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Mergers & Acquisitions

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Overview

India witnessed a year of rebound in 2010 after the weak activity levels in mergers and acquisitions ("M&A") and private equity ("PE") transactions in 2009, particularly with landmark deals such as India's telecom major *Bharati Airtel's* acquisition of the African assets of Kuwait's telecom major *Zain Telecom* for USD 10.7 billion. The year 2010 recorded a substantial growth both in the value (which quadrupled) and number (which doubled) of transactions in comparison to 2009. The resilient capital market, increased confidence in the Indian economy, improvements in the global perception of India and improved performance of earlier cross-border transactions were seen as some of the primary reasons for such rebound. These reasons also resulted in the total M&A and PE activity reaching USD 62.24 billion, thereby registering a growth of 159% over the year 2009.[1] The telecom sector was the most sought after M&A sector in 2010, while the power sector received the maximum investment from PE funds garnering USD 1.5 billion through 24 deals.

Against the backdrop of a slight dip in confidence in the economic outlook of the country, primarily due to the weakening of the capital market, increased interest rates and new guidelines on merger controls notified by the Competition Commission of India (the "Competition Commission"), the first half of 2011 has, nevertheless, resiliently kept pace with the 2010 levels. M&A activity was upbeat with some large billion dollar deals, several mergers as companies looked at unlocking value through a more efficient internal structure, as well as some small and large-sized investments made by increasingly active PE funds. The first half of 2011 saw 5 M&A deals valued at over a billion dollars each, the largest being *British Petroleum*'s USD 7.2 billion acquisition of oil and gas assets of *Reliance Petroleum*.[2] The number of inbound deals trebled, evidencing the continued interest that international companies have in Indian businesses. There has also been an increasing trend of stake sale by promoters of Indian companies, which is expected to continue as Indian companies realise the need for expansion of operations and an increased demand for international operations.[3] However, between July and September 2011, the volume of M&A fell to its lowest in six years, with deteriorating economic conditions and lower valuations linked to equity markets, prompting companies to defer plans.

The third quarter of 2011, ending in September, has also been disappointing. Whilst the number of deals continued to be at par or more than those during the same period in 2010, the deal values have plummeted by close to 56%[4], as compared to the same period in 2010. The third quarter has also witnessed a larger number of outbound deals than inbound and domestic deals, in contrast to the first two quarters of 2011. The mining sector has emerged as a prominent sector in terms of deal values, with the telecom sector following closely behind.

Significant Deals and Highlights

One of the biggest hurdles in M&A transactions in India, particularly for listed entities, has been the time taken by regulatory authorities and government agencies to accord their approvals to transactions.

In August, 2010 Vedanta Resources Plc ("Vedanta"), a company listed on the London Stock Exchange, announced its proposal to purchase a 51% controlling stake in Cairn India ("Cairn India"), for a consideration of (reportedly) USD 9.6 billion. Cairn India is a subsidiary of Cairn Energy Plc, a listed

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entity in the United Kingdom, a leading player in the Indian oil and gas industry. The deal was structured to include a non-compete fee into the price of the shares of the promoters of Cairn India. One of the advantages of the Cairn-Vedanta deal having been finalised prior to the Revised Takeover Regulations coming into force (discussed below) is that the parties were able to retain the non-compete fee component incorporated into the price of the promoter's shares, which is not permitted under the Revised Takeover Regulations (discussed below). However, the conclusion of the deal was delayed, *inter alia*, for the following reasons:

(a) Pursuant to, *inter alia*, the production sharing contracts between Cairn India and the Indian Government, which sets out the terms and conditions on which Cairn India would be permitted to conduct exploration of oil in the 'Rajasthan Block', Cairn India was required to obtain consent of the Indian Government to effect a change in control of its ownership. The approvals from the securities regulator, the Securities Exchange Board of India ("SEBI"), were also part of the governmental approvals required. SEBI's approvals and requirements have been discussed in the next section.

(b) In terms of the *inter se* agreement between state-owned Oil and Natural Gas Corporation ("ONGC") and Cairn India, ONGC had 30% participating interest under in the 'Rajasthan Block', while Cairn India owned the remainder. ONGC had claimed that it had a pre-emptive right to purchase Cairn India's 70% interest, in the event of a change of control of Cairn India. Therefore, ONGC's waiver of this pre-emptive right was required prior to completion of the acquisition of Cairn India by Vedanta. ONGC was making royalty payments to the Indian Government not only in respect of its 30% rights in the Rajasthan Block but also in respect of Cairn India's 70% rights. After several months of deliberations, ONGC, in September this year, finally agreed to waive its pre-emptive right, on the condition that Cairn India agrees to pay its share of the royalties and proportionate taxes.

