IMPACT OF GOVERNMENT INTERVENTION ON M&A

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ABSTRACT

In today's business environment, the merger and acquisition (M&A's) deals have drastically increased. M&A's are quite often considered as one of the best and quickest strategic methods to confront the global competitive market. They are usually undertaken with the aim of creating value in general and maximizing shareholders wealth.

The process of mergers and acquisitions in India is usually court driven, long drawn and hence problematic and time consuming. The process may be initiated through common written agreements between the two parties, but that does not finalize the merger and is not sufficient to provide a legal cover to it. For bringing the agreement into effect, the sanction of high Court or NCLT is required.

The Companies Act, 2013 includes provisions relating to mergers and amalgamations and other related issues of compromises, arrangements and reconstructions; however other provisions of the Companies Act get attracted and implemented at different times and in each case of merger and acquisition and the procedure remains far from simple. The Central Government has a role to play in this process and it acts through an Official Liquidator (OL) or the Regional Director of the Ministry of Company Affairs. In other words, the entire process has to be to the satisfaction of the Court and this sometimes results in delays.1

This report aims to analyze the kind of impact government and court intervention has on Mergers and Acquisitions while providing general knowledge about the process of Mergers and Acquisitions in India. The report also traces the effect of Covid-19 pandemic on the M&A sector and its impact on foreign investment.

[1] Report of the Expert Committee on Company Law, Available at: https://www.mca.gov.in/MinistryV2/mergers+and+acquisitions.html

INTRODUCTION

Mergers, acquisitions and takeovers have been a part of the business world for centuries. In today's dynamic economic environment, companies are often faced with decisions concerning these actions with the aim of maximizing shareholder value. Through mergers and acquisitions, a company, in theory, can develop a competitive advantage and ultimately increase shareholder value.

The terms mentioned here and onwards in this report may seem alike but in legal/ corporate terminology, they can be distinguished from each other:

Merger: A full joining together of two previously separate corporations. A true merger in the legal sense occurs when both businesses dissolve and fold their assets and liabilities into a newly created third entity. This entails the creation of a new corporation.

Acquisition: Taking possession of another business is an Acquisition. It is also called a takeover or buyout. It may be share purchase (the buyer buys the shares of the target company from the shareholders of the target company. The buyer will take on the company with all its assets and liabilities.) or asset purchase (buyer buys the assets of the target company from the target company)

Amalgamation: An amalgamation is a combination of two or more companies into a new entity. Amalgamation is distinct from a merger because neither company involved survives as a legal entity. Instead, a completely new entity is formed to house the combined assets and liabilities of both companies. Amalgamation also differs from Acquisitions in the sense that Acquisition is usually driven by the buyer company with or without consent of the acquired company and Amalgamation is initiated by both the companies with equal interest.

The primary legislation governing Mergers and Acquisitions in India is the Companies Act, 2013. However, several other Acts and Regulations come into play in different stages – namely - the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, The SEBI (Delisting of Equity Shares) Regulations, 2009, Foreign Exchange Management Act (FEMA), 1999, Competition Act, 2002, and Income Tax Act, 1961.

The ongoing Covid-19 pandemic has bought the entire economy to a standstill. With some businesses shutting down and the others struggling to make their ends meet, the trickle-down

impact has affected the M&A sector too. There has been a significant change in the outlook of investors who have adopted a “wait and see” approach for further investments in businesses in India. The M&A deals in India prospered in certain respects during the second half of the year 2020 and bodes well for 2021. However, the outbound M&A’s declined by 13% since 2019 with only 382 deals as opposed to 461 deals in 2019.

While tracing the impact of government intervention, a noteworthy effect has been on M&A due to the recent change in foreign direct investment (FDI) policy that impacted investments from countries sharing a land border with India – specifically China. This report provides knowledge about the process of mergers and acquisitions in India and the effect of government intervention on this sector.

