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INDIA M&A

Third Edition

Contributing Editor
PM Devaiah

LEXOLOGY
Getting the Deal Through

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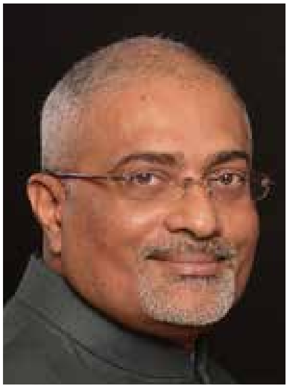

PM Devaiah
Everstone Group

PM Devaiah is vice chairman at Everstone Group. He joined Everstone in 2007 as general counsel. As group general counsel he led Everstone's legal and compliance team in its advisory work across investments, diligence, risk and day-to-day operations. Mr Devaiah has over 30 years' experience across a variety of industries, including telecommunications, power, IT services, fast-moving consumer goods, manufacturing, private equity, real estate and multimodal transport. In the past he has been associated with TATA Projects, Hindustan Unilever, TCI, BPL Group, Carlyle, ICICI Ventures and the Future Group in a variety of senior roles.

Mr Devaiah holds a master's degree in constitutional and administrative law (LLM) and a diploma in journalism from Mysore University. He also has a certification on late-stage buyouts from Harvard Business School. He was listed as one of the top general counsel in the 'Legal Powerlist 2020' presented by Forbes India.

Contents

Introduction

PM Devaiah[1]

This is the third edition of the *Practice Guide – India M&A* published by Lexology Getting the Deal Through. It provides a contemporary analysis of the legal framework, opportunities, challenges and risks that arise in connection with M&A transactions in India. Each chapter in the *Practice Guide – India M&A* specifically deals with an important segment that forms an integral part of M&A transactions in India. India is endowed with a robust legal system that worships the rule of law in letter and spirit, with governance mandates shared between the union and state levels, with a constitutional mandate of central and decentralised power equations. In addition, there are local bodies, union and state regulators, the Supreme Court, which is the court of final appeal, High Courts at state level and other district courts. These multi-layered interventions have intense impact on the ease of doing business in India owing to their far-reaching supervisory powers. Therefore it is an inevitable benefit to be well advised by relevant and competent advisers and legal counsel to do the right thing at the right time, such that an M&A activity does not fail to meet the mandates of applicable laws and regulations.

As such, the *Practice Guide – India M&A* aims to serve as a snapshot and a useful tool for industry practitioners when doing business in India, giving a nuanced dimension in answering key questions around Indian M&A. Admittedly this is not an exhaustive work, but an attempt to capture the essence of the nature of activities involved in a typical M&A transaction.

I have assisted in the selection of the chapters for the *Practice Guide – India M&A* and in bringing together respective authors known for their involvement in the industry and their expertise in M&A and related fields of law. I am very pleased to have been able to attract these select experts from reputed Indian law firms. I have had the opportunity to work with a few of these learned authors or their law firms on a primary M&A deal or an ancillary part that they supported and led to a successful M&A transaction.

I have been involved and closely associated with Indian M&A for the past three decades. The nature of the assignments that I have worked on with my colleagues and external experts has offered me an invaluable opportunity to deeply understand the Indian legal and regulatory

1 PM Devaiah is vice chairman at Everstone Group.

landscape and the nuances of doing business in India, its political landscape, legal services industry, and the multidimensional culture that brings in its own complexities to the game. My previous role at Everstone Group as a group general counsel over the past decade gave me great opportunity to participate in complex and stimulating M&A deals in India and across the Asia-Pacific region where our investing footfall extends. I had the great opportunity of working very closely with deal captains, tax and legal experts and risk managers in India and abroad.

Everstone is a premier investment group focused on India and South East Asia, with assets in excess of US$5 billion across private equity, real estate, credit, infrastructure and venture capital. Everstone has focused on developing a world-class alternative investments platform and, in doing so, the group has ensured that its own business and investments adhere to the highest standard of governance and universally accepted environmental, social and governance criteria. Everstone is committed to a business model of investing in companies and sectors responsibly towards its investors and employees while supporting its local communities. Such responsibility in business brings the need to collaborate with advisers and experts who bring wisdom and knowledge that are at par with global standards. Some of the authors here or the firms that they represent do exactly that.

