



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

13/7

Before the Securities and Exchange Commission of Pakistan
consisting of its Chairman and four Commissioners
In the matter of

Proceedings in respect of Honorable Lahore High Court's order, dated 11th
September, 2012 in ICA No. 290/2012, titled "Asghar Abbas Gardezi Versus SECP &
others" read with Order dated 18th October, 2012 on C.M. No. 3648 and 3716 and
order dated 11th April, 2012 passed in W.P. No. 1163/2011

Date of Hearing:

November 14, 2012.

- (i) Mr. Sheharyar Kasuri representing Applicant Mr. Asghar Abbas Gardezi;
- (ii) Mr. Syed Ali Zafar representing United Bank Limited;
- (iii) Mr. Sikandar Bashir Mohmand representing Bestway Group;
- (iv) Mr. Kazim Hasan representing Abu Dhabi Group through its Chairman;
- (v) Mr. Aqeel A. Nasir, Company Secretary, Chief Legal Counsel, United Bank Limited.

ORDER

Through this order, the proceedings initiated by the Securities and Exchange Commission of Pakistan ("the Commission") on the direction of the Honorable Lahore High Court through order, dated 11th September, 2012 in ICA No. 290/2012, titled "Asghar Abbas Gardezi Versus SECP & others" read with its order dated 18th October, 2012 on C.M. No. 3648/2012 & C.M. No. 3716/2012 and its order dated 11th April, 2012 passed in W.P. No. 1163/2011, are disposed of.

2. The Honourable Lahore High Court, Lahore in the said Order, dated 11th September, 2012, directed the Commission that all matters pending before Commissioner (CLD) with reference to present controversy shall be placed before the Commission, which shall take-up the matters, hear the all concerned parties and



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decide the same in accordance with law through a reasoned order. The Appellant shall be at liberty to file any additional documents and take all legal and procedural objections that it may wish to raise, before the Commission. Through the said Order, the Honourable Court also directed that the Commission shall decide these matters within a period of two months from the date of receipt of a certified copy of this order.

3. Brief facts of the case are that the Group Chief Executive, Bestway (Holdings) Limited through his letter, dated November 26, 2010 addressed to the Commissioner (Enforcement), sought clarification regarding applicability of the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002 on the proposed transaction of further acquisition of 25.50% shares from Abu Dhabi Group by the Bestway Group ("BG"). It was explained therein that prior to the proposed transaction BG held 31.07% of total issued and paid up share capital of United Bank Limited ("UBL"). The Abu Dhabi Group ("ADG"), held 30.3% of the share capital of UBL including Global Depository Receipts. BG and ADG collectively held and continue to hold 61.37% shares of UBL. ADG and BG collectively controlled and continue to control UBL pursuant to the shareholders agreement dated 10.9.2001 (as amended from time to time). The majority shareholding and the control of UBL was acquired by the Consortium comprising of the ADG and the BG pursuant to the privatization of UBL in 2002, when 51 % of the paid up capital of UBL along with its management control was sold by the Government of Pakistan with the approval of the State Bank of Pakistan. It was intended that BG or anyone or more entity within the BG would acquire 25.50% shares from ADG. As a result, BG would holds around 56.57% shares in the paid up capital of UBL and ADG's shareholding in UBL would around at 4.80%. Besides, BG and ADG would continue to regulate their affairs *inter se* as shareholders of UBL and matters relating to the management of UBL through the Shareholders Agreement that has been in place since 2001 and is amended from time to time. It was also expressed that the parties will ensure compliance with all



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applicable laws and regulations and will obtain all the required consents and will make all requisite regulatory disclosures.

4. Director (Enforcement) of the Commission, vide letter dated 1st December, 2010, in response, viewed that as consortium of Bestway Group and Abu Dhabi Group held 61.37% shares and control of UBL, a restructuring in the shareholding within the said consortium would not attract the provisions of section 6 of the Listed Companies (Substantial Acquisition and Takeovers) Ordinance, 2002 ("the Takeover Ordinance").

5. Mr. Asghar Abbas Gardezi ("the Applicant") vide letter dated 5th January, 2011, addressed to Chairman of the Commission, approached to intervene in the matter of acquisition of 20% shares by BG from ADG to protect the interest of UBL shareholders and alleged that the said acquisition of shares by Bestway Group was neither an arm's length nor transparent transaction. Deputy Director (Enforcement) of the Commission, vide letter dated 14th January, 2011, replied the Applicant that BG and ADG jointly acted as consortium and held 61.37% shares and control in UBL. Thus only restructuring of shareholding within the consortium did not attract the provisions of the Takeover Ordinance.

