



M&A Report **2018**

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INTERNATIONAL FINANCIAL LAW REVIEW

Bangladesh

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SECTION1: Market overview

1.1 What have been the key trends in the M&A market in your jurisdiction over the past 12 months and what have been the most active sectors?

The practice of mergers and acquisitions may be considered at a nascent stage in Bangladesh. The rationality of this position is the mindset of traditional business people in Bangladesh, who consider it taboo to sell a business, even if it is the best thing to do. Moreover, the lack of clear regulatory guidelines is one of the major impediments to M&A activities. The current regime is governed by the established practice adopted from transactions completed in recent years.

Nonetheless, we have noticed few large deals in Bangladesh in recent times and also found an environment ripe for bank mergers. As per a survey report, given the high number of banks compared to the size of the economy, 72% of bankers are in favour of reducing the number of banks in Bangladesh through merger or acquisition.

Recently, a number of M&A and joint-venture deals in the telecommunication, energy, FMCG, and food sectors have been initiated. These transactions over the past 12 months were intra-group mergers having common or related sponsor shareholders.

1.2 What M&A deal flow has your market experienced and how does this compare to previous years?

During 2017, no remarkable merger process has been completed, however, the acquisition of 100% of the ownership of Holcim Cement (Bangladesh) by LafargeHolcim Bangladesh for \$62.5 million attracted the attention of the interested parties/stakeholders. Apart from that acquisition, many private M&A deals may have taken place, however, as those M&A transactions took place outside of the public domain, there is no publicly available data.



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About the author

Dewan Faisal, an advocate of the Supreme Court of Bangladesh and one of the principal associates of the A S & Associates, is an expert in M&A and restructuring with a special focus on foreign investment and foreign exchange. Currently, Faisal is involved in several cross-border acquisition deals where target companies come from wide-range of business areas, such as investment banks, a power supplier and hotel management etc.

Faisal played a pivotal role in the acquisition of Kite Bangladesh Limited. This included advising on the applicability of capital gains tax and challenges related to applicable double taxation avoidance treaties and legal provisions. He is currently engaged in the takeover of a four-star hotel, located in Dhaka, Bangladesh, by way of an acquisition. He is also leading an intra-group merger of a group of companies in the RMG sector, which has six local companies and a company domiciled in the US. Faisal has assisted in structuring an investment bank domiciled in Bangladesh, which involved the acquisition of shares by an investment bank of Sri Lanka. He also assisted on the acquisition of shares of a joint-venture between a local company and a South Africa-based subsidiary of a group of companies, whereby the shares of the local partner will be acquired by another subsidiary of the same group, based in the UK.

1.3 Is your market driven by private or public M&A transactions, or both? What are the dynamics between the two?

The market is predominantly driven by private M&A transactions, and public M&A activities are very limited in practice. M&A transactions in private (but unrelated) companies are dictated by acquisitions as opposed to mergers. Various cross-border acquisitions in the telecommunication, energy and banking sectors during the first decade of 21st century, such as acquisitions of Aktel by Axiata, Warid Telecom by Airtel, Sheba Telecom by Orascom Telecom and Oriental Bank by ICB Financial Group, are testament to this. On the other hand, restructuring between intra-group entities (regardless of their private or public status) usually takes place by way of merger.

In the case of private mergers, required permission from Government agencies is limited in condition, whereas, for public M&A transaction,

the Bangladesh Securities and Exchange (Substantial Acquisition and Takeover) Rules, 2002 (2002 Rules) comes into play and caters for situations where any person is interested in acquiring 10% or more shares of a publicly listed company. However, the 2002 Rules are regarded as inadequate for the modern dynamics of capital markets. Hence, as of now, companies usually seek and obtain exemption from Bangladesh Securities and Exchange Commission from compliance with the provisions of 2002 Rules.

1.4 Describe the relative influence of strategic and financial investors on the M&A environment in your market.

Bangladesh is observing intra-group merger transaction in the form of private M&A. Therefore, the culture of strategic and financial investors on the M&A environment has not been developed yet.

SECTION 2: M&A structures

2.1 Please review some recent notable M&A transactions in your market and outline any interesting aspects in their structures and what they mean for the market.

Following the merger of Lafarge Group and Holcim Group, the corporate market observed a restructuring in shareholding of Holcim Cement (Bangladesh). To give effect of that merger, LafargeHolcim Bangladesh, one of the largest multinational cement manufacturers listed with local stock exchanges, was willing to acquire 88,244 share in the target company. As part of the acquisition process, due diligence was conducted on the company. Upon taking into consideration of the value of shares, Lafarge Surma Cement executed the share transfer agreement for purchasing the shares from Holderfine B.V for \$117 million, and accordingly sought the central bank's approval to remit \$117 million to Holderfine B.V.

