COUNTRY COMPARATIVE GUIDES 2023

The Legal 500 Country Comparative Guides

India

MERGERS & ACQUISITIONS

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This country-specific Q&A provides an overview of mergers & acquisitions laws and regulations applicable in India.

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INDIA
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1. What are the key rules/laws relevant to M&A and who are the key regulatory authorities?

M&A transactions involving an Indian company, or a limited liability partnership (LLP), are principally subject to the Companies Act 2013 (Companies Act), the Limited Liability Partnership Act 2008 (LLP Act) and the Securities Exchange Board of India Act 1992, as applicable. The Companies Act governs the issuance and transfer of securities by Indian companies and, among other things, also deals with the formation and dissolution of companies, mergers (including cross-border mergers), de-mergers, shareholder rights and meetings, and management rights and duties. Similarly, the LLP Act governs the regime for the transfer of the partnership interest of an Indian LLP, in addition to prescribing the rules and requirements for the management and governance of LLPs in India. While the Ministry of Corporate Affairs, Government of India (MCA) is the nodal ministry for company and LLP law matters, regional directors and registrar of companies have been delegated the powers over companies and LLPs incorporated in their respective jurisdictions.

Where an M&A transaction involves a publicly traded company, the regulations issued by the Securities Exchange Board of India (SEBI) (which is India's securities market regulator) also become applicable to such transaction. These regulations deal with, among other things, event-based and on-going reporting obligations, tender offers, insider trading norms and stricter corporate authorisation/governance requirements.

All inbound and outbound M&A transactions also attract the applicability of the provisions of the Foreign Exchange Management Act 1999 and the rules thereunder (FEMA), which govern all investments (direct and indirect) into or from India. The Reserve Bank of India (RBI) (which is India's central bank) is the nodal authority under FEMA for enforcing the provisions under FEMA and issuing regulations/directions governing cross-border M&A.

Further, all M&A transactions are also required to comply with the Indian anti-trust law (i.e., Competition Act 2002), which is enforced by the Competition Commission of India.

Lastly, companies operating in certain sensitive sectors (such as insurance, brownfield pharmaceutical, banking, multi-brand retail or telecommunications) may also be subject to additional regulations issued by the respective sector regulators including caps (or other conditions) on foreign investments.

2. What is the current state of the market?

While the global M&A market has been undergoing a correction to pre-pandemic levels since the second half of 2022 (owing to factors such as macroeconomic uncertainty, geopolitical tensions, volatile capital markets and rapidly rising interest rates); the deal activity in India, however, in the last year has defied the global trend and remained strong. According to publicly available data, in 2022, the Indian M&A market accounted for 2,007 M&A and PE deals worth USD 127 billion, witnessing a 47% increase in deal values (but a 6% decrease in deal volumes) from 2021. In particular, M&A deals have contributed 72% of the total deal value (a 28% increase in contribution over 2021), with domestic consolidation deals leading the M&A deal value, contributing 77% of the total M&A deal value in India.

PE deals, on the other hand, accounted for 28% of the total deal value; however, witnessing a 27% decrease in its contribution from 2021 owing to the impact of global macroeconomic conditions.

3. Which market sectors have been particularly active recently?

According to publicly available data, the top market sectors in India in 2022 by: (a) deal value, were banking and financial services (35.4%), IT and ITes (17.2%) and manufacturing (9.8%); and (b) deal volume, were start-

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ups (56%), e-commerce (11.1%) and IT and ITes (7.4%).

4. What do you believe will be the three most significant factors influencing M&A activity over the next 2 years?

We believe that India will continue to be a strong and growing M&A market in the next 2 years, and we expect the M&A activity in India to be heavily influenced by several domestic factors, such domestic consolidations, growing GDP and the Indian government's increased focus on launching investor-friendly schemes/programs and rapid development of Indian infrastructure. With the aggressive move towards domestic consolidation in the last year, we expect Indian conglomerates to drive the M&A market with acquisitions expanding their market base and helping them diversify into new market/segments. Further, the Indian government's push for 'Make in India' and 'Digital India' and the ensuing roll-out of various incentive schemes (for instance, the recently announced incentives worth more than USD 10 billion for development of semiconductor and display manufacturing ecosystems) will attract players looking to diversify into new segments or enter into the Indian market.

