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EYE ON INDIA

A Cyril Amarchand Mangaldas Thought Leadership Publication

4th EDITION

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FOREWORD

COVID-19 and the resultant economic contraction has had a significant negative impact across countries. The so-called first wave affected cross-border transactions across the world, due to lockdowns, closure of international borders and related uncertainties. As the world was recovering from the damage caused by the first wave and had just commenced its journey from the 'resilience' phase of COVID-19 to the 'recovery' phase, it was struck by a bigger and more damage causing second wave. In India, though there was no nation-wide lockdown, state-specific lockdowns prevailed in large parts of the country.

Despite the grim outlook, the COVID-19 crisis has opened up buy-side opportunities, leveraging lower valuations in the short term to seek higher long-term returns. Now, the situation is returning to normalcy and we are witnessing sequential improvement in terms of economic activity and mobility trends. Pent-up demand and increase in consumer spending are expected to revive in the coming months. The second wave did not significantly affect foreign investments into India and the stock market remained buoyant throughout this period. Encouragingly, certain regulators in India had moved swiftly to adjust onerous regulatory compliance burdens to stimulate investments.

Despite a fall in overall deal volumes as compared to 2020, there has been an increase in deal values. We are seeing major deal activity in the telecom, energy, e-commerce, manufacturing, IT and banking sectors. The startup space continues to be very active, and India now has a sizeable number of unicorns and a few decacorns that will undoubtedly explore listings in Indian and overseas markets in the coming year.

The digital and technology sector also saw a whopping increase in the number of deals in the past couple of months. India also witnessed a significant influx of foreign investments, particularly in the retail sector. The consolidation of various retail brands, the booming of e-commerce and digital technology preparedness have put India on the forefront and retail remains a sector to watch out for in the coming year.

While Covid-19 still occupies centre stage in our collective consciousness, I am excited to bring to you the next edition of 'Eye on India', and I am amazed, but not surprised, at the extent of India's growth and development. There is no denying that these are interesting times to be in India and we hope that our selection of essays will provide you with an equally interesting insight on these, and other issues of your interest. I look forward to your comments and suggestions as we continue to capture India's growth and journey through our thought leadership publications.

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September 30, 2021

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THE INDIAN **M&A LANDSCAPE**

TRENDS, OPPORTUNITIES AND RISKS

The impact of the COVID-19 pandemic was felt across the globe, with the society, global economy being significantly affected. India, however, is emerging from the ordeal with the worst behind it, and the Indian economy is looking poised for exponential growth, and more promising than ever.

Introduction

The world has seen considerable turmoil since the beginning of 2020. The rapid spread of COVID-19 forced industries to a standstill and entire offices had to move to remote work models, combined with issues such as tensions in global trade, stressed assets, and an overall economic slowdown. Despite this, deal activity in 2020 saw an increase of 29% in deal value, at a cumulative value of USD 77.667 billion over 2019 and a 3% increase in deal volume at 1,301 deals.[1]

The effects of the COVID-19 pandemic were widely felt across India as well – production and manufacturing reduced greatly as non-essential services were brought to a grinding halt, e-commerce (initially) suffered due to the nationwide lockdown, and many jobs were lost due to the inability of companies to continue employing non-essential staff. Nevertheless, domestic M&A in 2020 saw 209 deals with a cumulative value of USD 16.406 billion, while cross-border deals and mergers and internal restructurings saw a total of 142 and seven deals, with a cumulative value of USD 21.019 billion and USD 35 million, respectively. Private Equity **(PE)** also continued to flourish, with a total of 943 deals (up 15.5% from 2019) cumulatively, valued at USD 40.207 billion (an increase of 20.2% from the previous year).[2]

1 See: https://www.grantthornton.in/globalassets/1.-member-firms/india/assets/pdfs/annual-dealtracker-2021.pdf
2. See: https://www.grantthornton.in/globalassets/1.-member-firms/india/assets/pdfs/annual-deal-list-2021.pdf

The year 2020 also saw some of the largest deals in recent Indian history. In August 2020, Reliance Retail Ventures Limited acquired 100% of the Future Group's retail and wholesale business, along with its logistics and warehousing businesses for a net value of USD 3.295 billion, making it the largest domestic M&A transaction of 2020.[3] Facebook Inc. and Google LLC invested a cumulative amount of over USD 10 billion into Jio Platforms Limited (alongside other investors), marking the largest inbound investment into an Indian company in 2020.[4] Private equity, too, saw several deals with investments of over USD 1 billion, although the hallmark was the USD 2 billion investment by Brookfield Asset Management Inc. for 18% in RMZ Corp's real estate assets, making it the largest PE deal of 2020.[5]

This trend of growth in deal volumes and values in 2020 continued well into 2021, proving India to be a prime investment destination. As per reports published by Grant Thornton, the first half of 2021 has already shown 167 domestic M&A deals, 52 cross-border deals, and two mergers and internal restructurings, bringing an aggregate of 221 M&A deals, cumulatively valued at USD 24.36 billion, an increase of 36% in volume and 34% in value over H1 2020. Additionally, PE deals saw a 44% increase in volume and a 5% increase in value over H1 2020, with 635 deals cumulatively valued at USD 18.471 billion. Overall, H1 2021 appears to be off to a great start, with a total of 856 M&A and PE deals cumulatively valued at USD 42.831 billion, marking an incredible volume increase of 42% and a value increase of 20% over H1 2020.[6]

If H1 2021 is taken to be an indicator, this year is likely to be even more fruitful in the M&A and PE space – the first half of the year alone has already seen deals totaling over USD 8 billion, with the largest of these being the USD 5.1 billion acquisition of Dewan Housing Finance Corporation Limited by Piramal Capital and Housing Finance Limited, followed closely by the USD 3.5 billion acquisition of SB Energy India by Adani Green Energy Limited.[7] Interestingly, 2021 also saw the creation of multiple Indian unicorns, such as Innovative Retail Concepts Private Limited (known by their brand name 'BigBasket'), which saw a USD 1.257 billion acquisition of 64% of its shareholding by Tata Digital Private Limited, and Aakash Educational Services Limited, which was acquired at a valuation of USD 1 billion by Think and Learn Private Limited (known through their brand name 'Byju's Classes').

3. See: https://www.livemint.com/companies/news/reliance-retail-buys-future-group-s-retail-other-businesses-for-rs-24-713-cr-11598714386781.html
4. See: https://www.forbes.com/sites/meghabahree/2020/07/15/google-joins-facebook-in-billionaire-mukesh-ambanis-jio-juggernaut/
5. See: https://economictimes.indiatimes.com/industry/services/property-/-cstruction/rmz-divests-18-of-their-real-estate-assets-worth-2-billion-to-brookeld/articleshow/79603787.cms?from=mdr
6. See: https://www.grantthornton.in/globalassets/1.-member-firms/india/assets/pdfs/grant_thornton_dealtracker_h1_2021.pdf
7. See: https://www.grantthornton.in/globalassets/1.-member-firms/india/assets/pdfs/grant_thornton_dealtracker_h1_2021.pdf

Not surprisingly, educational technology and e-commerce companies saw a large growth spurt during the nationwide lockdown. Private equity deals, too, have flourished, with the largest being the USD 2 billion investment by three Blackstone affiliated funds for 55.3% shareholding in Mphasis Limited (a significant player in the IT – ITeS sector).[8]

While some of this growth can no doubt be attributed to positive economic spurt, brought about by an increasingly hopeful global outlook in light of emerging vaccines for COVID-19 and the corresponding decline in the number of cases, the consistent increase in both deal volumes and deal values even from 2019 to 2020 clearly shows that – pandemic or not – India remains an area of prime focus from an international economic perspective. This has been heavily influenced by geo-political considerations and global trade relations; and India priming itself to become a credible alternative to manufacturing in China (for example, Apple Inc. announced in 2020 that it will shift some of its manufacturing out of China and into India).[9] Additionally, several policy changes have been brought about by the Government to make India a more attractive destination for foreign investment. These include (inter alia) liberalisation of foreign direct investment limits, taxation reforms (especially in light of the much-reported Vodafone and Cairn disputes), startup promotion, the government's 'Make in India' initiative, the establishment of GIFT City in Gujarat, and the introduction of the long awaited Labour Codes. The most significant of these factors will be examined below.

Further, one of the most significant direct impacts of the COVID-19 pandemic on global practice has been in the way Material Adverse Change **(MAC)**/ Material Adverse Effect **(MAE)**/ Force Majeure **(FM)** clauses are negotiated and interpreted. A study conducted in 2005 found that approximately 69% of terminated acquisitions and 80% of renegotiated acquisitions were the result of an MAE clause.[10] COVID-19 brought about renewed focus on MAE/ MAC/ FM clauses in contracts, as parties sought to renegotiate terms due to the impacts of the pandemic.[11] Many disputes arose due to force majeure clauses and termination of contracts. Over the last year, we have seen a marked increase in newly negotiated MAE/ MAC/ FM clauses, containing an explicit provision for a pandemic. We anticipate such negotiations to become the new norm.

Recent M&A Trends and Sectors that made Giant Leaps

The bourgeoning M&A and PE figures quoted above have not been uniform across sectors. As expected, some sectors have seen larger growth than others.

In 2020, in terms of deal value, the top five sectors, which saw significant growth were telecom (at USD 20 billion, spurred by Jio Platforms Limited's 18 round fundraise spread over four months), retail and consumer sector (at USD 10.7 billion, bolstered by investments worth around USD 6.4 billion into Reliance Retail), energy and natural resources

8. See: https://www.grantthornton.in/globalassets/1.-member-firms/india/assets/pdfs/grant_thornton_dealtracker_h1_2021.pdf
9. See: https://www.business-standard.com/article/companies/apple-plans-to-move-10-of-its-global-manufacturing-to-india-in-5-years-120080300042_1.html
10. David J. Denis and Antonio J. Macias, Material Adverse Change Clauses and Acquisition Dynamics, The Journal of Financial and Quantitative Analysis, Vol. 48, No. 3 (JUNE 2013), pp.819-847.
11. See: https://www.legal500.com/developments/thought-leadership/renewed-focus-on-mac-and-mae-clauses-in-light-of-covid-19/

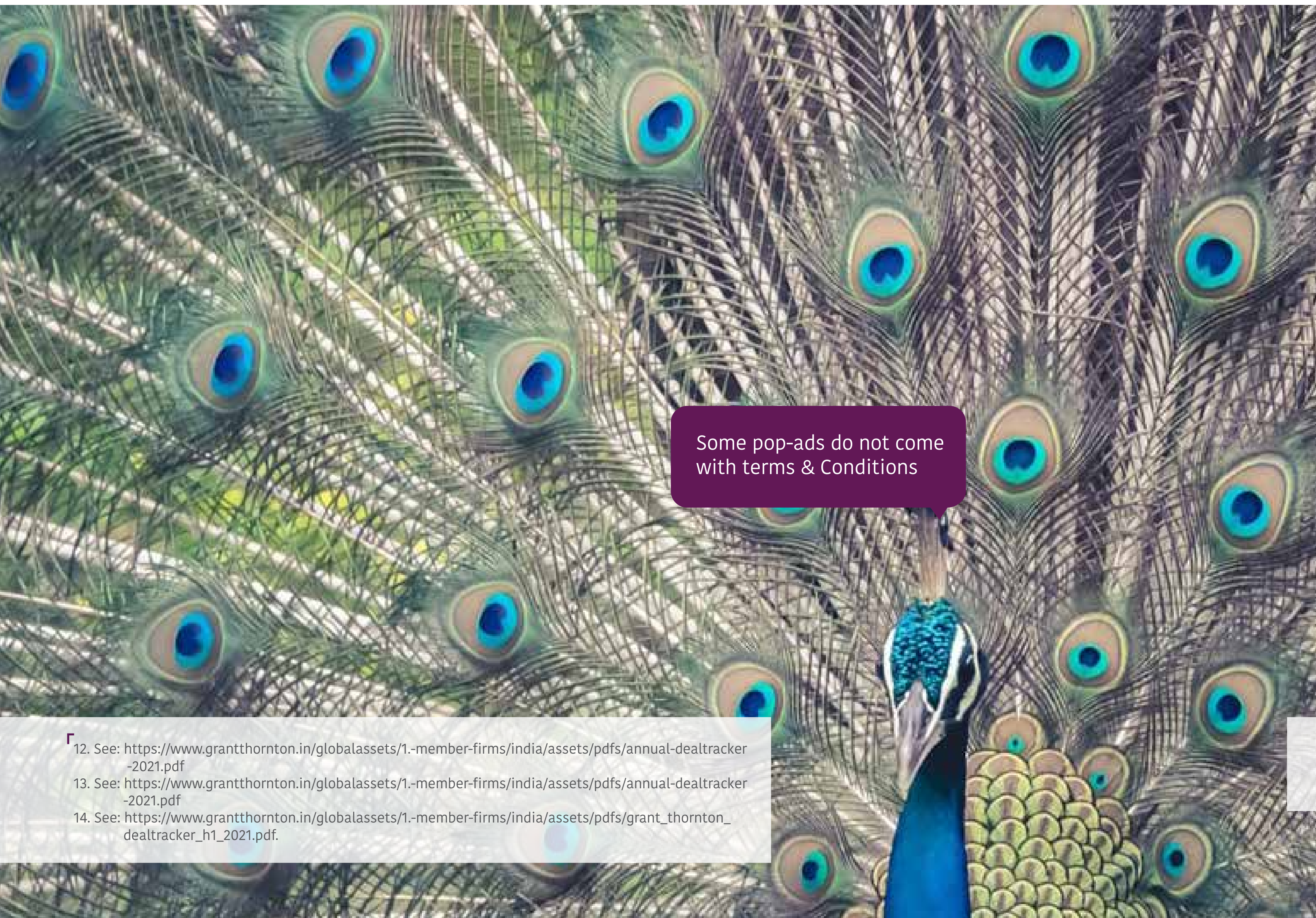
(at USD 6.7 billion), start-ups (at USD 5.7 billion), and real estate (at USD 5 billion). Sectors such as IT and ITeS (USD 3.7 billion), pharmaceuticals, healthcare, and biotechnology (USD 3.44 billion), e-commerce (USD 4.5), education (USD 1.27 billion), manufacturing (USD 4.7 billion), and infrastructure management (USD 2.137 billion) also continued to perform well.[12]

In terms of deal volume, the most activity in 2020 was seen in start-ups (677 deals), followed by IT and ITeS (103 deals), e-commerce (95), pharmaceuticals, healthcare, and biotechnology (63 deals), and retail and consumer (55 deals). Additionally, sectors such as banking and financial services (49 deals), manufacturing (39 deals), education (36 deals), and energy and natural resources (30 deals) also showed considerable activity during the year. Although the infrastructure management sector saw only eight deals through 2020, high deal values played a large role in contributing to the performance of the sector over the year.[13]

In H1 2021, the largest activity in terms of deal value was seen in the energy and natural resources sector (USD 7 billion), banking and financial services sector (USD 6.5 billion), IT and ITeS (USD 6.1 billion), e-commerce (USD 5.1 billion), and start-ups (USD 3.3 billion). Sectors such as manufacturing (USD 3 billion), education (USD 2.8 billion), and pharmaceuticals, healthcare, and biotechnology (USD 2.7 billion) also showed healthy activity, while sectors such as hospitality and leisure showed poor activity (with a mere USD 100 million), due to the effects of the COVID-19 pandemic and the travel restrictions imposed by various governments.[14]

In terms of deal volume, H1 2021 saw the most activity in start-ups (439 deals), e-commerce (78 deals), IT and ITeS (72 deals), pharmaceuticals, healthcare, and biotechnology (50 deals), retail and consumer (50 deals), and education (43 deals). Sectors such as aerospace (6 deals) and hospitality and leisure (6 deals) showed poor activity, again due to the COVID-19 pandemic.[15]

However, while industries such as aviation and hospitality may have suffered in the last 18 months, it would not be unreasonable to expect a significant upturn in activity in these sectors as COVID-19 vaccination rates increase and leisure travel begins to resume and return to pre-pandemic levels.



12. See: https://www.grantthornton.in/globalassets/1.-member-firms/india/assets/pdfs/annual-dealtracker-2021.pdf
13. See: https://www.grantthornton.in/globalassets/1.-member-firms/india/assets/pdfs/annual-dealtracker-2021.pdf
14. See: https://www.grantthornton.in/globalassets/1.-member-firms/india/assets/pdfs/grant_thornton_dealtracker_h1_2021.pdf.

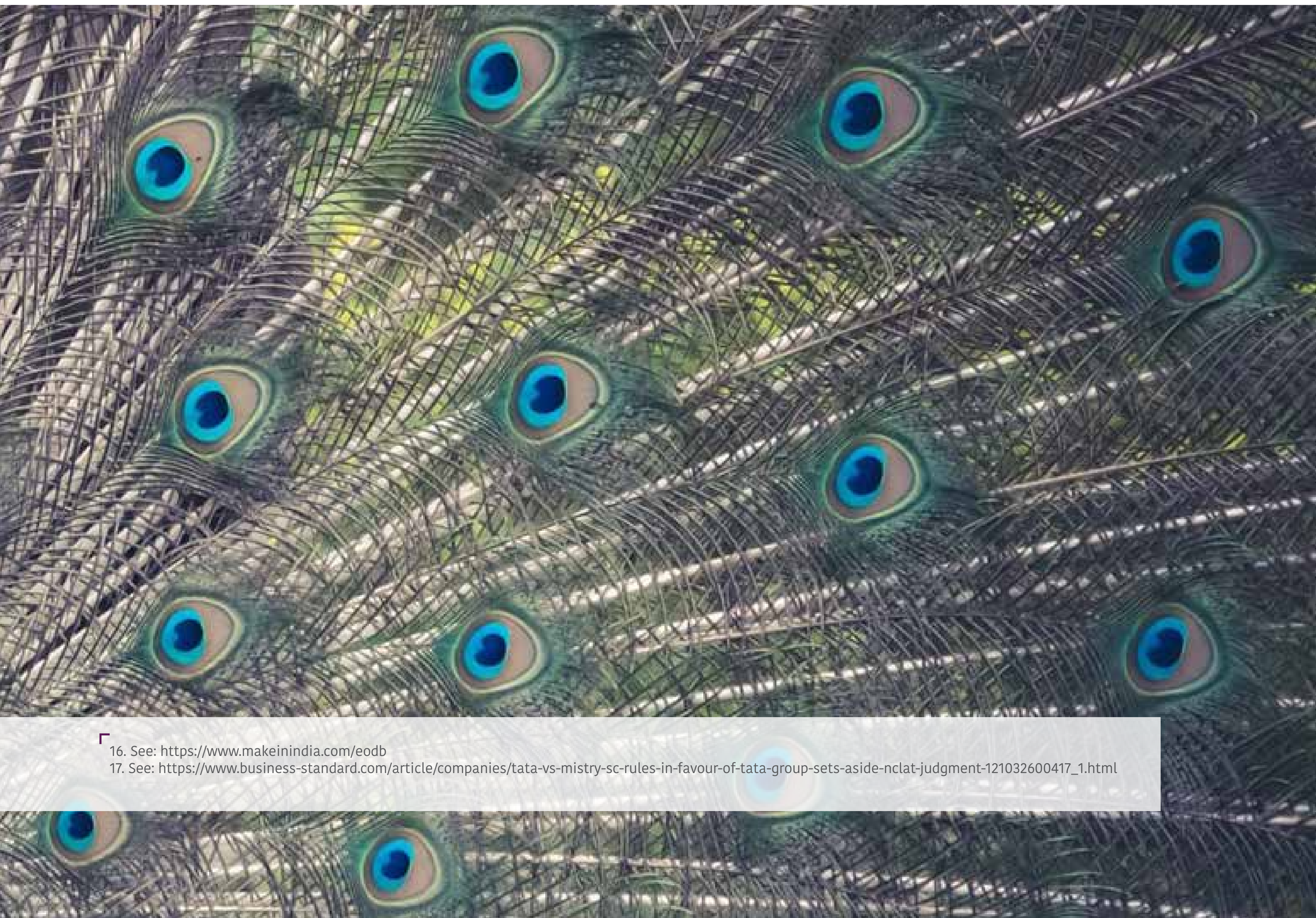
Recent Policy Changes Impacting M&A Growth

CORPORATE GOVERNANCE

The year 2020 saw a number of changes being made to the Companies Act, 2013, and generally to corporate governance in India. These changes are likely to make compliance easier, thereby improving India's Ease of Doing Business rating (in which, as of 2020, India ranked in the 63rd position[16]). Other changes include easing compliances in relation to Corporate Social Responsibility (wherein unspent amounts for previous years may be set off simply by transferring such amounts to a permitted fund established by the government for the purpose), rationalisation of penalties for non-compliances, relaxation of numerous compliance requirements, de-criminalising various provisions under the Companies Act, 2013, promoting virtual meetings for shareholders and Boards of companies, permitting payments to non-independent directors even in case of inadequacy of profits, and speeding up of various timelines under the Companies Act, 2013, as well.

The Securities and Exchange Board of India **(SEBI)** has also amended and even replaced many regulations to streamline various processes and compliances. For example, SEBI recently notified the new SEBI (Delisting of Equity Shares) Regulations, 2021, to bring the delisting process in line with procedures applicable to tender offers under Indian law. Many amendments to various other regulations pertaining to Indian listed companies have also been made (such as reduction of promoter lock-ins), ostensibly with the goal of making India more attractive to foreign investors.

Recent corporate governance related issues that have made headlines include the Tata-Mistry dispute and SEBI's intervention in the recent Carlyle-Punjab National Bank deal. The Tata-Mistry dispute essentially pertains to the validity of the removal of Cyrus Mistry as Managing Director of Tata group and is currently sub judice.[17] In the Carlyle-Punjab National Bank deal, SEBI had intervened in Punjab National Bank's deal to raise INR 4,000 crore through preferential allotment of shares and issue of share warrants to Carlyle, directing the halting of the allotment process until valuation had been conducted by an independent valuer, citing also the argument that the allotment was ultra vires the Articles of Association of the Company.



16. See: https://www.makeinindia.com/eodb
17. See: https://www.business-standard.com/article/companies/tata-vs-mistry-sc-rules-in-favour-of-tata-group-sets-aside-nclat-judgment-121032600417_1.html

FOREIGN EXCHANGE REFORMS

On April 17, 2020, the Department for the Promotion of Industry and Internal Trade **(DPIIT)** issued a notification in Press Note 3 (2020 Series), for "curbing opportunistic takeovers/ acquisitions of Indian companies due to the current COVID-19 pandemic".[18] Under the new framework, any investment from any country sharing a land border with India would require government approval, regardless of whether the proposed sector was covered under the automatic route or not (as opposed to the previous requirement only in respect of Pakistan and Bangladesh), including if such a proposed transaction would result in the beneficial ownership vesting in a resident of a country sharing a land border with India. This notification came hot on the heels of the announcement that the People's Bank of China was raising its stake in HDFC Bank Limited from 0.8% to 1.01%, shortly after the COVID-19 pandemic became a cause for global concern.[19] The notification does not specify the manner or thresholds with which beneficial ownership will be calculated, although it appears to be targeted primarily at investments inbound from China.

The last two years have seen several positive policy changes as well. For example, the limit in single brand retail trading was increased to 100%, subject to fulfilment of conditions such as local sourcing requirements.[20] The foreign direct investment limit in the defense sector was raised to 74% under the automatic route, while in 2021, in a bid to attract FDI into the Indian insurance sector, the DPIIT in June 2021 notified an increase in foreign direct investment limits in the insurance sector, from 49% to 74% under the automatic route, along with 100% foreign direct investment under the automatic route for insurance intermediaries.[21] This notification is anticipated to benefit 23 private life insurers, 21 private non-life insurers, and seven specialised private health insurance companies.[22]

Additionally, 100% foreign direct investment has been allowed under the automatic route in oil public sector undertakings.[23] Foreign direct investment into India remained strong, with a total inflow of USD 13.438 billion in January 2021-March 2021 alone. Overall, the total foreign direct investment inflow in FY2020-21 saw a 19% rise from its immediate predecessor, at USD 59.636 billion. Of the total foreign direct investment made in India in the last financial year, the computer software and hardware sector saw the maximum inflow at USD 26.145 billion, followed by construction/ infrastructure and the services sector at USD 7.875 billion and USD 5.060 billion, respectively.[24]

The Reserve Bank of India's Annual Report for FY 2020-21 suggests that changes are also likely to the Overseas Direct Investment framework in India, to make them "simpler and more principles- based".[25] These changes, if implemented, are expected to make it easier for Indian companies to invest abroad, thereby expanding the growth potential of Indian companies further – making them even riper targets for foreign investment.

TAXATION REFORMS

Several taxation related changes have occurred in the last two years that are likely to significantly impact M&A deals in the country. Most recently, Finance Minister Ms. Nirmala Sitharaman introduced the Taxation Reforms (Amendment) Act, 2021, in the Parliament, which received Presidential assent on August 14, 2021. This much awaited Bill nullifies the ability of the government to levy retrospective tax on companies – a policy decision that was most significantly debated in the Cairn Energy and Vodafone cases.[26] The government will also return (albeit without interest) any amounts that had thus far been collected under the retrospective taxation regime – totaling over INR 8,000 crore.[27] It is anticipated that this decision will further boost investor confidence in India and highlight India as a prime destination for foreign investment.

Additionally, the Finance Act, 2021, also brought about significant changes in taxation laws in India. For example, fair market value of assets transferred under a slump sale would now be the consideration paid for purposes of computation of tax. As a result, calculating capital gains would now become easier. Further, the Act also settled the dust on the previously debated issue of depreciation of goodwill – with effect from this financial year, taxpayers won't be able to claim depreciation on goodwill that forms a part of a block of assets.

18. See: https://dpiit.gov.in/sites/default/files/pn3_2020.pdf
19. See: https://www.indiatoday.in/business/story/alarmed-by-chinese-bank-raising-stake-in-hdfc-centre-revises-fdi-policy-1668407-2020-04-18
20. See: https://corporate.cyrilamarchandblogs.com/2020/05/single-brand-retail-trading-a-tale-to-harmonise-ndi-rules-with-the-fdi-policy/
21. See: https://dpiit.gov.in/sites/default/files/pn2-2021.pdf
22. See: https://www.deccanherald.com/business/business-news/dpiit-notifies-74-fdi-cap-in-insurance-sector-under-automatic-route-997843.html
23. See: https://economictimes.indiatimes.com/industry/energy/oil-gas/govt-allows-100-fdi-in-oil-exploration-cos-refiners-psus-with-in-principle-nod-for-strategic-divestment/articleshow/84862687.cms?from=mdr
24. See: https://dpiit.gov.in/sites/default/files/FDI_Factsheet_March%2C21.pdf
25. See: https://rbidocs.rbi.org.in/rdocs/AnnualReport/PDFs/0RBIAR202021_F49F9833694E84C16AAD01BE48F53F6A2.PDF at page 131 (Paragraph V.41)
26. See: The Taxation Reforms (Amendment) Act, 2021.
27. See: https://economictimes.indiatimes.com/news/economy/policy/retro-tax-law-scrapped-taxation-law-amendments-act-2021-gets-presidential-assent/articleshow/85321944.cms

ARBITRATION AND DISPUTE RESOLUTION

In 2020, the Arbitration and Conciliation Act, 1996, was amended with the primary objective of curbing dishonest practices while securing contracts or arbitral awards. Among other changes, a new provision has been inserted (with retrospective effect from the date of commencement of the Act in October 2015), to the effect that if an Indian court is satisfied that fraudulent or corrupt means were used in entering into the arbitral agreement or in securing the arbitral award, it may indefinitely stay the award, pending the disposal of the proceedings under Section 34 of the Act. It has also done away with the qualifications of arbitrators that had been added in a 2019 amendment to the Act, providing instead that the qualifications will be prescribed under appropriate regulations, allowing greater party autonomy in selection of an arbitrator.

One of the most widely covered commercial disputes in recent times has been the Amazon-Future arbitration. In 2020, Amazon had challenged the acquisition of Future Group's businesses by Reliance, alleging a breach of a non-compete agreement that Future Group had with Amazon. The agreement also contained provisions providing that disputes would be subject to arbitration before the Singapore International Arbitration Centre **(SIAC)**. In August 2021, the Supreme Court held that the order of the emergency arbitrator under the SIAC is enforceable in India. Although the dispute is far from resolved, it is expected that this newly- clarified position will further boost investor confidence, as holding emergency orders from proceedings outside India will now be enforceable within India, which will ensure that investor rights are better protected and dispute resolution processes are better streamlined.