6. The Applicant, by challenging the letter of Director (Enforcement) of the Commission, dated 1st December, 2010, filed a Writ petition No. 1163/2011 in the Lahore High Court, Lahore. The honorable Lahore High Court through order dated April 11, 2012, without going into further discussion on the strength and merits of the submissions made by the two sides, *set aside* the impugned letter/order of the Director (Enforcement) of the Commission. The Honourable Court held that *"the matter is remanded back to the Commission for decision by the competent authority envisaged under the law on the objections raised by the petitioner. Such determination shall be made after hearing the affected parties for reasons to be recorded in writing in accordance with the statutory principle enshrined in Section*



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22(3) of the SECP Act within three months. Pending a fresh order being made by the SECP the Acquirers shares in UBL respondent no. 4 target company shall not be transacted or transferred by the respondents no. 5, 6 & 7 Acquirers. Also pending fresh SECP decision status quo with respect to the title of shares of management of the target company shall be maintained as of today."

7. In compliance of the directions of the Honourable Court, the Commissioner (Company Law Division), the competent authority, initiated the proceedings on the subject matters and the following hearing opportunities were granted to all the parties in the petition No. W.P 1163/2011:-

- (i) On July 17, 2012 vide hearing notice, dated June 29, 2012;
- (ii) On July 24, 2012 vide hearing notice, dated July 17, 2012;
- (iii) On August 6, 2012 vide hearing notice, dated July 30, 2012;
- (iv) On August 15, 2012 vide hearing notice, dated August 7, 2012;
- (v) On August 29, 2012 vide hearing notice, dated August 15, 2012;
- (vi) On September 5, 2012 vide hearing notice, dated August 29, 2012;
- (vii) On November 01, 2012 vide hearing notice, dated October 25, 2012;
- (viii) On November 14, 2012 vide hearing notice, dated November 5, 2012;

8. The Applicant through his authorized counsels sought adjournments in four hearings scheduled before the Commissioner (CLD), however, hearings held on 6th August, 2012 and 5th September, 2012 were duly attended. Counsels of the Applicant mainly contended that the Commissioner (CLD) had no jurisdiction to hear and conduct the proceedings of the subject matter. Their main contention was that full Commission at that time had the jurisdiction to hear and conduct the proceedings of the subject matter as it had been remanded back to the Commission for its decision.

9. Subsequently, the Applicant filed the ICA No. 290/2012 before the Honourable Lahore High Court, Lahore and expressed his reservations regarding the matters being heard solely by the Commissioner (CLD). The Honourable Court by disposing of the matter, directed the Commission that all matters pending before



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Commissioner (CLD) with reference to present controversy shall be placed before the Commission, which shall take-up the matters, hear the all concerned parties and decide the same in accordance with law through a reasoned order. Hence, the proceedings on the subject matters were initiated by the Commission and notices were issued to all parties to appear before the Commission on 1st November, 2012. However, adjournment was sought by the Applicant and legal representative of United Bank Limited which was allowed till 14th November, 2012.

10. The Legal Counsel of the Applicant appeared before the Commission on 14th November, 2012. As a preliminary point, it was contented that the Applicant has filed a Civil Petition for Leave to Appeal (CPLA) before the Honourable Supreme Court of Pakistan against the Judgment in ICA 290 of 2012 (ICA Judgment). Besides, he submitted the following written submission and mainly challenged before the Commission that -

- (i) Under the sanction of the incumbent Commissioner, the unlawful transaction of shares *inter se* Abu Dhabi Group and Bestway was consummated as per terms of the letter No. EMD/233/662/05 dated 01-12-2010. The aforesaid letter as well as all other issues relating thereto were challenged before the honorable Lahore High Court vide W.P No. 1163/2011. Therein, upon the consent of the counsels for the respondents, including that of SECP, the letter dated 1.12.2010 was set aside and the matter was remanded to the SECP by the honorable Court. Under the circumstances, propriety demands that since the original order/direction, dated 1.12.2010 has been set aside, the remand proceedings should be dealt with by the Commission.
- (ii) The composition of a lawful Commission as envisaged under the Securities and Exchange Commission of Pakistan Act, at the time of the receipt of letter by the Bestway Group on November 26, 2010 needs to be determined in light of the judgement rendered by the Supreme Court of Pakistan in CPLA No. 447 and 448 of 2001. In the said judgement, the absence of even one member of the Commission has been held by the August Court to have rendered the Commission to be *coram non jure* and the proceedings conducted by the Commission have been stuck down.



