Jurisdiction: India

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1. What are the key laws and regulations that govern mergers and acquisitions in your jurisdiction?

The key laws and regulations that govern and are of significance to mergers and acquisitions in India are the Companies Act, 1956, the Companies Act, 2013, the Securities and Exchange Board of India Act, 1992 ('SEBI Act'), the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ('Takeover Code'), the Foreign Exchange Management Act, 1999 ('FEMA'), the Competition Act, 2002 ('Competition Act'), the Indian Contract Act, 1872 ('Contract Act'), and the Income Tax Act, 1961 ('Income Tax Act'). The applicability of these laws depends on the nature of the entities (whether listed, unlisted or private company) involved in the merger or acquisition and the nature of the transaction.

The Companies Act, 1956 and the Companies Act, 2013 are the principal legislations which provide for mergers and acquisitions that are either required to be carried out by involvement of the court of law or effected through private arrangements. The provisions of the Companies Act, 2013 pertaining to mergers have not yet come into effect; therefore, the mergers provisions of the Companies Act, 1956 are still applicable and govern the mergers of Indian companies.

The SEBI Act and the Takeover Code also apply if one of the parties to the merger or acquisition is a listed company, in which case the provisions of the listing agreement of the stock exchange on which the stock of the company is listed are required to be complied with. The Takeover Code provides for acquirers to make disclosures of shareholdings and encumbrances and public announcements, and to make open offers in cases of acquisition of shares or voting rights beyond a certain threshold percentage, consolidation of holdings, and acquisition of control over a company.

Cross-border mergers and acquisitions or acquisition of an Indian company by a person resident outside India have to comply with the provisions of FEMA and the regulations, guidelines, directions and circulars made under FEMA that regulate foreign investments in India. The Foreign Direct Investment Policy issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, is the guiding and regulatory policy on the specific limits of investment in, or acquisition of, an Indian company by a person resident outside India in a particular sector or activity.

The Competition Act controls business combinations, i.e. mergers, acquisitions and amalgamations, which cause, or are likely to cause, an appreciable adverse effect on competition within the relevant market in India. Hence, an approbation of the Competition Commission of India, a quasi-judicial authority constituted under the Competition Act, has to be sought in case the combination meets the prescribed financial thresholds. De minimis provisions for exemption of certain combinations are also envisaged under the Competition Act.

Further, the provisions of the Income Tax Act have considerable commercial bearing on transactions involving mergers and acquisitions in India, especially on the applicability of capital gains tax. In cross-border transactions, provisions of the Double Taxation Avoidance Agreement signed between India and the relevant country may also be applicable.

Acquisitions pursuant to private arrangements may also attract the application of the Contract Act.

2. What are the government regulators and agencies that play key roles in mergers and acquisitions?

Mergers and acquisitions in India are effected either as required by sanction of the relevant High Court(s) in whose jurisdiction the registered offices of the companies involved in the merger are located, or by way of private arrangements. In the case of a merger through the court, the Official Liquidator and the Regional Director having delegated power of the Central Government of India are also involved in the process of sanctioning the schemes of merger.

The relevant provisions of the Companies Act, 2013 pertaining to mergers are yet to be notified. After the said provisions are notified, matters that presently require sanctioning by the court shall be dealt with by the National Company Law Tribunal ('NCLT'), which has recently been constituted.

The Securities and Exchange Board of India ('SEBI'), a quasi-judicial body, is involved in and acts as regulator for the process of mergers and acquisitions where a listed company is involved.

The Competition Commission of India ('CCI') is an important government authority in the context of mergers and acquisitions. CCI regulates combinations that cause, or are likely to cause, an appreciable adverse effect on competition within India based on certain prescribed financial thresholds.

The Reserve Bank of India ('RBI'), acting as an administrative body for FEMA, has the authority to regulate and permit transactions involving foreign exchange and cross-border transactions. Certain mergers and acquisitions transactions require specific approval of the government of India, involving authorities such as the Department of Industrial Policy and Promotion and the Foreign Investment Promotion Board ('FIPB'). The Cabinet Committee on Economic Affairs may also be involved if the proposed investment exceeds the prescribed limit.