MERGERS, ACQUISITIONS AND AMALGAMATIONS

Merger and Acquisition are fundamental tools that are considered by organizations to flare their business around the globe and furthermore to render sustainable development for business. Listed below is the concept of M&A’s with respect to the Companies Act, 2013 -

1. MERGERS AND AMALGAMATIONS

The term ‘merger’ is not defined under the Companies Act, 2013 or under Income Tax Act, 1961 Simply put, ‘merger’ is a combination of two or more entities into one; the desired effect being not just the accumulation of assets and liabilities of the distinct entities, but organization of such entity into one business. Sections 230-234 of the Companies Act, 2013 contains provisions for mergers and deals with the schemes of arrangement or compromise between a company, its shareholders and/or its creditors.

Justice Dhanajay Y Chandrachud in the case of ***Ion Exchange (India) Ltd***[22]., has beautifully put forth the approach of the judiciary in the matters of mergers and amalgamations - “Corporate restructuring is one of the means that can be employed to meet the challenges and problems which confront business. The law should be slow to retard or impede the discretion of corporate enterprise to adapt itself to the needs of changing times and to meet the demands of increasing competition. The law as evolved in the area of mergers, and amalgamation has recognized the importance of the

[2] (2001) 105 Comp Cases 115 (Bom)

Court not sitting as an appellate authority over the commercial wisdom of those who seek to restructures business."[3]

The possible objectives of mergers are manifold - economies of scale, acquisition of technologies, access to varied sectors / markets etc. Generally, in a merger, the merging entities would cease to exist and would merge into a single surviving entity. There are different types of Mergers:

- **Horizontal Merger**

A merger taking place between two companies that deal in the same product or services is a Horizontal Merger. A horizontal merger takes a company a step closer towards monopoly by eliminating a competitor and establishing a stronger presence in the market. The other benefits of this form of merger are the advantages of economies of scale and economies of scope. These forms of merger are heavily scrutinized by the Competition Commission of India ("CCI").

- **Vertical Mergers**

This type of merger happens between those entities who are involved in the dealing of complementary goods and services. For example, the merger of a company engaged in construction business with a company engaged in production of brick or steel would lead to vertical integration. Companies stand to gain on account of lower transaction costs and synchronization of demand and supply. Moreover, vertical integration helps a company move towards greater independence and self-sufficiency.

- **Congeneric Mergers**

A congeneric merger is a type of merger where two companies are in the same or related industries or markets but do not offer the same products. In a congeneric merger, the companies may share similar distribution channels, providing synergies for the merger. The acquiring company and the target company may have overlapping technology or production systems, making for easy integration of the two entities. This type of merger is often resorted to by entities who intend to increase their market shares or expand their product lines.

- **Conglomerate Mergers**

[3] Ibid

A merger between organizations that deal in different types of business is called as Conglomerate Merger. The principal reason for a conglomerate merger is utilization of financial resources, enlargement of debt capacity, and increase in the value of outstanding shares by increased leverage and earnings per share, and by lowering the average cost of capital.

- **Cash Mergers**

In a ‘cash merger’, also known as a ‘cash-out merger’, the shareholders of one entity receives cash instead of shares in the merged entity. This is effectively an exit for the cashed-outshareholders.

- **Triangular Merger**

A triangular merger is often resorted to, for regulatory and tax reasons. As the name suggests, itis a tripartite arrangement in which the target merges with a subsidiary of the acquirer. Based on which entity is the survivor after such merger, a triangular merger may be forward (when the target merges into the subsidiary and the subsidiary survives), or reverse (when the subsidiary merges into the target and the target survives).

Procedure of Mergers -

The steps involved in the procedure of merger and acquisition are as follows:

1. A merger essentially involves an arrangement between companies, those companies which intend to merge must make an application to the National Company Law Tribunal (“NCLT”) having jurisdiction over such company for -

a. convening meetings of its respective shareholders and/or creditors;

b. or seeking dispensation of such meetings basis the consents received in writing from the shareholders and creditors.

2. The first and the foremost step in an M&A deal is to duly examine the company’s MOA (Memorandum of Association). The same is done to confirm whether the object clause of the company grants the power of merger or not.