LABOUR LAW REFORMS

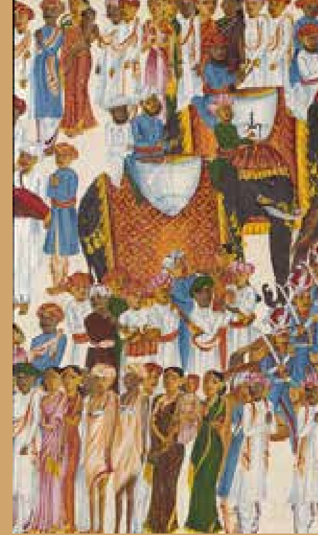
In a bid to simplify compliance under labour laws in India, the government recently introduced the much awaited Labour Codes, which consolidate India's labour laws into four codes (covering a Code on Wages, Code on Social Security, Code on Industrial Relations, and a Code on Occupational Safety and Health). It is anticipated that these codes will be notified in October 2021.[28]

Some of the changes brought about by these codes include the ability to compound offences; amounts payable on compounding are calculated at 50% of the penalty for offences punishable with a fine, and 75% of the penalty for offences that include imprisonment (as some offences are punishable with up to one-year imprisonment). The codes also establish 'inspectors-cum-facilitators' as authorities to monitor compliance by companies.

Conclusion

While it would be inaccurate to say that the effects of the COVID-19 pandemic were not felt on the Indian economy or on the M&A and PE deal landscape in India, it is noteworthy that – overall – there has been a marked increase in deal making over 2019, showing that the economy continues to grow, pandemic notwithstanding. India remains a compelling alternative to China for global manufacturing, and continual economic reforms by the government to boost investor confidence show that the nation has, and will continue to persevere through the pandemic and grow at unprecedented rates. Initiatives such as 'Make in India' are targeted toward making India a USD 5 trillion economy by 2025, with a promise to continue to spur economic growth in an upward trajectory.

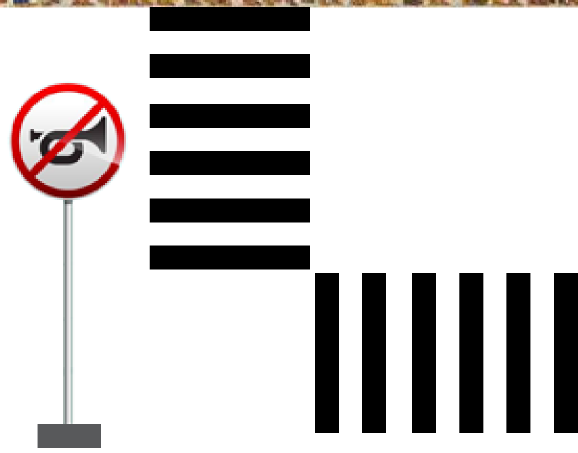
28. See: https://www.financialexpress.com/economy/labour-codes-keen-on-oct-rollout-govt-may-address-employers-concerns/2293606/



02

AN OVERVIEW OF **BENEFICIAL OWNERSHIP** REGIME

UNDER THE COMPANIES ACT, 2013



Introduction

Complex structures and chains of corporate vehicles have been historically used to hide the real owners behind the underlying transactions. Thus, it is no surprise that determination of beneficial owner of assets and income to prevent misuse of corporate structures for the purpose of evading tax or laundering money for corrupt or illegal purposes, including for terrorist activities, became an exercise across several jurisdictions and international bodies, including the Financial Action Task Force **(FATF)**.[1] His article gives an overview of the key provisions of the Companies Act, 2013 **(2013 Act)** that stipulate the tests for determination of significant beneficial ownership.

1. Guidance on Transparency and Beneficial Ownership (Recommendations 24 & 25).

Significant Beneficial Ownership under the Companies Act

With the objective[2] to prevent misuse of corporate vehicles for propagating corrupt or illegal purposes such as tax evasion, money laundering and terrorist activities, the 2013 Act was amended in 2017. The amendment introduced provisions dealing with identification and disclosure of Significant Beneficial Owners **(SBOs)**. This was shortly followed by the notification of the Companies (Significant Beneficial Owners) Rules, 2018 **(SBO Rules)**, which were made effective from February 08, 2019.

Objective Test and Subjective Test

(I) OBJECTIVE TEST:

(a) Not less than 10% indirect shareholding (including any direct holding) in the reporting company;

(b) Not less than 10% indirect voting rights (including any direct holding) in the reporting company;

(c) Not less than 10% (including any direct holding) right to receive or participate in the total distributable dividend, or any other distribution, in a financial year in the reporting company.

(II) SUBJECTIVE TEST:

Right to exercise or actual exercise of 'significant influence' or 'control' in any manner other than through direct holdings alone. Whether an individual exercises or has the right to exercise the powers captured in the definition of the term 'significant influence' or 'control' would have to be evaluated based on the factual circumstances of each case.

2. Paragraph 7.1, Company Law Committee Report dated February 1, 2016.

ASCERTAINING SBO VIS A VIS LEGAL FORM OF MEMBER ROUND

Depending on the legal form of the member of the reporting company, the SBO Rules have prescribed different rules for identification of SBOs.

Sl. No.	Legal Form of member of the Reporting Company	Who shall be regarded as the SBO
1.	Body corporate (whether incorporated or registered in India or abroad), other than a limited liability partnership	An individual who: (a) holds majority stake[3] in that member; or (b) holds majority stake in the ultimate holding company (whether incorporated or registered in India or abroad) of that member
2.	HUF (through karta)	An individual who is the karta of the HUF
3.	Partnership entity (whether represented by itself or through its partner)	An individual who: (a) is a partner (b) holds majority stake in the body corporate, which is a partner of the partnership entity; or (c) holds majority stake in the ultimate holding company of the body corporate, which is a partner of the partnership entity.
4.	Trust (represented through trustee)	An individual who: (a) is a trustee in case of a discretionary trust or a charitable trust; (b) is a beneficiary in case of a specific trust; or (c) is the author or settlor in case of a revocable trust.
5.	Pooled investment vehicle **(PIV)** or an entity controlled by the PIV, based in a member State of the FATF, and the securities market regulator in member States of the International Organization of Securities Commissions.	An individual in relation to the PIV, who: (a) is a general partner (b) is an investment manager; or (c) is a CEO where the investment manager of such pooled vehicle is a body corporate or a partnership entity
6.	Where the member of a reporting company is a PIV or an entity controlled by the pooled investment vehicle, based in a jurisdiction other than mentioned at Sl. No. 5 above.	SBO to be determined as per principles set out at Sl. Nos. 1 to 4 of this table.

3. The term "majority stake" means – (i) holding more than one-half of the equity share capital in the body corporate; or (ii) holding more than one-half of the voting rights in the body corporate; or (iii) having right to receive or participate in more than one-half of the distributable dividend or any other distribution by the body corporate.

KEY COMPLIANCES

Every individual who is a SBO as on the commencement date of the SBO Rules is required to file Form BEN-1 with the reporting company within 90 days thereof **(Reporting Date)**. Any changes to SBO holdings after such first filing, need to be reported within 30 days to the reporting company. The reporting company is required to file Form BEN-2 with the Registrar within 30 days from the Reporting Date. Every reporting company is required to maintain register of SBOs in Form BEN-3.

FAILURE TO DISCLOSE OR UNSATISFACTORY DISCLOSURE – RECOURSE TO THE REPORTING COMPANY

The reporting company is required to give a notice under Form BEN- 4 to any person whom it has a reasonable cause to believe to (i) be a SBO or (ii) be having knowledge of the identity of a SBO or another person likely to have such knowledge; or (iii) having been a SBO of the company at any time during the three years immediately preceding the date of such notice being issued by the company, and who is not registered as a SBO. It is provided in Section 90(7) of the 2013 Act that (a) where that person fails to give the reporting company the information required by the notice within the time specified therein; or (b) where the information given is not satisfactory, the reporting company shall apply to the National Company Law Tribunal **(NCLT)** for an order directing the shares in question to be subject to restrictions with regard to transfer of interest, suspension of all rights attached to the shares and such other matters as may be prescribed. Rule 7 of the SBO Rules prescribes an inclusive list of the restrictions on shares as below:

(a) restrictions on the transfer of interest attached to the shares in question;

(b) suspension of the right to receive dividend or any other distribution in relation to the shares in question.

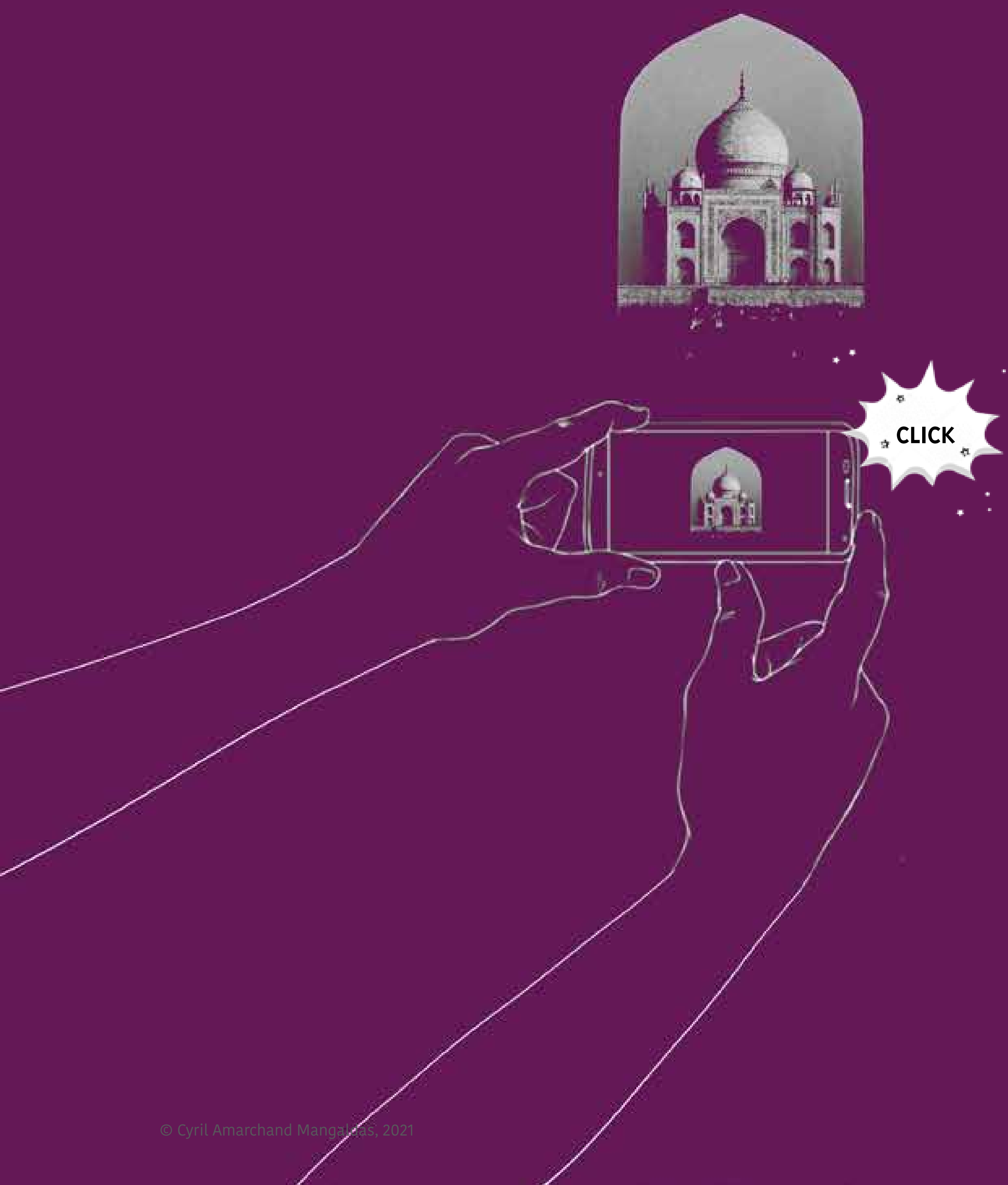
(c) suspension of voting rights in relation to the shares in question

The aggrieved person has the right to apply to NCLT for relaxation or lifting of such restrictions within one year, failing which NCLT has the powers to transfer such shares to the Investor Education & Protection Fund, without any restrictions.

The decision on whether the information furnished by an individual is satisfactory or not can only be made by the Board of Directors of the reporting company. Any person wilfully furnishing false or incorrect information or suppressing material information that he is aware of, is also liable to be prosecuted for fraud under Section 447 of the 2013 Act.

Conclusion

To sum up, determination of a SBO requires careful consideration and detailed scrutiny, especially where the ownership is structured through several layers (of companies, partnerships or trusts) and through combination of direct and indirect holding through trusts. One has to carefully evaluate implications of such declarations under other legislations like the Prohibition of Benami Transactions Act, 1988 and the Income Tax Act, 1961 to assess the likely impact on the tax structure taken with respect to such shareholdings in the reporting companies.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03

Private **Equity Transactions** in India

RECENT TRENDS

Last year, the pandemic caused acute disruptions across business sectors. The Private Equity **(PE)** investments in India that soft-pedalled through the first quarter of the year 2020, picked up momentum by the year end. By the end of year 2020, PE investments in India hit a record USD 62 Billion[1]. Further, in H1-2021, India recorded USD 40.7 Billion in PE investments[2]. The following paragraphs trace some of the recent PE deal trends in India.

PLATFORM TRENDS

The AIF sector has observed ~23% surge in the total fund raised between March 31, 2020 and March 31, 2021[3]. After a frenetic 2019, when the FPIs made record-breaking investments of USD 3 billion[4], the bullish trend took a hit owing to the pandemic. However, the FDI inflows in the financial year 2020-2021 has observed a 40% growth in comparison to financial year 2019-2020[5] despite the issuance of Press Note 3, which now mandates prior Government approval for FDI from any land border-sharing foreign country.

SECTOR TRENDS

The pharma and healthcare sector attracted the most investment in India after Covid-19 infections abated, with Piramal Healthcare and JB Chemicals walking

1. See: https://www.financialexpress.com/market/private-equity-investments-hit-record-62-2-billion-in-2020-bain-ivca-report/2268437/
2. See: https://www.pwc.in/assets/pdfs/services/deals/deals-in-india-mid-year-review-and-outlook-for-2021.pdf
3. See: https://www.sebi.gov.in/statistics/1392982252002.html
4. See: www.fpi.nsdl.co.in/web/Reports/Yearwise.aspx?RptType=6
5. See: https://dpiit.gov.in/sites/default/files/FDI%20Factsheet%20December%2020.pdf

away with lion's share of investments. The USD 2.1 billion-investments recorded in H1-2021 in the health and pharma sector is nearly equal to the investment it received in the year 2020 (USD 2.5 billion)[6]. With India being regarded as the hub of bulk manufacturing of medicines and vaccines, it is expected that investment in the pharma and healthcare sector will grow in the coming years. Businesses in the technology sector grew by 77% in H1-2021 in comparison to the year 2020[7], with huge investments in start-ups like Swiggy, Cred and Upgrad. The Indian market has also witnessed a surge in PE investments in the real estate and infrastructure sectors mainly due to the introduction of investment vehicles like Real Estate Investment Trusts **(REITs)** and Infrastructure Investment Trusts **(InvITs).** The e-commerce sector witnessed USD 10.6 billion worth of PE investments in H1-2021, which is double the previous all-time high investment of USD 5.1 billion[8], recorded in 2018. The H1-2021 also recorded a spike in investment in the banking, financial services and insurance sectors compared to the year 2020 with notable deals in SBI Life, Policy Bazar, Altico Capital SREI Equipment Finance[9]. It is observed that the increase in the limit for FDI for the insurance sector from 49% to 74% will also attract PE investments in the near future. On the other hand, PE investments in the Retail and Consumer Goods sector declined by 664% in the period under consideration as compared to the year 2020[10].

PRIVATE INVESTMENT IN PUBLIC EQUITY (PIPE)

During the early part of this decade, PIPE investments in India accounted for 20%[11] of the total deal value, which fell to only ~6% of the total deals value in the year 2020[12]. The decline in PIPE investment was, to a great extent, due to the rise of PE funds' attraction towards the entrepreneurial landscape and start-ups. They increasingly preferred control deals over minority deals, which is elaborated below. A fall in the value for PIPE investments may also be attributed to the regulatory hurdles faced by the PE investors. For instance, the one-year lock-in period for preferential allotment restricted the ability of the investor to exit even when the company was facing huge losses. PIPE investments in H1-2021 recorded a 11% increase in comparison to the year 2020, which is primarily due to the fundraising by the Carlyle Group in PNB Housing Finance[13]. However, the deal is currently on hold and under regulatory scrutiny on account of valuation concerns.

CONTROL V. MINORITY INVESTMENTS

On account of the pandemic, PE investments in control deals declined sharply from USD 12.2 billion in the year 2019 to USD 3.8 billion in the year 2020[14]. The ratio of PE investments in control deals to minority deals was 15 to 85 in 2020[15]. However, the Q4-2020 witnessed an increase in the inclination towards control deals as PE investors sought majority control in companies to retain the ability to run the business in their own terms as well as to have a greater say during exits. Additionally, as companies have matured, a lot of promoters are no longer keen to run the businesses and are open to cede control. Further, a lot of promoters and family-run businesses in India are currently in distress and are willing to sell, thereby providing the perfect opportunity for PE investors to capitalise on the situation and take control of the company. In control transactions involving listed companies, PE investors are required to be mindful of corporate governance standards, compliance requirements, valuation, related party arrangements, minority interest, being classified as 'promoters' and anti-trust regulations.

AUCTION V. BILATERAL PROCESS

Typically, PE deals are bilateral transactions. However, in view of the increased competition and to achieve the optimal value for the sale, auction processes have gained popularity in India.In fact, in the year 2020, there were over 31 auction process for various PE deals in India[16]. Auction processes are more successful for companies that are enticing targets in hot button sectors. The deal dynamics under competitive auction process are evolving with shortened exclusivity period being offered to investors, investors relying upon vendor due diligence, warranty survival period, qualifications, materiality, remedy regimes, standstill provisions and reserved matters being heavily negotiated. The swiftness of deal consummation is turning out to be a crucial factor for selection of an investor in a competitive auction process.

6. See: https://www.pwc.in/assets/pdfs/services/deals/deals-in-india-mid-year-review-and-outlook-for-2021.pdf
7. See: https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/topics/private-equity/pe-vc-monthly-roundup/2021/ivca-ey-monthly-pe-vc-roundup-june-2021.pdf
8. See: https://www.ey.com/en_in/private-equity/pe-vc-monthly-roundup#:~:text=2021%20has%20been%20a%20spectacular%20year%20for%20PE%2FVC,third%20%2829%25%29%20of%20all%20PE%2FVC%20investments%20in%202021.
9. See: https://www.livemint.com/market/india-private-equity-landscape-in-the-first-half-of-2021-11627888532648.html; https://www.pwc.in/assets/pdfs/services/deals/deals-in-india-mid-year-review-and-outlook-for-2021.pdf
10. See: https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/topics/private-equity/pe-vc-monthly-roundup/2021/ivca-ey-monthly-pe-vc-roundup-june-2021.pdf
11. See: https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/topics/private-equity/2021/pe-vc-trendbook-2021.pdf
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14. See: https://www.pwc.in/assets/pdfs/services/deals/deals-in-india-mid-year-review-and-outlook-for-2021.pdf
15. See: https://www.bain.com/globalassets/noindex/2021/bain_report_india_private_equity_report_2021.pdf
16. See: https://law.asia/year-ahead-pe-deal-making-in-india/

HOLDING PERIOD

The holding period for a first fund investor is typically 4-5 years but for a second fund investor it is usually between 5-7 years[17]. Trends have shown that the median holding period of investment in India increased from 3.1 years to 6.2 years[18] during calendar year 2015 to 2019. In the year 2020, the average holding period of leading PE funds stood between ~ 4-6 years[19]. The pandemic has led to uncertainty in the market due to which PE funds are even more cautious in their exit-related approach. It appears that PE funds have shifted to a 'wait and watch' approach so that they can assess the market recovery before opting to exit.

R&W INSURANCE

PE investors have shown a keen interest to use representations and warranties insurance **(R&W insurance)** in the recent few years, particularly in deals involving PE exits and for covering risks related to withholding tax liability. Further, R&W insurance presents a competitive edge to PE investors in a bidding process since the seller is not required to provide extended indemnity. Having said that, India is still considered to be a high-risk jurisdiction and certain sectors are considered to be more 'high risk' than others, e.g. telecom, financial services and infrastructure. As a result, the insurance premium levels are relatively higher than other sectors and for certain high-risk sectors, insurance may not even be available. Insurance premium vary from sector-to-sector and also for each company, and could vary from 1.5% to 3% of the insured amount (reduced from the historical levels of 3% to 3.5%) for R&W insurance policies and from 4% to5% for withholding tax insurance policies. However, with the growth of R&W insurance business, the premium levels are expected to reduce further.

EXIT TRENDS

In H1-2021, 118 PE exits were recorded in comparison to 151 PE exits in the year-2020.[20] Further, the deal value of PE exits in H1-2021 recorded an increase of 273% in comparison to the year 2020.[21] In H1-2021, strategic sale, secondary sale (i.e. sale to another PE investor) and public market sale accounted for 58%, 21% and 18% of the exit value respectively.[22]

The sectors that have dominated the PE exit deals include the Financial sector, with USD 1.88 billion of deal value, and the consumer discretionary sector, with USD 1.7 billion of deal value.[23] The technology sector witnessed a surge in the value of PE exits in India from USD 0.84 billion in the year 2020 to USD 11.8 billion in H1-2021.[24] Further, sectors like infrastructure and real estate have also struggled to provide exits[25] to PE investors due to delayed execution of projects and market slowdown.

The Indian IPO market has revived significantly which has witnessed a massive increase in the share of IPO exits. In case of strategic sales, PE funds need to hunt for buyers, and they do not necessarily give them the best valuation since certain returns need to be left for the new investors also. Promoter-driven exits (e.g. buyback, put option) have been the least preferred since the last few years due to unfavourable pricing, liquidity and funding issues and limited option under buy-back. With the upcoming IPOs, it is expected that PE exits will gain significant impetus.

Conclusion

In the past year, India has witnessed record PE investments in various sectors and has managed to overcome the challenges posed by the pandemic. The prospect of PE investments in India looks bright with technology, e-commerce and the pharma & healthcare sectors in the lead. . The increasing maturity of both promoters and PE funds (specifically those with learnings post Covid) could pave way for the evolution of newer trends and investment strategies.

17. See: https://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-fa-private-equity-noexp.pdf
18. See: https://economictimes.indiatimes.com/tech/funding/pe-vc-deals-in-india-shot-up-60-between-2016-and-2019-kpmg/articleshow/81003408.cms
19. See: https://assets.ey.com/content/dam/ey-sites/ey-com/en_in/topics/private-equity/2021/pe-vc-trendbook-2021.pdf
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24. See: https://www.pwc.in/assets/pdfs/services/deals/deals-in-india-mid-year-review-and-outlook-for-2021.pdf
25. See: https://www.bain.com/globalassets/noindex/2021/bain_report_india_private_equity_report_2021.pdf and http://ivca.in/wp-content/uploads/2020/05/

04

ACHILLE'S HEELS OF **PUBLIC M&A:**

CORPORATE GOVERNANCE AND MINORITY INTEREST

As the dust settles on the COVID-19 pandemic, economic recovery in India is once again on track. While M&A activity was impacted during the onset of the pandemic, it has now gathered momentum. Throughout the COVID-19 crisis, consideration of corporate governance and minority interest continued to remain an important theme in M&A activity. Afterall, the last decade not only witnessed expansion in M&A activity in India, but also the emergence of themes like corporate governance, shareholder activism, stewardship codes, role of proxy advisory firms, investor awareness, etc. It is observed that governance and minority shareholder's interest have been paramount in any discourse on legal and policy reforms concerning M&A in publicly traded companies.

In India, the corporate governance framework for publicly traded companies and minority protection manifests itself in the Companies Act, 2013, and the various regulations issued by the securities market regulator, Securities and Exchange Board of India **(SEBI)**, where the fiduciary duties of the directors have been codified and a stakeholder model of governance has been set out. Additionally, the regulators are in a constant pursuit to improve governance standards by way of deliberations, market engagement, revisions of the norms and increased regulatory scrutiny.

In the context of governance and minority protection in publicly traded companies, the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 **(Takeover Regulations),** has a primary role in control transactions, which seeks to protect minority interests by requiring a partial exit to be provided to public shareholders through a mandatory tender offer **(MTO)** for a minimum of 26% of the outstanding capital of the target, at the higher of: (1) the negotiated price; and (2) the price based on trading price for a specified lookback period. This exit obligation is triggered at various thresholds, including any purchase in excess of 5% in a financial year by a controlling shareholder. Another exit opportunity provided to public shareholders as part of an M&A process is through a delisting, which is undertaken in accordance with the SEBI (Delisting of Equity Shares) Regulations, 2021 **(Delisting Regulations)**. Under the Delisting Regulations, the floor price for the exit is determined based on the parameters prescribed under the Takeover Regulations, however, the final exit price is determined through reverse book building process (i.e. discovered through a public bidding process with no price cap, though subject to acceptance by the acquirer).

The involvement of the board of directors of the target company under the Takeover Regulations, especially in case of secondary purchases from controlling shareholders, happens only after the trigger of the MTO. In this regard, a committee of target's independent directors is required to publish reasoned recommendations on the MTO. In case of control transactions involving primary issuance, the board's involvement in exit opportunity to minority shareholders, is solely to approve the terms of the allotment, including the price, identity of the acquirer as well as the terms and conditions. This pricing of the preferential issuance is inter-alia one of the determinants of the MTO price. Therefore, as such, the board of the target is not mandated to actively negotiate or have a say in the determination of the MTO price.

At the other end of the spectrum, within the SEBI's regulatory regime is the exit price in case of voluntary delisting offers (acquisition of 90% of the shares), which are provided to the public shareholders under the Delisting Regulations. Given that in a number of instances, the discovered price, pursuant to the reverse book building process, is found to be at an unreasonable premium to the floor price, the regulator has received repeated representations from the industry to develop criteria or parameters that ensure minority shareholders are provided a 'fair' exit, without there being an unfair advantage in the hands of the minority shareholders.

In recent times, the issue of pricing offered to minority shareholders in case of control transaction has also come to the fore, due to a much publicised ongoing disagreement between the regulator and a large housing finance company on the pricing of the preferential issue as part of a change of control transaction. While the dispute finds its genesis in technical interpretation of a provision in the charter documents of the company, questions are being raised on governance and fairness of acquisition price (based on pre-announcement trading price), especially due to significant increase in the price of the shares after the announcement of the deal.

In the United States, to evaluate control transactions, the board of directors of a company is required, under the takeover regime (specifically under the Delaware law), to keep in view various judicial principles and practices that have evolved. The board of directors of the target is expected to act as a vigilant gatekeeper of its company's interests and act as a trustee of the shareholders. These principles, which include the default standard of review i.e. the Business Judgement Rule; intermediate scrutiny standards i.e. Revlon duties, Unocal principles, Balsius principles; and enhanced scrutiny standards i.e. Entire Fairness principle, ensure that the board of directors at least act under a 'duty of care' and 'duty of loyalty' to the target and its stakeholders, while discussing and deliberating on control transactions. As a principle, all actions of the board of directors of the target remain subject to scrutiny against the Business Judgement Rule, requiring the board of directors to rationally examine control transactions and the terms thereof. Under certain enhanced scrutiny principles e.g. the 'Revlon' principles, the board of directors is under a duty to seek the highest value reasonably available for stockholders, when a company embarks on a transaction on its own initiative or in response to an unsolicited offer that will result in a change of control. Further, in the event 'Entire Fairness' principles are applied to a transaction, which would typically be in cases involving a conflict of interest i.e. where controlling shareholders receive additional consideration to the detriment of other shareholders or when majority of the board, considering the control transaction, lacks independence or is dominated by an interested party, all aspects of the process and price are considered holistically in evaluating the (1) fairness of the transaction, including timing, structure, negotiations, disclosures, etc., and (2) fairness of the price by evaluating economic and financial considerations, including relevant factors like assets, market value, earnings, future prospects and any other elements that affect the intrinsic or inherent value of a company's stock.

Unlike the US, the board of directors in Indian companies continue to have a passive role in influencing the nature of control transactions, which are primarily negotiated deals between controlling shareholders and acquirers (including pricing of exit offer, whether through the acquirer favourable MTO process or the minority favourable delisting process). However, with unprecedent importance being given to governance, views expressed by proxy advisory firms and focus on fiduciary duties of the board of directors, it can be expected that the regulators may re-examine the governance framework in the context of control transactions, while taking guidance from the aforementioned principles to ensure that boards of listed companies have far greater role and responsibility in respect of protection of minority interests in such transactions.