In addition to the above, there are certain sector-specific authorities that play an important role in mergers and acquisitions in such sectors, and additional permission from such sector-specific regulators may also be required.

3. Are hostile bids permitted? If so, are they common in your jurisdiction?

Hostile bids are not prohibited in India. However, due to the nature and structure of companies and regulatory guidelines in India, hostile bids are not common. In the case of a private limited company which is closely owned and controlled by the promoters or a group of promoters and whose shares are not freely traded, the acquisition is typically carried out by private negotiations and arrangements. The possibility of hostile bids in such a case is not practical.

For listed companies, since there is no prohibition under the Takeover Code against making hostile offers, a hostile acquirer may launch a voluntary offer or make a competing offer against a public offer. However, a hostile bid for a widely-held listed company in India is also not common in light of the public offer mandated by the Takeover Code. Further, the promoters and promoter group generally have substantial stock and are typically in a controlling management position in most Indian listed companies. Hence, they are in a position to monitor stake building by the potential hostile bidder, which enables them to adopt some control defence strategies, such as scorched earth, poison pills and white knights. In India, the white knight strategy has been widely used to resist hostile acquisitions. Thus, control defences in India are mainly promoter-driven, and successful hostile bids are not common due to the aforesaid reasons and the stringent disclosure requirements under the Takeover Code.

4. What laws may restrict or regulate certain takeovers and mergers, if any? (For example, anti-monopoly or national security legislation).

The Competition Act provides that certain mergers and acquisitions can be restricted or considered void by CCI. The test is, inter alia, whether the proposed combination causes, or is likely to cause, an appreciable adverse effect on competition in the relevant market in India. Further, in the context of cross-border transactions, foreign shareholding in the Indian company breaching the sectoral cap prescribed for that particular industry is not permissible. Also, investments in certain sectors or business activities are subject to specific security clearance by the relevant authorities of the government of India for the investment or for the involvement of foreign management personnel. Some examples of industries in which foreign investments are regulated are defence, civil aviation, telecommunications, railway infrastructure in sensitive areas,

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Rahul is the Managing Partner of Chadha & Co. He works closely with senior management of leading multinational clients of the firm on strategy formulation, M&A, private equity, government policy, regulatory and management issues that impact their business in India.

Rahul started his professional career in 1992 with Unilever's Indian subsidiary. Subsequently, he set up and managed, as a director, a joint venture company with Singaporean and Ukrainian partners in the field of underground mine construction, after which he founded a dotcom which grew to be India's largest women's portal, with a focus on e-commerce. The company was subsequently acquired by the Times of India group. Thereafter, Rahul managed and grew the Indian operations of one of the first knowledge process outsourcing companies set up in India, along with a team of consultants from McKinsey.

Rahul is a member of the board of directors of the Indian subsidiaries of several leading multinational companies. He also serves on the board of a leading international association of law firms, accounting firms and tax advisors. Rahul is an associate member of the American Bar Association and a Charter Member of TiE.

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broadcasting, private security, multi-brand retail, liquor, cigarettes, and gambling.

5. What documentation is required to implement these transactions?

For the purpose of acquisition or transfer of shares of a private limited company, typically, a share purchase agreement is executed between the transferor and the transferee. Pursuant to the said agreement, the transferor and the transferee are also required to execute a Securities Transfer Form (SH-4) as prescribed under the Companies (Share Capital and Debentures) Rules, 2014. Acquisition is also effected by subscribing to a fresh issue of shares with a view of acquiring substantial control over the target. In such a case, typically a share subscription agreement or investment agreement is executed.

In an asset transfer transaction, an asset transfer agreement or business transfer agreement is executed by the parties. However, additional documents (such as a sale deed or a delivery note) may also be required, depending on the nature of the assets (movable, immovable, tangible or intangible) or the business proposed to be transferred.

