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Published by

Law Business Research Ltd

Meridian House, 34-35 Farringdon Street

London, EC4A 4HL, UK

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First published 2018

Third edition

ISBN 978-1-83862-390-6

Printed and distributed by

Encompass Print Solutions

Tel: 0844 2480 112



Public M&A

2020

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Lexology Getting The Deal Through is delighted to publish the third edition of *Public M&A*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Australia, Bulgaria, Greece, Israel, Nigeria and Sweden.

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Alan M Klein of Simpson Thacher & Bartlett LLP, for his continued assistance with this volume.



London

June 2020

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This article was first published in July 2020

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Contents

Global overview	5	Germany	69
Alan M Klein Simpson Thacher & Bartlett LLP		Gerhard Wegen, Christian Cascante and Jochen Tyrolt Gleiss Lutz	
Cross-border M&A: the view from Canada	7	Ghana	78
Ian Michael Bennett Jones LLP		Kimathi Kuenyehia, Valery Atuwu, Sarpong Odame and Kojo Amoako Kimathi & Partners Corporate Attorneys	
Introduction to public M&A in the United Kingdom	9	Greece	85
Caroline Rae and Mark Bardell Herbert Smith Freehills		Catherine M Karatzas, Alexandra Th Kondyli and Eleana Rouga Karatzas & Partners Law Firm	
Australia	11	India	90
Simon Rear, Chris Rosario, Michael Van Der Ende and Connor McClymont Squire Patton Boggs		Rabindra Jhunjunwala and Bharat Anand Khaitan & Co	
Bermuda	17	Ireland	97
Stephanie Paiva Sanderson BeesMont Law Limited		Madeline McDonnell and Susan Carroll Chrysostomou Matheson	
Brazil	22	Israel	109
Enrique Tello Hadad, Richard Blanchet and Daniel Domenech Varga Loeser, Blanchet e Hadad Advogados		Michael Barnea, Zvi Gabbay and Ariella Dreyfuss Barnea Jaffa Lande	
Bulgaria	29	Italy	114
Ivo Alexandrov and Yonko Hristov Kambourov & Partners, Attorneys at Law		Fiorella Federica Alvino Nunziante Magrone	
Canada	34	Japan	121
Linda Misetich Dann, Brent W Kraus, John E Piasta, Ian C Michael, Chris D Simard and Beth Riley Bennett Jones LLP		Sho Awaya and Yushi Hegawa Nagashima Ohno & Tsunematsu	
China	42	Luxembourg	129
Caroline Berube and Ralf Ho HJM Asia Law & Co		Chantal Keereman and Frédéric Lemoine Bonn & Schmitt	
Denmark	48	Mexico	135
Thomas Weisbjerg, Julie Høj-Nielsen and Adam Kara Mazanti-Andersen Korsø Jensen Law Firm LLP		Julián J Garza C and Luciano Pérez G Nader Hayaux & Goebel	
Egypt	55	Nigeria	140
Omar S Bassiouny and Mariam Auda Matouk Bassiouny		Gbolahan Elias SAN, Yemisi Falade and Oluwatosin Omobitan G Elias & Co	
France	60	North Macedonia	146
Anya Hristova and Océane Vassard Bersay & Associates		Emilija Kelesoska Sholjakovska and Ljupco Cvetkovski Debartiev Dameski & Kelesoska	

Norway	153	Taiwan	209
Ole K Aabø-Evensen Aabø-Evensen & Co		Susan Lo and Yvonne Hsieh Lee and Li Attorneys at Law	
Poland	166	Thailand	214
Anna Nowodworska, Dariusz Harbaty and Joanna Wajdzik Wolf Theiss		Akeviboon Rungreungthanya and Pratumporn Somboonpoonpol Weerawong, Chinnavat & Partners Ltd	
Qatar	173	Turkey	220
Faisal Moubaydeen Dentons		Kerem Turunç and Noyan Turunç Turunç	
Russia	178	United Kingdom	226
Vasilisa Strizh, Philip Korotin, Valentina Semenikhina, Alexey Chertov, Dmitry Dmitriev and Valeria Gaikovich Morgan Lewis		Antonia Kirkby and Robert Moore Herbert Smith Freehills LLP	
South Africa	185	United States	232
Ezra Davids and Ian Kirkman Bowmans		Alan Klein Simpson Thacher & Bartlett LLP	
Sweden	194	Vietnam	238
Carl-Johan Pousette and Marcus Tipner Advokatfirman Hammarskiöld		Nguyen Anh Tuan, Phong Le, Ha Thi Hai and Nguyen Thu Huyen Bizconsult LLC	
Switzerland	200		
Claude Lambert, Reto Heuberger and Andreas Müller Homburger			

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STRUCTURES AND APPLICABLE LAW

Types of transaction

1 | 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: 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.

