BUSINESS LAW INTERNATIONAL

VOL 20 NO 3 SEPTEMBER 2019

Business Law International

Vol 20 No 3 pp 191–304 ISSN 1467 632X September 2019

Published by the Legal Practice Division of the International Bar Association

INTERNATIONAL® BAR ASSOCIATION

Indian Public M&A: A Comprehensive Guide to the Key Concepts, Deal Structuring and Execution Considerations and Market Practice for an International Lawyer

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Introduction

At first glance, the legal framework governing Indian public M&A transactions may appear to be similar to that in England and Wales. The company law foundation is similar, and a number of familiar English law concepts find place in the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (the 'Takeover Regulations'). However, on closer examination, the Indian regulatory regime is very different to that in England and Wales in relation to matters such as delistings, minority squeeze-outs and the operation of the regulatory regime in practice. Contested deals have, until recently, been rare. Listed companies are, in many cases, subject to high levels of control by founding shareholders known as 'promoters', independent directors have historically not felt able or been willing to act as a meaningful counterpoint to executive management and the institutional investor base is not as organised as it is in England and Wales or the United States.

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However, this landscape is changing. A number of controlling shareholders are in a weakened position due to the insolvency or over-leveraged position of their groups and this loss of influence is spilling over to mainstream transactions. International private equity and hedge funds hold positions in a number of listed companies and are more assertive than the traditional shareholder base in India. Both of these factors played a role in the recent IHH/Fortis acquisition where there were a number of competing bids and where the board changed (to become more independent) in the midst of the deal. While it is too early to draw any longer-term conclusions from this deal, 2019 has seen an unsolicited bid for Mindtree Limited that is currently under way. These are encouraging signs for Indian public M&A.

Against that backdrop, this article seeks to guide international counsel and clients seeking to undertake Indian public M&A deals through the regulatory landscape, drawing comparisons with corresponding concepts in England and Wales.

Backdrop to the Indian public M&A environment

Before considering the techniques to achieve public M&A transactions in India and the more detailed features of public M&A in India, it is worth pausing to consider some basic contextual issues.

Regulatory architecture

The Securities and Exchange Board of India (SEBI) regulates public takeovers in India through the Takeover Regulations and its views are critical. For structural questions, it is possible to consult SEBI through its 'informal guidance scheme', but this process takes longer and is less fluid than the consultation process with the Takeover Panel in England and Wales (and the query and the SEBI response are made public). Apart from SEBI's views, as a result of litigation, certain aspects of the Takeover Regulation, particularly around concert party status and the meaning of 'control', have been subject to judicial determination.

Promoter concept

Founding shareholders in India are commonly referred to as promoters. There are different definitions of promoters under company law and under securities law, but both include the concept of 'control' of the relevant company (discussed further below). However, the definition under the

Companies Act 2013 (CA 2013) also includes a shadow directorship concept (which is no longer a feature of directorship itself under Indian law).[1]

CONSEQUENCES OF BEING A PROMOTER

There are two aspects to the promoter concept of relevance in the public M&A context.

First, promoter-controlled companies comprise the majority of listed companies in India. In contrast to England and Wales, where premium listed companies must have a relationship agreement with their controlling shareholder, there is no such requirement in India.[2] This allows controlling shareholders to exert a greater degree of influence over listed companies in India.

Second, any potential acquirer or investor in a public company will need to understand the possibility and the risk of being treated as a promoter. This is an issue that is of concern not just to strategic investors. Financial investors are also capable of being treated as promoters (although most such investors try not to be treated as such).[3]

In this regard, the issue is that unlike England and Wales, where the UK Listing Authority's (UKLA) listing rules clearly define 'controlling shareholders' by reference to a 30 per cent threshold, there is no such clear-cut guidance in India. In practice, any holding over 20 per cent is likely to necessitate discussion as to promoter status with SEBI.

If an investor is treated as a promoter, the main implications are disclosure-related as well as the investor being deemed to be a concert party of the other promoters in a takeover context. Promoters are also subject to lock-in

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1 The historic definition of 'director' under the Companies Act 1956 was with reference to 'any person occupying the position of director, by whatever name called', a construction that imported the 'shadow directorship' concept into Indian company law. However, the CA 2013 defines director by reference to 'a director appointed to the Board of a company', a narrower definition. That said, the definition of promoter includes in limb (c) a person who 'in accordance with whose advice, directions or instructions the Board of Directors of the Company is accustomed to act'. This is the classic shadow directorship test.

2 Although reg 4(2) of the SEBI (Listing Obligations and Disclosure Requirements) 2015 (the 'Listing Regulations') contains some general obligations on the listed company to protect minority shareholders from abusive actions by controlling shareholders and there are other obligations with regard to the equal treatment of shareholders, this is not a clear requirement for a relationship agreement and there is no direct equivalent to Listing Rule 6.5 and 9.2.2 of the UK Listing Authority' Listing Rules, which necessitate a relationship agreement and establish a clear requirement that the listed company be independent.

3 Eg, in the IPO of Pratap Snacks Limited, an entity controlled by Sequoia has been listed a promoter and in relation to the offer of shares of CMS Info Systems Limited, Sion Investment Holdings Private Limited, an entity controlled by Baring Private Equity Asia, has been listed a promoter.

requirements in an initial public offering (IPO).[4] Other residual provisions also apply under company law and various securities laws. Therefore, as a formal matter, the exposure created by being classified as a promoter would seem to be limited. However, in situations where there is a breach or an alleged breach of any securities or other laws, in practice, SEBI is perceived as being harsher on promoters. This explains why most financial investors (and indeed most shareholders other than the founding shareholder or their families) prefer not to be treated as promoters by SEBI.

Shareholder control

Despite the influence that promoters exert in practice, the legal and regulatory environment in India does confer some power on shareholders of public listed companies in India as various matters require shareholder approval but is wary of permitting any particular shareholder special rights.

The main considerations in relation to 'special rights' are summarised below.

Investor protection rights in public listed companies

Upon a listing of a company's shares, SEBI will require most investor protection rights to fall away. Although SEBI's views on this are evolving, it has accepted the survival of limited investor board nomination rights and has frowned on the survival of affirmative voting rights and transfer restrictions on shares (although there have been certain exceptional cases). Therefore, financial investors will need to manage their expectations as to what rights are permissible both in relation to any investor rights when they invest in public-listed companies as well as the survival of any pre-IPO rights that they may have negotiated.

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4 Regulation 36 of the SEBI (Issue of Capital and Disclosure Requirements) Regulations 2009 provides for a promoter lock of three years to the extent of 20 per cent of the post-IPO share capital of the company and any promoter holdings in excess of this will be locked up for a one-year period.

Dual class share structures

Although Indian company law permits shares with differential voting rights in certain circumstances,[5] in the listed company context, shares with superior voting rights (which would provide control to founding shareholders) have until recently been restricted. However, SEBI approved the concept of shares with superior rights in the listed company context in a board meeting on 27 June 2019, subject to certain protections. For instance, such shares can only be issued where the listed company operates in certain sectors (including the technology sector among others) and only to promoters whose group has a net worth of below INR 5bn (excluding the listed company seeking to issue such shares) and where the promoters hold executive roles. The listed company will be subject to enhanced governance requirements in relation to board and audit committee composition. Such shares must also have been held at least six months prior to the IPO and must be approved by a special resolution. They will also be subject to a lock-up and a five-year 'sunset' requirement (extendable once by shareholder approval, not including the shareholders with superior rights) and the total voting rights issued cannot exceed 74 per cent of the total voting rights of the listed company.[6] The superior voting rights shall also not apply to certain matters including voting on relating party transactions, substantial value transactions, de-listings and buy-backs and other matters to be notified by SEBI (which leaves the door open for SEBI to restrict its use in a takeover situation).[7]

The concept of dual class shares in the listed company context has been subject to criticism from institutional investors in other markets. In an earlier discussion paper dated 20 March 2019, SEBI considered these arguments and has tried to strike a balance between facilitation and restrictions to avoid abuse. Time will tell how this plays out.

