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Understanding the Regulatory Landscape for Mergers and Acquisitions in

INDIA & GERMANY

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Foreword

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It is with great pleasure that we present this Handbook titled : **"Understanding the Regulatory Landscape for Mergers and Acquisitions in India and Germany"** a collaborative effort by FICCI, Amarchand & Mangaldas & Suresh A. Shroff & Co., a leading Indian law firm in India and Hengeler Mueller, a leading law firm in Germany.

This report is an initiative to provide an overview of the M&A framework in India and Germany including the regulatory environment in both countries, the impact of respective regulatory interventions, opportunities for access to finance, insights on optimising tax planning, labour related requirements, avenues of investment. This publication also maps the latest transaction statistics and trends in both countries.

With the global economy on road to recovery, companies are now scouting beyond their traditional target geographies and sectors leading to an increase in cross-border deals and multinational trans-country joint ventures. The release of this Handbook thus comes at the most opportune time. People of India have recently elected a new government with a decisive mandate and their overwhelming support has come with high expectations. The new Government's focus on encouraging 'Make in India' and facilitating the business environment in the country is translating on the ground in the form of labour reforms, nation-wide financial inclusion and digitisation initiatives, policy measures focusing on industry-friendly regulations, easing of restrictions for FDI, etc. A facilitative regulatory landscape would provide further impetus to both in-bound and out-bound M&A activity in India.

We hope that this Handbook would provide useful insights to both Indian and German companies looking to invest in each other's country.

We are thankful to our partners for sharing their knowledge and insights for this publication.

Sidharth Birla

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Part 1
Mergers & Acquisitions in Germany

Executive Summary

When Dr. Frank-Walter Steinmeier, the German Foreign Minister recently visited India, Mr. Narendra Modi, the Prime Minister of India described Germany and India as ''made for each other''. Those who have been following the business relations between Germany and India for the last many decades, this was certainly no surprise.

Germany is India's principal trading partner in the EU. Germany's trade surplus of around EUR 3.4 billion (2012/13) testifies to the strong Indian demand for German goods, especially capital goods (machinery, which accounts for around a third of Germany's total exports to India), electro technology, metal goods, chemical products, motor vehicles and vehicle parts. Beside goods, Germany offers a lot of opportunities for the Indian companies to invest and grow their business. Based on our experience, some key sectors in Germany which are attractive for the Indian companies to invest in are renewable energy, automotive, technology and IT.

This article does not aim to be a comprehensive guide to the German legal framework governing mergers and acquisitions and is no substitute for in-depth legal advice. However, we certainly hope that the article helps the readers in getting a basic understanding of the relevant laws and issues for doing M&A in Germany. While the German legal framework may be complex and often pose challenges e.g. in areas like corporate, labour, tax or regulatory, the German M&A practice is highly developed and provides a reliable basis for successful expansions by international investors into the German and European market.

1 Introduction

Germany and India are 'made for each other'; this is how the new Prime Minister of India, Mr. Narendra Modi, chose to describe the two nations. For those who have been following the business relations between Germany and India, for the last many years, this was not a surprise. Germany is India's principal trading partner in the EU. Germany's trade surplus of around EUR 3.4 billion (2012/13) testifies to the strong Indian demand for German goods, especially capital goods (machinery, which accounts for around a third of Germany's total exports to India), electro technology, metal goods, chemical products, motor vehicles and vehicle parts. Beside goods, Germany offers a lot of opportunities for Indian companies to invest and grow the own business. The time is right.

Germany has been witnessing an increased optimism about M&A activity in recent years. Statistics on deal value and the number of deals show that the first half of 2014 is on par with the same period in 2013. Both inbound and outbound M&A are active with the US-based companies being the top inbound acquirers.

Industrials and chemicals remain the lead industry both in terms of deal and value. In terms of value, energy, mining and utilities rank second. However, this is mainly due to the highest value inbound deal in 2014 when Letter One Group signed an agreement to acquire RWE Dea for EUR 5.1 billion.

Following subdued M&A markets in the years since the beginning of the financial and sovereign debt crisis in 2007, in 2012, for the first time, we saw a noticeable recovery, in particular in the last few months of the year. Market activity further increased in 2013 and 2014 so far. However, both in the global markets as well as in Germany, the growth of the M&A market materialised rather in a (significant) increase of deal volumes rather than increased numbers of transactions.

Also, even if the tendency towards purely national/domestic transactions remained steady, it is significant to note that the majority of the top 10 transactions involving Germany were cross-border transactions.

The most important deals in the second half of 2013 involving German bidders, targets or sellers were among others the telecommunications transactions mentioned before, the sale by Franz Haniel (a traditional family-owned business) of its subsidiary Celesio AG, a drugs wholesaler, to McKesson (US$8 billion), the secondary LBO acquisition of Springer Science & Business with a deal volume of US$4.4 billion (seller: EQT), the sale by Röhn-Klinikum AG of 43 hospitals to Helios Kliniken GmbH, a large existing German operator of hospitals, with a deal volume of more than US$4 billion, and the sale by Bayern LB of its residential property holding company GBW to an investor group for US$3.2 billion.

The biggest deals in 2014 so far include the sale of RWE Dea to LetterOne Group (€5.1bn), the sale by Franz Haniel of its subsidiary Celesio AG to McKesson (approx. €5bn), the acquisition of 21st Century Fox's 57.4% stake in Sky Deutschland by BSkyB (€3.6bn), the acquisition of the 50% stake in BSH Bosch and Siemens Haushaltsgeräte by Bosch (€3bn), the sale of Rolls-Royce Power Systems AG (50% Stake) to Rolls-Royce Plc by Daimler AG (€2.4bn) and the sale of Flint Group to Goldman Sachs; and Koch Equity Development LLC by CVC Capital Partners Limited (€2.2bn).

Also significant for the M&A market, in terms of initial public offerings, the market remains low in comparison to pre-crisis levels although a certain degree of revival is evident. IPOs in 2013 included the initial public offering of LEG Immobilien, the IPO of Evonik, the re-IPO of RTL Group, the IPO of Kion and the long-expected public flotation of Osram in July 2013. In 2014 so far has been the uptick in IPO activity in almost all major markets. Deal volume and proceeds reached the midpoint of the year at levels more than 60% higher than at the same time 12 months ago, with expectation of more to come in the second half of 2014. Investor confidence has been further bolstered by the predominantly solid aftermarket performance of companies that have gone public and the robust pipeline of IPO-ready businesses, indicating that there will be no shortage of opportunities in the remainder of 2014. Some of the major recent IPOs in 2014 in Germany include Zalando and Rocket Internet from the ecommerce sector – which did not, however, start quite as successfully as expected. Depending on the stock market performance there are more IPOs likely.

2. Legal and corporate environment; M&A process

2.1 General

In Germany, most private transactions are implemented via share deals. Even in situations where business divisions or partial businesses are divested, the sellers seek to complete the carve-out in the pre-signing or pre-closing period with the objective to solely assign the shares in NewCo at closing (instead of transferring individual assets). Public transactions are almost exclusively implemented by means of a tender offer. Mergers (including cross-border mergers) are possible, but rare.

Process-wise, larger and medium-sized private targets are mostly sold through auction proceedings, both by industrial sellers and by private equity investors. Auction sales are organized in a typical manner, starting with a "teaser" being sent out to potential investors and subsequently, a more detailed information memorandum, followed by preliminary bids. Selected bidders will then be given the opportunity to conduct an initial due diligence investigation and are invited to submit "final" offers (which are usually not yet binding due to provisos and form requirements governing most acquisition agreements). After another phase of due diligence, potentially another round of offers and a condensed phase of negotiations (often simultaneously with several bidders), the seller and the successful purchaser will enter into an acquisition agreement, which will be consummated typically after a couple of weeks or months needed in order to obtain the requisite merger control approvals.

2.2 Legal Framework

M&A transactions are less regulated in Germany than in some other countries, leaving aside public deals and specific regulatory requirements, in particular under merger control laws.

The German Civil Code (BGB) contains the general framework governing civil law contracts. There are no specific rules governing business acquisition agreements. The general provisions on sale and purchase contracts, in particular regarding representations and warranties, are generally deemed inappropriate for modern M&A transactions. Therefore, not surprisingly, M&A contracts usually set up their own regime of warranties and liability.

The Commercial Code (HGB) includes detailed accounting rules (German GAAP and IFRS), providing, also for disclosure obligations for publicly listed companies in respect of agreements or matters that may frustrate a takeover offer, e.g. material agreements with third parties which also include a change of control clause. The Commercial Code also contains provisions governing commercial partnerships.

While the Limited Liability Companies Act (GmbH-Gesetz) governing limited liability companies is relatively brief and affords the shareholders a substantial degree of flexibility, the Stock Corporation Act (Aktiengesetz) is a rather comprehensive statute providing for detailed, complex and mostly mandatory rules on the establishment and governance of the stock corporation.

The main source of regulation for public takeovers in Germany is the Takeover Act (Wertpapiererwerbs- und Übernahmegesetz – WpÜG), as amended in 2006 to implement the EU Takeover Directive (see section 8 below).

The Securities Trading Act (WpHG) contains provisions relating to insider dealing, which make dealing in securities based on inside information a criminal offence.

The Act on Corporate Transformations (Umwandlungsgesetz) contains the mechanics for a process of a statutory merger between two German companies. It also contains the most important provisions regarding corporate restructurings that can be relevant both in the post-closing phase or in connection with any pre-closing carve-out or other corporate restructurings.

Merger control by the Federal Cartel Office (Bundeskartellamt) pursuant to the Act Against Restraints of Competition has a major impact on most mergers and acquisitions. Please see section 5 of this Article for a detailed discussion on the anti-trust related issues.

2.3 Types of Companies

Various details of the transaction structure will depend on the corporate form of the target entity. Likewise, the buyer will often want to use an acquisition entity (SPV) and will need to decide on the most suitable type of company.

The limited liability company (Gesellschaft mit beschränkter Haftung or GmbH) is the most common form of incorporation in Germany. It is designed to be used as a closely held or private corporation and has a very flexible corporate governance regime, where the shareholders' meeting is the ultimate decision making body and may give instructions to the management (Geschäftsführung) also on day-to-day transactions. Powers of the shareholders' meeting may also be delegated to shareholder committees, advisory boards or similar bodies, where also non-shareholders may be represented.