Since Vedanta announced its intention to acquire Cairn India in August 2010, it has taken the parties close to a year to obtain all requisite approvals. Reportedly, on account of the delays and various approvals required in this acquisition, the deal value has now fallen by approximately USD 600 million. It is envisaged that the transaction will reach closure sometime this year.

In rather stark contrast to the story of the Cairn – Vedanta deal, the Competition Commission's maiden order under the new Combination Regulations (discussed later) was issued within 26 days of receiving notification of the transaction. Reliance Industrial Infrastructure Limited ("Reliance") acquired Bharti Group's (the "Bharti Group") 74% stake in each of two insurance companies, namely Bharti AXA Life Insurance Company Limited and Bharti AXA General Insurance Company Limited (the "Acquired Enterprises"). The Competition Commission held that Reliance and the Bharti Group do not operate in interchangeable or substitutable products. Therefore, there is no 'horizontal' overlap in the proposed combination. The Competition Commission also did not find any significant 'vertical' relationship in the proposed combination, which could pose any competitive constraints in the life and general insurance business. Taking into account the presence of many players in both the life and general insurance sectors and insignificant market share of each of the Acquired Enterprises, and having due regard to the factors to be taken into consideration in accordance with the Competition Act, 2002 (the "Competition Act"), the Competition Commission held that the proposed combination was not likely to have an 'appreciable adverse effect' on competition.

The efficacy and promptness with which the Competition Commission has delivered its order has been well appreciated, and it is hoped that the Competition Commission will continue to deliver orders on future transactions as promptly as it has in the Reliance – Bharti Group transaction.

M&A transactions involving acquisitions of private companies or public unlisted companies have had a relatively smoother ride. The issues in such transactions have typically hinged around:

(a) *Deferred Consideration and Valuation Issues*: Indian law, i.e. the Foreign Exchange Management Act, 1999 (the "FEMA") does not permit the payment of 'deferred consideration' by foreign investors / acquirers, i.e., situations where the stake of Indian shareholders is sold to a foreign party, and the transaction consideration is staggered (structured usually as 'earn-outs') and payable subject to the achievement by the Indian shareholders of certain key milestones or merely a lapse of time. Such deferred consideration is viewed by India's central bank, the Reserve Bank of India (the "RBI"), as a 'credit facility', and is consequently not permitted under the existing law on the subject. Therefore, foreign acquirers are forced to stagger their acquisition over a period of a few

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years. The price of each tranche of the acquisition cannot be determined upfront, but has to be determined in accordance with the existing pricing guidelines at the time of completion of the relevant tranche.

In cases of a staggered acquisition by a foreign investor / acquirer, seller promoters have, typically, insisted on a floor price or a base valuation for the next tranche of the acquisition to shield them from recessionary factors that could potentially affect the valuation of their shares, especially in the information technology and information technology-enabled services industries.

(b) *Operational Issues*: Operational flexibility in M&A transactions where the promoters continue operating the company have caused some bit of concern, particularly on account of integration of past practices with the new. More often than not, these issues are resolved by having a detailed, yet flexible, operational matrix within which the promoters are required to operate.

(c) *Forum for Dispute Resolution*: Foreign investors have been hesitant to submit to Indian laws on arbitration, particularly, since India is an unfamiliar turf, and the dispute resolution process is sluggish and not as effective as compared to the well-established processes in Singapore or London. However, with the London Court of International Arbitration establishing a seat in New Delhi, India, this mindset of foreign investors appears to be rapidly changing.