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5 Section 43(a)(ii) of the CA 2013 permits the issuance of shares with differential voting rights. There are incremental requirements in the Companies (Share Capital and Debenture) Rules 2014, which limits the shares with differential rights being issued to 74 per cent of the total post-issue share capital of the company (including the shares with differential voting rights).

6 This is different from the provisions of CA 2013 (set out in the footnote above), which will need amendment to facilitate this.

7 These are all set out in SEBI's board approval announcement dated 27 June 2019 and enabling regulations, including amendments to various rules under CA 2013, will be needed.

Approaches to public M&A transactions

Just as in England and Wales, it is possible to structure a public M&A transaction in a number of ways. The main approaches are summarised below.

Offers versus schemes

The two most common approaches are either for the acquirer (and its concert parties) to bid for the shares of a listed target through an offer under the Takeover Regulations, or for the transaction to be structured as a scheme under Indian company law pursuant to a court-approved process (and subject to shareholder approval).[8] In India, schemes are governed by company law only and are not treated as being a type of offer under the Takeover Regulations. The main points of difference between the two in India are summarised below.

First, schemes involve a court approval process and a longer timeline in comparison to offers under the Takeover Regulations. The documentation and process involved in a scheme are therefore different to those required in an offer.

Second, a scheme needs to be approved by 75 per cent of all classes of members and creditors present in person or by proxy (or postal ballot) and voting.[9] In addition, in certain cases, specific SEBI super-equivalent 'majority of minority' requirements may apply (meaning the votes cast by public shareholders in favour must exceed the votes the public shareholders cast against the scheme).[10] By contrast, in a mandatory offer, the minimum offer size is 26 per cent, which means that the offer must be for a minimum of 51 per cent of the listed target. Although acceptance-level conditions are possible in a mandatory offer, they are rare in practice, as discussed under 'Mandatory offer triggers' below.

Third, schemes, provided they satisfy certain requirements, benefit from an exemption from the mandatory offer requirements in the Takeover Regulations and, if properly structured, also present capital gains tax

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8 For further details, see the discussion at 'Ability to structure around the need for a mandatory offer' in 'Mandatory offer triggers' below for discussion on the exemption conditions.

9 S 230(6) of the CA 2013. English law concepts on the constitution of classes such as the classic test in *Sovereign Life Assurance Co v Dodd* (1892) 2 QB 573 (CA) have been quoted with approval by Indian cases and authorities.

10 The circumstances where these may apply are set out in paragraph 9(b) of the SEBI circular dated 10 March 2017.

advantages in comparison to mandatory offers under the Takeover Regulation.[11]

Fourth, because schemes are considered to be self-contained under Indian law, once approved, they may provide exemptions from various processes and approvals that would otherwise have been needed for individual components of the transaction or from the need for certain third-party consents. Therefore, schemes present a useful way of achieving a number of process objectives.

Fifth, schemes are more likely to involve share-for-share exchanges (to ensure tax-neutrality), whereas offers are more likely to involve cash consideration (although other forms of consideration are possible).

Mandatory offers and schemes can also be used together. For instance, upon completion of a mandatory offer and the subsequent delisting process (or a combined offer and delisting process), schemes can be used to squeeze out any remaining minorities (through a reduction of capital). SEBI's regulations and circulars do not readily facilitate the use of a scheme to acquire 100 per cent control and a delisting in one single process.[12]

Other structural alternatives

Another alternative is for the acquirer to enter into an agreement with the listed target to acquire its business (or the businesses of interest to the acquirer) through the transfer of the business as a going concern. Such a transfer is unlikely to escape the need for the approval of the shareholder of the listed seller (indeed, both the Listing Regulations and the CA 2013

11 A number of conditions need to be satisfied under s 2(IB) of the Income Tax Act 1961, including that three-quarters of the shareholders of the transferor company become shareholders of the transferee company and that the schemes are 'merger schemes' pursuant to which all the assets and liabilities of one company become that of the resultant entity with the shareholders of the transferor companies receiving securities of the transferee company. Note that transfers under schemes are also subject to stamp duty.

12 Regulation 11 of the Listing Regulations provide that a scheme cannot override any securities law provisions. This would include the public float requirements and also the Delisting Regulations. SEBI published circulars on 10 March 2017 and 3 January 2018 imposing various public shareholding and other requirements, including that the shares of the transferee company need to be listed (Annexure 1, para III(A)(2)(b) of the 10 March 2017 SEBI circular).

contain special resolution approval requirements where the sale is of a material subsidiary or a material undertaking).[13]

However, precedent transactions of this nature have involved scenarios where the acquirer acquired a key business of the listed seller[14] leaving the seller with a retained business or where the seller has indicated its intention to pursue another line of business after the sale. Transactions where neither of these factors is satisfied may provide difficult to implement, not because of any formal prohibition, but because of the risk of minority shareholder action in practice and also because such a structure may not be tax-efficient.[15]

Types of offers under the Takeover Regulations

There are two types of offer possible under the Takeover Regulations and these are summarised further below.

Mandatory offers

Mandatory offers are triggered by the acquisition by an acquirer and its concert parties of shares or voting rights constituting 25 per cent of the voting rights in the listed target[16] or of 'control' (which is a separate trigger event)[17] of the listed target.

The Takeover Regulations require the mandatory offer to be of at least 26 per cent of the total share capital of the target. This is to be calculated as of the tenth working day after the date of the closure of the tendering period.[18] The offer size may need to be increased proportionately if there is an increase

13 A public company whose shares are listed will be subject to two distinct and sometimes overlapping approval requirements. Under s 180(a), the transfer of 'undertakings' whose value is no less than 20 per cent of the seller's balance sheet or that generates no less than 20 per cent of its income under its income statement will need approval by a special resolution. Similarly, under reg 24(5) any sale, disposal or lease of the assets amounting to more than 20 per cent of the assets of a material subsidiary will need shareholder approval by way of special resolution, unless pursuant to a court-approved scheme.

14 In 2010, Abbott Laboratories acquired the formulations business of Piramal Healthcare for US$3.72bn. More recently, in January 2019, Tirumala Milk Products Private Limited (a subsidiary of the French Groupe Lactalis) acquired the dairy business of the Indian listed Prabhat Dairy Limited for INR 17bn, with the seller intending to focus on its animal nutrition business after the sale.

15 Unless the funds are reinvested in alternative business by the seller, the seller's shareholders will suffer two levels of tax (capital gains tax in the hands of the company and dividend distribution tax when the proceeds are distributed).

16 Reg 3(1) of the Takeover Regulations. There is a considerable body of analysis and case law on the meaning of 'control', which is discussed further below.

17 Reg 4 of the Takeover Regulations.

18 Reg 7(1) of the Takeover Regulations.

in the total number of shares during the offer period contemplated as of the date of the public announcement (normally dealt with by publishing an addendum). However, because of the minimum public float requirements, the aggregate holding of the acquirer and its concert parties (including by virtue of the shares acquired pursuant to the mandatory offer) cannot exceed 75 per cent.[19] There are techniques to achieve this as discussed further below.

