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M&A ACTIVITY

1. Please give a brief overview of the public M&A market in your jurisdiction.

M&A has become an increasingly popular method of reorganising business entities. Following the widespread economic reforms introduced in India in 1991, the exposure of Indian industries to global competition has resulted in Indian companies significantly increasing their M&A activities, particularly in cross-border acquisitions. Dynamic government policies and economic stability are two of the main factors considered to be favourable for the steady growth of the M&A sector in India.

The year 2009 witnessed slow progress in cross-border M&A due to the global recession, with deals worth a modest US$11.9 billion. In contrast, 2010 started with the announcement of deals worth US$14 billion during the first 45 days. Some of the major transactions which took place during the year were:

- Acquisition of Zain Telecom's Africa operations by Bharti Airtel, a major telecommunications operator, for US$10.7 billion (as at 1 March 2011, US$1 was about EUR0.7).
- Thermax Ltd, a company headquartered in Pune, India, and operating globally by providing a range of engineering solutions to the energy and environment sectors, has acquired Danstoker A/S, a leading European boiler manufacturer and its German subsidiary, Omnical Kessel. The acquisition, valued at EUR29.5 million was completed on 8 November 2010.
- To build a global presence in the international fast moving consumer goods market, Dabur India acquired US-based Namaste Laboratories LLC and its three subsidiary companies for US$100 million. The deal marks Dabur's entry into the US$1.5 billion ethnic hair care products market in the US, Europe and Africa. The transaction is expected to be completed by the end of 2010, subject to regulatory approvals in the US.
- IMImobile, one of India's largest and fastest growing mobile technology companies, acquired a 97.1% stake in WIN plc, a UK-based mobile content and services company.

2. What are the main means of obtaining control of a public company?

The following are the main methods of obtaining control of a public company.

Mergers and amalgamations

Mergers and amalgamations are the combination of two or more companies into a single company, resulting in the surviving company taking over the merging companies' assets and liabilities.

Demergers

Demergers require splitting one company into two or more companies, resulting in the shareholders of the original company receiving shares in the new companies.

Acquisitions

An acquisition involves buying the shares of the target from its existing shareholders, through one of the following methods:

- **Takeover.** The bidder acquires control over the target's shares or assets either:
  - directly by becoming the owner; or
  - indirectly by acquiring control over the target's management.
- **Leveraged buyout.** A financial investor acquires a controlling interest in the target's equity, with a significant percentage of the purchase price being financed through borrowing. The assets of the target are used as collateral for the borrowed capital, sometimes with the assets of the bidder.
- **Bailout takeover.** This involves the takeover of a financially weak but recoverable company for the purposes of revival or rehabilitation.

Private placements

Private placements involve selected companies buying another company's freshly issued shares, rather than purchasing shares from existing shareholders.

Public offers

It is possible to acquire control by buying shares offered and issued by listed companies to the general public through the stock market.

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HOSTILE BIDS

3. Are hostile bids allowed? If so, are they common? If they are not common, why not?

Indian law does not specifically prohibit hostile bids or takeovers because the management of a company cannot determine or exercise control over who becomes a shareholder of the company.

Hostile bids, however, are not common in India. This may be because of the:

- Regulatory controls on takeovers under the Securities and Exchange Board of India (SEBI) (Substantial Acquisition of Shares and Takeovers) Regulations 1997 (Takeover Code) (*see Questions 4 and 25*).
- Foreign investment limits set out under the foreign direct investment (FDI) policy of India for investment in the various industrial sectors (*see Questions 4 and 26*).

REGULATION AND REGULATORY BODIES

4. How are public takeovers and mergers regulated, and by whom?

Mergers and public takeovers are regulated under the following laws:

- **The Companies Act 1956 (Companies Act**). This provides the following legal requirements for mergers and amalgamations:
  - the shareholders, board of directors and company law board (CLB) must give permission for a merger or amalgamation before it is implemented. The CLB is a quasi-judicial body constituted by the Central Government of India and conferred with certain powers of a civil court. Proceedings before the CLB are regarded as judicial proceedings. Among other various powers, the CLB has been entrusted with the role of approving mergers and amalgamations;
  - the acquiring and the acquired companies must inform the stock exchanges on which they are listed about the merger;
  - the merging companies must file an application, approved by the boards of directors of the merging companies, with the relevant High Court;
  - the shareholders and creditors of the companies concerned must hold separate meetings to approve the merger or amalgamation scheme;
  - the High Court must pass an order to sanction the merger or amalgamation scheme, which must be filed with the Registrar of Companies (Registrar);
  - the assets and liabilities of the acquired company must be transferred to the acquiring company in accordance with the approved merger or amalgamation scheme, with effect from the specified date;
  - the acquiring company's shares and debentures and/or cash must be exchanged with the shares and debentures of the acquired company. These securities will be listed on the stock exchange.
- **Takeover Code.** The provisions of the Takeover Code cover public takeovers. Its aims are to:
  - regulate takeovers in India;
  - ensure takeovers are transparent;
  - protect the interests of minority shareholders;
  - provide the existing shareholders with information about the impeding change in control of the company along with an opportunity for them to exercise their exit options if they do not wish to retain their individual shareholding after the change in control.

See *Questions 5* to *28*.

- **SEBI (Issue of Capital and Disclosure Requirements) Regulations 2009 (ICDR).** If the acquisition of an Indian listed company involves the issue of new equity shares by the target to the bidder, the following provisions apply:
  - if the target's equity shares have been listed on a stock exchange for six months or more, the price of the shares must be fixed at a minimum value based on certain determining factors;
  - the shares issued to the bidder (not being a promoter of the company, that is, someone who takes active steps in a company's formation, organisation and/or financing) will be subject to a lock-in of one year from the date of issue;
  - shares issued on a preferential basis to promoters or promoter groups will be subject to a three-year lock-in from the date of allotment;
  - a preferential allotment of shares pursuant to a resolution passed by the target's shareholders must be completed within 15 days from the date of that resolution.
- **Competition Act 2002 (Competition Act).** The Competition Commission of India (CCI) will regulate the various forms of business combination through the Competition Act. However, the provisions of the Competition Act relating to the regulation of combinations, including mergers and amalgamations, have not yet come into force as they are yet to be notified (*see Question 25*).
- **Exchange control laws.** These include the:
  - Foreign Exchange Management Act 1999 (FEMA);
  - FDI policy of India;
  - relevant notifications or circulars of the Indian government and the Reserve Bank of India; and
  - specific rules relating to acquisitions of rights shares or bonus shares issued by an Indian company, and the issue of shares under mergers, amalgamations and demergers.
- **The Income Tax Act 1961 (IT Act)**. The IT Act sets out the taxes that apply to:
  - mergers and amalgamations;

- slump sales (that is, the transfer of an undertaking for a lump-sum consideration) and asset sales;
- transfers of shares; and
- demergers.

The laws are intended to make M&A deals transparent and protect the interests of all classes of shareholders.

PRE-BID

Due diligence

5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

Recommended bid

The bidder usually requires a number of documents for due diligence, including documents for the purpose of:

- **Financial due diligence.** The following documents are required:
  - the target's audited and unaudited financial accounts;
  - the target's quarterly income statements;
  - unaudited information supplied by the target or given in press publications;
  - information regarding the target's shareholding patterns, authorised share capital, and paid-up share capital;
  - information concerning the target held by, or available with, stock exchanges;
  - a certificate from the target's chartered accountant certifying the financial soundness of the target.
- **Legal due diligence.** The following documents are required:
  - the target's memorandum of association and articles of association (articles);
  - the target's prospectus;
  - documents evidencing the registration of charges held by, or available with, the:
    - Registrar; and
    - Property Registry.
- **Commercial due diligence.** The following documents are required:
  - published information in newspapers;
  - information in the general trade directory;
  - market reports.
- **Documents required for market information.** This consists of information acquired from suppliers, customers and market experts.

Hostile bid

Hostile bids are not specifically prohibited under the provisions of the Takeover Code. There is usually no due diligence carried out by the bidder on the target in the case of hostile takeovers.