In demonstration of its willingness to regulate, Bangladesh Bank approved the share transfer for the merger but said that the share is overpriced and asked Lafarge Surma to submit documents related to share valuation of Holcim Cement. Upon taking into consideration of necessary documents, the central Bank approved repatriation of \$62.5 million only. After waiting for three months, Lafarge Surma and Holderfine B.V agreed to close the deal as per instruction of the central bank.

2.2 What have been the most significant trends or factors impacting deal structures?

As the market is still developing, strategic investments rarely take place in Bangladesh. With the exceptions of a few acquisition deals, the market is primarily dominated by intra-group mergers. While most of these mergers occur to boost profitability, in many cases, the profits of the entities involved decline, and historically, achieving tax neutral reorganisation has been the primary goal for mergers.

If a company is acquired by way of share purchase, the said transaction will attract stamp-duty of 1.5%, as well as capital gains taxes from the seller; by the same token, if there is a transfer of immovable property, the transaction will attract a hefty amount 8-11%

of the transaction value, on account of stamp duties, registration charges, capital gain tax and advance income taxes. By contrast, any transfer of shares and assets as a result of a merger is deemed to be effective by operation of law, alleviating any need to pay of taxes and stamp duties on such transactions.

Furthermore, in the absence of any provision in the Income Tax Ordinance, 1984, regulating carry forward of losses in the event of amalgamation, presumably, the accumulated loss of the transferor company will be deemed to be the loss of the transferee company. Consequently, the transferee company would be entitled to carry forward such loss, and set off such amounts against its future profits, reducing tax liabilities of the transferee companies.

SECTION 3: Legislation and policy changes

3.1 Describe the key legislation and regulatory bodies that govern M&A activity in your jurisdiction.

Key legislation

The Companies Act 1994 contains the broad conditions for a transfer of shares in an acquisition/takeover transaction. Moreover, where a merger is under consideration, one has to resort to sections 228 and 229 of the legislation, which lay down guidelines for concluding arrangements with shareholders as well as the power of the High Court Division to sanction a scheme of arrangement/amalgamation.

The Bangladesh Securities and Exchange Commission (BSEC) (Substantial Acquisition of Shares and Takeovers) Rules, 2002, has been promulgated by the capital markets regulator of Bangladesh to regulate public takeover/acquisition activities.

As anti-takeover defense, section 15 of the Competition Act, 2012 prohibits direct or indirect execution of any takeover by any person that would have detrimental effects on competition or create monopoly or oligopoly in the market. However, this Act empowers the Competition Commission to deal with complaints under the Act, which has been formed, but yet to be fully functional.

Section 18 of the Foreign Exchange Regulations Act 1947 mandates that permission be obtained from Bangladesh Bank for any act whereby a company, which is controlled by persons resident in Bangladesh, ceases to be so controlled.

In addition to the above, sector specific laws, rules and regulations, guidelines, and policy decisions may also be applicable. For example, M&A deals in the telecommunication sector will be subject to provisions of Bangladesh Telecommunication Act, 2001, Telegraph Act, 1885 etc.

Key regulatory bodies

The BSEC is the key regulatory body for M&A transactions. However, there is no explicit requirement to consult or seek permission from the BSEC for undertaking an M&A transaction unless the proposed transaction results in its paid up capital being BDT 100 million (\$1.25 million) or more (a requirement triggered by the rules regulating issue of capital, as opposed to M&A). Moreover, as far as public takeovers are concerned, it is worth noting that in the present environment of non-enforcement of 2002 Rules, the BSEC has limited scope in scrutinising such transactions.

Besides the BSEC, depending on the sector in which the proposed M&A deal is to take place, particular regulators, for instance the Bangladesh Telecommunication Regulatory Commission (BTRC), Bangladesh Power Development Board (BPDB), Bangladesh Bank (BB) and Insurance Development & Regulatory Authority Bangladesh (IDRA), may take up the role of regulating M&A activity.

3.2 Have there been any recent changes to regulations or regulators that may impact M&A transactions or activity and what impact do you expect them to have?

In the last 12 months no such changes in regulation and/or a regulator have been made that may impact in M&A transactions or activity in Bangladesh.

3.3 Are there any rules, legislation or policy frameworks under discussion that may impact M&A in your jurisdiction in the near future?

Considering the limitations and inadequacies of existing regulatory frameworks, the BSEC, the key regulatory authority for capital markets, formed a committee in 2016 to revise the existing rules and formulate new rules for regulating M&A activity in Bangladesh. It is expected that if the BSEC issues its guidelines, M&A transactions will have to comply with certain new rules and it will make the process more transparent, formal and systematic.

SECTION 4: Market idiosyncrasies

4.1 Please describe any common mistakes or misconceptions that exist about the M&A market in your jurisdiction.

Corporate culture is relatively new in Bangladesh and traditionally many of the large businesses are proprietorship or family businesses. In the existing conservative corporate scenario, selling/dissolution of a business is considered a taboo by many established entrepreneurs. Tax neutral reorganisations, let alone strategic mergers, are often overlooked as a viable option for achieving better growth. In the absence of a clear regulatory framework, the practice of M&A is viewed as cumbersome by many.