Secondly, we expect certain external factors such as global supply chain disruption, impending recession and global geopolitical events to also potentially impact deal activity in India. For instance, due to global supply chain disruptions, India is trending as an attractive market for global companies to expand their supply chains, and we expect to see robust in-bound M&A deals.

Lastly, with the general elections in early 2024, we believe that we may see a boost in government spending and the overwhelming view remains that the Indian market as well as M&A deal activity will continue to do well in the run up the elections.

5. What are the key means of effecting the acquisition of a publicly traded company?

For publicly traded companies, commonly used structures are: (a) acquisition of substantial voting rights or control followed by a mandatory tender offer, and (b) tribunal approved mergers (typically exempt from tender offer obligations).

On entering into definitive agreements for direct or indirect acquisition of voting rights (primary or secondary) in a publicly traded company which are in excess of certain prescribed thresholds under Indian securities law (i.e., initial 25% or more voting rights, and subsequent voting rights in excess of 5% every Indian financial year) or control over the publicly traded company, the acquirer triggers a mandatory tender offer. Such tender offer is made to the minority shareholders of the target for a minimum of 26% of the total capital of the target and typically involves cash consideration.

In a merger, the consideration typically involves issuance of securities of the surviving entity to the shareholders of the merging entity. The process, among other things, requires corporate approvals (from the audit committee, board, shareholders and creditors of the acquirer and the target company) and regulatory approvals (from the stock exchanges, court/tribunal etc), and is a relatively lengthy process.

6. What information relating to a target company will be publicly available and to what extent is a target company obliged to disclose diligence related information to a potential acquirer?

Indian securities law mandates detailed public disclosures in connection with the ownership, governance and operations of a publicly traded companies. For instance, such companies are required to periodically disclose their shareholding pattern, financial statements, corporate governance reports, disclosures of related party transaction, annual reports, etc. Publicly traded companies are also required to disclose all events/information which are material in nature (including acquisitions, sale of units/divisions, issuance of securities, buyback, appointment and resignation of directors and key management persons). Notices of convening shareholders' meeting, summary of proceedings and voting results are also required to be submitted to the stock exchanges. The notice for scheduling shareholders' meeting must include relevant information regarding the matters placed before the shareholders and the recommendation of the board on such matters. Beyond what publicly traded companies are required to file with the stock exchanges, a fair amount of information is also publicly available on the company's website and from market research publications and news sources.

On the other hand, not much information is available in respect of a private company in the public domain, except the charter documents (including any modification thereto) and certain annual filings (such as the directors report, audited financial statements and shareholding pattern) and disclosures (such as the shareholder resolutions and encumbrance/charge filings) that are required to be mandatorily made by an Indian company every year.

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As far as the disclosure of diligence related information by an Indian company is concerned, this is purely driven by the commercial agreement/understanding between the parties, and there is no general obligation on an Indian company (public and private) to disclose any information to a potential acquirer under Indian law. However, any material non-public information related to a publicly traded company can only be shared post board approval and under the cover of a non-disclosure agreement. In a minority acquisition of a publicly traded company, it is not uncommon for the acquirer to proceed with the transaction based on review of publicly available information.

7. To what level of detail is due diligence customarily undertaken?

As a general practice, the scope of due diligence in private deals in India is typically greater than in public deals, given that the information relating to a private company is extremely limited in the public domain.

However, the level of the legal due diligence varies across deals and is driven by various factors, including the transaction structure (direct or indirect acquisition), transaction timeline (including exclusivity period), target company's sector and size, risk appetite of the potential acquirer and the commercial understanding between the parties.