3. Basis the NCLT order, either a meeting is convened or dispensed with.

4. If the majority in number, representing 3/4th in value of the creditors or shareholders present and voting at such meeting (if the meeting is held) agree to the merger, then the merger, if sanctioned by the NCLT, is binding on all creditors and shareholders of the company.

5. The Merger Provisions under the Companies Act,2013 constitute a comprehensive code in themselves, and under these provisions, the NCLT has full power to sanction any alterations in the corporate structure of a company

Fast Track Mergers

The Fast Track merger covered under section 233 of the Companies Act, 2013 requires approval from shareholders, creditors, the Registrar of Companies, the Official Liquidator and the Regional Director.

Under the fast track merger, scheme of merger shall be entered into between the following companies:

i. two or more small companies (private companies having paid-up capital of less than INR 100 million and turnover of less than INR 1 billion per last audited financial statements); or,

ii. a holding company with its wholly owned subsidiary; or,

iii. Such other class of companies as may be prescribed.

Cross-border Mergers

Section 234 of the Companies Act, 2013 permits mergers between Indian and foreign companies with prior approval of the Reserve Bank of India (“RBI”).

The following conditions must be fulfilled for a cross border merger:

a. The foreign company should be incorporated in a permitted jurisdiction which meets certain conditions.

b. The transferee company is to ensure that the valuation is done by a recognized professional body in its jurisdiction and is in accordance with internationally accepted principles of accounting and valuation.

c. The procedure prescribed under CA 2013 for undertaking mergers must be followed.

The RBI also issued the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 ("Merger Regulations") which provide that any transaction undertaken in relation to a cross-border merger in accordance with the FEMA Regulations shall be deemed to have been approved by the RBI.[4]

In a recent judgment of the Ahmedabad Bench of the NCLT, the feasibility of the regulations was brought into question, wherein the NCLT rejected a request to approve an outbound demerger involving the transfer of specified undertakings of the demerged company to foreign companies because the definition of 'cross-border merger' under the recently enacted regulations does not include the term 'demerger'[5] Outbound demergers were expressly allowed under Section394 of the 1956 Act, but transferee company was not permitted to be a foreign company. However, this is not the case with the Companies Act of 2013. In fact, the legislature itself omitted the term from the nomenclature of Section 234 and the FEMA Cross Border Merger Regulations of 2018. Therefore, NCLT being an adjudicating authority ought to sanction a scheme of arrangement as per the law of the land. An inbound cross border demerger is expressly allowed by Rule 9 of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017.

In a case of ***Shrikant Bhujaballi Bahirshet and others V. Shamrao Vithal Co - Operative Bank Ltd.,***[6] the facts of the case are that the appellant was employee of Mahavir Co-operative Bank Ltd. (MCBL). It was not doing well and was in financial doldrums and hence was merged with the Respondent Bank.

Appellant was superannuated in year 2003 and had been paid his retirement benefits on such superannuation. Jurisdictional errors or error resulting in miscarriage of justice committed by subordinate Courts or Tribunals can be corrected by exercising powers u/art. 226 of Constitution, and that it is not lawful to hold that jurisdictional errors or error resulting in miscarriage of

[4] Foreign Exchange Management (Cross Border Merger) Regulations, 2018 ("Merger Regulations") Available at: https://rbi.org.in/Scripts/NotificationUser.aspx?Id=11235&Mode=0

[5] NCLT's order in Sun Pharmaceuticals Industries Limited, in CP(CAA) No. 79/NCLT/AHM/2019 in CP(CAA) No. 38/NCLT/AHM/2019. Available at: https://nclt.gov.in/sites/default/files/Jan-final-orders-pdf/FINAL%20Sun%20Pharmaceutical%20Industries%20Ltd%20Vs%20--.pdf

[6] 2017 Indlaw MUM 1495

justice committed by subordinate Courts or Tribunals can be corrected only by exercising powers under article 227 of Constitution.

The court held that Labour Court did not answer issue of liability of Respondent Bank on ground that said issue did not survive for consideration as it had come to conclusion that claim of Appellants was not based on any pre-existing right and therefore Application u/s. 33C(2) of Industrial Disputes Act was not maintainable.