Asset acquisitions

With asset acquisitions, parties will 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 IP) while leaving other assets behind (eg, trade debts). Tax will also be a key driver 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 with superior voting rights, 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.

Statutes and regulations

2 | 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 the following:

- the Companies Act 2013 and subordinate legislation (the Companies Act), 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 and subordinate legislation, which sets out the merger control regime in India.

Unless the 'small target' (aggregate assets in India worth less than 3.5 billion rupees or aggregate turnover in India of less than 10 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: (1) 20 billion rupees of combined assets in India; (2) 60 billion rupees of combined turnover in India; (3) US\$1 billion of combined assets worldwide (including 10 billion rupees of combined assets in India); or (4) US\$3 billion of combined turnover worldwide (including 30 billion rupees of combined turnover in India); and
- at the level of the group (to which the target or resultant entity would belong): (1) 80 billion rupees of combined assets in India; (2) 240 billion rupees of combined turnover in India; (3) US\$4 billion of combined assets worldwide (including 10 billion rupees of combined assets in India); or (4) US\$12 billion of combined turnover worldwide (including 30 billion rupees of combined turnover in India).

The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (the Takeover Regulations) govern takeovers of publicly listed companies. Any direct acquisition of 25 per cent or more of the voting rights in, or of control over, a publicly listed target in India will require the buyer to offer to further acquire at least 26 per cent of the target's voting capital. Indirect acquisitions of more than 80 per cent of the net asset value, sales turnover or market capitalisation of the ultimate target are regarded, in all respects, as direct acquisitions.

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 involved publicly listed companies. In addition, the Listing Regulations, together with the Takeover Regulations and the SEBI (Prohibition of Insider Trading) Regulations 2015, contain certain disclosure requirements for business combinations involving publicly listed companies.

Cross-border transactions

3 | 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 case of acquisitions by non-residents and a maximum price in case of sales by residents, in each case, based on any internationally accepted valuation methodology. 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.

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

Sector-specific rules

4 | 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 and gambling), permitted up to a specified cap only (eg, 49 per cent in insurance) or permitted beyond specified caps but with prior governmental approval (eg, the telecoms sector, in which foreign investment beyond 49 per cent requires governmental approval). In addition, in certain sectors, there are also additional conditions and operating obligations (eg, single-brand retail trading).

Transaction agreements

5 | 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 transfers of contracts and other liabilities are normally undertaken through separate novation agreements.

In a mandatory open offer, the buyer needs to issue a public announcement and a detailed public statement and subsequently provide an offer letter to all shareholders.

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.

FILINGS AND DISCLOSURE

Filings and fees

6 | 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 open 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) and the relevant stock exchanges. Court schemes must be filed with the National Company Law Tribunal and also with the relevant stock exchanges.

Details of inbound foreign investments need to be reported to the Reserve Bank of India (RBI) within 30 days. Details of shares transferred on the stock exchanges and involving 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 or a long-form filing in Form II. The Form II filing is generally used where the combined market share is more than 15 per cent in the horizontal market or more than 25 per cent in the vertical market.

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

Stamp duty is chargeable on instruments, so the duties will vary depending on the transaction structure and the nature of instruments being executed. From 1 July 2020, all share acquisitions (on a delivery basis) will be chargeable to stamp duty at a uniform rate of 0.015 per cent.

Information to be disclosed

7 | 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, 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.

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

Disclosure of substantial shareholdings

8 | 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?

Persons holding at least 25 per cent (including holdings of any concert parties) of the voting rights of a publicly listed company need to disclose their aggregate holdings and voting rights within seven working days of the financial year close (ie, 31 March).