The stock corporation (Aktiengesellschaft or AG) is the form of incorporation which is typically used for large publicly held companies. Its shares can be listed and traded on the stock market. Its downsides are stricter capital maintenance and financial assistance rules than for a GmbH and, in particular, a very rigid corporate governance regime, where the management board (Vorstand) is generally not bound by instructions of other corporate bodies, but only subject to supervision by the supervisory board (Aufsichtsrat) and the powers of the general meeting of shareholders are fairly limited.

Partnerships, in particular limited partnerships, are widespread in family-owned companies. A frequently encountered combination of the commercial partnership and the corporation is that of a limited partnership (Kommanditgesellschaft or KG) in which the only general partner is a GmbH (GmbH & Co KG). In its typical form, the shares in the GmbH are held exclusively by the limited partners of the KG and the percentage of their shareholding in the GmbH is equal to their interests in the KG. The GmbH normally has no equity interest in the KG and is entitled to only a small compensation for the assumption of personal liability and reimbursement of expenditures.

2.4 Impact of corporate law, e.g. on the due diligence process

German corporate law may impact the process of an M&A transaction in particular with regard to the due diligence process. If the target is a stock corporation, the final decision on the scope of any disclosed information is with the executive board of the target that has to decide how much information is appropriate to be disclosed taking into account its fiduciary duties, confidentiality restrictions, the progress of the transaction as well as rules on inside information. If a shareholder of a GmbH wishes to sell its share, management will require a shareholders' resolution in order to make available information to potential buyers, which, arguably, has to be unanimous.

No equal treatment is required to be given to competing bidders. In particular, the scope of disclosure to competitors will often be more restricted than, for example, to financial investors.

3. Financing of M&A deals

Acquisitions need to be financed, whether from internal or external sources, or both. There are various ways of procuring internal financing, which include, inter alia, the generation of additional cash flow, in particular by tax savings from higher depreciation or amortization resulting from an asset step-up, the divestment of disposable assets, and sale and leaseback transactions.

3.1 External financing

Equity is the capital provided by the owners of the business and by the company. It is committed capital and unlike a loan to the business or company, it cannot be freely withdrawn. Equity ranks last in the event of insolvency or liquidation. The form equity takes will depend on the type of business organization concerned. Capital injections into corporations need not necessarily be accompanied by an increase of the registered (stated) capital, but may be made into the company's reserves.

Debt may be divided into senior debt and mezzanine debt.

(i) Senior debt – it ranks highest in the event of bankruptcy or liquidation. Senior debt typically takes the form of loans or straight bonds. Loans are in general provided by a bank or a syndicate of banks. The customary loan to finance an acquisition is the term loan, which may be secured or unsecured. As a rule, the lender will seek security for the loan.

Straight bonds, as opposed to profit-participating bonds, convertible bonds and option bonds, qualify as senior debt. The issuance of straight bonds is legally available to all business forms. However, the credit standing is required to place financing instruments of this kind successfully in the market which generally means that only large companies qualify to issue straight bonds.

(ii) Mezzanine debt – this bridges the gap between equity and senior debt in an acquisition. Simply stated, mezzanine debt is any form of financing ranking ahead of equity and (at least in certain respects) behind senior debts in the event of bankruptcy or liquidation. German law offers a variety of forms suitable for mezzanine finance, such as: subordinated loans, profit-participating loans, silent partnerships, corporate profit participation certificates (Genussscheine), profit-participating bonds (Gewinnschuldverschreibungen), convertible bonds (Wandelschuldverschreibungen), option notes (Optionsschuldverschreibungen) and vendor notes.

3.2 Ratio between equity and debt

There are no legal principles requiring a specific ratio between debt financing, on the one hand, and equity financing, on the other. In general, the shareholders or partners are free to choose whether to make funds available as debt or as equity. However, it should be noted that a shareholder granting a loan to his or her company is generally subordinated in the company's insolvency and tax-wise, the rules on deductibility of interest have to be considered.

3.3 Finance assistance

When debt finance is being used to finance an acquisition, the repayment of both capital and interest often have to be borne by the business acquired. Moreover, senior lenders will regularly, and mezzanine lenders will occasionally, require that the acquired business serve as security for the finance.

In the case of an asset purchase transaction, the fulfillment of these requirements causes little difficulty. The business acquired can be used to service the debt. Accounts receivable can be assigned for security purposes (Sicherungsabtretung), title to moveable assets and inventory can be transferred as security (Sicherungsübereignung) and real estate and buildings can also be charged (Grundpfandrechte).

In the case of a share purchase transaction, matters are more difficult. It is, of course, possible to pledge the shares in the target company to the lenders as security. However, this is not satisfactory from the financiers' point of view because a pledge over the shares ranks behind the creditors of the target. The provision of financial assistance by the target company itself, however, is subject to the applicable capital maintenance rules which vary according to the legal form of the target. Whereas any financial assistance by a stock corporation (AG) is generally prohibited, financial assistance by a GmbH is prohibited only to the extent the registered capital would be affected and any legal risks (including for the management of the GmbH) can be addressed by using appropriate 'limitation language' restricting the lenders' recourse to the GmbH in these cases.

4. Taxation

The two basic legal methods of acquiring a business – the share purchase transaction on the one hand and the asset purchase transaction on the other hand – entail substantially different tax consequences both for the seller and the purchaser.

4.1 Share Purchase Transaction

(a) Seller's position

The respective tax consequences will depend on whether the shares constitute business assets (Betriebsvermörgen) or private assets (Privatvermögen) and on whether the Seller is an individual or a corporation. Shares owned by an individual may constitute private or business assets, but shares owned by a company are always business assets.

For individual shareholders holding shares in a corporation as business assets, in general only 60% of the capital gains arising from the sale will be taxed. Shares acquired prior to 2009 and held as private assets may under certain circumstances be sold without any taxation of a capital gain. Capital gains realised by corporations from a sale of shares are generally 95% tax-exempt. Capital gains from a sale of shares held as private assets will be subject to the flat withholding tax of 25% (plus solidarity surcharge) if the shares were acquired after 2008. This is why a share purchase transaction will often be the seller's obvious choice.

(b) Purchaser's position

The tax position of a purchaser of shares is, as a rule, somewhat disadvantageous. The acquisition cost of the shares cannot be utilised for tax purposes. For tax purposes, shares cannot be depreciated or amortised and the book value of the assets of the target company cannot be stepped up. Thus, a share purchase transaction will not result in increased depreciation or amortisation and improved cash flow which the purchaser might require to service the acquisition financing.

4.2 Asset Purchase Transaction

(a) Seller's position

If a corporation sells assets, any capital gain arising therefrom is part of its ordinary income and, therefore, will be subject to corporate income tax and trade tax at ordinary rates. Certain roll-over provisions may apply to the sale of land and buildings, if and to the extent that the requirements for reinvestment in accordance with section 6b of the Income Tax Act can be fulfilled. Tax is levied, irrespective of whether the seller is a resident corporation, or is a non-resident corporation disposing of assets of a permanent establishment in Germany. As the sale of shares is generally tax-exempt for corporate shareholders, a German-resident corporate seller disposing of a business operated by a subsidiary will, therefore, prefer to dispose of the shares in the subsidiary.

If a partnership of individuals or an individual which is a sole proprietor sells single business assets, any capital gains derived therefrom are generally subject to personal income and trade tax. However, capital gains from the disposal of the entire business or a business division (Teilbetrieb) of a business by an individual are exempt from trade tax.

(b) Purchaser's position

The purchaser of assets generally has a favourable tax position. The acquisition costs can be allocated directly to the various assets acquired. This will usually allow the purchaser to step-up the tax basis of the acquired assets. Depreciation and amortisation can then be taken from the stepped-up basis, thus reducing the taxable income and increasing the cash flow of the purchaser. The purchaser of an interest in a partnership is treated as if assets had been purchased, because a partnership is transparent for income tax purposes.

The purchaser of assets will normally establish a German acquisition company which takes out the necessary financing and which can deduct the interest paid thereon from its income. For the acquisition of a partnership it is not necessary to interpose a German acquiring company, even if the purchaser is a non-resident.

4.3 Corporate Income Tax

A corporation having either its statutory seat or principal place of management and control in Germany is generally subject to corporate income tax on its world-wide net income. A uniform corporate income tax rate of 15% applies, irrespective of whether profits are distributed or retained (Corporate Income Tax Act, s.23).

Non-resident corporations are subject to German corporate income tax only in relation to specific items of German-source income. The most frequently encountered type of German-source income is generated by the operation of a permanent establishment in Germany. Such permanent establishment is typically created by a branch, or by the acquisition of an interest in a commercial partnership. The tax rate for non-resident corporations is 15%. Germany does not apply a branch profits tax or similar levy.

4.4 Taxation of dividends

Dividends distributed by a German-resident corporation are generally subject to a 25% withholding tax (Kapitalertragsteuer) plus solidarity surcharge of 5.5% of such tax. For German-resident individual shareholders holding the shares as private assets, such withholding tax satisfies the personal tax liability. All other German tax-resident shareholders are entitled to a credit for the withholding tax against their personal income tax or will receive a refund.

Non-residents of Germany may be entitled to claim a partial refund of the German withholding tax under an applicable tax treaty. Following article 10 of the OECD Model Convention, the modern German tax treaties tend to provide for a reduction to 5% for intercorporate shareholdings (Schachtelbeteiligungen) and 15% for portfolio investments (Streubesitz).

4.5 Real Estate Transfer Tax (Grunderwerbsteuer)

Real estate transfer tax is imposed on a number of transactions involving real estate located in Germany. In particular, this tax is levied on the sale or transfer of title to real estate and on the direct or indirect acquisition, by one person or a group of related persons, of 95% or more of the shares or interests in a company which owns real estate situated in Germany. The real estate transfer tax rate ranges from 3.5% to 6.5%, depending on the German State (Bundesland) in which the real estate is located. Since the transfer of an indirect shareholding of 95% or more triggers the tax, even a transfer of 95% or more of the shares in a foreign company may be subject to the tax, if such foreign company directly or indirectly, alone or together with related parties, owns 95% or more of a German or foreign company which owns real estate in Germany.

4.6 Stamp Duties and Notarial Fees

No stamp duties are payable in connection with mergers and acquisitions. However, various transactions must be recorded by a notary public in order to be effective. This applies, for example, to the sale and transfer of shares in a GmbH, or of real estate. The fees of German notaries public are set by statute and depend on the value of the transaction. A transaction value of, for example, EUR 10 million, will result in notarial fees of approx. EUR 21,000. The notarial fee is capped at a maximum amount of approx. EUR 52,000 applicable for transaction values of EUR 60 million upwards. Surcharges will apply, for example, to agreements notarized in English.