It is also required to be noted that Respondent Bank had opposed application filed by Appellants inter alia on grounds mentioned in its Written Statement which included denial of its liability to pay amount claimed by Appellants. Also no such issue was raised and contentions advanced as regards existence or non-existence of pre existing right in Appellants.

In Re: ***Equitas Finance Limited***[7], Petitioner Companies, i.e., Transferor Company no. 1, Transferor Company no. 2 and Transferee Company, jointly filed petitions seeking sanction of Scheme of Amalgamation. Whether, Scheme of Amalgamation, as proposed, could be sanctioned with or without modification. Sanctioning of compromise or arrangement does not necessarily fetter Court from delaying date of actual amalgamation/merger of entities.

In this case, amalgamation of transferor Company nos. 1 and 2 with transferee Company is dependent on issuance of banking license by RBI and, in turn, issuance of license is dependent on High Court sanctioning Scheme. The court held that the scheme envisages merger of transferor Company nos. 1 and 2 with transferee Company. Shareholders and secured creditors of each of petitioner companies have given their consent to Scheme.

However, Scheme can neither provide clear appointed date nor can it fix share exchange ratio. What adds further twist to the situation is that Scheme by itself cannot provide for dissolution of transferor Company nos. 1 and 2, albeit, without winding up, perhaps, for the same reason that there is possibility, that RBI may not issue license to amalgamated company/ merged entity.

Section 394 (1) of the Act gives such leeway to Court Therefore, since affidavit of RD and report of OL indicate that affairs of transferor Company nos. 1 and 2 are not carried out in a manner prejudicial to its member or public, Scheme can be sanctioned, with caveat, that transferor

[7] 2016 Indlaw MAD 4440

Companies will move applications for their dissolution, albeit, without winding up within 30 days of effective date.

Most recently the merger of **Bharti Infratel and Indus Towers** took place in the year 2020. Vodafone Group held 28.12% stake in the merged entity, while the holding of Airtel Group was about 36.7%. Upon implementation, the aggregate shareholding of the company in the combined entity was changed from 53.51% to 36.73%.

Noteworthy Mergers

1. Arcelor Mittal Merger

The biggest merger valued at $38.3 billion was also one that was the most hostile. In 2006, Mittal Steel announced its initial bid of $23 billion for Arcelor which was later increased to

$38.3 billion. This deal was frowned upon by the executives because they were influenced by the patriotic economics of several governments. These governments included the French, Spanish, and that of Luxembourg. The very fierce French opposition was criticized by the French,American, and British Media.

The then Indian commerce minister Kamal Nath even warned that any attempt by France to block the deal would lead to a trade war between India and France. The Arcelor board finally gave in to the deal in June for the improved Mittal offer. This resulted in the new company Arcelor-Mittal controlling 10% of global steel production.

2. Vodafone Idea Merger

The Vodafone Idea merger is valued at $23 billion. Although the deal resulted in a telecom giant it is safe to say that the two companies were pushed to do so due to the entry of Reliance Jio and the price war that followed. Both companies struggled amidst the growing competition in the telecom industry. The deal worked both for Idea and Vodafone as Vodafone went on to hold a 45.1% stake in the combined entity with the Aditya Birla group holding a 26% stake and the remaining by Idea. Later, Vodafone Idea unveiled its brand new identity ‘Vi’ which marked the completion of the integration of the 2 companies.

3. Hindalco-Novelis Merger

The Hindalco Novelis merger marks one of the biggest mergers in the aluminum industry. Hindalco industries Ltd. is an aluminum manufacturing company and is a subsidiary of the Aditya Birla Group and Novelis is the world leader in aluminum rolling, producing an estimated 19percent of the world's flat-rolled aluminum products. The Hindalco Company entered into an agreement to acquire the Canadian company Novelis for $6 billion, making the combined entity the world's largest rolled-aluminum Novelis operates as a subsidiary of Hindalco.

