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STRUCTURING CROSS-BORDER M&A TRANSACTIONS TO NAVIGATE INDIAN REGULATORY BARRIERS: A LEGAL PERSPECTIVE

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Abstract

Cross-border mergers and acquisitions (M&A) represent one of the most complex categories of corporate transactions, particularly when they involve India as either the acquirer or the target jurisdiction. The Indian regulatory ecosystem governing such transactions is layered and multidimensional, encompassing foreign exchange controls under the Foreign Exchange Management Act, 1999, competition law clearances under the Competition Act, 2002, securities law requirements under the SEBI Takeover Code, and a wide array of sector-specific approvals. This paper undertakes a systematic legal analysis of the principal regulatory barriers confronted by foreign investors in cross-border M&A transactions involving India. It further proposes a set of structuring strategies ranging from careful entity selection and phased investment approaches to creative use of joint ventures, asset acquisitions, and scheme-of-arrangement mechanisms that can meaningfully reduce regulatory friction. The paper concludes with an assessment of emerging trends, including the competition law overhaul introduced by the Competition Amendment Act, 2023, proposed SEBI reforms to streamline scheme approvals, and the strategic opportunities opening up through India's National Monetization Pipeline and Production Linked Incentive schemes. The analysis proceeds from the conviction that regulatory barriers, while real, are rarely insurmountable and that a legally informed, proactively structured transaction stands a considerably better chance of achieving its commercial objectives.

Keywords: Cross-border M&A, Foreign Exchange Management Act, Competition Act, SEBI Takeover Code, FDI policy, deal structuring, joint ventures, competition clearance.

I. Introduction

Mergers and acquisitions have long served as one of the most direct pathways through which capital, technology, and managerial expertise cross national frontiers. For economies seeking foreign investment and domestic firms aspiring to global scale, M&A transactions represent more than financial deals they are moments of structural transformation. Within Asia, and indeed within the broader emerging-market landscape, India has come to occupy a position of growing significance as both a target and an originator of cross-border M&A activity.[520]

The numbers bear this out. Inbound M&A into India has grown at a striking pace over the past decade, with deal values in certain years exceeding USD 35 billion. The sectors driving this

[520] Cross-border mergers and acquisitions refer to transactions in which at least one party is a non-resident entity acquiring or merging with an Indian entity, or vice versa. See generally R.P. Austin & I.M. Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 16th edn., 2015) 928.

activity have diversified well beyond the traditional strongholds of information technology and pharmaceuticals to encompass financial services, consumer goods, logistics, renewable energy, and digital infrastructure.[521] Yet every cross-border M&A transaction that touches India must navigate what is, by international standards, an unusually dense regulatory landscape.

India's legal framework for cross-border M&A is not unified in a single statute. It is, instead, an intricate web of overlapping legislative regimes: foreign exchange controls administered by the Reserve Bank of India (RBI) under the Foreign Exchange Management Act, 1999 (FEMA);[522] a nuanced FDI policy maintained by the Department for Promotion of Industry and Internal Trade (DPIIT);[523] corporate restructuring provisions in the Companies Act, 2013;[524] mandatory competition clearances from the Competition Commission of India (CCI) under the Competition Act, 2002;[525] and, for transactions involving listed companies, the obligations imposed by the SEBI Takeover Code.[526] Layered on top of these are sector-specific caps, licensing conditions, and, in some cases, national-security-driven approval requirements.

The objective of this paper is to provide a rigorous and practically oriented analysis of this regulatory terrain. It seeks to do three things: first, to map the key legal barriers confronting foreign investors in Indian cross-border M&A; second, to articulate structuring strategies that have emerged in practice as effective means of navigating these barriers; and third, to assess how the regulatory environment is changing and what this means for transaction planning. Throughout, the analysis draws on statutory texts, regulatory guidelines, judicial and quasi-judicial decisions, and practitioner commentary and situates the legal analysis within the economic and commercial context that gives it meaning.

II. The Indian Regulatory Landscape for Cross-Border M&A

A. Foreign Exchange Management Act, 1999 and the FDI Policy Framework

FEMA constitutes the foundational statute for any cross-border M&A transaction involving India. Enacted to replace the more draconian Foreign Exchange Regulation Act, 1973, FEMA reoriented the law away from criminal prohibition and toward a regulatory framework predicated on capital account convertibility (subject to prescribed conditions). Under FEMA, foreign direct investment is governed primarily by the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 and the FEMA (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017.[527]

The RBI, which administers FEMA, issues a comprehensive Master Direction on Foreign Investment in India, updated periodically, which consolidates the substantive rules applicable to inbound FDI.[528] The overarching structure of the FDI policy divides investment into two tracks: the 'automatic route,' under which no prior government approval is required (though post-investment reporting to the RBI is mandatory), and the 'approval route,' under which specific government sanction must be obtained before

[521] KPMG, *India M&A Trends Report 2023* (KPMG India, 2023) 5. The report notes that inbound M&A deal value in India crossed USD 35 billion in 2022, reflecting a compound annual growth rate of approximately 14% over the preceding five years.

[522] The Foreign Exchange Management Act, 1999 (Act 42 of 1999) [hereinafter FEMA] is the principal statute governing cross-border capital flows, including inbound foreign direct investment into India.