Key Legal Developments

(a) Enforceability of Put and Call Options

Issues for Public Companies

The issue of enforceability of 'put' and 'call' option rights between shareholders of public companies has been a subject of debate, with one school of thought viewing such options as 'contingent contracts', which materialise upon exercise of such options and not the mere grant of such options. However, judicial pronouncements have rejected this argument and held that since shares of public listed and unlisted companies are freely transferrable, options of such nature fetter free transferability rights of the shareholders, and are therefore invalid. Further, put and call options in relation to securities of listed and unlisted public companies are considered to be "forward contracts", which may either be concluded on a spot delivery basis, i.e. with the exchange of securities and consideration taking place on the same or the next day, or where such contracts are settled over a stock exchange, in accordance with the Securities (Contract) Regulation Act, 1956 and the notifications issued thereunder.[5]

Until quite recently, the SEBI had not taken a view on this matter, but has finally done so in the Cairn-Vedanta deal, where it has ordered the parties to delete the put and call options and the pre-emptive rights included in their share purchase agreement.

Issues for Private Companies

In October 2011, India's Foreign Direct Investment Policy was amended to clarify that only equity shares, fully, compulsorily and mandatorily convertible debentures and preference shares, with no "in-built options of any type", would qualify as eligible instruments for foreign direct investment. Equity instruments issued / transferred to non-residents with 'in-built options' or supported by options sold by third parties would lose their equity character and such instruments would be considered "external commercial borrowings" and would have to comply with the extant guidelines pertaining to the same. This amendment came in the wake of the RBI frowning upon the practice of using put options in equity investments as a method of guaranteeing returns to foreign investors and providing financial protection to their investments. This amendment was bound to curtail investments in certain sectors and by specific types of investors (e.g. financial investors such as PE funds), who tend to rely upon put options in securities as an essential component of the transaction structure. Whilst it was clear that this amendment was an attempt to do away with put and call options which offer guaranteed price exits to foreign investors, it was unclear as to what extent this amendment sought to regulate "options", in general, provided to investors and acquirers in their investment agreements.

On October 31, 2011, this amendment to India's Foreign Direct Investment Policy was deleted in its entirety, since it threatened to have a negative impact on foreign investment and pursuant to widespread protests by all stakeholders to the Government. All eyes are now on the RBI to see what stance it will take since the RBI has, in recent transactions, viewed such options as debt.

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(b) Merger Control Regulations by the Competition Commission of India

Background

The Competition Commission in May, 2011 notified the Competition Commission of India (procedure in regard to the transaction of business relating to combination) Regulations, 2011 (the "Combination Regulations"), under the Competition Act.

The Competition Act was partially enforced on May 20, 2009, wherein the provisions relating to anti-competitive agreements and abuse of dominant position were notified. Sections 5 and 6 of the Competition Act which seek to regulate "combinations", requiring prior notification and approval, were notified on May 11, 2011 and have come into effect from June 1, 2011. With the notification of the Combination Regulations, all mergers, amalgamations and/or acquisitions falling within the thresholds indicated in Section 5 of the Competition Act, will require prior approval of the Competition Commission. Transactions found to have an "*appreciable adverse effect*" on competition in India will be rendered void in accordance with the Combination Regulations.

Notification Requirements

The requirement to file notice of combinations with the Competition Commission is based upon the occurrence of certain events,[6] such as:

(i) **Acquisition of Control / Merger and Amalgamation**
Competition Commission is required to be notified within 30 days of (a) the execution of any agreement or other binding document for acquiring control, shares, voting rights or assets; or (b) in the case of a merger and amalgamation, the board of directors' approval of the proposed merger or amalgamation.

(ii) **Public Financial Institution, Foreign Institutional Investor, Bank or Venture Capital Fund**
Whilst merger control provisions under the Competition Act do not apply to investments, financing facilities or any acquisition by a public financial institution, foreign institutional investor, bank or venture capital fund, the Competition Commission is, nevertheless, required to be notified of details of the transaction within 7 days from the date of the investment, financing or acquisition.

Competition Commission's Review

Under the Combination Regulations, the Competition Commission should endeavour to pass an order or issue direction within 180 days. A combination is deemed to be approved only in the absence of a decision from the Competition Commission within 210 days (excluding time taken in responding to clarifications sought by the Competition Commission). The Competition Commission is required, within 30 days of valid and complete notice, to formulate a *prima facie* opinion on whether the combination is likely to cause or has caused an '*appreciable adverse effect*' on competition within the relevant market in India.

This timeframe of 180 days was a cause of concern to prospective investors and acquirers, since delays in receiving the requisite regulatory orders could potentially change the dynamics of the deal (as in the case of the Cairn – Vedanta deal discussed above). However, the Competition Commission's timely order in the Reliance-Bharti Group transaction (discussed above) has provided hope to the industry.

