1. BIRD'S EYE VIEW.

India is globally recognized as a developing yet highly competitive economy with enormous potential. The Government's commitment and its policy initiatives towards liberalization of foreign investments, growth of service sector, rationalization of regulatory framework, capital market reforms coupled with business opportunities and increased standard of living are the key contributors to the fast paced and robust Indian economy. Some of the major factors spurring the growth of Mergers and Acquisitions in India have also included excess of capital flow, economic stability, corporate investments, and dynamic attitude of Indian companies.

The phrase Mergers and Acquisitions ('**M&A**') refers to the aspect of corporate strategy, corporate finance and management which deals with the buying, selling and combining of different companies which can finance and aid a growing company in an industry to grow rapidly without having to create another business entity.

Identifying and assessing the risks of an M&A transaction at an early stage is crucial to deal making and India is no different. Towards this, factors including the prevalent legal and regulatory environment should be kept in mind while undertaking M&A deals.

This paper attempts to provide a wide overview of the prevalent legal and regulatory framework that governs M&A in India.

2. OVERVIEW OF LEGISLATIVE FRAMEWORK.

The legislative framework governing M&A in India includes the Companies Act, 2013, the Income Tax Act 1961, the Stamp Act 1899, the Competition Act, 2002 and various employment related regulations. This section provides a broad overview of the provisions of note pertaining to the same.

(a) Companies Act, 2013.

Earlier, procedures related to M&A were governed by the provisions of Section 390 to 396 of the erstwhile Companies Act of 1956 which prescribed the manner in which arrangements and compromises between companies and their shareholders and creditors are given effect to. Much has changed over the past couple of decades in the nature of business and the manner in which they are conducted both domestically and internationally leading to the enactment of the Companies Act of 2013.

The Companies Act, 2013, does not specifically define the term 'merger and amalgamation', however section 230(1) defines the term 'arrangement' as re-organization of the company's share capital by way of consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods. Palpably the term 'arrangement' is broader than the term 'merger and amalgamation'. Although substantial changes have been incorporated under the new Companies Act of 2013, several key provisions under the old Act remain unchanged and continue to apply. The significant changes brought about by the Companies Act, 2013 ('**2013 Act**') with regard to merger provisions are set out below:

RBI Approval	➢ *The 2013 Act allows foreign companies to merge into Indian companies and vice versa but requires that Reserve Bank of India ('RBI') approval for both cases be obtained.* ➢ *Such mergers can only be possible with foreign companies domiciled in any of the jurisdictions notified by the central government (Section 234).*
Notice	➢ *Section 234(5) of the 2013 Act obligates companies to send notice of meeting to approve a merger to various government authorities including, the, the Income Tax Department, the RBI, the Registrar of Companies, the official liquidator and the Competition Commission of India ('CCI'), as well as the Securities and Exchange Board of India ('SEBI)' and respective stock exchanges, in case of listed companies.* ➢ *Within a period of 30 days from such notice, and if representations are not received from such authorities, it is presumed that the authorities have no representation to make on the proposal.* ➢ *There is however ambiguity on this considering Section 6(2a) of the Competition Act allows 210 days to the Competition Commission of India ('CCI') to pass an order after verification of the proposed merger.*
Objection to Merger	➢ *Section 230(4) of the 2013 Act provides that only persons holding not less than 10% of the shareholding, or not having less than 5% in total outstanding debt can object to a merger.*
National Company Law Tribunal (NCLT)	➢ *The 2013 Act provides for constitution of the National Company Law Tribunal ('NCLT'), which has been constituted recently. However the provisions relating to mergers and amalgamations under Chapter XV have not as yet been notified due to which, the process with respect to Mergers under the 1956 Act and jurisdiction of High Court continue to be applicable.* ➢ *Under the 2013 Act, the NCLT is meant to take over from the Board for Industrial and Financial Reconstruction, the Appellate Authority for Industrial and Financial Reconstruction and the Company Law Board.*