Mandatory offers are also treated as being either direct or indirect acquisitions. Direct acquisitions involve direct acquisitions of shares or voting rights in the listed target. Indirect acquisitions arise by virtue of the chain principle, that is, the acquisition of a holding company, which has the effect of triggering a mandatory offer. Different provisions apply to direct indirect acquisitions (eg, when the public announcement of an offer should be made, time for completion and pricing requirements).[20]

In certain cases, indirect acquisitions are deemed to be direct acquisitions because the Indian target constitutes a disproportionately large percentage of the overseas holding entity's business. This determination is undertaken by virtue of an 80 per cent threshold of proportionate net asset value, proportionate sales turnover and proportionate market capitalisation.[21]

Therefore, an international acquirer or its counsel should quickly determine the nature of the acquisition that would apply and organise themselves and their bidding processes accordingly.

Voluntary offers

The Takeover Regulations also contain a distinct regime enabling acquirers to make voluntary offers. The Takeover Regulations formally limit the ability to make voluntary offers to those who, together with their concert parties, already hold 25 per cent or more (but less than 75 per cent) of the shares or voting rights in a target,[22] but SEBI has published Frequently Asked Questions (FAQs) permitting acquirers with lower holdings to make voluntary offers

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19 Otherwise, there will need to be a sell-down after the mandatory open offer closes, so that there is dilution down to this level under reg 7(4) of the Takeover Regulations. If the public float threshold were to increase (please refer to footnote 102 for recent developments in this regard), then the effect of the current SEBI regulations is that the upper limit on mandatory offers would reduce accordingly, after which the sell-down obligations referred to here would apply (unless this regulation too were amended). Market participants should 'watch this space'.

20 Reg 13(2)(e) and (f) for timing of the public announcement, reg 8(12) with regard to completion and regs 8(2) and (3) with regard to pricing.

21 Reg 5(2) of the Takeover Regulations. Also, where the ratios for these thresholds exceeds 15 per cent, the computation needs to be set out in the letter of offer pursuant to reg 8(5) of the Takeover Regulations.

22 Reg 6(1) of the Takeover Regulations.

too.[23] Voluntary offers must be for a minimum of at least ten per cent of the shares of voting rights in a listed target.[24]

Voluntary offers have two uses. First, they present a useful way to continue stake-building after a mandatory offer (although creeping acquisitions prior to this would restrict voluntary offers as discussed under 'Stake-building' below). Second, they allow an acquirer to effectively launch an offer ahead of the mandatory offer trigger.[25] This may present certain timing advantages (in that the offeror does not have to wait for the mandatory offer triggers to be satisfied before seeking to bid for the target).

Mandatory offer triggers

There a number of aspects of the mandatory offer triggers that merit further consideration.

Agreements to acquire shares in a listed target

Since 'acquisition' is defined by reference to an agreement to acquire,[26] any binding agreement entered into that results in the satisfaction of the triggers set out above will trigger a mandatory offer. Since a very large proportion of listed companies in India remain controlled by a promoter or key founding shareholdings, public M&A transactions are usually triggered by the execution of an agreement to acquire shares or voting rights from the promoter.

Given that the level of acceptances is uncertain (although acceptance-level conditions are possible as discussed further below), in order to stay within the 75 per cent public float requirement,[27] the acquirer and its concert parties may wish to structure the acquisition with the seller such that the number of

23 Question 19 of SEBI FAQs indicates that voluntary offers can also be made at below the 25 per cent holding level.

24 Reg 7(2) of the Takeover Regulations. The SEBI FAQs indicate that where the acquirer holds less than 25 per cent of the target company, the voluntary offer must be for a minimum of a further 26 per cent of the listed target.

25 Question 19 of the SEBI FAQs indicates that there is no upper limit in respect of voluntary acquisitions initiated by an acquire that holds less than 25 per cent of the listed target, but reg 7(4) of the Takeover Regulations will still require an acquirer to sell down to the public float threshold after this (please also refer to footnote 102 for discussion on potential regulatory changes to this public float threshold).

26 Reg 2(1)(b) of the Takeover Regulations. In certain deals, SEBI appears to have accepted the principle that an option to acquire shares will only trigger a mandatory offer once exercised. There may be some judicial support for this as in *MCX Stock Exchange Limited v SEBI* (MANU/MH/0289/2012) the Bombay High Court held that an option merely conferred a privilege (although this was not in the context of the takeover regime).

27 Please refer to footnote 19 in relation to the potential impact of certain recent proposed changes to the public float threshold in this regard.

shares acquired is within a range (ie, there is a minimum floor on the number of shares acquired, which is increased depending on the level of acceptances).

Similarly, because of the chain principle that applies as a result of the 'control' test, agreements to acquire interests in holding companies outside India might also trigger a mandatory offer. However, in the case of certain types of such as chain arrangements known as 'indirect acquisition', completion of the takeover process in India can be deferred subject to certain conditions.[28]

Voting rights

The mandatory offer trigger is tied not just to the acquisition of shares, but also to the acquisition of voting rights in a listed target. This means that any contractual arrangements where a party holds or controls voting rights without holding the shares themselves,[29] or the acquisition of any securities that carry voting rights other than equity shares, could also trigger a mandatory offer, if the voting rights exceed 25 per cent.

Chain principle and concept of 'control'

The Takeover Regulations incorporate the 'chain principle' in that acquisition of direct or indirect control of a listed target would constitute a trigger for a mandatory offer. In this context, the term 'control' has attracted significant discussion in India, particularly in the context of minority investments, where investors have affirmative voting rights and board representation rights. The end result of a long line of case law and regulatory discussion is that most practitioners feel that investment protection rights would not amount to control, but rights that deal with operational matters run the risk of being treated as conferring 'control'. These issues are discussed in detail below.

Subhkam principle

The starting point for the analysis is *Subhkam Ventures (I) Private Limited v SEBI*,[30] where the Securities Appellate Tribunal (SAT) considered the issue of whether the grant of certain affirmative voting rights to an investor would

28 The proviso to reg 13(4) contemplates deferral of the detailed public statement in such cases. Also, reg 8(12) of the Takeover Regulations provides for the increase in the offer price in relation to indirect offers by ten per cent for the period after the primary offer (offshore) is contracted. Therefore, the deferral of indirect offers is permitted, provided the bidder compensates the shareholders in India with an increased payment.

29 Such an arrangement might also conceivably trigger the acquisition of 'control' test.

30 Appeal no 8 of 2009 in the Securities Appellate Tribunal, Mumbai.

amount to the acquisition of control by the investor. In this case, the investor had a right to appoint a nominee director on the board and certain veto rights in the company; SEBI had ruled that such rights constituted control and the appeal challenged that ruling. SAT ruled that 'control' meant *positive control*, that is, the ability to cause a company to perform certain actions, and that it *did not cover rights constituting 'negative control'*, that is, the right to prevent the company from carrying out certain actions. The SAT held: 'Control really means creating or controlling a situation by taking initiative. Power by which an acquirer can command the target company do what he wants it to do… It is positive power and not negative power.'

Accordingly, SAT held that they were only provided for the purposes of protecting the investment and did not amount to providing day-to-day control or management control to the acquirer. However, SEBI had appealed the decision of the SAT before the Supreme Court. The Supreme Court's order[31] states that the question of law (ie, whether negative control would qualify as control) remains open and that the SAT decision would not be treated as precedent.

