Nishith Desai Associates

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Outbound Acquisitions by India Inc.

A Primer on Outbound Acquisitions by Indian Companies With a Focus on United States, United Kingdom and Australia

September 2014

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1. Introduction

The idea of outbound investments has always attracted the fancy of companies. This idea gained wings with the advent of globalization and development of international financial markets. It is no wonder that companies from emerging markets including India have been particularly active in making outbound investments since the last decade. Though the level of activity might have been influenced by short-term economic factors, a clear trend towards overseas acquisition has emerged.

The year 2013 till date already has had some significant overseas acquisitions such as for e.g. Apollo Tyres' acquisition of Cooper Tire for about USD 2.5 billion in the United States and Oil India's & ONGC Videsh's acquisition of a stake for about USD 2.5 billion in the Rovuma-I gas field in Mozambique. The year 2012 witnessed a slew of acquisitions across diverse sectors of the economy in India despite global economic turmoil, rising inflation, currency fluctuations and volatile stock markets.

Outbound investments in the year 2012 saw some stability and improvement over 2011 with deal values of about USD 14 billion as against USD 10 billion respectively, however, it was less than the deal value of USD 27.25 billion recorded in 2010.[1] These values indicate that the deal activity was broadly tracking the general market sentiment during the said period.

1. Grand Thornton Dealtracker: Providing M&A and Private Equity Deal Insights, 8th Annual Ed. (2012), available at: http://www.grantthornton.in/assets/Grant_Thornton_Dealtracker-Annual_Edition-2012.pdf

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2. Accelerating Growth Through Outbound M&A

There are several strategic factors that have motivated India Inc. to become active in global markets and focus on making cross-border acquisitions to achieve the next level of growth. The trend of outbound acquisitions gained momentum because of the demand of the companies to grow inorganically across geographies, which along with easy availability of financing made it all the more easy for companies to make acquisitions across borders.

The following are some of the significant reasons why Indian companies have become active in cross-border acquisitions:

I. Search for New Markets

One of the factors motivating India Inc. to look for assets abroad is to enter into new markets. It is quite difficult for a new firm to break into developed markets because those markets are already matured and the various relative competitive disadvantages (such as high start-up cost, establishing dealer network from scratch etc.) hinders entry of new firms into developed markets. These entry barriers get further accentuated for foreign firms who usually don't have local relationships which is almost always invariably critical for entering into new markets. Thus, entry through acquisitions is one of the relatively viable options for firms entering into new markets which provide the acquirer with a going concern with established relationships such as for e.g. branch network, customers, employees, brand value, revenue and in many cases profits, making acquisitions a preferred mode of entry for investors from foreign countries.

Another reason why firms are willing to enter into new markets is to achieve higher profit margins or enter into markets where there may be achievable growth opportunities. For example, in case of Bharti's acquisition of Zain in Africa, wherein Zain, a telecom operator in Africa having a wide presence and market leadership position in many African mobile telecom services market, provided a respite to Bharti as Zain's profit margins were higher as compared to margins in a highly competitive telecom services market in India. Further, the relative low tele-density in Africa provided Bharti with a growth opportunity to implement its best practices from India, to a new growth market which was relatively less clogged than the Indian telecom market.

II. Need for New Technologies

Indian companies have traditionally spent low on research & development (R&D) which has restricted their access to the most advanced technologies. As the Indian economy grew and companies achieved a reasonable scale, they quickly realized that they need to invest in R&D in order to maintain their competitive edge. Since investments in R&D have a high gestation period, investments in R&D take a long time before they have a real impact on margins in the short to medium term. In order to fill this void, Indian companies started snapping up assets located in developed markets such as in Europe and North America. These types of acquisitions typically involve a company having proprietary technologies or carrying out research in the same field or a related field as that of acquirer. Such assets provide instantaneous access to advanced technologies and compliments the talent and existing setup of the acquirer.

III. Access to Natural Resources

In the recent past, lot of Indian conglomerates have acquired foreign companies which have access to natural resources. Natural resources is usually a contentious issue and is a sensitive sector in many countries. As such, this sector is highly regulated. An acquisition of an already operating company makes it easy for an acquirer to establish itself in one of the most regulated sectors of most economies as compared to setting up their own operations and applying for all clearances and licenses required for commencing a greenfield project.

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IV. Product & Market Diversification

Many domestic companies have a product or access to technology which is limited or which cannot be upgraded or which may not be upgraded in a short span of time. To address this gap, companies may acquire a target with product diversity and complementary range of products. Such an acquisition provides an acquirer ready access to an existing product range which it otherwise might not have had without investing in R&D. For instance, Mahindra acquired Ssanyong Motors, a South Korean automaker which has a portfolio of cars in the sports utility vehicle segment. Since, Mahindra is an important player in the SUV/MUV market, Ssanyong's portfolio will prove to be complementary for Mahindra as it will have immediate access to new geographies, platforms and vehicles, which otherwise would have required time, money and effort.

Another reason why Indian companies are making acquisitions abroad is to diversify their consumer base and provide their product offering in a variety of markets in order to protect them against the risk of dependence on a single market. An acquisition in a developed market not only ensures a relative stability in market demand, thus offsetting dependence on evolving markets. However, in the wake of globalization, the world economy has become so inherently integrated that more often than not, the underlying economic health of the global economy moves in tandem, thus in the process, limiting the benefits that companies from developing markets could derive from acquisitions in developed markets.

V. Rise of Global Finance

One of the greatest trends in the times of modern economy especially in the last two decades has been the advent of global finance and an active broad-based participation in the modern global economy by market participants/investors irrespective of their geographic location. The advancement in technology and connectivity have made it possible to transmit a high amount of data across the globe, providing access to information, resulting in higher participation in global financial markets. This increased access to information helped increase the appetite of the investors which made them willing to finance cross-border acquisitions which otherwise would not have been possible had there not been free flow of information.

VI. Attractive Assets Available for Cheap

The financial crisis prompted companies across the world to acquire assets located in developed markets at cheap valuations. Acquirers especially from the developing world utilized this opportunity to add to their portfolio, targets which had the technologies but were facing temporary financial pressure in the wake of the financial crisis. The impact of the financial crisis was felt more on the developed economies and less on the developing economies leading to the companies from the developing economies taking advantage of the opportunity by making acquisitions in developed economies.

VII. Vertical Integration

Companies in the developing economies are realizing that they need to be vertically integrated in order to improve efficiency, margins and ensure supplies. This trend has been especially seen in case of natural resources wherein companies have acquired mines in developed markets in order to ensure raw material supplies to produce final product. For e.g. Adani Group has acquired mines and ports in Australia in order to ensure uninterrupted supply of coal for its power plants. Vertical integration provides operational visibility and efficiency for a company. In a globalized world wherein raw materials are sourced from one country and production activities are undertaken in another it has resulted in companies scouting for cross-border acquisitions in order to vertically integrate their operations.

VIII. Regulatory Evolution

Regulatory approach towards cross border acquisitions has seen a tremendous shift in favor of cross-border investments due to a variety of reasons especially in the wake of globalization in developing countries. Regulators have over time become more open, and encouraging towards cross-border acquisitions especially in emerging economies

like India, wherein the investment regulations for cross-border acquisitions have been considerably relaxed over the years. This regulatory evolution in developing countries coupled with easy availability of finance has resulted in increased cross-border investment activity from developing economies into developed economies.

IX. Bureaucracy and lack of Single Window Clearance

For long, the Indian corporate world has been longing for a single window clearance agency for any industry to seek approvals for the commencement of business operations. With the ever increasing bureaucracy and political instability within the country, seeking approvals for green field projects sometimes become economically unviable and hence the Indian companies look for inorganic growth by way of acquisition of companies in countries where the regulatory systems are much more developed.

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3. Trends in Outbound Investments

Over the course of years Indian companies have become active in making acquisitions/investments abroad, which has particularly increased in the last decade. The tables below show the outflow of investments from India during the last four years from different routes in different sectors:

Table 1: Outflow of foreign investment from India including guarantees[2] (amount in USD millions)

Year	Equity	Loan	Guarantee Invoked	Guar Issued	Total
2008-2009	12477.14	6101.56	0.00	3322.45	18578.70
2009-2010	9392.98	4296.91	24.18	7603.04	13714.07
2010-2011	9234.58	7556.30	52.49	27059.02	16843.37
2011-12*	4031.45	4830.01	0.00	14993.80	8861.46
2012-13**	7209.34	4579.09	NA	24093.782	34509.92
2013 – 14***	10194.48	3752.503	NA	22980.48	36900.47
Total	**42,345.49**	**27,363.87**	**76.67**	**100052.6**	**129408**

* April 2011 to February 22, 2012** April 2012 – March 2013. The figures for this year have been collated from the monthly data on overseas investment periodically released by the Reserve Bank of India.

*** April 2013 – March 2014. The figures for this year have been collated from the monthly data on overseas investment periodically released by the Reserve Bank of India.

Source: Reserve Bank of India

Table 2: Type of route under which investments made[3]

Year	Approval Route	Automatic Route	Total
2008-09	6	974	980
2009-10	4	690	694
2010-11	19	1187	1206
2011-12*	10	1123	1133

* April 2011 to February 22, 2012;

Source: Reserve Bank of India

2. Outward Indian FDI – Recent Trends & Emerging Issues, Address delivered by Shri. Harun R Khan, Deputy Governor, Reserve Bank of India at the Bombay Chamber of Commerce & Industry, Mumbai available at: http://www.rbi.org.in/scripts/BSSpeechesView.aspx?id=674#T1 (March 2, 2012).
3. Ibid.