4.2 Are there frequently asked questions or often overlooked areas from parties involved in an M&A transaction?

Valuation: In the absence of any regulatory guideline as to the methods and basis of valuation to be adopted during M&A activities, companies, particularly in intra-group mergers, may opt for methodology yielding higher valuation. As a result, propriety of valuation bears the possibility of becoming a highly contested issue before the court in considering an application for approval of a scheme of amalgamation.

Financial statements: During the planning stage, some companies may overlook financial statements. Consequently, where cash pay-out

is involved, there might arise irreconcilability between the amounts available on the balance sheet and the amount agreed to be paid against the shares, creating a gridlock during the post-sanction and post-closing stage.

Regulatory compliance: Due to underdeveloped corporate cultures, many companies fail to secure annual regulatory compliances. As a result, the proposed M&A may end up being a far more time-consuming activity than initially foreseen.

Disclosure to public shareholders: In the absence of any regulatory provisions imposing strict disclosure requirements, listed companies' disclosure is limited to the publication of price sensitive information, which does not mandate giving details to the public of the effects of a proposed M&A transaction or how the interests of sponsors are affected consequent to a merger.

Interests of employees: Though mergers may involve redundancies of employees, the interests of employees are often overlooked during the planning stage so that companies involved do not take enough precautions, such as preparing voluntary retirement schemes or other compensatory schemes before presenting the proposal for sanction before the Hon'ble High Court Division.

4.3 What measures should be taken to best prepare for your market's idiosyncrasies?

Setting up a clear regulatory framework should be the first step towards addressing the misconceptions about M&A in Bangladesh. In addition to this, creating awareness about the importance of regulatory compliance, transparent financial reporting and tax structures, as well as improving the overall business cultures, would go a long way towards busting various myths surrounding M&A activities in Bangladesh.

SECTION 5(a): Public M&A

5.1 What are the key factors involved in obtaining control of a public company in your jurisdiction?

Takeovers of public companies are very limited in practice. A number of notable takeover transactions, during the first decade of 2000, were undertaken to revive a sick company or to enter the stock market. However, during the twenty first century, there had been several intra-group horizontal mergers between listed companies seeking operational efficiency and cost reduction.

5.2 What conditions are usually attached to a public takeover offer?

Since public offers have hardly been made (see Question 5.1) it is not possible to answer this.

5.3 What are the current trends/market standards for break fees in public M&A in your jurisdiction?

The practice of break fees is absent in Bangladesh.

SECTION 5(b): Private M&A

5.4 What are the current trends with regard to consideration mechanisms including the use of locked box mechanisms, completion accounts, earn-outs and escrow?

These mechanisms are not practiced in Bangladesh.

5.5 What conditions are usually attached to a private takeover offer?

Any private take-over offer would usually be associated with the following conditions:

- obtaining of approvals from relevant regulatory authorities, where applicable;
- obtaining No Objection Certificates from the lending banks;
- obtaining the latest tax clearance certificate;
- rectifying any regulatory defects revealed during the due diligence process, including renewal of licenses and approvals.

5.6 Is it common practice to provide for a foreign governing law and/or jurisdiction in private M&A share purchase agreements?

This is not a common phenomenon in Bangladesh. Since in acquisition transactions share transfer registrations are to be regulated by local law, it is usual to stipulate Bangladesh law as the governing law of the share purchase agreements.

5.7 How common is warranty and indemnity insurance on private M&A transactions?

There is no such practice of warranty and indemnity insurance in Bangladesh.

5.8 Discuss the exit environment in your jurisdiction, including the market for IPOs, trade sales and sales to financial sponsors.

In Bangladesh, both selling shares through the capital markets and trading shares are very common in nature for closing the investment in a company. However, the most common exit route is to sell shares through the capital markets, as it creates the opportunity to remit the sale proceeds without observing the permission requirement of the central bank.

Financial sponsors are entitled to acquire shares of a company if the company has failed to perform its obligation in compliance with the financial documentations. However, in reality such power has not been exercised yet.

SECTION 6: Outlook 2018

6.1 What are your predictions for the next 12 months in the M&A market and how do you expect legal practice to respond?

As the economy is growing, it is likely that many companies will seek mergers to achieve inorganic growth by downsizing costs. Prospective sectors for mergers are banks, financial institutions, pharmaceuticals, healthcare, real estate, textiles, cement, steel, power and telecommunication. In the next 12 months, consolidation in the banking sector by way of mergers is highly probable. It is expected that globalisation and the adaptation of strategic corporate cultures will make the new generation of entrepreneurs open to strategic investments through M&A.

Currently, the BSEC is working on a draft regulation for M&A. It is hoped that the proposed regulation, when published, will fill in the legislative vacuum and shall set objective standards against which a proposed M&A transaction can be evaluated. Furthermore, it is expected that the regulation will alleviate many misconceptions surrounding M&A in Bangladesh and bring transparency in the regulatory process so as to create an environment more conducive to M&A.