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- (iii) The letter dated 26-11-2010 seeks a clarification from the Commission viz. the application of the Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Ordinance, 2002 to the then proposed acquisition of shares of UBL by BG. Unfortunately, neither under the Act nor under the Takeover Ordinance, the Commission has powers to render opinion and or clarifications. Further, the Commission has no powers to issue a clarification whereby extending the scope of section 3 of the Takeover Ordinance and thereby a transaction from the purview of the said Ordinance.
- (iv) Indeed, there is no other exception viz. compliance of the requirements of the Takeover Ordinance except as contained in section 3 thereof; the same does not include the transaction contemplated in the letter dated 26-11-2010. In fact, no official of SECP can permit, allow or endorse any exclusion of applicability of the provisions of the Takeover Ordinance. Thus any clarification allowing the proposed transaction by extending the scope of section 3 of the Takeover Ordinance shall be in sheer violation of the law.
- (v) The SECP in its own judgement reported in a case cited as 2010 CLD 262 the purpose and intent of the Takeover Ordinance that *"The Ordinance has been promulgated to develop a transparent system, where substantial acquisition of voting rights or control of listed companies could take place so that in such an instance, the investors (in the company whose shares or control is being acquired) are provided with the opportunity to dispose of their shareholding, where they are not confident of the merits, with the acquisition of voting rights or control by one or more individuals"*.
- (vi) The concept of any consortium, as per the stance of BG, is alien to the provisions of Takeover Ordinance and the 2008 Regulations; the same does not have any legal basis inasmuch as BG and ADG are separate and distinct entities/individuals holding their respective holdings, which is even evident as per Privatization Agreement of 2002. The said cannot under any garb of interpretation, treat themselves as single acquirer and exclude the transaction from the purview of the Takeover Ordinance. The mode and manner of the entire transaction, with reference to the lack of any action and or objections by the Commission smacks of a financial scam at the highest level.
- (vii) SECP ought to have invoked the proceedings under Chapter IV and enforced penal consequences under the Ordinance viz. BG and ADG in order to protect the rights of the small shareholders of UBL and not to facilitate the violation.



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- (viii) The Respondents are bound to make public offer upon acquisition of additional shares.
- (ix) The BG has caused loss of Rs. 1,733 million to the general public and loss of Rs. 1,811 million to the Government of Pakistan, therefore, the acquisition is against the public interest whereas, as per section 22(4)(d) of the SECP Act, 1997, it is incumbent upon the Commission while exercising its powers, to have regard to the interest of public investors and to safeguard the interest of general public as well as per section 22(4)(f).
- (x) Though the Applicant has miniscule shareholding, therefore, has no *locus standi* to approach the Commission, however, as the Takeover Ordinance has been promulgated to safeguard the interest of minority shareholders, therefore, the Applicant has an inherent right to sale its shares at competitive rate and to benefit out of its investment.
- (xi) The case law relied by the BG refers to all cases initiated by the Commission on its own motion, whereas the matter in hand is a case of first impression where a minority shareholder has approached the Commission to inform it of violations being committed by BG under the Takeover Ordinance, thus, the case law cited on behalf of BG is clearly distinguishable.

11. The representatives of the persons and entities constituting the BG and ADG as well as UBL also appeared before the Commission. They submitted their written statements and defended the subject transaction through which the BG acquired approximately 20% of the issued share capital of UBL from the ADG.

12. The Commission have noted and duly considered the submissions made by Legal Counsel on behalf of the Applicant and representatives of the persons and entities constituting the BG and ADG as well as UBL and also examined the documents appended with the written submissions filed by the Applicant, BG, ADG and UBL.

13. The grounds agitated by the Applicant are two-fold. As a preliminary point, it has been contented that the Applicant has filed a Civil Petition for Leave to



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Appeal (CPLA) before the Honourable Supreme Court of Pakistan against the Judgment in ICA 290 of 2012 (ICA Judgment). Then it has been submitted that the Commission does not have the legal authority of power to adjudicate upon and decide the issues arising from: (a) the letter dated November 26, 2010 from BG to the Commissioner (Enforcement); and (b) the representation dated 5th January, 2011 from the Applicant to the Chairman of the Commission. Finally, on merits, the petitioner basic content is that the provisions of section 6 of the Takeover Ordinance requiring a public offer to be made to shareholders other than ADG apply to the acquisition by BG of approximately 20% of shares of UBL from ADG, which according to him has not been complied.