5. Merger control and other regulatory consents

5.1 Merger control

All transactions exceeding a certain size are subject to a merger control clearance either by (i) the European Commission or (ii) the Federal Cartel Office ("FCO"). The European Commission enjoys exclusive jurisdiction if the transaction results in a concentration with an EU dimension as further specified by Regulation (EC) No. 139/2004 on the control of concentrations between undertakings. Where a transaction does not fall within the exclusive jurisdiction of the European Commission, it may require clearance by the FCO.

The relevant turnover thresholds for a notification with the FCO are: (i) an aggregate worldwide turnover of the parties of more than EUR 500 million; (ii) a turnover in Germany of at least one party of more than EUR 25 million; and (iii) a turnover in Germany of at least another party of more than EUR 5 million. Under German merger control rules, the acquisition of a minority stake of 25% or more constitutes – even if it does not afford control – a transaction that must be notified. A notification is required even below this threshold if the minority stake or any other combination of undertakings enables the purchaser to exercise a competitively significant influence on the target company. The concept on which this rule is partly based upon is the aim to prevent circumvention of merger control rules, e.g. the acquisition of minority shareholdings just below the above mentioned 25% threshold.

Exceptions apply to credit institutions, financial institutions or insurance undertakings acquiring shares in another undertaking for the purpose of resale. Transactions of this type are not subject to merger control as long as the acquiring institution does not exercise the voting rights attached to the shares and provided the resale of the shares occurs within one year.

After submission of a complete notification, the FCO must decide within one month of the notification whether to clear the merger (so-called "Phase I") or, if the transaction raises competition concerns, whether to commence an in-depth investigation (so-called "Phase II"). In "simple cases" proceedings before the FCO are not overly burdensome. Mergers being subject to German merger control may not be completed before either the Bundeskartellamt cleared the transaction or the relevant waiting periods have expired (one month in Phase I, a total of four months as of the filing date in Phase II). The completion of a notifiable merger prior to clearance can lead to severe penalties (up to EUR 1 million against individuals and/up to 10% of the undertakings group turnover). It is admissible, though, to sign the SPA. Only closing needs to be postponed until after clearance.

The notification with the FCO may be filed prior to entering into binding agreements but the FCO publishes all new cases on its website which makes the transaction public and may interfere with disclosure obligations under the applicable capital markets regulation.

In 2013, about 1,100 merger control notifications were filed with the FCO, amounting to roughly the level of the two previous years; overall, the total number of notifications remains relatively low compared to the pre-financial crisis years (2008: almost 1,700 filings; 2007: more than 2,400 filings). The FCO cleared about 98% of the notified transactions within the Phase I deadline of one month. Only 18 transactions raised competitive concerns and were reviewed in more detail (Phase II proceedings), decreasing the number of Phase II proceedings by three compared to the previous year. Out of these 18 transactions, two were blocked by the FCO, one was cleared subject to remedies, and another two were abandoned by the parties themselves.

5.2 Foreign investment clearance

Under the Foreign Trade Act (Außenwirtschaftsgesetz) and the Foreign Trade Ordinance (Außenwirtschaftsverordnung), the Federal Ministry for Economic Affairs and Energy (Bundesministerium für Wirtschaft und Energie) has the authority to review an acquisition of 25% or more of the voting rights in a domestic business by an acquirer domiciled outside the territory of the European Union (EU) or the European Free Trade Association (EFTA). There is, however, no obligation to notify any such transaction to the Ministry or to seek the Ministry's approval, although it is recommended to obtain a clearance (no action) letter in potentially critical transactions. The Ministry may prohibit, or may impose conditions on, the transaction within certain deadlines to the extent required to safeguard German public order or security. The German foreign investment control also applies if the investor is an EU or an EFTA resident but a non EU/EFTA resident holds 25% or more of the voting rights in the investor or if there are circumstances indicating an intention to circumvent the Ministry's review. Similar restrictions apply with regard to acquisitions of interests in domestic companies which operate in industries sensitive to national security (primarily the weapons industry and encryption companies).

5.3 Other regulatory requirements

Additional regulatory requirements, including approval or notification requirements, may apply to M&A transactions in certain highly regulated areas, such as telecommunications, infrastructure or energy.

6. Labour law

6.1 Co-Determination

Any acquirer should be aware that in particular stock corporations and limited liability companies employing more than 500 employees in Germany need to establish a supervisory board where one third of its members are elected by the employees and two thirds of its members are elected by the shareholders. If the number of employees in Germany exceeds 2,000, the shareholders and the employees, in each case, elect 50% of the members of the supervisory board; in case of a tie, the chairman of the supervisory board who is a representative of the shareholders has a casting vote. Certain exceptions apply to specific entities such as those organized as limited partnerships and Societas Europaea (SE).

6.2 Consultation Obligation with the Economic Committee

Each enterprise in which a works council has been established and which employs more than 100 employees in Germany has to establish an economic committee (Wirtschaftsausschuss) consisting of representatives of the employees. The economic committee needs to be informed about the economic situation of the enterprise regularly and needs to be consulted in the context of M&A transactions (mergers, takeovers, demergers etc.). In the absence of an economic committee, the works council, if any, must be informed instead.

6.3 Notification of Takeovers with the Works Council

In public takeovers, the executive board of the target must notify the works council or (in the absence of a works council) all its employees of the announcement of a takeover bid. If the target's works council (in the absence of a works council, its employees) has subsequently submitted a position paper to the executive board within the relevant period, that position paper must be attached to the opinion of the target's boards. However, the target employees do not have any direct right to challenge a takeover offer in their capacity as employees.

6.4 Negotiation Obligation with the Works Council

If a deal relates only to a part of a business and therefore, requires a split of the business or massive redundancies, there is not only a consultation obligation, but the need to negotiate a compromise of interests (Interessenausgleich) and a social plan with the works council. This may have a considerable impact on the timing of transactions since the negotiation procedure may take several months and must in principle be completed before the split of the business and/or the massive redundancies.

6.5 Automatic transfer of employees in case of asset purchase transactions

In general, in case of asset purchase transactions, the employment relationships with employees who are assigned to the acquired (part of a) business will automatically transfer to the purchaser on the basis of statutory law. The relevant employees must be informed in detail about the transfer of their employment relationships and the effects of the transfer. Each individual employee has the right to object to the transfer of his or her employment relationship. The employees who make use of their objection right will remain with the seller.

7. Negotiating the acquisition agreement

A successful acquisition in Germany requires an approach adapted to the German environment and practice. The vast majority of deals are privately negotiated acquisitions of small and medium-sized private firms which are often family-owned. These transactions demand a high degree of sensitivity, diplomacy, persuasive bargaining and, sometimes, patience.

7.1 Duty to negotiate in Good faith

The mere entry into negotiations between the seller and the purchaser establishes a pre-contractual relationship which imposes various obligations on the parties, regardless of whether or not an acquisition agreement is eventually signed. These obligations also require the seller to disclose certain material information relevant to the buyer; in certain situations these disclosure requirements will be mandatory and cannot be waived in the acquisition agreement. There is no clear case law on the level of materiality, but arguably, this will depend on the type of transaction, the buyer's experience and the scope of due diligence conducted.

However, the pre-contractual obligation to negotiate in good faith does not, as such, require any party to sign the acquisition agreement and close the transaction. As long as no binding commitment has been made, either party may, in principle and subject only to very narrow exceptions, walk away from the negotiations without becoming liable for damages.

7.2 Letter of Intent

Once the negotiations have resulted in a basic agreement on the major business and legal points, the parties will often reduce their understanding to writing in a more or less summary fashion. The document drawn up in this respect may have different designations, such as a letter of intent, memorandum of understanding, heads of agreement or pre-contract (Vorvertrag). Whether or not such a document constitutes a binding commitment on the parties to enter into a definitive acquisition agreement is a matter of construction of the relevant document. Typically, a letter of intent will explicitly provide that its provisions (except for non-disclosure, exclusivity obligations, etc.) are non-binding.

7.3 Important elements of contract

The factual, legal and tax issues, as well as the interests of the seller and the purchaser, differ in each acquisition. Each transaction follows its own rules and there is no such thing as a standard acquisition agreement, although certain parts have seen an increasing degree of standardization (in line with Anglo-American practice) in recent years. Nevertheless, there are a number of issues which are typically dealt with in an acquisition contract, or which should at least be considered when drawing up the contract. These include, inter-alia, - parties, subject matter, closing and transfer date, purchase price, representations and warranties, legal remedies, statute of limitations, undertaking not to compete, arbitration, governing law, taxes and costs.

German 'style' acquisition agreements now follow well-established international standards, but, especially in the medium and smaller segments of the M&A market, tend to be somewhat more concise than Anglo-American style agreements. Generally speaking, they are often somewhat more seller friendly than their Anglo-American counterparts, although no specific standards have been established. Locked box arrangements, that is fixed purchase price arrangements, have become popular in the last M&A boom market in the years 2005 – 2007 and have survived the years of the financial crisis. Especially financial (private equity) investors exiting from their investments have been fairly successful in minimizing their representations and warranties and liability.

7.4 Formal requirements

Notarial form for the acquisition agreement is required by statute in particular for asset transactions involving the sale and conveyance of real estate and transactions involving the sale and transfer of shares in a GmbH. This means that the parties, or their proxies, must appear before a notary public (Notar) and the document must be read aloud to the parties in a formal procedure.

Where notarization is required, this formal requirement generally extends to the entire transaction. 'Side-letters' which have not been notarized jeopardise the validity of the entire transaction.

Notarial fees are set by statutory law and depend on the value of the transaction. Many transactions are required to be notarized by a German notary, while it is controversially discussed whether GmbH share sales and transfers may also be validly notarized by foreign (e.g. Swiss) notaries with an equivalent legal education.

An acquisition agreement does not need to be registered or filed (e.g. with a court or commercial register) in order to be valid. For merger control requirements, please see section 5 of this article).

8. Acquisitions of public companies

8.1 Voluntary and mandatory take-over bids

A bid may be either voluntary or mandatory. A mandatory bid is required when a party acquires voting rights in a relevant target which exceed a threshold of 30%. Inter alia, shares held by affiliates, trustees or persons who are 'acting in concert' are attributed to the relevant shareholder. Under certain (limited) circumstances, the German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht - BaFin) may grant an exemption from the requirement to make a mandatory bid.