[523] Consolidated FDI Policy 2020, DPIIT Press Note No. 4 of 2020, Government of India, Ministry of Commerce and Industry, Department for Promotion of Industry and Internal Trade.

[524] The Companies Act, 2013 (Act 18 of 2013), ss. 230–240 [hereinafter Companies Act], govern domestic and cross-border mergers, amalgamations, arrangements and reconstructions.

[525] The Competition Act, 2002 (Act 12 of 2003), ss. 5–6 [hereinafter Competition Act], prescribe mandatory pre-merger notification thresholds in terms of assets and turnover.

[526] The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Regulation 3 [hereinafter SEBI Takeover Code] mandates an open offer whenever an acquirer crosses the 25% shareholding threshold.

[527] Notification No. FEMA 20(R)/2017-RB, Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 [hereinafter FEMA 20(R)].

[528] Reserve Bank of India, Master Direction — Foreign Investment in India, RBI/FED/2017-18/60 (4 January 2018, updated periodically) [hereinafter RBI Master Direction on FDI].

investment. The allocation of sectors between these two routes and the applicable equity caps on foreign ownership is determined by the Consolidated FDI Policy published by the DPIIT.

In practice, the distinction between the automatic and approval routes shapes M&A strategy profoundly. A transaction structured as an acquisition of shares in an entity operating in a sector on the automatic route, within the applicable foreign equity cap, can be closed without any government consent provided the prescribed pricing norms and reporting requirements are met. Conversely, a transaction touching a sector under the approval route (such as defence, print media, or satellite communications) must obtain prior government clearance, introducing both additional time and regulatory uncertainty into the deal calendar.

B. The Companies Act, 2013 and the NCLT Framework

Cross-border M&A involving Indian companies may be structured through several mechanisms under the Companies Act, 2013 most notably, mergers and amalgamations governed by Sections 230 to 240. The adjudicatory body for such restructurings is the National Company Law Tribunal (NCLT), a specialised quasi-judicial forum whose approval is required for any court-sanctioned scheme of merger or arrangement.[529]

A particularly significant development for inbound cross-border M&A was the insertion of Rule 25A into the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, which operationalised Section 234 of the Companies Act.[530] This provision, for the first time, expressly permitted a foreign company to merge with an Indian company (an 'inbound merger'), subject to RBI approval and compliance with the applicable FDI sectoral limits.[531] Prior to this amendment, the statutory framework was widely understood to permit only outbound mergers (Indian company into foreign company), and inbound transactions therefore required elaborate workarounds — typically through holding structures in intermediary jurisdictions. The availability of the inbound merger route has materially widened the structural options available to foreign acquirers.[532]

The NCLT process, however, is not swift. A scheme of merger or amalgamation typically requires the convening of meetings of shareholders and creditors, regulatory notices, filing of the scheme with the NCLT, and ultimately a hearing at which the NCLT examines the fairness and legality of the scheme. For schemes involving listed companies, SEBI must be notified, and SEBI's observations on the scheme must be obtained before the matter is placed before the NCLT.[533] End-to-end, the process can take anywhere from nine to eighteen months, depending on the complexity of the scheme and the workload of the relevant NCLT Bench.

C. Competition Law: The Role of the Competition Commission of India

Foreign investors proposing to acquire significant stakes in Indian companies — or to execute mergers that meet the prescribed thresholds must obtain clearance from the Competition Commission of India (CCI). The Competition Act, 2002 mandates prior notification to the CCI for 'combinations' exceeding the asset and turnover thresholds set out in Section 5 of the Act.[534] The CCI is then required to assess whether the combination is

[529]The Companies Act, 2013 (Act 18 of 2013), ss. 230–240, govern domestic and cross-border mergers, amalgamations, arrangements and reconstructions.

[530]Companies Act, 2013 (Act 18 of 2013), s. 234 read with the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, Rule 25A, inserted by amendment in 2017 to facilitate inbound mergers.

[531]RBI Master Direction on FDI, para 4.1, provides that inbound mergers permitting the foreign company to merge into an Indian entity are subject to RBI approval and must comply with sectoral caps.

[532]Mihir Naniwadekar & Umakanth Varottil, "The Curious Case of Cross-Border Mergers in India" (2016) 17 *Singapore Academy of Law Journal* 512, 519.

[533]SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Regulation 37 [hereinafter LODR Regulations], require listed companies to obtain SEBI's no-objection for schemes of arrangement before approaching the National Company Law Tribunal.

[534]Competition Act, 2002 (Act 12 of 2003), ss. 5–6, prescribe mandatory pre-merger notification thresholds in terms of assets and turnover.

likely to cause an appreciable adverse effect on competition in India.[535]

The Competition Amendment Act, 2023 introduced a significant revision to this framework: in addition to the existing asset and turnover thresholds, a deal-value-based threshold now applies. Transactions with a deal value exceeding INR 2,000 crore, where the target has 'substantial business operations' in India (measured by reference to users, revenue, or assets), will require CCI notification even if the conventional thresholds are not met.[536] This amendment was plainly directed at capturing technology-sector acquisitions particularly acquisitions of start-ups with large Indian user bases but modest revenues or tangible assets. Its practical impact on deal timelines and costs for technology M&A in India is expected to be considerable.