In the case of a merger, since the process is supervised and monitored by the court, an application and a scheme of merger need to be prepared and filed before the court of law along with the requisite supporting documents. An advertisement with respect to the merger also needs to be published in newspapers. The order of the court sanctioning the scheme of merger must be filed with the Registrar of Companies in a prescribed form (Form INC28).

If a listed company is involved in the merger, the stock exchange is required to be notified. Where the target company is a listed company and the acquirer is required to make an open offer as per the Takeover Code, the acquirer needs to issue a letter of offer and a detailed public statement for the said acquisition, and make a public announcement.

Cross-border mergers and acquisitions require additional documentation for the purpose of informing and obtaining approval from the Reserve Bank of India and the government of India, as applicable.

In the event that the merger or acquisition is handled through an escrow mechanism, an escrow agreement is typically executed by the parties concerned.

6. What government charges or fees apply to these transactions?

Stamp duty is a major component of the charges and fees payable to the government in mergers and acquisitions. Stamp duty is payable on the instrument and, barring a few cases that are subject to a central levy, stamp duty is governed by the stamp legislation of the state in which the transaction takes place. Stamp duty varies from state to state.

Acquisitions by way of transfer of shares in physical form are subject to a stamp duty of 0.25%, payable uniformly in India, of the market value of the shares on the trade date. No stamp duty is levied on a transfer of shares held in dematerialized form. Stamp duty is also separately payable on share transfer agreements or asset transfer agreements as per the rate prescribed under the stamp legislation of the state in which such agreement is executed and performed, which is generally a nominal stamp duty.

For court-driven mergers, a court fee is payable at the time of filing the application with the court as per the rules of the respective High Court. Additionally, many states of India have expressly provided, in their state legislation, that the order of the High Court sanctioning the merger and amalgamation shall be considered as 'conveyance', and an instrument of 'conveyance' is chargeable to the applicable stamp duty of that state. However, there are various other states that have not made such express provisions.

For acquisitions where the provisions of the Takeover Code become applicable, prescribed fees are payable to SEBI at the time of filing the letter of offer with SEBI. The fee depends on the consideration payable under the open offer.

If the merger or acquisition is required to be notified to the CCI, the applicant has to pay a prescribed fee at the time of filing the form. Presently, the filing fees for Form I and Form II are INR 1.5 million and INR 5 million respectively.

7. Do shareholders have consent or approval rights in connection with a deal?

The Companies Act, 1956 (as presently applicable to merger cases) provides for a requirement of consent of the shareholders who are a majority, representing three-fourths in value, for the purpose of sanctioning of the scheme of merger by the court. Accordingly, the High Court, while sanctioning the scheme, directs the company and ensures that the shareholders' meeting is convened and the aforesaid consent of the shareholders is obtained.

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Neeraj Prakash is a Partner in the firm, with more than 13 years of experience of successfully practicing corporate and commercial laws. Neeraj practices in the areas of Mergers & Acquisitions, Joint Ventures, Government tenders, corporate and commercial transactions (including deal structuring, negotiation, documentation and execution of transactions), Foreign Direct Investment and setting up of businesses in India, competition law and general corporate legal and regulatory advisory.

He has represented companies ranging from start-ups to multinationals and has practiced in industries including manufacturing, logistics, health care, retail, electronics, banking, and infrastructure with special focus on the power sector and railways, and is regularly involved in cross-border matters.

Neeraj has substantial experience in conceptualisation of transactions, from negotiation and drafting of transaction documents and carrying out due-diligence, to monitoring of pre and post-closing obligations. With his vast knowledge and experience in commercial transaction laws, Neeraj has handled complicated client situations effectively. He has assisted a wide variety of multinational companies in obtaining necessary regulatory and legal approvals required to consummate transactions, including approvals from Foreign Investment Promotion Board, Reserve Bank of India, Ministry of Corporate Affairs, Competition Commission of India and other regulatory bodies, and has also advised clients in making necessary regulatory filings to comply with Indian laws and regulations.