8.2 Buying shares before making a bid; disclosure requirements

A potential bidder is generally free to buy shares (e.g. on the stock exchange) before submitting a bid, if it complies with inside trading rules and applicable disclosure requirements. A bidder that acquires material confidential inside information in the due diligence process may arguably continue to buy shares despite applicable inside trading rules, provided that it only continues to pursue a preconceived plan. Purchases of shares in the target prior to making a bid may, however, in case of a take-over offer, impact the pricing of the offer (minimum price).

Under the Securities Trading Act (WpHG) any natural or legal person must notify both the target and the BaFin as soon as such person's direct or indirect voting rights (given with regard to the above-mentioned attribution rules) reach, exceed or fall below the thresholds of 3%, 5%, 10%, 15%, 20%, 25%, 30%, 50% or 75%. Therefore, a shareholder may not build up stakes unnoticed. In order to prevent a 'sneaking-up' on the target through agreements on options, cash settled sway arrangements or the like, the disclosure requirements were recently expanded so as to include other instruments that enable the shareholder to acquire 5% or more of the voting rights (in line with the above thresholds) of the voting rights of the target.

In companies with major anchor shareholders, a bidder would usually seek to obtain irrevocable acceptance undertakings from such key shareholders.

8.3 Agreements between bidder and target

If, in a friendly takeover situation, the target's management decides to give the bidder the opportunity to conduct a due diligence investigation, a customary non-disclosure requirement will be required at a very early stage of the process (see section 2.4 above).

In addition, the bidder and the target often enter into business combination agreements where the target management agreed to support the bid, whereas the bidder agreed to certain covenants regarding the future integration of the target or the like. After some court decisions holding that any commitments by the management will not be enforceable if the target's best interests requires otherwise, these agreements have become less common and in many takeover cases, the parties only agree on a non-binding letter of intent or memorandum of understanding.

Due to the same restrictions, break fees payable by the target are rare in Germany. Also, while "no talk" clauses would generally not be permitted because they would not be in the target's interest, non-solicitation ("no shop") clauses are more customary.

8.4 Conditions precedent

A public take-over bid may generally not be made subject to any conditions precedent that are within the bidder's control. They may be subject to receiving a certain level of acceptance, often 50% or 75%. MAC clauses are possible, but need to be sufficiently specific; as the relevant requirements are unclear, they are not as common as in other jurisdictions. Mandatory bids may only be made subject to the obtaining of any requisite regulatory (merger control) approvals.

8.5 Cash consideration and guarantees

If the offer is mandatory, consideration must be in cash; the consideration in a voluntary offer may, with certain exceptions, also be liquid shares admitted for trading in an organized market.

In any event, although the consideration need not guaranteed, a cash offer must include a confirmation by an independent investment services provider that the bidder has taken all necessary actions to ensure financing of the offer.

8.6 Process

The Takeover Act contains specific requirements governing the content of the bid (which is a prospectus style document), changes of the bid, minimum and maximum acceptance periods as well as any requirements of the bidder to regularly disclose the status of acceptance. It also provides, in accordance with EU law, for restrictions on the right of the target's management to oppose a takeover bid. Target management has to prepare and publish comments on the bid and its terms (including the offer price).

8.7 Post-merger integration

A successful post-merger integration will often require a 75% majority, which is required, in particular, to resolve amendments to the articles of association or to implement a so-called domination agreement with the target according to which the bidder may instruct the executive board of the target and which exempts the bidder from capital maintenance rules and similar restrictions limiting the integration of the target into the purchaser's group. The implementation of a domination agreement requires the bidder to make a purchase offer or an offer of a guaranteed annual profit distribution to the remaining minority shareholders where both the offer price as well as the dividend need to be "adequate". A squeeze-out of the minority shareholders will require a 90% or 95% shareholding. The adequacy of any compensation payments to minority shareholders will, upon their request, be subject to special appraisal proceedings.

Part 2
Mergers & Acquisitions in India

Executive Summary

India and Germany have enjoyed more than 60 years of diplomatic relations along with a long and fruitful trading history spanning back several centuries. Since 2000, India and Germany have enjoyed a strategic partnership to discuss development of Indo-German collaborations in the fields of education, automobiles, infrastructure, energy, tourism, transport and defence.

Apart from being a key trading partner, Germany accounts for one of India's largest sources of foreign direct investment (FDI) having contributed close to 3% of the total foreign investment flows to India and is a key partner in technological collaborations. The key sectors attracting German investment in India are transportation, electric equipment, metallurgical industries, fuels, services sector, chemicals, construction activities, trading and automobiles. Several well renowned German brands such as Mercedes Benz, BMW, Volkswagen, Bayer, Bosch and Wurth have established a large presence in India.

As India claims its position in the global economic super powers, its economic allies like Germany will have a key role to play in the Indian growth story. With its well established and reliable legal system, technological advantages, skilled workforce, research and development facilities, Germany is an obvious choice for Indian businesses looking to do business in Europe.

While this article aims to provide an overview of the Indian M&A market for German businesses looking to invest in India, it is not a substitute for in-depth legal advice. We hope that this article helps readers in getting a basic understanding of the relevant laws and issues for doing M&A in India.

1 Introduction

1.1 Business environment

The Indian economy showed a significant slow down between 2011 and early 2014. Slow growth in the manufacturing sector, an ailing infrastructure sector without much inbound investment, inflationary forces, rising fiscal deficit and a significant current account deficit, coupled with a general global economic slowdown created serious fiscal imbalances in India (including a plummeting in the value of the Rupee, capital flight by institutional investors and stagnation of capital markets).

Following the recently concluded general elections, a new government took oath in May 2014 under the leadership of Prime Minister Narendra Modi. In the run up to the elections, one of the key expectations that the business community had for the new government, was to usher in economic reforms to revive the Indian economy. This government has shown its clear focus on long term economic objectives and fiscal stabilisation, as is evident in the Union Budget 2014.

The Union Budget 2014 lays clear emphasis on the 4 main prongs of this government's economic policy: infrastructure, education, rural development and information technology. The Union Budget 2014 proposes:

- The development of "smart cities" to enable the neo-middle class to find reasonable accommodation
- The "Rurbanisation model" to be implemented across India as a part of the Shyama Prasad Mukherji Rurban Mission, which is stated to deliver both integrated project-based infrastructure in rural areas and development of economic activities and skill development
- The Deendayal Upadhyaya Gram Jyoti Yojana which aims to augment power supply to rural areas, with the ultimate aim being to provide 24x7 uninterrupted power supply to all homes
- Development of industrial corridors to facilitate growth of "smart cities" and 20 new industrial clusters
- Development of ports and inland water navigation on the River Ganges
- Increased expenditure on roads and expressways
- Development of ultra mega solar power projects in Gujarat, Rajasthan, Tamil Nadu and Ladakh

Amongst the other initiatives launched by the new government, the Jan Dhan Yojana aims to provide every citizen with a bank account to meet the goal of financial inclusion. Some of the other steps undertaken are:

- permitted 100% foreign investment in railway infrastructure
- declared its intent to undertake divestment in public banks
- formed a committee to restructure the Food Corporation of India, to re-haul the public distribution system
- launched "Digital India" program, which proposes to ensure broadband connectivity at the village level across India coupled with increased indigenous production of IT hardware and software
- launched "Make in India" campaign, which aims to encourage global businesses to manufacture in India
- launched "Swachh Bharat" campaign, a drive to improve cleanliness and hygiene across India

Other economic steps have been taken to accelerate growth in the North-East part of India, a highly educated and politically sensitive region of the country but lagging in commerce, industry and infrastructure.

These policy announcements will give a fillip to the manufacturing, infrastructure and information technology sector in India and result in greater expenditure and job creation in these fields. In addition, empowering Indian youth through financial inclusion, improved education and vocational training will contribute to the development of a highly skilled work force that should allow India to reap its demographic dividend in the years to come.

While the new government's first 150 days have been fairly strong from a policy perspective, it remains to be seen how these policy measures will be implemented.

1.2 Recent Legal Developments

The recent enactment of the Companies Act 2013 (Act) has over hauled the Indian corporate law regime. The new Act focusses on process oriented, unbiased and transparent decision making to promote strict corporate governance standards and maximises on disclosures. The new Act aims to raise the internal corporate governance standards of Indian companies on par with their international peers. These measures endeavour to curb value leakages through related party transactions and enable investors to value companies in a more efficient manner. Raising capital even on a private placement basis, however, will require a prospectus, resulting in increased transaction costs for small companies. The increase in transaction costs could become drivers for higher value M&A.

In terms of foreign investments, the new government has further liberalised sectors such as defence, railway infrastructure and insurance for foreign investment. The pricing guidelines for foreign investment have been relaxed to allow shares to be valued in accordance with internationally accepted valuation principles (earlier, it was strictly in accordance with the discounted free cash flow methodology, which restricted holistic valuation by excluding other principles like net asset value).

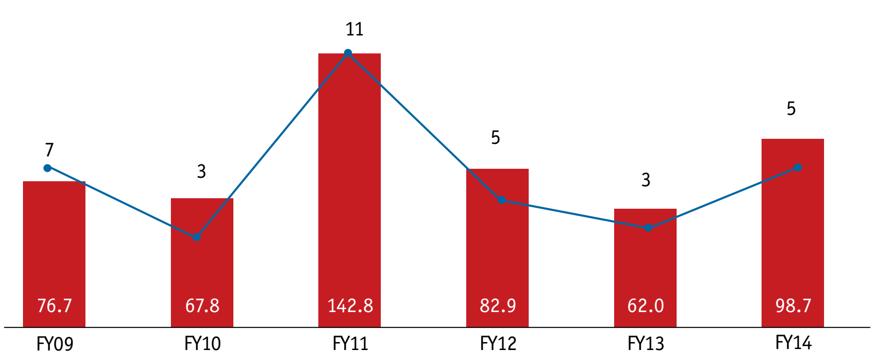
2. M&A Process

2.1 Trends in Indian M&A

Indian markets have recently seen an economic recalibration. Multiple factors like current account deficit, inflation and the announcement by the US Federal Bank of the roll back of its bond-buying program has contributed to a period of volatility. Foreign currency fluctuations have impacted target company valuations and have affected cross-border M&A. However, this period has been used for private equity buyouts, consolidation of holdings and even some secondary sale exits.