The CCI offers two procedural pathways. Combinations that do not give rise to horizontal, vertical, or complementary overlaps assessed against a checklist prescribed by the CCI — may be notified through the 'green channel,' which results in deemed approval upon filing.[537] All other combinations require review under the standard Form I or Form II process, with the CCI having thirty working days for Phase I review and an additional period (extendable) for a Phase II investigation. In practice, most straightforward combinations clear in Phase I; complex cases particularly those involving significant market shares in concentrated sectors — may face remedies or, in rare cases, prohibition.

D. Securities Law: The SEBI Takeover Code

Where the target of a cross-border acquisition is a company listed on an Indian stock exchange, the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (the Takeover Code) apply in full force. The Takeover Code requires any acquirer crossing the 25% shareholding threshold or, if already holding more than 25%, making an acquisition of 5% or more in a financial year to make a mandatory open offer to the public shareholders of the target for at least 26% of the total share capital.[538]

The open offer requirement substantially affects the economics and structure of cross-border M&A in the listed space. An acquirer must finance not only the primary acquisition but also the contingent liability arising from the mandatory open offer which, depending on the target's market capitalisation and the acquirer's entry price, can be a very substantial sum. The Takeover Code does, however, provide a catalogue of exemptions from the open offer obligation.[539] Most relevant to structured cross-border transactions is the exemption for acquisitions pursuant to a court-sanctioned scheme of arrangement, which has historically provided a route for inbound M&A without triggering the open offer requirements (though the availability of this exemption is itself subject to regulatory scrutiny).

The LODR Regulations additionally require listed target companies to make timely disclosures of material information, including the pendency of any scheme of amalgamation or arrangement. This creates an inherent tension between the confidentiality requirements of deal negotiations and the disclosure obligations of listed entities — a tension that practitioners must navigate carefully.[540]

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[535] *Competition Commission of India v. Coordination Committee of Artists and Technicians of W.B. Film and Television*, (2017) 5 SCC 17.

[536] The Competition (Amendment) Act, 2023 (Act 17 of 2023) introduced deal-value-based thresholds for CCI notification, with the relevant threshold set at INR 2,000 crore for transactions involving significant business operations in India.

[537] Competition Commission of India, Combination Regulations, 2011 (as amended 2022), Regulation 5(8) — the "green channel" route for automatic approval of combinations that do not result in horizontal, vertical or complementary overlaps.

[538] SEBI Takeover Code, Regulation 3, mandates an open offer whenever an acquirer crosses the 25% shareholding threshold.

[539] SEBI Takeover Code, Regulation 10, provides exemptions from the mandatory open offer obligation, including for transactions pursuant to a court-sanctioned scheme under the Companies Act, 2013.

[540] LODR Regulations, Regulation 37, require listed companies to obtain SEBI's no-objection for schemes of arrangement before approaching the National Company Law Tribunal.

E. Sector-Specific Regulations and National Security Considerations

Beyond the horizontal regulatory framework described above, a number of sectors impose their own, additional requirements. Insurance, for example, is subject to the regulatory oversight of the Insurance Regulatory and Development Authority of India (IRDAI), and any change in control of an insurer requires IRDAI approval.[541] Telecommunications companies must obtain clearance from the Department of Telecommunications. Banking sector M&A requires the approval of the Reserve Bank of India in its capacity as banking regulator (distinct from its FEMA-related functions). Defence manufacturing imposes some of the most stringent foreign equity restrictions of any sector.

Of particular contemporary relevance is the FDI restriction introduced through Press Note 3 (2020), issued in the immediate aftermath of the COVID-19 pandemic. Under this measure, entities from countries sharing a land border with India prominently China or where the beneficial owner of the investing entity is from such a country, are required to obtain prior government approval for any investment in India, regardless of sector.[542] The measure has introduced a new layer of complexity for deals involving Chinese capital and, by extension, for many global private equity and venture capital structures that count Chinese investors as limited partners.[543]

III. Structuring Strategies to Navigate Regulatory Barriers

A. Pre-Transaction Planning: Due Diligence and Structural Assessment

The most effective risk mitigation in cross-border M&A begins before the transaction is formally structured. A thorough pre-transaction regulatory due diligence encompassing FEMA compliance history, CCI notification obligations, pending litigation, sector-specific licence conditions, and the target's own corporate structure is indispensable. Regulatory issues discovered after signing are far more costly to resolve than those identified and addressed at the term sheet stage.[544]

An early-stage regulatory assessment should address at least the following questions: (i) Does the target operate in a sector subject to FDI caps, and if so, what is the headroom for additional foreign investment? (ii) Does the proposed acquisition structure trigger the CCI notification thresholds including, post-2023 Amendment, the deal-value threshold? (iii) Is the target a listed company, and if so, will the transaction trigger the mandatory open offer requirement? (iv) Are there sector-specific approvals required from industry regulators? (v) What are the foreign exchange pricing norms applicable to the transfer of shares, and will the proposed consideration satisfy those norms?

