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## A CRITICAL STUDY OF THE LEGAL FRAMEWORK GOVERNING MERGERS AND ACQUISITIONS IN INDIA

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### ABSTRACT

Mergers and acquisitions in India are not discrete events of corporate strategy development, but structural transactions embodying key tensions between the imperatives of capital formation efficiency, minority shareholder protection, competition policy goals and regulatory regimes aimed at balancing competing stakeholder interests. This article offers a critical legal analysis of the regulation of M&A transactions by the Companies Act, 2013, Competition Act, 2002, SEBI guidelines and sectoral approval requirements, which creates a multi-tiered approval process that may not be the most efficient means of delivering certainty for M&A transactions or safeguards for investors and the public. Through doctrinal analysis of legislation, landmark court cases, and international comparative law, this study suggests that procedural complexity is both an indicator of India's regulatory development, as well as a potential obstacle generating regulatory costs, timing risks and opportunities for regulatory arbitrage by savvy parties while leaving loopholes for inefficient stakeholder protection. The real-world consequences of this regulatory framework are drawn-out approval processes deterring foreign investments, divergent valuation practices negatively impacting minority shareholders, retrospective taxation practices triggering perceptions of sovereign risk, and regulatory loopholes. This paper offers in-depth coverage of institutional mechanisms such as the adjudication of National Company Law Tribunal, merger control by Competition Commission, takeover code by Securities Exchange Board of India and sectoral approvals, assessing whether these mechanisms act as gatekeepers or as bureaucratic red tape contributing to cost without corresponding benefit. Finally, recommendations highlight efficiency-enhancing reforms to regulatory processes via single-window approvals, valuation standards harmonisation, clear thresholds for competition law, minority shareholder protection through improved appraisal rights, and enhanced institutional capacity to ensure M&A regulation supports capital formation while aiding in the prevention of market concentration and stakeholder abuse.

**Keywords:** M&A; corporate restructuring; competition law; shareholder protection; regulation; NCLT; takeover code; Companies Act; Competition Act; valuation.

## 1. INTRODUCTION: M&A IN INDIA'S EVOLVING CORPORATE LANDSCAPE

Acquisitions and mergers (M&A) are key forms of corporate restructuring and are essential for firms to meet their strategic goals of market expansion, technology acquisition, synergies and capital allocation.<sup>1</sup> The Indian M&A scene has transformed from a regime of pre-liberalization government-imposed industrial licensing to market-based consolidations that reflect global capital movements and India's economic transformation. Over the last 30 years, M&A activity has grown exponentially in terms of domestic consolidations, cross-border acquisitions by Indian firms and foreign direct investments in Indian industries through acquisitions.<sup>2</sup>

A number of policy goals, some in conflict with each other, are embodied in the regulatory regime governing M&A transactions. Corporate law provisions within the Companies Act, 2013 provide procedural safeguards for mergers and amalgamations to ensure the rights of creditors, shareholders and other stakeholders are protected and legitimate restructuring is enabled.<sup>3</sup> Competition law (Competition Act, 2002) requires that transactions in excess of certain thresholds undergo a review by the merger control regime to ensure that combinations do not substantially lessen competition.<sup>4</sup> SEBI takeover regulations ensure minority shareholders' rights in change of control through mandatory open offers at fair prices.<sup>5</sup> Specific regulations in sectors such as banking, insurance and telecommunications add to the approval process, as they take into account the unique nature of the sectors.

This multi-faceted regulatory framework poses compliance challenges. M&A parties must obtain various approvals from National Company Law Tribunal, Competition Commission of India, Securities and Exchange Board of India, sectoral regulators, stock exchanges, the Reserve Bank of India (foreign exchange matters), and income tax authorities.<sup>6</sup> The regulatory authorities have different statutory powers, processes and substantive tests, which introduces complexity into transactions that adds to the costs of the transaction, lengthens the time to complete a transaction, and creates regulatory uncertainty.