2013 and early 2014 saw the run up to the 2014 general election, which gave India its first non-coalition government after almost 30 years. Not surprisingly, in this period, investors elected to remain cautious against the uncertain political future and the market saw restrained deal activity. While India remains a desirable investment destination, strong emerging market fundamentals like domestic market volumes, a growing middle class, relatively cheap labour; a democratic government and a volatile market, have served to sour the pitch for investors. This impact can be seen on inbound M&A volumes which declined by 19.7% in 2013 as compared to 2012, though the number of deals remained high. This is a clear indicator that the average deal value has dropped and cross-border M&A has been largely small ticket transactions.

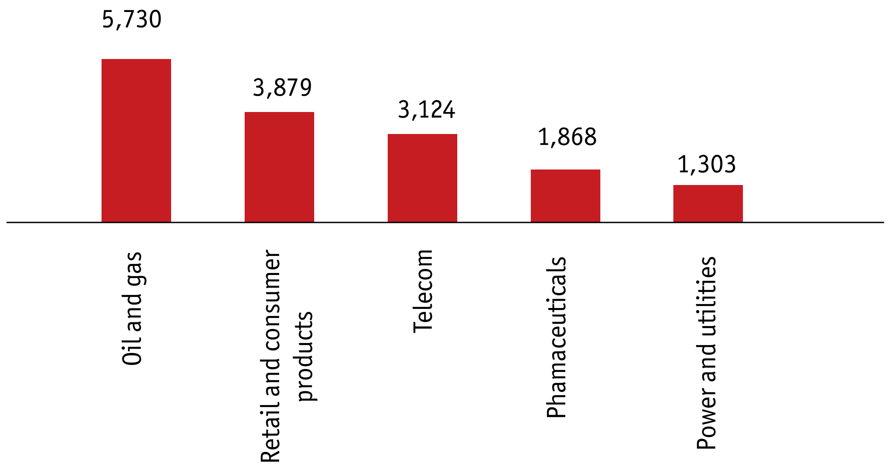
Average deal size and number of mega deals over the last five years



Sourse: EY analysis of Thomson ONE data

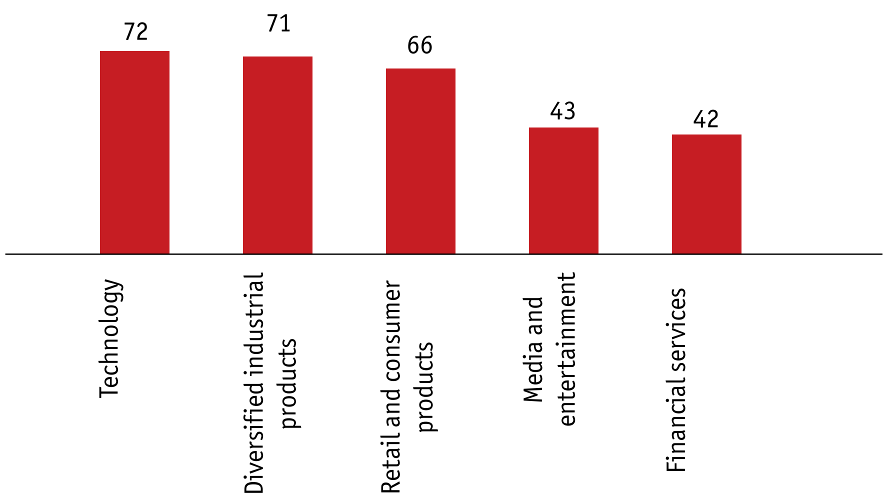
In terms of sectors, pharmaceuticals, infrastructure, consumer products (including e-commerce) have seen significant M&A interest.

Five most active sectors by deal value in FY14 US$ million



Sourse: EY analysis of Thomson ONE data

Five most active sectors by deal count in FY14



Sourse: EY analysis of Thomson ONE data

While large ticket transactions are typically share sales, asset sales and business transfers have gained momentum in small ticket buy-outs, especially by investor-backed buy-side strategic vehicles. Business transfers and asset sales serve to protect the investor from residual liabilities in a promoter-driven sell-side entity. Numerous sectors are heavily debt laden (such as real estate and infrastructure), and the promoters are often keen to sell business verticals to raise cash and deleverage their balance sheets. Post completion price adjustments are becoming a common feature in private M&A transactions which do not involve foreign parties (as otherwise approval from the Reserve Bank of India is needed). The adjustments are typically indexed to the performance parameters of the target, namely earnings before interest, tax, depreciation and amortisation (EBITDA) or profit after tax (PAT). However, these are more common in domestic transactions unless the acquirer is a minority investor subscribing to an instrument convertible into equity shares, where the conversion is determined based on a pricing formula linked to future earnings. Though a few management assisted buy outs have seen earn out mechanisms or incentives for management, these are yet to gain popularity.

Mid-market deals have seen a rise in popularity of tranche investments and lock-step consideration. Such investments are benchmarked to pre-identified performance objectives. Payment terms can involve escrow deposits and consideration holdbacks for indemnity claims, though such payments are difficult to structure in cross-border deals due to regulatory constraints.

2.2 Preferred Legal Forms

Buyers and sellers in private acquisitions are usually private limited companies or unlisted public companies. Promoter or family-run businesses are fairly common, and even public companies may be closely held. Listed companies may also be acquirers in private acquisitions.

Under the Act, private companies can seek capital from up to 200 shareholders (as compared to the earlier limit of 50 shareholders). Increased compliance costs, disclosures and corporate governance requirements have resulted in increased transaction costs for private companies. This may result in a rise in popularity of alternate business entities such as one-person companies (OPCs). The changes rung in by the Act now permit a single individual who is resident in India to form a company. OPCs are expected to be the desired alternate model for sole proprietorships with an average annual turnover of less than around US$330,000. OPCs that have been around for more than two years may see themselves becoming targets of venture capital funding and low value private equity buyouts.

Foreign investors should keep in mind foreign investment restriction and conditionalities for investment while making acquisitions in India. Unless a sector is specifically restricted, foreign investors can own up to 100% of the share capital of the Indian company without prior governmental approval or regulatory approval. In general, restrictions are usually by way of a cap on foreign participation in share capital (such as 26%, 49% or 74%) or a requirement for prior governmental or regulatory approval, or both. Foreign investment in LLPs is restricted to those sectors falling within the automatic approval route (i.e., no prior governmental approval required) where there are no other FDI linked conditionalities and foreign investors in LLPs require prior governmental approval for their investment. The foreign investment restrictions currently imposed on LLPs do not make them attractive vehicles.

2.3 Financing of M&A deals

Indian corporates have historically financed their M&A war chests through surpluses generated from their business activities, sale of non-core businesses or assets, fresh infusions of capital from the shareholders or the public or shareholder loans.

External sources of funds such as bank loans and external commercial borrowing have not been easily available to Indian businesses and often come attached with eligibility conditions and restrictions on use. While senior or mezzanine debt is common in global markets, banks in India are restricted from extending acquisition financing and external commercial borrowing cannot be used for on-lending and investment in the capital market for acquisition of a company in India. In large acquisition transactions, it is common to structure the financing through offshore subsidiaries to obtain loans on favourable terms and then infuse the money into an Indian company as equity or other instruments, subject to applicable round-tripping guidelines.

2.4 Typical M&A Process

Under the Act, corporate governance norms applicable to both private and public companies require an authorisation of the board of directors of the buyer and seller to be obtained. In companies of size and scale, a valuation report may additionally need to be approved by the audit committee of the buyer and seller. Sale of undertakings (business divisions as going concerns) may additionally require shareholder approval prior to consummation of the transaction. Listed companies will need to comply with requirements for disclosures under the listing agreement for material events.

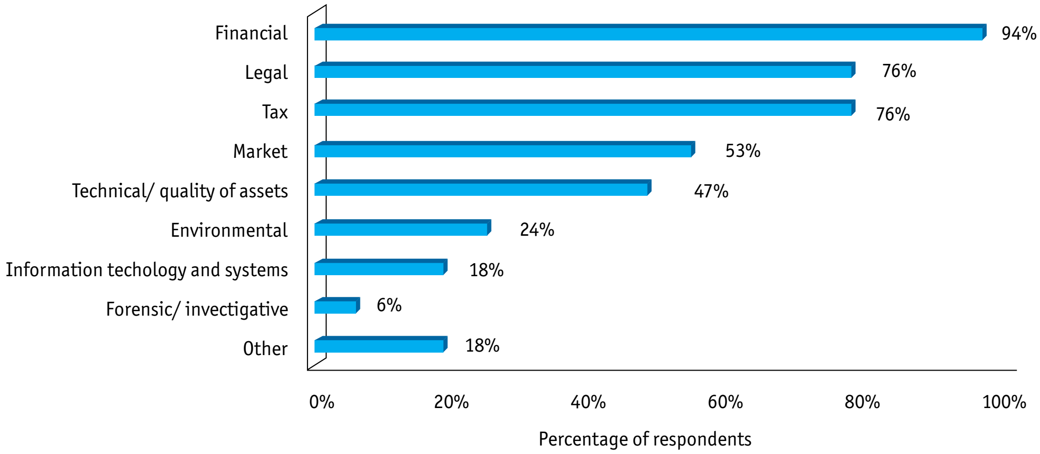
In typical M&A transactions, the main documents at the time of signing are the acquisition agreement, the board resolution authorising the signatories and the disclosure letter. Prior to closing, the seller usually provides a notice indicating satisfaction of the conditions precedent. Updating disclosures according to an updated disclosure letter is not common and often hotly negotiated.

Between signing and closing, the documents evidencing satisfaction of the conditions precedent are produced by the seller. If the buyer is of the opinion (usually subject to reasonableness) that, based on the documentary evidence, the conditions precedent have not been satisfied, the buyer will not be under an obligation to proceed to closing. The acquisition documents will typically provide remedies for conditions precedent which are not satisfied before an identified long stop date. If the conditions precedent are satisfied, the buyer is typically under an obligation to proceed to closing.

2.5 Due Diligence

A typical M&A transaction in India will involve legal, tax and financial due diligence on the target company or business. In addition, some buyers may undertake commercial, reputational and market due diligence. Acquirers spend considerable time evaluating transaction structures to ring fence liabilities and leave them behind with the seller. Buyers may consider undertaking technical, environmental and IT due diligence on a case-by-case basis where needed. Foreign buyers are typically subject to anti-bribery legislation such as the FCPA and the UK Bribery Act and check for compliance with such laws.