Public domain

The following information is in the public domain:

- **Corporate information**. Information relating to the corporate records of a company is available on the website of the Ministry of Corporate Affairs (*www.mca.gov.in*). The website contains, among others, the following information and documents:
  - incorporation documents, including the certificate of incorporation, memorandum of association and articles;
  - authorised and paid-up share capital;
  - details of directors;
  - annual returns and all other statutory forms filed with the Registrar.
  - financial statements, including the:
    - balance sheet;
    - profit and loss account; and
    - auditor's report.
- **Intellectual property information**. Information relating to intellectual property, whether registered or pending registration, can be obtained from the:
  - Department of Industrial Policy and Promotions website (*www.patentoffice.nic.in*) in relation to:
    - trade marks;
    - patents;
    - designs; and
    - geographical indications of goods.
  - Ministry of Human Resource Development's website (*www.copyright.gov.in*) in relation to copyright.

These websites contain information concerning the status of applications filed for registration of intellectual property, notifications in the journal on advertisement and other related information. The journals published on these websites advertise the details of each application once the concerned judicial officer has passed an order to that effect. These advertisements are for the purpose of inviting objections from third parties claiming that their rights to intellectual property will be adversely affected if the intellectual property rights applied for are registered.

Secrecy

6. Are there any rules on maintaining secrecy until the bid is made?

There is no express requirement to maintain secrecy until a bid is made. However, the Takeover Code sets out the specific circumstances under which the public announcement of a bid is to be made and the timing for that announcement (*see Question 12*). It is an implied rule, therefore, that potential bids and details of potential bids must not be disclosed until publicly announced under the Takeover Code.

Agreements with shareholders

7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

It is fairly common for a bidder to execute a memorandum of understanding or undertaking with the target's key shareholders. There are no disclosure requirements or other restrictions on a memorandum of understanding's terms, provided the memorandum complies with the applicable mergers and acquisitions laws (*see Question 4*).

The memorandum of understanding typically includes:

- The deal's principal terms and conditions.
- The pricing and valuation methods.
- The payment terms.
- Confidentiality and non-disclosure provisions.
- The governing law.

Ordinarily, a memorandum of understanding is not legally binding unless it is specifically agreed between the parties. However, certain provisions of the memorandum, such as the governing law, confidentiality and non-disclosure provisions, can be made binding on the parties.

Stakebuilding

8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives), before announcing the bid, what disclosure requirements, restrictions or timetables apply? Are there circumstances in which shareholdings, or derivative holdings, of associates could be aggregated for these purposes?

There are no disclosure requirements to be made to the public by the bidder prior to the public announcement of a bid, although there are restrictions on obtaining certain levels of shareholding without making a public offer (*see Questions 12 and 16*). However, a bidder acquiring shares or voting rights in a listed company (amounting to 5%, 10%, 14%, 54% or 74% of the total shares or voting rights), must disclose its aggregate shareholding or voting rights to the target and the relevant stock exchanges.

Agreements in recommended bids

9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

It is not mandatory to have a formal agreement between the bidder and the target. However, it is common and advisable to have a legally binding agreement to document each party's specific rights and responsibilities concerning the bid. An agreement typically includes:

- The obligation of each party to implement the bid and carry out its responsibilities under the bid.
- Remedies in the case of a breach of obligations.
- Obligations relating to complying with legal provisions and governmental regulations.
- The payment of break fees (*see Question 10*).
- Each party's representations and warranties.
- Conditions precedent to closing the deal.
- Closing events and activities.
- Terminating events.
- Rights on termination and consequences of termination.
- Confidentiality.
- Non-solicitation obligations (*see below*).

The target's board can be restrained from soliciting, recommending or considering other offers or negotiating with other bidders under a non-solicitation, non-compete or exclusivity agreement with the bidder. Those obligations can also be incorporated into the main agreement between the bidder and the target.

Competitive bids from third-party bidders are allowed (*Takeover Code*) (*see Question 12*). Therefore, the target cannot block third-party bids from bidders complying with the provisions of the Takeover Code.

Break fees

10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful? If so, please explain the circumstances in which the fee is likely to be payable, and any restrictions on the size of the payment.

Although break fees or reverse break fees are not provided for under the law, they can be contractually agreed between the parties:

- **Break fees**. These can be agreed to be payable by the bidder to the target if the bidder wishes to terminate the arrangement.
- **Reverse break fees**. These can be agreed to be payable by the target to the bidder in case the target does not wish to proceed with the proposed acquisition. Reverse break fees are not common in India.