Developments post-Subhkam

Although the issue does remain open, SEBI appears to have softened its position slightly after *Subhkam*. For instance, in the *Jet-Etihad* matter,[32] the question arose as to whether the acquisition of 24 per cent of the equity stake in Jet Airways (India) Limited ('Jet') by Etihad Airways ('Etihad') would amount to Etihad obtaining 'control' in Jet for the purposes of making a mandatory open offer under the Takeover Regulations. SEBI ruled that Etihad's investment in Jet did not amount to control, relying on the findings of the Foreign Investment Promotion Board regarding the retention of effective control of Jet Airways by Indian promoters.[33]

Also, on 12 March 2016, SEBI launched a consultation paper on whether or not to set out a more prescriptive definition of 'control'. In this paper, it drew the distinction between participative rights and protective rights, which appears to be its current position. It ultimately decided in September 2017 not to make any changes to the definition of control, but it does appear to have settled on the distinction set out above. For instance, in March 2017, in the matter of *Kamat Hotels (India) Limited*,[34] SEBI held that certain covenants

31 2011 (5) Comp LJ 386.
32 SEBI order dated 8 May 2014.
33 SEBI distinguished between the more expansive competition law test and the narrower securities law test of control.
34 SEBI order, 31 March 2017.

in favour of investors were merely to protect their rights and did not amount to control.[35]

SEBI has not (so far) indicated that there is a different test that would apply in the context of companies where the shareholding is widely dispersed. However, by rejecting a formulaic approach in its consultation process, SEBI will always be able to consider the context.

Impact of Arcelor Mittal?

More recently, the meaning of control was considered by the Supreme Court in the context of the prohibition on certain 'tainted' bidders under section 29A of the Indian Insolvency and Bankruptcy Code 2016. The Supreme Court quoted with approval the references to control meaning positive control in *Subhkam* and applied this in the insolvency context.

The impact of this rests on an issue that is often overlooked in the analysis of the 'control' decisions, that is, the SAT in *Subhkam* approved a number of affirmative voting rights, including the approval of the company's business plan and key management, that most market participants would regard as being operational rather than protective, in contrast to SEBI's current position, which is to accept only protective rights. Nevertheless, if, as the Supreme Court suggests, the *Subhkam* SAT judgment should prevail, then that might give parties greater freedom with regard to their affirmative voting rights. However, since this judgment was on insolvency law, the issue still remains open and it would be prudent not to read too much into this judgment for the time being.

Applicability in cross-border cases?

Given the high level of discussion around the control issue in India, it is curious that the Supreme Court's decision in *Technip SA v SMS Holdings Private Limited*[36] has attracted limited attention. In this case, the Supreme Court ruled that the acquisition of control under an overseas takeover would be determined by reference to the relevant applicable overseas law (in this case, French law). This case raises an interesting question. Consider a scenario where an acquirer acquires a significant minority, but non-controlling stake,

35 In the *NDTV* matter (26 June 2018), SEBI considered lending protections in the form of warrants allowing the lenders the ability to acquire control of the promoter bidding entity and certain option arrangements and concluded that these conferred control. Note that in its earlier discussion paper, SEBI suggested that more routine lender covenants might not confer control, so the concern here was the more aggressive nature of these protections (ie, they could be exercised without a clear linkage to the loan).

36 MANU/SC/0385/2005.

in the holding company of a listed Indian target, with extremely robust affirmative voting rights. How then is control to be determined? Arguably, this should be a matter of the law of the jurisdiction of the upstream transaction. If there is greater tolerance of robust affirmative voting rights not constituting control in that jurisdiction, will that prevail, notwithstanding SEBI's views on this as discussed above? However, as a practical matter, there may be limited case law or regulation in the relevant offshore jurisdiction on this point, which may mean that it is difficult in practice to reach such a conclusion, so perhaps this difficult question may not need to be addressed in many deals.[37]

Ability to structure around the need for a mandatory offer

The Takeover Regulations do contain a number of exemptions to the mandatory offer requirements that could prove useful in certain circumstances and parties often spend significant time considering the exemptions in practice.[38]

For instance, transfers as between promoters (who have been named as such in the target's public filings for at least three years) benefit from an exemption from the mandatory offer requirement.[39] Therefore, set against the general perception of risk that arises because of promoter status, being categorised as a promoter may at least have this one benefit. There are also 'between' persons who have been concert parties for a three-year period.[40] There is furthermore an exemption with regard to transfers between group companies.[41] These exemptions may have value for long-term investors in a listed company or as between consortium members (provided they have been invested for a three-year period).[42]

Transactions structured as schemes benefit from an exemption from the mandatory offer requirements under the Takeover Regulations. However,

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37 There are some examples of transactions of a similar nature (eg, the mandatory offer in respect of Sharp India), where presumably because of these concerns, the parties preferred to avoid the ambiguity and conducted a mandatory offer.

38 Indeed, as Umakanth Varottil highlights in his working paper, *The nature of the market for corporate control in India* dated 15 December 2015, exemptions often significantly exceed offers actually made. See https://law.nus.edu.sg/wps/pdfs/011_2015_Umakanth_Varottil.pdf accessed 24 July 2019.

39 Reg 10(1)(a)(ii) of the Takeover Regulations.

40 Reg 10(10a(a)(iv) of the Takeover Regulations.

41 Reg 10(1)(a)(iii) of the Takeover Regulations.

42 In practice, where the company has been listed for less than three years, even if the parties have been promoters for a greater period (ie, pre-listing), SEBI has been unwilling to take this prior period into account (see the SEBI informal guidance in the matter of *Commercial Engineers and Body Builders Company Limited*, 5 December 2012).

they come with their own set of requirements as discussed above.[43] The scheme exemption, although expressly stated to cover schemes under non-Indian law, operates only when the scheme is pursuant to a court order (ie, a scheme of arrangement under English law would qualify on this basis) and also only when the cash and cash equivalent component of the consideration is at least 25 per cent and 33 per cent of the shareholder of both entities remain shareholders of the transferee company upon implementation of the scheme. Where overseas schemes have not satisfied these requirements, SEBI has not permitted them to be exempted from the mandatory offer requirements.[44]

Another topical exemption is that any acquisition pursuant to a resolution plan approved under the Insolvency and Bankruptcy Code 2016 will benefit from an exemption from the mandatory offer requirement.[45] This does not apply to pre-insolvency restructurings, which will be subject to the mandatory offer requirements (except for certain legacy exempt restructuring schemes, which also benefit from certain exemptions).

There may be other possibilities that arise depending upon what is being proposed and the specific facts involved.

Structuring and executing a mandatory offer in India

Secrecy and approach to leaks

Secrecy is essential in public M&A transactions in any jurisdiction to avoid a false market in securities and to avoid damaging share price escalation based on leaks or rumours. However, the regulatory approach in India is different to that in England and Wales.

In England and Wales, there are multiple formal requirements under the City Code on Takeovers and Mergers (the 'City Code') emphasising the need for secrecy, such as Rule 2.1 and the requirements on the containment of information in Rule 2.2(e) of the City Code. By contrast, there are no comparable formal requirements under the Takeover Regulations in India, although parties are mindful of the need for confidentiality in order to prevent share price escalation and to prevent a breach of insider trading

43 Reg 10(1)(d) of the Takeover Regulations.

44 Eg, in 2017, in the matter of *Xchanging Technology Services India Private Limited*, SEBI was asked to consider, as part of its informal guidance process, whether an overseas merger under Delaware law, which did not involve court approval, would benefit from this exemption. SEBI indicated on 5 May 2017 that the exemption would not apply.

45 Proviso to Regulation 3(2) of the Takeover Regulations.

regulations.[46] Therefore, parties customarily execute non-disclosure agreements and maintain information protocols.[47]

Similarly, partly because the announcement triggers in Rule 2.2 of the City Code are more detailed, and partly because there is no equivalent to the 'put up or shut up' regime under the City Code, leak strategies are not as formalised as in England and Wales. If leaks occur, the stock exchanges (rather than SEBI) normally do approach the target (and sometimes the promoters) seeking clarification. But responses tend to be reactive (rather than by publishing a leak announcement that has been prepared in advance).