Key legislation and regulators

In addition to the various institutions and government initiatives at the union and state levels, some key laws that rule the M&A landscape in India are, inter alia:

- the Companies Act 2013: administered by the Ministry of Corporate Affairs, the Companies Act is the primary legislation governing companies and mergers;
- securities regulations: the securities markets are regulated by the Securities and Exchange Board of India (SEBI) – the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (the Takeover Code) govern substantial stake acquisitions in publicly listed companies; the SEBI (Delisting of Equity Shares) Regulations 2009 govern take-private transactions;
- the Foreign Exchange Management Act 1999 (FEMA): administered by the Reserve Bank of India (RBI) and the government of India, FEMA, the rules issued by the government of India thereunder as well as the associated RBI regulations regulate capital inflows and outflows;
- the Competition Act 2002: the Competition Commission of India, the regulator established under the Competition Act, grants antitrust approvals;
- the Income Tax Act 1961: administered by the Income Tax Department, the Income Tax Act along with double tax avoidance treaties entered into by the Indian government govern the tax treatment of M&A transactions; and
- the Insolvency and Bankruptcy Code 2016 (IBC): administered by the National Company Law Tribunals, the IBC regulates auction sales under a corporate insolvency resolution process.

All these laws and regulations and more have their shades of black, white and grey, and at times are highly open to interpretation, requiring professional intervention to unclog the clutter.

Indian M&A market

The 'Deals in India: Annual review and outlook 2021' published by PricewaterhouseCoopers indicated deal value in 2020 nearly retained momentum with the previous year. It further stated that, at an aggregate level, deal values amounted to little over US$80 billion across around 1,268 transactions, which was a 7 per cent increase in terms of value compared with 2019.[2]

Having said that, M&A transactions in the past season have suffered because of frequent lockdowns and other effects of the pandemic. Approval delays, online hearings by courts and scant staff at government agencies all have been a hindrance to expedited deal closure. On the transaction side, delays in deal closure owing to inefficiencies arising from online diligence, remote deal documentation, delayed leverage and negotiations have all had their negative impact on deal finalisation.

I wish to thank and extend my sincere gratitude to all the contributing authors who have shared their valuable learning and wisdom by participating in this effort with me and Lexology Getting the Deal Through. Special thanks to the team at Lexology Getting the Deal Through for having invited me a third time to be the contributing editor of the 2022 edition of the *Practice Guide – India M&A*.

2 Data from Venture Intelligence and VCC Edge.

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Regulatory Interventions in M&A

Rahul Chadha, Neeraj Prakash and Ashish Gupta[1]

M&A transactions in India are likely to increase in the coming years, given the importance of India as a market for global companies. Further, at a time when companies are seeking to diversify and de-risk their supply chains, India is an attractive option for companies to establish their manufacturing operations and expand inorganically.

In the past few years, there have been several legislative, regulatory and procedural reforms aimed at facilitating doing business in India. This process may accelerate, as India positions itself to attract more foreign investment and stimulate domestic growth.

As in other jurisdictions, successfully closing an M&A transaction requires knowledge and understanding of the regulatory requirements, and the ability to navigate the processes efficiently. The regulatory requirements may vary depending on the type, structure and process of the deal, and the size and market share of the companies involved.

This chapter summarises and provides insights on the important regulatory considerations (apart from tax and other cost aspects) that may help companies plan their Indian M&A transactions.

Key regulations affecting M&A deals in India

Regulations under company law

The Companies Act 2013 is the primary Indian legislation that provides the general framework for the formation and governance of a company in India. It also contains provisions (sections 230 to 240) and rules that govern M&A transactions.

While the Companies Act does not specifically set out the definition of 'merger', it does, in a generic sense, give a broad understanding of a merger to be:

- the transfer of the whole or any part of an undertaking, properties or liabilities of one or more companies to another existing or new company; or

1 Rahul Chadha is the managing partner, and Neeraj Prakash and Ashish Gupta are partners at Chadha & Co.

- the division of the whole or any part of the undertaking, property or liabilities of one or more companies to two or more existing or new companies.[2]

The applicable provisions of the Companies Act differ depending on whether the company:
- is private or public;
- is listed on a stock exchange;
- has foreign investment; or
- is in the purview of a specific regulator.

These factors will affect the process and manner in which an M&A transaction will proceed.

In addition to any other sectoral regulator or government authorities that may be involved in an M&A transaction on the basis of the type of entity and the business sector it is in, under the Companies Act, several authorities may also have a role to play, such as the Registrar of Companies (ROC), the Regional Director (RD), the Official Liquidator (OL) and the National Company Law Tribunal (NCLT). The final approval for any merger is granted by the NCLT.

