PANORAMIC

PUBLIC M&A

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LEXOLOGY

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STRUCTURES AND APPLICABLE LAW

Types of transaction

How may publicly listed businesses combine?

The general forms of business combinations that are available to private companies are also available to publicly listed companies. These are:

- business or asset acquisitions;
- share acquisitions; and
- court-approved schemes.

Where the target is a publicly listed company, the business combination also becomes subject to Indian securities laws.

Business or asset acquisitions

Parties have two key structuring alternatives: they may transfer either an entire running business or undertaking (also known as a slump sale) or only identified key assets (eg, material contracts and intellectual property) while leaving other assets behind (eg, trade debts). Tax will also be a key consideration for this choice of structure.

Owing to Indian exchange control restrictions on direct ownership by non-residents of certain categories of assets (eg, real estate), direct assets acquisitions by non-resident buyers are generally difficult to implement.

Share acquisitions

Unless there are concerns about historic liabilities, or a carve-out transaction is contemplated, buyers will be expected to undertake a share acquisition.

Acquisition structures involving convertible securities, or shares, in publicly listed companies, are also permitted, subject to conditions. Acquisition finance in India, however, involves certain challenges.

Cross-border share acquisitions will also be subject to the requirements of Indian exchange control regulations.

Court-approved schemes

Complex transactions are best implemented through court-approved schemes, which provide a great degree of structuring flexibility. The principal trade-off, however, is the relatively lengthy and public court approval process.

Law stated - 28 February 2025

Statutes and regulations

What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

The principal legal and regulatory framework for business combinations and acquisitions of publicly listed companies in India comprises of the following:

- the Companies Act 2013 (the Companies Act) and subordinate legislation, which regulates, among others, non-pre-emptive issuances of shares, significant sales of material undertakings, court-approved schemes and related party transactions. Together with the Indian Contract Act 1872, the Companies Act comprises the basic legal framework for business combinations;
- the Foreign Exchange Management Act 1999 and subordinate legislation, which regulates cross-border transactions involving Indian residents and non-residents; and
- the Competition Act 2002 (as amended) and subordinate legislation, which sets out the merger control regime in India.

Unless the small target (aggregate assets in India worth less than or equal to 4.5 billion rupees or aggregate turnover in India of less than or equal to 12.5 billion rupees, or both) exemption, or any other specified exemption, is available, transactions that would exceed the following thresholds must be notified to the Competition Commission of India:

- at the level of the buyer and target or the resultant entity:
    - 25 billion rupees of combined assets in India;
    - 75 billion rupees of combined turnover in India;
    - US$1.25 billion of combined assets worldwide (including 12.5 billion rupees of combined assets in India); or
    - US$3.75 billion of combined turnover worldwide (including 37.5 billion rupees of combined turnover in India); and
- at the level of the group (to which the target or resultant entity would belong):
    - 100 billion rupees of combined assets in India;
    - 300 billion rupees of combined turnover in India;
    - US$5 billion of combined assets worldwide (including 12.5 billion rupees of combined assets in India); or
    - US$15 billion of combined turnover worldwide (including 37.5 billion rupees of combined turnover in India).

Additionally, any transaction whose value exceeds 20 billion rupees and the target entity has substantial business operations in India, shall also be notifiable to the Competition Commission of India.

The Securities and Exchange Board of India (SEBI) Act 1992 and subordinate regulations set out the insider trading, takeovers and disclosure regime in India.

The SEBI (Prohibition of Insider Trading) Regulations 2015 (the Insider Trading Regulations) govern the sharing or receipt of any unpublished price-sensitive information and prohibit trading in securities of publicly listed companies while in possession of such information.

Furthermore, any due diligence of publicly listed companies would need to comply with the processes and conditions set out in these regulations.

The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (the Takeover Regulations) govern takeovers of publicly listed companies. Any direct or indirect:

- acquisition of an initial 25 per cent or more voting rights (at any time);
- subsequent acquisition of more than 5 per cent voting rights (in an Indian financial year); or
- acquisition of control in a publicly listed target in India, will trigger a mandatory tender offer.

This will require the buyer to offer to further acquire at least 26 per cent of the target's voting capital. Indirect acquisitions where the proportionate net asset value, sales turnover or market capitalisation of the publicly listed target is more than 80 per cent of the consolidated net asset value, sales turnover or market capitalisation of the ultimate target or business are regarded as direct acquisitions.

The Takeover Regulations provide flexibility in completing acquisitions of listed targets. For instance, an acquirer has the option to proportionately reduce its acquisitions under:

- the triggering acquisition agreement; and
- the shares tendered in the tender offer, such that its ultimate shareholding in the listed target does not exceed 75 per cent.

This provides an acquirer with the option to restrict its overall acquisition to 75 per cent and not be subject to a subsequent sell-down obligation to achieve minimum public float requirements (if the contracted shares plus shares tendered in the open offer breach the 75 per cent threshold). However, the acquirer should not:

- acquire joint control of the listed target; or
- have been (in the last two years):
    - a promoter of the listed target;
    - associated with promoters of the listed target; or
    - hold more than a 25 per cent stake in the listed target.

The Takeover Regulations also permit combined tender offer cum take-private deals. In brief, a takeover deal triggering a tender offer can be structured in a manner where the acquirer (not being a promoter) specifies upfront the tender offer price and an indicative take-private price. The indicative take-private price would need to include a suitable premium and amongst others required to be determined in accordance with parameters specified by SEBI under the delisting regulations. If the response to the tender offer leads to satisfaction of the take-private threshold (ie, 90 per cent of the total shares of the publicly traded company), the shareholders will be paid the indicative take-private price (ie, take-private succeeds) and if it does not, then the shareholders will be paid the tender offer price (ie, take-private fails). In the event, the take-private threshold is not met, but the acquirer acquires more than 75 per cent, a period of 12 months would be available to the acquirer to re-attempt (at its discretion) the take-private deal. If the take-private fails again, the acquirer would be required to bring

down its shareholding to 75 per cent within a further period of 12 months. Similar eligibility criteria are applicable to the acquirer, as in the case of proportionate reduction of acquisition (discussed above).