Table 3: Sectors in which overseas investments made[4] (amount in USD billions)

Period	2008-09	2009-10	2010-11	2011-12*	Total
Manufacturing	10.18	5.35	5.04	2.74	**23.31**
Financial Insurance, Real Estate Business & Business Services	3.55	4.41	6.53	2.53	**17.03**
Wholesale & Retail Trade, Restaurants & Hotels	1.17	1.13	1.89	1.00	**5.19**
Agriculture & allied activities	2.38	0.95	1.21	0.41	**4.94**
Transport, Communication & Storage Services	0.31	0.38	0.82	1.34	**2.85**
Construction	0.35	0.36	0.38	0.37	**1.46**
Community, Social & Personal Services	0.39	0.18	0.70	0.18	**1.45**
Electricity, Gas & Water	0.14	0.84	0.10	0.04	**1.19**
Miscellaneous	0.12	0.11	0.18	0.10	**0.51**
Total	**18.58**	**13.71**	**16.84**	**8.73**	**57.86**

* April 2011 to February 22, 2012;

Source: Reserve Bank of India

Table 4: Destinations for investments by Indian companies[5] (amount in USD billions)

Country	2008-09	2009-10	2010-11	2011-12*	Total
Singapore	4.06	4.20	3.99	1.86	**14.11**
Mauritius	2.08	2.15	5.08	2.27	**11.57**
Netherlands	2.79	1.53	1.52	0.70	**6.54**
United States of America	1.02	0.87	1.21	0.87	**3.97**
United Arab Emirates	0.63	0.64	0.86	0.38	**2.51**
British Virgin Islands	0.00	0.75	0.28	0.52	**1.55**
United Kingdom	0.35	0.34	0.40	0.44	**1.53**
Cayman Islands	0.00	0.04	0.44	0.14	**0.62**
Hong Kong	0.00	0.00	0.16	0.31	**0.46**
Switzerland	0.00	0.00	0.25	0.16	**0.41**
Other countries	7.65	3.19	2.65	1.23	**14.71**
Total	18.58	13.71	16.84	8.86	

* April 2011 to February 22, 2012;

Source: Reserve Bank of India

4. Ibid.
5. Ibid.

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India's Share of World Cross-Border Deals

Indian companies have been galloping in making cross-border investments, especially in the last decade, however, as compared to other emerging economies, particularly the other members of the BRIC economies, it still has a lot of catching up to do since the total foreign investments made by companies from these economies is much more than companies from India. The following figure[6] shows a comparison of total cross-border deals executed by companies, in percentage terms, from BRIC economies:

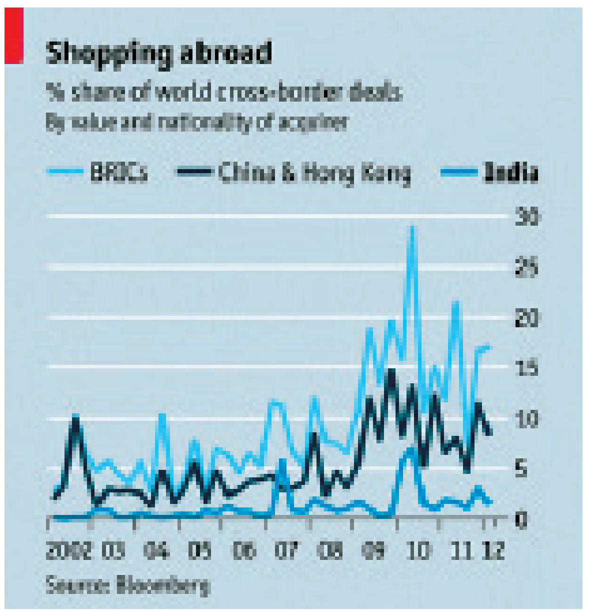

Fig. 1: Foreign investment by Indian companies as compared to other emerging economies.

6. Indian Takeovers abroad: Running with the bulls - Are Indian firms really going to take over the world, The Economist (March 3, 2012) available at: http://www.economist.com/node/21548965

4. Strategy for Outbound Acquisitions

While developing the strategy for outbound acquisitions, it is necessary to integrate and leverage on a number of intrinsic and extrinsic factors. Globalization scholars such Richard D. Robinson have identified certain basic, input and structural strategies that are key drivers of globalization. In addition to purely business considerations, the implications and compliances under diverse legal and taxation regimes around the world, plays a critical role while implementing a globalization strategy.

The following strategy matric provides an overview of the basic elements that have to be factored into a company's globalization strategy.

Fig. 1: Inspiration from Richard D. Robinson, Internationalization of Business

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5. Indian Exchange Control Regulations

I. ODI Regulations

An Indian Party that wishes to acquire or invest in a foreign company must comply with the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 (the "**ODI Regulations**").

The ODI Regulations are an extension of the process of liberalization initiated by the Government of India in the late 1990s. The regulations contain detailed provisions governing investments made as well as to be made by an Indian company in a foreign company by grant of 'general permission' to make a 'direct investment outside India' in *bona fide business activities, subject to compliance with the regulations.* The term 'direct investment outside India' has been defined as *'investment by way of contribution to the capital or subscription to the Memorandum of Association of a foreign entity or by way of purchase of existing shares of a foreign entity either by market purchase or private placement, or through stock exchange, but does not include portfolio investment'.* An Indian company is not permitted to make any direct investment in a foreign entity engaged in real estate business or banking business without the prior approval of the RBI.[7]

The Indian Party may choose to fund the aforesaid investment out of balances held in the EEFC account, by way of drawing funds from an authorized dealer subject to certain limits, or using the proceeds of an ADR/GDR issue. There are several routes available to an Indian company which intends to invest in a foreign company. The key routes normally utilized in such transactions are described below:

A. Direct Investment in a Joint Venture / Wholly Owned Subsidiary

An Indian party is permitted to invest in a joint venture ("**JV**") or a wholly owned subsidiary ("**WOS**") upto 400%of the net worth of the Indian company as on the date of the last audited balance sheet without seeking the prior approval of the RBI, subject to the following conditions being fulfilled:

i. The direct investment is made in an overseas JV or WOS engaged in bona fide business activity.

ii. The Indian company is not on the RBI's caution list or under investigation by the Enforcement Directorate.

iii. The Indian company routes all the transactions relating to the investment in the JV or the WOS through only one branch of an authorized dealer to be designated by it.

iv. The Indian company files the prescribed forms with the RBI.

It should, however, be noted that any financial commitment exceeding USD 1 (one) billion (or its equivalent) in a financial year would require prior approval of the RBI even when the total financial commitment of the Indian party is within the eligible limit under the automatic route (i.e., within 400% of the net worth as per the last audited balance sheet).

Further, investment by an Indian company engaged in the financial sector in a JV or WOS in the financial sector is subject to the following additional conditions being fulfilled:

i. The Indian company has earned net profit during the previous three financial years from the financial services activities;

ii. The Indian company is registered with the regulatory authority in India for conducting financial services activities;

iii. The Indian company has obtained approval from concerned regulatory authorities both in India and abroad for making such investments;

iv. The Indian company has fulfilled the prudential norms for capital adequacy.

B. Investment in Company Listed Overseas

A listed Indian company may invest in an overseas company listed on a recognized stock exchange, or in rated bonds or fixed income securities issued by a listed company. If the investment is made by an Indian listed company, the quantum of investment is limited to 50% of the net worth of such Indian company as on the date of its last audited balance sheet.

7. Although banking business is a prohibited business under the ODI regulations, Indian banks can set up JVs/WOSs abroad provided they obtain approval from the RBI under the ODI regulations and also under the Banking Regulation Act, 1949.

C. Swap or Exchange of Shares

An Indian company can invest in a foreign company which is engaged in a *bona fide* business activity in exchange of ADRs/GDRs issued to the foreign company in accordance with the ADR/GDR Scheme. In order to be eligible for investment under this route, the Indian company must already have made an ADR/GDR issue, and such ADRs/GDRs must be listed on a stock exchange outside India. The ADR/GDR issue must be backed by a fresh issue of underlying equity shares by the Indian company, and the underlying shares must be valued by an investment banker, or as per the valuation procedure prescribed in the regulations. If the investment is made by way of remittance from India in an existing company outside India, the valuation of shares shall be done by a Category I Merchant Banker registered with the SEBI where the investment is more than USD 5 million and by a certified Chartered Accountant or Certified Public Accountant where the investment is less than USD 5 million.

D. Investment by Individuals

Under the ODI Regulations, there are limits on individuals owning shares in foreign companies. An individual may *inter-alia* invest upto a maximum amount of USD 125,000 in equity and in rated bonds/ fixed income securities of overseas companies as permitted in terms of the limits and conditions specified under the liberalized remittance scheme, modified from time to time (“**LRS Scheme**”).[8] Remittance under the LRS Scheme is permitted for any permitted current or capital account transactions or a combination of both. Under the LRS Scheme, the funds remitted can be used for various purposes such as purchasing objects, making gifts and donations, acquisition of employee stock options and units of mutual funds, venture funds, unrated debt securities, promissory notes, etc. In addition to the above, resident individuals can set up JV/WOS outside India for bonafide business activities outside India within the limit of USD 125, 000 and subject to certain specified terms and conditions.[9] However, it should be noted that the JV/WOS so set up has be an operating entity and cannot just be a holding company. The RBI has also recently allowed resident individuals to acquire immovable property outside India within the limit of USD 125,000 [10]

Further, general permission has been granted to individuals to acquire foreign securities:

- as a gift from any person resident outside India,
- under Cashless Employees Stock Option Scheme issued by a company outside India, provided it does not involve any remittance from India,
- by way of inheritance from a person whether resident in or outside India,
- under ESOP Schemes, if he is an employee, or, a director of an Indian office or branch of a foreign company, or of a subsidiary in India of a foreign company, or, an Indian company in which foreign equity holding, either direct or through a holding company / Special Purpose Vehicle (SPV), is not less than 51 percent,
- if they represent qualification shares for becoming a director of a company outside India not exceeding 1% of the paid up capital of the overseas company, provided the consideration for the acquisition does not exceed USD 20, 000 in a calendar year, and
- if they are rights shares.

Any person intending to make any investments other than those specifically covered under the ODI Regulations must obtain the prior approval of the RBI.

E. Acquisition of a Foreign Company Through Bidding or Tender Procedure

Where an Indian Company proposes to participate in bidding or tender process for acquiring a company outside India, the authorized dealer in India may allow remittance towards earnest money deposit or bid bond guarantee on its behalf for participation in bidding or tender process.

Upon the Indian Company winning the bid, the authorized dealer may allow further remittances towards acquisition of the foreign company, subject to ceilings in Regulation 6 of ODI Regulations, i.e. upto 400% of the net worth of the Indian Company and the Indian Company shall make the necessary filings with the RBI.

8. This limit has been modified from USD 200,000 to USD 125,000 pursuant to RBI’s circular RBI/2013-14/624 A. P. (DIR Series) Circular No.138 dated June 3, 2014.
9. RBI’s Notification No. FEMA.263/RB-2013 dated March 05, 2013.
10. RBI’s circular RBI/2014-15/132 A. P. (DIR Series) Circular No.5 dated July 17, 2014.