4. RIL-RPL Merger

Reliance Industries Limited (RIL) is an Indian Conglomerate holding company headquartered in Mumbai, India. Reliance is the most profitable company in India, the second-largest publicly traded company in India by market capitalization. Reliance Petroleum Limited was set up by Reliance Industries Limited (RIL), one of India's largest private sector companies based in Ahmedabad. Currently, Reliance Industries taking over Reliance Petroleum Limited (RPL) for the price of 8500 crores or $1.6 billion.

2. ACQUISITION

Acquisition may be share purchase (the buyer buys the shares of the target company from the shareholders of the target company. The buyer will take on the company with all its assets and liabilities.) or asset purchase (buyer buys the assets of the target company from the target company) Take-over is a form of acquisition where the acquiring firm is much larger than the target company. The term is sometimes used to designate hostile transactions.

Reverse take-over refers to an operation where the target company is bigger than the acquiring company. However, mergers of equals (in size or belonging to the same sector of activity) may also result in a hostile take-over.

Acquisition by share purchase – (Provisions under the Companies Act, 2013)

Acquisitions may be via acquisition of existing shares of the target, or by subscription to new shares issued by the target.

Section 236 of the Companies Act, 2013, provides that, if a person or group of persons acquire 90% or more of the shares of a company by virtue of an amalgamation, share exchange,conversion of securities or for any other reason, then such person(s) shall besides notifying the company of their intention to buy the remaining equity shares of the company, have a right to make an offer to buy out the minority shareholders at a price determined by a registered valuer, which shall be determined based on the fair value of shares of the company after taking into account valuation parameters including return on net worth, book value of shares, earning per share, price earning multiple vis-a-vis the industry average, and such other parameters as are customary for valuation of shares of such companies.[8]

Section 230 read with Rule 3 of the **Companies (Compromises, Arrangements andAmalgamations) Rules, 2016** made effective from February 2020, permits the shareholders of [8] Rule 27 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016

unlisted companies holding at least 75% of the securities (including depository receipts) with voting rights to make an offer for acquisition of any part of the remaining shares in such company, pursuant to an application of compromise or arrangement to be filed before the NCLT. Once NCLT approves such offer for acquisition, the minority shareholders would mandatorily berequired to sell their shares to the acquiring shareholder. This method of squeeze-out is only available to unlisted companies and listed companies will be subject to the regulations prescribedby SEBI in this regard.

Acquisition by Asset purchase –

Besides share acquisition, the acquirer may also decide to acquire the business of the target which could typically entail acquisitions of all or specific assets and liabilities of the business for a pre-determined consideration.

Therefore, depending upon the commercial objective and considerations, an acquirer may opt for:

(i) an asset purchase, whereby one company purchases all of part of the assets of the other company; or

[8] Rule 27 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016

(ii) a slump sale, whereby one company acquires the 'business undertaking' of the other company on a going concern basis i.e. acquiring all assets and liabilities of such business.

Under Companies Act, 2013, the sale, lease or other disposition of the whole or substantially the whole of any undertaking of a company (other than a private company) requires the approval of the shareholders through a special resolution.[9]

Procedure of Acquisition -

A typical Acquisition procedure includes the following steps –

a. Develop an acquisition strategy – Developing a good acquisition strategy revolves around the acquirer having a clear idea of what they expect to gain from making the acquisition what their business purpose is for acquiring the target company (e.g., expand product lines or gain access to new markets)

b. Set the M&A search criteria – Determining the key criteria for identifying potential target companies (e.g., profit margins, geographic location, or customer base)

c. Search for potential acquisition targets – The acquirer uses their identified search criteria to look for and then evaluate potential target companies

d. Begin acquisition planning – The acquirer makes contact with one or more companies that meet its search criteria and appear to offer good value; the purpose of initial conversations is to get more information and to see how amenable to a merger oracquisition.

e. Perform valuation analysis – Assuming initial contact and conversations go well, the acquirer asks the target company to provide substantial information (current financials, etc.) that will enable the acquirer to further evaluate the target, both as a business on its own and as a suitable acquisition target

f. Negotiations – After producing several valuation models of the target company, theacquirer should have sufficient information to enable it to construct a reasonable offer; Once the initial offer has been presented, the two companies can negotiate terms in more detail