Importantly, the combined process:

- does not entail a reverse book-building process to be followed for the take-private leg;
- allows the acquirer to offer a differing price for the take-private on one hand, and the tender offer on the other hand; and
- does away with any interest costs being levied on account of any gap between the tender offer and take-private deal.

The SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 (the Listing Regulations) prescribe regulatory approval, shareholder voting, disclosure and other requirements for court-approved schemes involving publicly listed companies. In addition, the Listing Regulations, together with the Takeover Regulations and the Insider Trading Regulations, contain certain disclosure requirements for business combinations involving publicly listed companies.

Law stated - 28 February 2025

Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border share acquisitions are subject to Indian exchange control and securities laws and may be structured through one of two routes:

- foreign direct investment (FDI), which comprises strategic investments into equity and convertible securities; and
- foreign portfolio investment, which comprises portfolio investments below 10 per cent in listed or to-be-listed equity and specific convertible securities as well as non-convertible corporate bonds.

FDI is also subject to fair valuation requirements, which require payment of a minimum price in the case of acquisitions by non-residents and a maximum price in the case of sales by residents, in each case, based on prescribed valuation parameters. Deferred and contingent consideration structures are regulated and only 25 per cent of the purchase consideration can be paid subsequently, within an 18-month window.

In addition, outbound mergers (ie, the transferee or resultant entity outside India) are permitted only with specified foreign jurisdictions. Furthermore, foreign investment from a country that shares a land border with India can only be undertaken with prior government approval.

Merger control and takeover and other securities laws will also impact cross-border transactions.

Law stated - 28 February 2025

Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Yes. Many sectors are subject to a sector-specific regulatory regime, in most cases, with a dedicated regulatory body. For example, there is a separate regulatory regime for banking and financial services administered by India's central bank, the Reserve Bank of India. Similarly, insurance has its own set of regulations, with the Insurance Regulatory and Development Authority of India acting as the regulatory body.

In addition, under the Indian exchange control regulations, although foreign investment is freely permitted in most sectors, in other sectors, it is either prohibited entirely (eg, atomic energy, lotteries, gambling etc), permitted up to a specified cap only (eg, 49 per cent in the pension sector under automatic route) or permitted beyond specified caps but with prior governmental approval (eg, private banking, in which foreign investment beyond 49 per cent and up to 74 per cent requires governmental approval). In addition, in certain sectors, there are also additional conditions and operating obligations (eg, single-brand product retail trading).

Law stated - 28 February 2025

Transaction agreements

Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

Sale and purchase agreements are entered into for both asset deals and share deals. In asset deals, the transfer of immovable property will require a separate conveyance document and transfer of contracts and other liabilities are normally undertaken through separate novation agreements.

In share deals, if a substantial stake or control of the listed target is sought to be acquired (thresholds discussed above), entering into the agreement will trigger a mandatory tender offer. Such tender offer is highly regulated and time-bound in nature. The buyer needs to issue a public announcement, and a detailed public statement and subsequently provide an offer letter to all shareholders setting out, among other things, details of the underlying transaction as well as the tender offer process. The shareholders are granted 10 working days to tender their shares (at their own discretion). The acquisition of shares envisaged in the underlying transaction may, subject to certain conditions, be completed prior to or post-completion of the tender offer process.

The scheme document that is filed with the National Company Law Tribunal is the principal document in court-approved schemes. In strategic public M&A transactions structured under a scheme, there is an emerging trend for the parties to also enter into an implementation agreement.

Transaction agreements are typically governed by Indian law.

Law stated - 28 February 2025

FILINGS AND DISCLOSURE

Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

In mandatory tender offers, the public announcement, the detailed public statement and the letter of offer are all filed with the Securities and Exchange Board of India (SEBI), the relevant stock exchanges (where the shares of the target are listed) and the listed target. Court schemes must be filed with SEBI, the National Company Law Tribunal and also with the relevant stock exchanges.

Details of inbound foreign investments (primary) need to be reported to the Reserve Bank of India (RBI) within 30 days. Details of shares transferred (secondary) between residents and non-residents need to be reported to the RBI within 60 days.

Where merger control thresholds apply, the deal parties may have to make either a short-form filing in Form I (which also includes a green channel filing) or a long-form filing in Form II. A green channel filing is allowed when there are no horizontal overlaps or vertical relationships or complementary linkages between the parties to a transaction. A Form II filing is generally used where the combined market share is more than 15 per cent in any of the horizontal markets or more than 25 per cent in any of the vertical markets. In all other scenarios, a transaction is notified through a regular Form I filing. The filing fee for the short form (including a green channel filing) is 3 million rupees and for the long form is 9 million rupees.

Business combinations will also involve secretarial filings to be made with the relevant registrar of companies under the the Companies Act 2013 and subordinate legislation.

Stamp duty is chargeable on instruments, so the duties will vary depending on the transaction structure and the nature of the instruments being executed. In addition, all share acquisitions (on a delivery basis) are chargeable to stamp duty at a uniform rate of 0.015 per cent.

Law stated - 28 February 2025

Information to be disclosed

What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?

The SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 (the Listing Regulations) require public disclosure of basic information regarding business combinations. The disclosable information includes the size and turnover of the relevant transaction parties, the relevant business or industry, the transaction objective, impact on management and control of listed entities, the nature and amount of consideration and whether any related parties are involved. In share acquisitions, the disclosure obligation is also triggered upon execution of the transaction documentation.