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6. Indian Corporate Laws

The Companies Act, 1956, the legislation governs the Indian companies and activities to be done by such an Indian company. There are no specific provisions under this legislation which governs the activities of an Indian company outside India. However, Section 372A of the Companies Act allows an Indian company to make investments into another body corporate[11] by way of acquisition of shares upto an amount not exceeding 60% of its paid-up share capital and free reserves or 100% of its free reserves, whichever if more, without the consent of its shareholders. If the consideration payable towards the acquisition of shares is more than the stated limit, the Indian Company is required to obtain a shareholders' approval by way of a special resolution.[12] It is also pertinent to note that this provision is only applicable to a public limited company or to a private limited company which is a subsidiary of a public limited company. [13]

11. Body corporate is defined under Section 2(7) of the Companies Act which includes a company incorporated outside India but does not include (a) a corporation sole, (b) a co-operative society registered under any law relating to co-operative societies, and (c) any other body corporate which the Government may, by notification in the Official Gazette, specify.
12. Special Resolution, as described in Section 189 of the Companies Act means a resolution where consent of 3/4th of the shareholders is required to be passed.
13. Section 372A(8)

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7. Indian Competition Act, 2002 ("Competition Act")

The Competition Act, 2002 (**"Competition Act"**) is the primary competition statute in India. The Competition Commission of India(**"CCI"**) is a body established under the Competition Act to administer it. In exercise of its authority under the Competition Act, it has notified the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (**"Combination Regulations"**) to regulate Competitions, and it came into effect from June 1, 2011 to supplement Sections 5 and 6 of the Competition Act. Under the provisions of the Competition Act, the Competition Commission of India CCI has been conferred with extra-territorial jurisdiction to fulfill its mandate of eliminating practices having an appreciable adverse effect on competition in India. This essentially means that every acquisition that involves the acquirer or the target, wherever incorporated having assets or a turnover in India in excess of the prescribed thresholds shall be subject to scrutiny by the CCI.

"Combination", for the purposes of the Competition Act means:

i. an acquisition of control, shares or voting rights or assets by a person;

ii. an acquisition of control of an enterprise where the acquirer already has direct or indirect control of another engaged in identical business; or

iii. a merger or amalgamation between or among enterprises;

that exceed the 'financial thresholds' prescribed under the Competition Act.

Table 5: Financial thresholds prescribed under the combinations regulations for determining 'combinations' are as follows

For Parties in India	For Parties worldwide	For the Group* in India	For the Group worldwide
Assets INR 15 billion (approx USD 333 million) or Turnover INR 45 billion (approx USD 1 billion)	Assets USD 750 million or Turnover USD 2,250 million AND In India Assets INR 7.5 billion (USD approx 167 million) or Turnover INR 22.5 billion (approx USD 500 million)	Assets INR 60 billion (approx USD 1.3 billion) or Turnover INR 180 billion (approx USD 4 billion)	Assets USD 3 billion or Turnover USD 9 billion; AND In India Assets INR 7.5 billion (approx USD 167 million) or Turnover INR 22.5 billion (approx USD 500 million)

I. Mandatory Reporting

Section 6 makes void any combination which causes or is likely to cause an appreciable adverse effect on competition in India. Accordingly, Section 6 of the Act requires every acquirer to notify the CCI of a combination within 30 days of the decision of the combination or the execution of any agreement or other document for acquisition and seek its approval prior to effectuating the same.

The Combinations Regulations mandate CCI to form a *prima facie* opinion on whether a combination has caused or is likely to cause an appreciable adverse

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effect on competition in India, within 30 days of filing. The combination will become effective only after the expiry of 210 days from the date on which notice is given to the CCI, or after the CCI has passed an order approving the combination or rejecting the same.

II. Exempt Enterprises

An enterprise whose shares, control, voting rights or assets are being acquired has assets of the value of not more than INR 250 crores (approx. USD 56 million) in India or turnover of the value of not more than INR 750 crores (approx. USD 160 million) in India is exempt from the provisions of Section 5 of the Competition Act till March 4, 2016.

III. Exceptions to Filing

Deviating from the strict interpretation of Section 6 of the Competition Act, which requires all combinations to be notified to the CCI, Schedule I to the Combination Regulations specifies certain categories of transactions which are *ordinarily* not likely to have an appreciable adverse effect on competition in India and therefore would not *normally* require to be notified to the CCI which *inter alia* include:

- Acquisitions of shares or voting rights as an investment or as an investment in so far as the total shares or voting rights held by the acquirer directly or indirectly does not exceed 25% of the total shares or voting rights of the company.
- Consolidation of holdings in an entity where the acquirer already had 50% or more shares or voting rights except in cases where the transaction results in a transfer from joint control to sole control.
- An acquisition of assets unrelated to the business of the acquirer other than an acquisition of a substantial business operation.
- Acquisitions of stock-in-trade, raw materials, stores, current assets (in the ordinary course of business).
- Acquisitions of bonus or rights shares, not leading to acquisition of control.
- Combinations taking place entirely outside India with insignificant local nexus and effect on markets in India.

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8. Taxation in India

The Income Tax Act, 1961 (“**ITA**”) governs the taxation of income in India. ITA imposes tax on residents and non-residents. Persons resident in India are taxed on their global income whereas, non-residents are generally taxed only on income generated in India, or accruing on behalf of a source that is resident in India.

I. Corporate Residence

A company is said to be resident in India if it is an Indian company or if the control and management of its affairs is situated wholly in India. An ‘Indian company’ is defined to mean a company formed and registered under the Indian Companies Act, 1956 and includes certain other categories. The principal requirement under the definition is that the registered office or the principal office of the company should be situated in India.

Indian Courts have indicated that control and management would rest where the head and brain of the company is situated i.e. situs of the meeting of the board of directors of the company. Under Indian corporate laws, control and management of a company vests with the board of directors as a whole and not with any one individual on the board. Relying on UK jurisprudence, Indian Courts have taken a view that the place of ‘control and management’ refers to the place where the central management and control actually resides i.e. where the head and brain of the company are situated. It has been held that this would not mean where one or more of the directors normally reside but where the board of directors actually meets for the purpose of determination of key issues relating to the company. These decisions may be those pertaining to the expansion or contraction of business (territories), raising of finances and their appropriation for specific purposes, the appointment and removal of staff etc.

In this regard, it is pertinent to note that criteria such as residency of the director or the shareholders of the Company are not relevant in the determination of location of central control and management for the reasons set out below.

II. Taxation of Indian Companies

Companies resident in India are subject to corporate tax of 30% on business profits derived on a worldwide basis.[14]

Long term capital gains (from sale of long term capital assets) are taxed at a lower rate of 20%, while short term capital gains (from sale of short term capital assets) are taxed at the ordinary corporate tax rate. Capital assets such as shares shall be treated as long term if they are held for a period exceeding 36 months. (except in case of listed securities, in which case the shares shall be treated as long term if they are held for a period exceeding 12 months). Otherwise they will be treated as short term capital assets. For other capital assets, the relevant holding period is 36 months.

The ITA exempts payment of tax on income received by way of dividends distributed by a domestic company in the hands of the receiver, choosing to replace it with an alternative tax levied on the company distributing such profits. However, this exemption is applicable only to domestic companies.

Income received in the form of dividends from a company other than a domestic company is chargeable to tax in the hands of the Indian recipient.

Section 115BBD of the ITA, provides that dividends received by an Indian company from a foreign company in which the Indian company holds 26% or more in nominal value of the equity share capital of the company is taxed at a lower rate of 15% (excluding surcharge and cess).

India currently does not have any participation exemption or thin capitalization or controlled foreign corporation regime.

Resident companies are taxed on their worldwide income including any interest earned from foreign sources. Such interest is taxable at the ordinary corporate tax rate of 30%.

Indian companies may claim double tax relief under an applicable tax treaty with respect to taxes withheld outside India. Further the ITA also grants unilateral relief to residents in cases where they derive income from a country with which no tax treaty exists.

14. All Indian tax rates mentioned herein are exclusive of surcharge and education cess.

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III. Disclosure of Offshore Assets

The Finance Act, 2012 amended Section 139 of the ITA to require all Indian residents to disclose all their overseas assets, whether in companies, partnerships or otherwise. This includes financial interests or even a signing authority in any offshore account. The return has to be filed regardless of the Indian resident having taxable income in the relevant financial year. Corresponding modifications have also been brought out in the tax filing forms so as to allow for the information to be provided to the tax authorities in India.

IV. Anti-avoidance

A number of judicially created anti-avoidance rules have developed in India over the years. India has traditionally followed the form over substance principle unless the taxpayer's arrangement involves a sham or a colourable device.

With effect from April 1, 2015, India proposes to implement a new general anti avoidance rules (GAAR) to counter abusive transactions referred to as 'impermissible avoidance arrangements'. Under GAAR the tax authorities have the power to disregard entities in a structure, reallocate income and expenditure between parties to the arrangement, alter the tax residence of such entities and the legal situs of assets involved, treat debt as equity and vice versa. In doing so, the tax authorities may also deny tax benefits even if conferred under a double taxation avoidance agreement.

The expression 'impermissible avoidance arrangement' has been defined very broadly to mean any arrangement where the main purpose is to obtain a tax benefit and which contains any of the following elements: (i) non-arm's length transactions, (ii) misuse or abuse of the ITA, (iii) non - bona fide purpose, or (iv) lack of commercial substance.

A number of specific anti avoidance rules also exist under Indian tax law to cover various arrangements including arrangement involving transfer of assets by a resident to a non-resident where a resident continues to enjoy the benefit of income arising from such assets.

Comprehensive transfer pricing regulations allow for adjustment of income and expenses in the case of non-arm's length transactions. While transfer pricing provisions generally apply in the case of international transactions, it may also apply in a limited context with respect to certain domestic transactions.

The DTC Bill pending before the Indian Parliament also proposes to introduce a controlled foreign corporation (**"CFC"**) regime as per which the attributable income of a CFC would be taxed as income of the Indian resident. Under the proposed legislation, a CFC is defined to have the following attributes.

i. It is a tax resident of a foreign counry, where its actual amount of tax paid, under the law of that country or territory would be less than half of what it would have been subject to under the DTC, if it was a domestic company;

ii. Its shares are not traded on any stock exchange recognised by law of such territory;

iii. One or more persons, resident in India, individually or collectively exercise control over the foreign company;

iv. It is not engaged in any active trade or business;

v. The specified income of the foreign company exceeds two and a half million rupees.

In its current form, the proposed CFC legislation does not have any provisions for claiming credit against foreign taxes.

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9. Mergers and Acquisitions in the United States of America (USA)

The United States (US) is the world's largest economy and powerhouse of global capitalism. It has been at the forefront of free markets and has inspired and attracted entrepreneurs for generations. As such, the fundamental philosophy guiding the great American dream is fastened to the idea of free markets at its core. Accordingly, it has generally been welcoming and encouraging of foreign investments and has only limited restrictions. In the following sections, we have discussed some of the issues which require consideration while making investments into the United States.

I. Corporate Legal Framework

Corporate laws generally in the United States are state specific. Legal entities like corporations, limited partnerships, limited liability partnerships, limited liability companies, etc. are incorporated and governed under the state corporate laws. One of the important jurisdictions where legal entities get incorporated is Delaware. Delaware corporate laws are relatively preferred over other states' corporate law because of its progressive legal framework, judicial capability to handle complex issues of corporate law, a stable and consistent approach towards corporate law jurisprudence and a relatively quick judicial adjudication are some of the reasons why Delaware is a preferred jurisdiction of incorporation in the United States. Delaware is also sometimes perceived as a friendly jurisdiction for legal entities. Another important point to note in context of incorporation is that legal entities may get incorporated under the laws of any of the states of the United States, but their principal place of business may be in any other state. This may have state tax implications which will depend upon the facts in a given situation.