In a negotiated public M&A deal, it is likely that a publicly traded company may also agree to share material non-public information (also known as unpublished price sensitive information (UPSI)) with the acquirer and/or its advisors as part of the due diligence process. However, such sharing of UPSI should be in the best interests of the company (in the informed opinion of the board) and would be subject to certain compliances (which, among other things, include execution of appropriate non-disclosure agreements prior to sharing UPSI).

8. What are the key decision-making organs of a target company and what approval rights do shareholders have?

Under Indian company law, the board of directors is the key-decision making organ of a target company and is entrusted with the responsibility and powers to run the day-to-day management of the Indian company. However, the board usually delegates its management powers to senior-level key employees (including managing director, chief executive officer, chief financial officer etc) who work under the supervision of (and report to) the board.

Separately, the Companies Act and India securities law also prescribe certain extraordinary matters which significantly impact shareholder returns or the financial performance/business continuity of the company which require the affirmative approval of the shareholders of the company – for instance, changing the company's business objects, selling company's substantial undertakings or assets, variation of shareholders' rights or issuance of new shares.

9. What are the duties of the directors and controlling shareholders of a target company?

The common law duties of directors of a company are codified in the Companies Act, which require them to always act in good faith, with due and reasonable care, and in the interests of the company, its shareholder, its employees and the community at large. In furtherance of these duties, directors are required to disclose their pecuniary interests (in other entities) and ensure that they sit out of decisions which are in conflict with their personal interests. Additionally, directors are also obligated to fulfil certain administrative duties of the company – for instance, signing of financial statements, preparing board report, ensuring accuracy of offer documents and financial statements, and ensuring compliance with annual filing requirements.

Controlling shareholders are commonly known as 'promoters' in the Indian context. Generally, Indian company law does not impose any fiduciary duties on the promoters of a company. However, in the context of publicly traded companies, any breach by a company tends to carry a potential legal and reputational impact on the promoters as well. In fact, among other things, the promoters of publicly traded companies are responsible for ensuring accuracy of statements in security offer documents and are also subject to various disclosure and compliance requirements with respect to their dealing in the securities of the publicly traded company. Further, any transaction between a publicly traded company and its promoter(s) is subject to greater level of scrutiny, approval and disclosure requirements.

10. Do employees/other stakeholders have any specific approval, consultation or other rights?

Under Indian law, there is no general requirement to seek the approval of or consult the employees of a company or any other stakeholders except for the board,

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shareholders and in some cases, creditors of the company.

11. To what degree is conditionality an accepted market feature on acquisitions?

In India, there are no restrictions on using conditionality as a measure of deal protection, and it is widely accepted as a common market feature in M&A deals. Other than the receipt of all applicable regulatory approvals and third-party consents, conditionalities which are common in the transaction documentation for M&A deals in India include: (a) no material adverse effect/change should have occurred between signing and closing; (b) representations and warranties remaining true and accurate as on the signing date and the closing date; (c) an obligation on the seller to deliver a no-objection certificate from the Indian tax authorities in respect of the transfer of the sale shares; and (d) procurement of a valuation report in support of the purchase price for the sale shares from an exchange control law and a tax perspective (as applicable).

Separately, in public M&A deals, conditionality is also permitted under the Indian securities law whereby an acquirer can make a tender offer conditional on a minimum level of acceptance by the public shareholders, failing which the acquirer has the right to walk away from the transaction.

12. What steps can an acquirer of a target company take to secure deal exclusivity?

It is common for acquirers to insist on exclusivity for the proposed acquisition. The exclusivity obligation is usually agreed upfront and captured under a term sheet or letter of intent between the parties or sometimes even as a separate exclusivity agreement. However, in public M&A deals, deal exclusivity would need to be considered in light of higher corporate governance standards (i.e., for limited period and on reasonable justification).

