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Indian Subsidiaries in the Transaction Perimeter: Key Issues in Cross-Border M&A

Introduction

As one of the world's fastest-growing major economies, India is increasingly becoming an important jurisdictional touchpoint for cross-border M&A deals. The focus of this note is on instances where there is an indirect acquisition of an Indian subsidiary on account of a transaction that takes place at a higher level within the corporate group. This note sets out key issues that teams should be mindful of while dealing with such transactions. Understanding these aspects can be critical for structuring, timing, and assessing deal economics.

Foreign Investment Approvals

Cross-border transactions that result in the direct or indirect change of control or ownership of an Indian company can trigger approval requirements under Indian foreign exchange control regulations.

As context Foreign Direct Investment ("**FDI**") into India is governed by the (Indian) Foreign Exchange Management Act, 1999 and the rules and regulations framed under it (collectively, the "**FEMA Regulations**"), along with the Consolidated Policy on FDI and press notes and circulars ("**FDI Policy**") issued by Department for Promotion of Industry and Internal Trade under the Ministry of Commerce & Industry.[1] The FDI Policy is implemented through amendments to the FEMA Regulations. Non-compliance with the FEMA Regulations carries significant consequences including penalties of up to three times the sum involved (where the sum is quantifiable) and confiscation of securities.

While the FDI Policy has evolved over time, it continues to restrict investments in certain sectors by either (i) prohibiting FDI in certain limited sectors (e.g., atomic energy, tobacco products, lottery business); or (ii) permitting FDI in other sectors, either (a) subject to obtaining an investment approval from the government (approval route) (e.g., print media, defence, insurance, brownfield pharmaceuticals); or (b) without having to obtain such an approval (automatic route) either up to 100% or subject to a prescribed ceiling, depending on the sector. Where foreign investment is permitted under either of the routes, the investment could also be subject to certain sector specific conditions. Where no specific conditions have been provided for a sector under the FDI Policy, FDI is permitted up to 100% under the automatic route.

[1] The most significant regulation framed under the Foreign Exchange Management Act, 1999 are the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 ("**NDI Rules**").

Foreign Direct Investment from Countries Sharing Land Borders

Prior government approval is needed for FDI from an entity is situated in, or the beneficial owner of any investment in India (direct or indirect) situated in, or is a citizen of, any country that shares land borders with India.[2]

Indirect Acquisitions – approval route investments

An indirect acquisition of an Indian subsidiary operating in an approval route sector will be subject to approvals under the FEMA Regulations, notwithstanding that the transaction occurs offshore, and no consideration flows into India.[3]

Practice Notes

- *The requirement for government approval under the FEMA Regulations is a critical path item. The acquirer should check if any approvals under FEMA Regulations will be triggered on account of the proposed transaction. The approval process can be protracted (typically 3 to 6 months, or longer), and can materially impact transaction timelines.*

- *Key diligence checks:*
  - *whether an Indian subsidiary is engaged in a sector under the approval route; and*
  - *whether the investment has been made in compliance with the FEMA Regulations.*

[2] Rule 6, NDI Rules.
[3] Rule 23 (1), NDI Rules.

Merger Control

Cross-border transactions can be subject to notification and approval under Indian merger control regulations, even if undertaken outside India.

The legislative framework for merger control in India comprises of the (Indian) Competition Act, 2002 ("**Competition Act**") and the regulations framed under it, the primary regulation being the Competition Commission of India (Combinations) Regulations, 2024 ("**Combination Regulations**"). The competition/anti-trust regulator in India is the Competition Commission of India ("**CCI**").

India operates a mandatory and suspensory merger control regime. Even in the case of an indirect acquisition such as a cross-border merger or acquisition involving entities outside India, if the target group has assets, turnover, or substantial business operations in India that cross the prescribed thresholds, the transaction becomes notifiable to the CCI. Failure to notify a reportable transaction can result in significant penalties and potentially unwinding of the transaction.