Some of the important features of Delaware corporate law relevant in case of acquisitions are as follows:

A. Board & Shareholder Approval Required

Delaware law generally requires the acquirer' as well as target' board and shareholders to approve the merger agreement. The board is required to take a position on the merger and recommend its position to the target's shareholders, before they vote on the merger proposal.

B. Director's Subject to Fiduciary Duty Obligations

Directors in a Delaware corporation owe fiduciary duty to the corporation as well as its shareholders. The two primary fiduciary duties are 'duty of loyalty' and 'duty of care'. Duty of loyalty is generally understood to mean that the directors owe their primary allegiance to the corporation and in case there is a conflict in the interests of the corporation and their own personal interest, they are required to give primacy to the interest of the corporation. Duty of care is generally understood to mean that the director should take all due care when dealing with the affairs of the corporation.

C. Appraisal Rights

Under certain circumstances, shareholders of a target corporation in Delaware may be eligible to approach the Delaware Chancery Court to get the value of their shares in a target company to be appraised by the court. This appraisal or 'dissenters right' is available to only those shareholders who do not tender their shares in the tender offer and who have not voted in favor of the tender offer. The court generally determines the 'fair value' of the shares which usually does not include a takeover premium. Any shareholder approaching the court to get the value of their shares appraised, does not affect the validity of the merger nor does it have any effect on the acquirer owning target wholly subsequent to the merger. It only affects the price being offered to such shareholder.

II. Securities Law

Acquisition of publicly traded companies in the United States may be subject to an elaborate set of regulatory requirements, as compared to acquisition of closely held companies.

The securities regulatory framework in the US exists

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both at the federal level and at the state level (the securities regulatory framework at the state level is often referred to as the 'blue sky laws'); however it is the federal regulations which are generally applicable in most situations. The primary federal securities laws in the United States are the Securities Act, 1933 (**Securities Act**)[15] and the Exchange Act, 1934 (**Exchange Act**).[16] Any acquisition of a publicly traded company will generally attract regulatory provisions under these acts, unless certain applicable exemptions are available.

A. Registration Under the Securities Act

Any acquisition of securities in the US which involves offering of any securities as a consideration will most likely trigger the registration requirement with the Securities Exchange Commission (**SEC**), unless the issuer qualifies for certain available exemptions. Registration requirement under the Securities Act means filing of a registration statement with the SEC, which is a detailed disclosure document containing all the relevant information about the issuer of such securities. The registration statement becomes effective after incorporating SEC's comments, if any. Any offering of securities by an issuer without a valid registration statement in effect may expose it to liabilities under the securities regulatory framework. Therefore due care should be taken when an acquirer is contemplating consideration other than cash while making an acquisition in the US.

B. Reporting Requirements under the Exchange Act

Under certain circumstances a corporation in the US may become subject to the periodic reporting requirements under the Exchange Act. Such reporting requirement may include filing quarterly reports (10-Q Filing), filing annual reports (10-K Filing) or filing interim reports in case of some important developments involving the corporation (8-K Filing).

III. Acquisition of a Publicly Traded Company

Acquisition of publicly traded companies in the US may be friendly or hostile. Accordingly, a variety of structures are generally considered which may involve consideration other than cash. If in an acquisition a component of the consideration being paid is other than cash, then unless the acquirer qualifies under any of the available exemptions, the acquirer would be required to file a registration statement with the SEC. The registration statement is an elaborate document detailing the antecedents, financial position and risk and other factors which are material to a prospective investor's investment decision. This process may take some time as after the initial statement is submitted to the SEC, the SEC may give comments which may have to be incorporated in the registration statement.

In a hostile acquisition the acquirer may directly approach the shareholders of the target with its offer, soliciting them to tender their shares in the tender offer. In such a case, the acquirer has to follow certain rules and procedures relating to the tender offer, commonly referred to as the 'tender offer rules'.

Depending on the situation, an acquirer may solicit proxies from shareholders to vote in a shareholders meeting on specific issues such as election of directors or voting on some other important resolutions. Such proxy solicitation is subject to certain rules, commonly referred to as the 'proxy solicitation rules'.

IV. Substantial Acquisition Reporting / Open Offer Requirement

In the US acquisition of shares beyond certain threshold shareholding levels require disclosure. Acquisition of 5% or more of the beneficial interest in a company requires disclosure. However, there is no requirement to make an open offer after acquisition of certain percentage of shares in a publicly listed company, as against such a requirement in India. Acquirers generally build significant minority positions, also known as 'toehold positions' and use it as part of their acquisition strategy. However, such positions might be subject to other rules such as for e.g. rules prohibiting acquirers from making 'short-swing profits' in case the stake of the acquirer is more than 10%, and may require disgorgement of profits. However, recent decision indicate that such a prohibition against short-swing profit may not be

15. 15 U.S.C. 77a-77aa
16. 15 U.S.C. 78a-78jj

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applicable in case the transaction involves trading in different class of equity securities.[17]

V. Anti-Trust / Competition Law Considerations

The primary anti-trust law in the US is under the Hart-Scott-Rodino Act (HSR Act)[18], wherein certain mergers and acquisition transactions are subject to prior approval if they fall within certain predefined threshold levels based on the revenue of the parties involved and size of the transaction. The rules prescribed under the HSR Act provide certain exemptions which may be available depending on the specifics of the transaction. The primary administrative authorities responsible for administering the HSR Act are the US Federal Trade Commission ("**FTC**") and the US Department of Justice ("**DOJ**"). If a transaction is subject to prior approval requirement under the HSR Act, it may have cost and time implications apart from the risk of structuring the transaction/divesting certain assets depending upon regulatory directions, and hence such eventualities should be captured in the transaction documents and the risk should be appropriately allocated depending upon the risk appetite of the parties.

The HSR Act requires parties to a merger and acquisition agreement to report transactions which meet certain pre-defined thresholds, to the FTC and the DOJ. The levels of thresholds are adjusted each year by the FTC based on the gross national product. The table below shows the reporting thresholds for the year 2013.

Table 6: Reporting thresholds to the FTC[19]

Original Threshold	2014 Adjusted
USD 10 million	USD 15.2 million
USD 50 million	USD 75.9 million
USD 100 million	USD 151.7 million
USD 110 million	USD 166.9 million
USD 200 million	USD 303.4 million
USD 500 million	USD 758.6 million
USD 1 billion	USD 1.5171 billion

VI. The Committee on Foreign Investment in the United States (CFIUS)

The Exon-Florio amendment to the Defense Production Act[20], empowered the US President to block certain transactions involving acquisition of "persons engaged in interstate commerce in the United States and such transaction may pose national security risks to the US. CFIUS is a committee comprising of Secretaries of key departments, which considers the impact on national security because of transactions resulting in control of US businesses by non-US based persons. The CFIUS reviews certain transactions involving acquisition of targets in the US which operate in sensitive industries (such as for e.g. nuclear energy, natural resources etc.) or in areas of critical infrastructure (such as for e.g. ports, energy grids, public utilities, natural gas infrastructure etc.), and if such acquisition may pose national security risks, then such transaction may be subject to review by the CFIUS. Accordingly, any transaction which fits within the broadly defined parameters for review by CFIUS should be submitted to CFIUS for their consideration. Such an approach is recommended, as CFIUS may suo motto scrutinize transactions for consideration and if it finds national security risks then it may even cause the parties to unwind the transaction.

17. Gibbons v. Malone, No. 11 Civ. 3620, 2013 U.S. App. LEXIS 398 (2d Cir. Jan. 7, 2013)
18. 16 CFR 803
19. Federal Register, Vol. 78, No. 8 (January 11, 2013) available at: http://www.ftc.gov/os/2013/01/130110claytonact7afrn.pdf
20. 50 U.S.C. App. § 2061 et seq.

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VII. Exchange Control

US has a freely floating currency and it generally does not impose restriction on movement of capital. This in-effect means that foreign companies investing in the US may be able to freely repatriate their income in form of dividend or otherwise. This is an important consideration for foreign investors; as such a free economy allows the flexibility to repatriate the income earned in one country to their home jurisdiction or the jurisdiction of their upstream holding entity without any restrictions.

VIII. Anti-Corruption

The Foreign Corrupt Practices Act, 1977 ("**FCPA**")[21], is the primary anti-corruption statute in the US. The FCPA prohibits US persons from engaging in activities resulting in a "corrupt payment" to a "foreign official" in order to "obtaining or retaining business" in a foreign country. The FCPA has been enacted in way to encompass a wide range of prohibited activities and related persons, and bring them within the ambit of the FCPA. The primary governmental agencies administering the FCPA are the SEC and the Department of Justice (DOJ). FCPA may result in substantial civil liability and criminal liability resulting in fine and/or imprisonment of upto five years. Another, important point to note is that corporate officials may be held personally liable for failing to ensure compliance/proper processes resulting in violation of FCPA.

In the recent past, there has been an increased focus on enforcement proceedings under the FCPA by the enforcement agencies. Regulatory agencies in the past have encouraged suo-moto or self-reporting of non-compliance with the FCPA, and have favorably settled cases where there have been good faith effort on part of the entity involved to ensure compliance and check prohibited activities. Thus, it becomes very important to identify vulnerabilities, ensuring continuing compliance, establishment of processes and adherence to standards of conduct, in terms of FCPA. Therefore, for a foreign company making an acquisition in the US, it becomes necessary to properly evaluate an acquisition from an FCPA perspective.

IX. Common Deal Structures

Companies often use the merger route to make an acquisition in the US. From a buyer's perspective, mergers may be relatively straight forward to implement. such as for e.g. under Delaware law a parent having a shareholding of 90% or more in a subsidiary may effect a merger of the subsidiary with itself by passing just a board resolution.[22] However, minority shareholders under Delaware law have a right of appraisal when they satisfy the prescribed conditions under the state's corporate law. Such an appraisal right entitles them to approach the chancery court for determining the fair market value to be offered by the buyer to the minority shareholders. Further, the board of directors of corporations generally, and particularly in case of reorganization of the company, tread very carefully as they are subject to fiduciary duties and may be held personally liable for breach of such duties.

Acquisition of public companies can traditionally be effected through two routes: (i) a one-step merger; or (ii) a two-step merger. A one-step merger involves filing of a proxy statement with the SEC followed by a shareholders vote on such merger. In such a merger, there is no upfront tender offer and the shareholders vote on the pure merits of the merger. If such a merger is approved, the shareholders become eligible to receive the per share consideration being offered by the acquirer.