13. What other deal protection and costs coverage mechanisms are most frequently used by acquirers?

In private M&A deals it is standard practice for an acquirer to push for appropriate deal protection and cost coverage mechanisms to be legislated under the transaction documentation. For instance, it is common for an acquirer to insist on: (a) conditionality provisions, to make closing of the deal conditional upon fulfilment of the agreed conditions; (b) standstill provisions in a deal with staggered signing and closing; (c) 'no-shop' provisions, which require the sellers and the target to abstain from seeking any other offers for acquisition until transaction closing; and (d) a specific performance clause, which enables the acquirer to seek the enforcement of the contract against the seller by approaching an arbitration tribunal or the local courts in India (as applicable).

Lastly, the protection afforded by warranty and indemnity (W&I) insurance policies, is also gaining traction in India with more buyers opting for W&I insurance, especially in case of financial sponsor sellers with limited fund lives.

14. Which forms of consideration are most commonly used?

Indian law does not postulate a prohibition on the form of consideration (cash or non-cash) that can be offered by acquirers in M&A. However, cash is the most common form of consideration in M&A deals in India. As far as non-cash consideration is concerned, stock (of the acquirer or the ultimate holding company) is the preferred form of consideration. However, except in domestic merger deals, stock as a form of consideration is scarcely used in cross-border deals due to certain regulatory requirements. For instance, acquisition by share-swap in a secondary sale requires prior approval of the RBI, which in our experience is typically not forthcoming (particularly, where the seller is an individual).

15. At what ownership levels by an acquirer is public disclosure required (whether acquiring a target company as a whole or a minority stake)?

Certain threshold linked disclosures are required to be made on acquisition of shares or voting rights of a publicly traded company, a high-level overview of which is set out below:

- any acquirer (along with persons acting in concert (PAC)), who acquires shares or voting rights, aggregating to 5% or more is required to disclose the aggregate shareholding and voting rights to the target and the stock exchanges within 2 working days from the acquisition date.
- any person (together with PAC) who holds 5% shares or voting rights is required to disclose any 2% change in holding from the last disclosure to the target and the stock

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exchanges within 2 working days from the date of change in holding.

As far as private M&A is concerned, any public disclosure of the transaction is purely driven by commercial understanding between the parties. Further, depending on how sensitive a transaction is for a party, it is typically announced either at the time of the signing of the binding transaction documentation or post-closing.

16. At what stage of negotiation is public disclosure required or customary?

In public M&A, there is no specific requirement (and nor is it customary) to publicly disclose any details of a potential transaction involving a publicly traded company during the negotiation stage. Typically, public disclosure of such transactions is required to be made only upon execution of binding transaction documents. Further, discussions/negotiations regarding potential transactions involving a publicly traded company may be considered as UPSI. Therefore, communication of such information should be undertaken strictly on a need-to-know basis, subject to confidentiality and other requirements under the Indian securities law. In order to maintain confidentiality of such information, parties typically enter into a confidentiality agreement at the outset of negotiations.

On the other hand, where all the parties involved in a private M&A transaction are private companies, there is no obligation on either party to make a public disclosure of the transaction (or the status of the transaction) at any stage of the negotiation.

17. Is there any maximum time period for negotiations or due diligence?

No restrictions are prescribed under Indian law regarding the duration or time period for negotiations or due diligence. The due diligence process is driven largely by the request of the acquirer (and its advisors) and the target's willingness to cooperate. The process can continue for as long as the parties mutually agree or the transaction structure warrants.

18. Are there any circumstances where a minimum price may be set for the shares in a target company?

From a tax perspective, a transfer or issuance of shares is required to be undertaken at a minimum fair market value (FMV) which needs to be determined using the prescribed methodology and formula. Separately, a minimum FMV requirement is also triggered in the following scenarios:

- Under the Indian exchange control law, in case of a: (a) transfer of shares of an Indian company between an Indian resident seller and a non-resident buyer (or vice versa); (b) transfer of shares of an Indian company between an Indian resident seller and an Indian company which is foreign owned and controlled; and (c) issuance of shares by an Indian company to a non-resident investor; and
- Under the Indian company law (for unlisted companies) and Indian securities law (for publicly traded companies), in case of any issuance of shares by an Indian company to an investor by way of a preferential allotment (i.e., issuance of shares to person(s) identified by the company's board).