In order to ensure more transparency and accountability of public disclosures, the Listing Regulations have been updated to include various disclosures and approval requirements. Key changes, inter alia, include:

- disclosure of agreements entered into by shareholders, promoters, promoter group entities, directors, related parties, key managerial personnel, employees of listed entity or its associate, holding, subsidiary company, among themselves or with the listed entity or with a third party, solely or jointly, which directly or indirectly or potentially or whose purpose and effect is to:
    - impact management or control of listed entity;
    - impose any restriction on the listed entity; or
    - create any liability upon the listed entity; and
- special right granted to the shareholders of a listed entity are subject to the approval of the shareholders in a general meeting by way of a special resolution once in every five years starting from the date of grant of such special rights; and
- top 250- listed entities (based on market capitalisation) are required to confirm, deny or clarify (upon material price movement) any reported event or information in the mainstream media which is not general in nature and which indicates that rumours of an impending specific event or information (in terms of the Listing Regulations) is circulating amongst the investing public, as soon as reasonably possible and not later than 24 hours from the trigger of the material price movement. Thresholds have been prescribed for positive and negative material price movement. Furthermore, certain price protection mechanisms have also been provided for corporate actions such as tender offer, primary issuances, buybacks etc, for which pricing norms are specified by SEBI, if a rumour is confirmed on material price movement.

Separately, acquisitions and disposals of shares beyond specified thresholds will trigger additional disclosure obligations under the SEBI (Prohibition of Insider Trading) Regulations 2015 and the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 as well.

Law stated - 28 February 2025

Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?

Any person acquiring an initial 5 per cent or more (including holdings of any concert parties) of the shares or voting rights of a publicly listed company must disclose such acquisition.

Thereafter, persons already holding at least 5 per cent (including holdings of any concert parties) of the shares or voting rights of a publicly listed company must disclose all acquisitions or sales of more than 2 per cent.

Publicly listed companies must also disclose details regarding their significant beneficial owners on a quarterly basis. Significant beneficial owners are individuals who directly or indirectly hold at least 10 per cent of the shares, voting rights or rights to receive distributions, or otherwise exercise significant influence or control, over the listed company.

If the publicly listed company is a party to a business combination, the disclosure obligations under the Listing Regulations will apply.

Law stated - 28 February 2025

DIRECTORS' AND SHAREHOLDERS' DUTIES AND RIGHTS

Duties of directors and controlling shareholders

What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?

Directors' duties

The principal duties of a director under Indian laws are:

- to act in good faith to promote the objects of the company for the benefit of its members as a whole;
- to act with due and reasonable care, skill and diligence;
- to avoid any actual or potential conflict between his or her own and the company's interests; and
- not to achieve or attempt to achieve any undue gain or advantage to him or herself or his or her relatives or partners or associates.

The Companies Act 2013 and subordinate legislation further expands the scope of directors' duties by requiring them to act not only in the best interest of the company but also its employees, the shareholders, the community and for the protection of the environment.

With respect to business combinations, directors also have a statutory obligation to declare any direct or indirect interest in the business combination, first, in the board meeting at which the matter is first considered, and subsequently, at the first board meeting in each financial year and whenever there is any change to the earlier declaration. In these board meetings, with respect to matters in which directors are interested, the interested directors will not be considered for determining a quorum and may not vote on the matters.

Directors and specified connected persons (including relatives and holding subsidiary and associate companies) are also considered related parties, so any arrangements between the company, on one hand, and a director or his or her connected person, on the other hand, may require board or shareholder approval.

Shareholders' duties

Under Indian law, controlling shareholders are not subject to similar duties as directors. However, as in English law, controlling shareholders are obliged not to deal with the minority in an unfairly prejudicial or oppressive manner. Courts have wide-ranging powers in the case a claim of unfair prejudice is successfully made.

Law stated - 28 February 2025

Approval and appraisal rights

What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

Shareholders' approval by special resolution (ie, 75 per cent of votes) is necessary where a public company proposes to dispose of a substantial part or the whole of an undertaking. Such a special resolution can only be acted upon if the votes cast by the public shareholders in favour of the resolution exceed the votes cast by public shareholders against the resolution. Moreover, no public shareholder is permitted to vote on the resolution if it is a party, directly or indirectly, to such sale, lease or otherwise disposal of the whole or substantially the whole of the undertaking of the listed company. Furthermore, the listed companies are, inter alia**,** required to disclose the object of and commercial rationale for carrying out such sale, lease or otherwise disposal of the whole or substantially the whole of the undertaking of the entity, and the use of proceeds arising therefrom.

In a merger or demerger transactions, shareholders' approval is necessary provided that a majority in number and three-quarters in value of the shareholders and creditors approve the said transaction. Listed companies need shareholders' approval by special resolution in the case of disposal of a material subsidiary (more than 10 per cent income or net worth on a consolidated basis) or sale or disposal of more than 20 per cent of the assets of a material subsidiary. Furthermore, the approval of a majority of public shareholders is required in certain cases involving schemes of arrangement between a listed company and promoter or promoter group entities.

Listed Indian companies tend to be closely held by an individual or a family. Therefore, deal protection can be achieved by ensuring that the controlling shareholders are committed to the proposed transaction.

Law stated - 28 February 2025

COMPLETING THE TRANSACTION

Hostile transactions

What are the special considerations for unsolicited transactions for public companies?