There are the following potential restrictions to break fees:

- The draft letter of offer, which would contain the terms of any break fee, must be submitted to the SEBI (*see Question 12, Offer timetable*). The SEBI has the power to require changes to the letter of offer and may change the terms relating to the break fees if it considers them to be unreasonable.

Country Q&A

- Break fees are limited to compensation for losses that are reasonably foreseeable as the natural loss resulting from non-performance. In most cases, the party breaching the letter of intent or memorandum of understanding must reimburse the expenses incurred by the other party in connection with the transaction.
- If the non-breaching party is a foreign party and the party paying the break fees is an Indian company, the prior approval of the Reserve Bank of India may be required to pay the break fees (*see Question 25*).

Committed funding

11. Is committed funding required before announcing an offer?

Before announcing an offer, information must be disclosed stating that a firm arrangement is in place in relation to the financial resources required to implement the offer. This includes details regarding the sources of the funds, and whether they are:

- Domestic (from banks, financial institutions or otherwise).
- Foreign (from non-resident Indians or otherwise).

In this context, it is relevant to mention that the bidder must deposit a certain sum of money in an escrow account to guarantee the performance of its obligations under the offer (*see Question 13*). If the bidder does not fulfil its obligations under the bid, the merchant banker appointed to administer the bid (*see Question 12, How and when the bid is made public*) is required to ensure the realisation of the escrow amount by:

- **Foreclosure of the deposit.** Where the escrow account consists of a deposit with a scheduled commercial bank, the merchant banker will realise the entire amount for distribution (in accordance with the proportion set out in the Takeover Code) among the target, the regional stock exchange and the shareholders after deducting the expenses incurred by the merchant banker and registrars to the offer.
- **Invoking the bank guarantee or sale of securities.** Where the escrow account consists of a bank guarantee, the bank guarantee is valid for a period starting from the date of public announcement until 20 days after closure of the offer. The merchant banker may invoke that guarantee, while the guarantee is still valid, because of non-fulfilment of obligations by the bidder. Where the escrow account consists of securities, the merchant banker has the power to realise the value of the account by, for example, selling those securities. If the realisation of the value of the securities proves to be insufficient, the merchant banker is liable to make good the deficit.

In each of these cases, the merchant banker must send the proceeds of realisation of the escrow account to the target's regional stock exchange for the credit of the investor protection fund or any other fund established by the bidder's board.

ANNOUNCING AND MAKING THE OFFER

Making the bid public

12. Please explain how (and when) the bid is made public (highlighting any relevant regulatory requirements), and set out brief details of the offer timetable. (Consider both recommended and hostile bids.) Is the timetable altered if there is a competing bid?

How and when the bid is made public

Before making a bid, the bidder must appoint a merchant banker registered with the SEBI to administer the various procedures involved in the bid. These procedures include:

- Making the public announcement of the bid.
- Realising the bidder's escrow amount if it fails to meet its obligations under the bid (*see Question 11*).

The bidder must make the public announcement through its merchant banker within four working days of it entering into an agreement to acquire the target's shares or voting rights. In the case of an indirect acquisition or change in control, the public announcement must be made within three months of that acquisition or change in control.

The public announcement of the bid must be made in one English daily newspaper with nationwide circulation and one Hindi (national language) daily newspaper with nationwide circulation, at the (*Takeover Code*):

- Place where the target's registered office is situated.
- Location of the stock exchange on which the target's shares are most frequently traded.

A copy of the public announcement must be submitted to:

- The target's board of directors through the merchant banker.
- The stock exchanges on which the target's shares are listed.
- The registered office of the target, to be placed before its board.

The public announcement includes the:

- Offer price.
- Number of shares to be acquired from the public.
- Bidder's identity.
- Purpose of the acquisition.
- Bidder's future plans, if any, regarding the target.
- Change in control over the target, if any.
- Procedure that the bidder will follow in accepting the shares tendered by the shareholders.
- Period for completing all formalities concerning the offer.