In addition, the Companies Act, 2013 enables the minority shareholders (not fewer than 100 shareholders of the company or not less than one-tenth of the total number of its shareholders, whichever is less, or any shareholder(s) holding not less than one-tenth of the issued share capital of the company) to approach the NCLT in the event prejudice is caused to their interest. A provision for a class action is also stipulated in the Companies Act, 2013. The rights of these shareholders sometimes may have an impact on proposed mergers.

In the event of acquisitions by way of private arrangements, the shareholders' consent is obtained as the shareholders are parties to the deal.

8. Do directors and controlling shareholders owe a duty to the stakeholders in connection with a deal?

Unlike the earlier legal position under the Companies Act, 1956, the Companies Act, 2013 has codified the fiduciary duty of directors. Accordingly, the directors of an Indian company owe a fiduciary duty to the company and its shareholders. The provision stipulates that a director must act in good faith for the benefit of its members as a whole, and in the best interests of the company. Directors are required to exercise their duties with due and reasonable care, skill and diligence and to exercise independent judgment. Thus, a general duty has been cast on a company's directors to explain to the shareholders the commercial prudence, rationale, benefits, risks etc. of the merger/acquisition at the time of recommending the deal to the shareholders for their approval, thereby enabling the shareholders to make an informed and considered decision.

Controlling shareholders have no express and direct obligations or duties towards the other shareholders in connection with the deal. However, balancing provisions have been provided for the minority shareholders to challenge the deal if the same is prejudicial to their interests.

In the event the target company is a listed company, the Takeover Code casts an additional obligation on the board of directors of the target company to constitute a committee of independent directors to provide reasoned recommendations on each offer, which recommendations are required to be published by the company.

9. In what circumstances are break-up fees payable by the target company?

The payment of break-up fees is not prohibited in India. It can be contractually agreed upon between the parties, but it is not very common in India for the target company to agree on break-up fees with the acquirer. The Contract Act provides for damages in case of a breach of contract. Such damages are generally limited to compensation for direct losses resulting from non-performance by the breaching party.

Hence, in most cases, the party in breach of the terms of the letter of intent or memorandum of understanding agrees to reimburse the expenses incurred by the other party in connection with the transaction.

10. Can conditions be attached to an offer in connection with a deal?

Parties to a share acquisition or business acquisition can privately negotiate and agree upon the terms and conditions for consummating the deal. Typically, in India, some of the prevalent conditions include, inter alia, the findings of a comprehensive due diligence exercise, material adverse change, hold back condition, minimum level of acquisition etc.

In the case of an acquisition of a listed company, the Takeover Code acknowledges and provides for a conditional offer whereby an acquirer may make an open offer conditional as to the minimum level of acceptance. In such a case, the competing offer can also be made conditional as to the minimum level of acceptance. However, the competing offer can be conditional only if the original offer is also conditional.

11. How is financing dealt with in the transaction document? Are there regulations that require a minimum level of financing?

Mergers are generally different from acquisitions in the way they are financed. Mergers are generally cashless and involve share swaps. Financing is important in acquisition deals.

In the case of a private acquisition, i.e. where the target company is not a listed company, there is no legal requirement on the level of financing. Typically, the seller negotiates on the terms under the acquisition agreement/document to secure the financial ability of the purchaser to complete the acquisition. The financing options available for acquisitions are not very wide and are being evolved in India for domestic acquirers.

In the case of a listed company where the acquisition triggers a mandatory public offer under the Takeover Code, a provision to secure the acquirer's performance of the financial obligations is stipulated under the Takeover Code. The acquirer, not fewer than two working days prior to the date of the detailed public statement of the open offer for acquiring shares, is required to deposit a part of the consideration (as prescribed under the Takeover Code) payable under the open offer in an escrow account. The escrow account may be created by way of a cash deposit, a bank guarantee issued in favour of the manager to the open offer by any scheduled commercial bank, or a deposit of frequently traded and freely transferable equity shares or other freely transferable securities with appropriate margin.

