

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced, stored, transmitted, or distributed in any form or by any means, whether electronic, mechanical, photocopying, recording, or otherwise, without prior written permission of the Managing Editor of the *International Journal for Legal Research & Analysis (IJLRA)*.

The views, opinions, interpretations, and conclusions expressed in the articles published in this journal are solely those of the respective authors. They do not necessarily reflect the views of the Editorial Board, Editors, Reviewers, Advisors, or the Publisher of IJLRA.

Although every reasonable effort has been made to ensure the accuracy, authenticity, and proper citation of the content published in this journal, neither the Editorial Board nor IJLRA shall be held liable or responsible, in any manner whatsoever, for any loss, damage, or consequence arising from the use, reliance upon, or interpretation of the information contained in this publication.

The content published herein is intended solely for academic and informational purposes and shall not be construed as legal advice or professional opinion.

**Copyright © International Journal for Legal Research & Analysis.
All rights reserved.**

ABOUT US

The *International Journal for Legal Research & Analysis (IJLRA)* (ISSN: 2582-6433) is a peer-reviewed, academic, online journal published on a monthly basis. The journal aims to provide a comprehensive and interactive platform for the publication of original and high-quality legal research.

IJLRA publishes Short Articles, Long Articles, Research Papers, Case Comments, Book Reviews, Essays, and interdisciplinary studies in the field of law and allied disciplines. The journal seeks to promote critical analysis and informed discourse on contemporary legal, social, and policy issues.

The primary objective of IJLRA is to enhance academic engagement and scholarly dialogue among law students, researchers, academicians, legal professionals, and members of the Bar and Bench. The journal endeavours to establish itself as a credible and widely cited academic publication through the publication of original, well-researched, and analytically sound contributions.

IJLRA welcomes submissions from all branches of law, provided the work is original, unpublished, and submitted in accordance with the prescribed submission guidelines. All manuscripts are subject to a rigorous peer-review process to ensure academic quality, originality, and relevance.

Through its publications, the *International Journal for Legal Research & Analysis* aspires to contribute meaningfully to legal scholarship and the development of law as an instrument of justice and social progress.

PUBLICATION ETHICS, COPYRIGHT & AUTHOR RESPONSIBILITY STATEMENT

The *International Journal for Legal Research and Analysis (IJLRA)* is committed to upholding the highest standards of publication ethics and academic integrity. All manuscripts submitted to the journal must be original, unpublished, and free from plagiarism, data fabrication, falsification, or any form of unethical research or publication practice. Authors are solely responsible for the accuracy, originality, legality, and ethical compliance of their work and must ensure that all sources are properly cited and that necessary permissions for any third-party copyrighted material have been duly obtained prior to submission. Copyright in all published articles vests with IJLRA, unless otherwise expressly stated, and authors grant the journal the irrevocable right to publish, reproduce, distribute, and archive their work in print and electronic formats. The views and opinions expressed in the articles are those of the authors alone and do not reflect the views of the Editors, Editorial Board, Reviewers, or Publisher. IJLRA shall not be liable for any loss, damage, claim, or legal consequence arising from the use, reliance upon, or interpretation of the content published. By submitting a manuscript, the author(s) agree to fully indemnify and hold harmless the journal, its Editor-in-Chief, Editors, Editorial Board, Reviewers, Advisors, Publisher, and Management against any claims, liabilities, or legal proceedings arising out of plagiarism, copyright infringement, defamation, breach of confidentiality, or violation of third-party rights. The journal reserves the absolute right to reject, withdraw, retract, or remove any manuscript or published article in case of ethical or legal violations, without incurring any liability.

GUIDE TO PUBLIC M&A IN INDIA

AUTHORED BY - TANVEEN KAUR

In India, the year 2021 has been an intriguing one for public M&A.

According to statistics, M&A deals (both public and private) increased by 39% in 2021, totaling 499 transactions for USD 42.9 billion.

This represents a huge increase above the 360 deals for USD 37.5 billion recorded in 2020. With M&A deal activity in India hitting pre-covid levels in 2021, it appears that the time is perfect for it to pick up even more in 2022.

In India, the M&A regime is highly regulated, complex, and timebound. Every stage of the process, from deal inception to due diligence, documentation, and closing, is regulated.

It might be difficult to navigate India's complicated public M&A market. Here are some crucial principles and aspects to keep in mind.

1. Legal and Regulatory framework

The regulatory M&A regulation contains 5 components such as:

- The Companies Act 2013 which regulates, among other things, the non-pre-emptive issuance of shares, the significant sale of 'material' assets, court-approved schemes, and related group transactions);
- Indian Contract Act 1872;
- Foreign Exchange Management Act 1999 which regulates cross-border transactions involving Indian citizens and non-citizens;
- Competition Act 2002 which sets out the regulation of mergers in India;
- Securities rules issued by the Securities and Exchange Board of India (SEBI) set out the main framework for listed companies' deals which include:

The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (the Takeover Regulations) governing the acquisition and awarding of tenders to listed companies;

The SEBI (Listing Obligations and Disclosure Requirements) 2015 (Listing Regulations) determines legal authorization, shareholder voting, disclosure, and other requirements of court-authorized schemes involving listed companies; and

The SEBI (Prohibition of Insider Trading) Regulations 2015 (the Insider Trading Regulations), contains specific provisions for the sharing of sensitive pricing information and deal

completion involving listed companies.¹

2. Sector-Specific Regulations

Many sectors fall under a sector-specific regulatory framework that, in most cases, is a dedicated regulatory framework.