The regulatory regime also results in regulatory arbitrage and enforcement gaps. Different

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<sup>1</sup> Robert F. Bruner, *Applied Mergers and Acquisitions* 45–52 (Wiley 2004).

<sup>2</sup> Grant Thornton, *Dealtracker Annual Report 2022*, at 23–29 (2023).

<sup>3</sup> *Companies Act*, 2013, §§ 230–240 (India).

<sup>4</sup> *Competition Act*, 2002, §§ 5–6 (India).

<sup>5</sup> SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (India).

<sup>6</sup> Vaish Associates, *M&A in India: Regulatory Framework* 34–41 (2022).

transaction structures (mergers, demergers, share purchases, asset purchases and slump sales) are subject to different regulatory treatment even when the economic outcome is the same.<sup>7</sup> Interested parties use these to avoid regulatory scrutiny or tax. Methods to calculate fair value for remuneration are not harmonised across jurisdictions, with differing results based on applicable rules.

This study critically assesses India's legal framework for M&A, including corporate law, competition law, securities law and taxation, to evaluate whether regulations effectively achieve stated policy goals or need reform to improve certainty in transactions while ensuring adequate stakeholder protection.

## **2. CORPORATE LAW FRAMEWORK: COMPANIES ACT, 2013**

### **2.1 Scheme of Arrangement Provisions**

The Companies Act, 2013, codifies the provisions relating to mergers, amalgamations and arrangements in Sections 230-240, which replaced the regime under the Companies Act, 1956.<sup>8</sup> Section 230 allows companies to make compromises or arrangements with creditors/members, subject to approval by the National Company Law Tribunal (NCLT) following specified procedure involving creditor/member meetings with required majorities.

The statutory process has several steps that extend the process. First application to NCLT for an order to hold meetings subject to tribunal being satisfied of the transaction's bona-fides.<sup>9</sup> A scheme should be approved by 75% in value and a majority in number of creditors and shareholders, respectively. After meetings, parties apply to NCLT for sanction, and tribunal then considers procedural, fairness and public interest considerations.<sup>10</sup> The scheme is effective only after filing with Registrar of Companies and compliance with conditions precedent, even after being sanctioned by NCLT.

Section 233 introduced Fast Track Mergers, which provide for simpler process for mergers between a holding company and its wholly owned subsidiary companies or between small companies, with no need for NCLT approval but with reduced documentation.<sup>11</sup> But the limited

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<sup>7</sup> *Income Tax Act*, 1961, § 2(1B) (India).

<sup>8</sup> *Companies Act*, 2013, §§ 230–240 (India).

<sup>9</sup> *Id.* § 230(3).

<sup>10</sup> *Id.* § 230(11).

<sup>11</sup> *Id.* § 233.

scope and mechanisms for creditor objection limit the efficacy of fast track mergers for complex mergers.

Cross-Border Mergers were explicitly mentioned in Section 234, allowing mergers between Indian companies and foreign companies from notified countries.<sup>12</sup> But it has been constrained by restrictive rules, regulatory and tax uncertainties that favour share acquisitions over cross-border mergers.

## 2.2 Shareholder and Creditor Protection Mechanisms

The Companies Act provides various safeguards for parties that may be adversely affected by M&A transactions. Section 230(11) dissenting shareholder appraisal rights enable shareholders who oppose schemes to insist on share buy-back at values calculated by certain methods.<sup>13</sup> But the effectiveness of appraisal rights is hampered by disputes over valuation, payment delays and the difficulties faced by individual shareholders in bringing claims.

Mergers cannot disadvantage creditors by diluting assets or taking on liabilities as a result of compulsory notice and objection provisions.<sup>14</sup> NCLT considers creditor objections and may withhold approval of schemes aggrieving creditors. Yet, jurisprudence on creditor protection is not well developed, and tribunals demonstrate a reluctance to interfere with commercial decisions in absence of unfairness.