Main documentation, regulatory approvals, timeline and process

The document that is published in the context of a mandatory offer is the 'public announcement' on the date of the trigger event. This is a relatively basic document and is followed by a 'detailed public statement' (containing further detail) to be published within five working days of the date of the public announcement. This is followed by a 'letter of offer', which is the formal offer document. The draft letter of offer should follow within five working days of the detailed public statement, which is submitted to the SEBI for its review and comments. SEBI has a maximum of 15 days to respond on this, but the overall timing of the publication of the final letter of offer depends on SEBI's approach and turnaround time.

In the absence of regulatory approvals, a mandatory open offer would take approximately three months to complete (from the date of the public announcement). However, competition approval may well be required and, in the event that the bid involves an offshore acquirer seeking to invest in a regulated sector of the Indian economy, foreign direct investment may be required, as may the approval of any sector regulator.

To take account of any regulatory approvals, SEBI will consider pausing the bid process until all regulatory consents are secured (ie, the tender period is only opened once the necessary regulatory approvals have been secured). It may also require interest at the rate of ten per cent on the consideration

46 Reg 3 of SEBI (Prohibition of Insider Trading) Regulations 2015 (the 'Insider Trading Regulations') restricts the communication of unpublished price-sensitive information.

47 Although, again, there are differences with England and Wales, with no formal regulatory need for 'insider lists' in India. Parties therefore establish information barriers based on what they perceive as appropriate.

paid to the shareholders whose shares are tendered in the offer, for the delay beyond the scheduled date of payment of consideration.[48]

The acquisition of any shares of voting rights under an agreement that triggers a mandatory offer cannot complete prior to the lapse of the offer period in the mandatory offer, subject to very limited exceptions.[49]

Gathering support for a bid

This is another area where market practice in India diverges from that in England and Wales. The practice of gathering irrevocable undertakings is not a feature of the Indian public M&A market.

With regard to the process of meeting with shareholders, there is no formal equivalent to Rule 20.2 of the City Code, which calls for 'chaperoned' discussions with a suitable qualified financial adviser present, so there is greater flexibility in India.

Diligence

Diligence in public M&A transactions is traditionally limited to avoid the risk of leaks and because, in theory, all material information regarding the listed target should already be public because of its various disclosure obligations. The target may also be wary of sharing sensitive commercial information with a competitor.

However, in the Indian context, acquirers usually seek to conduct robust diligence that is not limited to public information only. The Insider Trading Regulations permit the board of the target, if they determine this to be in the best interests of the target, to permit such access, provided the letter of offer contains all information necessary for the shareholders to make an informed assessment of the bid. The target and the acquirer will need to

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48 Reg 18(11) of the Takeover Regulations allows SEBI to grant further time, provided the delay is not due to the fault of the acquirers. As to the application of this in practice, it is often the case that the draft letter of offer (which is considered by SEBI) contains a tentative timetable, including a tentative tendering period and disclosure of the regulatory approvals required. However, because SEBI will permit the tendering period to commence only after the receipt of regulatory approvals, this is only indicative and the publication of the final letter of offer is delayed until such approvals are received and will contain a revised timetable with the final schedule of events in a comparative tabular format (with the original tentative schedule as a comparator).

49 Reg 22 of the Takeover Regulations restricts an acquirer from completing its acquisition before the tendering period has expired, except where either the entire purchase consideration for the offer has been pre-deposited in an escrow account and the offer period has lapsed. Further, the tender period can be opened only after the necessary regulatory approvals have been secured.

sign a confidentiality agreement with a target. Furthermore, the acquirer is not permitted to trade in the securities while in possession of unpublished price-sensitive information.[50] If the transaction is not structured as an offer under the Takeover Regulations (eg, a scheme or a business transfer or the acquisition of shares below the mandatory offer triggers) then, in addition, a cleansing announcement must be made at least two trading days prior to the transaction being 'effected').[51]

As regards the issue of equality of treatment of bidders, the Takeover Regulation requires the board of a target to make available to competing bidders all information and provide them with all cooperation provided to other bidders.[52] However, since this only applies to actual competing bidders, it is not as wide as the protection under the City Code, which also applies to potential acquirers in certain cases. That said, particularly where there is a primary issuance, the directors of the listed company may also feel that by not providing equal access to rival potential acquirers, they are potentially hindering value-enhancing bids that may breach their fiduciary duties.

Pricing requirements

The offer price will need to be by reference to the higher of any negotiated price (eg, with the seller group) and certain historic market price reference points. There are slightly different requirements for direct and indirect offers.[53]

Non-cash consideration

Cash consideration remains the most common form of consideration in mandatory offers, but the Takeover Regulations also permit the consideration payable in a mandatory open offer to be in the form of the issue, exchange or transfer of listed shares in, or listed debt securities (with a minimum credit rating) or convertible debt securities (convertible into listed shares) of the acquirer (or any combination of the foregoing and cash).[54]

50 Reg 3(3)(i) of the Insider Trading Regulations.
51 Reg 3(3)(ii) of the Insider Trading Regulations.
52 Reg 26(9) of the Takeover Regulations.
53 Reg 8 of the Takeover Regulations contains these requirements.
54 Reg 9(1) of the Takeover Regulations.

Conditionality

As far as the mandatory open offer is concerned (and not the underlying acquisition agreement with the seller, if any), this is possible only within very narrow limitations. In this regard, the only conditionality permissible is with regard to the level of acceptances (which would protect the acquirer from acquiring a suboptimal stake) and in such circumstances the acquirer and persons acting in concert cannot acquire shares outside the offer process during the offer period.[55] Despite its possibility, conditions as to acceptance levels are not common in practice, partly because the Takeover Regulations require that if they are not satisfied, then any agreement to acquire shares in the listed company (eg, in an agreement with the seller) will be rescinded and the acquirer cannot then make any acquisitions as part of the mandatory open offer.[56]

With regard to any agreement triggering the mandatory open offer, as distinct from the mandatory open offer itself, SEBI has in the past accepted some conditionality, for example, receipt of third-party consents needed for the transfers, no material litigation or regulatory action affecting the transfers, repetition of fundamental warranties, no material breach of the acquisition agreement, the absence of insolvency events and more customary material adverse change (MAC) protections, and so on.

Ability to withdraw mandatory offers

Withdrawal of a mandatory offer, once made, is extremely difficult as there are very limited circumstances under which this would be permissible.[57] These include the rejection of any statutory approval needed, the death of the acquirer (if a natural person), the failure of the triggering agreement owing to a condition not being satisfied outside the reasonable control of the acquirer) or if permitted by SEBI.

SEBI takes quite a tough line on withdrawals in practice and, in particular, has historically frowned on the use of MAC provisions for withdrawal. However, in one case and as an exception to its normal practice, SEBI allowed a tightly worded MAC clause, although even there, it applied for a strictly defined period.[58] SEBI has been consistent in its approach, even when there

55 Reg 19 of the Takeover Regulations.

56 Provision to reg 19(1) of the Takeover Regulations.

57 Reg 23(1) of the Takeover Regulations.

58 The mandatory open offer for Nirlon Limited by GIC, through Roco Berry Private Limited, in 2014/15 contained a MAC provision that was tied to certain defined earnings before interest, taxes, depreciation, and amortisation (EBITDA) triggers. This MAC operated for the period between the date of the share purchase agreement and the date of the letter of offer, meaning that it fell away before the tendering period.

might be mitigating circumstances. For instance, in *Nirma Industries v Securities and Exchange Board of India*,[59] SEBI refused to permit a bidder to withdraw upon discovery of fraud (that was previously undetected in diligence) and this was subsequently judicially upheld.