Historically, unsolicited transactions in the case of publicly listed entities have been scarce in India owing to the concentration of controlling interests in a few individuals or families. Most public deals involve a degree of due diligence by the acquirer and a fairly robust representations and warranties package backed by the seller. Accordingly, public takeovers

resemble private M&A transactions, with the additional complications of, among other things, the triggering of a mandatory tender offer, completing the underlying transaction within permissible regulatory windows and making mandatory disclosures' under the Takeover Regulations, the Securities and Exchange Board of India (SEBI) (Prohibition of Insider Trading) Regulations 2015, the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (the Takeover Regulations) and the Listing Regulations.

Having said that, any person intending to acquire control of a listed company may announce an unsolicited takeover bid. Such announcement may be on the basis of an underlying negotiated deal or based on the intent to acquire control and substantial stake from existing shareholders. The broad tenets of an unsolicited takeover remain similar to a mandatory tender offer.

In addition, the Takeover Regulations set out certain conditions upon satisfaction of which an acquirer can make a voluntary offer to acquire shares of an Indian-listed company. These conditions include, inter alia, the following:

- a voluntary offer can be made only by a person who holds at least 25 per cent shares or voting rights in a company, but not more than 75 per cent (taking account of the maximum permissible non-public shareholding);
- the offer size must be for at least 10 per cent of the voting rights of the target;
- a voluntary offer can be made only by a person who has not acquired any shares in the target in the preceding 52 weeks prior to the offer;
- during the offer period, the acquirer cannot acquire shares other than through the voluntary offer; and
- once the voluntary offer is completed, the acquirer shall not acquire further shares in the target for six months after completion of the offer. However, this excludes acquisitions by making a competing offer or another voluntary open offer.

As the Insider Trading Regulations make communication of unpublished price-sensitive information an offence, the approach towards due diligence of a listed target and the related public disclosure of the findings requires careful planning, as well as execution of appropriate confidentiality and standstill agreements between the target and the acquirer.

Law stated - 28 February 2025

Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?

Although much more common in relation to private deals (especially where financial investors are involved or in the case of termination owing to non-satisfaction of a condition), deal protection devices such as break fees (payable by the target or promoters to the bidder) and reverse break fees (payable by the bidder to the target or promoters) are extremely rare in connection with public deals in India. It is not clear whether SEBI would approve an offer letter involving such payments, especially if these arrangements cast a potential payment

obligation on the target. Separately, the payment of break fees to non-residents may require the prior approval of the Reserve Bank of India (RBI).

Under the the Companies Act 2013 (the Companies Act) and subordinate legislation, it is unlawful for any public company to give financial assistance in connection with the acquisition of shares. Furthermore, the consequences of a breach are stringent and the liability of the company is subject to a fine of a maximum of 2.5 million rupees, and every officer of the company who is in default is liable to imprisonment for a term that may extend to three years and, or a fine of a maximum of 2.5 million rupees.

Law stated - 28 February 2025

Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?

Yes. If there is a perceived risk to national security, the government can influence or restrict the completion of a business combination. For instance, under the Indian exchange control policy, foreign investments requiring government approval in the defence, railway infrastructure, broadcasting contents services or telecom sector are scrutinised from a security standpoint. Furthermore, foreign investment by non-resident entities from, or entities whose beneficial owners belong to, countries sharing land borders with India can be undertaken only with prior government approval.

Law stated - 28 February 2025

Conditional offers

What conditions to a tender offer, exchange offer, merger, plan or scheme of arrangement or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

Most forms of business combinations will be subject to conditions, in particular, on obtaining governmental and regulatory consent.

In the case of tender offers under the Takeover Regulations, however, there are funding requirements and the only conditionality that can be provided is with respect to minimum acceptance levels (provided that the higher of 100 per cent of minimum acceptance level consideration or 50 per cent of total consideration under the tender offer, has been deposited in cash, in an escrow account). However, the Takeover Regulations permit withdrawal of a tender offer in the event 'any condition stipulated in the agreement for acquisition attracting the obligation to make the tender offer is not met for any reasons outside the reasonable control of the acquirer', SEBI may resist attempts to expand the ambit of conditional offers.

Law stated - 28 February 2025

Financing

If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Pure leverage cross-border deals are not common in India (owing to restrictions on domestic banks in India providing acquisition financing). Where a transaction is debt-financed outside India, an offshore security package is normally put in place by the acquirer, as taking security over Indian assets needs prior approval from the RBI. In this scenario, funds are normally drawn down and available at the time of signing the acquisition documents and making the public announcement to satisfy the merchant banker that necessary financing is available. Even in purely domestic deals, financing conditions are rarely sought for, or accepted.

Law stated - 28 February 2025

Minority squeeze-out

May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Indian securities laws require that public (or non-controlling) shareholders must hold at least 25 per cent of the publicly listed companies. Coupled with SEBI's mandate to safeguard the interests of minority shareholders, implementing a squeeze-out of minority shareholders in a publicly listed company therefore becomes challenging, unless the company is delisted first.

Voluntary delistings require approval by at least two-thirds of public shareholders and also the stock exchanges. The exit price is determined through a reverse book-building (RBB) methodology. The statutory time frame for a voluntary delisting is approximately two to three months, but the actual time frame may vary by a few weeks. Furthermore, a new fixed-price voluntary delisting mechanism has been introduced for frequently traded companies as an alternative to the existing RBB. The fixed price must include a 15 per cent premium over the floor price. Public shareholders can either accept and tender their shares or reject the offer. The delisting offer would succeed if the acquirer's holding reaches 90 per cent or more. While this mechanism offers a clear 'yes' or 'no' choice, eliminating RBB risks and ensuring price certainty, its success, however, would depend on shareholder satisfaction with the premium offered.

Post delisting, to squeeze out any remaining minority shareholders, buyers traditionally relied upon court-approved schemes, selective reductions of capital and share consolidations (to cause the minority to end up holding fractional shares).