14. The Commission considered the grievances after examining the legal provisions and documents on record and the decision of the Commission on each of the above is as follows:

A. Claim of Applicant for filing of a CPLA against the ICA judgment:

This matter was basically brought to the notice of the Commission by learned counsel for the Applicant by way of information at the time of hearing verbally after which he proceeded to raise the other jurisdictional objections and submissions on merits of the case addressed below. However, as of the date of this order, no copy of the actual CPLA has been furnished nor has the Commission otherwise received any notice from the Honourable Supreme Court of filing or listing for hearing of any such CPLA. The Commission is not aware of any injunctive order against the present proceeding before it nor of the counsel representing BG and ADG, the ICA Judgment remains in the field and the Commission remains bound to comply with the direction of the Honourable Lahore High Court in paragraph 13 of the ICA Judgment to take-up the matters, hear all concerned parties and decide the same in accordance with law within a period of two months from the date of receipt of certified copy thereof. Therefore, in compliance with direction to the Commission in the ICA Judgment, we now proceed to decide the issues raised during the hearing.



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B. Objection to power, authority and jurisdiction of the Commission

On the said issue, the Commission is of the considered opinion that all of these stands decided and settled in the ICA judgment by learned Division Bench of the Lahore High Court. Reproduced below are the portions of the ICA Judgment:

"11. At this stage, following question requires determination by this Court:-Whether there is any restriction on the powers of SECP to examine a transaction involving substantial acquisition of shares, if necessary, investigate allegations of violation of Takeovers Ordinance and pass appropriate orders?"

After considering the arguments of the learned counsel for the parties, examining the law on the subject and going through the record, in our opinion, the answer to the afore-noted question has to be in negative for the following reasons:

- 1. Admittedly, SECP is a Regulatory Authority and enjoys the requisite powers under section 20(4)(j), 6(g), etc., of the SECP Act, 1997 inter alia to regulate matters relating to substantial acquisition of shares and the merger and take-over of companies. It also inter alia enjoys power to take whatever action in accordance with law, and is necessary, in order to enforce and give effect to the Act (the Ordinance, the Law of Insurance) or any other law. To our mind the expression any other law includes the Takeovers Ordinance. In terms of section 29(b) of the Takeovers Ordinance, the Commission has the power to issue such directives, codes, guidelines, circulars or notifications, as may be necessary to carry out the purpose of Ordinance and the Rules and Regulations made there-under. Further, the Listed Companies (Substantial Acquisition of Voting Share and Takeovers) Regulations, 2008 empower the Commission to take action against any person who contravenes or otherwise fails to comply with any of the provisions of the said Regulations. We are, therefore, of the view that being the primary regulatory authority under the SECP Act as well as the Takeovers Ordinance, there is no restriction on the Commission to deal with the matters agitated by the parties before it provided that its orders are supported by the relevant law, rules and regulations, are issued after hearing the parties who may be affected by its orders. This subject always to the fact that such orders are justice-able by courts and authorities of competent jurisdiction, in appropriate proceedings under the law.*



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- II. *The basic grievance of the Appellant as disclosed in the petition is that the sale/purchase of shares inter-se BG & ADG was allegedly in violation of the Securities and Exchange Commission of Pakistan Act, 1997 and the Takeover Ordinance read with Listed Companies (Substantial Acquisition of Voting Shares and Takeovers) Regulations, 2008. As held above, the Commission being the primary regulatory authority in such matters under the law has the requisite powers to determine such questions in accordance with law.*

- III. *In view of the fact that the impugned letter issued by SECP which furnished the basis for the petitioner to challenge the same before this Court, has already been set aside, the only document left in the field is the letter sent by BG to SECP and the representation filed by the Appellant. Both the said matters directly relate to the regulatory functions of SECP and hence within its jurisdictional parameters. These will be deemed to be pending before SECP and will be decided after hearing the parties for reasons to be recorded in writing in accordance with law. The interests of the Appellant have already been secured by the learned Single Judge by directing that the acquirers' shares in UBL shall not be transacted or transferred by respondents No. 5, 6 & acquirers. Further, pending fresh decision, status quo with respect to title of the shares of the management of the target company has also been directed to be maintained. We, therefore, confirm and reiterate the impugned order passed by the learned Judge in Chambers."*