Fast Tract Mergers

- *The 2013 Act allows mergers between two small companies and holding companies and their wholly owned subsidiaries without having to go through the normal procedure.*

- *Such mergers can be completed only with the approval of the official liquidator and the members, and if sanctioned by the Central Government, without having to wait for the order of the NCLT confirming the merger.*

Blocking "backdoor" listing of companies

- *Mergers of listed transferor companies with unlisted transferees may not automatically result in listing of the resulting entity unless it goes through the process of a public offering.*

The Companies (Removal of Difficulties) Order, 2015

- *The purpose behind this order is to remove difficulties, faced by companies falling under the definition of 'Small Company', as prescribed under sections 2(85) and 186(11)(b) of the 2013 Act.*
- *The Order has been enacted to ensure ease of compliance and makes it easier for companies to acquire permission from regulatory authorities for making acquisition of securities, with specific regard to making an investment.*

(b) The Competition Act, 2002

The Competition Act, 2002 ('**Competition Act**') contains a comprehensive merger review process. It brings various new concepts under the provision of combinations like relevant market, turnover and assets outside India and the new test of appreciable adverse effect, etc. The salient features of the Competition Act include the below:

Notification of mergers

- *The CCI is to be notified when combined assets or turnover are beyond the threshold limits as provided in Section 5 of the Competition Act. It is also mandatory to give notice to the CCI within 30 days of the decision of the parties.*
- *The thresholds under Section 5 are as per the table below:*

	Applicable to	***Assets***		***Turnover***	
In India	***Individuals***	*Rs.1,500 Crores*		*Rs.4,500 Crores*	
	Groups	*Rs.6,000 Crores*		*Rs.18,000 Crores*	
In India and outside		***Assets***		***Turnover***	
		Total	***Min. Indian Component***	***Total***	***Min. Indian Component***
	Individual Parties	*750 Million*	*Rs.750 Crores*	*2,250 Million*	*Rs. 2250 Crores*
	Group	*3 Billion*	*Rs. 750 Crores*	*9 Billion*	*Rs. 2,250 Crores*

Post- filing Review	➢ *The Competition Act provides for a post-filing review period of 210 days, during which the merger cannot be consummated.* ➢ *If the commission fails to pass an order within the time limit, the proposed merger is be deemed to be approved*.
Exemptions	➢ *The Combination Act and Regulations provide that notice in respect of certain combinations need not normally be filed with the Commission as those transactions are ordinarily not likely to cause appreciable adverse effect which are*: - *An acquisition of assets, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5.* - *Acquisition of shares solely as an investment or in the ordinary course of business and does not entitle the acquirer to hold 25% or more of total shares.* - *Where the acquirer, are being acquired, prior to acquisition holds 50% or more shares or voting rights whose shares are being acquired, except in the cases where the transaction results in transfer from joint control to sole control.* - *Where the acquisition of assets is not directly related to the business activity of the party acquiring the asset.* - *An acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business.* - *An acquisition of shares or voting rights pursuant to a bonus issue or stock splits or consolidation of face value of shares or buy back of shares or subscription to rights issue of shares, not leading to acquisition of control.* - *Any acquisition of shares or voting rights by a person acting as a securities underwriter or a registered stock broker of a stock exchange on behalf of its clients.* - *An acquisition of shares or voting rights or assets, by one person or enterprise, of another person or enterprise within the same group.* - *A merger or amalgamation of two enterprises where one of the enterprises has more than 50% shares or voting rights of the other enterprise, and/or merger in which more than 50% shares or voting rights in each of such enterprises are held by enterprise within the same group.* - *A combination referred to in section 5 of the Act taking place entirely outside India with insignificant local nexus and effect on markets in India.*

(a) Foreign Exchange Management Act, 1999

Foreign Exchange Management Act ('**<u>FEMA</u>**') was enacted to consolidate and amend the law relating to foreign exchange in India, with the object of promoting external trade and maintenance of the foreign exchange market in India.

