

## FAQ'S

## Doing Business in India

### M&A

#### 1. What is NCLT?

The National Court of Law Tribunal has been formed under the Companies Act, 2013 setup as a quasi-judicial body for corporate law purposes. NCLT is one of the recent reforms undertaken by the government in corporate law. Please visit the following link.

#### 2. What are the key laws and regulations associated with M&A in India?

The key law governing M&A in India are: 1. Companies Act, 1956 and 2013 2. Income Tax Act, 1961 3. Competition Act, 2002 4. Foreign Exchange Management Act The key regulations governing M&A in India are: 1. Securities and Exchange Board of India (SEBI) 2. Takeover code of SEBI 3. Reserve Bank of India 4. Competition Commission of India

#### 3. What are the guidelines for transfer of existing shares from non-residents to residents or residents to non-residents?

The term 'transfer' is defined under FEMA, 1999 as 'sale, purchase, acquisition, mortgage, pledge, gift, loan or any other form of transfer of right, possession or lien'(Section 2 (ze) of FEMA, 1999). The following share transfers are allowed without the prior approval of the Reserve Bank of India subject to the conditions laid down in FEMA 20: 1) Transfer by way of sale or gift between a person resident outside India (not being a NRI or an OCB) and any person resident outside India; Prior Government approval shall be obtained for any transfer in case the company is engaged in a sector which requires Government approval. 2) Transfer of shares by way of sale or gift by a NRI to any NRI. Prior Government approval shall be obtained for any transfer in case the company is engaged in a sector which requires Government approval Transfer by way of gift by a person resident outside India to a resident. 3) Transfer by way of sale on a recognized stock exchange by a person resident outside India. Transfer by way of sale or gift by a resident to a person outside India subject to conditions prescribed in Regulation 10 of FEMA 20. For further details please access following link.

#### 4. What are the modes of payment allowed for receiving Foreign Direct Investment in an Indian company?

An Indian company issuing shares/convertible debentures to a person resident outside India shall receive the amount of consideration by: 1) Inward remittance through normal banking channels. 2) Debit to NRE/ FCNR (B) account of a person concerned maintained with an AD Category I bank. 3) Debit to non-interest bearing Escrow account in Indian Rupees in India which is opened with the approval from AD Category – I bank and is maintained with the AD Category I bank on behalf of residents and non-residents towards payment of share purchase consideration. 4) Conversion of royalty/ lump sum/ technical know-how fee due for payment or conversion of ECB. Conversion of pre-incorporation/ pre-operative expenses incurred by the a non-resident entity up to a limit of five percent of its capital or US\$ 500,000 whichever is less. 5) Conversion of import payables/pre incorporation expenses/can be treated as consideration for issue of shares with the approval of FIPB, against any other funds payable to a person resident outside India, the remittance of which does not require the prior approval of the Reserve Bank or the Government of India and swap of capital instruments, provided where the Indian investee company is engaged in a Government route sector, prior Government approval shall be required. If the shares or convertible debentures are not issued within 180 days from the date of receipt of the inward remittance or date of debit to NRE/FCNR (B)/Escrow account, the amount shall be refunded. Further, Reserve Bank may on an application made to it and for sufficient reasons permit an Indian Company to refund/allot shares for the amount of consideration received towards issue of security if such amount is outstanding beyond the period of 180 days from the date of receipt.

#### 5. What is an open offer under the SAST Regulations 2011, Under which situations is an open offer required to be made by an acquirer?

An open offer is an offer made by the acquirer to the shareholders of the target company inviting them to tender their shares in the target company at a particular price. The primary purpose of an open offer is to provide an exit option to the shareholders of the target company on account of the change in control or Substantial acquisition of shares, occurring in the target company. If an acquirer has agreed to acquire or acquired control over a target company or shares or voting rights in a target company which would be in excess of the threshold limits, then the acquirer is required to make an open offer to shareholders of the target company. For further details please access following link : [https://www.sebi.gov.in/sebi\\_data/faqfiles/aug-2017/1503313163982.pdf](https://www.sebi.gov.in/sebi_data/faqfiles/aug-2017/1503313163982.pdf)

#### 6. What are the threshold limits for acquisition of shares/voting rights, beyond which an obligation to make an open offer is triggered?

1) Acquisition of 25% or more shares or voting rights: An acquirer, who (along with PACs, if any) holds less than 25% shares or voting rights in a target company and agrees to acquire shares or acquires shares which along with his/ PAC's existing shareholding would entitle him to exercise 25% or more shares or voting rights in a target company, will need to make an open offer before acquiring such additional shares. 2) Acquisition of more than 5% shares or voting rights in a financial year: An acquirer who (along with PACs, if any) holds 25% or more but less than the maximum permissible non-public shareholding in a target company, can acquire additional shares in the target company as would entitle him to exercise more than 5% of the voting rights in any financial year ending March 31, only after making an open offer.