Therefore, the Honourable High Court has clearly held that there is no restriction on the powers of the Commission to examine a transaction involving substantial acquisition of shares and if necessary to investigate allegations of violation of the Takeover Ordinance and pass necessary orders. The Commission enjoys the requisite power to do so under the SECP Act and there is no restriction on the Commission to deal with the matters agitated by the Applicant before it. The Honourable Court was also not convinced that any prejudice would be caused to the Applicant by reason of this matter being referred to the concerned authority. The Commission is of the opinion that all parties to the ICA are bound by the above findings. Additionally, the Commission may also add that now the matter is being heard and decided by the entire Commission as constituted in accordance with the provisions of section 3 read



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with section 5 the SECP Act. The other contentions of the Applicant with regard to the delegation of powers under section 27 of the Takeover Ordinance also loose substance and are not applicable or relevant. However, it is clarified that section 27 of the Takeover Ordinance does not expressly require that there will be a delegation of power under that specific section/provision. Section 27 is merely an enabling provision which allows delegation of powers and functions of the Commission (without specifying any mode) under the Takeover Ordinance to a Commissioner. As aforesaid, however, even this is not relevant as the entire Commission under Section 5 of the SECP Act has heard and decided this matter. Additionally, the Commission also note that even otherwise under Section 20(1) of the SECP Act, the Commissioner shall all have all such powers as may be necessary to perform its duties and functions thereunder and under Section 20(4) regulating substantial acquisition of shares and the merger and take-over of companies in a specific responsibility and function of the Commission. Finally, it is also noted that the Applicant himself made a representation to the Commissioner (Enforcement) vide his letter of 5-1-2011 in which he himself has asked SECP to "Intervene in the matter, to protect the Interest of UBL Shareholders, especially minority shareholders". A reply was also sent to the petitioner in response on 14-1-2011. The representation by the Applicant himself to SECP and his specific request for "Intervention" is inconsistent and sits oddly with the objection now being raised before the Commission to its power, authority and jurisdiction which in any event has been decided in the ICA Judgment as explained above. The Commission, therefore, repels and rejects the jurisdictional and procedural objections of the Applicant which are devoid of any substance or merit.

- C. Whether there has been any violation of the 2002 Ordinance in the case of acquisition of approximately 20% shares of UBL by BG from ADG.

The basic issue on the merits is whether a public announcement of offer to acquire voting share was required to be made under Section 6(1) of the Takeover Ordinance in the case of the acquisition of approximately 20% of shares of UBL by entities



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forming part of BG from ADG. The Applicant's basic contention is that the concept of any consortium, as per the stance of Bestway, is alien to provision of the Takeover Ordinance and the 2008 Regulations made thereunder; the same do not have any legal basis in as much as Bestway group and Abu Dhabi Group are separate and distinct entities/ individuals holding their respective holdings. This contention was elaborated before the Commission but the crux of it remained the same. It was also contented that Section 3 of the Takeover Ordinance does not exempt a reorganization of shareholding within a Consortium and, therefore, the requirement of a public offer was mandatory in the present case. Learned counsel of the Applicant also placed reliance on the expression "person" in Section 6(3) to argue that this implies a single individual or entity and not any association of or body of persons. Essentially, according to the petitioner each entity must be treated as separate and its own shareholding is the only determining factor for accessing whether Section 6(1) of the Takeover Ordinance is attracted. After hearing the learned counsel for the Applicant, the Commission asked him to give his views on the definitions of acquirer, control, person acting in concert in Sections 2(a), (c) and (j) of the Takeover Ordinance, as he did not refer to these during his submissions. In response, the learned counsel of the Applicant reiterated his above stance and stated that these definitions would only apply in case of ambiguity in Section 6(1) and not otherwise and even if BG and ADG are or may be a consortium the provisions of Section 6(1) still apply.