Companies that propose to merge are required to file a petition (along with a detailed scheme of merger) before the NCLT to sanction the proposed merger scheme. Before any merger is approved by the NCLT, approval of the shareholders and creditors of the companies representing three-quarters in value of the creditors or members would be required. This must be achieved by conducting their meetings in the manner prescribed by the NCLT.[3]

The NCLT, at its discretion, may dispense with the requirement of holding creditors meetings upon the companies furnishing affidavits of creditors that have at least 90 per cent in value, confirming their acceptance of the scheme of merger. Although there is no specific provision for dispensation of the meeting of the members, if 90 per cent or more of the members give their consent for the proposed merger by way of an affidavit, the NCLT may, at its discretion, dispense with the requirement of holding the meeting. Any objection pertaining to the merger can only be made by members who hold not less than 10 per cent of the shareholding, or creditors that have outstanding debt amounting to not less than 5 per cent of the total outstanding debt as per the latest audited financial statement.[4]

Notices of the meetings are also sent to the RD and various government authorities and sectoral regulators, such as the ROC, the income tax authorities, the Reserve Bank of India (RBI), the Securities and Exchange Board of India (SEBI), the OL, the respective stock exchanges and the Competition Commission of India (CCI), as applicable, so as to receive objections or representations, if any, in relation to the proposed merger within 30 days of the date of receipt of notice.

If no representation is made by any regulator, it is presumed that the said regulator has no representation to make on the proposals.[5] If any of the parties to a proposed merger is a listed company, applicable SEBI regulations must be complied with.

Once the order approving the scheme of merger is issued by the NCLT, the same must be filed with the ROC for registration within 30 days of the date of receipt of the certified copy

2 Section 232(1) and explanation to section 232(8) of the Companies Act.

3 Sections 232(1) and 230(6) of the Companies Act.

4 Section 232(1) and proviso to section 230(4) of the Companies Act.

5 Sections 232(1) and 230(5) of the Companies Act.

of the NCLT's order.[6] The completion of the merger process may take a few months to a few years, depending on the complexity of the merger, the objections received from stakeholders, the sector in which the companies operate, etc.

The Companies Act sets out a fast-track merger procedure[7] without the intervention of the NCLT to simplify the merger process:

- between small companies;
- between a holding company and its wholly owned subsidiary;
- between two or more start-up companies; or
- between one or more start-up companies with one or more small companies.

In those cases, if no objections are received from the RD, the ROC or the OL for the scheme of merger, and the same is approved by a majority of members and creditors of the companies representing 90 per cent of their total numbers of shares and 90 per cent in value of their creditors, the scheme is considered to be approved.[8]

The Companies Act also provides for cross border mergers (ie, a merger between a foreign company and an Indian company, or vice versa).

Acquisitions constitute another type of M&A transaction. In accordance with market practice, an acquisition is generally effected either by transfer of existing shares or by subscribing to new shares of a company.

Regulations pertaining to M&A involving listed companies in India

An additional layer of regulatory compliances is required to be fulfilled in the case of merger or acquisition of shares of a listed company under the Securities and Exchange Board of India Act 1992 (the SEBI Act) and the rules and regulations framed thereunder. The key regulations are:

- the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (the Takeover Regulations);
- the SEBI (Issue of Capital and Disclosure Requirements) Regulations 2018 (the ICDR Regulations); and
- the SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 (the LODR Regulations).

The Takeover Regulations apply to all direct and indirect acquisitions of shares or voting rights or control in a listed company in India, except to companies listed on the institutional trading platform of a stock exchange without making any public issue.[9]

According to the Takeover Regulations, the acquirer is under an obligation to make a public announcement of an open offer for acquiring shares of the target listed company in certain scenarios, such as if:

- the acquirer acquires shares or voting rights in a target listed company that, along with the shares or voting rights, if any, already held by the acquirer and the persons acting in concert

6 Section 232(5) of the Companies Act.
7 Section 233 of the Companies Act.
8 Section 233(1)(b) and (d) of the Companies Act.
9 Regulation 1(3) of the Takeover Regulations.