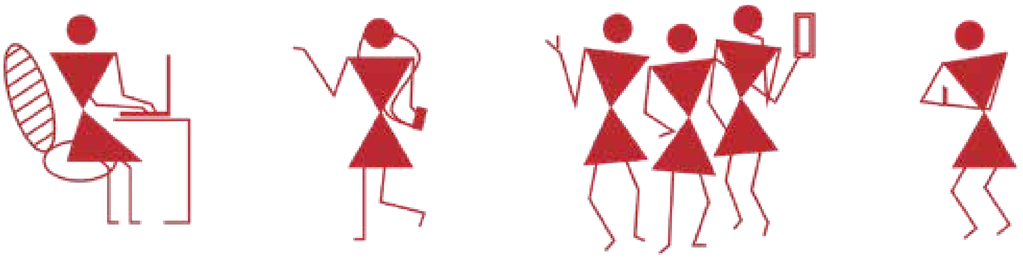
While the above considerations bode well from an absolute governance and minority protection stand-point, practical challenges of this approach will also need to be addressed. As an example, under the Takeover Regulations, the relevant thresholds that trigger the MTO are: (1) acquisition of 25% of voting rights; (2) further acquisition of 5% of voting rights in a financial year in case 25% or more of the voting rights is already held; (3) acquisition of 'control'. If at all there is a transition from the current pricing mechanism to one which is based on fair market value, it is unreasonable to expect acquirers to invite tenders from public shareholders at so many multiple and subjective thresholds. A solution could be to reduce the triggers for providing exit opportunity to public shareholders and limit the same to true and definitive change of control thresholds.

While there have been consistent noises over reviewing the exit regime from a governance perspective, in our view, an end-to-end review is required of both the MTO process as well as the delisting process to ensure that there is more fairness in the process and pricing for both such exits. This will of course require the regulator to holistically re-look at the Takeover Regulations and Delisting Regulations. An opportunity recently arose with the regulator reviewing the concept of promoter and the potential inclusion of a new 'controlling shareholder' construct in the securities law regime. Further, SEBI has recently proposed that in a delisting undertaken pursuant to an MTO, the acquirer can offer a delisting price with a 'suitable premium' over the MTO Price, instead of undertaking a reverse book building process. While the proposed amendment would make delisting pursuant to an MTO more palatable for acquirers, SEBI's guidance in relation to 'suitable premium' would be key on how the proposed amendment will play out for acquirers as well as the minority shareholders. It is expected that the emerging activism and greater market scrutiny of control transactions will eventually ensure a nuanced discourse.

05

CORPORATE **FRAUD AND WHITE-COLLAR CRIMES**

RECENT TRENDS AND DEVELOPMENTS



Introduction

India has seen a surge in the number and volume of white-collar crimes in recent times. From data theft to multi-billion dollar corporate frauds, India has been witness to the entire gamut of white-collar crimes in sectors such as banking, securities, real estate, consumer goods, digital media, etc. It has triggered a review of not only the legal architecture in India, but also the manner in which such issues are being addressed while creating further accountability.[1]

This article aims to analyse the statutory and regulatory developments in India in the last year, including from a securities law, corporate law and information technology law perspective. The article proposes to further analyse the extent to which these developments satisfactorily address the challenges being faced in India, and briefly provides a structure from a hygiene perspective that may be implemented by entities doing business in India.

1. As per the Annual Report published by the Reserve Bank of India, in comparison to 2018-2019 (INR 71,534 crores), bank frauds alone rose to INR 1,85,468 crores (an increase of 159%) in value in 2019-2020 and INR 138,422 crores in value in 2020-2021

What is a White Collar Crime?

White Collar Crime is understood as *"crimes committed by persons of respectability and high social status in the course of his occupation"*. The broad range of white-collar crimes recognised today include fraud (and its variations), cyber-crimes, bribery and corruption, money laundering, tax evasion, insider trading etc.

A few of the legislations in India that currently identify and penalise the commission of white-collar crimes are,

(a) Indian Penal Code, 1860 **(IPC);**

(b) Companies Act, 2013;

(c) Securities and Exchange Board of India Act, 1992;

(d) Prevention of Money Laundering Act, 2002;

(e) Prevention of Corruption Act, 1988;

(f) Information Technology Act, 2000 **(IT Act);**

(g) Banning of Unregulated Deposits Schemes Act, 2019;

(h) Fugitive Economic Offenders Act, 2018

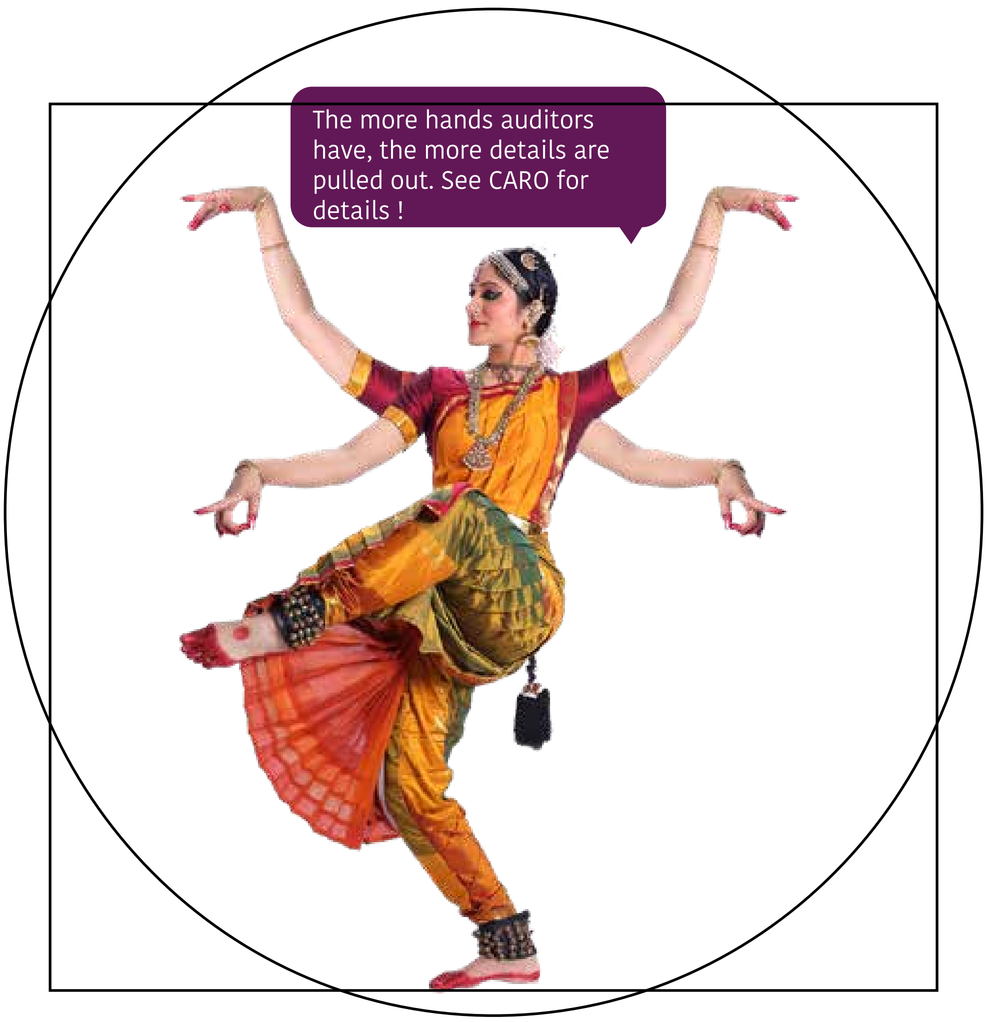
The legal landscape in relation to white-collar crimes is ever evolving, with new amendments and laws being brought into force to combat newer forms of crimes. With amendments to the anti-bribery laws in 2018 and money laundering laws in 2019, Indian jurisprudence further made headways in 2020-21. A few such key developments are identified herein.

Key Developments in 2020-2021

KEY SECURITIES LAW AMENDMENTS

On July 17, 2020, Securities and Exchange Board of India **(SEBI)** amended the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 providing for the following requirements:

(a) Expansion of the scope of information to include the nature of unpublished price sensitive information **(UPSI)**, names of persons who have shared such UPSI and with whom, Permanent Account Number or any other authorised identifier, all maintained in the structured digital database.



(b) With effect from the amendment, all listed entities, intermediaries and fiduciaries are required to submit the standard format identifying a violation to the entity's code of conduct on insider trading to stock exchanges where the concerned securities are traded, and not to SEBI. Further, any fine or penalty collected pursuant to a sanction or disciplinary action for violation of the code of conduct is required to be remitted to SEBI for credit to the Investor Protection and Education Fund.

(c) A promoter, designated person or director of a listed entity is required to make disclosures when undertaking a trade which, with effect from the amendment, shall be made in the form and manner as prescribed by SEBI from time to time.

SEBI further amended the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 with effect from October 8, 2020 and thereafter on May 5, 2021 to provide inter alia the following:

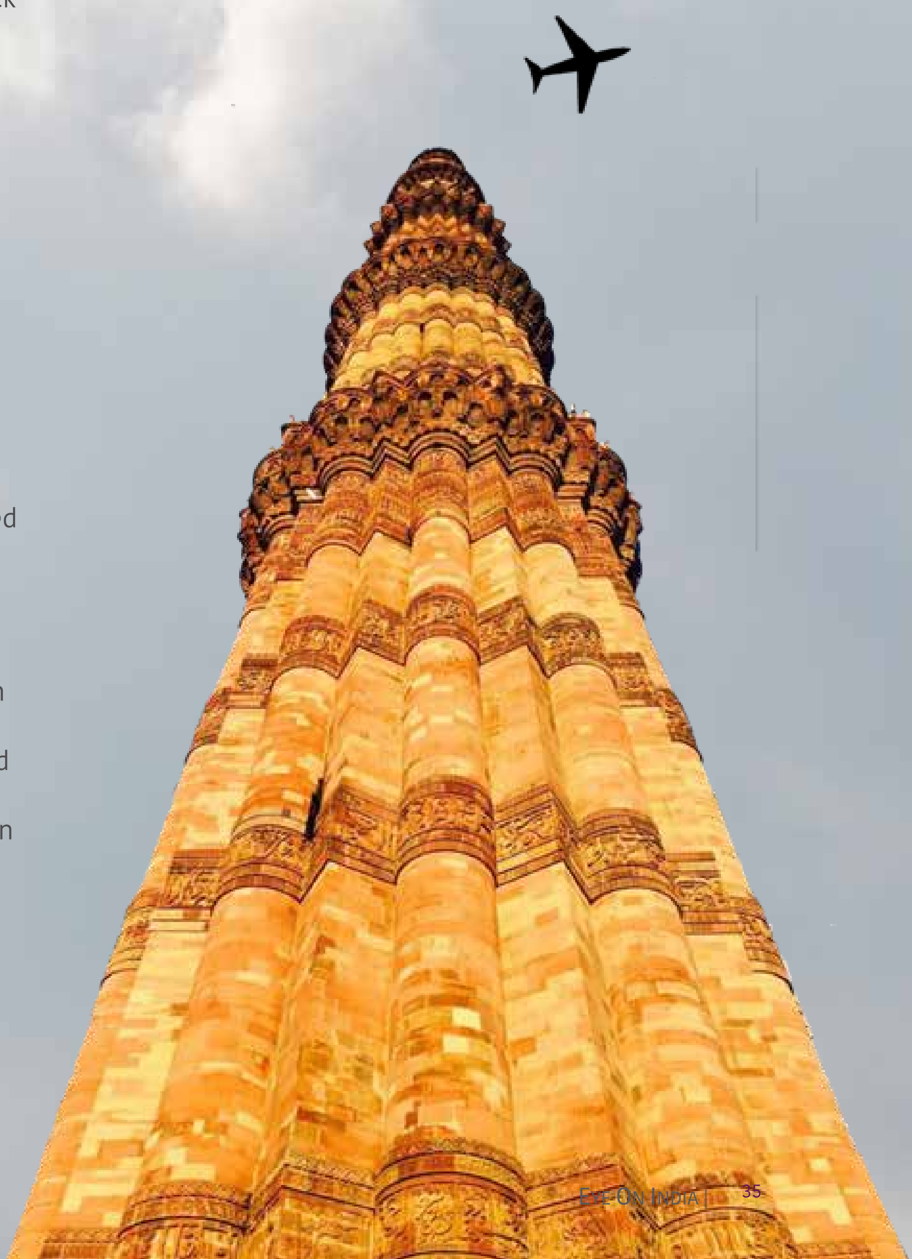
(a) In case of initiation of forensic audit, the following disclosures shall be made to the stock exchanges by the listed entities:

(i) The fact of initiation of forensic audit along with the name of the entity initiating the audit and reasons for the same, if available; and

(ii) Final forensic audit report (other than for forensic audit initiated by regulatory / enforcement agencies) on receipt by the listed entity along with comments of the management, if any.

(b) An effective vigil mechanism/whistle-blower policy is required to be put in place by the listed entities.

The rationale behind imposing these conditions is to create greater transparency in the investor market. However, the downside is that the condition for disclosure of forensic audit is devoid of any materiality thresholds and any such disclosure could have a significant bearing on the stock prices of a listed entity. This may result in volatility and panic in the investor community.



INCREASED SCRUTINY UNDER COMPANIES LAW

In February, 2020, the Ministry of Corporate Affairs empowered under Section 143(11) of the Companies Act, 2013, notified the Companies (Auditor's Report) Order, 2020 **(CARO)** which provides for a stringent reporting regime by auditors of every company including a foreign company except certain categories of companies. However, in December 2020, due to the ongoing pandemic, the applicability of the reporting regime under CARO has been deferred to Financial Year 2021-2022.

CARO has been amended since 2016 to include further disclosures and reporting inter alia in respect of applicable companies on investments, guarantees, securities or loans provided, default in repayment of loans, utilisation of term loan or monies raised by initial public offering, notice of fraud on the company, treatment of whistle blower complaints, unspent corporate social responsibility amounts, etc. The intendment of CARO is to bring large organisations under greater scrutiny and regulation which would prevent occurrence of frauds and crimes within them.

It is pertinent to note that the requirement on reporting of treatment of whistle-blower complaints will encourage private companies to put in place a policy or standard operating procedure for dealing with complaints from employees while also protecting such whistle-blowers. Presently, except for companies that are listed, accept deposits from the public or are indebted, there is no statutory mandate on others to have a framework to address whistle-blower complaints.

In fact, while there exists the Whistle Blowers Protection Act, 2014, which was enacted with a view to provide a mechanism for complaints relating to corruption, wilful misuse of power or discretion, the same is applicable only in cases where a public servant is involved. The statute being limited in scope to deal with allegations against public officials, there is currently no statutory mechanism for dealing with complaints for misuse of power by private individuals (other than internal measures). CARO is a welcome move in the direction to create greater accountability for prevention of frauds and white-collar crimes.

RELEVANT UPDATES IN THE BANKING SECTOR

The Banning of Unregulated Deposit Schemes Act, 2019 **(BUDS Act)** was enacted in July 2019 to provide for a uniform comprehensive legislation to regulate deposit-taking and an effective investor-protection mechanism to curb the menace of ponzi schemes in India.

The BUDS Act provides for 'regulated deposit schemes' and prohibits and penalises the acceptance of deposits under any scheme or arrangement which is not regulated, thereby characterised as 'unregulated deposit schemes'. The state government is empowered to set up a robust mechanism for regulation of deposit-taking activities within the state in accordance with the Banning of Unregulated Deposit Schemes Rules, 2020 **(Rules),** which were notified in February, 2020. The BUDS Act and Rules address several lacunae in the legal and regulatory framework and work to successfully bar illicit investment schemes from mushrooming and functioning, however, implementation of the same in the states is awaited.

UPHEAVAL OF INTERMEDIARY GUIDELINES

Ever since the enactment of the IT Act, the treatment of intermediary liability[2] has been pendulous. The recent Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 **(2021 Rules)**, bring about the most significant changes for intermediaries in terms of increasing due diligence obligations and liability in cases of non-compliance.

1. Section 79 of the IT Act incorporates a safe harbour provision shielding online intermediaries from liability under various laws, for any unlawful content uploaded by their users.

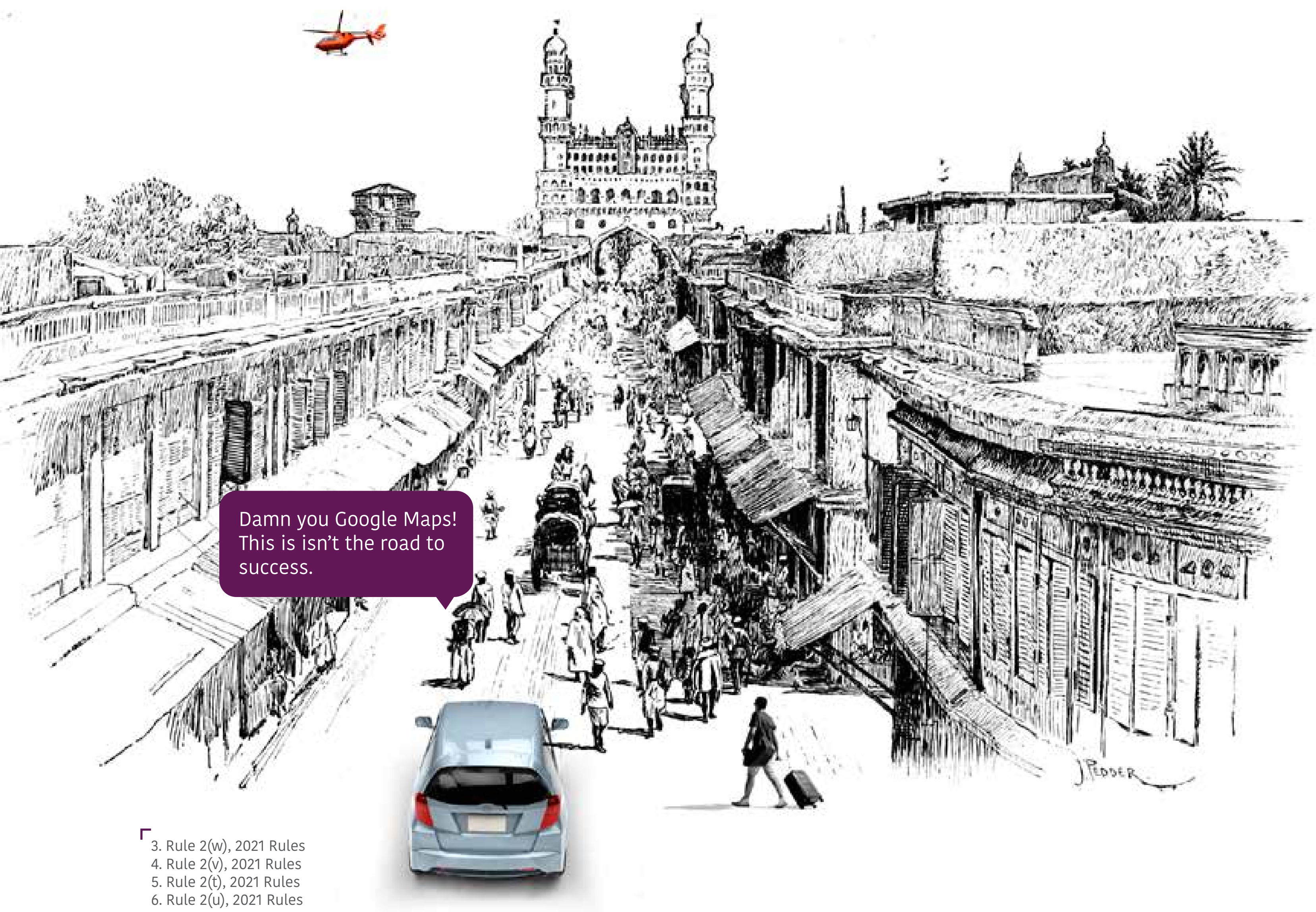
Over the last few years, the role of intermediaries has increased significantly with large sections of society starting to adapt to social media platforms as a primary mode of communication. In the same breath, digital media also attained mainstream relevance, thereby attracting the attention of the Government to regulate such platforms. The 2021 Rules can, therefore, be considered as the threshold step towards such regulation.

The 2021 Rules are divided into two parts based on their applicability. While Part II regulates intermediaries, Part III is applicable to digital media including an intermediary, publishers of news and current affairs or publishers of online curated content.

In a departure from the previous rules (of 2011), which regulated all 'intermediaries' without any distinction in terms of their user base or the content hosted on their platform, the 2021 Rules classify the regulated entities into (a) Social media intermediary[3] with less than 50 lakh registered Indian users; (b) Significant social media intermediary[4] **(SSMI)** with more than 50 lakh registered Indian users; (c) Publisher of news and current affairs[5] content including news aggregators; and (d) Publisher of online curated content[6] which covers all online streaming platforms including Over-the-Top **(OTT)** platforms.

To claim safe harbour under the IT Act, the intermediaries must undertake and comply with various obligations. With the 2021 Rules, at one end of the spectrum, intermediaries are required to prominently publish rules and regulation on their website informing its users about the type of information that must not be stored or transmitted on the intermediary's computer resource. In a step-up, this now includes content published purely for financial gain but is patently false and untrue or the information is aimed at gender-based harassment.

While the IT Act did not originally envisage regulation of digital media, the 2021 Rules impose various obligations on digital media entities which carry out systematic business of making content available



3. Rule 2(w), 2021 Rules
4. Rule 2(v), 2021 Rules
5. Rule 2(t), 2021 Rules
6. Rule 2(u), 2021 Rules

within India. These digital media entities would essentially include publishers of news and current affairs and publishers of online curated content **(publishers),** who shall adhere to a Code of Ethics **(Code)** prescribed under Part III of the 2021 Rules. Interestingly, even foreign news publishers with an online presence in India shall be regulated by this Code.

The 2021 Rules also mandate a three-tier grievance redressal mechanism to entertain any complaints of violation of the Code.

For intermediaries, a failure to observe the 2021 Rules and comply with the due diligence requirements under Part II thereof may disentitle them from claiming safe harbour under Section 79 of the IT Act. Consequently, they may become liable for offences under various laws including the IT Act and the IPC, as the case may be.

For instance, if an intermediary fails to furnish information required by a law enforcement agency, or fails to block public access to information when so directed, the IT Act prescribes that such offences are punishable with imprisonment of a term, which may extend up to seven years along with a fine.[7] Additionally, intermediaries involved in acts ranging from criminal conspiracy[8], sale of obscene books, etc.[9], deliberate and malicious acts intended to outrage religious feelings[10] to criminal defamation[11], and in some cases criminal breach of trust and cheating[13], may also attract provisions of the IPC.

As regards digital media entities, the 2021 Rules specify that they will be held liable under any law contravened by them, irrespective of adherence to the Code of Ethics prescribed under the 2021 Rules[14]. This becomes especially relevant in the present day with the prevalence of complaints or FIRs being registered against content hosted on video-sharing and OTT platforms.[15]

It is pertinent to note in this context that the High Court of Bombay, in an interim order dated August 14, 2021[16] in a public interest litigation that challenged the vires of certain provisions of the 2021 Rules (in particular Rules 7, 9 14 and 16), has stayed the operation of Rules 9(1) and 9(3) of the 2021 Rules which mandate that digital news media and online publishers should adhere to the 'Code of Ethics' prescribed by the Rules.

While the order is of an interim nature at this stage, it remains to be seen whether the provisions of the 2021 Rules will be upheld (which may thereafter to appealed before the Supreme Court of India as well). Interestingly, the 2021 Rules themselves do not specify penal consequences for non-compliance by the digital media entities. Rather, the 2021 Rules empower the self-regulating body or the Ministry of Information and Broadcasting (on the recommendations of the Inter-Departmental Committee) to, inter alia warn, censure, admonish a publisher, require apology, delete or modify content to prevent incitement to a cognisable offence and issue orders for blocking of content under Section 69A of the IT Act.[17]

Significantly for SSMIs, an additional obligation is imposed to enable the identification of the first originator of information, if required by a judicial order passed under Section 69 of the IT Act and the rules thereunder. While the 2021 Rules clarify that such an order shall be passed for prevention, detection, investigation, prosecution or punishment of 'serious' offences, which are punishable with imprisonment for a term of not less than five years, a direct implication of this is the possibility of compromising the end-to-end encryption of the messages that may be provided by the intermediary.

It is also interesting to note in this regard that in case the first originator of any information is located outside India, the first originator of the information within India shall be deemed to be the first originator of the information.

At first glance, the 2021 Rules cast a wide net over the various intermediaries and digital media platforms and seek to achieve several objectives with an intent to regulate the online space. The significance of intermediaries, and especially SSMIs, in the present day and age cannot be overstated, as online spaces are a ubiquitous and relevant part of society.

While the 2021 Rules are under challenge before various high courts,[18] another important question,

7. Section 69 and 69A, IT Act
8. Section 120B, IPC
9. Sections 292 and 293, IPC
10. Section 295A, IPC
11. Section 499, IPC
12. Section 406, 408, IPC
13. Section 415, 420, IPC
14. Rule 9(2), 2021 Rules
15. Aparna Purohit v State of UP, 2021 SCC OnLine All 179
16. Agij Promotion of Nineteenonea Media Pvt. Ltd. v. Union of India, Writ Petition (L.) No.14172 of 2021
17. Rule 12(4), 2021 Rules
18. Pravin Arimbrathodiyil v. Union of India, WP (C) No. 9647 of 2021 (Kerala High Court); Foundation for Indian Journalism and Ors. v. Union of India, WP (C) 3125/2021 (Delhi High Court).

that falls for consideration would be the effect they may ultimately have on user engagement and online discourse, especially from free speech and privacy perspective, where a fine balance is necessary to be maintained.

Hygiene Points for Entities Doing Business in India

The above legal updates are only a few in a host of changes that the Indian landscape has seen over the past 5-10 years. From strengthening of banking regulations, to consolidating the jurisprudence on issues such as, anti-bribery (amendments in 2018), providing statutory backing to the Serious Frauds Investigations Office **(SFIO)** (in 2013), stronger money anti-money laundering provisions (amendments in 2019), and promulgation of the Fugitive Economic Offenders Act, 2018, etc., Indian jurisprudence is fast gaining parity with international standards of combating white-collar crimes.

Such legal development needs to be matched with an increased vigilance and institutionalisation of a rapid response to potential investigation, especially when being faced with a more advanced and equipped investigative force.

We have often been engaged by companies and its officials when they receive a notice/ summons for giving a statement or have been subject to a dawn raid/ unannounced searches and seizures. Most investigative authorities in India either under general law (IPC) or under special statutes (PMLA, tax laws, SEBI Act, etc.) have the power to conduct investigations, seize assets and records, freeze assets and arrest persons if they have reasons to believe that an offence was committed. On the receipt of a notice/ arrival of investigative officers for a spot search/ inspection, a person is legally mandated to cooperate with such investigation and provide all necessary documents and information that may be requested.

While this is not meant to be an exhaustive list of to-do items, entities should immediately seek legal advice if faced with an investigation. An entity may consider putting in place standard operating procedures for taking preventive steps as well as anticipating and prescribing the proper conduct should they be faced with an investigation.

From the prevention perspective, this may include, strengthening internal policies in relation to usage and protection of confidential information, intellectual property protection and usage of devices for remote working; educating the work force on insider trading regulations and disclosure requirements; developing a robust IT infrastructure that will allow the company to detect irregularities; encouraging efficient record keeping by a company from an investigative standpoint; promoting legal awareness in business teams; and managing the work-force (in particular from a perspective of strict segregation of duties).

Upon being faced with an investigation, it is strongly advised to seek legal advice immediately upon receipt of a notice of investigation and all actions in relation to the same should be referred to a lawyer. Notwithstanding the above, the company should always designate a point of contact for all investigations. The chain of command and protocol should be clearly established such that in the event of a spontaneous investigation, the company is not caught unaware and unmonitored information is not shared.

The company should further invest in the training of such persons in relation to making statements and handling questioning from investigative agencies. Training should be given on the entire procedure involved in an investigation and the repercussions of statements, as and when made.

The company should further set out a standard operating procedure for all employees, and define the protocol to be followed in such situations from receipt of summons/notice till adjudication proceedings, and seek proper advice for the filing of any civil/ criminal proceedings and/ or quashing actions in case any member of the company has been wrongly accused.

06

A DECADE OF **INDIA'S MERGER CONTROL** REGIME IN INDIA

THE EVOLVING PERSONALITY OF THE COMPETITION COMMISSION OF INDIA

Introduction

On June 1, 2021, the Indian merger control regime completed a decade since the merger control provisions of the Competition Act, 2002, were enforced. A decade may not be sufficient to judge the performance of a regulatory regime, but it is a good time to consider whether its implementation has fulfilled the legislative expectations, i.e., to prevent practices having adverse effects on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade for participants in markets.

In the last 10 years, the Competition Commission of India **(the CCI / Commission)** processed close to 840 merger notifications and developed a broadly consistent jurisprudence. No transaction has been blocked by the CCI so far. The CCI found no competition concerns in most of the notified transactions. In cases where competition concerns were found, it showed willingness to clear the transaction, subject to certain remedies that would mitigate such concerns. The CCI has also been very efficient in its timelines for approvals. To the CCI's credit, it can be said that it has laid strong foundations for the Indian merger control regime.