Break fees

Break fees are rare in the context of mandatory offers under the Takeover Regulations in India and there are a number of issues that will need consideration. First, the parties will need to consider whether SEBI is likely to approve the letter of offer if such payments are involved. Second, payments of this nature, if made to non-residents by a resident, will need the approval of the Reserve Bank of India. Finally, there may be unlawful financial assistance issues to consider where the listed target or its subsidiaries are discharging the break fees (and Indian company law does not contain a *de minimis* exception to this rule similar to that set out in section 677(1)(d) of the Companies Act 2006 in England and Wales).[60]

'Special deals'

Although the exact nature of the restriction is different to Rule 16 under the City Code in England and Wales, 'special deals' in favour of individual shareholders or promoters are not permitted in relation to offers. The Takeover Regulations restrict payments outside the offer price to the selling shareholders, for example non-compete payments and control premiums, and so on.[61] Effectively, any payments of this nature need to be factored into the offer price and will therefore be equally payable to all selling shareholders on a pro rata basis.

This restriction does not apply to schemes of arrangement. Indeed, the recent aborted HDFC/Max Life merger, structured through a scheme, provided for the payment of a non-compete and non-solicitation fee to the promoters of Max Financial Services Limited of INR 8.5bn. The transaction failed to procure the necessary regulatory approvals, but it is a debateable as to whether SEBI would have permitted these arrangements had the transaction progressed.

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59 MANU/SC/0536/2013. The acquirer had lent money to the target that defaulted and so the acquirer exercised a share pledge trigging a mandatory offer. A number of financial irregularities were subsequently discovered. SEBI and SAT did not permit the withdrawal of the offer, a position upheld by the Supreme Court.

60 S 67(2) of the CA 2013.

61 Reg 7(7) of the Takeover Regulations.

Certainty of funding

Just as under the City Code,[62] there are provisions that bite on both the acquirer as well as the bank or financial adviser to the acquirer. The acquirer is required to have 'firm financial arrangements' so as to be able to implement the open offer.[63] Also, the manager to the offer is required to be satisfied of this and is also required to ensure that 'firm arrangements for funds through verifiable means have been made by the acquirer'.[64]

In addition to the requirements set out above, an acquirer is required to open a general escrow account (to secure its obligations as an acquirer) and a special escrow account (to pay tendering shareholders following expiry of the tendering period). It will need to deposit 25 per cent[65] of the purchase consideration two days before it issues the detailed public announcement for the open offer.[66]

Concert party concept

An acquirer and concert parties are jointly and severally liable to discharge the obligations under the Takeover Regulations.[67]

The test of concertedness under the Takeover Regulations is by reference to a common objective or purpose of acquiring shares or voting rights in, or acquiring 'control' of, the listed target. The definition is broad and covers all agreements or understandings, whether formal or informal, and whether direct or indirect, that achieve this purpose.

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62 General Principle 5 and Rules 27.7(d) and 24.8 of the City Code contain this principle.

63 Reg 25(1) of the Takeover Regulations.

64 Reg 27(1) of the Takeover Regulations.

65 Where the aggregate consideration exceeds INR 5bn, an additional ten per cent of the remaining consideration will need to be deposited. The escrow account can be in the form of a cash deposit, or in cases where the offer is not conditional, a bank guarantee issued by a scheduled commercial bank in India or a deposit of certain liquid securities. Where the escrow account consists of a bank guarantee or deposit of approved liquid securities, the acquirer is also required to deposit with the bank a sum of at least one per cent of the total consideration payable, as and by way of security for fulfilment of the obligations under the Takeover Regulations.

66 The proviso to reg 17(1) of the Takeover Regulations further provides that if the offer is subject to acceptance level conditions, then the escrow requirements are higher (100 per cent of the consideration payable in respect of minimum level of acceptance or 50 per cent of the consideration payable under the open offer, whichever is higher, shall be deposited in cash in the escrow account).

67 Reg 25(5) of the Takeover Regulations.

Presumption of concert party status

Similar to the City Code in England and Wales, there is also a rebuttable presumption of concertedness in certain situations. The categories covered are conceptually similar in a number of respects, but not identical to the City Code.

The categories of deemed concert party relationships include the company and its holding company, subsidiaries and companies under the same management or control, promoters (as between themselves), a company and its directors and management, and various categories of funds or collective investment vehicles with their management companies, sponsors and trustees.

There has been some judicial interpretation and SEBI interpretive guidance around a number of deemed concert party issues.

Judicial interpretation

The focus of the concert party definition is on the commonality of the objective and there is a line of cases that recognises this principle in the context of the deeming provisions.

For instance, in *K K Modi v Securities Appellate Tribunal*,[68] the Bombay High Court, in assessing whether a promoter was a concert party of another promoter, held: 'Before he can be said to be acting in concert with the acquirer, it must be shown that he shares with the acquirer a common objective or purpose for the substantial acquisition of shares or voting rights or gaining control over the target.'

This line of reasoning was subsequently upheld by the Supreme Court in *Daiichi Sankyo Company Ltd v Jayaram Chigurupati and Others*.[69]

SEBI approach

However, despite the clear line of judicial interpretation, SEBI, when approached under its informal guidance scheme, has been extremely reluctant to support any rebuttal of deemed concert party status, even when parties have produced arguments as to the absence of any commonality of objective as between them.

68 (2002) (2) Bom CR 523.

69 2010 7 SCC 449 , where the Supreme Court observed: 'the deeming provisions cannot do away with either the target company or the common objective or purpose of the acquisition of shares of a target company.'

This causes issues for certain groups that are structurally exposed to deemed party relationships. For instance, companies that have asset managers within their group are exposed both by virtue of the sponsor-mutual fund relationship and also potentially the group company relationship, both of which are treated as resulting in deemed concert party status. In the matter of *Reliance Capital Asset Management Limited*,[70] SEBI refused to rebut the presumption that a sponsor and a mutual fund were concert parties, despite arguments being presented on the absence of a common intention, that the funds were professionally managed and that voting rights were separately exercised. Similarly, in the matter of *Massachusetts Life Insurance Company*,[71] MassMutual, a mutual fund, had an indirect holding in certain financial services companies, including Barings and Oppenheimer, all three of which were then deemed concert parties. SEBI, again, was unmoved by arguments that the various entities operate independently, have information barriers, have no common intention and have independence with regard to voting rights.

SEBI's approach appears to be that the determination of the rebuttal will only be possible in hindsight after a deal is concluded. SEBI's concern appears to be that any exemption may set a precedent that is used later in situations that it would regard as inappropriate. Unfortunately, this leaves market participants with no real options to address their deemed concert party status.

In more formal rulings, such as *Rajesh Toshniwal v SEBI*,[72] in determining whether promoters were deemed concert parties, the SEBI adjudicating officers sought to distinguish the *Diiachi* case and ruled that the presumption of concert party status was not rebutted.

Therefore, if a party is a deemed concert party, it will prove extremely difficult in practice to rebut this presumption.

Stake-building

The Indian Takeover Regulations contain two sets of provisions to facilitate the consolidation of holdings by parties that already hold at least 25 per cent of the shares of a listed company. There are also various disclosure provisions that apply. These are summarised below.

70 Informal guidance sought on 3 June 2004 and published by SEBI on its website on 9 July 2004.

71 SEBI informal guidance dated 5 August 2011.

72 MANU/SB/0131/2012.

Pricing

Any stake-building prior to the launch of a mandatory offer by the acquirer and its concert parties may affect the price payable in a mandatory offer. In the case of direct offers, the offer price in the mandatory offer cannot be less than the highest price paid by an acquirer and its persons acting in concert in the 26 weeks preceding the date of the public announcement of the offer.[73] There is a similar requirement in relation to indirect offers, tied to the date on which the primary acquisition is contracted and announced.[74]

'Creeping acquisitions'

An acquirer that holds at least 25 per cent (but no more than 75 per cent) of the shares or voting rights in a listed target, together with its concert parties, will be able to further build its stake by acquiring an additional maximum five per cent in any financial year without being required to make a mandatory offer, up to a maximum holding of 75 per cent (because of the public float requirement).[75] These acquisitions are commonly referred to as 'creeping acquisitions'. There are a number of considerations that commonly arise in the context of creeping acquisitions as discussed further below.