(PACs) with the acquirer entitles them to exercise 25 per cent or more of the voting rights in the target company,[10]
- the acquirer acquires, directly or indirectly, control over the target company;[11] or
- the acquirer (along with the PACs) already holds more than 25 per cent or more voting rights in the target company and desires to acquire more shares or voting rights in a financial year entitling them to exercise more than 5 per cent of the voting rights, provided that the aggregate shareholding pursuant to the acquisition does not exceed the maximum permissible non-public shareholding (ie, 75 per cent), except in the case of an acquisition made pursuant to a resolution plan approved under section 31 of the Insolvency and Bankruptcy Code 2016 (IBC).[12]

An open offer for acquiring shares must be for at least 26 per cent of the total shares of the target company.[13]

In certain types of acquisitions (eg, inter se transfers of shares among immediate relatives, promoters, etc), the Takeover Regulations provide an exemption from the requirement of making an open offer to the shareholders.

An acquirer who already holds (along with the PACs) shares or voting rights in a target company entitling them to exercise 25 per cent or more of the voting rights can acquire additional shares in the target company by making a voluntary public announcement of an open offer to the shareholders, provided that the aggregate shareholding post-offer does not exceed the maximum permissible non-public shareholding (ie, 75 per cent).[14] The size of the offer in the case of a voluntary open offer should be for the acquisition of at least the number of shares that would entitle the acquirer to exercise 10 per cent of the voting rights of the target company, provided that the shareholding of the acquirer (along with the PACs) post-acquisition does not exceed the maximum permissible non-public shareholding.[15]

According to the Takeover Regulations, the price paid for the shares should include any price paid, or agreed to be paid, to the promoters for their shares or voting rights or control premium, or as non-compete fees, or otherwise.

If an acquirer who makes a public announcement of an open offer to acquire shares of the target company intends to delist the securities of the target company, the acquirer must declare their intention to delist the shares upfront at the time of making the open offer, as well as at the time of making the detailed public statement, which must be published not later than five working days of the date of public announcement of the open offer.[16]

In the case of an acquisition of shares by way of subscription of shares, the subscription must be carried out in accordance with the ICDR Regulations. The specified securities allotted on a preferential basis and the equity shares allotted pursuant to exercise of options attached

10 Regulation 3(1) of the Takeover Regulations.
11 Regulation 4 of the Takeover Regulations.
12 Regulation 3(2) of the Takeover Regulations.
13 Regulation 7 of the Takeover Regulations.
14 Regulation 6 of the Takeover Regulations.
15 Regulation 7(2) of the Takeover Regulations.
16 Regulation 5A read with regulation 13(4) of the Takeover Regulations.

to warrants issued on a preferential basis are subject to lock-in for periods ranging between six months and 18 months, as prescribed under the ICDR Regulations[17].

The ICDR Regulations also provide some exceptions to the transfer restrictions.[18]

In the case of M&A transactions pursued by listed companies in India, the companies are required to comply with the LODR Regulations. As and when a listed company plans to undertake a scheme of arrangement, the listed company must file the draft scheme of arrangement with the stock exchange or exchanges for the purpose of obtaining an observation letter or no-objection letter.[19] Only after receipt of the observation letter or no-objection letter can the company file a scheme of arrangement before the NCLT seeking its approval.[20]

Upon sanction of the scheme, the company must inform the stock exchanges and file the requisite documents, as mentioned in the LODR Regulations.[21] The LODR Regulations provide some exceptions to the above-mentioned obligation in cases of (1) mergers of a wholly owned subsidiary with its holding company, and (2) a reconstruction proposal approved as part of a resolution plan under section 31 of the IBC, in which case the only requirement is to file the draft scheme of arrangement within the statutory timelines with the stock exchanges for the purpose of disclosure.[22]

Regulations under competition law

The Competition Act 2002, read with the CCI (Procedure in regard to the transaction of business relating to combinations) Regulations 2011 (the Combination Regulations), requires mandatory pre-notification of all acquisitions (of shares, voting rights, assets or control) and mergers and amalgamations that cross jurisdictional thresholds (combinations) relating to a specified value of assets or turnover, to the CCI for its approval prior to completion of the transaction, unless specific exemptions apply.