Employee protection provisions mandate regard for employee interests and consultation with representatives, but lack enforcement and substantive protections of jurisdictions with robust worker protections.<sup>15</sup> Employee continuity provisions are typically part of schemes, but depend on scheme-specific provisions rather than strong legislative support.

Theoretically, court oversight by NCLT ensures judicial gatekeeper role for fairness and legality. But NCLT resource constraints lead to huge delays and approvals take often take 12-18 months, compared to under 6 months in comparable jurisdictions.<sup>16</sup> Variations in standards among different NCLT benches relating to valuation and fairness result in uncertainty in

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<sup>12</sup> Id. § 234.

<sup>13</sup> Id. § 230(11).

<sup>14</sup> Id. § 230(3).

<sup>15</sup> Id. § 230(9).

<sup>16</sup> Standing Committee on Finance, *NCLT Functioning Review* 45–52 (2021).

transaction planning.

### 2.3 Procedural Challenges and Delays

Many factors lead to time-consuming approvals for mergers under Companies Act. Limited judicial members, support staff and excessive caseloads at NCLT result in capacity issues leading to unpredictable delays.<sup>17</sup> Shareholder and creditor meetings add months to the duration of transactions even when they are a formality (meeting arrangements and notice periods take time).

Absence of deemed consent provisions means delays at any point cause completion to be continually delayed, whereas in some jurisdictions silence is deemed approval.<sup>18</sup> When tax authorities intervene to express concerns about tax avoidance, it adds to the uncertainty, especially since the Vodafone case and other controversial cases raised awareness of tax implications of M&A structures.<sup>19</sup>

## 3. COMPETITION LAW: MERGER CONTROL FRAMEWORK

### 3.1 Substantive and Jurisdictional Thresholds

The Competition Act, 2002 sets out the mandatory merger notification thresholds for combinations exceeding certain asset or turnover thresholds, and subjecting combinations to the review of Competition Commission of India to determine whether combinations have appreciable adverse effect on competition.<sup>20</sup> Section 5 covers combinations resulting from the acquisition of control, shares, voting rights, or assets and Section 6 includes notification requirements.

The thresholds for notification depend on the parties' assets and turnover, although recent changes have increased thresholds and decreased notification volumes.<sup>21</sup> De minimis thresholds exempt transactions below certain thresholds, striking a balance between regulatory scrutiny and compliance costs for minor transactions.

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<sup>17</sup> Id. at 67–73.

<sup>18</sup> Organisation for Economic Co-operation and Development, *Regulatory Reform and Deemed Approval* 23–27 (2020).

<sup>19</sup> *Vodafone International Holdings B.V. v. Union of India*, (2012) 6 SCC 613.

<sup>20</sup> *Competition Act, 2002*, § 20(1) (India).

<sup>21</sup> Competition Commission of India (Procedure) Regulations, 2011, reg. 9 (India).

Substantive review under Section 20(4) involves CCI assessing whether combinations have appreciable adverse effect on competition, by examining market structure and actual and potential competition, barriers to entry and impact on consumer welfare.<sup>22</sup> CCI has wide discretion in applying the standard, but has been pragmatic and business-friendly.

### 3.2 Approval Process and Timelines

Thirty days after the execution of definitive agreements, merger notifications are required to be sent, resulting in statutory time-frames.<sup>23</sup> Phase I assessment spans thirty working days, and is initial review where most transactions are cleared absolutely. If CCI has reservations, Phase II review allows for in-depth probe leading to conditions or ban.<sup>24</sup>

The consultation with CCI before notification, although not compulsory, has become a standard practice to resolve issues before notification.<sup>25</sup> The new Green Channel route facilitates automatic approval of transactions that match certain conditions, allowing quicker approvals for non-complex combinations.<sup>26</sup>

Standstill provisions mean implementation occurs only after the CCI clears a transaction.<sup>27</sup> Standstill and notification obligations can lead to significant fines, with compliance considerations impacting deal structures and timing.