Separately, any person 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 transfers 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 party to a business combination, the disclosure obligations under the Listing Regulations will apply.

DIRECTORS' AND SHAREHOLDERS' DUTIES AND RIGHTS

Duties of directors and controlling shareholders

9 | 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 law 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 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 interests 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 the 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.

Approval and appraisal rights

10 | 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?

Shareholder 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. In a merger or demerger, shareholder approval is necessary provided that a majority in number and three-quarters in value of the shareholders and creditors approve the transaction. Listed companies need shareholders' approval by special resolution in case of disposal of a material subsidiary (more than 20 per cent income or net worth on a consolidated basis) or sale or disposal of assets of a material subsidiary. Further, approval of 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.

COMPLETING THE TRANSACTION

Hostile transactions

11 | 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 fairly robust representations and warranties package backed by the seller. Accordingly, public takeovers closely resemble private M&A transactions, with the exception of the acquirer having to complete an open offer process in accordance with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (the Takeover Regulations) and make mandatory disclosure under the Takeover Regulations and the SEBI (Prohibition of Insider Trading) Regulations 2015 (the Insider Trading Regulations).

The Takeover Regulations provide for hostile takeovers of listed Indian companies and set out 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 an additional 10 per cent of the voting rights the target company;
- a voluntary offer can be made only by a person who has not acquired any shares in the target company 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 company for six months after completion of the offer. However, this excludes acquisitions by making a competing 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.

Break-up fees – frustration of additional bidders

12 | 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 the Securities and Exchange Board of India (SEBI) would approve an offer letter involving such payments, especially if

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

Under the Companies Act, it is unlawful for any public company to give financial assistance in connection with the acquisition of shares. Further, the consequences of a breach are stringent and 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 with fine of a maximum of 2.5 million rupees.

Government influence

- 13 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 exchange control policy, foreign investments requiring government approval in the defence, railway infrastructure, broadcasting or telecoms sectors are scrutinised from a security standpoint.

Conditional offers

- 14 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 open offers under the Takeover Regulations, however, there 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 and 50 per cent of total consideration has been deposited, in cash, in escrow). Although, the Takeover Regulations permit withdrawal of an open offer in the event 'any condition stipulated in the agreement for acquisition attracting the obligation to make the open offer is not met for any reasons outside the reasonable control of the acquirer', SEBI may resist attempts to expand the remit of conditional offers.

Financing

- 15 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.

Minority squeeze-out

- 16 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 publicly listed companies. Coupled with SEBI's mandate to safeguard the interests of minority shareholders, implementing a squeeze out of minority shareholders of 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 methodology. The statutory time frame for a voluntary delisting is approximately two months but the actual time frame can be longer by a few weeks.

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.

Waiting or notification periods

- 17 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 (eg, atomic energy, lotteries, telecoms), 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.

OTHER CONSIDERATIONS

Tax issues

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

Share sales

Under the Income Tax Act 1961 and subordinate legislation (the IT Act), the seller's capital gains tax liability will depend on the period of holding and the seller's residency status (including the investment route under exchange control regulations). The applicable tax rates are as follows.

Particulars	Long-term capital gains (period of holding exceeds 12 months)		Short-term capital gains (period of holding is 12 months or less)	
	Resident	Non-resident	Resident	Non-resident
Where securities (equity shares and 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)	10%	10%	15%	15%
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	10%	10%	15%	15%
Where securities (other than bonds or debentures) 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	10% (without indexation) or 20% (with indexation)	10% (without indexation)	30%	40%

The above-mentioned rates will be further increased by applicable surcharge and cess.

The concessional tax regime for foreign portfolio investment (FPI) is as follows.

	Long-term capital gains (period of holding exceeds 12 months)	Short-term capital gains (period of holding is 12 months or less)
Where securities are listed on recognised stock exchange and transaction of sales takes place on the stock exchange by FPI	10%	15%
Other securities	10%	30%

The above-mentioned rates will be further increased by applicable surcharge and cess. FPI is also accorded a concessional rate of withholding on interest payments at 5% (plus applicable surcharge and cess) on certain debt instruments such as listed non-convertible debentures (NCDs) and long-term infrastructure bonds provided the rate of interest on the NCDs does not exceed 500 basis points over the SBI base rate and are issued before 1 July 2023. If the conditions mentioned under the IT Act are not met, withholding on interest payments would be at the rate of 20% (plus applicable surcharge and cess).