- In general, the Competition Act prohibits combinations that cause, or are likely to cause, an appreciable adverse effect on competition (AAEC) within the relevant market in India. Any such combination is void.
- A combination subject to a notification requirement cannot be consummated until clearance from the CCI has been obtained or a review period of 210 calendar days from the date of notification to the CCI has passed, whichever is earlier.
- The thresholds for mandatory pre-notification are set out in terms of assets or turnover in India and abroad. These thresholds are as follows:
  - At the enterprise level, the parties to the combination, jointly have (1) in India, assets valued at more than 10 billion rupees or turnover of more than 30 billion rupees; or (2) in India or outside India, in aggregate, assets valued at more than US$500 million,

17 Regulation 167 of the SEBI (Issue of Capital and Disclosure Requirements) Regulations 2018 (the ICDR Regulations).

18 Regulation 168(1) of the ICDR Regulations.

19 Regulation 37(1) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 (the LODR Regulations).

20 Regulation 37(2) of the LODR Regulations.

21 Regulation 37(5) of the LODR Regulations.

22 Regulations 37(6) and 37(7) of the LODR Regulations.

including at least 5 billion rupees in India, or turnover more than US$1.5 billion, including at least 15 billion rupees in India; or
- At the group level, the group acquirer to the combination jointly has (1) in India, assets valued at more than 40 billion rupees or turnover of more than 120 billion rupees; or (2) in India or outside India, in aggregate, assets valued at more than US$2 billion, including at least 5 billion rupees in India, or turnover of more than US$6 billion, including at least 15 billion rupees in India.

- The de minimis exemption, or small target exemption, for a transaction is available if the transaction does not qualify as a combination under the Competition Act. Accordingly, any enterprises that are party to a combination where the value of assets being acquired, taken control of, merged or amalgamated is not more than more than 3.5 billion rupees in India or where the turnover is not more than 10 billion rupees in India, are exempted from the pre-notification requirement under the Competition Act. The de minimis exemption is presently available until 28 March 2027.[23]

The value of assets and turnover provided above are determined by taking the book value of the assets, as shown in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of the proposed transaction falls.

Other exemptions include the following.

- A 'group' has been defined as two or more enterprises that, directly or indirectly, are in a position to exercise 26 per cent or more of the voting rights in the other enterprise, appoint more than 50 per cent of the members of the board of directors in the other enterprise, or control the management or affairs of the other enterprise. The government had exempted groups exercising less than 50 per cent of the voting rights in other enterprises from the provisions applicable on combinations until 3 March 2021.[24] No notification for further extension had been issued as at 25 August 2022.
- Generally, it is the responsibility of the acquirer to notify the CCI, but in cases involving mergers or amalgamations, it is the joint responsibility of all the concerned parties to file the notification.
- The notice to the CCI disclosing the details of the proposed combination must be given within 30 days of either (1) the execution of any agreement or other document for acquisition or acquisition of control, or (2) the approval of the proposal relating to a merger or amalgamation by the board of directors of the parties concerned; however, to alleviate the stringent reporting requirements, the government has provided an exemption from this obligation to give notice within 30 days, subject to the condition that no combination shall come into effect until 210 days have passed from the day on which notice was given to the CCI, or the CCI has approved the combination, whichever is earlier.[25] The exemption is valid until 28 June 2027.[26]

23 Notification No. SO 1192(E) dated 16 March 2022.

24 Notification No. SO 673(E) dated 4 March 2016

25 Notification No. SO 2039(E) dated 29 June 2017

26 Notification No. SO 1192(E) dated 16 March 2022

- On receipt of a notice, the CCI conducts its investigation in two phases.
  - In the first phase, within 30 working days from the date of notification, the CCI determines, prima facie, whether the proposed combination is likely to cause an AAEC. If the CCI is of the opinion that the proposed combination will not cause an AAEC, it will approve the combination.
  - If the CCI forms a prima facie opinion that the combination is likely to have an AAEC, it will conduct a second phase in-depth investigation during a statutory period of 210 calendar days. After investigation, the combination may be approved, rejected or approved with modifications by the CCI.
- The Competition Act has extraterritorial application, thereby extending the jurisdiction of the CCI to transactions outside India. The implication is that combinations where the assets or turnover of the entities involved are in India and where the assets or turnover exceed the prescribed thresholds provided in the Competition Act shall be subject to scrutiny by the CCI, even if the purchasers, sellers or target entities are outside India.
- Pursuant to an amendment to the Combination Regulations in 2019, a green channel has been established with the CCI. Under the green channel, the parties to certain categories of combinations have the option to opt for green channel approval.

Upon filing under the green channel and an acknowledgment of receipt from the CCI thereof, the proposed combination is deemed to be approved by the CCI.