Offer timetable

The following timetable must be followed:

- Within 14 days of the public announcement: the bidder, through its merchant banker, must file the following documents with the SEBI (*Takeover Code*):
  - a draft offer document, together with a fee of INR50,000;
  - a due diligence certificate;
  - certain registration details.
- A copy of the draft letter of offer must also be sent by the bidder to the target at its registered office within 14 days of the public announcement, to be placed before the board of directors and all the stock exchanges where the target's shares are listed.
- The bidder must send the offer document together with the blank acceptance form to all the target's shareholders (including non-resident Indians) whose names appear on the register of the target's members on the date specified in the public announcement, so as to reach them within 45 days from the date of public announcement.
- No later than 55 days from the date of public announcement: the offer must be opened.
- Offer period: the offer must remain open for 20 days.
- Up to three working days before the date of closure of the offer: the shareholders can withdraw acceptances tendered by them.

The shareholders must send their share certificate(s) or related documents to the Registrar or merchant banker. The merchant banker must ensure that rejected documents which are kept in the custody of the Registrar or merchant banker are sent back to the shareholders through registered post.

It is possible to make a competing bid within 21 days of the public announcement of the first offer. On the public announcement of a competing bid the original bidder has the option to make an announcement revising the offer. If it does not make an announcement within 14 days of the announcement of the competing bid, the earlier offer continues to be valid and binding on the original bidder. However, the date of closing of the earlier offer will be extended to the date of closing of the competing bid.

Offer conditions

13. What conditions are usually attached to a takeover offer (in particular, is there a regulatory requirement that a certain percentage of the target's shares must be offered/bid)? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

A takeover offer that the bidder makes to the target's shareholders must be for a minimum of 20% of the target's voting capital.

However, the proposed bidder (and any person acting in concert) can make the takeover offer conditional on a certain level of acceptance being reached, which may be less than 20% of voting capital. If the bidder and the target have executed a memorandum of understanding, the memorandum of understanding can contain a condition providing that if the desired level of acceptance is not received, the bidder will not acquire any shares under the memorandum of understanding and will rescind the offer (*see Question 7*).

When an offer is made conditional on a minimum level of acceptance, the bidder (and any person acting in concert):

- Must acquire shares from the public up to the minimum of 20% of the target's voting capital, regardless of whether the offer received its minimum level of acceptance.
- Is prohibited from purchasing any shares from any of the target's existing shareholders. The bidder, during that offer period, can only subscribe to the target's newly issued shares.
- Will be liable for penalty of forfeiture of the entire escrow amount paid if it does not fulfil the obligations under the Takeover Code (*see Question 11*).

The offer cannot be made conditional on other pre-conditions, apart from minimum level of acceptances.

Bid documents

14. What documents do the target's shareholders receive on a recommended and hostile bid?

A letter of offer is addressed to the target's shareholders (*see Question 12, How and when the bid is made public*). It will contain information concerning:

- The bidder and persons acting in concert with the bidder, and their financial position.
- The number of shares to be acquired from the public.
- The offer price and its justification (*see Question 18*).
- The purpose of the acquisition.
- The bidder's future plans, if any, regarding the target.
- The resulting change in control over the target, if any.
- The procedure that the bidder will follow in accepting the shares tendered by the selling shareholders.
- The period for completing all formalities relating to the offer.

There is no specific legal provision setting out the documents which a selling shareholder of the target company would be entitled to receive in connection with a hostile bid.

Employee consultation

15. Are there any requirements for a target's board to inform or consult its employees about the offer?

There are no requirements for the target's board to inform or consult its employees about the offer.

Mandatory offers

16. Is there a requirement to make a mandatory offer? If so, when does it arise?

A bidder must make a mandatory open offer in certain circumstances, to provide the target's shareholders with an opportunity to surrender or sell their shares in light of the proposed acquisition. The trigger points requiring an open offer through a public announcement are (*Takeover Code*):