### **7. How is the maximum permissible non-public shareholding in a listed company defined?**

Maximum permissible non-public shareholding is derived based on the minimum public shareholding requirement under the Securities Contracts (Regulations) Rules 1957 (SCRR). Rule 19A of SCRR requires all listed companies (other than public sector companies) to maintain public shareholding of at least 25% of share capital of the company. Thus by deduction, the maximum number of shares which can be held by promoters i.e. maximum permissible non-public shareholding in a listed company (other than public sector companies) is 75% of the share capital. For further details please access following link.

### **8. What is a voluntary open offer?**

A voluntary open offer under Regulation 6, is an offer made by a person who himself or through persons acting in concert ,if any, holds 25% or more shares or voting rights in the target company but less than the maximum permissible non-public shareholding limit. For further details please access following link.

### **9. Do all acquisitions of shares in excess of the prescribed limits and/or control lead to an open offer?**

No, in respect of certain acquisitions, SAST Regulations, 2011 provide exemption from the requirements of making an open offer, subject to certain conditions being fulfilled. For example, acquisition pursuant to inter- se transfer of shares between certain categories of shareholders, acquisition in the ordinary course of business by entities like underwriter registered with SEBI, stock

brokers, merchant bankers acting as stabilizing agent, Scheduled Commercial Bank (SCB), acting as an escrow agent, etc. For further details please access following link.

**10. For how many days is an open offer required to be kept offer?**

10 days. For further details please access following link.

**11. What is meant by the term 'minimum level of acceptance'?**

'Minimum level of acceptance' implies minimum number of shares which the acquirer desires under the said conditional offer. If the number of shares validly tendered in the conditional offer are less than the minimum level of acceptance stipulated by the acquirer, then the acquirer is not bound to accept any shares under the offer. For further details please access following link.

**12. What is the stipulated size of an open offer?**

An open offer, other than a voluntary open offer under Regulation 6, must be made for a minimum of 26% of the target company's share capital. The size of voluntary open offer under Regulation 6 must be for at least 10% of the target company's share capital. Further the offer size percentage is calculated on the fully diluted share capital of the target company taking into account potential increase in the number of outstanding shares as on 10th working day from the closure of the open offer. For further details please access following link.

**13. Whether hostile offers/bids are permitted under the new regulations?**

There is no such term as hostile bid in the regulations. The hostile bid is generally understood to be an unsolicited bid by a person, without any arrangement or MOU with persons currently in control. Any person with or without holding any shares in a target company, can make an offer to acquire shares of a listed company subject to minimum offer size of 26%. For further details please access following link.

**14. What is a 'Target Company'?**

The company/body corporate or corporation whose equity shares are listed in a stock exchange and in which a change of shareholding or control is proposed by an acquirer, is referred to as the 'Target

Company'. For further details please access following link.

### 15. Who is an 'Acquirer'?

Acquirer means any person who, whether by himself, or through, or with persons acting in concert with him, directly or indirectly, acquires or agrees to acquire shares or voting rights in, or control over a target company. An acquirer can be a natural person, a corporate entity or any other legal entity. For further details please access following link.

### 16. What is meant by Takeovers & substantial acquisition of shares?

When an 'acquirer' takes over the control of the 'Target Company', it is termed as a Takeover. When an acquirer acquires 'substantial quantity of shares or voting rights' of the Target Company, it results into substantial acquisition of shares. For further details please access following link.

### 17. What is the meaning of control as per CCI?

The Act provides for an inclusive definition of 'control', as including 'controlling the affairs or management' of a target enterprise or group. For further details please access following link.

### 18. When should I notify a combination to CCI?

In case of mergers or amalgamations, a notice under Section 6(2) of the Act is required to be filed with the CCI prior to the same coming into effect subject to the provisions of sub-section (2A) of section 6 and section 43A of the said Act. (See Section 6(2A) of the Act, GoI notification S.O. 2039(E) published on 29th June, 2017) Parties are required to inform CCI of any change in the information provided in the notice to CCI, at the earliest, during the CCI's assessment of the combination. If the change in the information provided in the notice is likely to significantly affect the factors for the determination of AAEC or the CCI's assessment of the combination, the CCI may treat the notice filed as not valid, after providing parties an opportunity of being heard. For further details please access following link.

### 19. What is combination?

Any acquisition, merger or amalgamation that meets the following jurisdictional thresholds, as provided in Section 5 of the Competition Act, 2002 ('Act'), is a 'combination' for the purpose of the

Act. The thresholds relate to the assets and turnover of the parties to the combination, i.e., target enterprise and acquirer (or acquirer group)/merging parties (or the group to which merged entity would belong). At present, thresholds prescribed under the Act (as enhanced by the Central Government vide its Notification No. S.O. 675(E) dated March 4, 2016) as either of the following: 1. Enterprise Level India : > US\$ 308 mn (Assets) & > US\$ 923 mn (Turnover) Worldwide (with India component) : > US\$ 1 bn with at least US\$ 154 mn in India (Assets) & > US\$ 3 bn with at least US\$ 462 mn in India 2. Group Level India : > US\$ 923 mn (Assets) & > US\$ 3.69 bn (Turnover) Worldwide (with India component) : > US\$ 4 bn with at least US\$ 154 mn in India (Assets) & > US\$ 12 bn with at least US\$ 462 mn in India For further details please access following link.