Section 236 of the Companies Act was enacted to provide an express squeeze-out procedure without the involvement of the courts. In this procedure, the buyout price is to be determined on the basis of an independent valuation with reference to the final offer price of the delisting and the fair value of the target (as determined by conventional valuation methodologies). The section 236 procedure, however, can still involve judicial challenge and remains untested and unreliable as there is no clear right to acquire the minority's shareholding after price determination has taken place.

Law stated - 28 February 2025

Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?

In sensitive or highly regulated sectors, foreign investment approvals are directly handled by the relevant government department. Investment approvals are required to be given within eight to 10 weeks, but that time frame may be extended when security clearance is needed.

Separately, in regulated sectors (eg, insurance), business combinations also require the approval of the relevant regulatory authority in certain cases. In these circumstances, no fixed time frame is provided by the authorities and business combinations are approved on a case-by-case basis.

Law stated - 28 February 2025

OTHER CONSIDERATIONS

Tax issues

What are the basic tax issues involved in business combinations or acquisitions involving public companies?

The following position of law is as of the current provisions of the Income-tax Act 1961 (the IT Act) read with the amendments proposed by the Finance Bill 2025, as introduced on 1 February 2025.

Share sales

Under the IT Act, the seller's capital gains tax liability will depend on the nature of securities held, period of holding and the seller's residency status. The applicable tax rates are as follows:

Particulars	Long - term capital gains (period of holding exceeds 12 months or 24 months for shares sold under offer for sale)		Short - term capital gains (period of holding is 12 months or less or 24 months or less for shares sold under offer for sale)	
	Resident	Non - resident	Resident	Non - resident
Where securities (equity shares and	12.5 per cent (on gain exceeding 125,000 rupees)		20 per cent	

units of equity - oriented mutual fund) are listed on a recognised stock exchange in India and the transaction of sale takes place on the stock exchange such that the transaction is subject to securities transaction tax (STT)			
Equity shares sold in an offer for sale to the public included in the initial public offer and where these securities are subsequently listed on a recognised stock exchange	12.5 per cent (on gain exceeding 125,000 rupees)	20 per cent	
Where securities (other than bonds or debentures)	12.5 per cent	Applicable corporate tax rate (maximum	25 per cent (corporates) or 30 per cent (foreign portfolio

are listed on a recognised stock exchange in India and the transaction of sale does not take place on the stock exchange and is therefore not subject to STT			being 30 per cent)	investors and others)

Note 1: The above-mentioned rates will be further increased by applicable surcharge and cess. The rate of surcharge varies based on the legal status of the taxpayer and the taxable income for the relevant year. For individuals and other non-corporate entities, the maximum rate of surcharge is capped to: (a) 15 per cent for long-term capital gain on all asset classes and short-term capital gain on sale of equity shares on which STT has been paid; and (b) 37 per cent or 25 per cent (if the individual has opted for new tax regime) or 15 per cent (for foreign portfolio investments) for short-term capital gain on other shares or securities. For Indian resident corporates and partnership, the maximum surcharge is capped to 12 per cent whereas for non-resident companies, the surcharge is levied at a maximum of 5 per cent. A health and education cess of 4 per cent on income tax and surcharge (if any) is applicable to all assesses. In the case of non-resident investors, the provisions of the IT Act would apply to the extent they are more beneficial than the provisions of the tax treaty between India and the country of residence of the non-resident investor.

Note 2: Income arising on transfer or redemption, or maturity of any market-linked debenture or unlisted bonds or unlisted debentures is deemed as short-term capital gain that is taxable at applicable tax rates provided for short-term capital gains above (plus surcharge and cess). 'Market- linked debenture' means a security by whatever name called that has an underlying principle component in the form of debt security and where the returns are linked to market returns on other underlying securities or indices and include any security classified or regulated as a market- linked debenture by the Securities and Exchange Board of India.

Note 3: Unless specifically exempt under safe-harbour provisions or any tax treaty exemption, gains arising to a non-resident on transfers of shares or interests in foreign companies are also taxable under the IT Act if the substantial value test is met; namely, at least 50 per cent of the value is derived from India and the value of Indian assets exceeds 100 million rupees (as determined in the prescribed manner).

Note 4: In cross-border transactions, buyers have withholding obligations in relation to the non-resident seller's capital gains tax and need to obtain basic tax registrations in India. In this respect, parties often resort to tax indemnities, insurance, escrows and other risk-adjustment mechanisms.

The taxability of deferred or contingent consideration is not fully clear, as there have been conflicting judicial decisions. The court in one such ruling has held that the deferred component being contingent in nature would be taxable in the year of accrual as against the year of transfer, provided certain conditions were satisfied. On the other hand, in a different

ruling, it was held that capital gain is taxable in the year of transfer of capital asset and hence, the deferred consideration should also be taxed in the year of transfer. Accordingly, taxability of any deferred or contingent consideration or earn-outs should be assessed based on the facts and circumstances of each case.

No Goods and Services Tax (GST) is applicable on secondary or primary acquisitions, as securities are not treated as goods or services. This position has been confirmed by a clarification published by the tax authorities in July 2023 in relation to the holding of share capital by a parent company. Notably, the clarification explicitly provides that the holding of shares of the subsidiary by the parent or holding company would not be subject to GST by virtue of 'shares' being included in the definition of securities as per the terms of the Securities Contracts (Regulation) Act 1956. A subsequent clarification issued in June 2024 in respect of 'shares' issued as employee stock option (ESOP), employee stock purchase plan (ESPP) or restricted stock unit (RSU) to employees as an incentive reaffirmed this position, where issue of ESOP/ ESPP/RSU to employees was clarified to be a transaction in 'securities' and therefore outside the purview of GST.

