institution or insurance company payable to the SEC.

Rule 14 provides that the acquirer should inform the relevant company about their proposal for share purchase within three working days of publishing the public notice.

The 2002 Rules does not apply if the substantial shares are acquired:

- through an IPO;
- as an underwriter;
- by a merchant banker, stockbroker or stock dealer during the course of managing business for a client;
- administering assets of a mutual fund which is set up with the permission of SEC (the benefit of this exemption is not extended to any other types of funds);
- as a right or bonus issue;
- as a transfer through succession or inheritance; or
- as a transfer by operation of law or order of the court.

There is a provision for exemption from the provisions of the 2002 Rules. The power to grant exemption lies with the SEC. Such power will be exercised if SEC is of the opinion that it is in the interest of market that no disclosure should be made.

Under chapter 5 of the 2002 Rules, the SEC has wide powers to conduct an investigation where it considers it necessary.

Under section 21 of the newly enacted Competition Act, any combination (which has been defined to include acquisitions or mergers) in the goods and service market that adversely affects competition or creates a cause to adversely affect competition is prohibited. However, a combination that will not affect competition in an adverse way or create a cause that will affect competition in

an adverse way may be approved by the Bangladesh Competition Commission (BCC) following investigation. According to the above provision, the rules will prescribe which types of combination will require approval of the BCC. Please note that the rules have not yet been formed and the BCC has not yet been established. Therefore, it is not certain what kinds of acquisitions and mergers will require approval from the BCC.

Under chapter 4 of the Competition Act, the BCC has wide powers to investigate any combination that adversely affects competition. Under section 8(2), the BCC has the power to investigate any complaint under the Competition Act.

Depending on the nature of the acquisition or merger, various filing requirements may have to be complied with even though no threshold is reached.

6 Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

Where there will be a 'substantial acquisition of shareholding', under Rule 11(2) of the 2002 Rules, an attested copy of the public notice, brochure or other document has to be filed with the SEC through the merchant banker at least two days prior to publishing the same to the public. The filings, if applicable, are mandatory.

Under section 21 of the Competition Act a combination (which has been defined to include acquisitions or mergers) that will not affect competition in an adverse way or create a cause that will affect competition in an adverse way may be approved by the BCC following investigation.

The rules will prescribe which types of combination will require approval of the BCC. Since the rules have not yet been formed, it is not certain what kinds of acquisitions and mergers will require approval from BCC.

If the transaction will involve a change of control under section 18 of FERA, permission of the Bangladesh Bank would be required.

The filing requirements vary depending on the nature of the acquisition or merger, the residency or nationality of the acquirer, etc. For example, if shares of a Bangladeshi company are being transferred from a resident to a non-resident against foreign investments in freely convertible foreign exchange or in the form of capital machinery, the Foreign Exchange Investment Department of the Bangladesh Bank should be informed through the concerned authorised dealer (ie, local bank) within 14 days of such transfer. Please note that where general permission of the Bangladesh Bank has not been provided, special permission of the Bangladesh Bank would be required.

In certain circumstances, for instance, change in directorship resulting from the merger/acquisition, there are some filing requirements with the RJSC. If there is no such change in the directorship, etc, then the company, when filing its annual return with the RJSC under section 36 of the Companies Act, would have to set out the list of, inter alia, the existing shareholders. The filings, where applicable, are mandatory.

If the merger or acquisition involves issue of shares, permission of the SEC may be required depending on the nature of the company (ie, private or public limited company), the amount of capital to be raised and the existing share capital of the company. If the issue of shares is against foreign investment in Bangladesh, Foreign Exchange Investment Department of the Bangladesh Bank must be informed through the concerned authorised dealer about the issue of shares to non-residents within 14 days of such issue.

Under section 56(1) of the Companies Act, 1994, where a company having a share capital has increased its share capital beyond the registered capital, it shall file with the RJSC within 15 days after the passing of the resolution authorising the increase, notice of the increase of capital, and the RJSC shall record the increase. Under section 151 of the Companies Act, 1994, where a company having

a share capital makes any allotment of its shares, the company shall within 60 days thereafter, file a return with the RJSC. In addition, if the issue of shares amounts to a change in control under section 18 of FERA, permission of the Bangladesh Bank would be required.

Depending on the sector of the company and the regulatory approvals under which it is operating, other filing requirements may have to be complied with.