All foreign investments are regulated by FEMA and under the extant Foreign Direct Investment ('**<u>FDI</u>**') Policy of the Government of India. FDI is one of the most dynamic and evolving piece of regulation that generates a lot of global interest for obvious reasons. However, the FDI laws have been a difficult piece of legislation which begs for more attention and thoroughness on behalf of the draftsmen.

Foreign investments in India can be made either through the "automatic route", i.e., without any requirement of regulatory approvals or under the "specific approval route". The FDI policy of the Government of India, for the "automatic route" specifies different sectoral caps for foreign investments for certain sectors, such as 49% for the insurance sector (increased from 26%), 49% for the telecommunication sector etc., capitalization requirements, such as, for the Non-Banking Financial Companies and certain conditions such as for construction and development projects including housing, commercial premises etc.

For the foreign investments made above the prescribed limits requires approval from Foreign Investment Promotion Board ('**<u>FIPB</u>**'). Insurance companies and recently the defense sector have seen some relaxations from the above restrictions. Wherever required, approval from the FIPB generally takes 4-6 weeks. The process of transfer of shares from a resident to a non-resident or vice versa has to be at a price determined according to the guidelines announced by Reserve Bank of India. Further, approval of the FIPB is also necessary in case of transfer of shares from the resident to the non-resident in case of a company falling within the regulatory sector. Similarly, an approval of the RBI is required in case of transfer of shares from resident to non-resident or vice-versa in case of a company falling within the financial services sector.

(c) <u>Taxation Law</u>

The key taxes and duties in M&A include capital gains tax, sales tax and stamp duty, a snapshot of which is given below. M&A transactions meeting with the conditions under the Income Tax Act, 1961 are entitled to exemption from capital gains tax and are also entitled to carry forward the unabsorbed depreciation and past losses.

Capital Gains Tax	➢ *In case of share purchase, the tax issue concerned will be of capital gains tax. The rate of taxation depends on the period of holding of the asset, which determines whether the resulting gain is in the nature of a long*

term capital gain or a short term capital gain.

- *Long-term capital gains arise to a company, from transfers of capital assets held for a period of more than 36 months (12 months in the case of shares or any other listed securities). No tax is payable if the share transferred are of a listed company in India and the transaction is completed on the floor of the stock exchange after payment of securities transaction tax.*
- *Short-term capital gains are ordinarily taxed as part of the total taxable income of the assessee. Short-term capital gains arising from transfers of capital assets within a period of 36 months (within 12 months in the case of shares or any other listed securities) from the date of acquisition. Foreign shareholders could also claim adjustment of exchange control fluctuations whilst computing the capital gains.*

DTAAs

- *India has Double Taxation Avoidance Agreements with several countries with the object of minimizing dual tax levy in international transactions. DTAAs often have a lower rate of tax as compared to rates in the Income Tax Act.*
- *Until recently, Indo-Mauritius DTAA was considered as one of the most favorable DTAAs thereby making Mauritius a very tax friendly jurisdiction for the investors to route their investments in to India. However recently India has renegotiated its DTAA with Mauritius and a Protocol dated May 10, 2016 has been entered into towards amending the same. The protocol amends the existing residence based tax regime under the Mauritius DTAA and gives India a source based right to tax capital gains that arise from alienation of shares of an Indian resident company acquired by a Mauritian tax resident. It provides for grandfathering of all existing investments up to March 31, 2017, with the revised position being applicable only to investments made on or after April 1, 2017. A further relaxation in respect of capital gains arising to Mauritius residents from alienation of shares has been provided between April 1, 2017 and March 31, 2019. During this period the tax rate on any such gains will not exceed 50% of the domestic tax rate in India, subject to a 'limitation of benefits' provision proposed to be introduced to the Mauritius DTAA. While capital gains arising out of sale/transfer of shares of an Indian company that have been acquired before April 1, 2017 will not be affected by the protocol, it would appear that convertible instruments (including preference shares and debentures) acquired by a Mauritius resident prior to April 1, 2017 may need to be converted into equity/ordinary shares before April 1, 2017 in order to avail of the capital gains tax exemptions under the Protocol. However clarification on this is still awaited.*
- *Similar amendments have been proposed in Indo-Singapore DTAA as the position on capital gains under the India-Singapore DTAA is co-terminus with the benefits available under erstwhile provisions on capital gains contained in the treaty with Mauritius..*