15. The Commission carefully considered the stance of the petitioner and is of the opinions that in deciding this question the following provisions of the Takeover Ordinance are relevant:

Section 2(1)(a) of the Takeover Ordinance stipulates:

"acquirer" means any person who, directly or indirectly, acquires or has proceeded to acquire voting shares in the target company, or acquires or has proceeded to acquire control of the target company, either by himself or through any person acting in concert";

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Section 2(1)(c) of the Takeover Ordinance stipulates:

"control" includes the right to appoint majority of directors or to control management or policy decisions, exercisable by a person individually or through any person acting in concert, directly or indirectly, whether by virtue of his shareholding, management right, shareholders agreement, voting agreement or otherwise";

Section 2(1)(j) of the Takeover Ordinance stipulates:

"person acting in concert" means a person who co-operates with the acquirer to acquire voting shares or control of the target company";

Section 2(2) of the Takeover Ordinance stipulates:

"All other expressions used but not defined herein shall have the same meanings as are assigned to them in the Securities and Exchange Ordinance, 1969 (XVII of 1969), or the Companies Ordinance, 1984 (XLVII of 1984)."

Section 2(1)(j) of the Securities and Exchange Ordinance, 1969 stipulates:

"person" includes a Hindu undivided family, a firm, an association or body of individuals, whether incorporated or not, a company and every other artificial juridical person;"

Section 3(1)(j) of the Takeover Ordinance stipulates:

Ordinance not to apply to certain transactions. — (1) Except as provided otherwise in sub-section (2), nothing contained in this Ordinance shall apply to—

- (j) sale of shares in consequence of privatization of a unit or its management rights within the meaning of Privatization Commission Ordinance, 2000 (LI of 2000);"*

Further, section 6 of the Takeover Ordinance stipulates:

"Consolidation of holdings. — (1) No acquirer, who has acquired more than twenty-five per cent but less than fifty-one per cent of the voting shares or control of a listed company, shall acquire additional voting shares or control unless such acquirer makes a public announcement of offer to acquire voting shares or control in accordance with this Ordinance:

Provided that such acquirer shall not be required to make a fresh public announcement of offer within a period of twelve months from the date of the previous announcement.

(2) No acquirer shall acquire voting shares in excess of the quantity specified in the invitation of offer made by such acquirer and all additional or



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incremental acquisition beyond the preceding offer shall be valid only through further offer.

(3) Nothing in this section apply to a person who has already acquired fifty-one percent or more of the voting share or control in consequence of making a public announcement of the offer."

Section 13 of the General Clauses Act, 1897 stipulates:

"In all (Central Acts) and Regulations, unless there is anything repugnant in the subject or context - Words importing the masculine gender shall be taken to include females, and words in the singular shall include the plural, and vice versa."

15. The contention of the Applicant that the definitions in Section 2 should only be read into Section 6, if there is an ambiguity in that provision, it does not appeal to reason and is also contrary to settled principles of interpretation of statutes. The Commission cannot attribute redundancy to these provisions or pick and choose definitions. These have to be applied uniformly and consistently. The Legal Counsel of the Applicant has failed to convince the Commission that there is anything repugnant in the subject or context to justify the Commission ignoring these definitions. Therefore, the Commission holds that the definitions of the expressions in Section 2 of Takeover Ordinance must be read into Section 6 as and where the relevant expression is employed in order to ascertain its true meaning, scope and import.

16. The Commission noted that Section 6(1) employs the expression "acquirer", which applying the definitions in Section 2 quoted above, includes all persons acting in concert. The definition of "acquirer" is couched in broad terms in that it also employs the expression "directly or indirectly". BG and ADG have vehemently argued before the Commission that they are collectively "acquirer" for the purposes of Section 6 and are "person acting in concert" in terms of the Takeover Ordinance and in support thereof have referred to the following documents and provisions:



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- (i) BG and ADG entered into a Shareholders Agreement (SA) dated 10-9-2001 to jointly pursue the acquisition of 51% shareholding of BL being privatized by the GOP through the PC. The following provisions have been referred to:
- a) Article 2.2 of the SA provides that the BG and ADG agree to constitute an Acquisition Team in respect of the acquisition of the Equity Stake.
 - b) Article 2.3 of the SA identifies the members of the Acquisition Team.
 - c) Article 4.1 of the SA provides that all expenses incurred by the Acquisition Team shall be borne equally by BG and ADG.
 - d) Article 5.2 of the SA envisaged the opening of a joint expense account for this purpose which is referred to as the ADG-Bestway Acquisition Account.
 - e) Article 7.1 of the SA provides that UBL shall be managed in accordance with its Articles of Association and the provisions of the SA.
 - f) Article 10.2 of the SA provides that BG and ADG shall collectively procure that management of UBL to prepare a business plan and the budget and submit the same for approval of the Board of Directors of UBL.
- (ii) According to 1st Amendment to the SA, executed on 4th September, 2002, BG and ADG agreed, inter alia that BG and ADG shall have equal rights in the management of UBL and that the appointment of the Chairman of the Board and Chief Executive of UBL will be on a rotation basis.
- (iii) It has been confirmed to the Commission that these provisions remain in force and effect.