- Where the bidder (together with persons acting in concert, if any) intends to acquire shares or voting rights which would entitle the bidder to exercise 15% or more of the target's shares or voting rights.
- Where the bidder (together with persons acting in concert, if any):
  - already holds 15% or more but less than 55% of the target's shares or voting rights, and proposes to acquire additional shares or voting rights that would entitle him to exercise more than 5% of the target's voting rights in any financial year ending on 31 March, and the shareholding or voting rights after the acquisition will not exceed 55%;
  - already holds 55% or more but less than 75% of the target's shares or voting rights, and proposes to acquire any additional shares or voting rights in the target. However, the bidder can acquire additional shares or voting rights entitling him to up to 5% voting rights in the target without making a public announcement, if either:
    - the acquisition is made through an open market purchase in the normal segment on the stock exchange, or the increase in the shareholding or voting rights of the bidder is pursuant to a buyback of shares by the target; or
    - the post-acquisition shareholding of the bidder will not increase beyond 75%.
  - has already acquired 55% or more but less than 75% of the shares or voting rights in the target, and proposes to acquire any additional share or voting right while ensuring that the public shareholding in the target does not fall below the minimum level permitted by the listing agreement.
- Where the bidder seeks to acquire control over the target, whether or not there has been an acquisition of shares or voting rights, unless that acquisition of control takes place pursuant to a special resolution passed by the target's shareholders at a general meeting. (Control can include, for example, the right to appoint the majority of the directors, the power to direct the management or policy of the company, ownership of over 50% of the voting rights, and so on.)

CONSIDERATION

17. What form of consideration is commonly offered on a public takeover?

The common forms of consideration offered in a public takeover include:

- Cash.
- Issue, exchange or transfer of the bidder company's shares (other than preference shares), if the bidder is a listed company.
- Issue, exchange or transfer of the bidder company's secured instruments, which have a minimum "A" grade rating from a credit rating agency registered with the SEBI.
- A combination of the above.

If the agreement or memorandum between the bidder and the target or selling shareholders requires payment in cash to any class of shareholders whose shares are being acquired, the remaining shareholders must also be paid in cash.

18. Are there any regulations that provide for a minimum level of consideration?

The SEBI does not specifically approve the offer price. However, it must ensure that all relevant guidelines are taken into account when fixing the offer price and that the justification for these guidelines is disclosed in the offer document (*see Question 14*).

The offer price will be the highest of the:

- Negotiated price under the agreement that triggered the offer (*see Question 16*).
- Highest price paid by the bidder or persons acting in concert for the acquisition, if any, including by way of public rights or preferential issue, during the 26-week period before the date of the public announcement.
- Average of the weekly high and low of the closing prices of shares quoted on the stock exchanges where the target's shares are most frequently traded during the 26 weeks before the date of the public announcement. If the target's shares are not frequently traded, the bidder and the

merchant banker will consider other guidelines, such as the:

- return on net worth (net assets or assets minus liabilities);
- book value of the target's shares;
- earnings per share;
- price earning multiple compared to the industry average. (The price earning multiple, or p/e ratio, is the ratio between the current share price, or the market value per share, and the earnings per share.)

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders?

The Takeover Code does not make any distinction, in this respect, between domestic and foreign bidders. The foreign bidder must comply with the pricing guidelines (*see Question 18*).

However, there are certain procedural requirements under the relevant exchange control laws that an Indian company must comply with when it receives consideration from a foreign bidder, including:

- The Indian company must obtain a foreign inward remittance certificate from the relevant bank immediately when the bank receives the consideration.
- The consideration must be reported to the Reserve Bank of India within a period of 30 days from the date of receipt.

POST-BID

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders?

The bidder cannot compulsorily purchase shares from the remaining minority shareholders. Further, the Takeover Code provides that the post-acquisition shareholding of the target must not increase beyond 75% without a new offer (*see Question 21*). This suggests that the Takeover Code prevents a bidder from compulsorily purchasing minority shares. However, a bidder holding more than 55% but less than 75% and seeking to consolidate his holdings can acquire more shares provided the bidder makes a public announcement to that effect (*see Questions 8 and 16*).

21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

The Takeover Code does not contain any specific provisions in this regard. Therefore, a failed bidder can launch a new offer or buy shares in the target.

De-listing

22. What action is required to de-list a company?

The shares of a company in India can be de-listed through either a compulsory or voluntary de-listing.

Compulsory de-listing

This occurs when either the:

- Company does not comply with the guidelines of the relevant stock exchanges.
- Company's shares have not been traded for years.

The de-listing procedure is as follows (*Securities Contracts (Regulation) Act 1956*):

- The decision to de-list is taken by a panel of representatives from the:
  - relevant stock exchange;
  - investors;
  - Ministry of corporate affairs or the Registrar.