In a two-step merger, a tender offer is initially directly made to the shareholders of the target as a first step. There is no prior SEC filing requirement. Only a disclosure document has to be sent to the shareholders. If successful in the first step (i.e. the acquirer is able to acquire enough shares to get the merger resolution approved in a shareholders meeting), the acquirer uses the shares acquired in the first step to vote for the merger in the second step. If the merger is approved, then the shareholders who had not tendered their shares in the tender offer (i.e. in the first step) compulsorily become eligible to receive the consideration at which the shares were acquired in the tender offer, thus eliminating the non-tendering shareholders in the process. This type of merger is often referred to as the squeeze-out merger.

The following are some of the common forms of mergers used to effectuate an acquisition:

21. 15 U.S.C. §§ 78dd-1

22. § 253, Delaware General Corporate Law, available at: http://delcode.delaware.gov/title8/c001/sc09/index.shtml

A. Forward Merger

In a forward merger the target merges into the acquirer's, resulting in the acquirer being the surviving entity assuming all the rights and liabilities of the target in the process.

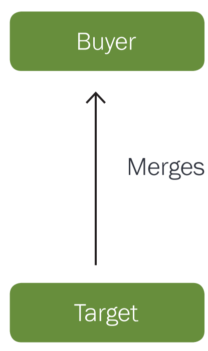

Fig. 3: Forward Merger

B. Forward Triangular Merger

In a forward triangular merger the Acquirer forms a subsidiary to implement the acquisition. In this type of acquisition, the target merges into the subsidiary of the buyer, resulting in the Acquirer subsidiary being the surviving entity assuming all the rights and liabilities of the target in the process.

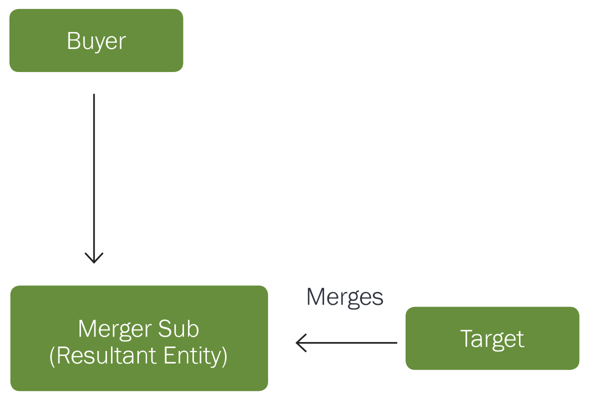

Fig. 4: Forward Triangular Merger

C. Reverse Merger

In a reverse merger, Acquirer merges into the target resulting in target being the surviving entity assuming all rights and obligations of the Acquirer in the process.

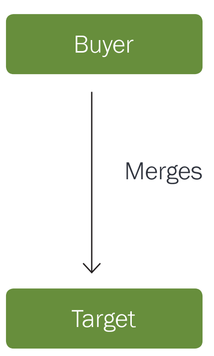

Fig. 5: Reverse Merger

D. Reverse Triangular Merger

In a reverse triangular merger the Acquirer forms a subsidiary to implement the acquisition. In this type of acquisition the Acquirer subsidiary merges into the target, resulting in the target being the surviving entity.

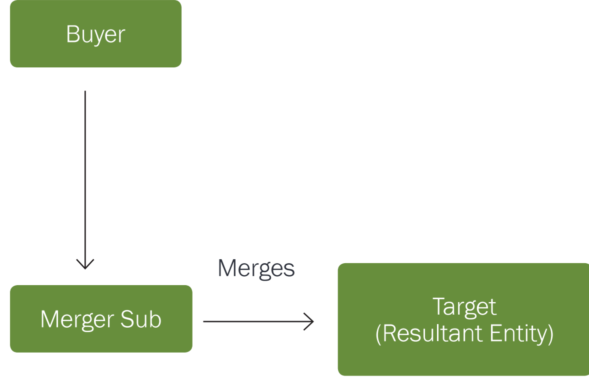

Fig. 6: Reverse Triangular Merger

X. Tax Considerations

A. General

The US follows the classical system of corporate taxation where companies are taxed on their profits and shareholders are separately taxed at the time of receiving dividends.

Domestic corporations (US residents) are taxed on their worldwide income while foreign corporations (non-residents) are taxed on income sourced in the US. A corporation is treated as domestic (and hence resident in the US) if it is organized under the US laws.

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Certain entities such as subchapter S corporations and limited liability corporations (LLCs) are treated as pass through for US tax purposes. Under the 'check-the-box regulations', specific types of foreign entities may elect to be treated as disregarded for US tax purposes. As a consequence, income or losses of such entities may be directly attributed to the US shareholders. Check-the-box elections form an integral part of tax planning strategy of US multinational corporations with subsidiaries and holdings around the world.

Taxpayers may obtain private rulings from the US tax authorities to obtain certainty on the US tax implications of specific transactions or arrangements.

B. Taxation of US Corporations

Tax rates for corporates are progressive in nature, starting at 15% and extending to 35%. Corporations may also be subject to a 20% alternative minimum tax ("**AMT**") to the extent the AMT exceeds the ordinary corporate tax liability.

Groups of companies may elect to be treated as a corporate group and file consolidated tax returns. A corporate group is one where the parent has a shareholding of at least 80% voting power and value in its subsidiaries. Members of the group may set off losses against profits within the group.

US corporations are taxed on all income, dividend and capital gains arising from domestic and foreign sources.

C. Corporate Reorganizations and Acquisitions

Certain forms of corporate reorganizations are tax neutral subject to satisfaction of specific pre-conditions. In such cases, a roll-over relief is provided in the sense that the gains from the reorganization are deferred till the time there is a transfer of stock or assets received as part of the reorganization.

Transfer of property to a corporation in exchange for shares of such corporation will not be subject to capital gains tax provided that the person acquiring the shares controls the corporation (i.e. owns at least 80% of the voting power and value) immediately after the exchange.

Receipt of property by a corporation pursuant to a complete liquidation of another corporation is tax neutral as long as it holds at least 80% of the voting power and value in the liquidating corporation.

US tax law recognizes specific types of reorganizations:

i. Type A Reorganization

This covers statutory mergers or consolidations. In a typical merger, the assets and liabilities of the target corporation are transferred to the acquiring corporation and the target ceases to exist. The shareholders of the target corporation receive shares in the acquiring corporation. A consolidation refers to a merger (and transfer of assets and liabilities) of two corporations into a third corporation.

ii. Type B Reorganization

The acquiring corporation acquires shares of the target corporation, the shareholders of which receive voting shares in the acquiring corporation. Immediately after the acquisition, the acquiring corporation acquires control (i.e. more than 80% of voting power and shares) of the target.

iii. Type C Reorganization

The acquiring corporation acquires substantially all assets of the target corporation and in exchange, the shareholders of the target receive voting shares in the acquiring corporation. The US Revenue has interpreted 'substantial' to mean at least 70% of the fair market value of the target's gross assets and 90% of the fair market value of the target's net assets.

iv. Type D Reorganization

Transfer of target corporation's assets to an acquiring corporation, subsequent to which the target or its shareholders acquire control (i.e. more than 80% of voting power and shares) of the acquiring corporation. In this type of reorganization, the target liquidates and distributes to its shareholders, its assets including the shares of the acquiring corporation as part of a recognized reorganization. Type D reorganization may also be structured as a spin off, split up or split off. In a spin off, a parent corporation transfers its assets to a new corporation in exchange for shares of the new corporation. Split ups involve transfer of assets of the parent corporation into a number of new corporations, in exchange for shares of the new corporations which are distributed to the shareholders of the parent corporation on liquidation. In a split off, the

shareholders of a corporation exchange the shares of the corporation for shares in a new corporation.

v. Type E Reorganization

Recapitalization involving reshuffling of the corporation's capital structure including issue of shares in exchange for bonds or outstanding preferred stock and unpaid dividends.

vi. Type F Reorganization

Change in identity, form, or place of organization of a corporation.

vii. Type G Reorganization

Transfer of assets in a case of bankruptcy or similar circumstances.

Reorganizations may qualify as tax free only if they satisfy the specific statutory conditions prescribed under US tax law. Generally, the reorganization should be characterized by continuity of interest and business, and should be undertaken for bonafide business reasons.

D. Taxation of Foreign Investors

Foreign corporations may be taxed on (i) US sourced fixed or determinable, annual or periodical gains, profits and income (FDAP), and (ii) income that is effectively connected to a trade or business in the US. FDAP income covers all interest, dividends, rents, royalties, wages, salaries, compensations, premiums, annuities, remunerations and emoluments arising from US sources.

Income that is effectively connected to a US trade or business will be taxable at the applicable domestic corporate tax rate. In addition branch profit tax of 30% (or a reduced amount under a treaty) may be applicable to the extent of the dividend equivalent amount attributable to the US branch.

US source dividends, interest, royalties and other FDAP income received by a foreign corporation will be subject to a 30% withholding tax, unless a reduced treaty rate applies. Dividends received by the foreign investor from foreign sources should not be taxable in the US. However in certain cases it may be taxed in the US if the income of the company distributing dividends is effectively connected with the US. Withholding taxes may not be applicable on certain US source interest including interest arising from portfolio debt obligations (where the debt holder's shareholding in the company is lesser than 10%), bank deposits and bonds issued by US states and local municipalities.

Foreign corporations are not subject to tax in the US on capital gains income arising from transfer of shares of US corporations. However, a foreign investor may be taxed if it earns gains from sale of US real property or shares of a US corporation, 50% of whose assets comprise of real property in the US.

E. Anti-avoidance Rules

The US has codified the economic substance doctrine to deny tax benefits not intended to be conferred by law. The application of the doctrine depends on whether the transaction alters the taxpayer's economic position in a meaningful way and whether the taxpayer has a substantial non-tax purpose for entering the transaction.

Robust and elaborate transfer pricing rules exist in the US allowing the tax authorities to re-allocate income and expenses between controlled parties. Taxpayers may enter into advance pricing arrangements with the tax authorities.

The US also enforces a number of specific anti-avoidance rules and anti-tax deferral rules. Earning stripping and thin capitalization rules seek to prevent erosion of the US tax base through excessive outbound interest distributions.