This piece examines the evolving personality of the CCI and the shape of things to come - best studied through the CCI's stance on remedies in complex merger cases, and the quirkier aspects of India's merger control regime.

Commission's stance on remedies

WHAT TYPE OF REMEDIES WOULD THE CCI IMPOSE IN COMPLEX MERGERS WITH ANTICOMPETITIVE CONSEQUENCES?

In the beginning, the CCI preferred clean-cut divestments or structural remedies. For instance, in the PVR/DT case (2015, cinema exhibition), the CCI clearly stated that behavioral remedies would not adequality replicate the outcomes of a competitive market. Behavioral commitments are difficult to formulate, implement and monitor and run the risk of creating market distortions. However, over time, the Commission has been less emphatic about its preference for structural remedies, accounting for the peculiarities of each case and increasingly being convinced that behavioral remedies may adequately address competition concerns.

In Schneider/LT (2018, switchgears), involving an in-depth Phase II investigation, the CCI accepted white labeling of certain products as adequate resolution; in Hyundai and Kia/Ola (2019, auto and ride-hailing app), the CCI accepted a commitment that the collaboration between Hyundai and Ola would not be on an exclusive basis and the algorithm/ programme of Ola would not discriminate for/ against drivers based on the brand of passenger vehicles. In Tata/ GMR (2019, airport), the CCI accepted voluntary commitments from parties, including restrictions on appointment of key managerial personnel and the conduct of directors.

In the horizontal mergers involving Nippon Kabushiki, Mitsui O.S.K. Lines, and Kawasaki (2017, shipping) and Northern T.K. Venture/Fortis Healthcare (2018, hospitals), the Commission accepted the parties' commitment to introduce a rule of information control towards addressing concerns around potentially collusive information exchange. In the Jio/Den (2018, DTH and broadband) and Jio/ Hathway (2018, DTH and broadband) mergers, Jio (acquirer) undertook to bear the cost of any technical realignment of the customers' equipment to alleviate the CCI's concerns around bundled services that the merged entities would offer.

In Phase I cases where the CCI found competition concerns, it granted its approval based on behavioral commitments that addressed concerns such as spillover effects, access to market and infrastructure, platform discrimination, information exchange, conflict of interest and consumer protection.

Out of approximately 840 approved cases, the Commission required remedies only in about 40 cases, in the prima facie stage (Phase I) or, after a detailed investigation (Phase II). Out of these, 13 involved either divestments or behavioral commitments or a combination of both, though in only eight of these cases, the CCI conducted in-depth Phase II investigation involving public consultation. In the remaining five problematic cases, the Commission accepted voluntary divestments/ commitments during the Phase I review.

If there was one word to describe the Commission, it would be 'adaptable.' In the future, one can continue to expect the Commission's open-mindedness in discussing possible remedies in complex cases.

An Indian merger control quirk that doesn't go away

The single most dominant quirk at the Commission is the requirement to notify minority acquisitions. This has left the private equity, financial and fund investors with at least a 30-working day hurdle to closing while the CCI reviews the merger notifications. An interesting development was the recent voluntary remedies offered by ChrysCapital (a private equity investor), in relation to its investment in Intas Pharmaceuticals, resulting in only around 6% shareholding in Intas. However, considering that ChrysCapital had minority investments in certain competing entities, the CCI treated its investment to be 'strategic' in nature and denied it the exemption available to pure financial investors. In fact, the approval was granted based on certain remedies, including: (a) resignation of ChrysCapital's nominee director in Mankind Pharma (a portfolio company of ChrysCapital); (b) an undertaking not to nominate a director in Mankind Pharma so long as ChrysCapital has a nominee director on Intas; (c) the nominee director on Intas' Board should not have been associated with Mankind Pharma in the previous one year; (d) ChrysCapital undertaking not to exercise its affirmative right in Mankind Pharma with respect to changes to capital structure, M&A, amendment to charter documents; and (e) ChrysCapital undertaking to use non-public information received from its portfolio companies competing with Intas, strictly for the purpose of evaluating the respective investment in such portfolio companies.

The Commission has faced a lot of heat, with multiple investors complaining about the need for scrutiny when it comes to the acquisition of non-controlling minority shares. It hasn't helped that such investments form a key portion of the merger enforcement activity at the Commission. The Commission's position (at least the portion of it that is clear) is that 'special rights' (such as those

impacting business and operations of the target, or the appointment of nominee director/s) amount to the acquisition of 'material influence' over the target and this is a notifiable event even if the investor acquires less than 25% shares in a company. The confusing additional exemption threshold provided for acquisition of less than 10% shares, being deemed to be made 'solely as an investment', has only complicated the availability of the exemption to financial investors as it is also subject to the stricter standard that any special rights in favour of the acquirer would take the exemption away.

For a company actively engaged in business that is horizontally linked or vertically connected with that of the target, the Commission's requirement is that such an acquisition is notifiable whether the acquirer takes special or negative veto rights, or not. The investing arms of companies do not, therefore, enjoy the 'special rights' standard and it is likely that they would have to seek the Commission's approval for their acquisitions.

IS THE COMMISSION LIKELY TO CONSIDER ISSUES OUTSIDE THE DOMAIN OF THE CONSUMER WELFARE STANDARD WHEN IT RECEIVES A NOTIFICATION SEEKING APPROVAL FOR MERGERS AND ACQUISITIONS?

Is the Commission likely to consider broader socio-economic impact on labor or unemployment, or sustainability when assessing the effect of proposed mergers? We believe that where a broad interpretation of the consumer welfare standard is possible, the Commission may indeed appear to expand its scope of inquiry to fields that are broader than what one may expect from a competition regulator.

WILL THE COMMISSION BE SWEPT BY THE RISING WAVE OF PROTECTIONISM AND NATIONALISM ACROSS THE WORLD?

So far, the Commission has maintained a broadminded stance with respect to the idea of Indian 'champions.' We do not believe that the 'national' card has been played successfully before the Commission in all these years. It has not been the Commission's concern where the investment is coming from into India, or which country the acquirer is based in because India has a robust foreign investment law addressing these issues.

Having said that, it is ambitious to deny possibilities. It will become increasingly difficult for the Commission to ignore the waves of sentiment that respond to and anticipate economic activity at present.

MARKET STUDIES

The Commission has recently undertaken insightful market studies into e-commerce, telecom, pharmaceutical and common ownership issues, with a focus on private equity. Some of these studies may even set the basis for a more informed merger review and various investigations into companies operating in these sectors.

THE WISH LIST

Here is the ask: In the near future, one can expect debate on a less strenuous approach in assessing financial investor driven/ minority acquisitions of non-controlling stakes; a reasonable law of derogation from the strict suspensory regime for mergers; clearer FAQs on the Commission's website; possibly, a revised, more up-to-date Form II (long form); and, a more formal, informal guidance system where the facts and the guidance are published.

07

THE LABOUR CODES:

A NEW LABOUR LAW REGIME IN INDIA

Labour laws in India are based on the ideal of social justice that is envisaged in the directive principles of state policy under the Indian Constitution. The labour jurisprudence in our country has been shaped by the concerted efforts of the Parliament, State Legislature, and the Supreme Court. However, the current labour regime consists of multiple Central and State legislations, which provide for distinct and inconsistent set of compliances, often giving rise to complexities in their adherence and on occasion, leading to contradictions in their enforcement. In order to address the aforesaid problem of multiplicity of laws and promote ease of doing business in India, the Parliament, with a view to overhaul the archaic regime, has introduced four new labour codes that are set to consolidate and replace 29 existing labour laws.

After several rounds of discussions over years, all the four codes have been passed by the Parliament and received the assent of the President. The Code on Wages, 2019 **(Wage Code)**, received the President's assent in August, 2019, while the other three codes i.e., the Occupational Safety, Health and Working Conditions Code, 2020 **(OSH Code)**, the Code on Social Security, 2020 **(SS Code)**, and the Industrial Relations Code, 2020 **(IR Code)**, received the President's assent in September 2020. Once the new codes are enforced and implemented, the relevant legislations subsumed by each such code shall stand repealed.

By way of this article, we aim to discuss the key changes under the OSH Code, SS Code and IR Code (collectively, **Labour Codes**).

Unpacking the key changes brought about by the Labour Codes

In the last edition of Eye on India, we had dealt with the Wage Code (which was passed by the parliament then) in detail. In this edition, we are addressing the other three labour codes.

THE OSH CODE

The OSH Code consolidates the laws regulating occupational safety, health and working conditions of persons employed in an establishment. It subsumes 13 existing labour legislations, including the Factories Act, 1948 **(Factories Act)**, Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996, Contract Labour (Regulation and Abolition) Act, 1970 **(CLRA)**, and Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979.

The key aspects of the OSH Code are:

SINGLE ELECTRONIC REGISTRATION OF ESTABLISHMENTS AND NEW CONCEPT OF 'WORK- SPECIFIC LICENSE' FOR CONTRACTORS:
To reduce the multiplicity of registrations mandated *under the existing laws*, the OSH Code has introduced the concept of "one establishment, one registration". The OSH Code envisages, at a national level, all establishments (whether a factory or a commercial establishment) to obtain a single electronic registration within 60 days from the coming into force of the OSH Code. The existing registrations under the applicable existing central legislations would be deemed to be valid under the OSH Code, and relevant details would have to be conveyed in the prescribed manner to the appropriate authority.

In relation to contractors, the OSH Code has introduced the concept of 'work-specific license' for project-based work orders and 'national license' for undertaking work in more than one state.

PROVISIONS RELATED TO WORKING HOURS AND LEAVE:
The OSH Code has decreased the daily working hours' limit to 8 hours from 9 hours under the Factories Act. It has also empowered appropriate state governments to prescribe weekly hours, intervals of rest and spread over. Further, appropriate state governments are empowered to prescribe overtime hours. However, consent of relevant employees is a must, in case such employees are required to work overtime. To remove restrictions regarding working hours of women employees, the OSH Code allows women employees to be employed in any establishment for any work before 6 a.m. and after 7 p.m., subject to fulfilment of certain conditions relating to their safety, welfare, and only after obtaining their consent to be employed during those hours.

In relation to leave entitlement, the OSH Code has reduced the qualifying period for entitling a worker to leave, from the existing 240 days under the Factories Act to 180 days, and permits workers to encash unavailed annual leave at the end of a calendar year as well.

PROVISIONS RELATING TO SAFETY, HEALTH AND WELFARE:
The OSH Code lists down various health and safety, and welfare provisions that an employer of an establishment must provide. The threshold for applicability of provisions relating to safety and welfare of employees has been decreased under the OSH Code, such as canteen facilities would now be required in all establishments with 100 or more workers as opposed to 250 workers or more under the Factories Act, appointment of welfare officer in all establishments with 250 or more workers as opposed to 500 workers or more under existing laws. One key development under the OSH Code is recognition of the third gender and providing adequate facilities to such employees.

THE IR CODE

The IR Code consolidates the laws relating to inter alia trade unions and settlement of industrial disputes, and subsumes the Industrial Disputes Act, 1947 **(IDA)**, the Trade Unions Act, 1926, and the Industrial Employment (Standing Orders) Act, 1946.

The key changes under the IR Code are:

DEFINITION OF WORKER AND INDUSTRY:
'Workman' under existing laws has been re-termed as 'worker' under the IR Code to align the same across the Labour Codes. It includes working journalists and sales promotion employees within its purview. Further, the salary limit for exemption of supervisors from the ambit of 'workers' has been increased from INR 10,000 per month under IDA to INR 18,000 per month (or such other amount prescribed by the Central Government).

The term 'industry' has been broadly defined to include the observations of the Supreme Court rendered in Bangalore Water Supply and Sewerage Board v. A. Rajappa and the proposed 1982 amendment to the IDA. Accordingly, it now includes any systematic activity carried on by cooperation between an employer and worker for the production, supply or distribution of goods or services with a view to satisfy human wants or wishes (not being wants or wishes that are merely spiritual or religious in nature).

CONCEPT OF SOLE NEGOTIATING UNION OR COUNCIL
The concept of sole negotiating union or council has been introduced under the IR Code. This concept is currently only recognised in certain states such as Maharashtra and West Bengal by way of state amendments. Under the IR Code, an employer is required to recognise a registered trade union as the sole negotiating union or council in an establishment to negotiate with an employer regarding prescribed matters.

CONSTITUTION OF GRIEVANCE REDRESSAL COMMITTEE (GRC):
Unlike IDA, wherein the number of members in a GRC was limited to six and employers were exempted from constituting a GRC if the organisation already had a grievance redressal mechanism in place, under the IR Code, all employers are required to constitute a GRC. Further, the IR Code has increased the limit on the number of members in a GRC to 10. Also, the IR Code provides for representation of women in a GRC in proportion to the number of women in the establishment. Additionally, any appeal against the decision of the GRC can be made before jurisdictional authorities, as opposed to appeal before an employer under the IDA.

REDUCTION IN NUMBER OF AUTHORITIES:
The IR Code has reduced the number of authorities, and provides that disputes on any subject matter under the IR Code can only be adjudicated upon by conciliation officers, arbitrators and industrial tribunals, and the jurisdiction of labour courts, courts of inquiry or boards of conciliation under IDA have been excluded.

CONCEPT OF FIXED TERM EMPLOYMENT AND ESTABLISHMENT OF WORKER RE-SKILLING FUND:
The concept of fixed term employment has been formalised under the IR Code and fixed term workers are entitled to all statutory benefits that are provided to regular employees in an establishment, prorated to the number of days worked. he IR Code has reduced the number of authorities, and provides that disputes on any subject matter under the IR Code can only be adjudicated upon by conciliation officers, arbitrators and industrial tribunals, and the jurisdiction of labour courts, courts of inquiry or boards of conciliation under IDA have been excluded.

The IR Code also provides for the setting up of 'Worker Re-Skilling Fund' for retrenched employees, by the appropriate government through a notification. In this regard, an employer is required to contribute 15 days' of last drawn wages, in addition to retrenchment compensation, in respect of each retrenched employee in the prescribed manner.

THE SS CODE

The SS Code has consolidated existing central legislations with an aim to provide a uniform social security scheme for workers across varied sectors. The SS Code subsumes nine legislations, including the Employees' Provident Fund and Miscellaneous Provisions Act, 1952 **(EPF Act)**, the Employees State Insurance Act, 1948, the Payment of Gratuity Act, 1972, and the Maternity Benefit Act, 1961.

The key changes brought in by the code are:

MANDATORY REGISTRATION:
The SS code calls for mandatory electronic registration for all establishments. The registrations under existing central laws would be deemed to be registrations under the SS Code. Further, the SS code mandates Aadhaar based registration for all categories of workers employed in any establishment.

INTRODUCES THE CONCEPT OF AGGREGATORS, PLATFORM WORKERS AND GIG WORKERS:
The SS Code has introduced the concept of 'aggregators', which refers to digital intermediaries or a marketplace for a buyer or user of a service to connect with the seller or the service provider. In line with the same, the SS Code has also introduced the definition of platform workers and gig workers, which refer to workers who do not fall within the purview of traditional employer-employee relationship. Aggregators are mandatorily required to provide social security benefits for such workers based on eligibility criteria.

COMMON CRECHE FACILITY:
For employers with 50 or more employees, the SS Code has allowed an establishment to avail a common creche facility of the Central Government, State Government, municipality, private entity or of a non-governmental organisation or of any other organisation. Further, establishments may pool their resources to set up a common creche based on mutual terms.

LIMITATION PERIOD OF INQUIRY:
Unlike the extant laws (specifically EPF Act), where there was no limitation period in relation to inquiry, under the SS Code, no inquiry may be undertaken by a relevant authority after the expiry of five years from the date on which such a dispute would have arisen or amounts are alleged to be due from an employer.

Conclusion

The Labour Codes will come into force on such date as notified by the government and the government is empowered to bring into force its various provisions in a staggered manner. The draft central rules have been formulated under the Labour Codes, however, many State Governments are yet to frame relevant rules. Once notified, the consolidation and rationalisation of the numerous labour laws would ease the existing compliance norms, and will be one of the key factors in attracting foreign direct investment in India.


He messaged.
It is about the court hearing.

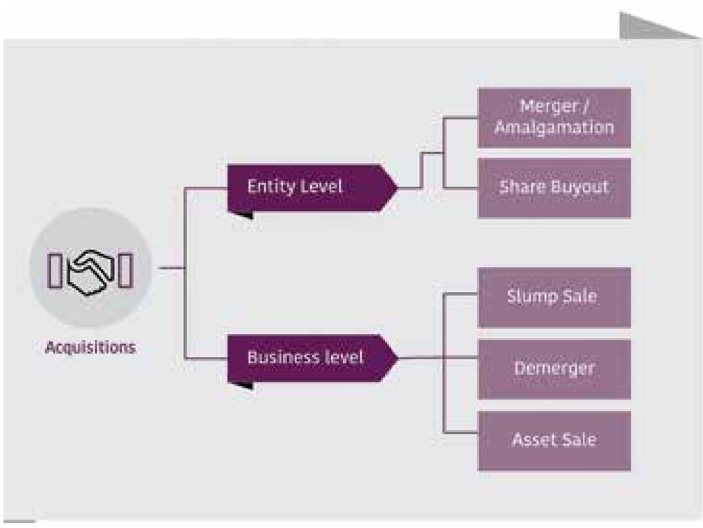
08

Taxation of **Cross Border** Mergers & Acquisitions in India

With the revision of tax treaties entered into between India and Mauritius, Singapore and Cyprus, the residence-based taxation of capital gains arising to foreign investors from transfer of shares of Indian companies is now replaced with 'source -based' taxation. Consequently, foreign investors are now generally subject to Indian capital gains tax in respect of gains realised from transfer of shares of Indian companies, if the shares are acquired after March 31, 2017.

Merger & Acquisition and taxation aspects

There are a number of ways of carrying out M&A activities, typical of which would fall in the following



These can be within India, i.e. both the target and the acquirer being in India, or cross border, where either the acquirer or the target or both are situated outside India. In such a situation, it becomes critical for the foreign entity to be aware of the high level tax nuances under the Indian law, which could have tax implications and may increase the cost of acquisition of the Indian target or a parent of an Indian company.

Before we move to consider the high level tax implications for the transferor of the business or assets in each of the above cases, it is important to discuss one very important anti abuse provision under the Indian Income Tax Act, 1961 **(IT Act).** This anti abuse provision is triggered when a person (including a non-resident) receives a ‘property’ from another person at a consideration which is less than the fair market value **(FMV)** of the ‘property’. The difference between the FMV and the consideration paid is treated as income from other sources in the hands of the recipient of the ‘property’. Such other income is taxed at the highest rate applicable, which would be 30% in case of a resident and 40% in case of a non-resident company. ‘Property’ for this purpose is specifically defined and includes shares, financial assets, land, buildings etc., but does not include ‘business undertaking’ as one of the listed items. Thus, this provision should not be attracted where a person receives ‘business undertaking’ through a business transfer agreement. There are detailed rules on determination of the FMV for each type of property. In view of this provision, it is very important to ensure that these negative tax implications are not attracted while undertaking M&A activities in India.

MERGER

Under the IT Act, a court/tribunal approved merger is not regarded as transfer for capital gains tax purposes provided it satisfies certain conditions. Consequently, such transfer of assets does not result in any tax in the hands of transferor company or its shareholders. If the conditions are not satisfied, then the transaction would be taxable. Further, please note that tax depreciation is not allowed now on any acquired goodwill.

SHARE BUYOUT

A seller would recognise capital gains as the difference between sale consideration and cost basis. The rate at which short-term or long-term capital gains tax would be levied on the transferor would depend on the period of holding of the shares. Capital gains is to be computed in accordance with the prescribed rules. A non-resident is also required to pay Indian capital gains tax. In the case of a non-resident seller, the buyer of shares is obligated under Indian law to withhold appropriate tax, deposit the same with the tax department and carry out related compliances.

SLUMP SALE

Sale of business undertaking for a lump sum consideration without attributing individual values to the different components of the items of the balance sheets is regarded as ‘slump sale’. All assets and liabilities of the business necessary for it to run as a going concern must be transferred. Unrelated assets or liabilities of the company – not part of the undertaking - may be left behind. Business undertaking is regarded as a capital asset and hence gains realised on sale of the undertaking is taxed as capital gains – long or short term. There are special provisions for computation of gains. Basis the recent amendment by Finance Act, 2021, in case the sale consideration is less than the FMV for specified assets i.e. immovable property, jewellery and artistic works and shares and securities calculated as per prescribed formula, then the FMV shall be deemed as the sale consideration for slump sale. The net worth of the undertaking is taken to be its cost basis for computing capital gains, wherein any self-generated goodwill for the undertaking appearing in balance sheet cannot be considered as an asset. Care needs to be taken to ensure that the undertaking qualifies as such under the definition provided in the IT Act. Further, no depreciation can be claimed on acquired goodwill.

DEMERGER

This is essentially hiving off of an undertaking generally carried out through a court-approved scheme. For such a demerger to qualify as tax neutral, conditions need to be satisfied and cash can be paid to no more than 25% in value of the shareholders of the demerging company. This may be a preferred route in certain circumstances since the transferor company would not be taxed on this transfer and even the shareholders may not pay any tax if this is structured appropriately.

ASSET SALE

In this case, each asset being acquired is valued and paid for separately. There may be capital gains on transfer of such assets, which is computed and paid by the transferor. Since the transferor would be an Indian enterprise, the acquirer would not have withholding tax obligation in relation to capital gains tax of the transferor, except a small withholding tax in case of acquisition of land. Depreciable assets forming part of a block of assets may result in short-term capital gain or loss, depending on whether the price received is more or less than the net value after deducting related depreciation.

It is opportune to discuss the tax aspects of cross border mergers now.

INBOUND MERGER

In case of cross border merger, where a foreign company merges with an Indian company, the benefit of tax neutrality under IT Act should be available to the transferor company. However, for the transferor company and its shareholders to avail such exemption the following conditions laid down in the IT Act would need to be satisfied:

a. All properties / liabilities of the merging company should become the properties / liabilities of the merged company;

b. Shareholders holding at least 75% in value of the shares in the merging company (excluding shares already held therein before amalgamation by the amalgamated company or its subsidiaries or nominees) should become shareholders of the merged company.

OFFSHORE MERGER

When, as a result of merger of two foreign companies, shares directly held by the merging company in an Indian company are transferred to the merged company, the transfer would not be subject to Indian capital gains tax under the IT Act in the hands of the merging company provided certain conditions are satisfied. The conditions are that such merger should not be subject to tax in the country where the merging/ transferor company is incorporated and at least 25% shareholders in value of the merging foreign company remain the shareholders of the merged/ surviving foreign company.

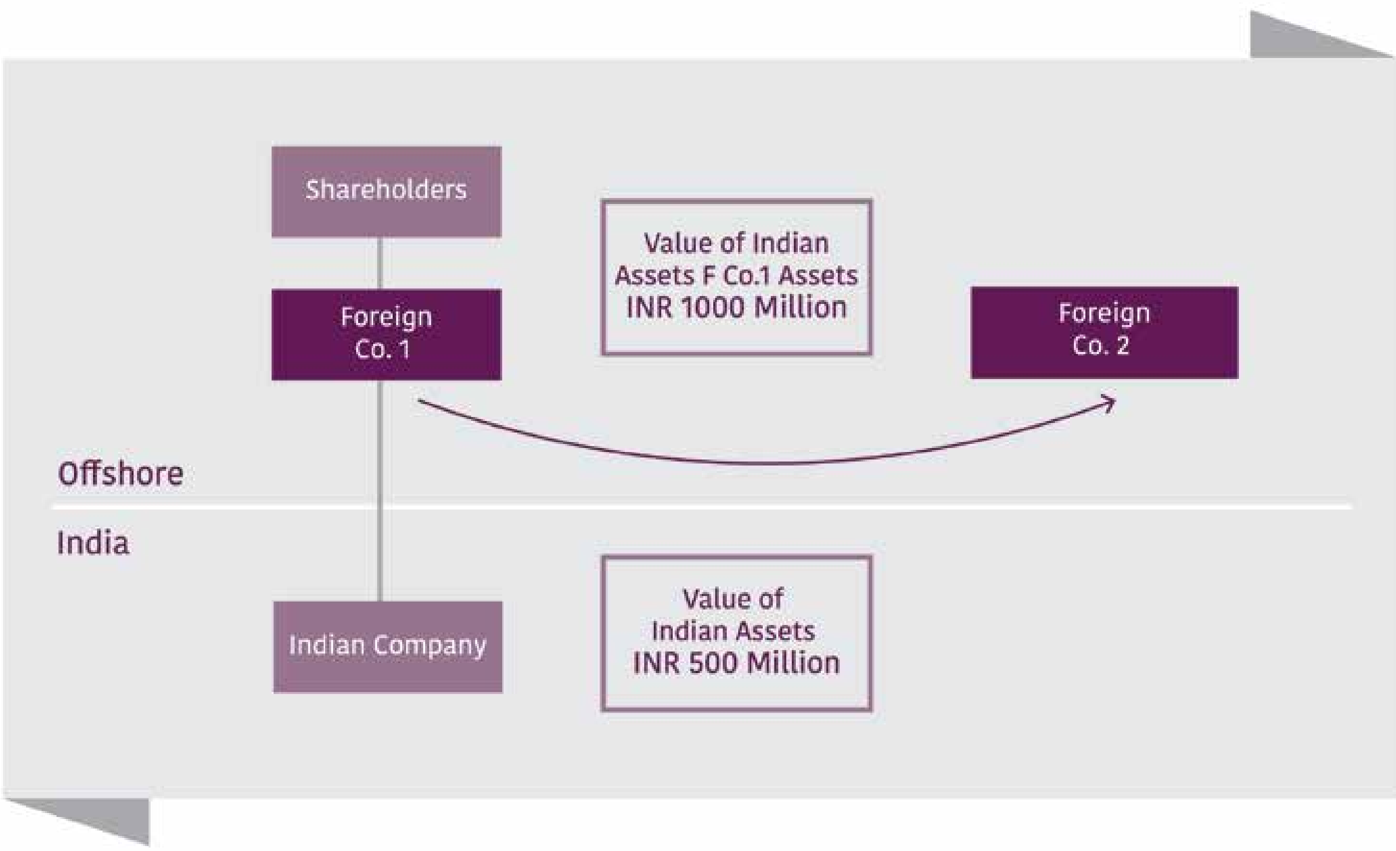
The above described transaction is depicted pictorially below.

As a result of this offshore merger, the shareholder of the merging company F Co1 is transferring his shares in F Co 1 to F Co 2. While the merger itself, as discussed above, would not be taxable in India in the hands of F Co 1 if conditions are satisfied, the shareholders of F Co 1 may get caught in the provision of Vodafone Tax since there is no specific exemption in the IT Act in such cases. Thus, the shareholder may be subject to tax in India in respect of the transfer of shares in F Co 1 if the conditions for attracting Vodafone Tax as discussed below are satisfied. In such a situation, valuation reports need to be procured to assess the situation and it may be possible to appropriately plan the transaction to steer clear of this uncertainty.

GLOBAL M&A INVOLVING AN UNDERLYING INDIAN ASSET (VODAFONE TAX)

In 2012, a retrospective clarification was made in the IT Act, as a result of which transfer of shares of a foreign company or an entity by a non-resident to another non-resident was also brought within the Indian tax net, if such a transfer fell within the provision set out below:

If the share or interest in a foreign company or an entity registered or incorporated outside India derives, directly or indirectly, its value substantially from assets located in India, then such share or interest of the foreign entity would be deemed to be situated in India and gains derived from the transfer thereof would attract Indian capital gains tax. This is known as 'Vodafone Tax' since it was introduced pursuant to the Hutchison-Vodafone telecom transaction, which the Indian tax department contended was taxable in India. The Supreme Court of India had ruled in favour of the taxpayer noting that the shares transferred were not assets situated in India and hence Indian tax was not attracted. While the amendment was in the form of a clarification applicable retrospectively, some aggrieved taxpayers (including Vodafone and Cairn Energy) had invoked Bilateral Investment Protection Treaty **(BITP)** and initiated arbitration proceedings against the Government of India and the BITP ruled in favour of Cairn Energy in September 2020. A further litigation in this regard may have potentially impacted the Indian Government's ambition of emerging as a credible



alternative to attract global investments. Hence, the retrospectivity of the aforesaid amendment has now been reversed by Taxation Laws (Amendment) Act, 2021 notified on August 13, 2021. As per the current law, a foreign share or interest is deemed to derive its value substantially from assets located in India if the value of such assets exceeds INR 100 Million and represents at least 50% of all assets owned by the offshore company or the entity. It is pertinent to note that to determine this, a valuation report needs to be procured as on the 'specified date' in accordance with the prescribed valuation methodology. Notably, the provisions of the IT Act provide an exemption from this tax to certain small shareholders, investors in Foreign Portfolio Investors **(FPI)**/ Foreign Institutional Investors etc.