**20. I am planning to acquire less than 25% of equity shares of a listed company from secondary market. Do I need to notify this combination to CCI?**

The acquisition of up to 25% shares where the acquirer does not acquire control and the acquisition is solely as an investment or in ordinary course of business, need not normally be notified to the CCI for prior approval. The acquisition of less than 10% of the total shares or voting rights of an enterprise shall be treated as solely as an investment. Provided that in relation to the said acquisition- 1) The Acquirer has ability to exercise only such rights that are exercisable by the ordinary shareholders of the target enterprise the extent of their respective shareholding. 2) The Acquirer is not a member of the board of directors of the target enterprise and does not have a right or intention to nominate a director on the board of directors of such enterprise and does not intend to participate in the affairs or management of such an enterprise. For further details please access following link.

**21. What are the applicable competition laws/rules/regulations in respect of merger, amalgamations and acquisition transactions?**

Following statutory provisions apply to mergers, amalgamations and acquisitions from competition law perspective: 1) Competition Act, 2002. 2) The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. 3) The Competition Commission of India (General) Regulations, 2009: i) Notification No. S.O. 93(E) dated January 8, 2013 ii) Notification No. S.O. 673(E) dated March 4, 2016 iii) Notification No. S.O. 674(E) dated March 4, 2016 iv) Notification No. S.O. 675(E) dated March 4, 2016 v) Notification No. S.O. 988(E) dated March 29, 2017 vi) Notification No. S.O. 2039(E) dated June 29, 2017 For further details please access following link.

**22. What are the tax implication on capital gains in case of merger?**



The capital gains is exempt for transferor company and transferee company subject to fulfilment of conditions.

### 23. What are tax implications of share transfer?

The tax implication of share transfer are: a) Capital gains tax on transfer of shares and consequent withholding of tax by the buyer in case of non resident seller i) Capital gain taxation in case of indirect transfer – discussed in ensuing slides ii) Concessional rate of 10% - for transfer of unlisted securities by non-residents. However, no indexation benefit available b) Business loss (excluding unabsorbed depreciation) would lapse if the change in shareholding is more than 49% as compared to the last day of the year to which loss relates. c) Tax clearance certificate to be obtained from the sellers

### 24. Is there any minimum level of acceptance that the acquirer needs to have under SEBI regulations under some situations?

Yes, there is a 'Minimum level of acceptance' when an acquirer makes a conditional offer. Minimum level of acceptance refers to the minimum number of shares which the acquirer desires under a conditional offer. If the number of shares validly tendered in the conditional offer, are less than the minimum level of acceptance stipulated by the acquirer, then the acquirer is not bound to accept any shares under the offer.

### 25. What are the disclosures required under Public Announcement?

Public Announcement contains minimum details about the offer, the transaction that triggered the open offer obligations, acquirer, selling shareholders (if any), offer price and mode of payment. SEBI has prescribed format of Public Announcement, which is available in the SEBI website. Please visit the following link.

### 26. Are there additional approvals required for a listed company?

Yes. The Takeover codes of SEBI are applicable for listed entities.

### 27. After the meeting with shareholders/creditors and related regulatory bodies, when can the petition be filed with NCLT?

The Chairperson is required to file a report post the meeting with members/creditors, etc. Within 7 days of the filing this report, the Chairperson need to file a petition with the NCLT.

### **28. What is the procedure to convene meeting of shareholders / creditors?**

At least one month prior notice shall be given to the concerned parties before convening the meeting. It is prescribed that individual notices are to be sent along with the all the related documents of the deal. The company must also make available certain documents on the request of the concerned members.

### **29. What are the key laws and regulations associated with M&A in India?**

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### **30. What is the typical time frame of M&A process?**

The Merger and Acquisition process typically takes about six to 8 months for completion.

### **31. What is the Merger process in India ?**

Broadly speaking, the merger process in India can be summarized in the following steps: 1. Approval of scheme/swap ration by the Board 2. Intimation to Competition Commission of India if applicable 3. File application with National Court of Law Tribunal (NCLT) for dispensation / convening of shareholders and creditors meetings 4. Holding shareholders / creditors meetings, if necessary 5. File petition with NCLT 6. Obtain RD / ROC / OL / stock exchange / IT / CCI approval 7. Obtain approval from Industry specific regulators 8. Obtain NCLT order and file with ROC (Registrar of Companies) 9. Effecting merger by passing necessary accounting entries in books 10. Intimation to various authorities Please note that these steps are based on various sources and may change depending on the industry or change in rules of existing or related policies. These steps may not be applicable to all the companies in the same chronology.



**32. What is an open offer under the SAST Regulations, 2011, Under which situations is an open offer required to be made by an acquirer?**

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**33. What is the meaning of control as per CCI?**

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