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GAAR	*India first proposed to introduce General Anti Avoidance Rules in 2012, granting discretion to the tax authorities to scrutinize arrangements and invalidate them as impermissible where they lack commercial substance and have been entered into primarily for claiming "Treaty Benefits". GAAR provisions would extend to all taxpayers irrespective of their residential or legal status (i.e. resident or non-resident, corporate entity or non-corporate entity) and would override DTAA's signed by India.* *The applicability of GAAR is subject to a minimum threshold of INR 3 Crore. However, Foreign Institutional Investors who are not claiming treaty benefits have been exonerated from the ambit of GAAR. Further, GAAR would not be applicable to any investment made by a non-resident that directly or indirectly invests in offshore derivative instruments. The Finance Minister in Budget 2015, has deferred the implementation of GAAR by 2 years, with its prospective applicability from April 1, 2017.*

Tax concessions on amalgamated company, amalgamating company and shareholders thereof:

Tax concessions to the Amalgamated (Buyer) Company	***Tax concessions to the Amalgamating (Seller) Company***	***Tax concessions to the shareholders of an Amalgamating Company***
If the amalgamating company has incurred any expenditure eligible for deduction under sections 35(5), 35A(6),35AB(3), 35ABB, 35D, 35DD, 35DDA, 35E and/or 36(1)(ix) for expenditure on scientific research, prior to its amalgamation with the company and if the amalgamated company is an Indian Company then the benefit of the above mentioned deductions shall be availed by the amalgamated company.	*Transfer of capital assets in the scheme of amalgamation by an amalgamating company to an Indian amalgamated company does not fall under the definition of "Transfer" as per the Income Tax Act. So no capital gains tax is attracted in the hands of the seller. However the case of an Indian company merging into a foreign entity has not been contemplated under the Income Tax, Act of 1961 currently and the applicability of capital gains tax in case amalgamated company is not an Indian company is still not unambiguous.*	*When a shareholder of the amalgamating company transfers his shares in consideration of allotment of shares in the amalgamated company, then this again does not fall under the ambit of "transfer" as per the Act, and is thus not taxable. Moreover Section 45 of the Income Tax, Act of 1961 exempts such transactions from the incidence of capital gains tax.* *Where an Indian target entity is sought to be acquired by a foreign entity, the foreign acquirer will have to create a special purpose vehicle (SPV) in India as per the laws to give effect*

	the merger with the Indian company and the SPV availing the tax benefits on amalgamation under the Act.

Tax related implications on companies going through a process of amalgamation:

Implication on Amalgamated (Buyer) Company	*Implication on Amalgamating (Seller) Company*
➢ *Capital gains spread between the cost of acquisition and sale price resulting from the 'transfer' of a 'capital asset' during the financial year.* ➢ *The spread is a gain where the sale price exceeds the cost of acquisition and is liable to tax in the hands of the transferor, unless otherwise specified.* ➢ *It is important to determine whether allotment of shares, debentures etc to the shareholders of the merging company constitutes 'transfer' under section 2(47) of the Income Tax Act, which would be liable to capital gains tax. According to judicial precedents in this regard, including decisions of the Supreme Court till recently, this type of transactions did not result in a "transfer" as described in section 2(47).* ➢ *The provisions of Section 45 relating to capital gains will not apply to any transfer by a shareholder when a shareholder in the scheme of amalgamation transfers the shares held by him in the amalgamating company if the certain conditions mentioned in Section 47(vii) are satisfied. Which are:* - *the transfer is made in consideration of allotment to him of shares in the amalgamated company.* - *the amalgamated company is an Indian*	➢ *There will be no capital gains tax on transfer of a capital asset by the amalgamating company to the amalgamated company in the scheme of amalgamation if the amalgamated company is an Indian company.* ➢ *Charge of Capital Gains only arises in respect of profits or gains from transfer of capital assets.* ➢ *There will be no Capital gain on transfer of shares held in an Indian company in a scheme of amalgamation by the amalgamating foreign company to the amalgamated foreign company if the following conditions are satisfied:* - *at least 25% of the shareholders of the amalgamating foreign company continue to remain shareholders of the amalgamated foreign company, and* - *such transfer does not attract tax on capital gains in the country in which the amalgamating company is incorporated*

company.

- *Even if the above mentioned conditions are not satisfied, a shareholder receiving shares in the amalgamated companies is not liable to capital gains tax since an amalgamation does not involve exchange or relinquishment of the assets or the amalgamation of any right therein or the compulsory acquisition under any law.*

(d) Stamp Duty regulations

Transaction documents are subject to stamp duty payments depending primarily upon the place where the said documents have been executed and/or likely to be enforced. Stamp Duty laws fall under the 'concurrent list' of the Constitution of India and hence are governed by the Indian Stamp Act as modified by the respective States. However, certain instruments continue to be stamped at a uniform rate under the Indian Stamp Act such as transfer of shares that are levied duty @ 0.25% of the transaction value.

It is important to ensure appropriate stamping of the transaction documents to ensure enforceability and/or avoid seizure of such documents. Penalty is levied on under stamped or unstamped documents and such penalty varies from state to state. It is not uncommon to have a transaction document adjudicated by the designated authority prior to its execution to avoid any interpretation issues at a later date over the quantum of duty leviable.

(e) Employment Laws

Indian employment laws cover a comprehensive campus of state intervention of social control through laws to protect directly the claims of workers to wages, bonus, retirement benefits such as gratuity, provident fund and pension claims. Social security measures such as workmen's compensation, insurance, maternity benefits, safety welfare and protection of minimum of economic well-being. The major Indian employment related statutes are (i) Industrial Disputes Act (ii) Shops & Establishment Act (iii) Factories Act (iv) Minimum Wages Act (iv) Payment of Bonus Act (v) Workman's Compensation Act (vi) Maternity Benefits Act (vii) Employees' Provident Fund (viii) Pension Scheme (ix) State Insurance Schemes (x) Payment of Gratuity Act (xi) Standing Orders (xii) Trade Unions and (xiii) Contract Labour (Regulation and Abolition) Act. With socialistic past and pro labor approach of judicial courts, there may be instances of stringent labour laws and issues. However, the Government is keenly considering amendment to most of the labour laws to make them friendlier for furthering growth, provide flexibility and amenable to global parameters.

3. OVERVIEW OF REGULATORY FRAMEWORK IN INDIA

(a) FDI Laws

(i) Pricing Guidelines

While pricing guidelines in case of listed shares have always been based on the price of the share as on the stock exchange, which continues under the present regulations, the policy on pricing guidelines with respect to unlisted shares has been amended over time.

Valuation requirements as per the Controller of Capital Issues ("**CCI**") based on guidelines that was in place earlier were done away with by the Reserve Bank of India in the year 2010 and replaced with valuation requirements based on the "Discounted Free Cash Flow" ("**DCF**") method of valuation. The Discounted Cash Flow (DCF) method is a prominent method based on the Income Approach of valuation, which is entirely based on the 'future cash earning capacity' of any business and thus, often leads to an optimum value scenario.