In view of the above, in case of a global restructuring being undertaken, it is important to identify what Indian assets are being indirectly transferred and whether Indian capital gains tax is at all attracted.

In this context, it is important to note that majority of the Indian tax treaties provide for such gains to be taxed only in the country of residence of the shareholders. It would therefore be very important to examine the jurisdictions of those shareholders and their eligibility to claim the benefit of the tax treaty between their country of residence and India. This evaluation in case of global restructuring should be examined early in the day.

AVAILABILITY OF OPERATING LOSSES TO THE ACQUIRER

It is also important to note that under the IT Act, the acquirer company in case of merger or acquisition of shares of a target company or a business transfer may not be able to benefit from the brought forward tax losses of the target. The IT Act restricts carry forward of tax losses to the acquirer and lays down conditions in this regard. It is, therefore, important to evaluate this situation and position while considering the acquisition structure.

OUTBOUND MERGER

Unlike inbound mergers, an Indian company merging with a foreign company would not get the benefit of tax neutrality under the IT Act as the merged company would not be an Indian company. Consequently, any transfer of capital assets from an Indian company to the foreign company would attract capital gains tax in the hands of the transferor/ merging Indian company. The shareholders receiving the shares of the foreign merged company may also be subject to tax in India in absence of any extant provision in the IT Act which could make this tax neutral in the hands of the shareholders in case of outbound merger. The shareholder of the merging company may also need to consider the anti-abuse provision under which it should be ensured that the FMV of the shares received of the merged company should not be more than the value of shares of merging company surrendered.

Another aspect that needs to be considered in such cases is the risk of creation of place of effective management **(POEM)** of the foreign company in India. POEM has been defined under the IT Act to mean the place where key managerial and commercial decisions of a company are undertaken. In the event the PEOM of the foreign company is determined to be situated in India either by the Indian tax authorities on their own or pursuant to a mutual agreement procedure under Article 4 of the Multilateral Instrument **(MLI)** under BEPS Action Plan 15, the foreign merged company would be considered as a company resident in India for tax purposes, and would be subject to tax on its global income in India. The tests laid down for POEM are different for companies with 'active' business income and 'passive' income earning companies.

GENERAL ANTI AVOIDANCE RULES (GAAR)

GAAR became operational in India from April 1, 2017. While undertaking a structure and transaction, it is important to consider whether, though tax efficient, the same falls foul of GAAR. These provisions empower the tax authorities to declare an arrangement, or transaction as an impermissible avoidance arrangement **(IAA)** if the main purpose of the arrangement is to obtain a tax benefit and which also satisfies at least one of the following four tests:

(1) creates rights and obligations, which are not normally created between parties dealing at arm's length;

(2) results in misuse or abuse of provisions of the IT Act;

(3) lacks commercial substance or is deemed to lack commercial substance in whole or in part; or

(4) is carried out in a manner which is normally not employed for bona fide purpose.

The consequences of a transaction or an arrangement being declared as an IAA are many and far reaching and could include:

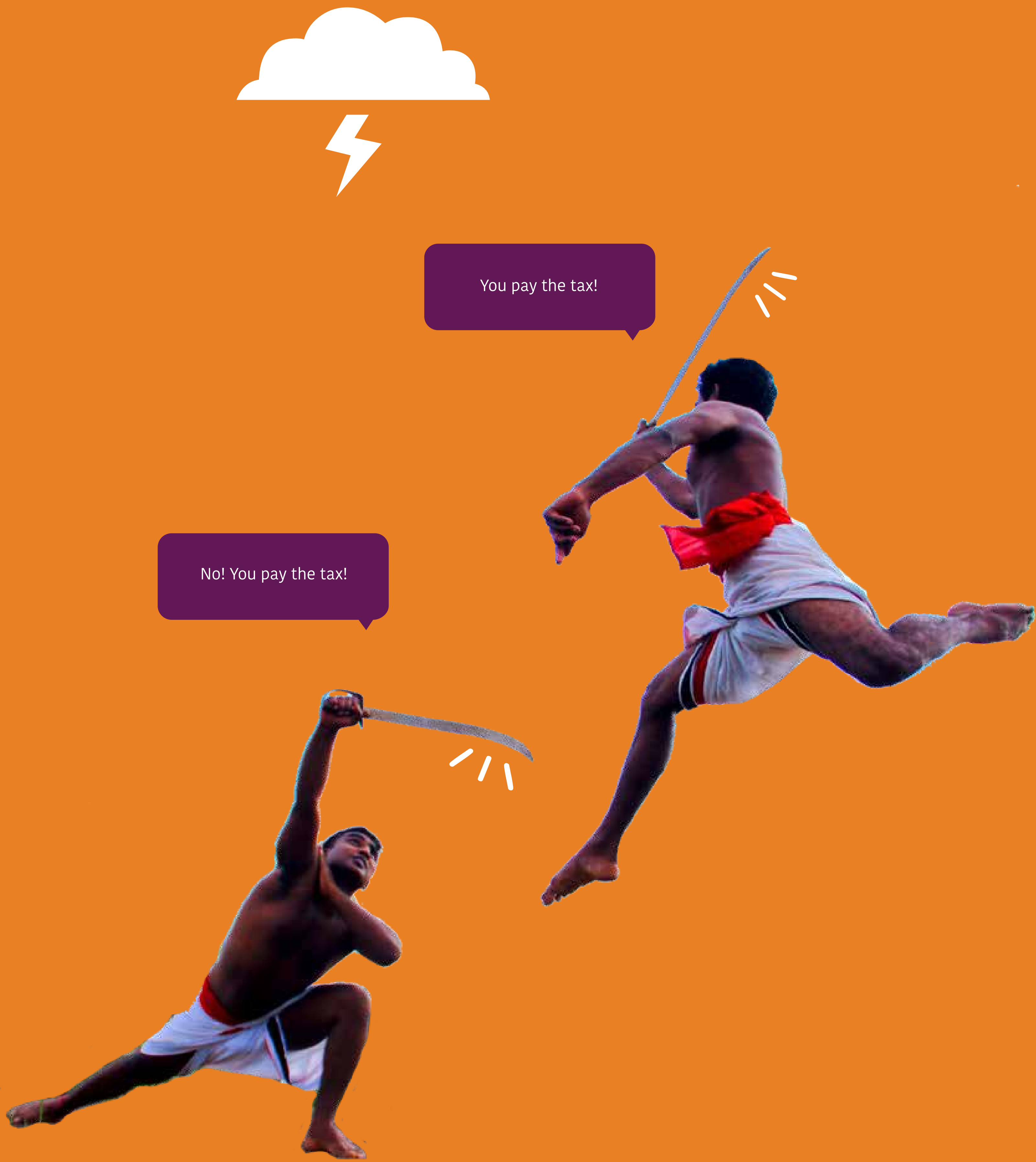
- Denial of treaty benefits;
- Disregarding, combining or re-characterizing steps in the transactions;
- Revising the place of residence of any party or situs of an asset;

- Looking through corporate structure;
- Re-characterizing equity or debt or accrual of receipts or expenditure, etc.

GAAR essentially codifies the doctrine of 'substance over form' to deter tax avoidance. The IT Act does contain inherent checks and balances to avoid frivolous exercise of powers under GAAR. The Assessing Officer would need to seek approval of the Principal Commissioner before proceeding to initiate action. One needs to be mindful of the fact that upon invocation of the proceedings to declare an arrangement as an IAA, the taxpayer would need to prove before the Principal Commissioner that the main purpose was not of obtaining tax benefit. Thereafter, the Principal Commissioner would be required to issue an appropriate order, which if had gone against the taxpayer, the Principal Commissioner would need to refer it to the Approving Panel. The Panel would then issue appropriate directions after hearing both the taxpayer and the Assessing Officer.

Conclusion

Having regard to the myriad consequences under GAAR and the risk of the denial of tax treaty benefits, it is vital that the transactions and arrangements, including any structuring thereto, pass the smell test under GAAR and a proper evaluation of pros and cons and commercial justification for the structuring of the transaction is carried out to avoid the rigours of GAAR. Further, the bilateral tax treaty network is also undergoing change in light of MLI and various tax treaties that have been renegotiated, requiring careful consideration of the impact of the applicable tax treaty. In transactions relating to global deals involving Indian assets, one would need to undertake a specific exercise to identify Indian tax issues relating to aspects such as adjustment of the sale consideration outside India, taxability of earn out payments or deferred consideration, applicability of transfer pricing, Indian withholding tax obligations etc. It would be advisable to seek a comprehensive advice on the transaction as a whole, ideally during the planning stages, to avoid any surprises from an Indian tax perspective.


You pay the tax!
No! You pay the tax!

09

DATA PROTECTION AND PRIVACY IN INDIA

A BIRD'S EYE VIEW ON LATEST DEVELOPMENTS

Since 2017, the data protection regime in India has been in a state of flux owing to a series of increasingly important legislative and judicial developments. The COVID-19 pandemic resulted in further complications as it propelled widescale technological adoption across sectors and marked an increase in data-driven governance.

The Personal Data Protection Bill, 2019

In 2017, in *Justice K. S. Puttaswamy v. Union of India*[1] **(Puttaswamy)**, the Supreme Court of India reaffirmed that 'Right to Privacy' is a fundamental right guaranteed under the Constitution of India. Post Puttaswamy, India witnessed many milestone moments in the data protection space with the most significant being the introduction of the draft Personal Data Protection Bill, 2019 **(PDP Bill)** in Parliament.[2] The PDP Bill will replace the existing anemic, poorly enforced, narrow framework with broad-based obligations and a strong enforcement mechanism.

The PDP Bill governs processing of all personal data and categorises a subset of it as sensitive personal data **(SPD)**.[3] In addition to financial, healthcare, sexual orientation, and biometric data, which are

1. *K. S. Puttaswamy v. Union of India*, (2017) 10 SCC 1.
2. The PDP Bill was introduced in the Parliament on December 11, 2019.
3. Section 3(36), PDP Bill.

considered as SPD even under the existing regime,[4] the PDP Bill categorises transgender or intersex status, official identifiers, caste or tribe, religious or political beliefs or affiliations as SPD.[5]

The PDP Bill provides for a fiduciary relationship between the entities which collect and process personal data **(Data Fiduciaries)**[6] and the individuals whose personal data is being processed **(Data Principals)**.[7] Consequently, Data Fiduciaries are required to process data in a fair and reasonable manner[8] for a valid purpose and ensure that such data is complete, accurate, not misleading and updated having regard to the purpose for which it is processed.[9] Further, Data Fiduciaries, who may be classified as 'Significant Data Fiduciaries'[10] (based on factors like the volume or sensitivity of data they process) and 'Social Media Intermediaries',[11] have more onerous compliance requirements under the PDP Bill.

The PDP Bill is a consent-centric regime where consent[12] is required to be obtained after providing a clear, concise and easily comprehensible consent notice,[13] and is required to be free, informed, specific, clear and capable of being withdrawn.[14] Additionally, consent for the processing of SPD is required to be explicit, and granular.[15] Other limited non-consent based grounds of processing data that are available are functions of the state,[16] employment (where consent is not reasonable)[17] and other reasonable purposes which are to be expanded upon by the Data Protection Authority, to be set up under the PDP Bill.[18]

Data Fiduciaries have also enhanced obligations in relation to implementing privacy by design[19] and breach notification.[20] Data Principals are granted extensive rights in relation to the processing of their data including the right of correction,[21] the right to be forgotten[22] and the right to data portability.[23]

The PDP Bill also lays down data localisation requirements: currently, SPD can be transferred outside India for processing, but a copy needs to be retained in India. However, any data notified as critical personal data by the Central Government may not be transferred outside India.[24]

The PDP Bill provides for a time-limited regulatory sandbox pursuant to which entities can apply for exemptions from purpose, storage and consent requirements under the PDP Bill.[25] The intent is to create an eco-system which encourages the development of new technologies in the nature of artificial intelligence and machine learning.

The PDP Bill is presently being reviewed by a Joint Parliamentary Committee **(JPC)**, which is holding consultations and is expected to present its report to Parliament later this year.

The Non-Personal Data Governance Framework

The Committee of Experts on Non-Personal Data Governance Framework constituted by the Ministry of Electronics and Information Technology **(MEITY)** submitted a revised report on December 16, 2020 **(Report)**, after holding public consultations. The Report defines (a) data that is not Personal Data, as defined under the PDP Bill, or data that is without any personally identifiable information;[26] (b) data that never related to an identifiable natural person;[27] and (c) personal data that has been anonymised[28] as non-personal data **(NPD)**. The Report recommends modifications in the PDP Bill so that both regimes are mutually exclusive and work harmoniously. However, any data which can be re-identified as personal data or mixed data sets that contain inextricably linked personal data and NPD will be governed by the PDP Bill.[29] Data Fiduciaries under the PDP Bill have been asked to take the Data Principal's consent before

4. Section 3, Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 **(SPDI Rules)**.
5. Section 3(36), PDP Bill.
6. Section 3(13), PDP Bill. Data Fiduciary means any person, including the State, a company, any juristic entity or any individual who alone or in conjunction with others determines the purpose and means of processing of personal data.
7. Section 3(14), PDP Bill. A Data Principal means the natural person to whom the personal data relates.
8 Section 5, PDP Bill.
9. Section 8(1), PDP Bill.
10. Section 26(1), PDP Bill.
11. Section 26(4), PDP Bill.
12. Section 3(10), PDP Bill.
13. Section 7, PDP Bill.
14. Section 11, PDP Bill.
15. Section 11(3), PDP Bill.
16. Section 12, PDP Bill.
17. Section 13, PDP Bill.
18. Section 14, PDP Bill.
19. Section 22, PDP Bill.
20. Section 25, PDP Bill.
21. Section 18, PDP Bill.
22. Section 20(1), PDP Bill.
23. Section 19(1), PDP Bill.
24. Section 33, PDP Bill.
25. Section 40, PDP Bill.
26. Paragraph 4.1(i), Report.
27. Paragraph 4.1(ii), Report.
28. Paragraph 4.1(ii), Report.
29. Paragraph 5.1(v), Report.

anonymising data[30] and using such anonymised data. Further, the Report recommends a new horizontal classification of businesses as 'Data Business'[31] based on factors considered under the PDP Bill for classifying entities as Significant Data Fiduciaries. Such Data Businesses will be required to register and share meta-data in compliance with applicable laws.[32] Further, appropriate obligations are defined for data custodians[33] (entities that collect and process NPD) and data processors[34] (Entities that process NPD on behalf of a data custodian). Data custodians are responsible for data stewardship and have a 'duty of care' to the community whose NPD they are processing.[35] Further, High Value Dataset **(HVD)** has been defined as "*a dataset that is a public-good and benefits the society at large*"[36] and requires the appointment of data trustees to create, maintain and enable sharing of such HVD.[37] The Report recommends sharing of NPD when such request is made (a) by a Government or public entity for a 'sovereign' purpose;[38] and (b) for a 'public good' purpose, or promotion of research, innovation and policy development.[39] Interestingly, the Report refrains from making any recommendations on sharing of NPD between two or more for-profit private entities for a business purpose.[40]

30. Paragraph 5.4, Report.
31. Paragraph 6, Report.
32. Paragraph 6.1(v), Report.
33. Paragraph 7.4, Report.
34. Paragraph 7.5, Report.
35. Paragraph 7.4(iv), Report.
36. Paragraph 8.2, Report.
37. Paragraph 7.7, Report.
38. Paragraph 8.1, Report.
39. Paragraph 8.2, Report.
40. Paragraph 8.3, Report.

Sector Specific Developments

AAROGYA SETU PROTOCOL

The Aarogya Setu Data Access and Knowledge Sharing Protocol, 2020 **(Protocol)**, issued on May 11, 2020 under the Disaster Management Act, 2005, governs the collection and processing of data which has been collected through the Indian COVID-19 contact tracing application, 'Aarogya Setu'. The Protocol (a) specifies restrictions on using, sharing and storing demographic, contact, self-assessment and location data (collectively, **Response Data**);[41] (b) obligates entities to collect and process data in a fair, transparent and non-discriminatory manner;[42] (c) enables sharing of de-identified data (data that has been stripped of personal information and assigned a randomly generated ID) with governmental agencies and public health institutions to assist in the formulation or implementation of a critical health response;[43] (d) requires that data be anonymised basis the standard prescribed by the Government before it is shared with Indian universities and research organisations;[44] and (e) mandates deletion of personally identifiable data after 180 (one hundred and eighty) days from collection, and within 30 (thirty) days from a request of deletion by an individual.[45] Violation of the Protocol will lead to penalties under the Disaster Management Act, 2005.[46]

The Protocol was challenged before the High Court of Karnataka, which in the case of *Anivar A. Aravind vs. Ministry of Home Affairs*[47] granted an interim relief restraining the Government and the National Informatics Centre from sharing the Response Data under the Protocol, as adequate consent for the same had not been obtained under the existing privacy policy available on the application. However, data sharing can be done under the Protocol after informed consent of the users is obtained for the same on the application.

ADVISORY BY SECURITIES AND EXCHANGE BOARD OF INDIA ON LOCALISATION

The Securities and Exchange Board of India issued the *"Advisory for Financial Sector Organisations regarding Software as Service (SaaS) Based Solutions"*[48] **(Advisory)** pursuant to an advisory from the Indian Computer Emergency Response Team for the Financial Sector. The Advisory, with the intent of reducing the surface area for adversary/cyber attacks, requires regulated entities to have complete control over its critical technology infrastructure including by keeping critical data in relation to its Governance, Risk and Compliance functions, within India.[49]

GEOSPATIAL DATA

The Department of Science and Technology released the "*Guidelines for Acquiring and Producing Geospatial Data and Geospatial Data Services including Maps*" dated February 15, 2021 **(Geospatial Guidelines)**. Geospatial Guidelines permit entities in India to freely collect and process geospatial data[50] without obtaining any consent or registration. Additionally, geospatial data above a certain

41. Clause 5, Protocol.
42. Clause 5(c), Protocol.
43. Clause 6, Protocol.
44. Clause 8, Protocol.
45. Clause 5(e), Protocol.
46. Clause 9, Protocol.
47. *Anivar A. Aravind v. Ministry of Home Affairs*, 2021 (2) AKR 435.
48. Securities and Exchange Board of India's Circular on "*Advisory for Financial Sector Organizations regarding Software as Service (SaaS) Based Solutions*" dated November 3, 2020.
49. Paragraph 4, Advisory
50. 'Geospatial Data' has been defined as: "*Positional data with or without attribute data tagged, whether in the form of images, videos, vector, voxel and/or raster datasets or any other type of geospatial dataset in digitized or non-digitized form or web-services*", in Paragraph 7 of the Geospatial Guidelines.

threshold **(Threshold Data)** cannot be transferred outside India. Foreign entities or foreign owned or controlled entities are not allowed to collect and process Threshold Data but can licence it from Indian entities only for the purpose of serving their customers in India.

DRAFT E-COMMERCE POLICY

The Department of Promotion of Industry and Internal Trade, in February 2019, released the "*Draft National e-Commerce Policy*" (**Policy**), which in order to enable the use of "*India's Data for India's Development*," creates clearly defined restrictions on the ability of entities to share certain types of data outside India. The Policy, after stating that data which is generated in India is a 'national asset',[51] seeks to restrict the cross-border transfer of data generated from sources such as social media networks, public Internet of Things devices, search engines and e-commerce companies.[52] The Policy received considerable pushback from industry and media reports indicate that the Government is in the final stages of revising it. The revised Policy apparently contains wide-ranging proposals in relation to sharing and cross-border transfer of data, retention of data and sharing of data with the Government.[53]

Further, the Government notified the Consumer Protection (E-commerce) Rules, 2020 on July 23, 2020, which are not only applicable to Indian entities but also apply to digital products and e-commerce entities which, while not established in India, 'systematically' offer goods or services to consumers in India. It requires all e-commerce entities including the foregoing to appoint a nodal officer or an alternate senior designated functionary, who is resident in India, to ensure compliance with the provisions of the Consumer Protection Act, 2019 or the rules made thereunder.

DATA PROTECTION IN THE TRANSPORT SECTOR

The Ministry of Road Transport and Highways released the Motor Vehicle Aggregator Guidelines, 2020 (**Aggregator Guidelines**), which lays down conditions in relation to data generated on platforms run by such aggregators. As per the Aggregator Guidelines, all aggregators, that is all digital intermediaries or marketplaces that enable a passenger to connect with a driver for the purpose of transportation, are required to ensure that all data generated on their platform is stored on a

51. Page 14 of the Department for Promotion of Industry and Internal Trade, Draft National E-Commerce Policy available at https://dipp.gov.in/sites/default/files/ DraftNational_e-commerce_Policy_23February2019.pdf
52. Available on Economic Times website https://economictimes.indiatimes.com/news/economy/policy/draft-ecomm-policy-seeks-to-set-up-regulator-restrict-data-storage/articleshow/76760134.cms?from=mdr
53. Available on **Economic Times** website, last accessed on August 25, 2020
54. Section 9 (4), Aggregator Guidelines

server in India. Further, such data must be stored for a minimum period of 3 (three) months and can only be stored for a maximum period of 24 (twenty-four) months. Furthermore, any customer data can only be disclosed with the prior written consent of the customer. Additionally, all data needs to be made available to State Governments in compliance with applicable law.[54] It also lays down additional obligations in relation to trip information and driver information that need to be available on the aggregators' platform.

DATA PROTECTION IN THE FINTECH SECTOR

In August 2020, the Government's policy think-tank NITI Aayog released a draft framework on Data Empowerment and Protection Architecture **(DEPA)**[55] for banks and other players in the fintech ecosystem. DEPA seeks to enable free flow of data between financial institutions (both, in public and private sector) to enable innovation and development. Additionally, it envisages the appointment of consent managers or account aggregators to enable individuals to control disclosure as well as sharing of their data, provide granular consent and enforce their rights as data subjects. DEPA is proposed to be implemented in the finance sector followed by the healthcare and telecom sectors.

DATA MANAGEMENT IN THE HEALTHCARE SECTOR

In December 2020, the Ministry of Health and Family Welfare approved the Health Data Management Policy **(HDM Policy)** to govern data in the healthcare sector. The HDM Policy lays down obligations for healthcare institutions that are part of the National Digital Health Ecosystem **(NDHE)** and aims to create a system of easily retrievable and shareable digital health records based on voluntary individual consent.[56] It envisages the allocation of a unique Health ID which can be used by data principals across healthcare institutions to access and share their healthcare data. Many of the principles and obligations relating to the collection and processing of healthcare data are similar to the PDP Bill. Presently, violation of the HDM Policy may prohibit or bar the entity from participating in the NDHE, in addition to any other actions that may be initiated under other applicable laws.[57]

CROSS-BORDER TRANSFER OF DATA

The MEITY, in the Fourth G20 Digital Economy Task Force held in June 2021, raised concerns in relation to 'free flow of data with trust' within domestically applicable legal frameworks and stated that such uninhibited cross-border transfer of data does not take into account India's considerations in relation to data access.[58]

Notable Judicial Developments

In *Karmanya Singh Sareen v. Union of India,*[59] the Delhi High Court, while examining changes to WhatsApp's privacy policy and terms of service, stated that users who opt to completely delete their account with WhatsApp before September 25, 2016, must find their data completely deleted from the company servers. The Delhi High Court added that data of such users (deleted accounts) cannot be shared with Facebook or any other group companies, and data of users who opt to continue using WhatsApp, must not be shared with Facebook or any group companies to the extent such data has been collected before September 25, 2016. An application was filed in this case before the Supreme Court, on February 15, 2021,[60] challenging WhatsApp's new privacy policy notified in January 2021 which, *inter alia,* does not permit users to opt-out of sharing their data with WhatsApp's parent company Facebook. The Supreme Court has issued notice to the respondents. The case may have far-reaching implications for sharing of data between group companies.

In *Balu Gopalakrishnan v. State of Kerala & Ors,*[61] the Kerala High Court relied on *Puttaswamy* to strike down data sharing with private entities over and above the purpose of collection. In this case, the Kerala Government had entered into a contract with Sprinklr, Inc., a US-based software company, for creating an online digital platform for data analysis of medical and health data of patients affected by COVID-19 and those who are susceptible to it. The petitioners alleged that the contract lacked any safeguard against the unauthorised exploitation of health data collected by Sprinklr on behalf of the

55. NITI Aayog, Data Empowerment and Protection Architecture. Available at https://www.niti.gov.in/.
56. Clause 3, HDM Policy.
57. Clause 35, HDM Policy.
58. Ministry of Electronics and Information Technology Major Achievements of Month of June, 2021 available at https://www.meity.gov.in/writereaddata/files/Major%20achievments%20month%20of%20May%20and%20June%202021.pdf.
59. *Karmanya Singh Sareen v. Union of India,* WP (C) 7663/2016.
60. *Karmanya Singh Sareen v. Union of India*, IA No. 6140/2021.
61. *Balu Gopalakrishnan v. State of Kerala & Ors.*, WP (C) Temp. no. 84 (2020).
62. *Balu Gopalakrishnan v. State of Kerala & Ors.*, WP (C) Temp. no. 84 (2020).
63. *Jorawer Singh Mundy v. Union of India*, MANU/DE/0954/2021; *Karthick Theodre v. The Registrar General, Madras High Court and Ors,* MANU/TN/5222/2021;

State of Kerala. A division bench of the Kerala High Court, while pronouncing their judgment, observed that it was their "*intent to ensure that there is no "data epidemic" after the COVID-19 epidemic is controlled*".[62]

Separately, other High Courts have issued orders to search engines as well as publishers of digital content to take down content based on the 'Right to be Forgotten,' which they have held is implied under the 'Right to Privacy'.[63]

While dealing with a bank's responsibilities in relation to digital lockers, the Supreme Court in *Amitabha Dasgupta v. United Bank of India*[64] emphasised on obligations to keep the customer data confidential (including biometric data) in line with the SPDI Rules. Further, such data may only be shared with third parties after obtaining the consent of the customer.

Conclusion

The above developments are indicative of the increased importance of data privacy and regulation in India's regulatory landscape. The PDP Bill is currently being reviewed by the JPC and is scheduled to be tabled in this year's Winter Session of Parliament. Further, there is an increasing trend of judicial decisions and sector specific regulation expanding the ambit of privacy beyond its current statutory boundaries. Businesses would be well-advised to evaluate their data collection and processing activities in view of the data protection principles of data minimisation, purpose limitation and storage limitation, as recognised in *Puttaswamy*.

64. *Amitabha Dasgupta v. United Bank of India,* AIR 2021 SC 1193.

10

RECENT DEVELOPMENT IN THE **INDIAN DISPUTE RESOLUTION SPACE**

FOSTERING PARTY AUTONOMY IN COMMERCIAL CONTRACTS

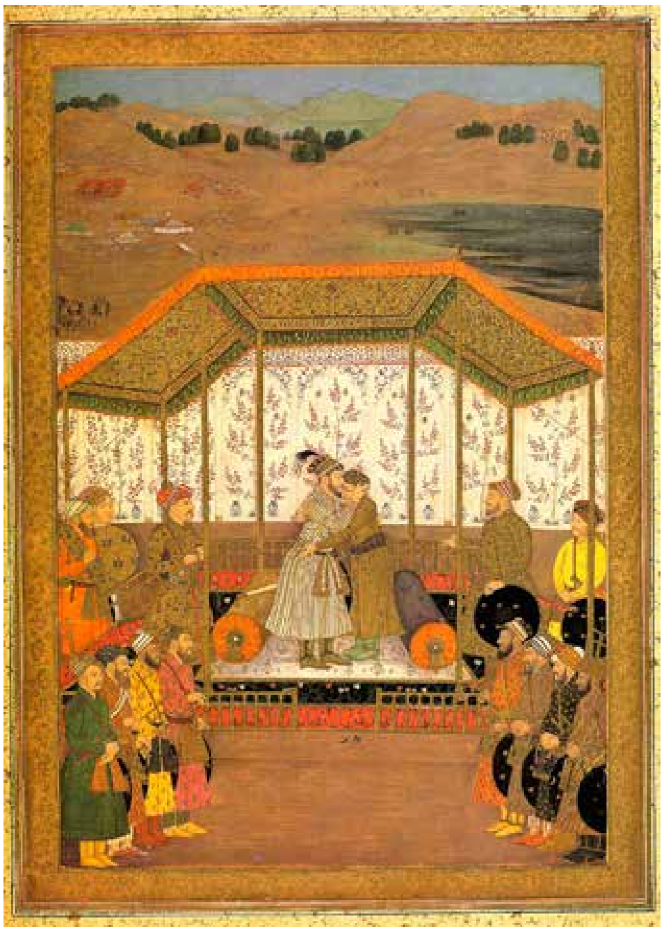
Introduction

"Party autonomy" and *"litigant first"* have emerged as dominant themes in the commercial dispute resolution space in India over the past months.