(c) SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011

The SEBI, by virtue of a circular dated September 23, 2011, notified the revised SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 (the "Revised Takeover Regulations") that has come into effect on October 22, 2011. The Revised Takeover Regulations apply to all direct and indirect acquisition of shares or voting rights in, or control over a target company whose shares are listed as an entity on a stock exchange.

The key modifications are:

(i) an increase in the initial mandatory public offer trigger from 15% to 25%. This increase in the initial trigger for mandatory public offer to purchase the securities of the target company held by the public ("Open Offer") would mean that shareholders of the target company holding below 15% can now increase their shareholding to up to 25% without an obligation to make an Open Offer;

(ii) an increase in the minimum Open Offer size from 20% to 26%, i.e. acquirers proposing to acquire 25% or more of the target company, will have to make an Open Offer to acquire 26% of the public's shares. Consequently, acquirers would have to commit additional funds to acquire a higher number of shares. The effect of this amendment will have to be analysed in the backdrop of such Open

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Offers historically not having received overwhelming responses, since the predominant (but seemingly incorrect[7]) view appears to be that share prices of the targets post takeover announcements will be higher than the Open Offer price;

(iii) incorporation of a separate non-compete fee in the price of the promoter's shares is not permitted, and all shareholders are to be offered the same price per share;

(iv) in cases of competitive offers, the successful bidder has been provided the right to acquire shares of the other bidder(s) after the Open Offer period, without attracting Open Offer obligations;

(v) promoter shareholding in the target company cannot exceed 75%. Any shareholding in excess of this limit must be divested; and

(vi) voluntary Open Offers have been introduced subject to certain conditions (discussed below).

Hostile Takeovers under the Revised Takeover Regulations

India's previous takeover regulations did not prevent hostile takeovers, as nothing prevented a person who was not a shareholder in the target company from making an Open Offer for the shares of such company held by public shareholders. Whilst the Revised Takeover Regulations do not *per se* prohibit hostile takeovers, it mandates that:

- voluntary Open Offers may only be made by existing shareholders of the concerned company holding 25% but not more than 75% of the shares of a company (taking account of the maximum permissible public shareholding). Consequently, a person who does not hold any shares, or holds less than 25% shares, in a company cannot make a voluntary Open Offer without first triggering the mandatory Open Offer requirement by crossing the 25% threshold;
- a voluntary Open Offer can be made only by a person who has not acquired any shares in the target company in the preceding 52 weeks prior to the offer;
- during the offer period, the acquirer cannot acquire shares other than through the voluntary Open Offer; and
- once the voluntary Open Offer is completed, the acquirer cannot acquire further shares in the target company for a period of 6 months after completion of the Open Offer. However, this excludes acquisitions by making a competing Open Offer.

The aforesaid characteristics of a voluntary Open Offer and all the conditions that offer before, during and after the voluntary Open Offer effectively make a classic hostile takeover almost impossible in the Indian context.

It is interesting that it was not the intention of the Takeover Regulations Advisory Committee (the "TRAC")[8] to negate the possibility of hostile takeovers. The TRAC had recommended that with the exception of voluntary Open Offers, any takeover should trigger the requirement for an Open Offer of 100% of the shareholding of the target company, and not just an Open Offer for 20% of the public shareholding. This would ensure that the public shareholders would also be afforded the option of a complete exit along with the substantial shareholders of the target company, and not an exit pro rated to the size of the Open Offer. However, the TRAC recognised that there may be a need for shareholders to consolidate their shareholding in the target company, and consequently, recommended the introduction of voluntary Open Offers where the requirement of conducting a 100% Open Offer may be avoided by the acquirer. However, to discourage non-serious voluntary Open Offers, the TRAC decided to set a minimum Open Offer size of 10%. While the Revised Takeover Regulations has disregarded the recommendation of the TRAC on 100% Open Offers, and limits the overall offer size requirements to 26%, the consequential conditions for voluntary Open Offers, that were based on the general offer size being 100%, was not addressed in the Revised Takeover Regulations. Although the purpose for the introduction of voluntary Open Offers loses relevance with the non-acceptance of the 100% offer size requirement imposed by the TRAC, the Revised Takeover Regulations has, by default, led to difficulties in effecting hostile takeovers.