For example, there is a separate regulation of banks and financial services regulated by a central Indian central bank, the Reserve Bank of India. Similarly, insurance has its own set of regulations, with Insurance Regulatory and Development Authority acting as a governing body. Additionally, in some areas, there are some other terms and conditions of service (e.g., single-brand retail trading).

3. Transaction Documents

Public M&A deals usually involve sale and purchase agreements that are negotiated and made between parties with documents governed by Indian law. In cases where a mandatory open offer is initiated, the buyer also needs to issue a public announcement, and a detailed public statement and thereafter provide a letter of offer to all shareholders. Where the parties take the course of a court-approved order, the scheme document filed with the National Company Law Tribunal becomes the main document and the parties often enter into an implementation agreement.

4. Disclosure Requirements

Security regulations authorize disclosure requirements to protect the interests of public shareholders if a change in shareholding, voting rights, or control will affect their interests. Ideally, the Listing Regulations require timely public disclosure of basic information about M&A activity so that targeted securities can trade in an informed market. The disclosure obligation is also enforced upon execution of the transaction documentation. Parties usually precede the definitive documents with a non-binding term sheet to avoid premature disclosure requirements. However, when the market should be informed about potential trade remains a sensitive issue considering that stocks will trade in an uninformed market during negotiations. Separately, the acquisition and disposal of shares over the prescribed amount will result in disclosure obligations under the Insider Trading Regulations and the Takeover Regulations.

¹ Key Issues in Public M&A in India

5. Due Diligence

When identifying a targeted business, it is a common practice to conduct financial and legal due diligence. The benefit of listed companies and acquirers is the availability of large business data in the public domain (by the company disclosure requirements listed under Indian law). However, deepening the workload requires compliance with the limitations imposed by the Insider Trading Regulations which, except in certain circumstances, prohibit the communication and receipt of unpublished price sensitive information (UPSI) about listed companies. UPSI can occur when a listed company is not obliged to disclose information as a rule and so securities are traded without the market knowing about this information. The only exception that allows for UPSI communication is the potential M&A transaction involving a listed company. In such a case, the listed company board is required to make a conscious decision that UPSI sharing is of great benefit to the listed company, and the information may be shared under the protection of the confidentiality agreement.²

6. Directors' duties

The main functions of a director under Indian law are:

- to act honestly to promote the company's objectives for the benefit of all its members;
- to perform with care and diligence;
- to avoid any actual or potential conflict between his or her interests and the company;
- and
- not to gain or attempt to gain an unfair advantage or gain from himself or his relatives or partners or associates.

The Companies Act also expands the scope of directors' duties by requiring them to do more than just perform in the most beneficial manner of the company but also its employees, shareholders, the public, and the environment. About business combinations, directors also have a legal obligation to declare any direct or indirect interests in a business merger, first, at a board meeting where the matter is first considered, and thereafter, at the first board meeting in each financial year and whenever there is a change in the previous declaration. In these board meetings, about matters in which directors are interested, interested directors shall not be considered a quorum and shall not be voted on the matters. Directors and specified persons (including relatives and holding, subsidiary, and associate companies)

² Public M&A in India

are also considered related parties, so any arrangements between the company and the director or his contact person may need the approval of the board or shareholders.

7. Shareholders' rights

Authorization of shareholders by special resolution (i.e., 75% of the vote) is required when a public company proposes to dispose of a substantial part of the whole of an undertaking. In consolidation or separation, the approval of shareholders is required only if the majority and the three-quarters in value of the shareholders and creditors approve the transaction. The listed companies require the shareholders' approval for a special decision in the event of a disposal of a material subsidiary (more than 10 percent income or net worth on a consolidated basis) or sale or disposal of assets of a material subsidiary. In addition, the approval of the majority of public shareholders is required in certain circumstances involving schemes of arrangement between the listed company and the promoter or promoter group entities.³

8. Financial Arrangements of Firm

Before making a public declaration of an open offer, the Takeover Regulations require the buyer to ensure that 'firm financial arrangements are made to fulfill payment obligations under the open offer and that the buyer can use the open promise, subject to any required legal permits. Additionally, the Takeover Code also requires the buyer to open an escrow account aimed at securing the performance of his or her obligations under the Takeover Regulations.

9. Hostile Transactions

Although there is no stated rule regarding the hostile takeover of listed companies in India, there have been a few instances of successful (and unsuccessful) taking. Generally, any person who intends to acquire control of a listed company is permitted to declare an unsolicited take-off bid based on the subject of gaining control and active participation in the existing shareholder. A basic negotiation with an existing shareholder is no doubt a bonus. In the case of unsolicited bids, the listed company board needs to act in a way that benefits the shareholders, and ultimately it is the shareholders who decide the success or failure of the bid.

10. Tax Considerations

Buyers are often advised to demand that sellers obtain a tax clearance certificate, to avoid the risk of Indian tax authorities declaring the transfer of one or more assets as void. In the purchase

of a business, the Income Tax Act provides that the buyer as the next may be liable for past tax paid by the seller, in certain conditions. Alternatives include certificates from reputed chartered accountants. In cross-border transactions, the availability of tax exemptions under Indian tax laws with the appropriate foreign authority must be considered. Indian tax authorities may use anti-abuse provisions if the activity is not for commercial purposes and is intended especially in earning tax benefits.⁴

These are just a few things that buyers should be aware of and each M&A agreement comes with its own set of nuances, issues, and workarounds. The value of having trusted Public M&A advisors to help the parties navigate these complex issues cannot be underestimated.