However, as any transaction in securities qualifies as an exempted supply, there is an attendant requirement to reverse tax credits on inputs and input services exclusively used for such transactions (and where such exclusivity is unidentifiable, on a proportionate basis), which is an inherent cost in such constructs.

Slump sales and asset transfers

In slump sales, the business is sold as a going concern for a lump sum consideration. The seller will be subject to capital gains tax on the sale of the business undertaking. Where the undertaking has been in existence for more than three years, a reduced rate of capital gains tax (ie, 12.5 per cent plus surcharge and cess) would apply. Otherwise, the rate of tax would be as per the general rates of corporate tax applicable to the seller. Slump sales have been made subject to pricing requirements where fair market value (FMV) would be deemed to be the minimum consideration for computing taxes in the hands of the seller. The FMV would be the higher of:

- lump sum consideration received or accruing; or
- the hybrid book value of the undertaking.

Hybrid book value is computed using the market value of certain assets, such as immovable property and shares and book value of other assets and liabilities and being transferred as a part of the undertaking. Also, where the consideration is received partly or wholly in kind, the FMV rules prescribe a method to arrive at the market value of such non-monetary consideration.

The cost of acquisition for the seller is the net worth of the undertaking, which is determined in accordance with specific rules.

A slump sale is not taxable under GST and is treated as an exempt supply. Accordingly, requirements for the reversal of tax credits also arise in such scenarios. Simultaneously, the law also allows for the transfer of tax credits pertaining to the undertaking to the acquirer. In this respect, as GST creates the fiction of a distinct entity in each state of operation, care would need to be taken to ensure that the credits are disbursed across the applicable states in the ratio of the value of assets assigned to each state as per the scheme for transfer.

An itemised asset transfer would also result in capital gains tax liability for the seller. The rate of tax would depend on the period for which the relevant asset is held and whether depreciation has been claimed. In addition, GST will be levied on the sale of movable assets (including intangible assets) at the prescribed rates depending on the classification of each asset. Where a lump-sum value is ascribed to the asset proposed to be transferred, the highest rate of GST inter se applicable to the assets will be applied to the entire consideration. If any consideration is paid for a non-compete obligation, GST will be payable on the consideration.

In both slump sales and itemised asset transfers, accumulated business losses and unabsorbed depreciation are not allowed to be brought forward. Furthermore, any goodwill arising pursuant to slump sale would not be eligible for depreciation.

Court-approved schemes

Amalgamations and demergers involve significantly different tax considerations. Subject to the satisfaction of certain conditions, amalgamations and demergers are tax-neutral and no capital gains tax is applicable. In addition, accumulated business losses and unabsorbed depreciation of the amalgamating company (engaged in certain specified activities or sectors) may be utilised by the amalgamated company and, in a demerger, the unabsorbed business losses and unabsorbed depreciation pertaining to the undertaking may be utilised by the resulting company, subject to the conditions provided in the IT Act. In demergers, the assets are transferred at book value or Indian Accounting Standard value and there is no step-up in the cost basis of those assets. Furthermore, any goodwill arising on amalgamation or demergers in the hands of the amalgamated or resulting company (as the case may be) would not be eligible for depreciation.

Other key tax considerations

Buyers are generally advised to require sellers to procure a tax clearance certificate from the Indian income-tax authorities, to avoid the risk of Indian tax authorities declaring one or more asset transfers as void (owing to the seller's pending tax proceedings and liabilities). In an acquisition of a business, the IT Act and GST law provides that the buyer as a successor can be held liable for the past tax dues of the seller, in certain circumstances. Alternatives include tax indemnities, representation/warranties and certificates from reputed chartered accountants.

Indian transfer pricing regulations will apply if the buyer and seller are related enterprises. The IT Act prescribes specific fair market valuation rules (tax FMV) for transfers of shares and other capital assets. Transfers that do not take place at tax FMV can result in additional tax incidences for the buyer or seller, or both.

Law stated - 28 February 2025

Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

For the transfer of employment of employees categorised as workmen (generally, someone not engaged in an administrative or a managerial capacity or, if employed in a supervisory capacity, earning a maximum monthly wage of 10,000 rupees), the Industrial Disputes Act 1947 (the ID Act) requires buyers to offer full and uninterrupted continuity of service with no less favourable terms. This involves:

- carrying forward accrued benefits and providing credit for past service;
- ensuring that their employment remains uninterrupted and that material employment terms and benefits are not varied; and
- periods of continuous service (with the seller) being credited and taken into account for all employment benefits.

If this requirement is not met, the workmen would become entitled to retrenchment compensation under the ID Act, in addition to other applicable statutory and contractual severance payments. The above requirements of the ID Act will not apply, however, in share acquisitions where there is no transfer of employment.

In addition, even in respect of the transfer of employment of non-workmen employees, uninterrupted continuity of service (on no-less favourable terms) may be offered, as a contractual matter, to help the buyer retain those employees.

For completeness, please note that the Industrial Relations Code 2020 (the IR Code) has been enacted, but the same is yet to be put in force and implemented by the Indian government. Once the IR Code is implemented, it will replace the ID Act. As far as the above-mentioned provisions are concerned, the IR Code does not envisage any change other than increasing the wage threshold from the current 10,000 rupees per month to 18,000 rupees per month for excluding the supervisory-level employees from the ambit of workers.