(d) Permission to Operate Escrow Accounts

The existing law on foreign direct investments, i.e. FEMA and the notifications issued thereunder did not permit the creation of escrow accounts from which foreign investment could be repatriated out of India. The RBI, which is the authority regulating foreign investments in India, only permitted the opening and maintenance of escrow accounts for acquisitions, transfer of securities through Open Offers, delisting and exit offers in accordance with the regulations issued by the SEBI.

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In May 2011, recognising the importance of affording foreign investors more operational flexibility in structuring their transactions, and with a view to facilitate foreign direct investment, the RBI has permitted the creation of non-interest bearing escrow accounts for the purposes of keeping shares or purchase or subscription money/consideration in an escrow for a maximum period of 6 months. However, the funds in the escrow account may not be used by the bank-escrow agent for providing any form of financing to a third party, nor for providing any non-fund based facilities such as letters of credits or guarantees against the balances in the escrow account.

The ability to operate escrow accounts is desirable for periods beyond 6 months, particularly to enable foreign investors to make adjustments against the transaction consideration towards tax indemnity claims. In a few cases where approval has been sought from the RBI to create and operate such escrow accounts for periods exceeding 6 months or to create interest bearing escrow accounts, the RBI has not accorded its approval. Consequently, the changes made by the RBI in May 2011 is unlikely to have the desired effect, although it has been viewed as a step in the right direction.

Industry Focus

In the year 2010, the telecommunication services, energy and healthcare sectors were the predominant sectors which saw a number of M&A and PE investments. These sectors attracted deals worth USD 14.03 billion, USD 1.17 billion and USD 961 million respectively. The telecommunication services sector generated the maximum revenue in the M&A space in 2010, owing to the USD 10.7 billion acquisition of *Zain Telecom*'s African operations by *Bharti AirtelAircel* (an Indian telecom service provider), followed by the USD 1.8 billion acquisition of tower assets of Aircel by GTL Infrastructure and Telenor ASA's USD 433 million investment in Unitech Wireless.

The oil and natural gas sector dominated the M&A activity in the first half of 2011, particularly on account of the *British Petroleum*'s purchase of a 30% stake in 23 oil and gas production-sharing contracts which are operated by *Reliance Industries Limited* for USD 7.2 billion. The first half of 2011 also witnessed robust activity in the telecommunication sector where, between the months of July and September, the pharmaceuticals, healthcare and biotechnology sector contributed 39% to the value of deals followed by the oil and gas sector.[9]

The year ahead

The second half of 2011 has been dominated by cautious investor sentiment in the backdrop of the European financial crisis and India's increasing inflationary issues. Despite these concerns continued momentum is expected in the M&A space in 2012 given the Government of India's focus on effecting policy changes to encourage foreign investment inflow.

From an outbound M&A perspective, the market trend reveals that there is likely to be continued activity in natural resources (i.e. oil and gas and metals and mining) and technology (information technology services) sectors in 2012. From an inbound M&A perspective, there will be continued interest in the healthcare, consumer and telecom sector. Further, domestic deals will see a sustained growth in terms of value and volume, to ensure corporate reorganisation and consolidation within the fragmented sectors. Sustained interest has been seen from Japan. Many Japanese corporates are seeking growth opportunities overseas and are becoming increasingly comfortable doing deals in India.[10]

* * *

Endnotes

1. Edition, 2010.
2. Grant Thornton, Dealtracker, Half Yearly Edition, 2011.
3. *Ibid*.
4. *Ibid*.
5. The Securities (Contract) Regulation Act, 1956 is the enactment that governs transactions in listed securities, and defines the term "option in securities' to mean a contract for the purchase or sale of

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a right to buy or sell securities in the future including put and call in securities.

6. It is pertinent to note that Schedule 1 of the Combination Regulations sets out the circumstances under which no notice is required to be provided to the Competition Commission of combinations.
7. News reports indicate that of the 98 Open Offers in 2010, 81 received poor responses with acquirers in these cases managing acquire less than half of the shares they had targeted for. Yet, 60% of the stocks where investors rejected Open Offers are now trading below the Open Offer price.
8. The TRAC is the body which has recommended the amendments to the takeover regulations in India.
9. Grant Thornton, *Dealtracker*, 2011 Quarterly Issue (July to September).
10. '*India Inc Deal Appetites and Trends*' http://www.vccircle.com/500/news/citi-ma-head-sameer-nath-on-india-inc-deal-appetite-trends, last visited on November 07, 2011.

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