		ASSETS	TURNOVER
Enterprise level	India	> INR 25 billion (~USD 302 million)	> INR 75 billion (~USD 907 million)
	Worldwide (with an India leg)	> USD 1.25 billion + at least INR 12.5 billion (~USD 151 million) in India	> USD 3.75 billion + at least INR 3.75 billion (~USD 453 million) in India
Group level	India	> INR 100 billion (~USD 1.2 billion)	> INR 300 billion (~USD 3.62 billion)
	Worldwide (with an India leg)	> USD 5 billion + at least INR 12.5 billion (~USD 151 million) in India	> USD 15 billion + at least INR 3.75 billion (~USD 453 million) in India

The Competition Act exempts acquisitions, mergers, and amalgamations from the requirement of seeking approval from the CCI where the value of the assets of the target entity in India is less than INR 4.5 billion (~USD 53.8 million) or the turnover is less than INR 12.5 billion (~USD 149 million) ("**De Minimis Exemption**").[4]

Recently, a Deal Value Threshold ("**DVT**") has been introduced as an additional criterion for merger control in India. Any transaction with a value of INR 20 billion (~USD 230 million) including direct, indirect, immediate, and deferred consideration will require prior approval of the CCI provided that the target has substantial business operations in India.[5] The De Minimis Exemption is not available where a transaction has to be notified for exceeding the DVT.

A target is considered to have substantial business operations in India if it crosses certain thresholds. In non-digital sectors, the target will be considered to have substantial business operations if (a) Gross Merchandise Value ("**GMV**") > 10% of global GMV and exceeds INR 5 billion (~USD 60 million), (b) or turnover > 10% of global turnover and exceeds INR 5 billion (~USD 60 million). In digital sectors, the target will be considered to have substantial business operations in India if GMV > 10% of global GMV, turnover > 10% of global turnover, business users in India > 10% of global business users, or end users in India > 10% of global end users.[6]

Practice Notes

Need to notify the CCI and obtain Indian merger control approval should be screened for early in the deal cycle by undertaking a jurisdictional analysis. If a notification is required, the transaction documents should provide for CCI approval as a condition precedent to closing. The CCI has 150 days to approve a filing. Form I (short form) filings are typically approved in 7-10 weeks, unless the filing is made under the green channel route where approval is automatic (deemed). Review period for form II (long form) filings is generally longer.

[4] Section 5(e), Competition Act; Regulation 3, Competition (Minimum Value of Assets or Turnover) Rules, 2024.
[5] Section 5(d), Competition Act; Regulation 4, Combinations Regulations.
[6] *Ibid.*

Open Offer

An indirect acquisition of shares or control in a foreign entity that holds shares in an Indian listed company may trigger an open offer requirement in India. Takeovers or substantial acquisitions of listed Indian companies are regulated under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (**"Takeover Code"**).

Any person or legal entity intending to directly or indirectly acquire a substantial stake in or control over a listed Indian company is obligated to inform the public shareholders (of the listed company) about its intention and offer them an opportunity to exit their holding in the listed company.[7] In such circumstances, the acquirer must make an open offer to acquire 26% of the total shares of the Indian listed company from its public shareholders, at a price determined in accordance with the Takeover Code.[8] The open offer process is highly regulated, timeline-intensive (typically 3 to 4 months). Under the Takeover Code, an agreement to acquire is treated on a 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) triggers the obligation to make a mandatory tender offer.

Certain exemptions exist, such as inter se promoter transfers (where control remains within the same promoter/family group) and intra-group mergers.[9]

Practice Notes

As local listed Indian subsidiaries become more common, identifying open offer triggers early on the deal cycle will become critical as such offers can have a significant impact on deal structure and economics.

[7] Regulation 3(1), Takeover Code.
[8] Regulation 3(1), Takeover Code.
[9] Regulation 10, Takeover Code.

Taxation

Direct taxes are governed by the (Indian) Income-tax Act, 1961 ("**IT Act**"). Cross-border share transfers of foreign entities deriving substantial value from Indian assets can trigger Indian capital gains tax if Indian assets exceed INR 100 million (~USD 1.2 million) and represent ≥ 50% of value of all assets of the foreign entity.[10] In addition, certain transfers are exempt, including (i) small shareholders holding less than 5% of the shares or voting power of the foreign entity, and (ii) certain qualifying intra-group mergers.[11]

Practice Notes

Potential Indian tax implications should be reviewed by tax advisors. In certain transactions, in our experience acquirers also seek to include indemnities for Indian taxes.

Sector Specific Approvals

Certain regulated sectors in India require prior regulatory approval for any direct or indirect change of control, including on account of cross-border M&A transactions. This applies to regulated sectors such as insurance, banking and financial services among others.