[9] Section 180 of the Companies Act, 2013

g. M&A due diligence – Due diligence is an exhaustive process that begins when the offer has been accepted; due diligence aims to confirm or correct the acquirer's assessment of the value of the target company by conducting a detailed examination and analysis of every aspect of the target company's operations – its financial metrics, assets and liabilities, customers, human resources, etc.

h. Purchase and sale contract – Assuming due diligence is completed with no major problems or concerns arising, the next step forward is executing a final contract for sale; the parties make a final decision on the type of purchase agreement, whether it is to be an asset purchase or share purchase

i. Financing strategy for the acquisition – The acquirer will, of course, have explored financing options for the deal earlier, but the details of financing typically come together after the purchase and sale agreement has been signed

j. Closing and integration of the acquisition – The acquisition deal closes, and management teams of the target and acquirer work together on the process of merging the two firms. Most recently in January 2020, Uber announced that it had sold the India business of **Uber Eats** to **Zomato** for a 9.99% stake in the loss-making Indian food delivery startup. The two companies had not disclosed the financial terms of the deal, which some Indian news outlets slated to be $350 million in size. Another recent acquisition is that of **Ola** Electric Mobility Pvt Ltd, the electric vehicle arm of Ola and Amsterdam-based **Etergo BV**, manufacturer of electric scooters.

Noteworthy Acquisitions

1. Vodafone-Hutchison Essar

Vodafone India Ltd. is the second largest mobile network operator in India by subscriber base, after Airtel. Hutchison Essar Ltd (HEL) was one of the leading mobile operators in India. In the year 2007, the world's largest telecom company in terms of revenue, Vodafone made a major foray into the Indian telecom market by acquiring a 52 percent stake in Hutchison Essat Ltd, a deal with the Hong Kong based Hutchison Telecommunication International Ltd. Vodafone mainmotive in going in for the deal was its strategy of expanding into emerging and high growth markets like India.

Vodafone's purchase of 52% stake in Hutch Essar for about $10 billion. Essargroup still holds 32% in the Joint venture.

2. Ranbaxy-Daiichi Sankyo

Ranbaxy Laboratories Limited is an Indian multinational pharmaceutical company that was incorporated in India in 1961 and Daiichi Sankyo is a global pharmaceutical company, the second largest pharmaceutical company in Japan. In 2008, Daiichi Sankyo Co. Ltd., signed an agreement to acquire the entire shareholders of the promoters of Ranbaxy Laboratories Ltd, thelargest pharmaceutical company in India. Ranbaxy's sale to Japan's Daiichi at the price of $4.5 billion.

3. Mahindra & Mahindra- Schoneweiss

Mahindra & Mahindra Limited is an Indian multinational automobile manufacturing corporation headquarters in Mumbai, India. It is one of the largest vehicles manufacturer by production in India. Mahindra & Mahindra acquired 90 percent of Schoneweiss, a leading company in the forging sector in Germany. The deal took place in 2007, and consolidated Mahindra's position in the global market.

4. Tata Motors-Jaguar Land Rover

Tata Motors Limited (TELCO) is an Indian multinational automotive manufacturing company headquartered in Mumbai, India and a subsidiary of the Tata Group and the Jaguar Land Rover Automotive PLC is a British multinational automotive company headquarters in Whitley, Coventry, United Kingdom, and now a subsidiary of Indian automaker Tata Motors. Tata Motors acquisition of luxury car maker Jaguar Land Rover was for the price of $2.3 billion.

5. Tata Steel-Corus

Tata Steel is one of the biggest ever Indian's steel company and the Corus is Europe's second largest steel company. In 2007, Tata Steel's takeover European steel major Corus for the price of

$12.02 billion, making the Indian company, the world's fifth-largest steel producer. Tata Sponge iron was a low-cost steel producer in the fast developing region of the world and Corus was a high-value product manufacturer in the region of the world demanding value products. The acquisition

was intended to give Tata steel access to the European markets and to achieve potential synergies in the areas of manufacturing, procurement, R&D, logistics, and back office operations.