It is interesting that even in the thick of a (hopefully) once-in-a-lifetime pandemic, Indian courts have passed notable rulings in 2020 and 2021, not only on COVID-related issues impacting commerce (such as "force majeure" clauses, rent moratoriums and extension of statutory limitation periods), but have also passed significant judgments that provide long-awaited clarity on larger issues, particularly in the field of arbitration. On the policy/ legislative front, the past year has witnessed further amendments to the Arbitration & Conciliation Act 1996 **(Arbitration Act)**, and big strides in setting up of a spanking new commercial hub in GIFT-City, Ahmedabad. Below are the key highlights from the year.

TWO INDIAN PARTIES ARE FREE TO CHOOSE A FOREIGN ARBITRAL SEAT

The issue of whether Indian law permits an arbitration involving only Indian parties to be seated outside India was mired in decades of litigation, conflicting rulings of High Courts and continuous academic speculation.



- The Supreme Court finally answered this question with a thumping 'yes' in the landmark judgment of *PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd.*[1] In arriving at its judgment, the Supreme Court examined the forward-looking legislative scheme of the Arbitration Act, noted the emphasis on party autonomy recurring through the statute, affirmed the limited scope of any 'public policy' related objections under the Arbitration Act, and concluded that sufficient checks were in place to ensure that no party could circumvent mandatory Indian law by choosing the foreign seat. Having done so, the three-Judge Bench of the Supreme Court concluded definitively that "*Nothing stands in the way of party autonomy in designating a seat of arbitration outside India even when both parties happen to be Indian nationals.*"[2]

- The same judgment decided a second issue, which stood to bolster the Court's findings, allowing Indian parties to choose a foreign seat, by finding legislative basis to allow Indian courts to grant interim relief in support of such arbitrations. The Court held that the phrase "international commercial arbitration" in the proviso to Section 2(2) of the Arbitration Act related to arbitrations with a foreign "seat" and not to foreign nationality (the latter being the case in the definition of *International Commercial Arbitration* under Section 2(1)(f) of the Arbitration Act). The Court relied on the scheme of the 'New York Convention' to support this conclusion, basis which it held that even two Indian parties arbitrating in a foreign *seat* of arbitration would have recourse to Indian Courts for interim relief (unless otherwise agreed).

A mere violation of FEMA is no ground to refuse enforcement of a foreign arbitral award

In *Vijay Karia v. Prysmian Cavi e Sistemi SRL*,[3] a three-Judge Bench of the Supreme Court ruled on an application for enforcement of a foreign award where the Appellant (the award-debtor) opposed the enforcement of foreign awards passed in arbitration proceedings conducted in London (which directed the Indian Appellant to sell shares to a foreign entity at a discount). The Appellant contended that the awards were in contravention of Foreign Exchange Management Act (1999) **(FEMA)** and as such, against the public policy of India, rendering the award unenforceable in India.

- The Court distinguished the earlier foreign exchange regime under the Foreign Exchange Regulation Act, 1973 **(FERA)**, with the current regime under FEMA, to note that while FERA contained provisions for voiding transactions and prosecution/ punishment, FEMA only provided for a fine. Further, under FEMA, a violation could be cured through approval/ condonation of the Reserve Bank of India.

- Accordingly a breach/ violation of FEMA would not amount to a violation of the fundamental policy of Indian law, so as to allow a Court to refuse enforcement of a foreign award under the Arbitration Act, and hence would not be a ground to refuse enforcement of a foreign award. The Court clarified again that in order to fall within the purview of a successful public policy challenge, there must be a breach of some legal principle or legislation, which is so basic to Indian law that it is not susceptible to being compromised, and must be limited to the core values of India's public policy as a nation, reflected not only in statutes, but also time-honoured, hallowed principles that are followed by the Courts. The apex court thus dismissed the opposition and ruled that the award was enforceable.

1. 2021 SCC OnLine SC 331
2. [Note: Cyril Amarchand Mangaldas represented the successful Claimant/Petitioner (GE) in this matter in the Zurich-seated arbitration, in enforcement proceedings before Courts in Gujarat as well as in the Supreme Court.]
3. 2020 SCC OnLine SC 177.

An emergency arbitrator (in an arbitration seated in India) (EA) is treated as an arbitrator under the Arbitration Act and orders passed by an EA are enforceable as orders of an arbitral tribunal passed under part I of the Arbitration Act

The Supreme Court in Amazon.com NV Investment Holdings LLC v. Future Retail Limited & Ors[4]. **(Amazon v Future)** held that the EA was an arbitrator within the meaning of the Arbitration Act, and that the rulings of emergency arbitrators could be enforced through Indian courts. Further buttressing the core principal of party autonomy in arbitrations (as it did in the GE–PASL case above), the Court held that there was no fetter under Indian law to parties seeking interim relief from an EA under institutional rules freely chosen by the parties.

- In an India seated arbitration, conducted in accordance with the SIAC Rules, Amazon succeeded in obtaining an injunction order against Future Retail from the emergency arbitrator, prohibiting it from taking any steps to complete its transaction with Reliance Retail, including but not limited to filing or pursuing any application before any regulatory bodies or agencies in India **(EA Order)**.

- Amazon sought to enforce the EA Order under Section 17(2) of the Act, in which proceedings by a Single Judge of the Delhi High Court, who made a prima facie observation (while passing a 'status quo' order) to the effect that the EA Order was enforceable as an order of the Court under Section 17(2).[5]

- Future Retail carried the matter in appeal to a Division Bench of the Delhi High Court, which stayed

4. Civil Appeal Nos. 4492-4493 of 2021, decided by the Supreme Court on August 6, 2021.
5. O.M.P(ENF)(COMM) 17/2021, Order dated 2.2.2021.

the Single Judge's status quo order. Amazon appealed the order of the Division Bench before the Supreme Court. On April 20, 2021, the Supreme Court stayed all proceedings before the Delhi High Court relating to the dispute and indicated it would pass final orders on all matters connected with the dispute.

On August 6, 2021, the Supreme Court passed its judgment holding that "*full party autonomy is given by the Arbitration Act to have a dispute decided in accordance with institutional rules which can include Emergency Arbitrators delivering interim orders, described as "awards". Such orders are an important step in aid of decongesting the civil courts and affording expeditious interim relief to the parties. Such orders are referable to and are made under Section 17(1) of the Arbitration Act.*" The Court also held that an order passed by a Single Judge of High Court enforcing an order/ award of an Emergency Arbitrator would not be appealable before a Division Bench under Section 37 of the Arbitration Act, since the provision contemplates only orders granting or refusing to grant interim relief and not orders in enforcement thereof (under Section 17(2)).

2021 AMENDMENTS TO THE ARBITRATION ACT

On the heels of reforms introduced by way of the 2015 and 2019 amendments to the Arbitration Act, further reforms were enacted by the parliament by way of the Arbitration and Conciliation (Amendment Act), 2021, which is a mixed bag of welcome and unnecessary changes:

QUALIFICATION OF ARBITRATORS

The Amendment does away with qualifications of arbitrators under the 8th Schedule of the 1996 Act (prescribing qualifications, experience and norms for accreditation of arbitrators – which had not been notified), thereby eliminating the requirement that an arbitrator must be an advocate under the Advocates Act, 1961, with 10 years of experience or an officer of the Indian Legal Service. This is a welcome change that paves the way for foreign practitioners to act as arbitrators in India, without which it is hard to imagine India as a global arbitration hub.

UNCONDITIONAL STAY ON AWARDS

A ruling of the Supreme Court in *Hindustan Construction Company Limited & Anr. v. the Union of India & Ors*[6] had clarified that the Arbitration Act (as originally enacted, or under the 2015 Amendments)

6. 2019 SCC Online SC 1520.

did not contemplate an automatic stay on execution of an award upon filing of an application challenging an award. This ruling put a welcome end to the trend of award-debtors stalling payment by filing frivolous challenges to an award. The 2021 Amendment provides that if on the filing of a challenge, the court is satisfied prima facie that the arbitration agreement or underlying contract which forms the basis of the award, or award itself is vitiated by fraud or corruption, then it can grant an unconditional stay on enforcement, pending disposal of the challenge. It remains to be seen how this provision is used by parties, and how Courts implement it in a manner that mitigates chances of abuse by recalcitrant award-debtors.

OTHER FORWARD-LOOKING REFORMS

The Commercial Courts Act, 2015, ensured that designated commercial divisions were set up to exclusively deal with commercial matters to provide speedy disposal to commercial disputes and increase ease of doing business. The Commercial Courts Act provides for a mandatory pre-suit mediation (in cases where no urgent interim relief is sought by parties), providing a further impetus to the already increasing popularity of mediation among litigants.

More recently, the Ministry of Law and Justice has launched a 'contract enforcement' portal, setting out information on legislative and policy reforms being undertaken on the "Enforcing Contracts" parameter (used by the World Bank to calculate Ease of Doing Business). This includes data on functioning and disposal of commercial cases before the commercial courts of Delhi, Mumbai, Bengaluru and Kolkata,[7] and is a welcome bid to usher in transparency in commercial dispute resolution.

The Gujarat International Finance Tec **(GIFT)** City International Financial Services Centre **(IFSC)** has been created in a Special Economic Zone in India; and in order to ensure a robust dispute resolution infrastructure, the Singapore International Arbitration Centre has signed a Memorandum of Agreement with the relevant authority in the GIFT IFSC to establish a representative office. The government is looking to provide a strong dispute resolution mechanism in the GIFT IFSC to provide the necessary comfort to the investors.

Conclusion

The 2021 Amendment states among its objects and reasons the need to address the concerns raised by stakeholders. The government appears receptive to (and indeed willing to act on) stakeholder feedback insofar as commercial disputes are concerned, which is an encouraging sign for the efforts to foster a positive investment and business climate in India.

7. Press Release, Justice Department launches "Enforcing Contracts Portal", Ministry of Law and Justice, June 29, 2021, available at https://pib.gov.in/PressReleasePage.aspx?PRID=1731090.

11

Crypto **Curriencies** In India

Introduction

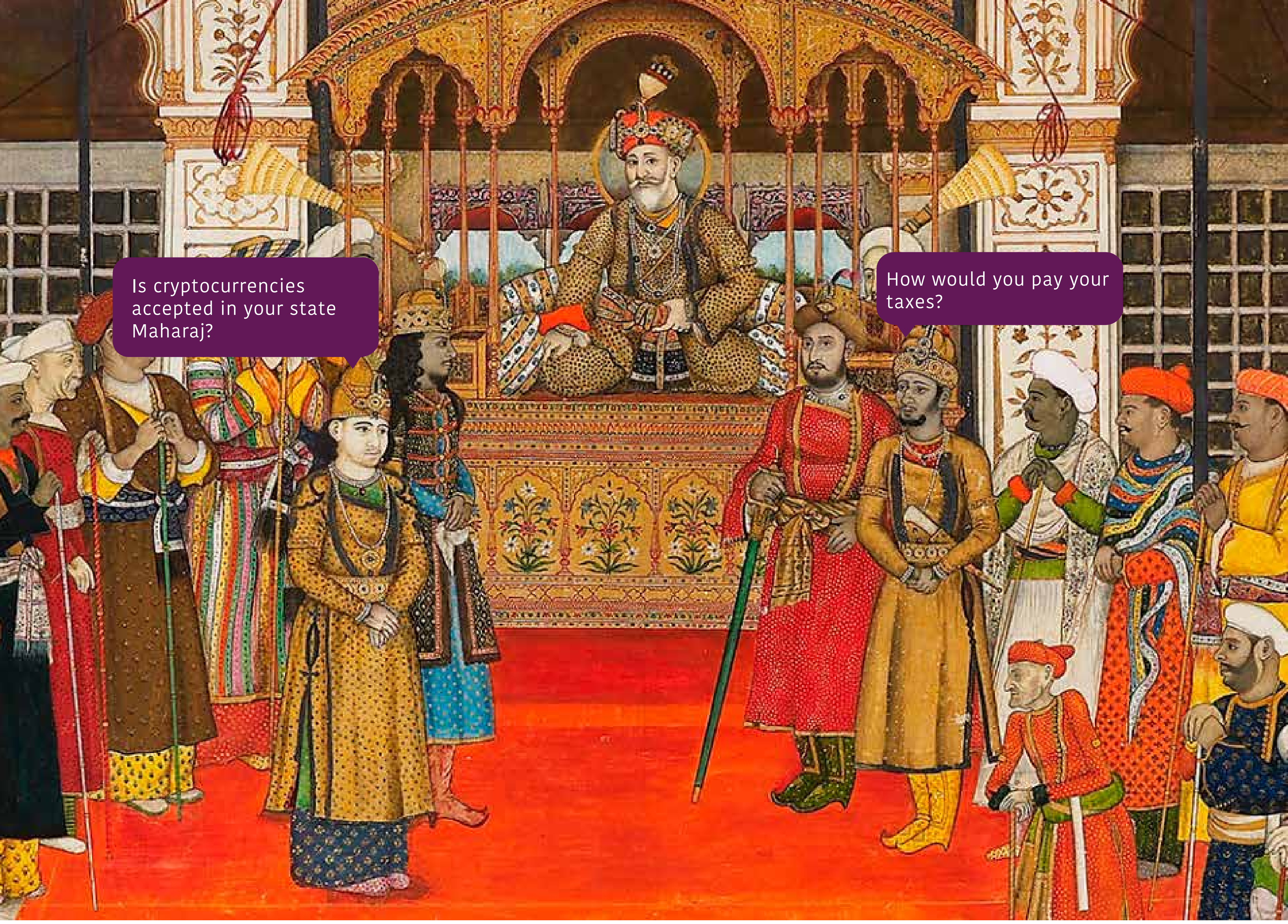
The recognition accorded to cryptocurrencies has been increasing globally, enabling its transformation from a payment method to an investment asset. In this past year, India has witnessed large volumes of cryptocurrency trading, with popular crypto exchanges in India claiming user bases in millions. Recently, a crypto exchange also became India's first crypto unicorn. Despite this explosion in market activity, regulators in India have approached cryptocurrencies with caution.

Crypto Regulation in India

Regulating cryptocurrencies is fraught with the difficulty of precisely identifying their legal character and consequently, the authority that should regulate it. Broadly speaking, cryptocurrencies may be classified under the following three heads:

AS MONEY/CURRENCY

The term "currency" is not defined in any Indian statute, including the Banking Regulation Act, 1949, and the Coinage Act, 2011. The Supreme Court, however, has recently held that cryptocurrencies could be considered as "other similar instruments" under the Foreign Exchange Management Act, 1999 **(FEMA, 1999)**, if the Reserve Bank of India **(RBI)** issued a notice to that effect, which would bring them under the RBI's purview.



AS A PAYMENT SYSTEM

The Supreme Court has recognised the RBI's authority to regulate cryptocurrencies under the Payments and Settlement Systems Act, 2007, given that such transactions include "payment instructions" and/ or "payment obligations".

AS A SECURITY

The Securities Contracts (Regulation) Act, 1956, defines "securities", but this definition does not include cryptocurrencies. However, cryptocurrencies may be considered "other marketable securities" under the definition, if issued and distributed in a centralised fashion.

Recent developments in India

CRYPTOCURRENCY BILL

The Central Government is slated to introduce the Cryptocurrency and Regulation of Official Digital Currency Bill, 2021 **(2021 Bill)**. While the text of the 2021 Bill is not publicly available, as per the Lok Sabha bulletin, it will facilitate an RBI-issued digital currency and "prohibit" private cryptocurrencies in India.

The 2021 Bill's title drops the words 'banning of' from its 2019 counterpart. However, it is unclear whether it will lean towards regulating rather than banning private cryptocurrencies outrightly.

PRESCRIPTIONS FROM THE MINISTRY OF CORPORATE AFFAIRS (MCA) AND THE RBI

To increase transparency, the MCA has created corporate disclosure requirements for companies to divulge the details of their investments/ trading in cryptocurrencies in their financial statements.

1 As de ned in Part IV of Schedule V.

In 2018, the RBI had issued a circular prohibiting regulated entities from facilitating transactions in virtual currencies. This circular was set aside by the Supreme Court in 2020 on grounds of being disproportionate.

On May 31, 2021, the RBI issued a circular stating that its 2018 circular cannot be cited and notably, required regulated entities to follow RBI guidelines on customer due diligence **(CDD)**, checking obligations relating to anti-money laundering **(AML)**, combating financing of terrorism **(CFT)**, know your customer **(KYC)** norms, and existing obligations under the Prevention of Money Laundering Act, 2002, and the FEMA, 1999.

DECENTRALISED FINANCE (DEFI) INDUSTRY

Cryptocurrencies have received a fillip from the budding DeFi industry in terms of reducing cross-border remittance costs and crypto-backed lending. As AML compliant DeFi solutions are currently in the pipeline, DeFi seems poised to receive further approval as a viable alternate financing option in the future.

INDIAN SECURITIES REGULATOR PUSHES BLOCKCHAIN-BASED REGULATORY TECHNOLOGY (REGTECH)

On August 13, 2021, the Securities and Exchange Board of India **(SEBI)** asked depositories to develop a platform to monitor securities and covenants using distributed ledger technology, which will be based on blockchain, the technology underlying cryptocurrencies. The adoption of blockchain-based Regtech is an exciting prospect and may simplify regulatory compliance.

THE POSSIBILITY OF AN INDIAN CENTRAL BANK DIGITAL CURRENCY (CBDC)

It seems increasingly likely that India will witness an RBI-issued digital currency, similar to the digital yuan issued by the People's Bank of China. The digital yuan is legal tender in China, with a value equivalent to its physical counterpart. The RBI Deputy Governor's speech in July noted the need for an Indian CBDC and outlined the RBI's definition of a CBDC, viz., legal tender issued by a central bank in digital form, exchangeable one-to-one with fiat currency. Given that the 2021 Bill is likely to facilitate an RBI-issued digital currency, it will be interesting to observe the implementation of a CBDC in India.

Crypto Regulation Globally

Regulators globally are engaged in a constant exercise to effectively regulate cryptocurrencies. The models used by these regulators could serve as possible approaches for India's regulatory framework. For Indian regulators, it will be important to investigate which of these is best suited to the Indian legal and economic landscape.

THE UNITED STATES OF AMERICA (US)

In the US, the regulation of crypto assets is not centralised with a single agency, rather, it is in the purview of multiple agencies. Each of these regulates a specific aspect of crypto assets with their own approaches and definitions. Notably, the US has kept its understanding of crypto assets technology-agnostic, to be able to meet future developments with ease.

SINGAPORE

From a securities perspective, the Monetary Authority of Singapore **(MAS)** has introduced regulations on the issue of digital tokens, which require the registration of an offer, the preparation of a prospectus and the procurement of an operating licence. On the payments side, entities providing services relating to digital tokens require MAS authorisation and meet AML and CFT norms.

THE UNITED KINGDOM (UK)

Crypto regulation in the UK is largely handled by the Financial Conduct Authority, which requires crypto exchanges to be registered, and regulates their KYC, CDD, AML and CFT procedures. The UK is currently considering a proposal to bring a set of crypto assets under its regulatory purview, when used as a payment method.

AUSTRALIA

Australia considers crypto assets as "financial products", which require a licence to be dealt in. Recently, the Australian securities regulator updated its regulations to include initial coin offerings under its purview, and any trade of crypto assets is subject to AML, CFT and KYC norms.

GERMANY

German law has incorporated the provisions of the European Union's fourth AML directive and defines crypto assets as digital value representations not issued by a public authority, which are accepted by individuals as a mode of payment. Crypto exchanges in Germany require an operating licence, and must meet AML, KYC and CFT provisions.

JAPAN

Japan's Payment Service Act, 2009, defines crypto assets as proprietary value, except fiat currency, that may be exchanged electronically. Cryptocurrencies on exchanges fall under this definition and their trade is subject to a licence under this law.

Crypto Prospects in India

With the present status of cryptocurrency regulation in India being uncertain, it is difficult to predict the future of cryptocurrencies in India. However, it is likely that India will go the CBDC route. The 2021 Bill will be an important indicator of regulatory intent. Once its text is available, it will be interesting to see whether the government decides to ban or regulate private cryptocurrencies.

Conclusion

Globally, there is a trend to regulate, rather than prohibit the use of cryptocurrencies, which is in contrast with the current regulatory uncertainty in India. With the ever-increasing adoption of cryptocurrencies in the country, Indian regulators should consider options to harness the potential of cryptocurrencies to speed up the digitisation of the Indian economy.

12

E-COMMERCE IN INDIA

Introduction

With increased internet and smartphone penetration, social media defining the way of life, and a potential rise in digital literacy, catalysed by the pandemic's end game for physical spaces, e-commerce is at the centrestage of India's digital transformation. India's e-commerce industry is touted to grow 84% to USD 111 billion by 2024.[1] As India wants everything home delivered, even brick and mortar businesses have metamorphosised themselves on the digital scale.

Indian startups have raised about USD 12.1 billion in the first half of 2021, which is about USD 1 billion more than the amount raised in the entire year of 2020. In all this, Zomato's IPO - India's first by a consumer internet platform[2] – has been the icing on the cake. With other e-commerce and digital businesses looking to go public, the sector has clearly dug in its heels.

1. https://www.business-standard.com/article/economy-policy/indian-e-commerce-to-grow-84-in-4-years-helped-by-covid-19-impact-study-121031000846_1.html last visited on August 24, 2021; "The Indian E-commerce market is expected to grow to USD 200 billion by 2026 from USD 38.5 billion as of 2017. Much of the growth for the industry has been triggered by an increase in internet and smartphone penetration. As of September 2020, the number of internet connections in India significantly increased to 776.45 million, driven by the 'Digital India' programme. Out of the total internet connections, ~61% connections were in urban areas, of which 97% connections were wireless" - https://www.ibef.org/industry/ecommerce.aspx last visited on August 24, 2021
2. https://economictimes.indiatimes.com/tech/newsletters/morning-dispatch/startups-raise-the-roof-in-2021/articleshow/84190410.cms?from=mdr last visited on August 24, 2021; The first quarter of 2021 has seen e-commerce startups raise close to USD 11.7 billion, from USD 2.8 billion in Q1 of 2021 and USD 5.2 billion in Q1 of 2019;

The Regulatory Framework

Since the liberalisation of the Indian economy, the trading and e-commerce sector has seen various phases. While, e-commerce was thrown open for B2B/ wholesale businesses in 2000, retail trading remained prohibited in the books. From opening up of single brand retail trading under the approval route in 2006 permitting it through automatic route (in 2019), and from removing multi-brand retail trading from the prohibited list to allow it now under the approval route, the retail sector regulations have carefully navigated through India's global aspirations and its local trading community's needs. The foreign direct investment regime, through the Foreign Exchange Management (Non-debt Instruments) Rules, 2019 **(NDI Rules)**, and foreign direct investment policy and press notes issued from time to time, regulates trading/ e-commerce under the following heads:

Sector	FDI
E-commerce marketplace model	100% automatic route
E-commerce inventory model	Not permitted
Wholesale and B2B e-commerce	100% automatic route
Single brand retail trading	100% automatic route
Multi-brand retail trading	51% approval route
Retail trading of food products manufactured in India	100% approval route

The historic regulatory intent for the trading regime in India (especially retail), and competition concerns are intricately linked to the e-commerce laws prevalent today. The government's aim is to ensure that e-commerce entities work within the confines of the trading regulations governing retail. Given this is a fast paced and evolving business, the government has, over the past few years introduced several regulatory changes (from introducing Press Note 3 of 2016 to Press Note 2 of 2018) driven towards one common goal – no multi-brand retail trading should be conducted directly or indirectly, and the business should be conducted in a fair and non-discriminatory manner. With this intent, and as a reaction to business models in the market, the following FDI in e-commerce regulations were overhauled in 2018 with the following key takeaway:

- A marketplace e-commerce entity cannot exercise ownership or control over the inventory, i.e., the goods purported to be sold. Inventory of a vendor would be deemed to be controlled by e-commerce marketplace entity if more than 25% of purchases of such vendor are from the marketplace entity or its group companies. *Any such ownership / control will render the business into an inventory-based model, which is not permitted to receive FDI*

- An entity having equity participation by e-commerce marketplace entity or its group companies or having control on its inventory by e-commerce marketplace entity or its group companies, is not permitted to sell its products on the platform run by such marketplace entity.

- E-commerce marketplace entity is restricted from mandating any seller to sell any of their product exclusively on its platform.

These were in addition to the conditions on *maintaining a level playing field between the sellers and the marketplace not influencing the sale price of products,* which were aimed at discouraging deep discounting and indirect financing of retail. Philosophically, the government wants the platforms to function purely as facilitators and not have a say in the actual trading activity.

2 See https://www.artificiallawyer.com/2019/04/23/lawgeex-beats-human-lawyer-round-two-feat-vice-news-dealwip/

The regulator's focus has been on compliance in letter and in spirit. For evaluation of business models, the regulators rely on testing control of the marketplace and its group vis-à-vis all entities in the supply chain through various factors such as commonality of directors, employees, shared resources, office spaces, significant influence etc.

Outside of foreign investment, the government has also recently introduced the Consumer Protection (E-commerce) Rules, 2020 **(Rules)** to protect the interests of the consumers against unfair trade practices in ecommerce. The Rules underline several conditions to comply with respect to labelling of goods and services; and providing a mechanism for grievance redressal to promote transparency and endorse consumer protection.

On 21st of June 2021, the Ministry of Consumer Affairs had proposed certain amendments to the Rules **(Amendment)**, which were opened for public comments. Under the proposed Amendment, various fundamental changes have been suggested to protect the consumers and prevent unfair trade practices. For example, many foreign investment principles have been extended to the domestic participants (such as no sales on platforms by related parties), marketplaces have been mandated to take fall-back liability in a potential move away from the intermediary regime, abuse of dominance and data sharing provisions have been introduced, mis-selling and cross-selling have been legislated on, fraudulent flash sales / manipulation of search indices have been restricted etc. The industry and stakeholders have weighed in with their arguments and the final regulations are awaited.

Conclusion

In comparative global economy, India has immense potential to leverage its consumer demand. While a stable regulatory regime will be quintessential to ensure consistent inflow of investment and growth, the final chapter of this game of catchup between regulations and industry is yet to be written.

13

FINTECH

EMERGING TRENDS

Introduction

The year 2021 has seen a lot of developments in the financial technology **(Fintech)** sector, both on the regulatory front as well as in terms of M&A activity. With the ever-increasing market penetration of Fintech platforms and the minting of fresh Fintech unicorns in India, regulators are poised to take advantage of the opportunities this sector presents for India's transformation into a digital superpower. The trends emerging from these regulatory prescriptions are enumerated below.

Fintech in Mutual Funds

The Securities and Exchange Board of India **(SEBI)** has taken note of the potential presented by Fintech and wealth technology **(wealth-tech)** companies in the mutual funds **(MF)** sector. Notably, SEBI amended its regulations to remove the requirement of MF sponsors to have a "sound track record", viz., being profitable in three of the preceding five financial years, including the fifth year. Instead, entities having a minimum net worth of INR 100,00,00,000 as their contribution towards the asset management company's net worth (to be maintained till the sponsor is profitable for five consecutive years) are also eligible MF sponsors.

This move allows for a fascinating entry of Fintech and wealth-tech companies in the MF sector. Their participation holds the promise of innovation and disruption in the sector, which has seen only traditional players so far.

SEBI pushes regulatory technology (Regtech) further

On August 13, SEBI announced the development of a new platform for security and covenant monitoring, to be hosted by depositories. This platform is to be based on distributed ledger technology, a specific application of blockchain technology. It is slated to come into effect, beginning April 01, 2022, with testing beginning on January 01, 2022.

Many entities in the financial services industry have been utilising Regtech tools for processes such as know your customer and digital reporting, especially during the pandemic. By asking depositories to adopt blockchain-based monitoring structures, SEBI has given a key push to adoption of technology-based solutions for regulatory compliance.

RBI forms working group for digital lending

On January 13, 2021, the Reserve Bank of India **(RBI)** announced the constitution of a working group tasked with studying all aspects of digital lending activities, both by regulated as well as unregulated entities, to draft appropriate guidelines and regulations. This follows an earlier announcement of the RBI that required banks and non-banking finance companies **(NBFCs)** lending through a digital or outsourced platform to adhere to its guidelines on digital lending platforms. For NBFCs operating in this space, this is potentially a time for big change, as they might have to re-align with the new proposed classification. In any event, the report of the working group may work towards providing a crucial boost to Indian digital lending and increasing its market reach.

Stronger regime of Digital Payments

The RBI has brought important changes to different aspects of digital payments in India. In August 2020, it had introduced a framework to authorise a pan-India umbrella entity for retail payments **(PUE)**. Based on media reports, six consortiums have applied for authorisation as PUEs. By providing alternative

payment and settlement systems for consumers, PUEs will compete with the National Payments Corporation of India and the Unified Payments Interface **(UPI)**. This competition is expected to drive market innovation and improve overall consumer experience.