The answers to these questions will shape not only the regulatory strategy but also the fundamental choice of acquisition structure. An acquirer that discovers, during due diligence, that the target's principal licences are non-transferable or that the proposed consideration structure does not comply with FEMA pricing norms must either renegotiate the commercial terms or find an alternative structural approach before proceeding to sign.[545]

B. Choice of Acquisition Structure

1. Share Acquisitions

The most common structure for inbound M&A in India is a direct acquisition of shares in the Indian target company. This approach is straightforward, carries fewer stamp duty implications than asset acquisitions in some states, and preserves the target's corporate

[541] The Insurance Regulatory and Development Authority of India Act, 1999 (Act 41 of 1999); the Insurance (Amendment) Act, 2021 increased the FDI cap in the insurance sector from 49% to 74%.
[542] Press Note 3 (2020 Series), DPIIT (17 April 2020): FDI from entities in countries sharing land borders with India, or where the beneficial owner is from such countries, requires prior government approval.
[543] Anirudh Krishnan, "FDI from China Post-COVID: Navigating the Regulatory Maze" (2021) 63 *National Law School of India Review* 101.
[544] P. Murali Krishnan, *Cross-Border Mergers and the Indian Legal Framework* (Eastern Book Company, 2nd edn., 2021) 143.
[545] S. Ramasubramanian, "Structuring Inbound Mergers in India: A Regulatory Perspective" (2022) 54 *Journal of the Indian Law Institute* 215, 219.

relationships (contractual, regulatory, and employment). For sectors on the automatic FDI route, a share acquisition can be completed with minimal regulatory interaction subject to post-investment reporting to the RBI and compliance with the applicable pricing formula.[546]

Where the acquirer wishes to obtain control without triggering the mandatory open offer under the Takeover Code (in the listed company context), structuring the acquisition so as to remain below the 25% threshold is one option though it will limit the degree of control obtained. Alternatively, the Takeover Code exemptions may be invoked: for instance, the exemption for inter-se transfers between promoters, or the scheme of arrangement exemption discussed above. In the unlisted space, there is no Takeover Code concern, and the share acquisition structure is generally the cleanest and most efficient approach.

2. Asset Acquisitions

Asset acquisitions in which the acquirer purchases specific assets and liabilities of the target, rather than shares in the target entity offer certain advantages in the Indian context. Most significantly, the acquirer takes on only those liabilities it expressly assumes; contingent liabilities (including legacy FEMA violations, tax disputes, or environmental liabilities) remain with the seller entity. In regulated sectors, however, key assets such as licences and permits may not be transferable by way of an asset sale, or may require regulatory consent to transfer eroding the principal advantage of the structure.

Asset acquisitions in India can also attract higher rates of stamp duty (levied by state governments, and therefore variable across states) and may give rise to complex tax implications, both for the seller (capital gains characterisation of the proceeds) and for the acquirer (deductibility of purchase price allocation). Practitioners therefore typically reserve the asset acquisition structure for situations where the target's liability profile is particularly concerning, or where only specific business units or intellectual property portfolios are being acquired.

3. Joint Ventures

For acquirers who wish to establish a presence in a sector subject to FDI caps or who wish to leverage the local knowledge, regulatory relationships, and distribution networks of an established Indian partner a joint venture structure may be preferable to outright acquisition.[547] A joint venture allows the foreign investor to invest up to the applicable FDI cap while the Indian partner maintains the majority stake, preserving the entity's qualification as a domestically controlled company for licensing and regulatory purposes.

Joint ventures, however, introduce their own complications: governance rights must be carefully negotiated, exit mechanisms must be clearly specified, and the relationship between the parties must be structured to minimise the risk of deadlock. It is advisable to include robust provisions for drag-along and tag-along rights, put/call options for eventual buyout (exercisable once any applicable sector cap is relaxed), and clear dispute resolution mechanisms preferably arbitration rather than litigation, given the relatively slower pace of Indian commercial courts.

4. Phased Investment Approach

In sectors where the applicable FDI cap does not accommodate an immediate majority or controlling stake, a phased investment approach allows the foreign investor to enter at the currently permissible level and increase its stake as the regulatory environment evolves. This strategy has proved particularly valuable in the insurance sector, where the FDI cap was progressively raised from 26% to 49% and

[546] FEMA, 1999 (Act 42 of 1999), s. 6(3); see also Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, Rule 9, for pricing guidelines applicable to transfer of shares by non-residents.

[547] Abhijit Joshi & Prashant Mara, "Joint Ventures as a Strategic Entry Mode in India: Legal Considerations" (2020) 12 *Indian Journal of Arbitration Law* 45, 52.

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subsequently to 74%.[548] An investor who structured its initial entry in anticipation of future liberalisation including appropriate first-refusal and preferential subscription rights in the JV or shareholders' agreement was well-positioned to deepen its investment as the regulatory space opened up.