Green channel approval may be sought if the parties to the combination, their respective group entities or any entity in which they, directly or indirectly, hold shares or control:

- do not produce or provide similar or identical or substitutable products or services;
- are not engaged in any activity relating to the production, supply, distribution, storage, sale or service or trade in products or provision of services that are at different stages or levels of the production chain; and
- are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade in products or provision of services that are complementary to each other.

Certain changes are proposed to be made in the Competition Law by way of an amendment in the existing Competition Law. The amendment, among other things, proposes to introduce a new deal value threshold, requiring notification and approval of the competition regulator in the case of a combination or acquisition of business in India.

Extent of foreign investment in India and sector-specific regulations

M&A deals in India involving foreign exchange, including cross-border M&A, are subject to a strict framework of regulations and guidelines prescribed under the Foreign Exchange Management Act 1999 (FEMA), administered by India's central bank, the RBI.

The main regulations are the Foreign Exchange Management (Non-debt Instruments) Rules 2019[27] and its amendment in 2022[28] (the NDI Rules), the Foreign Exchange Management

27 Notification No. SO 3732(E) dated 17 October 2019.

28 Notification No. SO 1802(E) dated 12 April 2022.

(Debt Instruments) Regulations 2019[29] and its amendment in 2021[30] and the Foreign Exchange Management (Cross-Border Merger) Regulations 2018[31] (the Cross-Border Merger Regulations).

In addition, the government, through the Department for Promotion of Industry and Internal Trade of the Ministry of Commerce and Industry, issues policy guidelines from time to time relating to foreign investment in India (the FDI Guidelines). The FDI Guidelines and the above-mentioned regulations broadly govern the mode through which foreign investment can flow into and out of India, the prescribed instruments that can be used, the sectoral caps for foreign investments and the entry conditions attached thereto. The conditions may include norms for minimum capitalisation, lock-in period, local sourcing, etc.

Acquisition of an Indian company can be done either through the 'automatic route' or the 'approval route', as mandated by the FDI Guidelines.

- Under the automatic route, neither the acquirer or non-resident investor nor the Indian company requires any approval from the government for the acquisition or investment.
- Under the approval route, prior approval of the government is required. The requirement of following the approval route and the extent of the acquisition of shares and control of the Indian target or investee company largely depend on the business activities of the Indian company. In some cases, it also depends on the source country of the investment flowing into India.

The FDI policy prescribes the sectoral caps for acquisition or investment in the capital of an Indian company. An illustrative list of such caps is as follows:

- manufacturing, including contract manufacturing: 100 per cent for the automatic route;
- single-brand retail trading: 100 per cent for the automatic route, subject to a condition that foreign direct investment of more than 51 per cent requires local sourcing of at least 30 per cent of the value of the goods procured;
- e-commerce: 100 per cent for the automatic route in the marketplace model;
- defence industry: 74 per cent for the automatic route, more than 74 per cent for government approval; and
- railway infrastructure: 100 per cent for the automatic route.

There are a few business sectors in which foreign investment is prohibited, such as the lottery business, chit funds, real estate business, manufacturing of cigars, cigarettes, atomic energy, etc.

In April 2020, the government broadened the country-specific approval requirement to curb opportunistic takeovers of Indian companies that are in financial distress owing to the covid-19 pandemic.[32] Accordingly, an entity of a country that shares a land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country can invest only through the approval route. As this requirement is because of a specific situation, it may be changed or withdrawn later.

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29 No. FEMA 396/2019-RB.

30 No. FEMA 396(1)/2021-RB dated 13 October 2021.

31 No. FEMA 389 /2018-RB.

32 Notification No. SO 1278 (E) dated 22 April 2020.

Regulations pertaining to cross-border mergers

To operationalise the enabling provisions under the Companies Act regarding cross-border mergers, the RBI has issued the Cross-Border Merger Regulations, which provide its operational framework. A cross-border merger is a merger, amalgamation or arrangement between an Indian company and a foreign company.

Cross-border mergers can either be inbound or outbound. An inbound merger is a cross-border merger where the resultant company is an Indian company. An outbound merger is a cross-border merger where the resultant company is a foreign company. Resultant company means an Indian company or a foreign company that takes over the assets and liabilities of the companies involved in the cross-border merger.