The RBI has also pushed to directly regulate payment aggregators **(PAs)** and payment gateways **(PGs)**. Under the guidelines, existing non-bank PAs are required to obtain RBI authorisation by September 30, 2021, and meet standards on capital requirements, governance, and safeguards against money laundering. The RBI has also put in place a framework containing minimum standards for outsourcing of payment and settlement-related activities by payment system operators **(PSOs)**, which must be complied with by March 31, 2022.

For fresh investments in PSOs from jurisdictions not compliant with the directives of the financial action task force **(FATF)**, the RBI has capped the PSO's voting power at 20%. With a view to preserve business continuity, the RBI has allowed investors who already held investments in PSOs prior to their source jurisdiction (or an intermediate jurisdiction) being classified as FATF non-compliant to continue holding their existing investments and bring in additional investments.

New incentives for Indian Fintech

The Fintech sector has especially been in focus this year because of its potential to serve customers during the pandemic. The Union Budget 2021 laid emphasis on setting up a Fintech hub at the Gujarat Finance Tec-City International Financial Services Center **(GIFT-IFSC)**. The new hub should be an important driver of the industry's growth in the coming years.

On July 28, 2021, the RBI announced that non-bank payment service operators would be allowed access to its centralised payment systems (NEFT and RTGS). In the first phase, pre-paid instrument issuers, card networks and white label ATM operators have been allowed access to its payment rails, which should allow consumers greater flexibility in making payments.

The RBI's framework for processing e-mandates on recurring online transactions **(E-Mandate Framework)** was extended in January 2020 to cover UPI transactions and required the implementation of additional security measures. To prevent large-scale customer inconvenience, the RBI extended the deadline for processing of e-mandates till September 30, 2021.

In addition to the second cohort under the RBI's regulatory sandbox in December 2020, which focused on cross-border payments, these measures provide incentives to Fintech players in a few key areas, which should accelerate the digitisation of the Indian economy and the push for financial inclusion through Fintech.

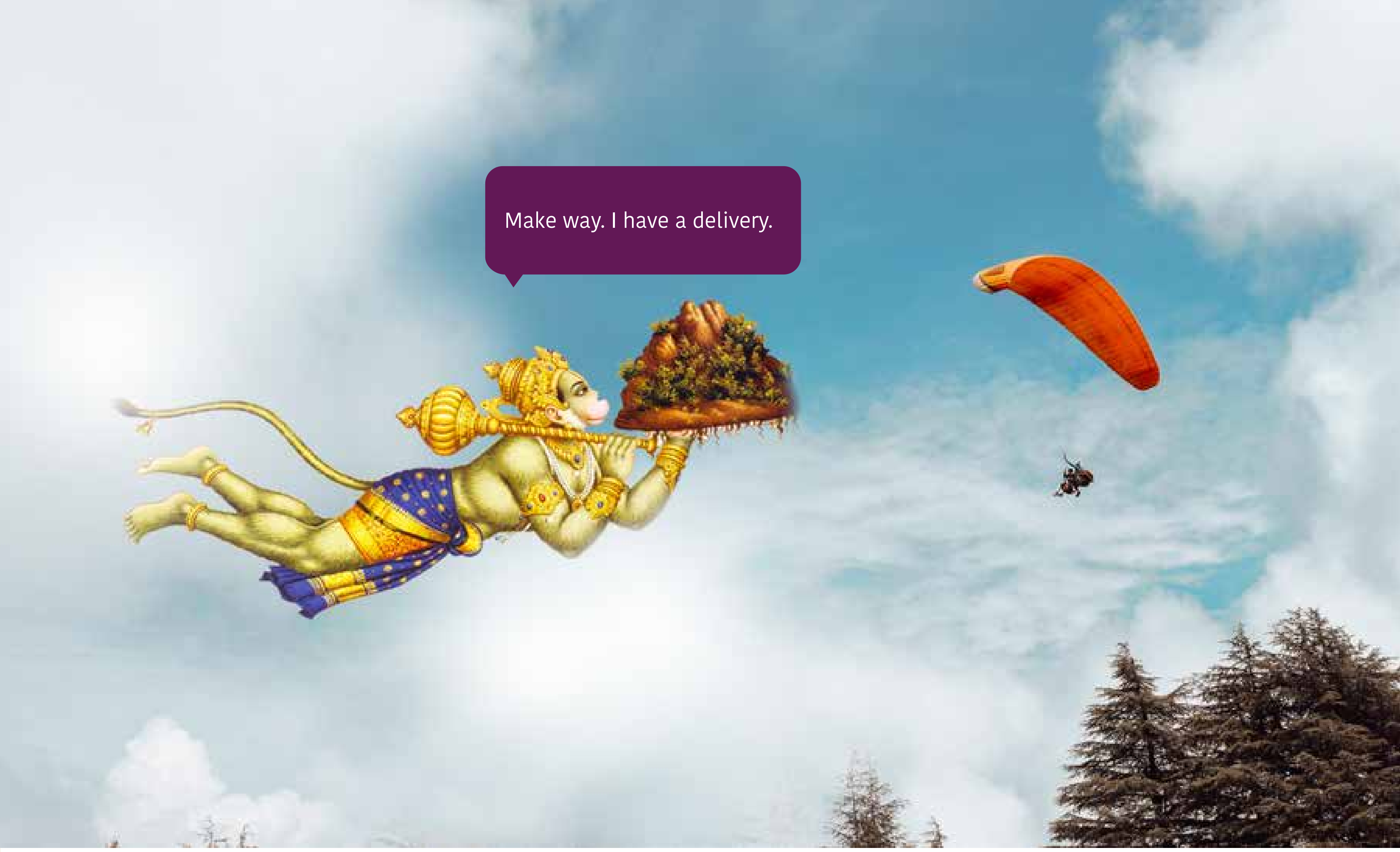
Conclusion

The Fintech industry presents a crucial opportunity for India to become a world leader in regulating this constantly evolving space, while harnessing its potential to further the goals of financial inclusion and digital transformation. The coming months will be exciting for observers to witness the approach Indian regulators take, given the growing market presence of Fintech companies.

14

The Indian PARMACEUTICAL INDUSTRY

KEY LEGAL MARKERS



Pharmacy of the World

This title has often been used to describe India as a leading player in the global pharmaceutical landscape. India currently ranks third in terms of production volume of pharmaceutical products and 14th in terms of value.[1] With a mix of manufacturing, marketing and export of generic and innovating drugs, and with the added support from the Government, India has become a destination of choice for inward investments. This is evident by the cumulative foreign investment of USD 16.86 billion in 2020 alone.[2] Investment into the pharmaceutical sector in India is permitted up to 100%, subject to permission from the Department of Pharmaceuticals in cases where investment is more than 74% in terms of shareholding.

Some key legislations, pertaining to a sector that is subject of increasing regulatory scrutiny, are discussed below.

MANUFACTURE, SALE AND IMPORT OF DRUGS. LICENSURE REQUIREMENTS

Manufacture, import, distribution, and sale of all drugs in India is regulated under the provisions of the Drugs and Cosmetics Act, 1940 **(D&C Act)**. This is the parent legislation that outlines the

1. India: Potential to be the pharmacy of the world. India Economic Survey. Volume II. Page 97
2. According to data released by the Department for Promotion of Industry and Internal Trade, Government of India

regulatory pathway for drugs and all products that are covered under the definition of the term drug,[3] as prescribed under the said Act. The Act is supported by a subordinate legislation, namely the Drugs and Cosmetics Rules, 1945 **(D&C Rules)**, which identify procedural aspects of the regulatory pathway.

A licence holder can only manufacture, import or sell those categories of drugs in respect of which a licence has been granted to the licence holder.

Drugs have been classified into various Schedules under the D&C Rules based upon their nature, ingredients and applications, and this classification determines the type of licence that would be required to manufacture, import or sell each of these drugs. Non-compliance carries stringent penalties, including financial penalties and imprisonment. Corporate liability is also applicable in cases of violations.

While the D&C Rules regulate licensure requirements, the D&C Act has additional subordinate legislations such as the Medical Devices Rules, 2018 **(MD Rules)**, and the New Drugs Clinical Trials Rules, 2019 **(NDCT Rules)**, which govern medical devices and approvals for new drugs, respectively. The same are discussed in detail in this chapter.

APPROVAL OF NEW DRUGS. NEW DRUGS AND CLINICAL TRIALS RULES, 2019

The New Drugs and Clinical Trials Rules, 2019 **(NDCT Rules)**, were notified under the aegis of the D&C Act to regulate inter alia all new drugs, investigational new drugs for human use, clinical trials, bioequivalence studies, bioavailability studies and ethics committees. The NDCT Rules act as the consolidated set of rules applicable to such drugs and studies.

Under the NDCT Rules, any person or institution or organisation which intends to conduct a clinical trial, bioavailability study or a bioequivalence study of a 'new drug' or an 'investigational new drug' is required to obtain approval for the same from the Central Licensing Authority i.e. the Drugs Controller (General) of India **(DCGI)**.

Further, the most important change brought in by the NDCT Rules are the provisions related to compensation. The NDCT Rules prescribe payment of compensation in case of injury or death in clinical trials or bioavailability or bioequivalence studies of 'new drugs' or 'investigational new drugs'. The quantum of compensation is calculated based on the formula specified in the NDCT Rules.

REGULATION OF MEDICAL DEVICES. MEDICAL DEVICES RULES, 2017

Medical devices are regulated as drugs given that they are covered under the definition of the term drug under the DC Act.[4] The MD Rules are the subordinate legislation under the DC Act that regulate the import, manufacture, sale an labelling of medical devices in India.

Under the MD Rules, medical devices are classified based on associated risks, into Class A (low risk), Class B (low moderate risk), Class C (moderate high risk) and Class D (high risk). The manufacturers/ importers of medical devices are required to meet corresponding regulatory requirements (based on the classification of their devices - risk based) that have been specified in the MD Rules.

The MD Rules currently cover all devices including an instrument, apparatus, appliance, implant, material or other article, whether used alone or in combination, including a software or an accessory, intended by its manufacturer to be used specially for human beings or animals which does not achieve the primary intended action in or on human body or animals by any pharmacological or immunological or metabolic means, but which may assist in its intended function by such means..." as drugs.[5]

ADVERTISING OF DRUGS UNDER THE DRUGS AND MAGIC REMEDIES (OBJECTIONABLE ADVERTISEMENTS) ACT, 1954

Advertisement of drugs is governed under the provisions of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 **(DMROA)**. Advertisements of substances that come within the ambit of the term 'drug' as defined under the

3. Section 3 of the DC Act. Medicines intended for internal or external use for or in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals
4. Section 3(b)(iv) of the DC Act
5. Gazette Notification No. S.O. 648(E) dated February 11, 2020

DMROA must be made in strict compliance with the provisions of the said legislation. In terms of Section 2(a) of the DMROA, 'advertisement', includes "*any notice, circular, label, wrapper or other document, and any announcement made orally or by any means of producing or transmitting light, sound or smoke*".

The DMROA prohibits publication of any advertisement relating to a drug if the advertisement contains any matter which: (1) directly/ indirectly gives a false impression regarding the true character of the drug; (2) makes a false claim for the drug; or (3) is otherwise false/ misleading in any material particular. There are additional restrictions on persons taking part in the publication of any advertisement, referring to a drug in a manner that leads to the use of that drug for inter alia diagnosis, cure, mitigation, treatment or prevention of any disease, disorder or condition as specified in the DMROA.

There also exists a self-regulatory mechanism whereby the '*Code for Self-Regulation of Advertising Content in India*' issued by the Advertising Standards Council of India **(ASCI Code)** prescribes certain principles and guidelines to be followed in terms of the content of the advertisements. The ASCI Code identifies honest and truthful representation as one of the fundamental principles of advertising. This includes the ability to substantiate all claims and descriptions made in relation to a product. Therefore, all claims made in such advertisements must be supported with scientific data/ report (for example reports on clinical trials of the drugs, peer reviewed reports, established scientific research, etc.).

DRUG PRICING. DRUGS PRICE CONTROL ORDER, 2013

With the objective of reducing the cost of healthcare in the country, certain specifically identified drugs, as listed in the National List of Essential Medicines, 2015 **(NLEM)**, are also subject to price controls. Identified as essential commodities, the production, control, and supply of such drugs is regulated through the Essential Commodities Act, 1955 **(EC Act)**. The Government regulates the production, supply, and prices (and consequent availability at these prices) of these drugs through the provisions of the Drugs Price Control Order, 2013 **(DPCO 2013)**.

Under DPCO, 2013, the government through the National Pharmaceutical Pricing Authority **(NPPA)** (the pricing regulator), monitors and fixes prices of drugs. Drugs that are included in the NLEM are referred to as scheduled formulations. Drugs that are outside the NLEM are referred to as non-schedule formulations. Scheduled formulations are the subject matter of active price control under provisions of DPCO 2013, where the NPPA sets price caps on these drugs and actively enforces these price caps. Non-scheduled formulations are not subject to price caps. They are permitted a single annual price increase of 10% (ten percent) on the maximum retail price.

Where the drugs that are subject to price control are sold above their price caps as fixed or where there is an increase of more than 10 percent on an annual basis (in case of non-scheduled formulations), the manufacturer (included importer) is liable to deposit any and all over-charged amounts with the government. Withdrawal of any drug that is the subject matter of price control under DPCO 2013 is subject to permission of the pricing regulator and applicable procedure as prescribed under the said legislation.

DPCO 2013 is also applicable to medical devices by virtue of them being regulated as drugs.

15

RECENT DEVELOPMENTS IN THE **INDIAN AEROSPACE AND DEFENCE**

India is touted as one of the biggest defence spenders in the world, and therefore the Indian market presents lucrative opportunities for global defence original equipment manufacturers **(OEMs)**. Successive iterations of the Indian government's procurement policies have shown a bent towards using Indian defence purchases as an incentive to make OEMs participate in the growth and development of the indigenous defence and aerospace ecosystem. First reflections of this approach appeared in the form of the offset policy introduced in 2005. Under the policy, foreign OEMs selling to India were required to reinvest a part of the sale proceeds back into India through avenues such as transfer of technology **(ToT)**, investment in Indian defence companies or purchase of Indian defence goods. Recently, the government has moved away from the offsets approach and is more focused on incentivising ToT through means such as import bans and purchase preference to Indian manufactured products.

On May 12, 2020, in a bold clarion call to the nation, the Prime Minister announced the ideals of a self-reliant India, with a specific focus on our self-reliance in the A&D sector. This is a strong move, though some might view it as over ambitious, given our present state of preparedness. While campaigns such as '*Atmanirbhar Bharat*' appear to push for purchases from Indian players only, a wholistic reading of all the recent policy changes reflects the Government's understanding of the important role foreign OEMs must play in India's growth story.

Looking at the entire gamut of announcements made by the Government since the beginning of the pandemic, it is clear that it is astutely aware of the existing sophistication of the sector. Consequently, the Government has adopted a multi-pronged approach, not only to reduce India's dependence on imports, but also to increase its exports -- all with the support from global OEMs. In its policy making, the Government has been cognisant of the fact that as of today, India still needs to rely on global imports for high-end technologies.

THE OPPORTUNITY

India is the second-largest importer of arms in the World, with a 9.5% share in global imports being attributed to India alone. Given its unique position in the sub-continent, with rising tensions on each of its borders, India cannot afford to cut down on its defence spending. In its latest Budget for 2021-2022, India allocated over USD 64 billion to the Ministry of Defence **(MoD)** that is responsible for defence procurement in India. Importantly, the allocation for capital expenditure has been increased by 19% over last year's allocation.

With such a large opportunity at hand, it is expected that OEMs will willingly participate in the development of India's A&D sector, and recent changes brought about by the Government aim to make such participation easier to achieve.

LIBERALISATION OF FOREIGN INVESTMENT LIMITS

Up until recently, the Government's strong stance on foreign investment in the defence sector has always been that for reasons of national security; defence sector companies cannot be controlled by foreign players. To this end, a 49% cap on foreign investment in the defence sector was prescribed under Indian foreign investment regulations. In addition, defence procurement regulations gave priority to indigenous procurement. Most procurement avenues attach conditions of Indian ownership (i.e., FDI capped at 49%) and Indian control to qualify as an eligible vendor.

The effect of this hard policy stance has been that joint ventures **(JVs)** formed in the sector so far were licensed only low-end technology to produce simple parts and components. Foreign original equipment manufacturers **(OEMs)** have been hesitant, and understandably so, in licensing state-of-the-art, sophisticated technologies to JVs they cannot control and therefore, such JVs are by and large far from the vision of becoming manufacturers of complete defence platforms. As a result, these JVs merely function as part of the foreign OEMs' global supply chain, adding to Indian exports in the defence sector, but have not been in a position to participate in Indian defence procurement as prime vendors and contribute to the development of the ecosystem in any significant way.

Recognising this gap, on May 16, 2020, in an unprecedented move to spur the post COVID-19 Indian economy, the Finance Minister announced that the automatic route limit for foreign investment in the defence sector will be raised from 49% to 74%. This is a major policy change and would mean that going forward, foreigners can set up Indian JVs with a controlling stake. Since lack of control was the single most significant roadblock to licensing of proprietary technology, this move should overcome that obstacle.

THE NEW PROCUREMENT AVENUES

In line with the increased FDI limits, the newly-introduced Defence Acquisition Procedure **(DAP)**-2020, unveils a new category of procurement under the head Buy (Global – Manufacture in India). Under this category, initial procurement would be in the form of an outright purchase of equipment from foreign vendors, followed by indigenous manufacture of the entire/part of the equipment and spares or sub-assemblies for the equipment, through an Indian subsidiary of the foreign OEM or through an Indian JV. This introduction is completely in line with the revised FDI limits introduced by the Government for the sector.

The DAP also requires that procurements under this category should have a minimum of 50% indigenous content, and that this procurement category would be given preference over the category 'Buy-Global' procurements.

Further, DAP 2020 has introduced leasing as a policy option. This makes the Indian aerospace and defence sector accessible for a lot of players who are not involved in defence manufacturing but are asset owners. This would also incentivise newer players to take up the business of defence leasing and partake in the huge opportunity that the aerospace and defence sector provides.

MOVE AWAY FROM OFFSETS

The provisions of the DAP-2020 reflect a move away from reliance on offsets as development drivers. Under the DAP-2020, offsets will no longer be appliable to any ab-initio single vendor cases, such as Government-to-Government route procurements, which account for the bulk of India's import deals. Instead, the Government has increased focus on choosing procurement avenues that require at least a certain percentage of the total order to be indigenously produced. The indigenously produced component is referred to as 'indigenous content' **(IC)** in a product, and is arrived at by reducing the value of imported components and fees/royalties paid in foreign exchange from the basic cost of the equipment. The DAP-2020 now specifies higher IC requirements for various procurement categories, as compared to previous iterations. It is expected that going forward, other than procurements undertaken through the Government-to-Government route, the bulk of defence procurements will require IC and technology transfer aspects.

Going forwards, foreign OEMs will have to invest in manufacturing facilities in India to be able to participate in the bulk of Indian procurements. While some technology/sub-assemblies for the equipment to be sold to the Government can still be imported, minimum IC requirements will have to be met through Indian manufacturing. The minimum IC stipulated by the DAP-2020 is 50%, and therefore, at least some sophisticated manufacturing will have to be transferred to India. With the Government increasing the automatic route FDI limit in the A&D sector to 74%, OEMs should now feel comfortable transferring sophisticated technologies to their subsidiaries in India.

FACILITATING INDUSTRY INTERACTION

A major hurdle for the A&D industry has been the information asymmetry and lack of visibility in defence requirements and expected procurements. To remove this impediment to growth, the recently launched SRIJAN portal lists all items that the Government currently imports along with the value of such imports and names of foreign OEMs that are involved in manufacture of the concerned items. Private Indian players who would like to indigenously manufacture any of the items mentioned on the portal may reach out to the OEMs in question and then express their interest in indigenisation to the Government. This would not only enable efficient technology transfer tie-ups, but also bring the much needed transparency to the process.

With the above policy decisions, the Government has paved the way for foreign OEM participation in the growth and development of the Indian A&D sector. It is expected that India's massive defence budget will not only result in achieving defence preparedness but also result in strengthening of indigenous capabilities through OEM support in the coming years.

16

EMERGING TRENDS IN **SUSTAINABILITY**

CORPORATE FOCUS ON ESG

"The more your company can show its purpose in delivering value to its customers, its employees, and its communities, the better able you will be to compete and deliver long-term, durable profits for shareholders."

– Larry Fink, Head of BlackRock, in his letter to CEOs in 2021

Sometimes it is difficult to identify the origin of an idea or a movement, but the force behind it is so strong that without any lapse of time it starts occupying centre space. No person or organisation planned for business corporations to start focusing on a sustainable world or that they should be evaluated based on their contribution to environmental, social and governance **(ESG)** issues. At the beginning of this century, it was not fathomed that 'sustainability' would become one of the key drivers of conducting business. However, in the time span of a decade, this movement has come to guide the behaviour in board rooms of corporates across several developed and developing countries.

The 'Millennium Development Goals' approved by the United Nations were a culmination of a global consensus for entire humanity. One of the goals called for a global partnership for development and for a trading and financial system that is rule based, predictable and non-discriminatory. These gave rise to the development of 'Sustainable Development Goals' in 2015 and were also called the '2030 Agenda for Sustainable Development'. Some of the goals include convertible and clean energy, clean water and sanitation, gender equality, sustainable consumption and production and encouraging partnerships for the goals. Many organisations came together to push for active participation by businesses as the principal driver in achieving these goals. UN Global Compact, Global Reporting Initiative, UN Environmental Programme and several other organisations across the world found a common cause in this, and helped in the development of the action plan for corporates to focus on sustainable issues and to actively contribute towards the same.

A dialogue and focus on ESG is no longer a “good to have” for companies, instead it is emerging as a necessity. The pandemic has made stakeholders take renewed interest in a company’s plans toward sustainability, climate change, employee welfare, among other factors, globally, and while conversation has been brewing in boardrooms in India for a while, it is now becoming a mainstream focus. Given that most Indian companies have a controlling shareholder with a vision and notion of long termism; ESG further reinforces the idea of long termism in companies, as sustainability is the bedrock of long termism.

While the requirement and discussion on ESG disclosures and reporting in India is primarily for listed entities, as India generates more and more unicorns with the aid of foreign institutional investors or is planning to list overseas, the topic remains relevant for both listed and unlisted companies. While the ‘governance’ related regime has substantially evolved over the years, both in principle and practice, the regulatory environment around ‘environment’ and ‘social’ components is also now changing.

Below is a discussion on the two key drivers for ESG push and the increasing focus on sustainability in India, in the recent years – the Regulatory Drivers and the Market Drivers.

REGULATORY DRIVERS

ESG journey in India started in 2007 with the Reserve Bank of India initiating the process, by advising banks on their role in corporate social responsibility, sustainable development and non-financial reporting, followed by the Ministry of Corporate Affairs’ release of the “National Guidelines on Social, Environmental and Economic Responsibility of Business” in 2011, which were voluntary guidelines for companies to understand, approach, and inculcate responsible business practices through nine principles. A milestone development took place when the Companies Act, 2013 (Act), legislated that directors owed a fiduciary duty beyond shareholders to include other stakeholders, namely employees, environment, and the community, and also brought with it a corporate social responsibility mandate for companies having a net worth or a turnover over a certain threshold; thereby sowing the seeds for corporate India to start thinking about its stakeholders. The Act and SEBI’s (Listing Obligations and Disclosure Requirements) Regulations, 2015 **(LODR)**, have mandated corporate governance in a prescriptive manner, where requirements pertaining to composition of a wholesome board and principles and expectations on board responsibilities as well as transparency and disclosures, risk management functions, etc., have been set out.

SEBI has also mandated the issuance of Business Responsibility Report (as part of annual reports) for the top 1,000 listed companies (in a phased manner). In addition, SEBI encouraged the top 500 listed companies to adopt integrated reporting, voluntarily, to provide consistent communication about how an organisation’s strategy, governance, performance and prospects create value over time.

In March 2019, the MCA launched the National Guidelines on Responsible Business Conduct as a set of voluntary guidelines, to set standards that are higher than compliance with the mandated legal regime, to be followed by all businesses in India (whether listed or unlisted), including MNCs.

In May 2021, SEBI released the business responsibility and sustainability report **(BRSR)** format, which the top 1,000 listed entities may voluntarily enclose with their annual report in 2021-2022, but will be made mandatory for these listed entities in 2022-2023. Its precursor, the Business Responsibility Report, was intended to capture ESG compliance, which followed

a principal-based approach. The BRSR has further detailed out these principals into various questions, asking for more specificity and transparency to give an accurate assessment of the entity. There has clearly been an evolution in SEBI's thought process, from asking boards of companies to think about ESG as part of its risk assessment to asking companies to make more transparent disclosures about the company's sustainability to investors.

Another development that has given impetus to the ESG conversation is the stewardship principles to be complied with, by mutual funds, AIFs, insurance companies and pension funds, including disclosure of voting activities as well as monitoring the activities of investee companies in terms of various parameters (including ESG).

While banks and non-banking and financing companies may not seem to be the quintessential industry that would need to address ESG, the Reserve Bank of India has released a white paper in January 2021 on "Green Finance in India: the Progress and Challenges". Green finance is central to the overall discussion of sustainability, however, governments around the world, including India, are figuring out ways to incentivise this.

MARKET DRIVERS

Asset managers such as Blackrock, State Street, and Vanguard, owning approximately USD 14 trillion in assets under management, have gone on record to make statements that they will only invest in companies that have incorporated ESG integration as it creates durable long term value. Other foreign institutional investors such as KKR and True North have also clarified that they will only invest in ESG compliant companies in India. Many other private equity and other institutional investors come in with mandates following their ESG agendas. Climate change is especially at the centre stage and with recent climate activism in the West, i.e. recent win by climate activists in Exxon and Dutch court's ruling on Shell's emissions, Environment and Social factors have certainly caught the attention of boards and managements, including in India.

The ESG movement also received impetus from the investor side, with the rise in creation of and investment by ESG funds, including increased interest from domestic funders such as SBI Magnum ESG Funds, Avendus India ESG Fund and others. Approximately 40 global ESG funds have invested 25% in Indian equities and approximately 90 socially responsible funds have allocated ~19% funds to Indian companies. New sustainable investing instruments have also been created and incentivised such as green bonds, production linked incentives for high efficiency modules in renewable energy, and other green finance activities.

Proxy advisory firms too have given a push to ESG in India. These firms set out their own methodologies and actively write ratings and reports for listed entities; some of these reviews and ratings have coerced companies to respond with specific agendas. There are also numerous benchmarking models, including by several banks and other institutions such as Barclays and Edelweiss, which measure companies. Even in sectors and industries considered to impact climate, from automobiles to banks and oil and gas companies, there is data to back the fact that companies with better ESG profiles are performing better than their peers because of their "sustainability premium". ESG is also aligned with millennial thinking, who truly believe in sustainability, ethical sourcing, and are more inclined towards companies with a greater purpose than profitability or investor returns. In fact, this has given an impetus to new industries such as electric vehicles, renewables and more. Many large companies, including Tata and Reliance, have recently made commitments that they will be ESG compliant, to raise the ratings of their investment opportunities, or have stated that they will be net-zero carbon by a target year.

What lies ahead?

While regulations for greater disclosure and transparency with respect to ESG mandates for making ESG a board conversation, and financial incentives have been put in place, the ESG journey in India has just started. It still follows a best practice approach, and therefore companies have not taken to it as a mandate of the law. We still foresee some challenges for Indian corporates in their ESG journey. These include "greenwashing" or making false or exaggerated claims of environmental compliance, plurality of definitions, maturity mismatches between long-term green investment and short-term interests of investors, and paucity of data. To ensure steady flow of finance into sustainable projects, there is a strong need for a reliable source of information on the entities' overall management of ESG risk.

The pendulum has swung substantially from the position where business organisations existed solely for the shareholders, towards providing value for the long term benefits of all stakeholders and the larger society.

Not only is there an international consensus backed by a push from institutional investors on ESG, but also the focus on ESG and its reporting is a regulatory requirement backed by the force of law. The awareness towards it and preparation for the same is something no chief executive officer or Board can ignore.

Given the current debate and trends on ESG, sustainability, long termism and corporate purpose, it is very likely that these would be the way of life for corporates in the future. A research study by PwC in the realm of possible futures of 2030's corporates provides that "*This is a world where corporate responsibility isn't just a nice-to-have, but it's a business imperative..... A strong social ethos places a heavy emphasis on diversity, human rights and the non-financial impacts of business on the planet and people's lives*". Compliance with ESG norms is likely to provide a foothold to the companies to continue to be relevant in the future, fulfilling the 'corporate purpose' and 'corporate responsibility', and demonstrating that 'corporates care'.

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He will focus on social responsibility.
He will not.
He will focus on environment.
He will not.

17

GST **LANDSCAPE** IN INDIA

The Goods and Services Tax **(GST)** regime was introduced in July 2017 exhibiting a tectonic shift in the landscape of economic reforms in India with the replacement of a complex indirect tax system with a simplified and uniform tax regime.