  When taking this decision, the panel must comply with the mandatory criteria for compulsory de-listing specified under the SEBI (Delisting of Equity Shares) Regulations 2009.
- The stock exchange publishes a notice in:
  - an English national daily newspaper with wide circulation; and
  - a regional language newspaper of the region where the relevant recognised stock exchange is located.

  Representations from the company and others in response to this notice are considered before passing the de-listing order.
- After completing these formalities the stock exchange will:
  - pass the order for de-listing;
  - publish a public notice:
    - providing details of the de-listing; and
    - informing the stock exchanges where the shares of the company are listed about the de-listing and the related circumstances.

When the shares of a company are compulsorily de-listed, the company's promoters must acquire the de-listed shares from the public shareholders at a price determined by an independent valuer appointed by the concerned stock exchange. The shareholders have the option to retain their shares.

Voluntary de-listing

This is when the company voluntarily intends to de-list its shares or is merged with or acquired by another company.

The following procedure must be used for a voluntary de-listing:

- The company's board of directors must approve the de-listing.
- Immediately after the board meeting, the promoter of the company or an acquirer must inform the relevant stock exchange(s) by submitting a certified copy of the resolution passed at the meeting.
- The promoter or acquirer must obtain the approval of the company's shareholders for the de-listing by special resolution passed through postal ballot.
- The company must file the necessary forms with the Registrar.
- The company must publish a notice, giving the relevant details and reasons for the proposed de-listing, in:
  - an English language daily newspaper;
  - a daily newspaper in Hindi (national language); and
  - a regional daily language newspaper.
- The company's promoters must give an opportunity to all the holders of the class of shares being de-listed offering to buy those shares at a price to be determined in accordance with the applicable regulations.
- Finally, the company must file an application with the stock exchanges for the de-listing of shares on completion of these formalities.

TARGET'S RESPONSE

23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

There are several defences available to the target's board against a hostile takeover. The most effective methods are those with built-in defensive measures that make it difficult to take over the company (shark repellents).

Two well-known methods are:

- **The poison pill strategy (shareholders' rights plan).** This is the most popular and effective defence to combat hostile takeovers. Under this method, the target gives existing shareholders the right to buy the target's shares at a price lower than the prevailing market price if a hostile bidder purchases more than a pre-determined amount of the shares. This is to devalue the shares and dilute the percentage of the target's equity that the hostile bidder owns to an extent that makes any further acquisition prohibitively expensive.
- **The white knight.** Under this mechanism, a third company makes a friendly takeover offer to the company facing a hostile takeover. Reasons why companies prefer to be bought out by the third company include:
  - better purchase terms;
  - a better relationship with the third company; and
  - better prospects for long-term success.

Other defences available to the target are the:

- **Pac-Man defence.** The target thwarts a takeover bid by buying shares in the bidder company, then taking it over.
- **Staggered board.** This is generally used in combination with a poison pill strategy, and is considered effective. It drags out the takeover process by preventing the target's entire board from being replaced at the same time. The directors of the target are grouped into classes; each group stands for election at each annual general meeting.
- **Golden parachute.** This is a tactic which makes the acquisition more expensive and less attractive. A provision is included in the contract of the chief executive officer (CEO) under which the CEO is entitled to receive a large bonus in cash or shares if the company is acquired.

TAX

24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in your jurisdiction? Can payment of transfer duties be avoided?

Stamp duty is payable on certain documents in connection with the sale of shares:

- Share transfer form (required by the Companies Act) executed between the selling shareholder(s) and the bidder: 0.25% of the consideration for the shares being transferred.
- Share purchase agreement between the selling shareholder(s) and the bidder(s): 0.01% of the consideration.
- Share certificates (where new share certificates are issued to the bidder): 0.1% of the total value of the shares.

Payment of stamp duty on share transfer instruments is mandatory and cannot be avoided. However, the payment of duty on new share certificates can be avoided if the selling shareholders' existing share certificates are endorsed in the name of the bidder instead of new certificates being issued.

OTHER REGULATORY RESTRICTIONS

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable?

Certain other regulatory approvals and permissions may be required for a public acquisition. These can considerably delay the timing of a public offer, and the target may need to comply with reporting requirements once the acquisition is complete.