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10. Mergers and Acquisitions in the United Kingdom

I. Introduction

The English legal system is based on common law as against civil law system which exists in most of continental Europe. United Kingdom (**UK**) is one of the biggest global economies, with a GDP of almost USD 2.4 trillion.[23] India shares strong linkages with the UK, as India was an English colony until 1947. India and UK have traditionally shared strong trade linkages, and bilateral trade between the two countries recently crossed GBP 13 billion[24] (~USD 20.5 billion). Indian companies have been fairly active in making acquisitions in the UK. Some examples of Indian companies acquiring companies in the UK include Tata group's acquisition of Tetley, Corus, Jaguar and Land Rover, and HCL Technology's acquisition of Axon. Deal size and mix range across the spectrum. The attractiveness of UK as an investment destination for Indian companies as compared to rest of Europe is further reflected in the fact that Indian companies invested about USD 1.3 billion in UK alone in 2011, as compared to USD 770 million in rest of Europe.[25]

II. Foreign Investments in the UK

Foreign investments in the UK are generally not regulated by a separate policy. However certain sectors of the economy attract heightened scrutiny and may require prior approval subject to certain ownership thresholds. Some of the sectors which attract heightened scrutiny include sensitive sectors such as defense, utilities, banking & financial services, electronic communications & services and nuclear energy. Such sectors usually have sector-specific regulators who may be critical and exercise significant influence in the acquisition process.

III. UK and the European Union

UK is an important member of the European Union ("**EU**") and prospective acquirer should consider the regulatory and operational issues relating to acquisition not only from a UK perspective but also from an EU perspective. By virtue of being an EU member state, the UK is subject to the EU regulatory framework as well. Based on the specifics of a transaction, a transaction may be subject to the UK regulatory framework, the EU regulatory framework or a combination of both. Sometimes, a transaction which may be subject to EU regulatory framework, may ultimately be governed by the national regulatory framework, as the EU framework may itself give deference to the national framework. This also becomes very important from a commercial perspective of a transaction such as for e.g. in a situation where an acquisition is being made in the utilities space by a foreign investor with one of the primary commercial consideration being vertical integration resulting in surplus gains for the acquirer through the target as well as the supplying entity. Such a transaction might be subject to the EU procurement rules which may hinder the ability of the target being acquired, to award contracts to an affiliated entity of the buyer and the target may have to follow the public tender process, thus frustrating the commercial logic of a deal.

IV. Exchange Controls

UK has a freely floating currency and it generally does not impose restriction on movement of capital. This in-effect means that foreign companies investing in the UK may be able to freely repatriate their income in form of dividend or otherwise. This is an important consideration for companies investing in a foreign jurisdiction; as such a free economy

23. Source: Office of National Statistics, United Kingdom

24. UK-India relations blossom in 2011; bilateral trade crossed the 13 billion-pound mark, The Economic Times available at: http://articles.economictimes.indiatimes.com/2011-12-22/news/30546950_1_bilateral-trade-financial-dialogue-british-secretary (December 22, 2011).

25. UK business taps Indian potential, Financial Times available at: http://www.ft.com/intl/cms/s/0/df08ac3a-138b-11e1-9562-00144feabdc0.html (December 11, 2011).

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allows the flexibility to repatriate the income earned in one country to their home jurisdiction or the jurisdiction of their upstream holding entity without any restrictions.

V. Competition Laws

The Competition Act, 1988 is the primary anti-trust legislation in the UK. It broadly prohibits anti-competitive agreements and abuse of dominance by dominant enterprises. The Office of Fair Trading ("**OFT**") is the body responsible for enforcement of the Competition Act. A conduct or an agreement which is not in consonance of the act and violates its provisions is void and unenforceable. The Competition Act empowers the OFT to impose fines which may extend upto 10% of an enterprises' turnover in the previous financial year, in case such an enterprise is found in violation of the provisions of the Competition Act.

The Enterprise Act, 2002 is a legislation which governs anti-trust issues in merger situations. The Enterprise Act is also enforced by the OFT, on which a duty is cast to address competition concerns in merger situations. Mergers or combinations which may result in substantial lessening of competition in a relevant market in the UK result in further investigation by the OFT, which has the authority to refer a transaction to the Competition Commission if it feels that such a transaction may result in substantial lessening of competition. The Enterprise Act further provides the OFT with the authority to accept undertakings from merging enterprises with respect to actions, they will undertake to address competition concerns of the OFT, in lieu of the OFT not referring the transaction for further investigation to the Competition Commission.

The Enterprise Act prescribes the conditions under which a relevant merger situation would be created requiring investigation by the Competition Commission. A relevant merger situation would be one which involves the following:

- Two or more enterprises have ceased to be distinct enterprises; and either:
- the value of the turnover in the UK of the enterprise being taken over exceeds GBP 70 million; or
- pursuant to such transaction there will be concentration of supply such that the merged entity would have a share of atleast a quarter of the market share for the relevant goods/services in the UK.

The Competition Commission conducts an investigation after a transaction has been referred to it by the OFT. Once the investigations are complete, the Competition Commission publishes its findings and makes recommendations with respect to the transaction under consideration, as to whether to approve or prohibit such transaction or approve it subject to fulfillment of certain conditions.

There is always a risk of a transaction which qualifies for further investigation under the Enterprise Act, and which has not been approved by the OFT, to be referred to the Competition Commission within a period of four months from such transaction becoming public.

Accordingly, an acquirer should be very careful while undertaking a transaction which may result in substantial lessening of competition in a relevant market in the UK, as in certain exceptional circumstances the authorities may even require the parties to a transaction to unwind their transaction, if such transaction has not being previously approved by the OFT.

In certain limited circumstances it may be possible to seek an informal advice from the OFT on whether OFT is likely to recommend a certain proposed transaction for further investigation by the Competition Commission. However, it should be noted that such informal advice is not binding on the OFT, and usually such advice is relatively limited and qualified. Further, in case of acquisition in the form of scheme of arrangement, the Takeover Code requires inclusion of a term to the effect of not going ahead with the transaction in case the transaction is referred to the Competition Commission.

Since, the UK is a constituent of the EU, the EU regulatory framework might be applicable in certain merger situations. It should be noted that the European Union Merger Regulation ("**EUMR**") may apply to transactions which may result in concentrations with a community dimension, in which case the European Commission shall have the exclusive jurisdiction to investigate and recommend action under the EUMR. A 'community dimension' here is a broad criterion which is generally understood to mean if such a transaction may raise competition concern which may have an impact on the European community.

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VI. Acquisition of Public Companies

An acquisition of a public company in the UK is to be made in accordance with the Takeover Code ("**Takeover Code**"), which traces its legal authority to the Companies Act, 2006. The Takeover Code applicability comes in case of acquisition of companies who have their registered office in the UK, Channel Islands and the Isle of Man and is registered for trading in a regulated market in the UK, the Channel Islands and the Isle of Man. The Takeover Code is further applicable on companies whose shares are traded on unregulated markets such as the Alternate Investment Market (AIM) and which are considered by the Takeover Panel (a body constituted under the Takeover Code) residents of UK, the Channel Island and the Isle of Man. The Takeover Code in certain circumstances may be applicable to private companies, if such companies may have had public shareholding at some point of time in the last ten years.

The Takeover Code is guided by six core principles and there are rules made therein giving effect to those core principles. The purpose of the Takeover Code is to ensure that:

- shareholders of the same class are treated equally and are provided information so that they may make an informed decision as to the offer made by the acquirer;
- a false market in the securities of the target and the acquirer is not created; and
- the target management acts in the best interest of the target shareholders and provides them opportunity to consider acquirer's offer without frustrating it.

Acquisitions which involve consideration other than cash, may attract filing of a prospectus with the financial services authority ("**FSA**") in the UK. Such a prospectus has to be made publicly available if the proposed offering would be to more than 100 persons in the UK or if the proposed listing would be in a regulated market in the UK. It is possible that a prospectus may not be required to be made available if instead a document containing equivalent information is made available to the FSA.

However there might be certain advantages of filing a prospectus with FSA as compared to providing an equivalent document, such as for e.g. filing of prospectus may allow an acquirer to take advantage of the Prospectus Directive issued by the European Commission which makes it possible for a company filing the prospectus to use such prospectus in any of the other EU member states without the need to file a separate prospectus except for the summary to be translated in the local language of the country it is being filed. It provides a portability advantage for such prospectus which is not available if an equivalent document is filed instead of a prospectus.

The other possible option to make an acquisition of a public company is through a scheme of arrangement. A scheme of arrangement requires approval from atleast half of the shareholders holding atleast 75% of each class of shares, and subsequent to obtaining such shareholder approval the court approves the scheme. Acquisition through a scheme does not entail an open offer. Such a process requires an extensive co-operation from the company and it is usually seen that acquisitions which take place through a scheme are negotiated transactions in which the board recommends the acquisition, and usually they are not hostile.

Table 7: Reporting thresholds under the Take Over Code[26]:

Percentage ownership	Requirement
1%	If a party owns, or has interests in, more than 1% of the shares at the start of an offer period (or reaches that threshold while a company is in an offer period), he must disclose his interests to the market, at the start of the offer period (or when he reaches/exceeds the 1% threshold) and disclose all dealings in shares or interest in shares of the target (or bidder as the case may be).
3%	Any person whose interest in the voting rights of a UK company listed on the Official List, another EEA regulated market, or AIM reaches, exceeds or falls below 3% (or any percentage point over 3%) must notify the company, which must notify the market.
10%	If a bidder (including parties acting in concert) has acquired interests in more than 10% of the target's shares for cash within 12 months before a takeover bid (or possible bid) is announced, it must offer a cash

26. Herbert Smith: A Legal Guide to Investing in the UK for Foreign Investors, Fourth Edition (July 2012) (p. 25) available at: http://www.herbertsmith-freehills.com/-/media/HS/L050712154578912171416219.pdf

	alternative to all shareholders at not less than the highest price paid. If it (including parties acting in concert) acquires interests in more than 10% of the target's shares in exchange for securities in the three months before a takeover bid is announced it must offer securities as consideration.
29.9%	No acquisition can be made by acquirers or persons in concert beyond 29.9% without making a compulsory open offer.

VII. Mandatory Open Offer

As in India, an acquirer is required to make a mandatory public offer to the shareholders of the target, if it reaches a certain threshold. The threshold for making such an open offer under the Takeover Code is at 30% of voting rights of a UK public company. Such open offer has to be made in cash at a price which cannot be less than the highest price paid by the acquirer during the preceding 12 month period. The acquirer may however place a 50% acceptance requirement for the offer and usually no other conditions may be attached to the offer. The open offer is undertaken in terms of the Takeover Code.

VIII. Anti-Corruption

The Bribery Act, 2010 is a UK legislation which prohibits the corrupt practice of bribery. The Bribery Act, 2010 is wider in scope and provides for measures to prevent general bribery offences as well as specific acts of corruption such as for e.g. bribery of foreign public officials. It may have extra-territorial reach and may not be limited to acts conducted in the UK. It even provides for provision which may result in an organisation being held liable for their failure to prevent bribery, resulting in not only the organisation been held accountable but also the employees and individuals. In certain situations, organizations may avoid liability by putting in place effective control mechanisms in order to restrict the activities prohibited under the act. The criminal liability under this act may result in imprisonment of upto 10 years an unlimited amount of fine.