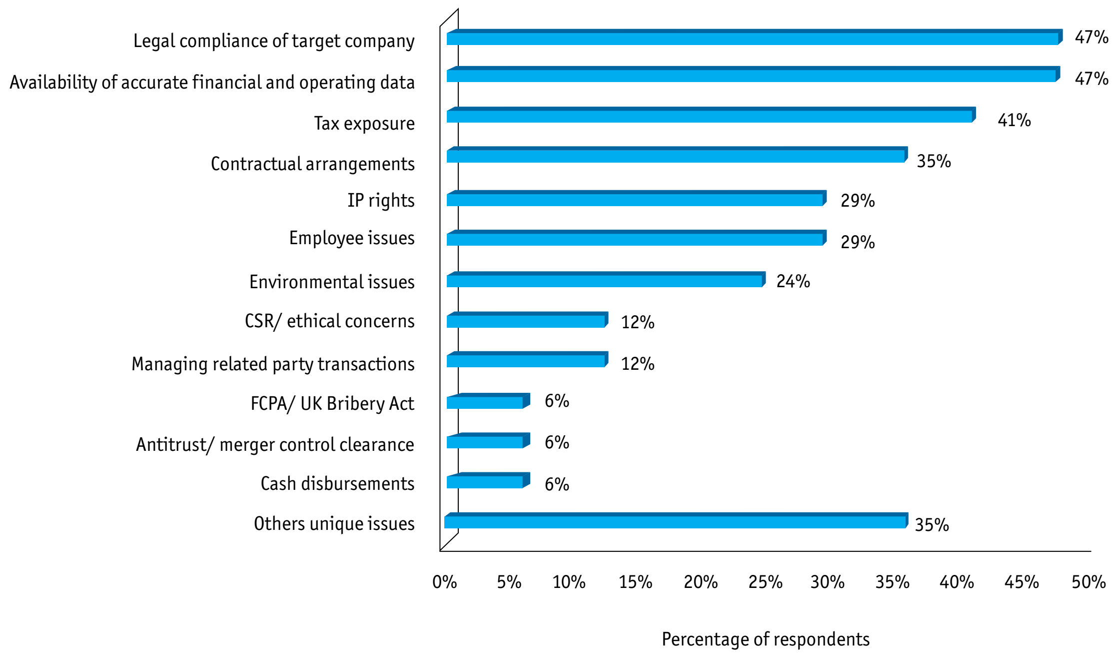
What types of the due diligence did you place the greatest emphasis on in your Indian acquisition?



Sourse: Finding as per interview conducted by mergemarket

Lack of proper documentation, multiple regulatory compliances, lack of credible historical data are the typical challenges faced by buyers. Sellers typically require hand-holding through the due diligence process and these challenges can result in somewhat lengthy due diligences.

What were the key due diligence challenges you faced while conducting M&A in India?



Sourse: Finding as per interview conducted by mergemarket

Confidentiality and non-disclosure agreements prior to commencing due diligence are de-riguer. The Act prohibits dissemination of non-public price sensitive information about a public company by its directors and officer to any outsider, which make such agreements essential. Acquisitions in listed companies pose additional challenges in the form of insider trading risks.

3. Purchase Price, Valuation and Acquisition Finance

3.1 Purchase Price

The choice of consideration utilised in a particular transaction stems from the objective of the transaction. Consideration other than cash may be preferable for tax purposes, or in the event of the buyer's inability to service a full-cash acquisition. The choice of consideration for the seller may depend on its tax circumstances. Typically, forms of consideration are:

- Cash
- Assets
- Shares
- Cross-consideration, in the form of assumption of obligations or liabilities

Foreign acquirers will need the prior approval of the India's central bank, the Reserve Bank of India (RBI) for payment of non-cash consideration.

3.2 Restrictions on Foreign Exchange

In case of an acquisition of shares, any deferred payment of consideration must be pre-approved by the Reserve Bank of India. This restriction is the primary cause for non-inclusion of deferred consideration, completion adjustments and earn out provisions in transactions involving a foreign acquirer, as the RBI does not typically grant such approvals.

3.3 Acquisition Finance

Cash can be raised by issuing shares, either by an underwritten public offering or a private placement. Cash can also be raised from current shareholders by a rights issue.

If cash is raised by private placement, the number of offerees is limited to 50. However, there is no limit on issuing shares to institutional buyers under a private placement offer.

If cash is raised by a public offering specifically for funding an acquisition, if the end-use of the public funds is changed by the company, the public shareholders who subscribed to such an issue must be given an exit option by the company.

Typical consents and approvals for fund raising include:

- Approval of share issue by public offering and rights issue by board of directors
- Private placement must be approved by the shareholders by special resolution
- Approval of stock exchange for listing and trading of shares when they are issued

A prospectus is generally required in public issues. The prospectus must comply with the guidelines issued by the market regulator i.e., the Securities & Exchange Board of India (SEBI), as well as the Act. In addition, companies can issue a shelf prospectus as well as a red herring prospectus, depending on the circumstances of the issue.

A private placement memorandum in a prescribed format is needed for private placements. An unlisted company is not required to issue a private placement memorandum for undertaking a preferential allotment to qualified institutional buyers. Classic acquisition financing, as often happens in international leveraged buy outs, is not possible in India due to financial assistance related issues set under company law. A company is not permitted to provide any assistance or guarantee in relation to an acquisition of its shares. Although such restrictions only apply to public companies, due to the typical heavy leverage of Indian companies and restrictions under existing legislations, it is not often feasible to implement a classic leveraged buy out or acquisition financed structure However, listed companies need to issue a placement document in the prescribed format for undertaking a preferential allotment to qualified institutional buyers. The placement document sets out all material information with respect to the company and the issue. In addition, private placements by listed companies to qualified institutional buyers are subjection to pricing restrictions.

4. Taxation

4.1 Tax and M&A Transactions

(i) Share Purchase Transactions

In a share sale, depending on the nature of the business or the person or entity holding the shares, the shares may be held as investment assets or as stock in trade (i.e., as trading assets). If shares are held as trading assets, gains from the sale of the shares are taxed as business income at 30% for an Indian company and 40% for a foreign company.

If shares are held as investment assets, gains from the sale of the shares are taxed as capital gains. Capital gains are the sale consideration less the cost of acquisition, cost of improvement and sale related expenses. In case of long term capital gains, the acquisition cost and cost of improvement is subject to indexation. This depends on the residential status of the seller and the nature of the asset disposed of.

If the shares are held for less than 12 months prior to the sale, short term capital gains tax is paid at 30% for an Indian company and 40% for a foreign company.

If the shares are held for more than 12 months prior to the sale, long term capital gains tax is paid at:

- 20% (for unlisted shares) for an Indian company
- 20% for a foreign company (or 10% on unlisted shares of public companies, where the benefit of indexation of the acquisition cost, cost of improvement and neutralisation of foreign exchange fluctuation is waived by the tax payer)

In a sale of listed shares, long term capital gains tax is not payable for on-market transactions if securities transaction tax is paid.

If the consideration for shares (of a company in which the public is substantially interested) is less than the fair market value (i.e., the book value of the shares, determined by the net asset method), the difference between the consideration paid and the fair market value is taxed in the hands of the buyer at 20% (if the buyer is an Indian company and a company in which the public is substantially interested) or 40% (if the buyers is a foreign company).

All tax rates are subject to additional surcharge and education cess. Taxes levied on a foreign company are subject to tax treaty benefits, if any. Different tax rates may be applicable if the buyer or seller is an individual and not a company.

(ii) Asset Purchase Transactions

In an asset sale, gains arising on the sale of trading assets are taxed as business income at 30% for an Indian company and 40% for a foreign company. Capital assets are depreciable (i.e., land). The sale consideration of depreciable assets is written down from a pool of assets. If the sale consideration exceeds the written down value of the pool, the excess is subject to tax at 30% for an Indian company and 40% for a foreign company.

If a non-depreciable capital asset is held for:

- More than 36 months prior to sale, the sale is subject to long term capital gains tax at 20% for an Indian company and a foreign company. The benefit of indexation is available for long term capital gains in certain cases
- Less than or equal to 36 months prior to sale, the gains are subject to short term capital gains tax at 30% for an Indian company and 40% for a foreign company

In an asset sale, the buyer cannot carry forward the losses of the seller relating to such assets.

(iii) Business Purchase Transactions

In a business transfer by slump sale (i.e., as a going concern on a non-itemised basis), if the undertaking is held for more than 36 months before the transfer, long term capital gains tax is payable, even if some assets in the undertaking have been held for a shorter period.

Capital gains on a slump sale is paid on the difference between the sale consideration and the net worth of the undertaking. The net worth is the written down value of the depreciable assets plus the book value of the other assets, less the liabilities of the undertaking. Long term capital gains tax is levied at 20% and short term capital gains tax is levied at 30% (for an Indian company) or 40% (for a foreign company).

In a slump sale, the buyer cannot carry forward the losses of the seller relating to such undertaking.

There is a capital gains exemption for the transfer of assets (including shares) by a holding company to its subsidiary and vice versa (provided the transferee company is an Indian company). This is subject to certain conditions (for instance, restrictions on the conversion of the capital assets into trading assets and on the sale of shares of the subsidiary by the holding company).

A capital gains exemption may be available to a foreign shareholder selling shares in an Indian company if the shareholder is subject to tax in a jurisdiction which has entered into a double tax treaty with India. Foreign investments, especially financial investments (as opposed to strategic investments) are usually routed through tax neutral jurisdictions like Mauritius, Singapore or the Cayman Islands, to use treaty benefits at the time of exit by share sale.

A business transfer by a court-approved demerger of an undertaking is tax neutral, if certain conditions are met, including that the transfer is:

- Of all properties and liabilities
- At a value appearing in its books of account immediately before the demerger
- As a going concern

In a tax neutral demerger, no capital gains is payable by the transferor company on the transfer of its assets to the transferee company (if the transferee company is an Indian company). In addition, no tax is payable by the shareholders of the transferor on the transfer of their shares or receipt of shares in the transferee. In a demerger, the transferee company can carry forward losses of the transferor company pertaining to the demerging undertaking.

In the aftermath of the Vodafone case, transactions involving cross border elements have included tax indemnities.