Practice Notes

- *Check with local counsel if any such approvals are triggered. These sector-specific approvals are often long lead-time items and the process for obtaining such approvals must be run in parallel with other regulatory workstreams.*

- *Alternatively, obtain suitable representations and warranties that no such approvals are required.*

[10] Section 9, IT Act.
[11] *Ibid.*

Scope and Approach to Diligence

Due diligence processes in India are broadly aligned with global practices. However, a key differentiator in India is the quality and availability of company information. Acquirers may find that the quality, completeness, and accessibility of corporate records and compliance documentation do not always align with international standards. As a result, a common challenge in the Indian context is the potential for information asymmetry.

Practice Notes

- *Typically, parties seek comprehensive representations and warranties, backed by corresponding indemnities. In terms of market practice, a pro-sandbagging approach is more common. That is, typically buyers will look to include language that pre-closing knowledge does not impact their ability to bring indemnity claims. Diligence issues can also impact W&I insurance and coverage.*

Post-Merger Integration

Corporate Governance

Corporate governance in India is primarily governed by the (Indian) Companies Act, 2013 and the rules framed thereunder ("**Companies Act**"). Every private company in India must have at least two directors and two shareholders, with at least one director being a resident in India (i.e., having resided in India for at least 182 days in the preceding financial year).

In M&A transactions, it is common for the board of the Indian subsidiary to be reconstituted. Any change in directors must be filed with the Registrar of Companies ("**RoC**")[12] within 30 days of appointment or cessation. Each incoming director must hold a valid Director Identification Number ("**DIN**") and a Digital Signature Certificate ("**DSC**"), and foreign nationals are required to submit notarized and apostilled documents.[13] These formalities often delay the onboarding of foreign nationals as directors of Indian subsidiaries.

Name and Registered Office Address Change

Post-merger integration may also require changes in the company's name and its registered office.

A change in the name of the company entails approval of the board, reservation of the proposed name with the RoC, approval of shareholders by way of a special resolution, and filing of the requisite forms, following which a fresh certificate of incorporation is issued to make the change effective.[14] This can typically take 4-6 weeks.

Where there is a change in the registered office, the procedure depends on the extent of the move: a shift within the same city or town is straightforward and requires only a board resolution and notification to the RoC. A shift within the same state but under a different RoC jurisdiction additionally requires approval of the shareholders by special resolution; and a shift from one state to another requires shareholder approval, confirmation of the Regional Director, and consequent filings with the RoC.[15] This can typically take 3 to 4 months.

[12] Under the Companies Act, the RoC is a government authority under the Ministry of Corporate Affairs (MCA) responsible for registering companies and for discharging various administrative and recordkeeping functions under the Companies Act.
[13] Section 152 and 153, Companies Act; Rule 8(4), Companies (Registration Offices and Fees) Rules, 2014.
[14] Section 13, Companies Act.
[15] Section 12 and 13, Companies Act.

Significant Beneficial Ownership Reporting

Under the Companies Act, any individual who, directly or indirectly holds at least 10% of shares, voting rights, or dividend entitlements, or who otherwise exercises significant influence or control, is required to declare such interest to the Indian subsidiary.[16] The Indian entity is required to make filings with the Ministry of Corporate Affairs with respect to such significant beneficial ownership ("**SBO**").

Where the holding company of the Indian subsidiary is a body corporate, the individual holding more than 50% of its share capital or voting rights of the holding company (or the ultimate holding company) is considered to be the SBO; if the holding company is a pooled investment fund, the general partner or investment manager may be regarded as the SBO.[17] As an indirect acquisition may trigger a change in the SBO of the India subsidiary, necessary filings with respect to such change in SBO will have to be made.

Practice Notes

As a part of the SBO filing, certain personal details of the SBO are required to be disclosed. This data is often also available for public inspection.

HR Integration

Further, in addition to statutory filings, post-merger integration typically also requires alignment of internal corporate policies. This typically includes adoption of a revised HR handbook and harmonization of employment terms. Early planning of these HR and policy matters is critical to ensure smooth integration and workforce stability.

Practice Notes

Best practice is to initiate integration planning at the outset of the transaction, as these steps involve significant lead time.

[16] Section 90, Companies Act.
[17] Rule 2(h), Companies (Significant Beneficial Owners) Rules, 2018.

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