In the rest of this chapter, it is assumed that the acquisition or merger will not involve issue of new shares.

7 Do foreign-to-foreign mergers have to be notified and is there a local effects test?

Yes, transfer of shares in a Bangladeshi company from a non-resident to another non-resident has to be notified to the Bangladesh Bank within 14 days of such transfer.

Whether upstream foreign-to-foreign mergers (ie, transfer of shares of a non-Bangladesh parent company having a Bangladesh subsidiary) would need to be notified, would depend on the sector the local subsidiary is involved in, the regulatory approvals under which it operates, etc.

If there is a foreign-to-foreign merger and one of the entities concerned has a branch or liaison office in Bangladesh, then the company must file with the RJSC a return containing the prescribed particulars of the alteration if any alteration is made or occurs in:

- the charter, statutes, or memorandum and articles or other instrument constituting or defining the constitution of the foreign company having a Bangladeshi establishment;
- the registered or principal office of the said foreign company;
- the names and addresses of the persons authorised to accept service on behalf of the said foreign company; or
- the principal place of business of the said foreign company in Bangladesh.

8 Are there also rules on foreign investment, special sectors or other relevant approvals?

Yes. There are rules on foreign investment, special sectors and other relevant approvals.

Notification and clearance timetable

9 What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

Where there will be 'substantial acquisition of shareholding', under Rule 11(2) of the 2002 Rules, an attested copy of the public notice, brochure or other document has to be filed with the SEC through the merchant banker at least two days prior to publishing the same to the public.

The sanctions for not filing include imprisonment or a fine or both.

The Foreign Exchange Investment Department, Bangladesh Bank, should be informed, through the concerned authorised dealer (ie., local bank) within 14 days of the transfer or issue of shares. There are sanctions for contravention of FERA and any rules, direction or order made thereunder.

Section 18 of FERA is silent in respect of the timing of taking permission from Bangladesh Bank for change in control. However, it is prudent to take prior permission to avoid any future complications.

The sanction for violation of FERA or of any rule, direction or order made thereunder, includes imprisonment or fine or both. In addition, the relevant asset or property may be confiscated.

Section 21 of the Competition Act is silent in respect of the procedure of approval. The rules under the Competition Act have not yet been framed.

The sanctions under section 24 of the Competition Act include imprisonment or a fine.

10 Who is responsible for filing and are filing fees required?

Permission from the Bangladesh Bank for change in control

Under section 18 of FERA, the 'person resident in Bangladesh' who would be committing an act whereby a company controlled by persons resident in Bangladesh ceases to be so controlled would need to take permission from the Bangladesh Bank. No prescribed fee has been set out in FERA.

Filing with the SEC in respect of substantial acquisition of shareholding

In respect of 'substantial acquisition of shareholding', under Rule 11(2) of the 2002 Rules, an attested copy of the public notice, brochure or other document has to be filed with the SEC through the merchant banker. No prescribed fee has been set out in the SATCSR.

Notifying the Bangladesh Bank in respect of transfer of shares

The Guidelines for Foreign Exchange Transactions (Vol-1) (the FX Guidelines), which provide for the notification requirement, do not specifically state who should make the notification. Generally, it is the transferor who makes the notification. The notification is carried out by the local bank. No fee has been prescribed in the FX Guidelines.

Approval from the BCC

Section 21 of the Competition Act does not specifically mention who is required to make the application. Please also note that the BCC has not yet been established nor have any rules been formed yet under the Competition Act.

11 What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

In respect of permission from the Bangladesh Bank for change in control, there is no prescribed time within which permission is granted by the Bangladesh Bank. It would be prudent to suspend the implementation of the transaction prior to obtaining the permission.

Filing of the public notice with the SEC should not take more than a few days. If there is substantial acquisition of shareholding, the transaction must not be carried out without complying with the filing requirement.

Notification to the Bangladesh Bank for transfer of shares would have to be given after the completion of the transaction.

With regard to approval from the BCC for a merger, there is no prescribed time within which permission will be granted by BCC. It would be prudent to suspend the implementation of the transaction prior to obtaining the approval.

12 What are the possible sanctions involved in closing before clearance and are they applied in practice?

In respect of sanctions for non-compliance, please see question 9.

Although the sanctions include imprisonment or a fine or both, there is no recent example of sentence of imprisonment for violations of regulatory requirements discussed in this chapter.