Law stated - 28 February 2025

Restructuring, bankruptcy or receivership

What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Corporate insolvency is regulated under the Insolvency and Bankruptcy Code 2016 (IBC), which follows a creditor-in-control model and requires the completion of an insolvency resolution process to be implemented within a statutory time frame of 180 days (extendable up to 330 days). However, in exceptional circumstances, the jurisdictional National Company Law Tribunal (NCLT) is empowered to extend these timelines even beyond 330 days, if the unique facts of the case merit such extension. Once a company enters the corporate insolvency resolution process (CIRP), the board of directors loses its powers, which get vested in a court-appointed insolvency resolution professional who is responsible for conducting the insolvency resolution process of the concerned corporate debtor and maintaining the corporate debtor as a going concern during the course of its insolvency

resolution process. Furthermore, the IBC scheme provides for a committee of creditors (CoC) (generally comprising of financial creditors who are not the related parties of the corporate debtor), which is responsible for approving fundamental matters, including the insolvency resolution plan submitted by an eligible bidder. In the event:

- the entire insolvency resolution process could not be completed within the timelines prescribed;
- a resolution plan for the insolvency resolution of the corporate debtor is rejected by the jurisdictional bankruptcy court; or
- the CoC, in their commercial wisdom decide to do so, the corporate debtor would be subjected to liquidation process.

Ordinarily, during the liquidation process, the affairs of the corporate debtor would be wound up and the assets of the corporate debtor are liquidated and distributed among the creditors as per a statutorily determined order of priority amongst various classes of creditors. However, the liquidator may also explore liquidating the concerned corporate debtor itself as a going concern whereby a bidder does not acquire the assets of the corporate debtor but instead, acquires the equity shareholding of the concerned corporate debtor. In such a scenario, unlike in case of a conventional liquidation process, the affairs of the concerned corporate debtor are not wound up and instead, the corporate existence of the corporate debtor continues under the management and control of the bidder.

During the course of the CIRP, a statutorily imposed moratorium is in place that inter alia prohibits:

- initiation or continuation of any suits or proceedings;
- enforcement of security interest created over assets of the corporate debtor;
- transfer or alienation of any of the assets of the corporate debtor; and
- recovery of any assets by any owner or lessor that are in the occupation or possession of the corporate debtor.

The moratorium continues to be in force until the completion of the CIRP or the commencement of liquidation. In the event of commencement of liquidation process, a more limited moratorium comes into force whereby initiation of fresh suits or proceedings against the corporate debtor shall remain prohibited during the course of the liquidation process.

The IBC also provides a framework for the pre-packaged insolvency resolution process of corporate debtors in terms of which a corporate debtor and its creditors may resolve its stress in a quick and expeditious manner by a combination of:

- a flexible informal process outside the scope of the NCLT where the corporate debtor and its existing management submit a base resolution plan to the CoC basis negotiations and discussions with the CoC; and
- a formal process under the aegis of the NCLT where either the base resolution plan or any other resolution plan received by the CoC basis, a price- discovery process is approved by the jurisdictional NCLT.

The framework for pre-packs in India has been put in place by drawing on the learnings from:

-

best practices in the European Union, Singapore, the United Kingdom and the United States; and

- the covid-19 pandemic.

Presently, the framework for the pre-packaged insolvency resolution process has been introduced on a pilot basis only to micro and small and medium-sized enterprises.

For bidders, one of the preliminary considerations will be satisfying the fairly broad eligibility criteria under section 29A of the IBC, which applies not only to the bidder but also to its connected persons (which, inter alia, include the holding company, subsidiary companies, associate companies and related parties of the bidder) and any person acting jointly or in concert with the bidder.

A resolution under the IBC entails settlement of dues of the creditors of the corporate debtor and its acquisition by the resolution applicant on an as-is-where-is basis. Accordingly, while the IBC scheme mandates that the resolution professional is statutorily required to provide to prospective bidders all relevant information or documents pertaining to the corporate debtor (target) pursuant to obtaining suitable undertakings from the bidders to keep such information confidential, such resolution professional does not provide any representations or warranties on behalf of the corporate debtor, including in relation to the veracity or legality of the information or documents shared by them. Furthermore, once a resolution plan is approved by the adjudicating authority, the bidder is required to implement the resolution plan as per its terms, failing which the bidder would suffer grave repercussions including forfeiture of security deposit and penal consequences including fines and imprisonment. Moreover, judicial precedents including those rendered by the Supreme Court of India have held that once a resolution plan is approved by the CoC, a bidder can neither unilaterally modify the terms of the resolution plan nor withdraw from the resolution plan including on the ground of insufficiency or inaccuracy of the information and documents shared and occurrence of force majeure events and material adverse events. So proper diligence is critical but given the limited availability of adequate information as well as strict time frames, bidders need to focus their diligence on pre-identified key risk areas and also ensure that the various aspects of diligence (ie, legal, financial and operational) are closely and efficiently coordinated. Key areas for legal diligence will include third-party consent requirements (including consents or approvals from relevant regulatory or statutory and governmental authorities), late and contingent claims, security interests given by third parties for the target's indebtedness, licences and leases and onerous or long-term contracts, litigations in relation to corporate debtor's title to its key properties, etc, proceedings in relation to title to the assets of the corporate debtor. Additionally, judicial precedents have clarified that while a bidder cannot be forced to be liable towards unforeseen claims or liabilities post the approval of the bidder's resolution plan, the rights or titles or interests of third parties in relation to matters other than claims cannot be unilaterally amended or modified under the terms of a resolution plan. In other words, issues like defective title to assets, terms and conditions stipulated in operational or employment contracts, etc, cannot be remedied, modified or extinguished under the terms of a resolution plan. All these factors further underscore the importance of a thorough and proper due diligence exercise. That said, the legal framework under the IBC sufficiently ensures that a bidder acquires a corporate debtor with a clean slate (ie, free and clear of all past liabilities or obligations that are in the nature of a claim against the concerned corporate debtor). Furthermore, both the IBC scheme and judicial precedents have underscored that the provisions of IBC shall have effect over all other laws for the time

being in force and all other instruments having the effect of law (such as contracts). Hence, when a bidder acquires a target company under a clean slate, such bidder is unlikely to face the risk of facing unanticipated claims post the approval of the resolution plan.