In the case of an inbound merger:

- the resultant Indian company is allowed to issue or transfer any security to a non-resident outside India in accordance with the pricing guidelines, entry routes and sectoral caps, in accordance with the NDI Rules;
- an office of the foreign company situated outside India is deemed to be a branch of the resultant Indian entity post-merger, and the resultant Indian entity is permitted to undertake any transaction through the foreign branch, as permitted under FEMA;
- any borrowings of the foreign company from overseas sources that become borrowings of the resultant Indian entity, or are entered into the books of the resultant Indian company pursuant to the merger, are required to comply with the guidelines for external commercial borrowing of the RBI within a two-year period, provided that no remittance for repayment of such liability is made from India within that two-year period; and
- any asset or security that is acquired abroad by the resultant Indian company owing to the cross-border merger, which is not permitted to be held by it under FEMA, is required to be sold within a period of two years from the date of sanction of the scheme of merger by the NCLT, and the sale proceeds must be remitted to India. Similarly, any liability outside India that cannot be held by the resultant Indian company must be extinguished from the sale proceeds of the aforementioned overseas assets within a period of two years from the date of the NCLT's sanction of the scheme of merger.

In the case of an outbound merger:

- a person resident in India can acquire securities of a foreign company pursuant to the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations 2004 or within the limit prescribed under the Liberalised Remittance Scheme, namely up to US$250,000 per financial year;
- an office of the Indian company in India is deemed to be a branch office of the resultant foreign company and is governed by the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations 2016;
- any outstanding borrowings or guarantees of the Indian company that become the liabilities of the resultant foreign company pursuant to the cross-border merger are required to be repaid by the resultant foreign company in accordance with the scheme of merger sanctioned by the NCLT; and
- any asset or security that is acquired in India by the resultant foreign company pursuant to the merger that cannot be held by it pursuant to FEMA must be sold within a period of

two years from the date of sanction of the scheme of merger, and the sale proceeds must be repatriated outside India. Any Indian liabilities may be repaid from those sale proceeds within that two-year period.

An Indian company is permitted to merge with a company incorporated in any of the notified foreign jurisdictions. The notified foreign jurisdiction includes countries:

- whose securities market regulator is a signatory to the Multilateral Memorandum of Understanding of the International Organization of Securities Commissions or a signatory to the bilateral memorandum of understanding with SEBI; or
- whose central bank is a member of the Bank for International Settlements; and
- that are not identified in the public statement of the Financial Action Task Force (FATF) as a jurisdiction that has strategic anti-money laundering or combating the financing of terrorism deficiencies to which countermeasures apply, or a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the FATF to address the deficiencies.

If any transaction on account of a cross-border merger is undertaken in accordance with the above-mentioned regulations, it is deemed to be approved by the RBI.

Court or tribunal involvement

The process of mergers in India, including cross-border mergers, is court-driven and is sanctioned by the NCLT. The process may be initiated by an agreement between the parties; however, that would not be sufficient to provide legal validity to the transaction.

The NCLT, among other things, takes the following aspects into consideration while supervising the process of mergers:

- determination of the class of creditors or of members whose meetings have to be held for consideration of the proposed merger;
- determination of the values of the creditors or the class of members whose meetings have to be held;
- fixing of the quorum, procedure and voting mechanism to be followed at the meetings of shareholders and creditors; and
- issuance of notices to the central government, the ROC, Income-tax authorities, the RBI, SEBI, the CCI and stock exchanges, as may be applicable.

The NCLT also has the power to direct provisions relating to dissenting persons to the transaction and the treatment of employees.

On sanction of the scheme of merger by the NCLT, it becomes binding on all the creditors, shareholders, and companies involved in the merger.

Acquisition of distressed assets through corporate insolvency resolution process

The prime objective of the IBC is to provide a consolidated legal framework for reorganisation and insolvency resolution of companies. While the IBC does not directly deal with M&A, the insolvency process creates an opportunity for potential acquirers to acquire assets of stressed companies, whereby the acquirer may be able to acquire assets at a lower valuation than in ordinary circumstances.

The process of acquisition of a company (corporate debtor) under the IBC begins with the submission of a resolution plan by the potential acquirer (resolution applicant) to the resolution professional proposing the acquisition, followed by an approval of the resolution plan by the committee of creditors of the corporate debtor and, finally, sanction of the resolution plan by the NCLT.

Any person can be a resolution applicant, except a person who is disqualified to be a resolution applicant pursuant to the IBC, such as a person who:

- is an undischarged insolvent;
- is a wilful defaulter in accordance with the guidelines of the RBI;
- is prohibited by SEBI from trading in securities or accessing the securities markets;
- has been a promoter or in the management or control of a corporate debtor in which a preferential transaction, undervalued transaction, extortionate credit transaction or fraudulent transaction has taken place, who, at the time of submission of the resolution plan, has an account that is classified as a non-performing asset according to the guidelines of the RBI, etc.