17. It has been held in decision dated 13-11-2006 in the matter of United Sugar Mills Limited by the Commissioner (CL/SM) in paragraph 17 and 18 that the test for persons to be regarded as acting in concert as follows:

"17. A plain reading of the above definitions shows that the following conditions must be met before any person may be regarded as having acted in concert for purposes of contravention of the provisions of the Takeovers Ordinance:

- (i) The person cooperates with the acquirer;*
- (ii) Such cooperation is for the acquisition of voting shares, that is, shares in the capital of a listed company, and*



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(iii) Such voting shares are of the target company, that is, the listed company whose shares are directly or indirectly acquired or intended to be acquired (as defined in Section 2(1)(o) of the Takeovers Ordinance).

18. It is obvious that each of the Directors and ASML is a 'person' at law vis-a-viz the first condition above. As for conditions (ii) and (iii) above, it is an admitted position that the Shares are voting shares of a listed company. Thus, to determine whether the statutory test for 'person acting in concert' is satisfied in the present case, the only question requiring determination is whether there was cooperation between ASML and its Directors and Clearshore in the matter of acquisition of the Shares by Clearshore."

18. Accordingly, the key test is "cooperation" between the parties to acquire shares of the target company (in this case UBL). The above quoted provisions of the Shareholders Agreement and the assurance on behalf of BG and ADG that the above arrangements are still in place, leave the Commission in no doubt that the BG-ADG Consortium does indeed constitute "acquirer" for the purposes of Section 6 as all the constituent members of this consortium are "persons acting in concert" as the cooperation between them to jointly acquire and manage UBL is clearly established and documented. Additionally, it is also relevant in this context that the Share Purchase Agreement, dated 19-10-2002 under which 51% shares of UBL were acquired on that date by the BG-ADG Consortium refers to the latter collectively as "the Purchaser". In other words, it is implicit that even the privatization Commission treated the BG-ADG Consortium effectively as a single purchaser. Also, from the definition of "control" in Section 2 it is implicit that the framework of the Takeover Ordinance recognizes agreements such as shareholders agreement. The Commission is, therefore, unable to accept the contention of the Applicant that the concept of consortia is alien to the scheme of Takeover Ordinance as this would amount to ignoring the abovementioned definitions.

19. In view of the above, the Commission holds that the entities and persons comprising the BG-ADG Consortium who jointly and collectively acquired 51% of

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shares of UBL on 19-10-2002 along with management control of UBL constitute "persons acting in concert" in terms of the Takeover Ordinance as they cooperated and acted jointly in the pursuit of acquiring 51% shares and management control of UBL and in view of the definitions of "acquirer" read with that of "persons acting in concert" the BG-ADG Consortium has to be treated and recognized as the "acquirer" for the purposes of interpreting and ascertaining applicability in the present facts of Section 6(1) of the Takeover Ordinance. In opinion of the Commission, if each individual or entity is treated as separate and distinct and the definition of "acquirer" and "persons acting in concert" are not applied it would tantamount to attributing redundancy to these provisions. Also such an interpretation would open a potential avenue for circumvention of Section 4, 5 and 6 of the Takeover Ordinance as even where persons/consortia/groups are in actual fact "acting in concert" they would be able to claim that only their individual and direct shareholding should be taken into account. Such an interpretation would in the Commission's considered opinion lead to effectively making the Takeover Ordinance practically redundant and unenforceable in many circumstances and defeat its avowed object.

20. At this point the Commission would also refer to the decision of the Appellate Tribunal in *Syaed Yawar Ali* (2010 CLD 262) wherein at page 270 it has been held that *"Once it is concluded that appellants acted in concert in acquiring the shares then any subsequent event cannot undo the position prior to that. The shares were acquired by the appellants collectively. To say that appellants acted in their independent capacity would defeat the very purpose of the definition of "acting in concert" as given in section 2(1)(h)..."*. The Commission agrees with this finding of the Appellate Tribunal and is of the opinion that the same applies in the facts and circumstances of this case as well. Once, it is held that the constituent members of the BG-ADG Consortium acted in concert and thus acquired 51% voting shares of UBL as well as management control, the legal consequences thereof must flow and be applied consistently.