13 Are sanctions applied in cases involving closing before clearance in foreign-to-foreign mergers?

Where prior approval is mandated by the law, closing before clearance may attract statutory sanctions. There is no recent example of a sentence of imprisonment for violations of regulatory requirements discussed in this chapter.

14 What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

The SEC and the Bangladesh Bank have wide powers to grant exemptions. The matter may be discussed directly with the SEC, and the Bangladesh Bank to ascertain whether any exemption would be allowed.

In relation to the BCC, it is yet to be seen how it will operate after it has been established.

15 Are there any special merger control rules applicable to public takeover bids?

In addition to the requirements discussed above, the 2002 Rules sets out specific provisions in respect of bail out takeovers of financially weak companies listed in any stock exchange.

16 What is the level of detail required in the preparation of a filing?

Filing with the SEC in respect of substantial acquisition of shareholding

Under the 2002 Rules, only an attested copy of the public notice, brochure or other document has to be filed with the SEC.

The provisions of the 2002 Rules do not stipulate any specific template in this regard. However, Regulation 10 of the 2002 Rules provides a list of information (not exhaustive) that is required to be included in the public notice, which includes the following (unofficial English translation):

- intention of acquiring shares and number of shares intended to be acquired;
- proposed purchase price for acquiring the shares and the terms thereof;
- full identity, including nationality, of the intending acquirer;
- full particulars of shares held by the intending acquirer and parties working in concert with it;
- full particulars of the share purchase agreement and all matters stated in the agreement relating to share purchase;
- proposed date of purchasing shares and the last date for accepting the offer;
- when and how the share purchase price will be paid;
- the following matters, among other terms of share purchase arrangement:
 - number of shares intended for purchase from sponsors, directors or public;
 - particulars of any conditions imposed under Companies Act, 1994, Banking Companies Act, 1991, Financial Institutions Act, 1993 and Foreign Exchange Regulations Act, 1947;
 - particulars of consent required to be obtained from shareholders of the concerned company, if applicable;
 - confirmation of a Performance Bond (PB) having been submitted to the SEC, which is to be issued as assurance of the proposed purchase or acquisition. The PB is to be issued in the manner and format prescribed by the SEC and to be issued by bank, financial institution or insurance company payable to the SEC; and
 - any other information required to be disclosed by the SEC relating to acquisition or purchase of substantial shares.

Permission from the Bangladesh Bank for change in control

There is no prescribed format for applying for the permission. In general, the name of the company, the relevant parties to the transaction and the details of the transaction should be set out in the application.

Notifying the Bangladesh Bank for transfer of shares

The following documents would have to be filed through the concerned authorised dealer within 14 days:

- copy of encashment certificate, authenticated by the concerned authorised dealer, of foreign exchange in Taka credited to the account of transferor in case of transfer of shares from resident to non-resident;
- attested copy of the permission for the transfer accorded by the RJSCF/SEC; and
- attested copy of up-to-date Schedule-X.

Approval from the BCC

Section 21 of the Competition Act does not specifically mention any prescribed format for applying for the approval.

17 What is the timetable for clearance and can it be speeded up?

- Filing with the SEC in respect of substantial acquisition of share-holding: the filing with the SEC should not take more than one day if the documents are in order.
- Notifying the Bangladesh Bank for transfer of shares: the filing with the Bangladesh Bank should not take more than one day if the documents are in order.
- Permission from the Bangladesh Bank for change in control: in respect of permission from the Bangladesh Bank for change in control, there is no prescribed time within which permission would be granted by the Bangladesh Bank. If the matter is followed up with Bangladesh Bank diligently, it is possible that the permission may be granted in a few weeks.
- Approval from BCC for a merger: with regard to gaining approval from the BCC for a merger, there is no prescribed time within which permission will be granted by BCC. It is yet to be seen how the BCC will operate after it has been established.

18 What are the typical steps and different phases of the investigation?

The SEC and Bangladesh Bank have wide powers of investigation. However, the statutes do not set out any specific steps in respect of investigation for the purposes of transfer of shares.

Under the 2002 Rules, prior to publication of the public notice, the merchant banker is required to see, inter alia, whether the acquirer has the potential to implement the offer, that there is sufficient fund to implement the offer, etc. The merchant bankers are also required to file a due diligence certificate with the SEC.

According to section 21 of the Competition Act, the BCC would be conducting the investigation in accordance with the procedure set out in the rules. Please note that the rules have not yet been formed.