### 3.3 Substantive Assessment and Remedies

CCI's competitive effects analysis looks at whether combinations give rise to or increase dominant positions that facilitate anti-competitive behaviour.<sup>28</sup> Market definition is an important analysis, and parties and CCI can differ in their views of relevant markets, which impact market share.

Horizontal mergers resulting in large market shares are scrutinised closely, while vertical and conglomerate mergers are treated leniently in the absence of foreclosure theories.<sup>29</sup> But India

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<sup>22</sup> *Competition Act, 2002*, § 20(4) (India).

<sup>23</sup> *Id.* § 6(2).

<sup>24</sup> *Id.* § 29(1)–(5).

<sup>25</sup> Competition Commission of India, *Guidance Note on Pre-Filing Consultations* 8–12 (2020).

<sup>26</sup> Competition Commission of India (Procedure) Amendment Regulations, 2019 (India).

<sup>27</sup> *Competition Act, 2002*, § 6(2A) (India).

<sup>28</sup> *Id.* § 20(4) read with § 19(4).

<sup>29</sup> Competition Commission of India, *Annual Report 2021–22*, at 67–74 (2022).

lacks detailed merger guidelines akin to the U.S. or EU, resulting in uncertainty about the rules and practices of analysis.

Unacceptable mergers may be remedied through behavioural conditions constraining post-merger behaviour, structural conditions (divestitures) or prohibition.<sup>30</sup> CCI has been open to negotiate remedies, but mechanisms for design and monitoring of remedies are not as advanced as the international best practices.

#### **4. SECURITIES REGULATION: TAKEOVER CODE**

##### **4.1 Mandatory Open Offer Requirements**

The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, regulate the acquisition of shares or control of listed companies, and oblige acquirers to make open offers to the minority shareholders upon reaching certain thresholds.<sup>31</sup> The regulatory regime offers exit options to the minorities at reasonable prices in change of control transactions.

Thresholds triggering mandatory open offers include acquisition of 25% or more shares, acquisition of control, and acquisition of shares above 25% in tranches above the thresholds.<sup>32</sup> Minimum offer size mandates acquirers to offer to buy at least 26% of target's shares to provide exit opportunity.

Acquiring price is calculated in accordance with specified rules including greater of negotiated price or volume weighted average market price for the relevant period(s) or other factors.<sup>33</sup> This structure stops acquirers from bid at a premium for control and minorities from sell at a discount.

##### **4.2 Exemptions and Exclusions**

The Takeover Code includes many exemptions for policy reasons. Creeping acquisition exemption allows existing shareholders above the threshold to buy further five percent (of the number of shares) in any financial year without an open offer.<sup>34</sup> Exemptions applied to inter-

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<sup>30</sup> *Competition Act*, 2002, § 31 (India).

<sup>31</sup> SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, reg. 3 (India).

<sup>32</sup> *Id.* regs. 3, 4.

<sup>33</sup> *Id.* reg. 8.

<sup>34</sup> *Id.* reg. 3(2).

promoter transfers among persons forming "control group" on grounds that control is not affected.

Scheme of arrangement exemption exempts NCLT-approved mergers from the open offer regime on basis that scheme offers alternative shareholder protection by court scrutiny.<sup>35</sup> Delistings and preferential allotments have exemptions.

Exemption availability incentivises structuring (designing transactions to secure exemptions) away from commercial best practices, which is regulatory arbitrage that may not align with policy goals.<sup>36</sup>

### 4.3 Enforcement and Compliance Challenges

SEBI oversees compliance with the Takeover Code through review of disclosure, investigation of potential non-compliance and enforcement.<sup>37</sup> SEBI administers the Takeover Code through disclosure monitoring, due diligence and sanctions. Disclosure requirements mandate acquirers to publicly announce significant shareholdings within prescribed time-frames, ensuring market transparency on shareholdings.