IX. Tax Considerations

A. General

UK taxes companies on income and profits, while qualifying distributions received by shareholders are exempt from tax.

Companies resident in the UK are taxed on their worldwide profits while non-residents are only taxed on income arising from sources in the UK. A company is treated as a UK resident if it is incorporated in the UK or its central control and management is in the UK. The test of control and management focusses on the place where the board of directors meet or where broader policy and strategic decisions are made, rather than the place where day-to-day activities and decisions are undertaken.

Companies and certain specific types of entities are subject to corporate tax while partnerships are fiscally transparent units.

Although UK does not have a general statutory framework for advance rulings, taxpayers may avail of certain clearance procedures under some of UK's anti-avoidance rules.

B. Taxation of UK Corporations

The main corporate tax rate in the UK is 21%. This rate is expected to go down to 20% in 2015. Companies earning small profits (i.e. not exceeding GBP 300,000) are subject to a lower corporate tax rate of 20%.

The small profits tax and main corporate tax rate applicable to companies with ring fence profits (i.e. income from oil extraction activities or oil rights in the UK and UK continental shelf) are 19% and 30% respectively.

Under the UK group and consortium relief rules, it is possible to transfer losses and specific expenses and allowances between companies qualifying as a group or consortium. In addition, transfer of assets within the group is not subject to tax. The relief however does not envisage treatment of a group or consortium as a single consolidated taxable unit. In certain circumstances group and consolidation relief may also be available to foreign subsidiaries resident in the European Economic Area. Broadly, for the purpose of group treatment, a company should be a 75% subsidiary of another company, or both should be 75% subsidiaries of a third company. Separate rules are prescribed for consortium relief.

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Dividend income is generally exempt unless they arise from an arrangement designed to reduce tax in the UK. Specific qualifications have been prescribed in this regard for small and large companies. The exemption is available to small companies if the distributing company is a UK resident or a resident of a qualifying territory (with which UK has a comprehensive tax treaty with a non-discrimination clause), it is not in the nature of recharacterized interest, the distribution has not been subject to deductions under foreign law, and it is not part of a tax advantage scheme. A small company (based on recommendation of the European Commission) is one with a head count lesser than 50, turnover and balance sheet total not exceeding GBP 10 million.

With respect to companies other than small companies, the exemption is available if it falls in an exempt class, is not in the nature of recharacterized interest, has not been subject to deductions under foreign law, and is not part of a tax advantage scheme. The exempt classes include distributions from controlled companies (i.e. control exercised by way of voting rights, right to income or assets), distributions in respect of non-redeemable ordinary shares, distributions in respect of portfolio holdings (less than 10% of a class of shares), dividends derived from transactions not designed to reduce tax and dividends in respect of shares accounted for as liabilities. To be entitled to the exemption, it is also necessary that the specific anti-avoidance rules relevant to dividend distributions do not apply.

Capital gains are normally taxed as part of corporate income unless one of the specific exemptions apply. UK has introduced a substantial shareholding exemption regime under which gains on the disposal by a company of shares will not be taxed if (i) the investing and investee company are trading companies (i.e. carrying on a trade or business on a commercial basis for realizing profits), and (ii) the investing company has continuously held more than 10% of the investee company's share capital in a 12 month period within 2 years before the share transfer.

Transfer of business as a going concern to a company in exchange for shares will not be subject to capital gains tax. Tax will be payable only when the company subsequently transfers the business or its assets. Tax neutral movement of assets within a group is also possible under the no gain/no loss rule. By fixing both the consideration received for the asset and the consideration given for the asset, the transferor is considered to not have either a chargeable gain or allowable loss. In essence, the transferee takes over the transferor's capital gains cost. The gain or loss may arise only once the asset is transferred outside the group.

In addition to the above, UK provides a number of roll over reliefs for specific types of corporate reorganizations including reconstructions, share exchanges, mergers, etc.

C. Taxation of Foreign Investors

Foreign companies will be taxed on trading income attributable to a permanent establishment in the UK.

Ordinarily, dividends received from UK sources are not subject to any withholding tax. However, interest and royalties from UK sources will be subject to withholding tax at the rate of 20%. This is subject to any exemption that may be available under the EU interest and royalties directive applicable to entities located within the European Union. Other exemptions may be available with respect to interest on bank deposits or quoted Eurobonds.

Non-residents are normally not subject to capital gains tax in the UK unless the assets transferred form part of a permanent establishment in the UK.

D. Anti-avoidance

UK Courts have evolved a number of anti-avoidance rules. While the fundamental principle is that a taxpayer is free to organize his affairs and mitigate taxes within the framework of the law, certain arrangements in the nature of colourable devices and shams may be disregarded for tax purposes. A number of anti-avoidance doctrine including the step transaction doctrine may be applied by the tax authorities to disregard a composite series of transactions with no business purpose other than tax avoidance.

Recently, UK has proposed a statutory general anti-avoidance rule that target abnormal arrangements which seek to avoid application of tax provisions, or exploit the application, inconsistencies and shortcomings in the provisions.

UK also enforces a number of specific anti avoidance rules including rules to limit group or consortium relief, counter tax arbitrage, etc. Transfer pricing provisions allow UK tax authorities to adjust income and expenses in cases of non-arm's length transactions between related enterprises. The arm's length principle also applies in the context of thin capitalization.

11. Mergers and Acquisitions in Australia

I. Background[27]

Australia's overall M&A activity witnessed an uptick with 394 deals worth USD 24.4 billion announced in the second quarter of 2012, a 17.4% sequential increase from the previous quarter, after suffering its third consecutive quarterly decline in Q1 2012. Despite the improvement, the USD 45.1 billion-worth of announced M&A deals in 2012 represented a 54.1% drop from the first half of 2011. Total cross-border transactions fell 45.1% to USD 25.2 billion from the first half of 2011 (USD 45.9 billion), pulled by the 79.2% drop in outbound activity. Inbound M&A declined 33.1% to USD 22.7 billion so far this year compared to the start of 2011, despite the 132% growth in deal value during the second quarter of 2012 to USD 15.9 billion from USD 6.8 billion in Q1 2012.

A. Energy & Power and Materials Capture 50% Combined Market Share

Energy & Power was the leading target sector for Australia M&A this year despite a 5.7% drop in volume to USD 11.6 billion compared with first half of 2011 (USD 12.3 billion), accounting for 25.7% of the M&A activity. Deal value in the Oil & Gas sector was down 32.4% to USD 5.9 billion from first half of 2011 (USD 8.7 billion). Meanwhile, the Materials sector saw its third consecutive quarterly decline as deal value amounted to USD 3.2 billion in Q2 2012, down 58.1% from the previous quarter, bringing 2012's total to USD 10.9 billion. Despite the 45.9% decrease in deal value compared to the start of 2011, Materials sector captured 24.1% of Australia's M&A activity. Metals & Mining, which accounted for 91% of the Materials industry, dropped 50% to USD 9.8 billion from the comparable period last year.

B. Private Equity-Backed M&A Improves in Second Quarter of 2012

The triple-digit percentage increase (420%) in deal value during the second quarter of 2012 to USD 2.2 billion, coming from a low of first quarter 2012 volume, was not enough to push Australia's private equity-backed M&A activity. The value of PE-backed M&A in Australia this year totaled USD 2.6 billion, down 53% from the first half of 2011. Nonetheless, Australia accounted for 29.9% of Asia Pacific's PE-backed M&A this year worth USD 8.9 billion, while China captured 26.1%.

II. Acquisition of a Private Company

The corporate and takeover framework in Australia is governed by the Corporations Act, 2001.[28] Unlike other jurisdictions such as USA, India, etc. mergers, amalgamations and takeovers are governed by the Corporations Act, 2001 itself rather than having a separate set of laws/regulations governing them. Acquisition of private company with less than 50 members can be done by simplicitor transfer of shares pursuant to execution of a share purchase agreement.

III. Acquisition of a Publicly Traded Company

A. Corporate Framework and Securities Law

Chapter 5 of the Corporations Act, 2001 deals with the M&A using a scheme of arrangement to be approved by the courts in Australia whereas Chapter 6 deals with the M&A through takeovers and open offers related thereto. The various thresholds in a takeover depend on the concepts of 'voting power' and 'relevant interest'. A person's voting power with respect to a company is in a designated body is:

Person's and associates votes

-- x 100

Total votes in designated body

is equal to the aggregate relevant interests of the person and their associates. Two or more persons are associates if one controls the other or they are under common control, or there is an agreement,

27. http://www.scoop.co.nz/stories/WO1206/S00624/thomson-reuters-australia-ma-preliminary-financial-advisory.htm

28. http://www.comlaw.gov.au/Details/C2012C00447

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arrangement or understanding between them for controlling or influencing the composition of target's board of directors or the conduct of target's affairs, or they are acting or proposing to act in concert in relation to the target's affairs.

A person has a relevant interest in a share if they are the holder or have the power to control disposal or to control the exercise of the right to vote. For instance, a person can have a relevant interest in a share as a result of an agreement to purchase the shares (even a conditional agreement) or even a call option to acquire the shares.

B. Regulator

Acquisition of or acquisition by a public company listed on the Australian Stock Exchange ("**ASX**") is regulated by Chapter 6 of Corporations Act, 2001 alongwith the listing rules and regulations prescribed by the ASX. However, Australian Securities and Investments Commission ("**ASIC**") has primary responsibility for the administration of the Corporations Act, 2001 and as such governs the ASX as well. ASIC is also responsible for supervising the market and overlooking the compliances to be done by listed companies in accordance with ASIC Market Integrity Rules.

IV. Substantial Acquisition Reporting / Open Offer Requirement

The level of control selected under Australian law as the trigger for the takeover legislation is 20% of voting power in a company. The rules will apply to acquisitions of shares in an Australian company whether the acquisition takes place within or outside Australia. In general, section 606 prohibition applies only when the target is a company listed on ASX or an unlisted company with more than 50 members. The key provision is section 606 of the Corporations Act, 2001 which prohibits a person from acquiring (whether by way of a purchase of existing securities or an issue of new securities) a 'relevant interest' in securities in an Australian company if as a result of the acquisition:

i. Any person's voting power in the company would increase from below 20% to more than 20%;

ii. Any person's voting power in the company that is above 20% and below 90% would increase,

The takeover rules do not apply where voting power remains below the 20% level after an acquisition, although other rules, such as those requiring declaration of substantial shareholdings (which exceed 5%), are relevant.