Towards simplifying the foreign direct investment (FDI) process, the RBI in July 2014 announced the withdrawal of all existing guidelines relating to valuation in case of an acquisition/sale of shares of an Indian company and notified that valuations would need to be performed according to any internationally accepted pricing methodology on an arm's length basis. Additionally, partly paid equity shares and warrants issued by an Indian company in accordance with the provision of the Companies Act, 2013 and the Securities and Exchange Board of India's (SEBI) guidelines, as applicable, have been made eligible instruments for the purpose of FDI and foreign portfolio investment (FPI) by Foreign Institutional Investors (FIIs)/Registered Foreign Portfolio Investors (RFPIs) subject to compliance with FDI and FPI schemes.

With the change in pricing guidelines, the valuer would need to apply professional judgement and the applicable valuation methodologies on a case-by-case basis. Accordingly, other valuation methodologies such as the Market Multiple method, Comparable Transactions method, Net Asset Value method, etc., would also need to be considered while valuing FDI-permissible instruments, including warrants and partly paid shares. Since the new guidelines emphasise on applying the revised pricing guidelines on an arm's length basis, this will enable Indian companies to comply with not only the RBI but also with transfer pricing regulations.

(ii) Amalgamation of different types of foreign Investment

Towards simplification of the procedures to attract foreign investments, the government has proposed the distinction between different types of foreign investments, especially between foreign portfolio investments and foreign direct investments to be done away with, and being replaced with composite caps. In addition to permitting foreign investments in Alternative Investment Funds (AIFs), tax 'pass through' status has been proposed for both Category-I and Category-II Alternative Investment Funds. This should step up the ability of AIFs to mobilize higher resources and make higher investments including into new ventures and start-ups.

In order to increase ease of doing business in India, the Finance Minister in his Budget speech has expressed his intention of appointing an Expert Committee to prepare draft legislation where the need for multiple prior permissions can be replaced with a pre-existing regulatory mechanism.

(b) SEBI Regulations

A gamut of securities laws impact M&A transactions several ways depending upon transaction specifics. Out of these, three primary securities laws that have substantial influence on M&A transactions are:

Take Over Code	➢ *The SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997 have been replaced by the SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 ("**Takeover Code**"), which restricts and regulates the acquisition of shares, voting rights and control in listed companies.* ➢ *The acquisition of shares and voting rights of a listed company, entitling the acquirer to exercise 25% or more of the voting rights in the target company, obligates the acquirer to make an offer to the remaining shareholders of the target company to further acquire at least 26% of the voting capital of the Company.* ➢ *Section 29 of the Takeover Code requires the acquirer to make disclosures of its aggregate shareholding in the target company.*
Insider Trading Regulations	➢ *The SEBI Insider Trading Regulations primarily restricts dealing in shares of any listed company based on insider information.* ➢ *The Regulations prohibit an 'insider' to (i) either on his own behalf or on behalf of any other person, deal in the securities of a company which is listed on any stock exchange when in possession of any unpublished price sensitive information and (ii) communicate or procure directly or indirectly, any unpublished 'price sensitive information', to any person who while in possession of such price sensitive information shall not deal in securities. However this is not applicable to any communication required in the ordinary course of business or profession or employment or under any law.* ➢ *Price sensitive information means any information which relates directly or indirectly to a company and which if published is likely to materially affect the price of the Company and certain information have been identified as deemed price sensitive information under the regulations. The regulations also require all listed companies to formulate a code of*

	internal procedures and conduct for prevention of insider trading.
Investor Protection Guidelines	➢ *Primary issuances are governed by the SEBI ICDR Guidelines. These guidelines include instructions for eligibility standards for companies issuing securities, pricing of securities to be issued by companies, requirements relating to promoter contribution, and lock-in period for securities and more.* ➢ *The guidelines also describe the information that should be included in offer documents to the public, like a prospectus, abridged prospectus, and letter of offer.* ➢ *The SEBI ICDR guidelines were amended to include inter-alia concepts of "Anchor Investors" referring to QIB (Qualified Institutional buyers) acquiring shares upto 50% of the IPO (Initial Public Offerings), restrictions on listed company to issue shares with superior voting rights, rationalization of disclosure norms in rights issues and rationalisation of fee charged.*