Foreign company acquisitions

See *Question 26.*

Competition clearance

When the relevant provisions of the Competition Act come into force, combinations (acquisitions, mergers or amalgamations that meet certain financial thresholds) must be reported to the CCI for clearance. Combinations that cause or are likely to cause an appreciable adverse effect on competition in the relevant market will be considered void. The CCI will consider certain factors when assessing these combinations, including:

- The actual and potential competition through imports.
- The extent of entry barriers into the market.
- The level of the combination's presence in the market.
- The extent of effective competition in the market.
- The possibility of the combination removing vigorous and effective competition in the market.
- Whether the benefits of the combination outweigh its adverse impact.

However, the provisions of the Competition Act relating to the regulation of combinations, including mergers and amalgamations, are yet to be notified and, therefore, have not yet come into force.

Other approvals

Mandatory approvals under the Companies Act and other sector specific regulations may apply.

26. Are there restrictions on foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

There are certain restrictions on the foreign ownership of shares. The FDI Policy followed in India provides sectoral caps on specified industrial sectors. For example, a foreign ownership limit of up to 74% applies to the civil aviation sector, ensuring that the remaining 26% must be held by an Indian resident or an Indian company.

Special rules apply to:

- Acquisitions of rights shares or bonus shares. As well as the sectoral caps, pricing guidelines apply.
- Issues of shares under a merger, amalgamation or demerger. A company can issue shares to the shareholders of a foreign bidder under a scheme of merger or amalgamation approved by an Indian court, subject to the sectoral caps.

There are also certain sectors where foreign investment is completely prohibited, such as the lottery and real estate businesses.

THE REGULATORY AUTHORITY

Securities and Exchange Board of India (SEBI)

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Plot No.C4-A
'G' Block
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E *sebi@sebi.gov.in*
W *www.sebi.gov.in*

Main area of responsibility. The main areas of responsibility of SEBI include:

- Investor protection.
- Regulating the substantial acquisition of shares and takeovers.
- Conducting inspections and inquiries.

Permission from the government and/or Reserve Bank of India is required where a foreign investor seeks to invest beyond one of the sectoral caps, or in a sector where foreign investment is generally prohibited.

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies? If so, please give details.

Repatriation is governed by the provisions of the amended Foreign Exchange Management (Current Account Transactions) Rules 2000. Dividends are freely repatriable without any restrictions of net after tax deduction at source or dividend distribution tax. There is one exception: repatriation is not permitted for a remittance to which the requirement of "dividend balancing" applies (that is, offsetting the outflow of foreign exchange for dividend payments against export earnings); however, this does not currently apply to any industry.

28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

There are no restrictions on dealing with securities of the parties to the bid following the offer (although certain documents must be distributed in connection with the offer (*see Questions 12 and 14*)).

REFORM

29. Please summarise any proposals for the reform of takeover regulation in your jurisdiction.

The SEBI set up a Takeover Regulatory Advisory Committee (TRAC) in September 2009, with the objective of introducing appropriate changes in the current takeover regulations. The reforms brought about by the TRAC are expected to encourage mergers and acquisitions by providing a level playing field for retail investors as well as potential bidders.

- Some of the major areas where reforms are being considered are as follows:
- Increasing the 15% threshold for an open-offer trigger, to bring it in line with international regulations (*see Questions 8 and 13*).
- Clarifying the position on control and change of control under the Takeover Code, therefore amending the position on triggers for an open offer in cases of change in control of the target (*see Question 13*).
- Providing for rules governing break fees to the intended target (*see Question 10*).Securities and Exchange Board of India (SEBI)

CONTRIBUTOR DETAILS

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Qualified. England & Wales, 2005; India (Madhya Pradesh) 1998

Areas of practice. Foreign direct investments; M&A; joint ventures; private equity funds.

Recent transactions

- Represented Emerson, a global manufacturing and technology company, in the acquisition of its Indian entity, via asset purchase, by GoAhead Software, structuring and advising on the transaction.
- Represented one of India's premier hairdressing salons in their acquisition by investors based in the Middle East.
- Represented one of India's leading packaging solution provider companies in its acquisition by a German-based company.