4.2 Other Transaction Taxes

(i) Share Purchase Transaction

In a share sale, stamp duty is chargeable at the rate of 0.25% of the consideration payable on the share transfer form.

Share sales are not subject to service tax or sale tax (central sale tax and state VAT) in India. Service tax is not chargeable on the transfer of title to goods and immovable property.

(ii) Asset Purchase Transaction

In an asset sale, each asset is subject to stamp duty, which differs from state to state. Stamp duty on a transfer of movable assets is a nominal fixed amount, or based on a value which could be up to 5% to 8% of the consideration. Stamp duty on the transfer of immovable property ranges from 3% to 10% of the consideration. Each immovable property is usually subject to a minimum consideration based on a circle rate set by the relevant state government, which differs based on the location of the property. In addition, the transfer of immovable property is subject to a registration charge, calculated on the area of the immovable property, at rates set by the respective state government.

Asset sales are subject to sales tax. If the sale is:

- Intra-state, it is subject to VAT levied by the respective state. VAT rates may vary from 5% to 15%, depending on the nature of the assets and the applicable state VAT legislation
- Inter-state, it is subject to sales tax levied by the central government. Central sales tax is usually chargeable at 2%.

In certain special economic zones, asset sales are exempt from payment of any central/state taxes.

(iii) Business Purchase Transaction

In a business transfer, stamp duty is not paid on the transfer of each movable asset. Instead it is paid on the transaction, at a nominal amount. However, if there is a transfer of immovable property, stamp duty and registration charges need to be paid on the transfer of the immovable property (but not on the other aspects of the business transfer).

Business transfers are not subject to sales or service tax, as they are transfers of a going concern and not a sale of individual assets.

5. Merger Control and Regulatory Approvals

5.1 Competition Law

If an acquisition of shares, voting rights, assets or control in one or more enterprises, or a merger or amalgamation of enterprises (combination), meets certain thresholds, the combination needs to be pre-notified to the Competition Commission of India (CCI).

Transactions where the target enterprise has Indian assets of less than Rs. 2.5 billion (about US$ 42 million), or Indian turnover of less than Rs. 7.5 billion (about US$ 125 million), are exempt from the CCI notification requirement. These de minimis target based exemptions are valid up to March 2016.

The thresholds based on which pre-notification is needed to the CCI are:

- Where the acquirer and the enterprise whose shares, assets, voting rights or control being acquired have either:
    - o combined assets in India of Rs. 15 billion (US$ 250 million); or
    - o combined turnover in India of Rs. 45 billion (US$ 750 million)

- Where the acquirer and the enterprise whose shares, assets, voting rights or control being acquired have either
    - o combined worldwide assets of US$ 750 million, including combined assets in India of Rs. 7.5 billion; or
    - o combined worldwide turnover of US$ 2.25 billion, including combined turnover in India of Rs. 22.5 billion

- Where the group to which the target enterprise would belong after the acquisition has either:
    - o assets in India of Rs. 60 billion (about US$ 1 billion); or
    - o turnover in India of Rs. 180 billion (about US$ 3 billion)

- Where the group to which the target enterprise would belong after the acquisition has either:
    - o worldwide assets of US$ 3 billion including assets in India of Rs. 7.5 billion; or
    - o worldwide turnover of US$ 9 billion including turnover in India of Rs. 22.5 billion

For the purposes of group threshold calculations, two enterprises are considered a group if one enterprise, directly or indirectly, both:

- holds more than 50% of the share capital of the other enterprise
- has power to:
    - appoint more than 50% of the board of directors of the other enterprise; and/or
    - control the management of the other enterprise

After March 2016, this threshold will drop to 26%, thereby bringing more enterprises within the ambit of a group for the calculation of thresholds. If an enterprise is part of a group, 100% of its assets and turnover are considered for the group calculations.

A combination needs to be notified to the CCI within 30 days of either the:

- Passing of the final board resolution approving a merger/amalgamation
- Execution of an agreement or other document in relation to an acquisition

Essentially, the notification obligation is triggered on the execution of any binding document, by whatever named called, conveying an agreement or decision to acquire control, shares, voting rights or assets. If such a document has not been executed, but the intention to acquire is communicated to the central or state government or any statutory authority, the date of such communication will be deemed to be the date of execution of the other document. In addition, the CCI has not accepted notifications according to the execution of memoranda of understanding, as these were held to be interim arrangements which are terminable and/or did not determine the exact scope of the proposed combination with sufficient certainty.

If the parties fail to notify a combination within 30 days from the trigger event, the CCI can impose a penalty of up to 1% of the total worldwide turnover or value of assets of the proposed combination, whichever is higher. The CCI can investigate a non-notified combination of its own initiative for up to 1 year from the date on which the combination took effect.

In addition, under Indian competition law, certain combinations are identified as ordinarily not likely to cause an appreciable adverse effect on competition (AAEC) and need not be notified to the CCI.

The combination may need to be notified to the CCI in either a simpler Form I filing or a more detailed Form II filing, depending on the size, scale and thresholds of the target business.

The Indian merger control regime is suspensory in nature. Combinations subject to review by the CCI cannot be completed until merger clearance is obtained or a review period of 210 calendar days expires, whichever is earlier.

5.2 Other Regulators

Where the subject matter of the transaction relates to regulated sectors, additional regulatory authorities may need to consent to the transaction and may have jurisdiction to investigate the transaction.

In a share sale, acquisitions by foreign buyers may require prior approval of the Foreign Investment Promotion Board if the target company is operating in a sector requiring prior government approval for foreign investment (such as banking, pharmaceuticals, telecommunication, defence, insurance or retail) or the RBI (cases where the pricing principles are not followed, involve deferred consideration or elaborate escrow mechanisms).

In addition, sectoral regulators like the Insurance Regulatory and Development Authority, Ministry of Information and Broadcasting, Department of Telecommunications, RBI or the Ministry of Defence may need to provide their prior consent to any acquisition of shares or business in the sector.

6. Labour & Employment

6.1 Consultation and Compensation

In an asset sale, Indian law does not require a seller or buyer to inform, consult or obtain consent from the employees. However, in a transfer of a business undertaking, prior notice and compensation must be given to employees if the business undertaking is considered as an "industry" under Indian labour laws, and the employees are engaged in manual or skilled labour (not in a managerial or administrative capacity), and either

- The services of the employees are interrupted by the transfer
- The terms and conditions of service of the employees after the transfer are less favourable than those applicable before the transfer

If there are more than 100 such employees, a lay off requires prior government approval to be obtained.

In addition, prior notice and compensation may need to be given to an employee under terms of their employment contract if it has change of control provisions. In addition, a contract cannot be unilaterally transferred by one party to a third party. Accordingly, unless the contract specifically reserves the right for the employer to transfer employment, prior consent is needed.

In a share sale, unless the employment contracts have a change of control provision, the employees generally need not be consulted nor informed of the sale. While typically, prior consent is not needed, if the company qualifies as an "industry" under Indian labour laws, prior notice and compensation must be given if the conditions discussed above are met.

6.2 Employee Rights on Dismissal

If a business undertaking being transferred qualifies as an "industry" under Indian labour laws, they may be entitled to prior notice and compensation as discussed above. For all other employees, conditions for dismissal are usually set out in their employment contracts. If the employment contract is silent or if there is no employment contract, the employment is at will.

In addition, restrictions on transferability of employees may be included in collective bargaining agreements, if any.

In general, in a share sale, since the identity of the employer does not change, the conditions of dismissal are either at will or set out in the employment agreements or collective bargaining agreements. However, if a business undertaking being transferred is an "industry" under Indian labour laws, prior notice and compensation must be given if the conditions discussed above are met. Since business undertakings need to be transferred on a going concern basis, there is an obligation on the buyer to assume all the employees. However, the transfer of each employee will depend on the conditions of transfer as well as the respective employment agreement.

6.3 Funding Employee Welfare

Under Indian law, all employers employing more than 20 persons need to contribute a percentage of every employee's salary to the employee pension scheme, which is administered by the government. Some employers may operate a private pension scheme over and above the statutory social security benefit obligations. Usually, the terms of private pension schemes are set out in the employee hand book or their employment agreements.

In a business transfer, the buyer and the seller (original employer) are jointly and severally liable for any unpaid employee pension scheme contributions of the transferor employer. The buyer needs to determine whether he will assume the unpaid liabilities of the original employer under private pension schemes under the acquisition documentation. Irrespective, the employee may have recourse under the terms of their employment agreement with respect to such unpaid liabilities against both the buyer and the seller.

In both share sale and business transfer transactions, it is customary to take detailed representations and warranties from the seller on the status of funding of the employee welfare obligations, compliance with labour laws and to obtain specific indemnities for any funding gaps.

6.4 Post Transaction Restrictions

The Indian Contract Act 1872 holds agreements in restraint of trade as being void. This poses a challenge for imposing non-compete obligations on the seller or key employees in share buyouts or business transfer transactions. Judicial interpretation of this provision has permitted reasonable non-compete obligations (in time and geographical scope) to be imposed on selling shareholders/sellers where there is a sale of goodwill.

Where there is no sale of goodwill, non-compete obligations are typically structured as confidentiality/non-disclosure obligations with an additional obligation to not use any confidential information gained or developed in the course of the previous employment.

7. Issues in Transaction Documentation

7.1 Market Practice on Key Provisions

Indian acquisition agreements typically provide for extensive representation and warranties as well as loss based indemnities (sometimes, specific indemnities may be sought). This is primarily because the law and judicial interpretation in India on damages and indemnities as far as corporate acquisitions are concerned is still at an early stage. The burden of proof is a degree less in a claim for indemnities, as while in case of damages,the breach as well as the loss needs to be proved, in case of indemnities, only the loss needs to be proved. Investors typically like to retain both claims, in addition to other equitable reliefs such as specific performance. India tends to follow a hybrid of the New York and English law market practice, with detailed representations and warranties provided on an indemnity basis and detailed limitations of liabilities.

Business warranties continue to be extensive, with the seller usually negotiating qualifiers like materiality, monetary thresholds and knowledge. Buyers usually tend to exclude findings in due diligence from the knowledge qualifiers, since due diligence in India has not reached the level of transparency and accuracy which warrants such inclusion. Usually, business warranties are limited to one to three years (subject to negotiation), tax warranties for seven years and warranties on essential matters like title, ability to contract and constitutional items are indefinite.