First, this annual five per cent threshold is to be determined on a gross basis, without regard to any sales of shares or voting rights or dilutions due to primary issuances by the target.[76] This puts a limit on the ability to structurally increase the five per cent threshold through these techniques.

Second, for a period of 26 weeks following completion of the tendering period in a mandatory open offer, any further acquisition of shares of the company must be at a price higher than that offered under the mandatory offer and the acquirers will then need to pay the difference in price to all shareholders who had tendered their shares in the mandatory open offer. However, this restriction is not applicable to acquisitions pursuant to another open offer under the Takeover Regulation, the Securities and Exchange Board of India (Delisting of Equity Shares) Regulations 2009 (the 'Delisting Regulations'), or open market purchases made in the ordinary course on the stock exchanges (ie, not negotiated acquisition of shares).[77]

73 Reg 8(2)(c) of the Takeover Regulations.
74 Reg 8(3)(c) of the Takeover Regulations.
75 Reg 3(2) of the Takeover Regulations.
76 Explanations (i) and (ii) to the proviso to reg 3(2) of the Takeover Regulations.
77 Reg 8(10) of the Takeover Regulations and its proviso.

Third, the interplay between creeping acquisitions and voluntary offers needs to be carefully considered as the use of creeping acquisitions will prevent subsequent voluntary offers for certain time periods in the future.[78]

Exposure to acts of concert parties

The other consideration in relation to creeping acquisitions is that because this five per cent is determined on an aggregate basis, across all concert parties, an acquirer may need to monitor and police the acquisition of any further interests by its concert parties. This can be achieved through an agreement setting out the process for the acquisition of further shares, notification obligations and a restriction on breaching the annual cap, supported by mutual indemnities.

While this is easier to achieve for parties that have actually come together specifically for the purpose of an acquisition, for example, consortium bidders, the situation is sometimes more difficult for deemed concert parties.[79] As discussed under the heading 'Concert parties' above, certain parties are deemed to be concert parties regardless of whether or not the two have common linkages. This obviously creates uncomfortable exposure on account of breach of the annual five per cent cap by another party, which may not be willing to execute an agreement of the nature set out above.

The problem may be exacerbated in circumstances where one of the parties has an asset manager in its group, as the concert party will then be exposed to a much higher risk of breach and one that is much harder contractually to control. There are no easy answers to these issues, which is why parties should do their best to avoid being categorised as being in relationships where they are deemed concert parties.

Voluntary offers

In addition to the 'creeping acquisition' process discussed above, acquirers can undertake a 'voluntary offer' to increase their stake.[80]

However, there are certain 'cooling off' period restrictions that apply to voluntary offers. For instance, a voluntary offer cannot be initiated where the acquirer and its concert parties have acquired shares in the target in the preceding 52 weeks without having to make a mandatory offer. This would also include prior creeping acquisitions. Furthermore, having initiated a

78 See discussions under the heading 'Voluntary offers' under 'Stake-building' below.

79 Reg 2(q)(2) of the Takeover Regulations.

80 As discussed under the subheading 'Voluntary offers' in 'Types of offers under the Takeover Regulations' above.

voluntary offer, an acquirer and its concert parties cannot acquire additional shares of the listed target, except through another voluntary offer (although there are carve-outs for acquisitions through bonus issues, stock splits and competing offers).[81]

Therefore, an acquirer seeking to consolidate will need to consider the optimal strategy (creeping acquisition versus voluntary offer) in advance.[82]

Disclosure requirements

All stake-building, whether below or above the 25 per cent threshold, will be subject to disclosure requirements, similar to other jurisdictions, and therefore any meaningful stake-building will be signalled to the market.

The formal disclosure requirements are contained in the Takeover Regulations and also in the Insider Trading Regulations.

As regards the Takeover Regulations, this imposes both continuous and annual disclosure requirements. Any acquirer that, together with its concert parties, acquires at least five per cent of the shares of a listed company will need to make disclosure of its acquisition and of any subsequent acquisition of shares of two per cent or more in any financial year (and will also need to disclose if its holding falls below five per cent). Such disclosures need to be made within two working days of the acquisition or allotment of shares (in the case of acquisition through a primary issuance).[83] Acquirers, who together with their concert parties, hold at least 25 per cent of the shares or voting rights in a listed company and promoters of a listed company are also required to make annual disclosures as to their holdings at 31 March within seven working days of such date.[84] Any encumbrance created over the shares of a promoter or that of its concert parties also needs to be disclosed within seven working days of creation and also of enforcement of such pledge.[85]

As regards the Insider Trading Regulations, this contains a separate set of disclosure requirements that apply to promoters, employees and directors. Such persons are required to disclose any trades they undertake within two days of that transaction where the aggregate trades undertaken by them in any quarter has a value of at least INR 1m.[86] In addition, the listed company can call on any 'connected person' (broadly persons who have inside

81 Reg 7(2) and 7(3) of the Takeover Regulations.
82 Proviso to reg 6(1) of the Takeover Regulations.
83 Regs 29(1), (2) and (3) of the Takeover Regulations.
84 Regs 30(1), (2) and (3) of the Takeover Regulations.
85 Reg 31 of the Takeover Regulations.
86 Reg 7(2) of the Insider Trading Regulations. Promoter, key managerial personnel and directors are also required to make an initial disclosure as well under reg 7(1), within seven days of their appointment or having become a promoter.

information by association with the company and there is also a deeming construct including persons such as relatives of otherwise connected persons) to disclose their holdings.[87]

Although contested bids have historically been uncommon in India, the build-up of interests, particularly by financial investors, is being watched with interest by the market and there have been certain instances where this has led to a considerable spike in the share price of the underlying listed company because of speculation of a future acquisition.

For acquirers, there is limited scope to avoid this disclosure by acquiring through another party because these disclosures are on an aggregated basis together with concert parties. This will also cover acquisitions by relatives and a number of other connected parties. However, since the regulatory reference point under these provisions of the Takeover Regulations is to shares or voting rights, it would appear that exposure to derivatives would not need to be disclosed, unless that synthetic exposure were also coupled with a conversion right or voting rights (as that would require disclosure in its own right).[88] By contrast, the disclosure requirements under the Insider Trading Regulations also cover derivatives, but those are obviously limited to a narrower set of circumstances. However, parties will need to be mindful of the new significant beneficial ownership rules that may still apply.[89]

Contested deals, the position of the board and defences

Competing deals

Competing offers, although rare, are provided for in the Takeover Regulations. Such offers can be announced within 15 working days of the original public announcement of an offer.[90] The original acquirer will then be permitted to revise its bid in a more favourable manner up to three working days prior to the commencement of the tendering period.[91] Unless the original offer was subject to acceptance conditions, the competing offer cannot be subject to any such conditions either.[92]

87 Reg 7(3) of the Insider Trading Regulations.

88 In its response to question 69 of its FAQs published on its website, SEBI indicates that the disclosure requirement applies to shares and convertible instruments, as well as depositary receipts with voting rights. It does not refer to derivative exposure.