Substantive assessment

19 What is the substantive test for clearance?

No substantive test for clearance has been specified in FERA or the 2002 Rules. However, the regulators look into a wide range of issues.

Under section 21(2) of the Competition Act, if a combination adversely affects competition or creates a cause to adversely affect competition, the combination will not be approved. If a combination does not adversely affect competition or create a cause to adversely affect competition, the combination may be approved.

20 Is there a special substantive test for joint ventures?

Other than section 21(2) of the Competition Act, no substantive test for joint ventures has been specified in the law.

21 What are the 'theories of harm' that the authorities will investigate?

No 'theories of harm' have been specified in the law.

22 To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

Not specified in the statutes.

23 To what extent does the authority take into account economic efficiencies in the review process?

There is no express guidance in the relevant statutory provisions regarding taking into account issues of economic efficiency in the review process.

Remedies and ancillary restraints

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

In respect of a transaction where permission from a regulatory authority is needed, the regulatory authority concerned may withhold the permission.

25 Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

The Competition Act does not specifically provide for such remedies.

26 What are the basic conditions and timing issues applicable to a divestment or other remedy?

Not applicable.

27 What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Not applicable.

28 In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

The Competition Act does not specifically address this issue.

Involvement of other parties or authorities

29 Are customers and competitors involved in the review process and what rights do complainants have?

Under the Competition Act, the BCC would be conducting investigation prior to giving the approval. Therefore, they might be consulting with the customers and competitors.

However, as mentioned above, the BCC has not yet been set up and the rules relating to the investigation procedure have not yet been formed. As such, it is not possible to envisage how the BCC will deal with such investigations.

30 What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The SEC Ordinance provides for secrecy of information. Section 19 of the SEC Ordinance provide that no person shall, except with the permission of the SEC, communicate or otherwise disclose to any person not legally entitled thereto any information which has been entrusted to him or which he has obtained or to which he had access in the course of the performance of any functions under the SEC Ordinance.

Section 36 of Competition Act provides that no information relating to any business establishment, being information that has been obtained by or on behalf of the BCC for the purposes of the Competition Act, shall, without the prior approval in writing of the business establishment, be disclosed other than in compliance with

Update and trends

The Competition Act, 2012 has been enacted. The purpose of the Act is to prevent, control and eradicate collusion, monopoly and oligopoly, abuse of a dominant position, anti-competitive practices and to encourage and ensure competitive business environment in order to promote economic development. The Act is applicable to all business establishments that are engaged in the business of buying and selling, manufacture, supply, distribution and storage of any product or services. The Act is not applicable to goods and services that are not open to the private sector and are regulated by the government for the interest of national security. The Act provides for the establishment of Bangladesh Competition Commission.

or for the purposes of the Competition Act or any other law for the time being in force.

However, in case of 'substantial acquisition of shareholding' the disclosure formalities would apply to the intended owner or acquirer of voting shares. There is a provision for exemption from the provisions of the 2002 Rules. The power to grant exemption lies with SEC. Such power will be exercised if SEC is of the opinion that it is in the interest of market that no disclosure should be made.

31 Do the authorities cooperate with antitrust authorities in other jurisdictions?

In Bangladesh, there is no antitrust authority.

Judicial review

32 What are the opportunities for appeal or judicial review?

Article 102 of the Constitution of the People's Republic of Bangladesh confers the power of judicial review on the High Court Division of the Supreme Court of Bangladesh. The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law, on the application of any person aggrieved, make an order:

- directing a person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or
- declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority, has been done or taken without lawful authority and is of no legal effect.

33 What is the usual time frame for appeal or judicial review?

There is no specific time frame for making an application under article 102 of the Constitution. However, in order to avail the remedy the petitioner is required to come to the court promptly and without unreasonable delay.

Enforcement practice and future developments

34 What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

Since in respect of most of the foreign to foreign mergers, local regulatory requirements are limited to submitting notifications to regulatory authorities, there is no robust enforcement record of the local authorities.

However, in respect of various regulated sectors, such as, banking, financial services, telecommunication, energy, etc, approval of the relevant regulatory authority is required. In general, such approvals are not unreasonably withheld.

35 What are the current enforcement concerns of the authorities?

There are no specific current enforcement concerns of the authorities.

36 Are there current proposals to change the legislation?

We are not aware of any proposals in respect of change in legislation.

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