4. JURISDICTION OF HIGH COURT

The process of M&A in the listed space is court driven and hence long drawn out. The process may be initiated through common agreements between the two parties, but that is not sufficient to provide a legal cover to it. The sanction of the jurisdictional High Court is required for bringing it into effect.

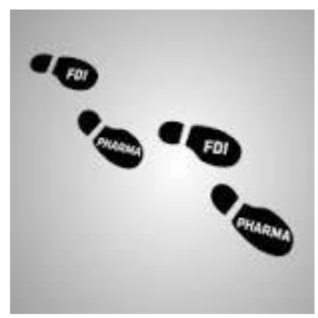
Towards the above, a scheme of arrangement has to be filed setting out the terms of the reorganization with the relevant High Court where the companies are located towards seeking sanction after obtaining the approval of the shareholders and creditors. Thereafter, the court reviews the scheme and grants its sanction depending on whether the proposed restructuring is procedurally as well as substantively fair.

5. RECENT TRENDS

<u>FDI-Sectoral analysis</u>: FDI inflows are permitted currently in 63 sectors as compared to 16 sectors in 1991. The sectors receiving the largest share of FDI inflows are the service sector and computer software and hardware sectors, followed by the telecom, real estate, construction and automobile sectors. The top sectors attracting FDI into India via M&A activity were manufacturing, information, and professional, scientific and technical services.

Real Estate: In a growing economy, Real Estate sector invites a lot of attention from all quarters including foreigners. India has a policy for non-residents which invite them to invest in the Construction and Development sector. In a recent press note issued on November 10, 2015, the Central Government, in furtherance of its objective to attract greater FDI, has announced significant relaxations to the consolidated foreign direct policy of India. Consequently, substantial changes have also been announced to the FDI provisions governing the construction-development sector. These changes will certainly open up the construction-development sector further, and will augment foreign investment into the Indian real estate sector.

E-Commerce: E-commerce, with its ever increasing consumers and market players, is emerging as a most sorted after industry for investment in India. The Indian government has recently allowed 100% FDI in e-commerce 'marketplace', while continuing with its stated policy of not allowing foreign funded online retailers to sell directly to consumers. Further, the Department of Industrial Policy and Promotion on March 29, 2016, has provided certain guidelines on FDI in e-commerce trading entities and e-commerce market place entities to remove ambiguities in this regard. E-commerce industry is expected to grow further in coming future.



Pharmaceutical: From being a marginal contributor to the M&A space, the pharmaceutical sector has shifted gears and attracts revenue multiples of 9 to 10 times as recent deals have proved. A strong and growing domestic market, a robust pipeline of generic drugs (cheaper versions of patented drugs) and an ability to service developed markets abroad have made Indian pharma companies most sought-after in the M&A space. By way of example, the Ranbaxy-Sun Pharma merger has resulted in the new entity becoming the world's fifth largest specialty generic pharma company. India is also one of the most competitive generic pharma industries globally which makes it an attractive sourcing destination for any pharma company looking to build global leadership in the generics space.