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21. The position that emerges from the above analysis and findings is that, from inception, the BG-ADG Consortium qua "acquirer" had acquired 51% of the share capital of UBL. The said BG-ADG Consortium/acquirer continues to exist and as disclosed by BG in its letter also, its collective shareholding in UBL remains exactly the same both before and after the acquisition of 20% shares. The Commission also agrees with the contention of BG-ADG Consortium that this 20% acquisition within the consortium did not result in any change in "control" of UBL and have not been revised even after the transfer of 20% shareholding from ADG to BG. At this time, it is also relevant to point out that Section 3(1)(j) of the Takeover Ordinance (which came into force on 29-10-2002) also exempts the sale of shares in consequence of privatization of a unit or its management rights. In the instant case, from the record it appears that the 51% shares were acquired on 19-10-2002 under the Share Purchase Agreement which has been filed on behalf of BG.

22. Now the Commission come to the specific language of Section 6(1) of the Takeover Ordinance which is as follows:

"No acquirer, who has acquired more than twenty-five per cent but less than fifty-one per cent of the voting shares or control of a listed company, shall acquire additional voting shares or control unless such acquirer makes a public announcement of offer to acquire voting shares or control in accordance with this Ordinance:

Provided that such acquirer shall not be required to make a fresh public announcement of offer within a period of twelve months from the date of the previous announcement."

23. On a plain reading of the above, it follows that Section 6(1) only applies when an "acquirer" (which as we have held above includes persons acting in concert) has acquired more than 25% but less than 51% of shares of the target company and such acquirer wishes to or does acquire "additional voting shares" or "control" of a target company. If, however, the acquirer (along with persons acting in concert) already collectively holds 51% or more of the voting shares of a target company and/or if there is no change in "control" then Section 6(1) would not be attracted according to

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its plain language. Applying this to the case in hand, the Commission find that for the reasons given above, the "acquirer" in this case being the BG-ADG Consortium had crossed the threshold of "less than 51%" mentioned in Section 6(1) on 19-10-2002 when the privatization was concluded and it also gained management control of UBL simultaneously. Moreover, from the record, it is clear that UBL is continuing to be managed and controlled in the same manner as it was being immediately prior to the transfer of 20% shareholding within the BG-ADG Consortium and as such there is no "change of control" as contemplated in Section 6(1) read with Section 2 on the 2002 Ordinance. Accordingly, in the Commission's considered opinion, neither of the two limbs of Section 6(1) in isolation and without reference to Section 2 and the position as determined from the Shareholders Agreement and the Share Purchase Agreement referred to above is, therefore, without any force and is hereby rejected.

24. As regards, Regulation 14 of the 2008 Regulations, these would only have come into play if Section 6 had been held to be applicable. Hence, the submissions in this regard are also not accepted.

25. In addition to the above the Legal Counsel for the Applicant also referred to some letters from the CCP, State Bank of Pakistan and Karachi Stock Exchange to establish violation of the Takeover Ordinance and change of control as a consequence of the 20% share acquisition. The Commission has carefully examined each of these but is not convinced that there is any substance in the argument advanced in this regard. It is also relevant to note that as held in the ICA Judgment and also borne out by the SECP Act and Takeover Ordinance, SECP is the regulatory authority which administers these statutes and is the primary regulator in such matters. Therefore, the Commission is of the opinion that the jurisdiction to decide matters covered by the SECP Act and Takeover Ordinance in the first instance vest in the Commission.

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26. Accordingly, for all of the foregoing reasons, it is held that in the facts and circumstances recorded above the acquisition of approximately 20% share of UBL by BG from its consortium member ADG without making an announcement of public offer does not result in violation or breach of the provisions of the 2002 Ordinance. The matters raised in the letter dated 26-11-2010 from Bestway (Holding) Limited to SECP and the representation dated 5-1-2011 filed by Asghar Abbas Gardzi are, therefore, decided in the above terms. Order Accordingly.


(Miriaz Haider)
Commissioner (SM)


(Tahir Mahmood)
Commissioner (CL)


(Zafarullah)
Commissioner (TMFCD & OED)


(Mohammed Asif Arif)
Commissioner (Insurance)


(Muhammad Ali)
Chairman

ANNOUNCED
November 26, 2012