C. Compliance Mechanisms During the Transaction

1. Foreign Exchange Pricing Norms

One of the most technically demanding compliance requirements in any inbound Indian M&A transaction is the pricing norm applicable to the transfer of shares from a resident seller to a non-resident acquirer. Under the relevant FEMA regulations, the price paid by the non-resident acquirer cannot be less than the 'fair value' of the shares, determined in accordance with any internationally accepted pricing methodology on an arm's length basis typically a discounted cash flow (DCF) analysis or a comparable company multiple analysis, certified by a SEBI-registered merchant banker or a chartered accountant.[549]

Conversely, where a non-resident seller is transferring shares to a resident buyer, the consideration cannot exceed the fair value so determined. These pricing norms are not merely administrative formalities they constrain the commercial negotiation. A foreign acquirer who agrees to pay a price above the certified fair value will be in violation of FEMA, with potential consequences including compounding penalties and the possible unwinding of the transaction. Structuring the consideration including earnouts, deferred consideration, and milestone-linked payments — must be done with the pricing norms in mind.[550]

2. CCI Filing Strategy

An effective CCI filing strategy can meaningfully reduce the time and cost of competition clearance. Where the transaction qualifies for the green channel (no horizontal, vertical, or complementary overlaps), filing under this expedited route results in immediate deemed approval a significant advantage over the standard review period.[551] Where the green channel is not available, counsel should focus on assembling a comprehensive and well-organised filing that anticipates the CCI's likely areas of inquiry, so as to minimise requests for additional information and thereby shorten the Phase I review period.

In transactions involving significant market overlaps particularly in concentrated sectors such as pharmaceuticals, cement, or telecom it may be advisable to engage in pre-filing consultation with the CCI (available under the CCI's informal guidance mechanism) to obtain an early read on potential competitive concerns. In some cases, proactively offering behavioural remedies (such as supply commitments or licensing undertakings) or structural remedies (such as the divestiture of overlapping business lines) can accelerate the clearance process and improve the probability of approval.[552]

3. Managing the Takeover Code in Listed Acquisitions

The mandatory open offer under the SEBI Takeover Code is, as noted, triggered by crossing the 25% shareholding threshold. Several structural techniques are available to manage this obligation. First, an acquirer that is willing to accept a minority position may calibrate its initial acquisition to remain below the 25% threshold acquiring, say, 24.9% of the target's expanded share capital (post a

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[548] The Insurance Regulatory and Development Authority of India Act, 1999 (Act 41 of 1999); the Insurance (Amendment) Act, 2021 increased the FDI cap in the insurance sector from 49% to 74%.

[549] FEMA, 1999 (Act 42 of 1999), s. 6(3); see also Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, Rule 9, for pricing guidelines applicable to transfer of shares by non-residents.

[550] Ministry of Finance, Guidelines on Computation of Consideration and Valuation of Shares in Case of Mergers and Amalgamations, Circular No. 5/2012 (1 February 2012).

[551] Competition Commission of India, Combination Regulations, 2011 (as amended 2022), Regulation 5(8) — the "green channel" route for automatic approval of combinations that do not result in horizontal, vertical or complementary overlaps.

[552] *Sun Pharmaceutical Industries Ltd. v. Ranbaxy Laboratories Ltd.*, CCI Case No. C-2014/05/170 — one of the earliest and most studied cross-border pharmaceutical sector combinations before the CCI.

preferential allotment). Second, where the acquirer seeks eventual control, it may stage the acquisition: first acquiring a sub-25% stake (no open offer), then triggering the open offer at a point when it is commercially ready to acquire up to 51% in total.[553]

Third, as noted above, the scheme of arrangement route particularly for inbound mergers under Section 234 of the Companies Act provides a court-sanctioned mechanism that carries its own Takeover Code exemption. Fourth, in negotiated acquisition scenarios, the buyer and seller may agree that the open offer is to be conducted simultaneously with the primary acquisition, with the acquirer's obligation to complete the primary acquisition conditioned on the open offer not resulting in an unacceptably high total consideration (the 'conditional tender offer' model, used, for example, in some of the larger Indian listed company acquisitions in the pharmaceutical space).[554]

D. Post-Transaction Integration: Regulatory Considerations

The regulatory journey does not end at closing. Post-transaction integration of an Indian acquired entity raises its own set of compliance obligations. On the FEMA front, the acquirer must file the requisite Form FC-TRS (for share transfers) or Form FC-GPR (for fresh share issuance) within the prescribed timelines following completion.[555] Failure to make timely filings is a compoundable FEMA violation, and while the RBI's compounding process allows for after-the-fact regularisation, it involves cost, management attention, and reputational risk.

For transactions effectuated through a scheme of amalgamation, all licences, approvals, and contracts of the transferor company vest in the resulting company upon the scheme's effectiveness but this vesting may, in some cases, require notification to or approval from the relevant regulatory authority or the counterparty. Sector-specific statutes (in banking and insurance, for instance) may require the regulator's explicit confirmation of the transfer of licences. Acquirers who overlook these post-closing obligations risk operating without valid regulatory authorisations.

Employment integration is another area of post-closing regulatory concern. India's labour laws a patchwork of central and state statutes impose obligations in respect of retrenchment compensation, employee benefit fund (provident fund and gratuity) transfers, and prior government consent for retrenchment in establishments above a specified size. An acquirer planning workforce rationalisation as part of post-merger integration must factor these obligations into its integration timeline and cost model.