In addition, unless specifically exempt under safe-harbour provisions, 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 value is derived from India and the value of Indian assets exceeds 100 million rupees (as determined in the prescribed manner).

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

The taxability of deferred or contingent consideration is not fully clear, as there have been conflicting judicial decisions. In a helpful 2016 ruling, however, it was held that the deferred component would be taxable in the year of accrual, provided certain conditions were satisfied.

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 that undertaking has been in existence for more than three years, a reduced rate of capital gains tax (ie, 20 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. The cost basis of the acquired assets, for the buyer, is determined in accordance with specific rules and needs to be supported by an independent valuation report. Generally, a judicial view has been taken that the sale of a business as a whole is not subject to goods and

services tax (GST) and most of the states have also exempted sale as a going concern from GST.

An itemised asset transfer would also result in capital gains 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 sale of movable assets (including intangibles assets) as per the prescribed rates. If any consideration is paid for a non-compete obligation, GST will be payable on the consideration. For IT Act purposes, the non-compete fee could either be characterised as business income or capital gains.

In both slump sales and itemised asset transfers, accumulated business losses and unabsorbed depreciation are not allowed to be brought forward.

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 may be utilised by the resulting (or demerged) entity or amalgamated entity, subject to the conditions provided in the IT Act. However, in demergers, the assets are transferred at book value or Ind AS value and there is no step-up in the cost basis of those assets.

Other key tax considerations

Buyers are generally advised to require sellers to procure a tax clearance certificate, to avoid the risk of Indian tax authorities declaring one or more asset transfers as void (owing to the seller’s pending tax liabilities). In an acquisition of business, the IT Act 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 and certificates from reputed chartered accountants.

In cross-border situations, the availability of tax relief under India’s tax treaties with the relevant foreign jurisdiction must be considered.

Indian tax authorities may invoke anti-abuse provisions if a transaction lacks commercial purpose and is aimed principally at obtaining a tax benefit. Re-characterisations of transactions can include disregarding specific entities in a structure, reallocation of income and expenditure, alteration of a party’s tax residency and the legal situs of an asset, treatment of debt as equity or vice versa, and even denial of tax treaty benefits.

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.

Labour and employee benefits

19 | 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 of 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.

Restructuring, bankruptcy or receivership

20 | 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 possession model and requires insolvency resolution plans to be implemented within a statutory time frame of 180 days (extendable up to 330 days). Once a company enters the corporate insolvency resolution process (CIRP), the board of directors loses its powers, which get vested in a court-appointed resolution professional, and a committee of creditors (generally comprising financial creditors) is responsible for approving fundamental matters, including the insolvency resolution plan submitted by an eligible bidder.

The IBC does not permit UK-style pre-packs or US-style 363 asset sales.

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 its connected persons. Section 29A eligibility has been the subject of judicial challenge in the past and can be a contentious issue, particularly in large deals involving several bidders.

An IBC sale is on an 'as is where is' basis, 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, late and contingent claims, security interests given by third parties for the target's indebtedness, licences and leases and onerous or long-term contracts.

Anticipating the motivations of the creditor committee and appropriately structuring the bid will be fundamental. For example, Indian public sector banks, which constitute a majority on the creditor committee 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 extent of the conditionality of the resolution plan;
- 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 creditor committee; and
- payments to non-committee creditors.

Tax liabilities arising from write-offs of existing debt 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.

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.

Anti-corruption and sanctions

21 | 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 Prevent 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 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 case of public companies dealing with the government, there is the risk of being blacklisted from future tenders.

UPDATE AND TRENDS**Key developments**

22 | 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?

As is the case in other jurisdictions, India has imposed a nationwide lockdown to deal with the ongoing covid-19 pandemic, which is expected to significantly impact the Indian economy. Monetary and fiscal support measures and temporary relaxations under the existing legal framework for businesses will therefore play a key role in driving M&A activity in 2020. It is expected that some businesses will need to consolidate to survive (especially in sectors that have been significantly impacted by lockdown).



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