Further, in public M&A deals, a tender offer is required to be made at a regulatory minimum price or, at the discretion of the acquirer, any price higher (but not lower) than such minimum price. The determination of minimum price is based on various factors including nature of the transaction (i.e., direct or indirect acquisition) and whether shares of the publicly traded company are frequently traded or not.

19. Is it possible for target companies to provide financial assistance?

Under Indian law, target companies are not permitted to provide financial assistance to acquirers.

20. Which governing law is customarily used on acquisitions?

In the context of domestic M&A, Indian law is used as the governing law. However, in case one of the parties to the acquisition is a non-resident, the parties have the flexibility of using foreign law as the governing law for the transaction. That being said, even in cross border deals with an Indian target, Indian law is the most common governing law.

21. What public-facing documentation must a buyer produce in connection with the acquisition of a listed company?

In an acquisition of substantial voting rights in, or control over a listed company (which triggers the tender offer process), the primary public facing documents are the

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public announcement (PA), detailed public statements (DPS) and letter of offer (LOF). Typically, if a direct acquisition triggers a mandatory tender offer, the PA is required to be made on the date of entering into the binding agreement. PA is required to include, among other things, details of the offer size; offer price; acquirer; PAC; selling shareholders (if any); target company; and the transaction which triggered the tender offer. A DPS is required to be published in local newspapers shortly after the PA, which builds on the PA with additional disclosures and details including summary of financial statements of the acquirer, PAC and target company; statutory approval; salient features of the binding agreements etc. Lastly, a LOF containing additional details in relation to the tender offer background and process is issued (post receipt of the regulator's inputs) to the public shareholders of the target.

Separately, prior to commencement of the tendering period, an advertisement announcing the schedule of activities and other details related to the tender offer is also required to be issued; and the committee of independent directors of the target is required to publish an advertisement providing recommendation to the public shareholders with respect to the tender offer.

22. What formalities are required in order to document a transfer of shares, including any local transfer taxes or duties?

In India, while private companies typically prevalently issue shares in physical form, public companies are required to issue shares in a dematerialised/electronic form. Depending on the form of the shares, the process for undertaking the transfer of shares varies.

Where the shares are in a physical form, the parties are required to execute the prescribed share transfer form and deliver it to the target company along with the physical certificates. Upon receipt, the board of directors are required to register the share transfer and authorise the directors to endorse the share certificate(s) in favour of the acquirer and update the company's statutory register to reflect the acquirer as the legal and beneficial owner of the shares.

On the other hand, if the shares are in a dematerialised form, the shares transfer is effected electronically without the need for execution of share transfer forms. In terms of the transfer process, the transfer is processed through the depository participants (DP) (i.e., registered firms maintaining securities account in which the dematerialised securities are held on behalf of the shareholder) of the acquirer and the seller and requires the seller to issue instructions to its DP to credit the acquirer's depository account with the sale shares. Once the shares are credited, the depository automatically updates the depository account statement of the company to reflect the acquirer as the legal and beneficial owner of the shares.

Separately, transfer of shares (physical or dematerialised) of an Indian company is subject to payment of stamp duty/transaction cost at 0.015% of the total consideration payable for the sale shares. Under Indian law, while the obligation for the payment of such stamp duty amount is on the seller; however, the allocation of this cost (like any other transaction cost) is subject to commercial agreement/negotiation between the parties.

23. Are hostile acquisitions a common feature?

Hostile takeovers are permitted in India (and there have been a few notable instances) – however, such acquisitions are not common. This can primarily be attributed to the prevalence of concentrated promoter shareholding in most publicly traded companies. That being said, with the evolution of the Indian public markets, there has been a gradual rise in deal structures involving hostile takeovers.