There are a number of important gateways which allow a person to exceed the 20% level. Permitted gateways include:

- an off-market takeover bid made to all shareholders which may be for all or a nominated proportion of their shareholding;
- an unconditional on-market takeover bid on the ASX;
- "creeping" acquisitions of not more than 3% of voting shares in every six months, by a person already holding at least 19% of voting power in the company;
- acquisitions approved by ordinary resolution of shareholders who are unassociated with the parties to the transaction; and
- indirect acquisitions of shares in a downstream company, resulting from the authorised acquisition of shares in an upstream ASX listed company or a company which is listed on an approved foreign stock exchange.

Some important percentage thresholds are as follows:

- below 5% - ASIC, public companies and the responsible entities can trace beneficial ownership in shares or units, even where voting power is below the 5% level;
- 5% - substantial holding level which requires the holder to give information to a company, responsible entity for a listed company and the ASX;
- over 10% - holder can block compulsory acquisition which requires voting power of 90% to be held;
- 15% - notification may be required under FATA (defined hereinbelow) if the bidder is a "foreign person";
- over 25% - can block special resolutions of the company;
- 50% - voting control of the target;
- 75% - holder can ensure special resolutions are passed;
- 85% - holder must give notice of substantial holding and the company must notify shareholders that, at 90%, the person can

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compulsorily acquire the remaining securities;

- 90% - in general, confers the ability to compulsorily acquire remaining securities in target; and
- for certain regulated industries and companies, acquisitions prohibited over varying thresholds.

V. Anti-Trust / Competition Law Considerations

Section 50 of the Trade Practices Act, 1974 (**"TP Act"**) prohibits mergers and/or acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in a market in Australia. If a transaction is between two competitors in the same market, the buyer and seller may consider including approval from the Australian Competition and Consumer Commission (**"ACCC"**) (which enforces the TP Act) under the Competition and Consumer Act. There is no mandatory pre-merger notification requirement under the TP Act, however the ACCC can apply for an injunction to prevent a merger (and seek divestiture and penalties) if it believes the merger will be likely to substantially lessen competition in a market.

Under the merger guidelines, ACCC encourages the parties to notify the ACCC well in advance of completing a transaction if:

i. The products of the merger parties are either substitutes or complements;

ii. The merged company will have a post-merger market share of 20% or more in any Australian market or an international market of which Australia forms a part. However, the ACCC also investigates mergers where the merged entity will have a market share of less than 20%.

Approval from the ACCC can be obtained through two methods, informal clearance and formal clearance. Informal clearance involves approaching the ACCC confidentially and seeking a comfort letter stating the ACCC does not intend to oppose the merger. However, formal clearance involves following the procedures set out in the TP Act and if obtained, will provide formal immunity from proceedings under section 50 of the TP Act.

VI. Exchange Control[29]

Foreign investment in Australia is regulated under Federal legislation, including the Foreign Acquisitions and Takeovers Act, 1975 (**"FATA"**), and by Australia's Foreign Investment Policy (**"Policy"**). The requirements for the information to be provided for applications for foreign investment approval are contained in the notification provisions of sections 25, 26 and 26A of the FATA.

Under FATA and the Policy, certain proposed investments by foreign investor should be notified to the Foreign Investment Review Board (**"FIRB"**) notified based on interest thresholds which include:

i. Direct or indirect acquisition of 15% or more of the voting power or issued shares in the Australian target company (or increase that holding) by a single foreign person (and its associates);

ii. Direct or indirect acquisition of 40% or more of the voting power or issued shares in the Australian target company (or increase that holding) by two or more foreign persons (and its associates);

Further, under FATA and the Policy, certain proposed investments by foreign investor should be notified to the FIRB notified based on monetary thresholds[30] which include:

i. For non-US Investors: (i) The value of the Australian target company or business is A$ 244 million or more; (ii) Offshore takeover where the target company has Australian assets or businesses valued at A$ 244 million or more.

ii. For US Investors[31]: (i) The value of the Australian target company or business is A$ 1062 million

29. http://www.ato.gov.au/careers/content.aspx?menuid=44849&doc=/content/00266705.htm&page=47&H47

30. http://www.firb.gov.au/content/monetary_thresholds/monetary_thresholds.asp

31. US Investor is defined under the Australian Foreign Investment Policy (http://www.firb.gov.au/content/_downloads/AFIP_Aug2012.pdf) as:

A national or permanent resident of the United States of America; a US enterprise; or a branch of an entity located in the US and carrying on business activities there.

Branch of an Entity Located in the US: *A branch may be*

'carrying on business activities in the US' where it is doing so in a way other than being solely a representative office; and in a way other than being engaged solely in agency activities, including the sale of goods or services that cannot reasonably be regarded as undertaken in the US and by having its administration in the US.

US Enterprise: *A US enterprise is an entity constituted or organised under a law of the United States of America. The form in which the entity may be constituted or organised may be, but is not limited to, a corporation, a trust, a partnership, a sole proprietorship or a joint venture.*

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or more; (ii) Offshore takeover where the target company has Australian assets or businesses valued at A$ 1062 million or more; (iii) Where the Australian target company is in a prescribed sensitive sector (including media, telecommunication, banking, defence and transport) and value of the target is A$ 244 million or more.

Further, notification to FIRB is compulsory irrespective of the value of the target or interest to be acquired for:

i. Direct investment by foreign governments (including the US government) and their related entities[32];
ii. Any investment of 5% or more in the media sector;

Further, if a transaction is in a regulated industry, it requires prior regulatory approval. Transactions in, inter alia, following industries could include the following regulatory approvals as conditions to closing:

i. Banking sector - Approval from the Australian Prudential Regulation Authority under the Financial Sector (Shareholdings) Act, 1998;
ii. Media sector - Approval from the Australian Communications and Media Authority under the Broadcasting Services Act, 1992; and
iii. Aviation sector - Approval under the Airports Act, 1996.

VII. Tax Considerations

A. General

Australia's corporate tax regime uses the imputation system of taxation to avoid double economic taxation at the corporate and shareholder level.

Resident companies are generally taxed on a worldwide basis, while non-resident companies are only taxed on income from sources in Australia. A company is treated as a resident of Australia if it is incorporated in Australia. A company carrying on business in Australia may be treated as a resident if its place of central management and control is in Australia or its controlling shareholders are residents of Australia.

The corporate tax is applicable to companies, limited partnerships and specific types of trusts. General partnerships are transparent for tax purposes.

Taxpayers may request the Australian tax authorities for a private ruling on the tax consequences of a specific scheme.

B. Taxation of Australian corporations

Corporate tax on income and capital gains is payable at the rate of 30%. Australia does not impose any minimum alternative tax.

Wholly owned Australian companies within a group may opt to be taxed on a consolidated basis. Multiple consolidated group status may be provided to a group of Australian subsidiaries wholly owned by a foreign company. Tax consolidation disregards intragroup taxation and allows members of the group to transfer losses within the group.

Under the imputation system, a shareholder receiving dividends may take credit for corporate tax paid by the company. For this purpose, companies attach franking credits to dividends which are passed on to the shareholders. The dividends may be fully franked, un-franked or partially franked.

A company resident in Australia holding more than 10% interest and voting power in a foreign company throughout a 12 month period may take advantage of the participation exemption. Capital gains arising from the transfer of shares of such foreign company (conducting active business) are not taxable. Further, dividends received from such foreign company are not subject to tax.

C. Corporate Reorganizations and Acquisitions

Australian tax law specifies a number of circumstances and arrangements involving transfer of assets where the capital gains tax is rolled over until there is a subsequent transfer.

Roll over relief is available in cases where capital assets are contributed in exchange for shares of a wholly owned company. Similar relief is available when shares of a certain class or option rights are cancelled in exchange for issue of new shares or option rights.

32. Foreign governments and their related entities are defined to mean and include: (i) a body politic of a foreign country; (ii) companies or other entities in which foreign governments, their agencies or related entities have more than an aggregate 15 per cent interest; or (iii) companies or entities that are otherwise controlled by foreign governments, their agencies or related entities.

Shareholders of a company may claim roll over relief if the shares are transferred to an interposed company in exchange for shares of such interposed company pursuant to a scheme of reorganization. The scrip-for-scrip rollover relief is available when the acquiring company acquires more than 80% of shares in the target company in exchange for shares issued to the shareholders in the target.

Roll over relief is also available in the case of demerger or a restructuring where the holding company disposes at least 80% of its interest in the demerged company to its shareholders.

In addition to the above, there are a number of other forms of restructuring or reorganizations where roll over relief is available. For claiming such roll over relief it is necessary to satisfy specific conditions and criteria prescribed under Australian tax law.

D. Taxation of Foreign Investors

Non-residents are taxed on all income arising from sources in Australia.

Ordinary business income derived by a non-resident from a permanent establishment in Australia will be subject to tax.

Fully franked dividends (i.e. where the company attaches franking credits based on payment of corporate tax on profits) earned by a non-resident are not subject to any withholding tax in Australia. Unfranked dividends may however be subject to a 30% withholding tax unless reduced under a treaty. To the extent such dividends represent conduit foreign income, it will not be subject to any withholding tax. Conduit foreign income refers to foreign income otherwise not taxable in Australia that flows through the domestic company and is distributed to its non-resident shareholders.

Interest income received by a non-resident will be subject to Australian withholding tax at the rate of 10% on a gross basis unless reduced under a treaty. The withholding tax is not applicable in specific circumstances including interest on certain publicly offered debentures, etc.

Non-residents are subject to capital gains tax only on transfer of 'taxable Australian property', which includes Australian real property, non-portfolio interest in Australian real property and assets of the non-resident's permanent establishment. Ordinarily, gains earned by a non-resident from transfer of shares of an Australian company (not representing Australian real property) should not be subject to tax.

Royalties arising from sources in Australia are subject to a 30% withholding tax unless reduced under a treaty. Fees for technical services and management fees are not normally subject to any withholding taxes in Australia.

E. Anti-avoidance

Australia enforces a general anti avoidance rule in addition to specific anti-avoidance rules. GAAR empowers the Australian tax authorities to cancel tax benefits in relation to a specific scheme or arrangement. A number of factors are considered for the purpose of application of GAAR, including the manner in which the scheme was carried out, the form and substance of the scheme, length of period during which the scheme was carried out, change in the taxpayer's financial position and other factors.

Adjustments may be made under Australia's transfer pricing rules in respect of international dealings that are non-arm's length. Taxpayers may also enter into advance pricing agreements with the Australian tax authorities.

Excessive interest payments may not be deductible in view of thin capitalization norms. The thin capitalization rule may be applied in cases where the debt is not at arm's length or where the debt-equity ratio exceeds 75% of the company's net assets. This rule applies to both inbound and outbound debt investments.

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12. Conclusion

Indian companies are increasingly becoming open to the idea of global expansion and making outbound acquisitions, more so in the wake of moderating domestic economic growth. This evolution of Indian companies oriented towards making overseas acquisitions is a trend which will become more prominent in the near future. Accordingly, the trend and outlook of outbound investments remains increasingly promising.

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