Contestations on valuations for determining the offer price pose compliance challenges, especially where market prices are not stable or the target company has low trading volumes.<sup>38</sup> Acquirers and minority shareholders sometimes dispute valuations, and need SEBI or Securities Appellate Tribunal intervention via litigation that slows down deals.

## 5. TAXATION AND CROSS-BORDER ISSUES

### 5.1 Tax Treatment of M&A Structures

Taxation impacts play a critical role in M&A structuring, with some structures being taxed very differently to others.<sup>39</sup> Selling shares attracts capital gains tax for vendors, at varying rates. Asset sales attract capital gains plus GST (if applicable), with buyers getting a stepped up basis.

Tax-free reorganisations are possible for mergers and demergers that meet the conditions of

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<sup>35</sup> Id. reg. 10(1)(e).

<sup>36</sup> Cyril Amarchand Mangaldas, *Takeover Structuring Strategies* 45–52 (2021).

<sup>37</sup> *SEBI Act*, 1992, §§ 11, 15A–15HB (India).

<sup>38</sup> AZB & Partners, *Valuation Disputes in Takeovers* 23–29 (2022).

<sup>39</sup> PwC, *Tax Structuring for M&A Transactions* 12–18 (2023).

Income Tax Act Section 2(1B).<sup>40</sup> But to qualify, several criteria need to be met such as business continuity and shareholder continuity tests, which pose structuring challenges.

General Anti-Avoidance Rule (GAAR) allows tax administrators to ignore arrangements without commercial substance resulting in uncertainty as to how tax structures will be treated.<sup>41</sup> The application of the GAAR is still developing with regard to M&A deals, and may challenge legitimate tax planning.

## 5.2 Foreign Investment and Cross-Border Transactions

International M&A transactions with foreign parties are subject to foreign investment laws under the Foreign Exchange Management Act.<sup>42</sup> Foreign investment is subject to sectoral limits and conditions in sectors such as banking, insurance, defense and telecommunications.

Investment restrictions on foreign-controlled Indian companies' downstream investments pose multi-tiered structuring issues.<sup>43</sup> Guidelines for valuations of foreign investments determine valuation methods that can differ from commercial valuations.

Tax disputes such as Vodafone gave rise to sovereign risk concerns that impacted India's investment profile.<sup>44</sup> The recent changes to retrospective tax laws to remove retrospective taxation have given some relief, but historic issues continue to have an impact on foreign investor appetite for acquisitions in India.

## 6. FINDINGS AND RECOMMENDATIONS

### 6.1 Critical Findings

The critical analysis reveals a number of insights. First, the complexity of procedures with multiple regulators increase transaction costs, time taken and uncertainty in M&A thereby deterring M&A activity especially cross-border transactions. The need for clearance from NCLT, CCI, SEBI, and sectoral regulators with divergent frameworks and no coordination leads to inefficiencies.

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<sup>40</sup> *Income Tax Act*, 1961, § 2(1B) (India).

<sup>41</sup> *Id.* §§ 95–102.

<sup>42</sup> *Foreign Exchange Management Act*, 1999 (India).

<sup>43</sup> FEMA (Non-Debt Instruments) Rules, 2019, r. 21 (India).

<sup>44</sup> *Vodafone*, *supra* note 19.

Second, institutional inefficiencies at NCLT result in significant backlog leading to delays in M&A transactions, far beyond the statutory time frames and global benchmarks, causing India's relative disadvantage as an M&A destination.<sup>45</sup>

Third, valuation differences between Companies Act appraisal rights, Takeover Code offer price, and income tax fair market value valuations result in compliance and stakeholder protection issues when valuations under different frameworks are significantly different.<sup>46</sup>

Fourth, perceptions of sovereign risk among foreign investors due to tax uncertainties, especially the application of the GAAR and retrospective tax legislation, are difficult to address through other regulatory reforms.