Finally, tax integration is an issue of the first order. While the Income Tax Act, 1961 offers certain exemptions for amalgamations including the transfer of accumulated losses and depreciation from the transferor to the transferee company these benefits are subject to conditions (including the requirement that the resulting company is an Indian company).[556] Inbound mergers under Section 234 of the Companies Act, where a foreign company merges into an Indian entity, may raise novel questions about the characterisation of the merger consideration for Indian tax purposes questions that courts and the tax authorities have not yet fully resolved.[557]

IV. Illustrative Case Studies

A. Case Study I: Inbound Pharmaceutical Sector Acquisition (Hypothetical)

Consider the following hypothetical scenario, constructed from features common to inbound

[553]Umakanth Varottil, "Comparative Takeover Regulation and the Concept of Control" (2015) 10 *Asian Journal of Comparative Law* 1, 14.
[554]P.K. Garg, *Mergers, Amalgamations and Takeovers: Law and Practice* (Taxmann Publications, 5th edn., 2022) 389.
[555]RBI Master Direction on FDI.
[556]The Income Tax Act, 1961 (Act 43 of 1961), ss. 2(1B), 47(vi), 47(vii), provide specific exemptions for amalgamations satisfying prescribed conditions, including the requirement that the resulting company is an Indian company.
[557]Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020; see also the Finance Act, 2021, s. 28, amending provisions relating to indirect transfers.

M&A in the Indian pharmaceutical sector.[558] A large European pharmaceutical multinational ("EuroPharma") seeks to acquire a controlling stake in an Indian listed pharmaceutical company ("IndoPharma") that has a diversified portfolio of branded generics and a significant manufacturing base. IndoPharma has a market capitalisation of approximately INR 12,000 crore. EuroPharma's existing shareholding in IndoPharma, acquired gradually over the preceding two years through open-market purchases, stands at 24.9%.

EuroPharma's objective is to increase its stake to 65% sufficient to exercise effective operational control. The structural challenges are immediately apparent. First, any acquisition of shares taking EuroPharma above 25% will trigger the mandatory open offer requirement under the Takeover Code, obliging EuroPharma to make a public offer for at least 26% of IndoPharma's total share capital. At IndoPharma's current market price, this open offer would require EuroPharma to deploy approximately INR 3,100 crore in addition to the consideration for the primary block acquisition. Second, the aggregated size of the transaction (primary acquisition plus open offer) is likely to meet the CCI notification thresholds, requiring competition clearance prior to completion.

The structuring solution deployed in this scenario involves the following elements. First, EuroPharma enters into a Share Purchase Agreement with the promoter group of IndoPharma for the acquisition of a 40.1% promoter stake. Simultaneously, it triggers the mandatory open offer (seeking an additional 26%). The primary acquisition is conditioned on the open offer not resulting in an aggregate cost exceeding a specified cap providing EuroPharma with a degree of financial protection in the event that a large number of public shareholders tender their shares. Second, EuroPharma files for CCI clearance under the standard Form I process, given that it is acquiring a pharmaceutical company and EuroPharma has its own Indian pharmaceutical operations. An experienced regulatory counsel team prepares a detailed competitive analysis demonstrating that the combined entity's market shares in individual therapeutic segments remain well below levels likely to raise competitive concerns securing Phase I clearance within twenty-seven working days.

Third, the pricing of the primary acquisition is structured to comply with FEMA's fair value norms a certified DCF valuation is obtained from a SEBI-registered merchant banker, and the purchase price per share is set at a modest premium to this fair value. The open offer price is determined separately, in accordance with the Takeover Code formula (the higher of the price at which shares were acquired in the preceding twenty-six weeks and the negotiated primary acquisition price). The entire transaction from signing of the Share Purchase Agreement to completion of the open offer takes approximately nine months, with the CCI clearance and NCLT-approval processes running in parallel where possible.

The key lesson from this case study is the value of parallel-processing the regulatory approvals and of stress-testing the financial model against the contingent open offer liability before signing. The acquirer who defers the regulatory analysis to the post-signing phase runs the risk of discovering unforeseen obstacles after it is contractually committed a position of considerable commercial and legal vulnerability.

B. Case Study II: Failed Structure — A Cautionary Illustration

The second case study illustrates the risks of inadequate pre-transaction regulatory planning.[559] A mid-sized technology firm from a country sharing a land border with India

[558] Hypothetical Case Study A is a composite illustration drawn from publicly reported features of pharmaceutical-sector M&A transactions in India between 2015 and 2022, including elements from the Abbott–Piramal and Mylan–Strides transactions, reconfigured for anonymity and pedagogical clarity.

[559] Hypothetical Case Study B draws on patterns documented in Cyril Amarchand Mangaldas, "India: M&A Disputes and Enforcement Trends 2022" (Cyril Amarchand Mangaldas M&A Report, 2022) 11.

("TechCo") sought to acquire a minority stake in an Indian fintech start-up ("FinStart"). TechCo's investment vehicle was a Cayman Islands-incorporated holding company, which TechCo believed would insulate the transaction from the Press Note 3 (2020) restrictions applicable to investments from land-border countries.