OTHER PROVISIONS FOR M&A's

1. **The Competition Act, 2002** ("Competition Act") which replaced the Monopolies and Restrictive Trade Practices Act, 1969 primarily covers

(i) Anti-competitive agreements (Section 3),

(ii) Abuse of dominance (Section 4), and

(iii) Combinations (Section 5, 6, 20, 29, 30 and 31).

The Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011[10] ("Combination Regulations") govern the manner in which the CCI will regulate combinations which have caused or are likely to cause an appreciable adverse effect on competition in India.

In terms of Section 5 of the Competition Act, a 'combination' involves:

- The acquisition of control, shares, voting rights or assets of an enterprise by a person;
- Acquisition of control of an enterprise where the acquirer already has direct or indirect control of another enterprise engaged in identical business; or
- A merger or amalgamation between or amongst enterprises; that cross the financial thresholds set out in Section 5.

2. **The Income Tax Act, 1961**("ITA") contemplates and recognizes the following types of mergers and acquisitions: *f*

- Amalgamation (i.e. a merger which satisfies the conditions mentioned below)[11]

[10] Available at: https://www.cci.gov.in/sites/default/files/regulation_pdf/Combination%20Regulations%202016%20-%20FINAL_0.pdf
[11] See Section 2(1B) of the Income Tax Act, 1961

- Demerger or spin-off; ƒ
- Slump sale/asset sale; and ƒ
- Transfer of shares.

The ITA defines an 'amalgamation' as the merger of one or more companies with another company, or the merger of two or more companies to form one company.

The ITA also requires that the following conditions must be met by virtue of the merger, for such merger to qualify as an 'amalgamation' under the ITA[12]:

- all the property of the amalgamating company(ies) becomes the property of the amalgamated company; ƒ
- all the liabilities of the amalgamating company(ies) become the liabilities of the amalgamated company; and ƒ
- Shareholders holding not less than 75% of the value of the shares of the amalgamating company become shareholders of the amalgamated company.

IMPACT OF GOVERNMENT INTERVENTION

While tracing the impact of Government passed laws on Mergers & Acquisitions, the recent

Press Note 3[13] (PN 3) is pertinent to note.

The Government of India has reviewed the extant FDI policy for curbing opportunistic takeovers/acquisitions of Indian companies due to the current COVID-19 pandemic and amended para 3.1.1 of extant FDI policy as contained in Consolidated FDI Policy, 2017.

The change called for prior approval of the government for Foreign Direct Investment by any entity

[12] Mergers and Acquisitions in India, May 2020, available at: https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Mergers_Acquisitions_in_India.pdf
[13] Review of Foreign Direct Investment (FDI) policy for curbing opportunistic takeovers/acquisitions of Indian companies due to the current COVID-19 pandemic. Available at: https://dipp.gov.in/sites/default/files/pn3_2020.pdf[14] Curbs on foreign investment by China: An analysis of Press Note 3, Bar and Bench, available at: https://www.barandbench.com/columns/curbs-on-foreign-investment-by-china-press-note-3

based in any country sharing a border with India, or if the beneficial interest lies with any such entity.

Prior to PN 3 of 2020, FDI from entities based out of Pakistan or Bangladesh were subject to government approval.

While the intention of the government behind the introduction of PN 3 of 2020 has been to "curb the opportunistic takeovers/acquisitions of Indian companies due to the current pandemic", the primary intent is to stem any attempts by Chinese firms to take control of Indian firms which have been affected by COVID-19 related lockdowns.

Presently, FDI applications seeking prior approval of the government may take anywhere between 6-10 months for approval, depending on the relevant ministry/department that processes the application. Additionally, in case of sensitive sectors like defense, telecom, private security, information and broadcasting etc, investments from China are subject to security clearance from the Ministry of Home Affairs (MHA), and the same generally takes an additional 1-2 months.[14]

How is investment being affected?

Investments in, and acquisitions (complete and partial) of, Indian companies by non-resident entities and individuals, are governed by the terms of the **Foreign Exchange Management (Non-Debt Instruments) Rules, 2019** ("Non-Debt Instruments Rules"), issued in supersession of **Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000** (the "FI Regulations") and the **press notes** issued by the Department of Industrial Policy and Promotion, Government of India.