6. CHALLENGES IN THE M&A SPACE

Deal Risks	➢ *Navigating through regulatory risks that arise in large M&A transactions involving different regulators. In some cases regulators have different views on control, resulting in unwarranted uncertainties.* ➢ *The best way to allay these risks is to formally approach the regulators before undertaking a transaction. Some regulators such as the CCI formally recognize such prior consultations.*
Corporate Governance	➢ *Assessing the corporate governance standards of the target*

Standards	*company by the acquiring company is crucial.* ➢ *The acquirer should also evaluate the dependence of the target company on the contracts with the other promoter entities. If the target company relies heavily on contracts with promoter entities then a thorough evaluation should be done to determine if such contracts are on arms-length basis or could result in significant erosion of value.* ➢ *In 2014, Indian laws relating to related party transactions were tightened significantly and public shareholders are now required to approve such related party transactions. This aspect has to be borne in mind by an acquirer as it may affect post acquisition integration plans.*
Anti-trust Assessment	➢ *Parties should at an early stage itself examine the anti-trust implication of the transaction including the need and timing of the filing and actions that need to commence prior to obtaining CCI's approval.* ➢ *If the parties foresee an anti-trust implication, then they should allocate the anti-trust risk by either bringing about modifications in the deal documentation to include clauses which require the buyer to undertake all measures to comply with anti-trust requirement or agreeing to a set of divestures as a condition precedent in order to mitigate any anti-trust concern.* ➢ *Deal documents including board resolutions should be carefully drafted to ensure that transactions are accurately structured to adhere to the laws set forth in the Competition Act.* ➢ *In competitive bids, parties and the target company's board must examine the anti-trust implications and the certainty of consummation of the transaction before recommending a deal to the shareholders.*
Tax Challenges	➢ *Apart from the provisions of GAAR already discussed, the other aspects where both parties have to be cautious are where:* - *An incident of tax occurring in the case of indirect transfers i.e. transfer of foreign securities which derives substantial value from underlying Indian assets;* - *Undervaluation of shares; or* - *Transfer pricing adjustments in the case of group transfers.* ➢ *In order to mitigate some of the tax risks, parties should first negotiate tax specific indemnities in their deal documents and should approach the appropriate authority for Advance Ruling to inquire about their tax liabilities and take tax insurance to cover potential tax risk*

7. HOW WE CAN ASSIST

Consistent with our reputation as leading Mergers and Acquisition Attorneys, we provide seamless advice to both domestic and international clients on full breadth of complex, high-value as well as comparatively smaller transactions.

Our team at ARA Law is well versed with all legal aspects associated with both domestic and cross-border transactions and is well known to provide creative solutions on regulatory, tax and competition law concerns inherent in prevailing corporate transactions. We advice on full range of deal structures encompassing:

- ***Mergers, De-mergers Scheme of Arrangement transactions:*** Providing advice on regulatory and tax structures of Mergers, De-mergers Scheme of Arrangement transactions in line with RBI guidelines, FDI regulations, Income Tax provisions, SEBI, DTAAs and exchange controls regulations, while working towards developing potential solutions to any conflict or problem keeping in mind the strategic objectives of the deal and assist in drafting the Scheme of Arrangements, Petitions and other corporate reporting and resolutions.

- ***Business Acquisitions:*** Providing deal specific advice and strategize effective corporate and business acquisition by conducting extensive and probing diligence including financial due diligence on target companies and provide objective and transaction specific reporting for clients to take informed business decisions. We also assist in the preparation, negotiation and execution of transaction documentation such as term sheet, Shareholders Agreements, Share Purchase Agreement, voting rights, non-compete, non disclosure, escrow, stock swap and employment agreement.

- ***Public and Private Takeover:*** Providing Pragmatic and effective processes and timelines for achieving private or public takeovers. We have assisted several of our domestic and off-shore clients in successfully completing the takeover process and completing regulatory filings, dealing with management-public interaction and working seamlessly with the company and merchant bankers.

- ***Joint Ventures & Foreign Collaborations:*** Joint Venture may be in the form of equity strategic alliance or global strategic alliance. Our experience in assisting Clients belonging to diverse industries and segment helps us in developing and effectively in negotiating joint venture contracts and ancillary documents keeping in mind the transaction specifics.

- ***Strategic Investment:*** Providing clients with proficient advice in forming profitable strategic alliances without diluting their independent organization status whilst mitigating risk and achieving a successful outcome.

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