The initial transition to the GST regime was fraught with issues such as glitches on the GST network portal, management of multiple state level registrations and their consequential compliance requirements, invoice matching, multiple tax rate structure, etc.

The Government and the GST Council have proactively reviewed representations, swiftly assessed their impact and acted decisively while providing solutions. They have been persistently conducting workshops, tweaking rates and clarifying various issues through continuous release of tweets, clarifications and sectoral FAQs to bridge the information gap. Needless to say, various transitional issues have been ironed out along the road of implementation.

Four year since the implementation of GST, the Government now needs to ensure that key steps are taken towards more simpler and harmonized goods and services tax. Some of the aspects which require attention to enable the redesigned version to move a step closer to an ideal structure are discussed below.

Ease of compliance

STREAMLINING TAX STRUCTURE

Currently, the GST tax structure in India has as many as six tax rate slabs. While the Government has expressed the intent to merge some of the tax slabs, the GST regime is still miles away from achieving the objective of "one nation, one tax". The Finance Minister of India has rightly stated in Parliament that "a BMW and a *Hawai chappal* (flip-flops) can't have the same tax rate" as it is not practical for a country like India, with its vast economic and regional disparities, to have a GST structure with a single tax rate.

Multiple tax rate slabs make India's GST regime one of the most complex in the world. The GST regime not only lists India as one of the country with the largest number of tax slabs, but at 28 %, it also has the highest GST rate in Asia and the second highest in the world.

The Government has been working towards pruning of the GST rates on goods and services. There has been a substantial reduction in the number of products in the 28% bracket with goods being moved to the 18% bracket. Unfortunately, such changes are being done in an ad-hoc and a piecemeal manner, leading to confusion and inviting prolonged litigation.

While the Central Government has also favoured merger of 12% and 18% slab and replaced with a common slab of say 15%, as demanded by some states and endorsed by the Fifteenth Finance Commission, this change is yet to be implemented.

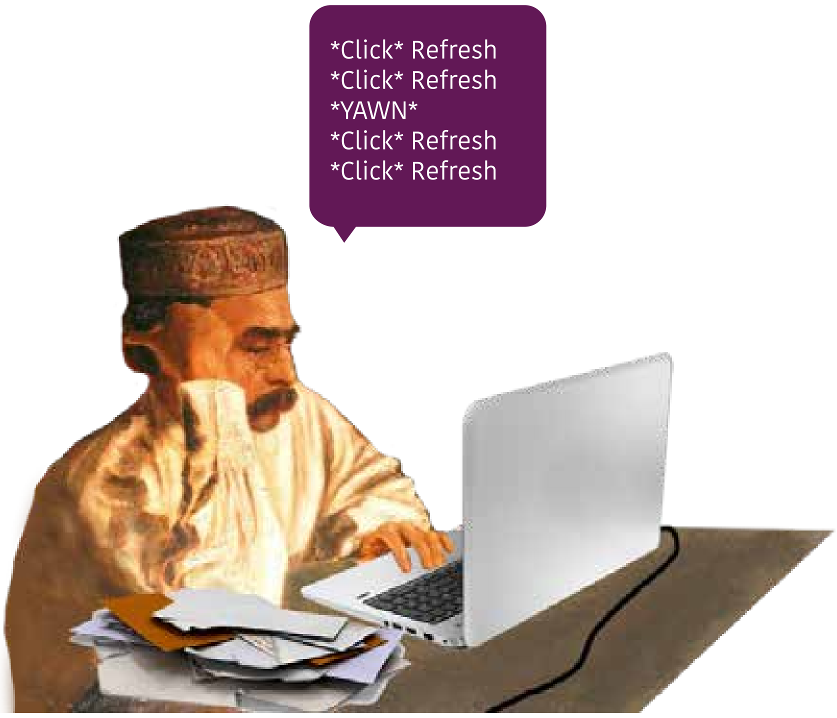
The need of the hour is a holistic review and rationalisation of the rate structure, to bring it to a lower level while keeping the exemptions to the minimum.

INCREASE IN THRESHOLD LIMIT

The threshold limit has been enhanced from INR 20 lakh to INR 40 lakh (subject to prescribed exceptions), for a person exclusively engaged in supply of goods to be liable to be registered under the GST legislations. Additionally, the threshold for availing benefits under the composition levy scheme has been increased from INR 1 crore to INR 1.5 crore, except in a few states.

After the introduction of a new composition scheme apart from the scheme stated above, GST became payable at a concessional rate of 6% for the first supplies under the new scheme, upto an aggregate turnover of INR 50 lakh, by any person making intra-state supplies (subject to other conditions) alone.

The increased threshold limit for registration combined with the composition scheme has definitely enhanced the ease of doing business for micro, small and medium enterprises **(MSMEs),** who lack the infrastructure or the level of sophistication required



for ensuring compliance under the GST legislations.

However, issues relating to multiple GST registrations for a company still prevail. This is especially true for service providers such as IT companies and banks which have pan-India presence. Such entities are required to obtain registration and undertake compliance in each state, where they have operations. This translates to significantly higher compliance costs and gives rise to issues relating to taxability of cross charge of expenses from head offices to branch offices, especially on account of shared services.

SIMPLER RETURN FILING

Compliance was expected to be an easier exercise under the GST regime due to harmonisation of tax rates, procedures, as well as creation of country-wide synergies through common formats/forms, definitions and an interface i.e. the GST network portal.

However, the technical glitches on the GST network portal have led to a lot of anxiety. Often, the portal has not been able to take the load of the traffic on account of return filing or tax payments despite dividing the states into two groups, having different compliance due dates fixed by such states.

The Government has deferred filing of returns requiring detailed and continuous disclosure of inward supplies, and has also extended deadlines for various other compliances or waived late fees for delay in compliance, while simultaneously attempting to implement a simplified reporting requirement system. The Government has also introduced requirement of e-invoicing for specified class of taxpayers, requirement of QR code, etc., to initiate automated population of the returns. In July 2019, the CBIC released a proposed format of the simplified returns called '*Sahaj*' and '*Sugam*', seeking comments from the stakeholders.

Even though the GST network portal has been revamped a few times since the introduction of the GST regime, it still offers marginal flexibility to the users. For instance, there is no option to set off the excess tax paid by an entity under one registration against another registration in a different state. The network does not allow filing of returns for a subsequent period till the returns for the previous periods are filed along with the penalty, except for companies undergoing insolvency resolution process, where alternate mechanism has been prescribed.

Resolution of these issues and several such concerns, and implementation of an easy-to-use online GST network portal is imperative for promoting timely compliances and the ease of doing business.

Enhanced Input Tax Credit (ITC)

One of the stated objectives of introducing GST was the removal of the cascading effect of multiple taxes on account of the lack of fungibility of credits. The GST legislations allow input credit on all goods and services *(subject to certain restrictions)* irrespective of the nature of business of the assessees (i.e. whether a service provider, trader or manufacturer).

However, issues of loss of ITC persist due to new restriction imposed i.e. proportionate availment of ITC on account of non-submission of information by supplier. The manner in which transitional provisions are structured i.e. arbitrary limitation period, ineligible credit for erstwhile cesses, lack of foresight for assessees availing location based incentives prior to GST have also resulted in the loss of credit. Further, no respite has been offered in situations where dealers have failed to report their eligible credit due to inadvertent errors or because incorrect amounts have been transitioned on the portal by them or by their supplier.

It is expected that the Government will address these concerns soon and give relief to taxpayers who have huge amounts blocked due to the procedural challenges or have failed to report credits due to inadvertent errors.

Anti-profiteering provisions introduced to pass on the benefit to ultimate consumers

Anti-profiteering provisions have been enacted under the GST regime to curtail undue profiteering by companies and ensure that the benefits by way of reduction in the price of the goods/services, are passed on to the consumers. The National Anti-Profiteering Authority **(NAA)** was set-up with an initial sunset clause of two years in the month of November 2017. However, its tenure has since been extended till November 2021.

The Government has not prescribed any computation mechanism to determine the appropriate reduction in prices and other corresponding guidelines, but has left it to the NAA to step in and fill the legislative gaps in the anti-profiteering provisions. In such a scenario, it was expected that the orders passed by the NAA would become the guiding principle to determine compliance with the anti-profiteering requirements. However, the orders passed by NAA lack clarity on various issues such as reasonable time within which price should be increased, alternate methods of reducing the price, etc.

For ensuring compliance, the provisions of a legislation need to be unambiguous and should provide adequate notice to the taxpayers. Additionally, there must be a sense of proportionality to its intended objective. The NAA has taken a hard stance that profiteering has occurred unless there is a tangible price reduction at a stock-keeping unit level. A bare reading of the provisions does not mandate this and most of the NAA orders are currently being subjected to judicial scrutiny.

The continuing agenda of rate rationalisation before the GST council, occasions more certainty and clarity on the computation mechanism to determine the appropriate reduction in prices for a more systematic compliance with the anti-profiteering provisions by the companies.

Authority for advance ruling (AAR)

An AAR has been set up in each state with the aim of facilitating certainty in determining the tax liability of the applicant. It also seeks to avoid long drawn and expensive litigation at a later date. Seeking an advance ruling is inexpensive and the procedure is simple and expeditious.

The rulings of the AAR mark the commencement of judicial interpretation of provisions of the GST legislations. Substantial number of advance rulings have been delivered and quite a few of them encompass important issues like recovery from employees for canteen services, outdoor catering services provided to factory owners, supply of goods with brand name or otherwise, supplies being composite or mixed, taxability of back office services provided by Indian offices to foreign offices, etc.

Given that the GST law is new, the rulings of the AAR on the questions brought before it for the first time, provide insights into the perspective of the department and the judicial interpretation of various provisions.

At the same time, a review of the precedents also reflects divergent rulings by the AAR, constituted in each state. Certain rulings are also contrary to rulings delivered by CESTAT for similar provisions under the erstwhile legislations. This has fuelled confusion on the issues of classification, valuation and application of tax rates.

Although, the GST council has mandated the creation of the National Appellate Authority, the same has not yet been notified. There is an urgent need to operationalise the same and expand its scope of review to serve its purpose of providing clarity and avoiding unnecessary litigation.

Augmenting Exports

The Government has constantly aimed at increasing the output and the quality of exports from India as portrayed by the "*Make in India*" policy. As a result, many tax benefits have been extended to the exporters under the GST legislations. The export of goods and/or services from India, are treated as zero-rated supplies. Such supplies can be undertaken without upfront payment of tax, or a taxpayer may opt to discharge tax on such supplies and subsequently, claim the refund of such tax paid.

The scope of export has been widened by allowing receipt of payment in INR in case of export of services, wherever permissible as per the Reserve Bank of India **(RBI)**. The said amendment harmonises the GST legislations with the RBI regulations.

However, glitches in the GST portal have led to piling up of export refunds, resulting in a grave situation of cash crunch for exporters due to blockage of working capital. The Government has issued guidance notes that clarify various aspects of refund claims. The

Government has also initiated special fortnight-long refund drives to process pending refunds on priority, clearing a major portion of the backlog.

The efforts of the Government, in streamlining the provisions relating to exports would enable the export industry in India to have internationally competitive prices due to smooth processing of the refund claims. This would provide a level playing field for the domestic companies and promote exports from India.

The Government must pursue a time-bound approach to execute the plans already announced to ease taxpayers' woes. For example, an e-wallet scheme and notional refunds for exporters would help India advance towards an evolved GST regime.

Conclusion

The time is opportune to refresh and introduce sweeping changes in the existing GST structure, procedures and systems to move towards a flawless and simpler regime. The changes being made by the Government to converge tax slabs, to simplify compliances, to revamp the GST network portal, etc. are right steps in the direction of achieving an ideal GST structure.

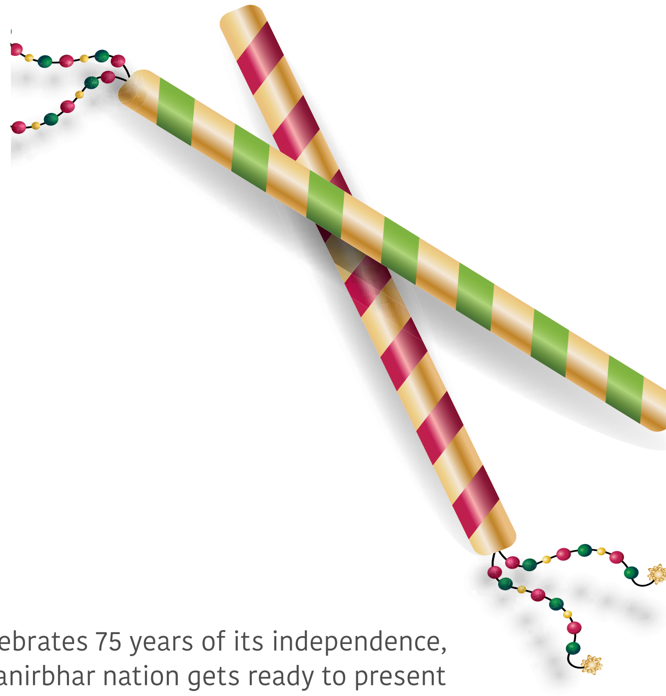
However, it is imperative for the authorities to chalk out a definitive plan for effecting changes without adding any additional burden on taxpayers.

Given the track record of the GST Council so far, it is hoped that the roadblocks on the journey towards better operation of GST would be suitably addressed and the dream of having a tax-friendly GST environment would become a reality.

18

GIFT CITY INTERNATIONAL FINANCIAL SERVICES CENTRE

A GIFT THAT'LL KEEP GIVING



As India celebrates 75 years of its independence, a truly Atmanirbhar nation gets ready to present itself before the international community. The government's Atmanirbhar initiative received an unexpected impetus in the form of a shift in Indian and global economies. The ongoing pandemic also gave India the opportunity to focus on developing domestic industries. Over the past decade, several ruling governments have taken many diplomatic, administerial as well as policy decisions to shape India's economy. But the establishment of an International Finance Services Centre **(IFSC)** in India – a regulatory island within the geographical boundaries of India with access to the country's multitude of resources and economy, whilst simultaneously providing a beneficial governance and legal regime benchmarked with best practices adopted by global financial centres such as Singapore, London, New York -- is perhaps one of the most ambitious projects undertaken in order to shape the Indian financial ecosystem in the next 25 years.

General overview

In terms of regulatory governance, India's first IFSC has been set up in the Gujarat International Finance Tec- City, i.e. a notified Special Economic Zone **(GIFT SEZ)** at Gujarat International Fin-Tech City, Gandhinagar **(GIFT City)**. Therefore, it enjoys access to a more streamlined and business-friendly regime on account of SEZ-related relaxations as well as subsidies provided by the State Government of Gujarat. The GIFT SEZ regulator along with the Government of Gujarat is fully committed to providing world class infrastructure and work hand in hand with the other regulatory authorities for the development of the IFSC at GIFT City.

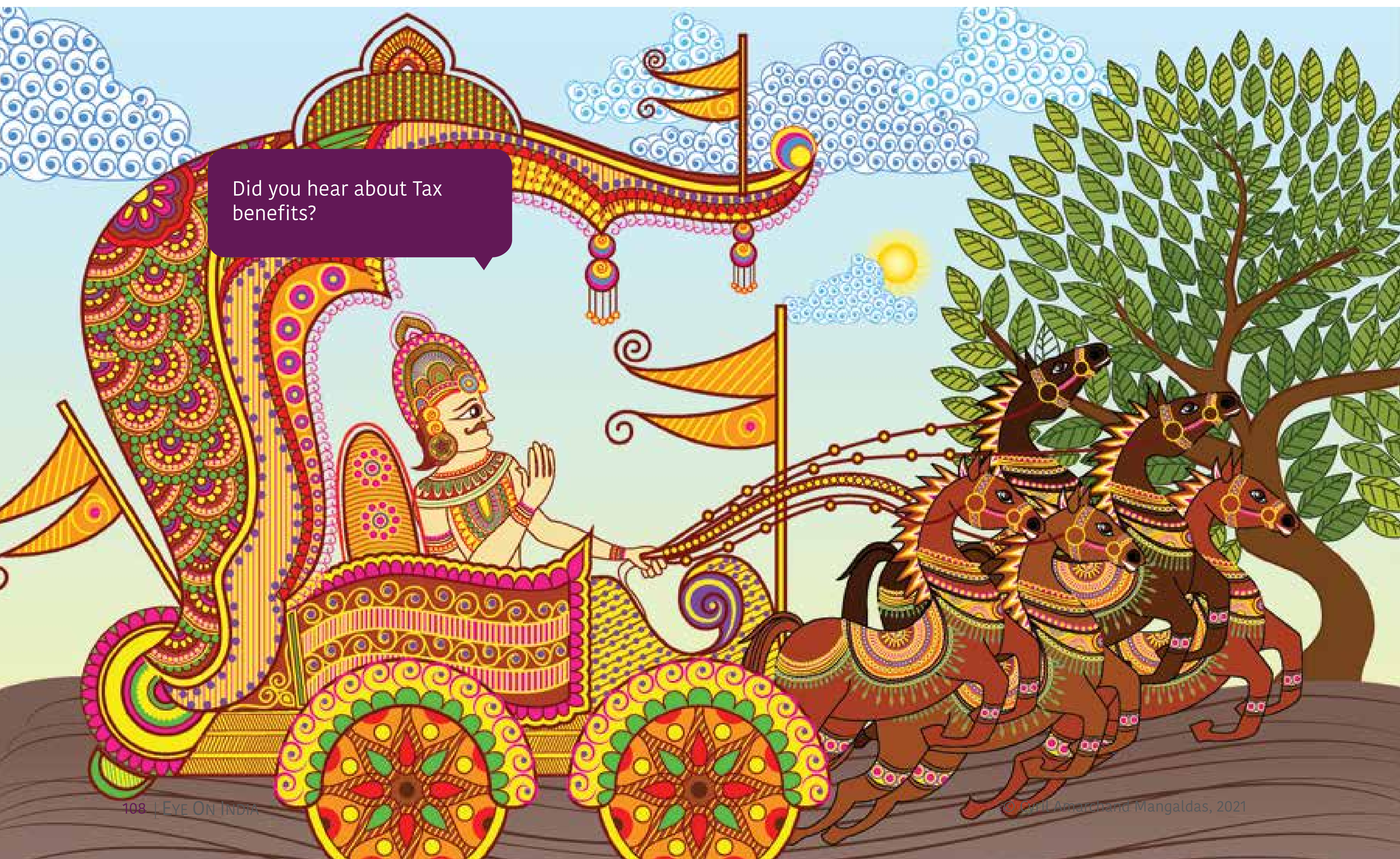
The IFSC is designed to attract overseas investors by onshoring the financial services and financial products that are currently being exported to overseas financial institutions. At the Indian IFSC, a business can be conducted in any freely convertible currency other than Indian rupee. Moreover, in terms of the Foreign Exchange Management (International Financial Services Centre) Regulations, 2015, any financial institution or its branch set up in IFSC shall be treated as a 'person resident outside India'.

Creation of a super regulator – IFSCA!

The Indian IFSC has been an ever-evolving and one of the most committed dream of the Indian Government. The IFSC was first established in 2015, with the Indian regulators like RBI, SEBI IRDA and PFRDA regulating the activities in the region. However, in line with the commitment, the Central Government notified the International Financial Services Centres Authority Act, 2019 on December 19, 2019 *inter alia* for the establishment of the International Financial Services Authority **(IFSCA)** as a unified regulator having powers of the RBI, SEBI, IRDA and PFRDA to develop and regulate the financial services market at the IFSCs in India. The IFSCA, as an authority, was established in April 2020 and since then it has been on a spree to develop the plethora of financial services and financial products to be provided from the IFSC. The law passed by the IFSCA has overriding effect in the IFSC over any other applicable Indian law.

In fact, both international and domestic investors have shown increased interest in the opportunities presented by the IFSC at GIFT City, post the operationalising of the IFSCA in late 2020s. An unprecedented number of entities, including marquee market players such as Bank of America, Deutsche Bank, and ICICI Lombard have set up businesses in the GIFT City IFSC.

The IFSCA has emerged as a modern day light touch responsive regulator, promising shorter lead times for approvals and process, to provide the much-needed certainty, cross-departmental co-operation and uniformity vis-à-vis the regulatory regime to set the stage for India in the global financial system.



Since its inception, the IFSCA has followed a dual course approach - to increase the ease of doing business for existing sectors such as banking, insurance, funds, wealth management, capital markets and international securities and to simultaneously develop sustainable ecosystems and regulatory regimes for emerging sectors such as fintech, insuretech, bullion exchanges, aircraft leasing, global inhouse centers and special purpose acquisition companies **(SPAC)**. Players wanting to set up shop in IFSC can do so with prior approval from the IFSCA. In a welcome move, even the RBI has paved way for resident Indians to invest in the Indian IFSC under the RBI's Liberalised Remittance Scheme. As the IFSCA continues to regulate and notify laws to govern various financial products and services in IFSC, an overview of the governance regime for some of the key sectors in it is set out below:

FUNDS

In its endeavor to facilitate growth of financial services intermediaries in IFSC[1], the IFSCA has introduced impressive reforms in the regulatory regime governing funds in IFSC. Apart from several funds-specific tax benefits, it is pertinent to note that Category I and II AIFs set up in IFSCs are now permitted to undertake leverage subject to satisfaction of prescribed terms. Furthermore, AIFs in IFSC are permitted to diversify subject to appropriate disclosures, and also invest in securities issued by overseas entities. In addition, other relaxations introduced by the IFSCA as a beneficial regime are a welcome move for the fund industry as it re-instates the Government's commitment to provide a competitive funds regulatory regime at par with other global funds destinations with a view to onshore the offshore. As a result, the IFSC is fast emerging as an attractive alternative to globally renowned funds jurisdictions, such as Singapore, Mauritius etc.

In leading global financial jurisdictions, funds are structured like protected cell companies, multi-share class vehicles or variable capital companies **(VCCs)**. Notably the Expert Committee constituted by the IFSCA to examine the relevance and adaptability of the VCCs in the IFSC has issued a detailed report recommending the broad framework for the governance of VCC structure in the IFSC, including principles for incorporation of VCC/sub-fund, capital funding, corporate governance, etc. Once implemented, VCC structures may provide greater incentive and comfort to the international players desiring to set up shop in GIFT City IFSC.

1. The SEBI (IFSC) Guidelines, 2015 read with the Operating Guidelines for Alternative Investment Funds (AIF Regulations) in IFSC govern the AIFs operating in IFSC.

BANKING AND FINANCE

The IFSCA (Banking) Regulations, 2020 govern the setting up and operation of banking units of domestic and foreign banks established in IFSC **(IBU)** allowing such IBUs to expand their services to include international business transactions, particularly in area of derivatives, dollar-denominated loans/ECBs, institutional banking etc.

The IFSCA has also issued the IFSCA (Finance Company) Regulations, 2021 **(Finance Company Regulations)** which provides the framework for governance and operations of finance companies (other than banks) in an IFSC in India. These regulations are aimed at providing a competitive regulatory environment to non-banking financial institutions to complement the role of banking in providing finance, innovative products and services from the IFSC.

CAPITAL MARKETS

The IFSC regime provides numerous opportunities for capital markets sector by permitting the setting up of international and domestic stock exchanges, clearing corporations, depositories[2], brokers, registrar/ share transfer agents, merchant bankers, wealth managers, portfolio managers, investment advisors, etc. The IFSC market also allows a wide range of products like index derivatives, commodities future, equity and debt listing, depository receipts, REITs and InVITs, and so on.

Notably, the IFSCA has also released the regulatory sandbox framework to permit players to test innovative financial products and fintech within the IFSC regime. Giving impetus and momentum to this regime, the NSE IFSC recently announced that trading in select US stocks by resident retail investors will be facilitated though its platform under the regulatory sandbox. Similarly, the IFSCA has also permitted the setting up of bullion exchanges in IFSC[3] and India's first and only international bullion exchange will be set up by a consortium of market infrastructure intermediaries (such as BSE, NSE, MCX, NSDL, CDSL), which will open the doors for India to join the exclusive club of nations trading in bullion.

EMERGING SECTORS

The IFSCA also aims to regulate and promote innovative and emerging financial services and products to ensure a holistic development of the financial ecosystem in the IFSC. Such a move strengthens Finance Minister Nirmala Sitharaman's commitment to making the Indian IFSC a world class fintech hub. Efforts have been made to position the IFSC at GIFT City as a hub for fintech based businesses, start-ups, ecosystems and innovation.

The IFSCA released the Framework for Regulatory Sandbox on October 19, 2020. The sandbox will enable eligible entities, (both domestic and foreign enterprises) operating in the banking, finance, capital markets, insurance and pensions segments in GIFT City IFSC to experiment with innovative fintech solutions in a real-time environment, with adequate safeguards for consumer protection and with a fixed set of customers and for a specified timeframe. This will allow innovative players to introduce pilot projects, which if successful, can be disseminated in mainland.

Furthermore, the Finance Company Regulations read with the Framework for Aircraft Operating Lease issued by the IFSCA paves way for permitting aircraft leasing – both finance and operating leases -- from the IFSC.

SUPPORT SERVICES

In addition to the aforementioned, the IFSCA along with the Government of India is making coordinated efforts to improve the governance regime for several contemporary and experimental financial services and products that may be provided from the IFSC such as setting up of global in-house centres by financial institutions[4], opportunities in re-insurance and retail-insurance[5], listing of SPACs (blank cheque), secondary listing of securities on recognised stock exchanges in IFSC and debt securities in ESG sector[6].

Moreover, ancillary and allied service providers such as legal, accounting and audit firms, research and analytics, consultants, fund accounting firms have also been permitted to set up shop within the IFSC[7]

Tax and Fiscal Benefits

In addition to offering a competitive cost of operations along with a globally benchmarked regulatory regime, the Government of India has sweetened the IFSC regime by providing numerous

2. IFSCA (Market Infrastructure Institutions) Regulations, 2021
3. IFSCA (Bullion Exchange) Regulations, 2020
4. IFSC (Global In-House Centres) Regulation, 2020
5. Consultation Paper on proposed IFSCA (Insurance Intermediary) Regulations, 2021 and Consultation Paper on proposed IFSC (Registration of Insurance Business), 2021
6. IFSC (Issuance and Listing of Securities) Regulations, 2021
7. Framework for enabling Ancillary Services at IFSC- IFSCA

tax and fiscal benefits to the units set up in IFSC as well as to the investors of such unites. Apart from sector-specific tax benefits, units in IFSC enjoy 100% tax holiday for 10 consecutive years out of 15 years, with the IFSC Unit having the flexibility to select any 10 years out of 15 years block, discounted Minimum Alternate Tax rates of 9% as well as complete exemptions from Dividend Distribution Tax, Securities Transaction Tax, Commodity Transaction Tax, Long Term and Short Term Capital Gains Tax, subject to applicable laws. Additionally, exemptions from stamp duty, GST exemptions, as well as other SEZ related tax benefits are a cherry on the top of the IFSC pie.

Other benefits

Apart from favourable regulatory regime, an array of tax benefits and holidays, the locational advantage available for business at the GIFT SEZ IFSC, the other benefit is that GIFT City is being developed as a greenfield futuristic smart city project. It promises to offer integrated and cutting-edge transportation, centralised and automated waste management systems, telecommunication and power linkages, city-level air conditioning, and the best practices. By incorporating latest technologies in town planning, architecture, design, green spacing, and sustainable development, GIFT City will aim to create a self-sustainable financial ecosystem on par with other leading international centres such as DIFC, Luxembourg. Single window clearance through the GIFT SEZ authority for licencing and business approvals have the potential to improve the ease of doing business within GIFT City IFSC, thereby attracting increased foreign investment.

GIFT City is currently home to two international stock exchanges with SGX, numerous foreign and Indian banks, and a large number of stock brokers, clearing houses, financial intermediaries, insurance corporations and IT/ ITES and other service providers.

What more?

Despite the plethora of benefits available only some of which have been summarised here, the challenges in the journey towards achieving status of global financial hub for the GIFT City IFSC, are not less. To list a few matters which will need more deliberation and blue-sky thinking would be issues such as data governance within the IFSC, allowance of free rupee convertibility, providing for on an effective dispute resolution mechanism as well as a robust insolvency regime for IFSC entities, innovative work from home solutions to enable capturing talent across the globe and yet facilitating the concept of establishing substance by the IFSC entities.

As India bets on a new era of technological innovation and development, with unicorn stalwarts like Zomato getting a record breaking response to its IPO in India, leading international unicorns and conglomerates investing in the Indian dream and start-ups, a passionate employable population, an IFSC providing competitive tax and regulatory regimes with a unique and passionate regulator – the IFSCA steering the ship, can the Indian FISC become one of the largest gateways to the Indian economy for inbound and outbound investments and whether India's pilot GIFT City IFSC is a "GIFT" that will keep giving, only time and policy can tell.

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