24. What protections do directors of a target company have against a hostile approach?

In public M&A, once a tender offer is announced, the company and its directors are required to act in ordinary course and are subject to certain regulatory standstill conditions which may make adoption of any defensive actions difficult. However, directors of a publicly traded company have a fiduciary duty to act in the best interest of the company and its stakeholders. While Indian regulations do not expressly adopt the 'Revlon Rule' (which effectively requires directors to make reasonable efforts to obtain the highest value for a company, when a hostile takeover is imminent), the directors may – given their fiduciary duties – be required to consider a hostile approach with a value accretion lens. Depending on the stage of the hostile approach (i.e., pre or post launch of tender offer), directors may also consider adopting potential defensive actions (such as sale of assets, selective preferential issue, stock split, bonus, etc) to stave-off a hostile approach (assuming this aligns with fiduciary duties).

The Indian securities law also envisage a white knight

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defence to a hostile approach (in the form of a competing offer) once a hostile tender offer is launched. In brief, any entity, other than the hostile acquirer, is permitted to make a competing tender offer within a prescribed timeline and for a minimum stake in the company. The acquirers are permitted to revise terms of the offer (for the better) up to 1 day prior to commencement of tendering. This concept of competing offers seeks to achieve 'shareholder democracy' by enhancing the choice and competition in the market for control over the target company.

25. Are there circumstances where a buyer may have to make a mandatory or compulsory offer for a target company?

Indian securities law prescribes certain triggers for a mandatory tender offer. A summary of such triggers is set out below:

- Significant Acquisition: Acquisition of shares or voting rights which would entitle the acquirer to exercise 25% or more voting rights in a publicly traded company.
- Creeping Acquisition: If a person already holds more than 25% voting rights (but less than 75%, on account of minimum public float), then any acquisition of more than 5% voting rights in a single Indian financial year (March-April).
- Control Acquisition: Acquisition of 'control' of a publicly traded company, regardless of whether there has been any acquisition of shares or voting rights of such company. The concept of 'control' is quite broad and includes the right to (a) appoint majority directors; or (b) control the management or policy decisions by way of shareholding, management rights, shareholders' agreement, or any other manner.
- Indirect Acquisition: Any acquisition that leads to an 'indirect' (a) Significant Acquisition; (b) Creeping Acquisition; or (c) Control Acquisition.

Further, under the Indian securities law, an agreement to acquire is treated at par with the actual acquisition of shares, voting rights or control over the publicly traded company, and accordingly the execution of an acquisition agreement (and not the actual acquisition itself) would trigger the obligation to make a mandatory tender offer.

26. If an acquirer does not obtain full control of a target company, what rights do minority shareholders enjoy?

In non-control deals, it is common for a minority acquirer to negotiate, at the time of its investment, certain protective (but not participative) covenants. Typically, these include the right to appoint a director (minority), veto rights over limited items such as change in business, fresh issue of capital, etc. In addition, such minority shareholder also continues to enjoy all the rights and benefits ordinary shareholders, such as the right to vote and receive dividends (if declared by the company).

27. Is a mechanism available to compulsorily acquire minority stakes?

In private M&A deals, majority shareholders/acquirers often negotiate call option rights in their definitive documentation, wherein upon trigger of certain agreed events, the majority shareholder(s) have a right to compulsorily acquire the minority stake in accordance with the agreed terms. However, where the call option holder is a non-resident shareholder, such call option right is subject to a transfer lock-in period of 1 year (from the acquisition date) and cannot contemplate a right to exit at an assured price.

However, in the case of a publicly traded company, an acquisition of 100% of a target company by a majority shareholder/acquirer is challenging (and time-consuming) as Indian laws do not provide a guaranteed path to full ownership. In such cases, a shareholder/acquirer can seek to achieve 100% acquisition by launching a 'take private' deal (also known as delisting offer), wherein they provide the minority shareholders of the target with an option (but not an obligation) to sell their shares.

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