Indemnity claims are also subject to monetary thresholds, in particular:

- The maximum aggregate indemnity which can be claimed
- A minimum loss for a claim to be valid
- Each claim not being below a minimum threshold, and a valid claim only being made when the aggregate also crosses a threshold

While warranty and indemnity insurance is not common in India, Marsh (a leading insurer in the UK) has started selling products relating to warranty and indemnity insurance. However, these products are fairly expensive given the Indian market conditions.

While material adverse change (MAC) clauses are not typical, they are being increasingly used in acquisition agreements, especially if there is a substantial time difference between signing and closing. Definitions of materiality and monetary thresholds, including global MACs, on MAC triggers are hotly negotiated.

7.2 Arbitration Provisions and Enforcement

In asset sales and business transfers, Indian law is the typical governing law and Indian courts have jurisdiction over assets located in India that are being transferred.

Share sales may provide for a foreign governing law and jurisdiction. However, this depends on the bargaining position of the buyer. Foreign governing law and jurisdiction is fairly common if both contracting parties are non-residents, or if the acquisition is of a foreign-based parent entity with Indian assets. English law and New York law remain the most common foreign governing laws. English, New York and Singaporean courts are commonly given jurisdiction in such cases.

Given the small ticket sizes of acquisitions in India, it is more common to have Indian governing law, as it reduces transaction costs for the seller and has a bearing on the consideration. In addition, acquisitions are usually subject to arbitration first which reduces the role of the Indian courts substantially (limited to enforcement and execution of the arbitration award). Recent

Supreme Court judgments have further limited the scope of Indian courts to grant injunctions in case of international commercial arbitrations.

Arbitrations clauses are quite common in private M&A documents and are enforceable in Indian courts. India is a signatory to the UN Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and the European Convention on International Commercial Arbitration 1961 (Geneva Convention). Accordingly, Indian courts usually respect the choice of jurisdiction in arbitration awards. If both parties are Indian, the governing law of the arbitration agreement will need to be Indian law, though the venue of the arbitration can be outside India. In international commercial arbitrations, one party needs to be a foreign entity and it is fairly common for arbitration agreements to provide for a non-Indian seat and venue.

In arbitrations where the seat is Indian law, Indian courts have the power to grant injunctions. Recent Supreme Court judgements have held that Indian courts do not have jurisdiction to grant injunctions in international commercial arbitration awards, unless such jurisdiction is specifically granted by the parties.

Indian courts can only set aside arbitral awards on limited grounds. In addition, in international commercial arbitrations, if there is evidence that the award is not binding on parties or has been set aside by a competent court under applicable substantive laws, the Indian courts can set aside such award.

7.3 Documentation Formalities

Companies execute agreements through authorised signatories who are usually authorised by board resolutions. Documents which are primarily declaratory in nature or are under oath (such as powers of attorney) need to be notarised and the signatory needs to be present before a notary public at the time of execution. Documents under oath (like affidavits and powers of attorney) that are executed outside India need to be attested under an apostile under the Hague Convention Abolishing the Requirement of Legislation for Foreign Public Documents 1961. For all other documents executed outside India or documents executed in India by a foreign person, there are no additional formalities for execution.

In addition, most documents in India need to be executed on a stamp paper of appropriate denomination. The rates of stamp duty differ from state to state and documents are often executed in the state with lower stamp duty. If a document is executed by a foreign person outside India, appropriate stamp duty must be paid within 3 months of the document entering India (including receipt of electronic copies in India). Unless a document is stamped, it will not be considered as conclusive evidence of the subject matter in an Indian court.

8. Public M&A and Takeover Offers

8.1 Overview

The Act and Companies Act 1956 are the overall laws governing companies in India (whether public or private) and deal with mergers, demergers, amalgamations and other corporate restructurings undertaken by all companies.

In addition to the Act, public M&A in India is regulated by the SEBI under the rules and regulations prescribed under the Securities and Exchange Board of India Act 1992 (SEBI Act) including the issue of shares, mergers or takeovers. SEBI, which serves as market regulator for the capital markets in India, has formulated regulations in relation to the issue of shares i.e., the SEBI (Issue of Capital and Disclosure Requirements) Regulations 2009,in relation to the acquisition of substantial shares or control of listed companies i.e., the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (Takeover Code) and in relation to taking listed companies private, i.e., the SEBI (Delisting of Equity Share) Regulations 2009 (Delisting Regulations).

Due diligences in public M&A are limited and the SEBI (Prohibition of Insider Trading) Regulations 1992 imposes both financial and criminal liability for insider trading based on unpublished price sensitive information. Consequently, due diligences for public listed companies are often limited to publicly available information (such as company records, intellectual property searches, property title verification, pending litigations and encumbrances).

As with private M&A, acquisitions of public companies must comply with competition law, foreign exchange regulations and sectoral regulations which may be applicable.

8.2 Mandatory offers

Under the Takeover Code, an acquirer is obligated to make an open offer for at least 26% of the share capital or voting rights of a target in the following circumstances:

- If an acquirer (along with persons acting in concert (PACs), if any) holds less than 25% of the shares or voting rights in the target and agrees to or acquires shares which, along with its or its PAC's existing shareholding, would entitle it to exercise 25% or more of the shares or voting rights in a target

- If an acquirer (along with PACs, if any) holds 25% or more but less than the maximum permissible non-public shareholding in the target (75%), acquires additional shares in the target (that would entitle it to exercise more than 5% of the voting rights in any financial year ending March 31). Gross acquisitions and purchases are taken into account in order to calculate acquisition limits. This disregards any intermittent fall in shareholding or voting rights, whether owing to disposal of shares or dilution of voting rights (due to a fresh issue of shares by the target)

- Where the acquirer make an indirect acquisition i.e., an acquisition of shares or control over another entity by a bidder, which would enable the bidder to exercise, or direct the exercise of, voting rights beyond the stipulated thresholds, or exercise control over the target

In relation to squeeze out of minority shareholders, the Takeover Code and the the Securities Contract Regulation Rules 1957 require that a minimum public float of 25% is maintained. As a result, an acquirer cannot compulsorily purchase the shares of the remaining minority shareholders. The instances in which the acquirer can buy out the minority shareholders are:

- through delisting of shares

- if the target is merged with another company and the dissenting shareholders are bought out in accordance with Section 395 of the Companies Act 1956. However, 90% of the shareholders must consent to squeeze out the minority which has proven practically difficult

8.3 Hostile Offers

The Takeover Code recognises two kinds of takeovers, i.e., voluntary and mandatory. As discussed above, mandatory offers must be conducted if the triggers set out in the Takeover Code are met. Voluntary offers on the other hand can be undertaken without such triggers and are generally seen in the context of hostile takeovers.

The regulatory constraints of conducting a hostile takeover offer in India means that hostile offers are not common. Contributing to these constraints are the practical challenges of acquiring a company without cooperation from either the board of directors of the target or its promoter shareholders. A hostile acquirer will not have the benefit of any due diligence or management discussions and must rely on publicly available information and this may pose a financial and commercial risk.

One of the common ways promoters defend against hostile offers is by issuing shares to the promoters and/or existing shareholders of the company to dilute the percentage which the hostile acquirer receives. Before the board of directors can authorise the allotment of shares, approval of the target company's shareholders must be obtained by way of a special resolution by postal ballot. In the alternate, a third party bidder may make a competitive bid by way of a friendly takeover (white knight). A competing offer must be made within 15 working days of the date of the detailed public statement made by the hostile acquirer. The target company's board can then give favourable recommendations on the open offer of the friendly acquirer. In extreme cases, a target may defend against hostile takeovers by acquiring shares of the hostile bidder itself.

As a preventive measure, the target company can set up poison pills such as large lump sum payments to promoter controlled entities or key management persons or termination of key rights in case of a change of control to act as a deterrent to the hostile acquirer.

8.4 Procedural Aspects

The shares acquired in the open offer must be acquired at a price not lower than the price determined in accordance with the provisions of the Takeover Code. Where the acquirer (either itself or with PACs) acquires or agrees to acquire shares or voting rights in the target during the offer period, whether by a primary or a secondary transaction, at a price higher than the offer price, the offer price to the public shareholders will stand revised to the highest price paid or paybale for any such acquisition.

Any payment made to the promoters of the target as consideration for their non-compete obligations must be included in the offer price of the share proposed to be bought from the public shareholders.

While not prohibited under Indian law, break fees are not common in India. A buyer and target company are free to negotiate and contractually agree on a break fee. These fees can be a percentage of the consideration or be limited to reimbursement of costs incurred by the acquirer/target. Where the acquirer is a foreign entity, the fees may be subject to prior approval of the RBI and must be in compliance with Indian foreign exchange regulations.

While not prohibited, the SEBI, while reviewing the draft letter of offer, could direct amendment or deletion of any provision of the acqusition agreement (including break fees), if it believes such provision is unreasonable.

8.5 Delisting

For companies electing to go private, securities can be delisted under the terms of Delisting Regulations, the Securities Contract Regulation Act 1956 and the Securities Contract Regulation Rules 1957. The securities of a company may be voluntarily delisted or must be mandatorily delisted in certain circumstances.

A listed company may not delist its share in certain situations such as if any instrument convertible into the same class of shares sought to be delisted is outstanding or if the minimum public shareholding has fallen below the prescribed threshold pursuant to a private placement or buyback of shares by the listed company. In addition, delisting is not allowed unless 3 years elapse from the listing of the relevant shares on any exchange.

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About FICCI

Established in 1927, FICCI is the largest and oldest apex business organisation in India. Its history is closely interwoven with India's struggle for independence, its industrialization, and its emergence as one of the most rapidly growing global economies. FICCI has contributed to this historical process by encouraging debate, articulating the private sector's views and influencing policy.

A non-government, not-for-profit organisation, FICCI is the voice of India's business and industry.

FICCI draws its membership from the corporate sector, both private and public, including SMEs and MNCs; FICCI enjoys an indirect membership of over 2,50,000 companies from various regional chambers of commerce.

FICCI provides a platform for sector specific consensus building and networking and as the first port of call for Indian industry and the international business community.

Our Vision

To be the thought leader for industry, its voice for policy change and its guardian for effective implementation.

Our Mission

To carry forward our initiatives in support of rapid, inclusive and sustainable growth that encompass health, education, livelihood, governance and skill development.

To enhance efficiency and global competitiveness of Indian industry and to expand business opportunities both in domestic and foreign markets through a range of specialised services and global linkages.

FICCI

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