In the wake of Covid-19, some countries are reconsidering reliance on manufacturing and supply bases located in a single country. Due the global supply shock caused by the Covid-19 pandemic and resulting lockdown, several countries are taking an initiative to move manufacturing and supply chain bases and diversifying production from a single country into other countries. The Japanese government has earmarked money to help companies shift manufacturing plants out of China and a number of US companies are considering moving out of China as well.[14]

[14] Nakamura, Keita, 'Japan to help shift manufacturing to ASEAN from China after virus disrupts supply

India, being one of the largest economies in the world with a young labor force, is budding to be a worthy alternative for businesses intending to move their investments elsewhere. The stage is set for India to draw resource-seeking and market-seeking FDI; the government is working towards attracting companies and businesses moving out of China, creating incentives for themto move to India.[15]

Certain Indian states like Maharashtra have identified 40,000 acres of land to offer globalinvestors and are looking to introduce single-window mega-clearances for non-polluting industries.[16] The state of Karnataka has constituted a special investment task force to attract investments,[17] while the state of Uttar Pradesh, has identified a land bank of approximately 115,000 acres for industries, of which approximately 25,000 acres is available and ready for investment.[18]

With India emerging as a top contender in attracting foreign investments in the manufacturing and business sector, one of the major reasons for the increase in M&A activity in India can be attributed to the government's **Make in India[19]** scheme, which has brought great benefits to domestic manufacturers as well as to their foreign partners who are willing to join hands in business. Our government has renewed focus on Indian manufacturing and its Make in India initiative has gained further traction, potentially promoting India's dream of becoming Asia's next superpower. In this regard, Mergers and Acquisitions (M&A) are being considered as the best way out for both Indian and international companies who want to conform to the Indian government's initiatives and promote local manufacturing, while adopting and retaining the global best practices in manufacturing and trade.

Mergers and Acquisitions are an effective tool to enjoy benefits of the advanced technical sector. It

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serves as a great way to attract financial resources of foreign businesses and coupled with the Indian manufacturers' deeper understanding of the local market, businesses are bound to boom with a wider network of customers and suppliers.

CONCLUSION

The end of Covid-19 era is taking a turn for the better for the M&A sector. However, the pandemic and the subsequent nationwide lockdown on all non-essential activities and businesses have unfortunately resulted in businesses struggling to stay afloat. Most businesses have been driven to losses, and some fated to wind up operations altogether. While employers continued to pay wages, rent and interest and other fixed costs, the general ambiguity in the global financial setting, near-total shortage of revenue and rapid halt in demand has made it very difficult for businesses to keep their wheels turning.

The uncertain economic climate has resulted in increased losses and lowered valuations of businesses. This resulted in promoters seeking to exit, looking for joint venture partners or rising of funds by partial sale of ownership interests in businesses have to consider this loss of valuation. However, these adversaries also provide great opportunities to the investors for entry, mergers and acquisitions, consolidation, and joint ventures.

Financially distressed businesses often look to sell their ownership interests to pay off their debts and whereas some businesses believe that they would be in a better position if they merged witha stronger partner and availing the benefits of vast resources pooling. In retrospect, in the current economic crisis – despite the government introducing reforms, providing liquidity and maintaining the flow of credit to businesses – some businesses might still not be able to sustain these adversities, resulting in a significant rise in M&A activity.

The biggest obstacle while completing any Mergers and Amalgamations remains to be the long drawn out court procedures and on occasion, the government passed laws and notifications. In conclusion, the legal framework for M&A's must be easy and facilitative and not restrictive or mired in regulatory hurdles. The recommendations of the **JJ Irani Report**[20] are of particular significance in this regard. The Report has recommended that legal recognition to

[20] J.J.Hirani, Report on Company Law, available at: http://www.primedirectors.com/pdf/JJ%20Irani%20Report-MCA.pdf

‘contractualmerger’ (i.e., mergers without the intervention of the court) can go a long way in eliminating theobstructions to mergers in India.

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