12. Can minority shareholders be squeezed out? If so, what procedures must be observed?

A new provision, which is yet to be notified and become effective, has been included in the Companies Act, 2013 whereby if an acquirer becomes a shareholder holding 90% or more of the shares in a company, it shall make an offer to the minority shareholders to buy the shares held by such minority shareholders in the company. However, it is not envisaged in the said provision that such an offer is mandatorily required to be accepted by the minority shareholders. Further, a 'sell out right' is also provided, whereby the minority shareholders may make an offer to the majority shareholders to purchase their shares.

In the case of a listed company, another set of regulations mandates that at least 25% of the shares of a listed company are held by public shareholders for the purposes of continuous listing. Therefore, an acquisition beyond this threshold by majority shareholders is not permitted in the case of a listed company.

Thus, it is challenging in the Indian legal framework to squeeze out minority shareholders. At times, companies have utilised the route of a scheme of arrangement to squeeze out minority shareholders, which has been discouraged by the Indian courts.

13. What is the waiting or notification period that must be observed before completing a business combination?

For the purposes of business combinations, certain timelines have been prescribed in the Takeover Code in relation to the process of an acquisition of a listed company where the acquisition triggers the requirement for an open offer, such as timelines for opening an escrow account, filing a detailed public statement and a draft letter of offer, making a competing offer, receiving the comments on the letter of offer from SEBI etc. The said prescribed timelines vary from 2 to 15 working days. Typically, the total time involved in completing an acquisition ranges from four to eight months, depending on various factors.

In the event a combination is required to be notified to the CCI, the Competition Act and the related regulations prescribe timelines for various actions to be undertaken by the applicant and the CCI. The party that proposes to enter into a combination is required to notify CCI within 30 days of approval of the proposal relating to the merger or amalgamation by the board of directors of the enterprise concerned, or execution of any agreement or other documents for acquisition of shares, assets, voting rights or control, as the case may be.

CCI is required to form its prima facie opinion, within 30 days from receipt of the notice, as to whether the combination is likely to cause, or has caused, an appreciable adverse effect on competition within the relevant market in India. If CCI's prima facie opinion is in the affirmative, a detailed investigation is then conducted by CCI, and the combination cannot be effected until CCI pronounces its decision. However, if CCI does not pass an order or issue directions within a period of 210 days from the date of filing the notice with CCI, the combination shall be deemed to have been approved by CCI.

In a cross-border acquisition where the acquisition requires the prior approval of the Foreign Investment Promotion Board or the Reserve Bank of India, typically, a period of 30 to 45 working days is taken for such an approval.

For court-driven mergers, no timeline is prescribed for completing the process and for passing the order by the court. However, once the provisions relating to mergers under the Companies Act, 2013 are notified and come into effect, matters relating to mergers will be dealt with by the NCLT. At present, such matters are heard by the respective High Court having jurisdiction over the registered office of the company. The NCLT is a specialised body dealing only with cases relating to company laws and related laws; hence, it is expected that the cases of court-driven mergers would be concluded in a speedy manner.

14. Are there any industry-specific rules that apply to the company being acquired?

In addition to the laws generally applicable to mergers and acquisitions, some industry-specific rules and regulations may also apply, and there might be some authorities whose prior approval is required or who need to be notified. Typically, the said specific rules apply to highly regulated sectors or sectors of strategic importance, such as banking, financial services, insurance, media, telecommunications, defence, civil aviation, electricity etc. Accordingly, sector-specific regulators have been established to regulate some of the aforesaid industries, e.g. the Telecom Regulatory Authority of India and the Department of Telecommunications regulate the telecommunications sector, the Directorate General of Civil Aviation regulates civil aviation, the Reserve Bank of India regulates the banking and financial services sectors, the Insurance Regulatory and Development Authority regulates the insurance sector, and the Ministry of Information and Broadcasting regulates the electronic media sector.