Ordinarily, during CIRP, the bidder cannot submit bids for standalone assets of the corporate debtor. Instead, the bid is required to be submitted for the acquisition and insolvency resolution of the entire corporate debtor as a whole and on a going- concern basis. However, recognising practical difficulties and with a view to maximise recovery, certain amendments have been introduced into the IBC scheme that allow the resolution professionals or CoC to solicit resolution plans that envisage acquisition of only certain assets of the corporate debtor from different resolution applicants and decide the manner of treating the residual assets of the corporate debtor. Additionally, the IBC scheme also provides flexibility on the assets or cluster of assets being put up for bidding depending upon the sector in which the corporate debtor is engaged in. For example, in the case of insolvency resolution process of core investment companies and systemically important non-bank financial companies, the bankruptcy courts have allowed the resolution plans to divide the assets of the corporate debtor into identified business verticals and solicit separate resolution plans for each of these verticals. Similarly, in the context of a corporate debtor engaged in the real estate sector, recent amendments to the IBC scheme have allowed the CoC to solicit separate resolution plans for each real estate project or group of projects of the corporate debtor.

Anticipating the motivations of the CoC and appropriately structuring the bid will be fundamental. For example, Indian public-sector banks, which constitute a majority on the CoC and are driven by their provisioning and capital adequacy requirements, are likely to favour plans with a higher upfront payment. Other key factors for the bid will include:

- the bidder's experience in turnaround situations and familiarity with the target's sector;
- the resolution plan's compliance with the IBC and other applicable laws, including how the plan addresses the interests of all stakeholders and not only the CoC; and
- payments to non-committee creditors.

It is further relevant to note that the resolution applicant or bidder is required to ensure that the resolution plan is in compliance with certain mandatory requirements as stipulated under the IBC scheme. Similarly, the CoC is also obliged to vote on a resolution plan that satisfies these mandatory requirements. Some of these requirements are:

- costs involved towards conducting the insolvency resolution process and towards maintaining the corporate debtor as a going concern during the course of its CIRP are required to be paid in full and in priority to all other payments by the bidder;
- payment towards operational creditors should be paid in priority to financial creditors;
- operational creditors are required to be paid a minimum of:
    - the liquidation value they are entitled to; or
    - the amount they would be entitled to if the proceeds of the resolution plan are distributed as per the statutorily determined order of priority mentioned above, whichever is higher; and
- financial creditors who did not vote in favour of the resolution plan, and operational creditors are required to be paid a minimum liquidation value; and

- the bidder is required to be eligible to submit a resolution plan in terms of section 29A of the IBC.

Tax liabilities arising from write-offs of existing debt under the terms of a resolution plan are often substantial and adjustments for past losses and unabsorbed depreciation may be inadequate sometimes. In these cases, specific risk mitigation strategies (eg, debt-to-equity conversions and reverse merger acquisitions) may need to be implemented. It is relevant to note that tax liabilities are often a key factor that guides the structure of the acquisition of a company under a resolution plan.

To achieve complete control of the target, bidders also need to design a plan that achieves a clean and efficient exit of incumbent promoters and minority shareholders. This may involve a debt-to-equity conversion and buyout, issuance of new equity or a capital reduction. Publicly listed targets will also need to be delisted and certain exemptions from the general delisting procedure under Indian securities laws have been made available to delistings pursuant to a CIRP.

It should be noted that the IBC is a relatively new piece of legislation and is still evolving. Issues that remain unsettled, or new untested strategies, may become contentious and require judicial or legislative intervention, or pose other challenges. Flexibility, foresight, swiftness of action and detailed meticulous advice should therefore underpin any successful acquisition strategy.

Law stated - 28 February 2025

Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

The offence of bribery under the Prevention of Corruption Act 1988 (POCA) involves an undue advantage offered to, or accepted by, a public servant and is punishable with up to seven years' imprisonment. An undue advantage can include a non-monetary bribe and Indian courts have interpreted 'public servant' quite broadly (even senior bank officials have been covered). Both the bribe taker and the bribe giver can be prosecuted under POCA and it is immaterial whether the bribe was offered or paid directly or through an intermediary.

Most importantly, commercial organisations can also be prosecuted for bribery offences committed by their associated persons and officers of commercial organisations can face personal liability for offences committed with their consent or connivance. A defence of having adequate procedures in place may be raised by corporate organisations.

Buyers also need to be wary of the public company's state of compliance with anti-money laundering laws (including legislation on black money), legislation restricting ***benami*** transactions (ie, transactions for the purchase of property in an ostensible owner's name) and tax laws. Consequences of non-compliance in these cases can involve not only fines and imprisonment but also attachment of tainted property. In addition, in the case of public companies dealing with the government, there is the risk of being blacklisted from future tenders.

Law stated - 28 February 2025

UPDATE AND TRENDS

Key developments

What are the current trends in public mergers and acquisitions in your jurisdiction? What can we expect in the near future? Are there current proposals to change the regulatory or statutory framework governing M&A or the financial sector in a way that could affect business combinations with, or acquisitions of, a public company?

Public M&A in India has been very active over the past few years and the activity in this space is expected to grow in the coming years as well. Robust deal activity coupled with strong regulatory reforms and ease- of- doing- business initiatives are likely to support large and complex deal making. Overall, India is proving to be a resilient and reliable market, and we expect Public M&A to substantially contribute to the India story.

Law stated - 28 February 2025