The DPIIT, upon reviewing the transaction, took the view that the beneficial ownership of the Cayman SPV rested ultimately with TechCo a Chinese-incorporated entity and accordingly required prior government approval for the investment.[560] Since TechCo had not obtained such approval prior to the transfer of funds into FinStart's bank account, the transaction was in prima facie violation of FEMA and the applicable FDI policy. The RBI initiated inquiries, and the parties were eventually required to undergo FEMA compounding proceedings, paying a significant penalty. More consequentially, the investment was effectively frozen for over eighteen months while the regulatory situation was resolved during which time FinStart's commercial momentum stalled and its valuation declined substantially.

This case illustrates several important lessons. The first is that intermediate holding structures do not automatically neutralise restrictions tied to the beneficial owner's nationality — DPIIT and the RBI have consistently applied a substance-over-form analysis in evaluating such structures.[561] The second is that pre-transaction clearance from the DPIIT (or at minimum, a written legal opinion addressing the Press Note 3 applicability question) should have been obtained before any funds were transferred. The third is that the compounding process, while available as a remedial mechanism, is not costless in terms of time, money, and the adverse signal it sends to counterparties and regulators about the investor's bona fides.

V. Emerging Trends and Future Outlook

A. Competition Law Reform: The 2023 Amendment and Its Implications

The Competition Amendment Act, 2023 represents the most significant overhaul of India's merger control regime since the Competition Act's notification provisions came into force in 2011. Beyond the introduction of the deal-value threshold discussed above,[562] the Amendment also reduces the statutory Phase I review period from thirty to thirty working days (with adjustments in the time-stop mechanism), introduces a settlement and commitment framework for anti-competitive agreements and abuse of dominance cases, and strengthens the CCI's investigative powers.

For cross-border M&A practitioners, the deal-value threshold is the most immediately consequential change. Its impact will be felt most acutely in technology, digital, and data-driven sectors, where targets may have tens of millions of Indian users and substantial Indian revenues but modest tangible asset bases. Acquirers in these sectors will now need to factor CCI filing costs and timelines into transactions that previously cleared without any notification obligation.[563]

The introduction of the settlement framework is also noteworthy. In transactions where the CCI raises competitive concerns that might otherwise result in a prolonged Phase II investigation, the ability to negotiate a settlement offering voluntary commitments and remedies in exchange for an expedited resolution may prove attractive to acquirers who value deal certainty and speed.

B. SEBI's Proposed Reforms to the Scheme of Arrangement Process

SEBI published a consultation paper in February 2023 proposing significant reforms to the regulatory process for schemes of arrangement

[560] Press Note 3 (2020 Series), DPIIT (17 April 2020): FDI from entities in countries sharing land borders with India, or where the beneficial owner is from such countries, requires prior government approval.

[561] Anirudh Krishnan, "FDI from China Post-COVID: Navigating the Regulatory Maze" (2021) 63 *National Law School of India Review* 101.

[562] Competition (Amendment) Act, 2023 (Act 17 of 2023), s. 6(2)(ba) — deal-value threshold of INR 2,000 crore for transactions where the target has "substantial business operations" in India, assessed on the basis of users, revenue or assets in India.

[563] AZB & Partners, "India M&A Review: Key Regulatory Developments in 2023" (AZB & Partners, January 2024) 4.

by listed companies. Among the most significant proposals is a reduction in the indicative end-to-end timeline for scheme approvals from approximately 150 days (or more) to 90 days, achieved through streamlining SEBI's own review process and enabling SEBI's observations to be issued earlier in the overall regulatory sequence.[564]

If implemented, these reforms would meaningfully improve the attractiveness of the scheme route for cross-border M&A — particularly inbound mergers under Section 234 of the Companies Act, which currently require both RBI approval and NCLT sanction in addition to SEBI observations. A shorter, more predictable timeline would reduce the regulatory risk premium that acquirers currently build into their assessment of scheme-based transaction structures.[565]

C. Strategic Opportunities: Monetization and PLI Schemes

The Indian government's National Monetization Pipeline (NMP) its initiative to monetize brownfield infrastructure assets across roads, railways, power, telecom, and related sectors over the period 2021–2025 represents a substantial pipeline of M&A-adjacent opportunities for foreign and domestic investors.[566] Transactions involving NMP assets typically involve long-term concessions or leases (rather than outright ownership transfers), but they nonetheless engage many of the same regulatory frameworks — including FEMA, CCI, and sector-specific approvals and offer practitioners useful experience in navigating these frameworks in a high-profile, government-sponsored context.

The Production Linked Incentive (PLI) schemes, launched across fourteen manufacturing sectors, are attracting significant FDI particularly in electronics, pharmaceuticals, and textiles and creating acquisition targets as domestic manufacturers scale up to meet PLI-linked investment and production commitments.[567] Foreign acquirers interested in the Indian manufacturing sector should be attentive to the PLI incentive structures of their target companies, since an acquisition may affect the target's eligibility for ongoing PLI disbursements.