Fifth, minority shareholder protection while on paper covered by takeover rules and appraisal rights, has practical shortcomings due to enforcement issues and procedural hurdles faced by individual shareholders.

## 6.2 Structural Reform Recommendations

Reforms are needed to resolve issues in M&A regulatory framework. One-stop clearance system amalgamating various approvals will shorten time and costs without compromising substantive assessments.<sup>47</sup>

Increased NCLT capacity through recruitment of more members with corporate restructuring expertise, administrative and technical support and case management systems would bring down pendency and enhance predictability. Statutory deemed approval provisions that silence of NCLT after a set period of time is considered approval would provide certainty.<sup>48</sup>

Valuation methodology harmonization across regulatory frameworks would eliminate compliance complexity while improving stakeholder protection through consistent fair valuation. Independent valuation expert panels could provide binding determinations reducing disputes.

Further refinements to competition law such as detailed merger guidelines spelling out the

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<sup>45</sup> Standing Committee on Finance, *supra* note 16, at 89–95.

<sup>46</sup> Nishith Desai Associates, *Valuation Issues in M&A* 45–51 (2022).

<sup>47</sup> Ministry of Corporate Affairs, *Ease of Doing Business: M&A Reforms* 23–28 (2022).

<sup>48</sup> Standing Committee on Finance, *supra* note 16, at 134–141.

methodology that the CCI will use to assess mergers and bright-line safe harbors for low-risk mergers would improve predictability.<sup>49</sup> Improved pre-notification processes would allow parties to strategically plan.

Tax certainty through parliamentary pledge to not make retrospective changes, guidance on the application of the GAAR, and advance pricing agreements would boost investor confidence. Safe harbours for typical M&A arrangements would provide certainty.

Increased minority shareholder protection via class action law to enable collective action, mandatory independent fairness opinions for conflicted transactions and quicker dispute settlement would provide effective recourse.

## 7. CONCLUSION: BALANCING EFFICIENCY AND PROTECTION

India's M&A regulatory framework is a complex compromise between several policy goals such as efficient allocation of capital, protection of stakeholders, preservation of competition, and regulation of sectors. The current system's multiple approval processes theoretically offer full protections against anti-competitive mergers, oppression of minority shareholders and harm to creditors. Yet complexity, capacity and coordination issues result in high costs such as time taken for approvals, compliance costs and disincentives for global investments.

Our analysis shows that regulatory goals do not mandate current procedural intricacies and time requirements. International best practices ensure similar stakeholder protection through efficient processes, bundled approvals and dedicated institutional capacity that India's system currently lacks. Institutional, especially NCLT capacity issues, are greater barriers than law shortcomings.

A holistic approach with single-window approvals, NCLT capacity building, valuation standardisation, fine tuning of competition law and tax certainty would significantly enhance India's M&A regulatory framework while ensuring stakeholder protection. IT-driven processes could improve efficiency without drastically increasing resources.

India's M&A regulation should meet economic development goals of capital formation, industrial consolidation to attain scale economies and technology imports through foreign

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<sup>49</sup> CUTS International, *Competition Law Reform Proposals* 67–74 (2022).

investments. Excessive regulation impedes productive activity and cannot prevent really harmful transactions that well-informed parties can structure to meet regulatory demands. More efficient processes and substantive review balancing efficiency and effectiveness would better achieve capital market and stakeholder protection goals.

The constitutional mandate to promote economic development demands regulatory settings promoting productive activity, avoiding market distortions and protecting weak stakeholders. Reforms of India's M&A framework offer opportunity to strike this balance through evidence-based decision making based on global best practices and India's institutional realities. Only with significant reforms can India achieve its potential as a major M&A market facilitating corporate restructurings for development of globally competitive firms that serve national development objectives while ensuring protection of minority shareholders, creditors, employees and competitive markets that are necessary for economic growth.