An acquisition by way of implementation of a resolution plan has been granted various regulatory exemptions, including under the Takeover Code, the ICDR Regulations and the Companies Act (seeking of shareholders' approval); however, if the combined values of the assets or turnovers of the resolution applicant (potential acquirer) and the target (corporate debtor) cross the thresholds prescribed under the Competition Act, it will be mandatory for the resolution applicant (potential acquirer) to obtain prior approval for the proposed acquisition from the CCI, and until then, the committee of creditors cannot approve the resolution plan.

Other regulatory considerations

Sector-specific regulations

There are some sector-specific regulations and regulators to regulate acquisitions in those sectors. Accordingly, additional approvals from those regulators may be required to complete an M&A transaction. For example, in the context of an acquisition of an insurance company, approval from the Insurance Regulatory and Development Authority of India is required. RBI approval is required for an acquisition of banking companies and non-banking financial companies (NBFCs).

The sector-specific regulations for insurance companies are triggered on the basis of the percentage of shareholding being acquired by the acquirer, and prescribe certain lock-in requirements, infusion of capital at periodic intervals, etc.

Similarly, the RBI's Master Direction – Amalgamation of Private Sector Banks, Directions 2016[33] provides guidelines for the amalgamation of two banking companies, the amalgamation of an NBFC with a banking company, and the amalgamation of a banking company with an NBFC.

Employment-related regulations

In the context of M&A transactions, section 25FF of the Industrial Disputes Act 1947 provides that when the ownership or management of an undertaking is transferred to a new employer, an

33 RBI/DBR/2015-16/22.

eligible employee is entitled to notice and retrenchment compensation from the employer of the undertaking. Such compensation is not applicable if the service of the employee

- has not been interrupted by the transfer;
- the new terms and conditions of service applicable to the employee after the transfer are not less favourable to the workman; and
- the new employer is, under the terms of the transfer, legally liable to pay compensation to the employee in the event of their retrenchment.

However, the Supreme Court[34] has observed that without their consent, employees cannot be forced to work under a different management, and if they do not give their consent to the transfer, those employees are entitled to retrenchment compensation.

The NCLT is also empowered to issue necessary directions on treatment of the workforce while sanctioning a scheme of amalgamation.

34 *In the matter of Sunil Kr Ghosh v K Ram Chandran* (2011) 14 SCC 320.

About the Authors

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Rahul Chadha is the managing partner of Chadha & Co. He works closely with senior management of leading multinational companies on strategy formulation, M&A, infrastructure projects, private equity and venture capital, corporate governance, government policy and regulatory and management issues that affect their business in India.

Rahul is a member of the board of directors of the Indian subsidiaries of several leading multinational companies. He has served on the board of a leading international association of law firms, accounting firms and tax advisers. Rahul is actively involved in mentoring start-ups and is a Charter Member of The Indus Entrepreneurs (TiE) and co-founder of the joint mentoring programme of IIM Bangalore and IIT Delhi for start-ups. He is a sought-after speaker and is the author of several articles and chapters on Indian laws and regulations for domestic and international publications.

In addition to his degree in law, Rahul holds a bachelor's degree in electronics and communications engineering from the University of Delhi and an MBA from the Indian Institute of Management Bangalore.

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Neeraj Prakash is a partner at Chadha & Co, with more than 19 years' experience of successfully practising corporate and commercial law. Neeraj practises in the areas of infrastructure projects, M&A, joint ventures, government tenders, corporate and commercial transactions (including deal structuring, negotiation, documentation and execution of transactions), foreign direct investment and the set-up of businesses in India, competition law and general corporate legal and regulatory advisory.

Neeraj has represented companies ranging from start-ups to multinationals and leading Indian corporates. He has practised in industries including infrastructure (with a special focus on the construction, railway and power sectors), manufacturing, automobiles, logistics, healthcare, retail, consumer electronics and banking and is regularly involved in cross-border matters.

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Ashish Gupta is a partner in the corporate practice of Chadha & Co, with over 22 years' experience in corporate and commercial matters, advising foreign companies doing business in India.

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Ashish is also a qualified company secretary and, with his team, he handles the secretarial matters of client companies, including maintaining all statutory records and making regulatory filings with government authorities. He has extensive experience in dealing with ministries, government departments and government authorities.

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