15. Are cross-border transactions subject to certain special legal requirements?

For court-driven mergers, the Companies Act, 1956 only enables mergers of foreign corporates into Indian companies (and not mergers of Indian companies into foreign corporates). However, no provision has been prescribed about the manner in which the consideration would be discharged in the event of such mergers.

The Companies Act, 2013 also provides for mergers of Indian companies into foreign companies. However, the said provision is yet to be notified by the government and hence has not come into effect. The Reserve Bank of India would also be involved in the process of approval for such a cross-border merger. The said Act also provides, inter alia, that the payment of consideration may be made in cash or in Depository Receipt or both. Additionally, the Central Government of India, in consultation with the Reserve Bank of India, may make rules with respect to cross-border mergers and amalgamations as mandated in the Companies Act, 2013, which may prescribe certain regulatory requirements and restrictions. Cashless issues of shares on account of the merger of a foreign company with an Indian company may require prior approval of the FIPB.

With respect to acquisitions, the acquisition of an Indian company by a foreign party and the acquisition of a foreign company by an Indian party are regulated by the policy of the government of India and the rules and regulations made by the Reserve Bank of India under FEMA. Inward investment in India is typically termed as 'foreign direct investment', and outward investment and acquisition is termed as 'overseas direct investment'; both are governed by the specific guidelines for the respective transactions.

Broadly speaking, a foreign party is allowed to hold 100% of the shares of an Indian company, unless there is a sectoral cap prescribed for any business activities carried out or proposed to be carried out by the Indian company. Sectoral caps have been provided for some of the regulated industries and may also have some conditions attached to allowing the limit of investment by a foreign party. Some examples of industries with sectoral caps are retail trade, insurance, banking, defence etc.

Foreign investment may be made under either the automatic route (where no approval of the government or Reserve Bank of India is required), or the approval route as prescribed under the relevant guidelines. There are certain sectors where foreign direct investment is prohibited, such as chit funds, agricultural or plantation activities, real estate business, lottery, atomic energy, railway operation etc.

Similarly, the financial limits and other conditions for overseas direct investment are also prescribed, and the same need to be complied with when undertaking such a transaction.

16. How will the labour regulations in your jurisdiction affect the new employment relationships?

From the perspective of mergers and acquisitions, the Indian labour and employment related laws may not have a substantial impact on the transactions if certain legal points of caution are addressed, such as continuation of service and related benefits, terms of employment before and after the transaction etc. Employees in India can be classified broadly into two categories: workmen and managerial personnel or non-workmen. Workmen's relationship with the company is governed by various legislations and the rules framed thereunder. The relationship of non-workmen is governed primarily by their employment contract. Labour is a concurrent list subject under the Indian Constitution. Accordingly, the Central Government of India as well as state governments enact labour laws and related rules. Therefore, although the employees' relationship and regulatory requirements may vary from state to state, the Industrial Disputes Act, 1947 primarily governs the transfer or termination of employees where the industrial undertaking is the subject matter of a merger or acquisition.

Apart from the above legal issues, there could be some human resources, trade union, social or political issues, which need to be handled with caution. The nature and magnitude of such issues may vary from state to state.

17. Have there been any recent proposals for reforms or regulatory changes that will impact M&A activity?

There are certain proposed changes that will have a significant impact on M&A activities. These proposed changes are focused on the broad themes of creating opportunities, facilitating ease of doing business in India, and reducing vulnerability.

Some of the notable proposed changes include notifying the procedure for court-driven mergers prescribed under the Companies Act, 2013 (which will be dealt with by NCLT), a new concept of short form mergers (i.e. mergers between two or more small companies or between a holding company and its wholly-owned subsidiary company – where no approval of NCLT would be required), and mergers of Indian companies and foreign companies.

On the regulatory front, the limits for foreign investments in certain sectors such as insurance, defence, multi-brand retail etc. are expected to be further relaxed. Various changes have also been proposed in labour and employment laws at the centre and state levels, which will improve the ease of doing business in India and may impact M&A activities.

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