89 Companies (Significant Beneficial Owners) Amendment Rules 2019, published on 8 February 2019.

90 Reg 20(1) of the Takeover Regulations.

91 Reg 20(9) of the Takeover Regulations.

92 Reg 20(6) of the Takeover Regulations.

Given that a bid is normally triggered in the Indian context when a binding agreement is executed, in certain cases, bidders have not needed to make an offer when engaging with the board of the target.[93]

Position of the board

Although mandatory offers are not perhaps categorised as being 'recommended' as prominently as in England and Wales, once the detailed public statement has been published, a committee of independent directors needs to be constituted, and they may seek professional advice at the expense of the company (this is not mandatory). This committee needs to provide 'written reasoned recommendations' that are to be published at least two working days prior to the opening of the tendering period.[94]

Prevention of frustrating action

Indian law is similar to English law in that the board of a target is required not to frustrate any offer. Apart from the general overlay of directors' fiduciary duties in company law, which include acting in the best interests of their shareholders[95] (among others) and the recently introduced 'class action' provisions in Indian company law,[96] the Takeover Regulations contain protections against frustrating action.

The target company is required to conduct its business in the ordinary course and the board cannot dispose of assets, take on debt or issue or allot shares with voting rights, undertake a buy-back without a special resolution, enter into or terminate any material contract outside the ordinary course of business or accelerate the vesting of any right.[97]

This restricts a number of defences that might be permissible in other jurisdictions. Also, partly because hostile deals are rare, there no formal practice of issuing a '*defence document*' highlighting why a bid may not be attractive.

93 Given the absence of any 'put up or shut up' obligations or the equivalent to the Rule 2.4 announcement regime under the City Code, in the IHH/Fortis transaction there were a number of 'virtual bids' (ie, bidders were negotiating with the board without triggering an offer or any other announcement of offer requirements as there was no formal 'agreement' to acquire at that stage). That said, the situation was very public and the market was aware that various interested parties were negotiating with the target.

94 Regs 26(6) and (7) of the Takeover Regulations.

95 S 166(2) of the CA 2013.

96 S 245 of the CA 2013.

97 Reg 26(2) of the Takeover Regulations.

Of course, key contracts of the target could always contain change of control triggers, which may operate as a structural defence, but this would need to have been planned long in advance. Any exercise by the board of termination rights will be restricted, but the contracts could be structured with automatic termination provisions (particularly where this involves a brand, technology licencing or any other asset of value to the acquirer that are provided to the target company by a promoter group). Outside of that, the *'white knight'* approaches are also possible. The recent SEBI announcement of 27 June 2019 enabling shares with superior rights (see earlier discussion under the heading dual class share structures, above) would create the opportunity for a structural defence, although the conditions that apply to these shares will impose some limitations to their use as a defence tool.

Minority squeeze-outs and delistings

Achieving a minority squeeze-out and delisting a listed company is difficult in the Indian context.

Delisting process

The delisting process involves multiple requirements: first, a special resolution that is also subject to a super-equivalent requirement of at least two-thirds of the public shareholders supporting the resolution;[98] second, in principle stock market approval with the stock markets having regard to shareholder litigation;[99] third, a 'reverse book-building' price discovery exercise is to be conducted;[100] and finally, the offer can only succeed (and can only complete) if the number of bids aggregate to 90 per cent of the target company's total share capital and if at least 25 per cent of the public shareholders have participated in this process.[101] In addition, unless a mandatory offer indicates that an intention to undertake a delisting (pursuant to regulation 5A of the Takeover Regulations introduced in 2015), there is a 12-month cooling-off period after the conclusion of a mandatory offer that must lapse before the delisting process can be attempted.[102]

The reverse book-building requirements and acceptance thresholds have been particularly problematic and make the delisting process difficult and

98 Reg 8(1)(b) of the Delisting Regulations.
99 Regs 8(1)(c) and 8(4)(e) of the Delisting Regulations.
100 Regs 14 of and Schedule II to the Delisting Regulations.
101 Reg 17 of the Delisting Regulations. Note that the acquirer also needs to escrow the consideration in advance under reg 11 of the Delisting Regulations.
102 Reg 7(5) of the Takeover Regulations.

expensive. SEBI's own estimates for the period between 2015 and 2017 indicate that the premiums paid in the delisting process range from 7.69 per cent at the lower end to 242.02 per cent at the higher end of the range.

In a consultation paper in July 2018, SEBI acknowledged the risk of being held hostage to opportunistic minorities and the unique and unusual nature of this process in comparison to other regimes elsewhere in the world. However, its response did not fully address the issue. It amended the Delisting Regulations to permit an acquirer to make a counter-offer (if it is dissatisfied with the price discovery exercise in the reverse book-building process), but there is no compulsion on the minority shareholders to accept. Therefore, fundamental problems with the delisting process still remain.

Structural workarounds to achieve a similar outcome without undergoing this process are very difficult to construct. Transferring the entire business of the listed company to an acquisition vehicle held by the acquirer presents the challenges highlighted at 'Other structural alternatives' above. Similarly, a scheme where the transferee company is unlisted may not be approved by SEBI.

Minority squeeze-outs

There are separate company law processes that can be undertaken to achieve a minority squeeze-out. Because public companies must maintain a 25 per cent public float requirement,[103] these can only be undertaken after the completion of the delisting process.

Experience shows that this process is not always straightforward and there have been instances of minority shareholders seeking to stall the process. However, the traditional route to achieving this has been a selective reduction of capital to take out the minority shareholders.[104] There has been some judicial support for this approach provided the valuation is fair.[105]

Alternatively, there is a separate process under section 236 of the CA 2013 allowing acquirers holding a 90 per cent interest in the target company

103 In her budget speech of 5 July 2019, the Finance Minister of India suggested that SEBI should consider increasing the public float threshold to 35 per cent. It is not clear yet as to whether SEBI (as an independent regulator) will accept this recommendation, but market participants should monitor developments in this regard.

104 Under s 66 of the CA 2013.

105 The courts have supported the proposition that where the terms of the exit are fair and reasonable, the mere fact that a reduction of capital is selective does not make it unjust or inequitable. This has been held by the Bombay High Court in *Sandvik Asia Limited v Bharat Kumar Padamsi* (2009) AIR Bom R 340, which quoted English case law in reaching this conclusion. Subsequently, in *In Re Elpro International Limited* (2009) 149 Comp Cas 646, a division bench of the Bombay High Court reconsidered its earlier decision in light of Sandvik and upheld a selective reduction on the basis of similar reasoning.

to offer to buy out the minority shareholders subject to certain valuation requirements (and similarly, the minorities can offer their shares up for sale to the acquirer too). Whereas a number of commentators have assumed this provides a minority squeeze-out right comparable to the regime in Chapter 3 of Part 28 of the Companies Act 2006 in England and Wales, the comparisons are not apt. Section 236 of the Indian CA 2013 is far briefer and contemplates a weak acquisition mechanism. It merely contemplates a buy-out offer with the possibility of failure of the offer being expressly recognised in subsection (9) and the possibility of a negotiated price being recognised in subsection (8). It is therefore difficult to force through a minority squeeze-out using these provisions. Therefore, the selective reduction process has advantages when compared to the section 236 process.

Closing thoughts

The public M&A regime in India is, as demonstrated in this article, very different in practice to regimes elsewhere. Considering that, on the face of it, frustrating actions are limited, and given the large number of listed companies in India, the public M&A market in India should be more robust. However, the dominance of promoters in India has in the past held the public M&A market in check and many acquisitions were either a result of offshore M&A activity (that gave rise to an indirect acquisition in India or transactions) or involved a consolidation of control.[106] However, the general environment is evolving in a manner that is more conducive to public M&A transactions, with the weakening of influence of promoters, the greater presence of international investors and the advent of certain recent high-profile contested and hostile public M&A transactions. All of this could potentially lead to greater public M&A activity. But despite the recent positive changes, minority squeeze-outs and delistings remain difficult so parties approaching transactions in India should plan accordingly.

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106 On the latter point see the observations of Umakanth Varottil in a study in 2014 published at https://law.nus.edu.sg/wps/pdfs/011_2015_Umakanth_Varottil.pdf accessed 24 July 2019.