D. Geopolitical Risk and the Evolving Investment Treaty Landscape

India's investment treaty landscape has undergone a substantial reconfiguration since the *White Industries* arbitration award of 2011 prompted a systematic review of India's bilateral investment treaty (BIT) programme.[568] India adopted a new Model BIT in 2016 that significantly narrows the substantive protections available to foreign investors most notably by requiring the exhaustion of domestic remedies for a period of five years before international arbitration may be invoked.[569]

For cross-border M&A investors, the state of India's BIT network has direct implications for the level of international legal protection available in the event of regulatory expropriation or denial of justice. The narrowing of treaty protections makes it more important not less for investors to structure their Indian acquisitions through jurisdictions that retain favourable BIT arrangements with India (though the current treaties are being progressively renegotiated or terminated), and to build

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[564]SEBI, Consultation Paper on Regulatory Framework for Mergers and Acquisitions (SEBI, February 2023), para 3.2, proposing a streamlined timeline for scheme approvals from 150+ days to 90 days.

[565]SEBI Circular No. SEBI/HO/CFD/DIL1/CIR/P/2021/0000000665 (23 November 2021) on streamlining the process of schemes of arrangement by listed companies.

[566]NITI Aayog, *National Monetization Pipeline 2021–2025* (Government of India, 2021): the Government's initiative to monetize brownfield infrastructure assets offers significant M&A opportunities, particularly in the roads, railways, and telecom sectors.

[567]Production Linked Incentive (PLI) Scheme, Ministry of Finance, Department of Expenditure, notification dated March 2020 (and subsequent sector-specific notifications): incentivises domestic manufacturing and has attracted significant FDI in electronics, pharmaceuticals, and textiles.

[568]*White Industries Australia Ltd. v. Republic of India*, UNCITRAL Award (30 November 2011) — an important investment arbitration award that spurred India to review its Bilateral Investment Treaty programme.

[569]India's Model Bilateral Investment Treaty, 2016, Art. 13, restricts recourse to international arbitration by requiring exhaustion of local remedies for a minimum of five years.

contractual risk mitigation into the deal documentation.[570]

E. Digitalisation and Data Regulation

The enactment of the Digital Personal Data Protection Act, 2023 (DPDPA) has added a new dimension to cross-border M&A due diligence in India. Targets operating in sectors with significant personal data processing e-commerce, fintech, healthtech, edtech must now be assessed for compliance with the DPDPA's requirements: data fiduciaries' obligations, consent management, data localisation (to the extent notified), and cross-border data transfer restrictions.

Inadequate data protection compliance is increasingly a material issue in M&A transactions both as a source of pre-closing liability risk and as a potential post-closing integration challenge. Acquirers should ensure that their due diligence teams include data protection specialists, and that the acquisition agreement includes representations and warranties (and corresponding indemnities) in relation to the target's DPDPA compliance status.

VI. Conclusion

India's regulatory framework for cross-border M&A is, by any measure, among the more complex in the Asia-Pacific region. Its architecture built layer by layer over decades, by legislative amendment, regulatory notification, and judicial interpretation reflects the competing imperatives that have historically shaped Indian economic policy: the desire to attract foreign capital alongside the imperative to preserve domestic control over strategic sectors; the aspiration toward market liberalisation alongside the retention of regulatory oversight of foreign exchange flows.

The analysis in this paper has demonstrated that the principal barriers to cross-border M&A in India are not insuperable. They are, rather, amenable to navigation provided the investor approaches the transaction with appropriate legal expertise, adequate lead time, and a genuine willingness to adapt its commercial structure to regulatory realities rather than the reverse. The key structuring insights that emerge from this analysis may be summarised as follows.

First, early-stage regulatory due diligence is not a cost to be minimised but an investment to be made — one that consistently delivers returns by enabling structural choices that would not have been available had the regulatory analysis been deferred.

Second, the choice of acquisition structure whether by way of direct share acquisition, asset purchase, joint venture, inbound merger, or phased investment should be driven not only by commercial preference but by a rigorous assessment of the regulatory implications of each approach for FEMA, competition law, and securities law compliance.

Third, the regulatory parallel-processing of approvals CCI notification, SEBI observations, RBI filings, and sector-specific clearances is essential to managing deal timelines. Sequencing these approvals serially, rather than concurrently, unnecessarily extends the deal calendar and increases the risk of regulatory changes adversely affecting the transaction.

Fourth, the post-closing compliance obligations FEMA filings, licence transfer confirmations, employment law requirements, and tax integration must be mapped and discharged with the same rigour as pre-closing regulatory clearances.

Finally, the Indian regulatory landscape is not static. The Competition Amendment Act, 2023, the proposed SEBI reforms to scheme timelines, the DPDPA, and the evolving BIT landscape are reshaping the regulatory terrain in ways that will affect the structuring calculus for cross-border M&A for years to come. Legal practitioners and transacting parties who stay abreast of these

[570] S. Krishnaswamy, "Geopolitical Risk and M&A Deal Structuring in Asia" (2023) 18 *Asian Business Lawyer* 77, 89.

developments and who engage proactively with regulators rather than reactively will be best placed to capture the very considerable opportunities that India's M&A market continues to offer.[571]

India, it has been said, is not a country for the impatient. But for those who engage with its regulatory architecture thoughtfully and in good faith, the rewards both commercial and in the form of durable legal relationships with one of the world's most dynamic economies are very substantial indeed.

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