Emerging Challenges in Mergers and Acquisitions

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Edited by

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NOTE FROM THE EDITORS

Mergers and acquisitions (M&A) constitute an intrinsic part of business development. M&A can be seen in varied forms across the globe, such as value-chain optimisation, globalisation, consumer-base expansion or product diversification. Any entity's long-term success is dependent on its planned and strategized actions, which can be executed in any of the above-mentioned forms; however, for an M&A process to be effective, it needs to be analysed in terms of opportunity to transform, potential for reward and risk of danger. An ideal merger can be transformational for any entity, enabling it to widen its margin by virtue of economies of scale, entering new markets and adopting new technologies. On the other hand, the cost of a failed M&A transaction could be the destruction of shareholder value and of the business itself; therefore, a buoyant and profitable M&A deal is about stacking the odds in one's favour.

India has witnessed tremendous development in the area of M&A over the past few years. Of late, several big-ticket deals have been in the limelight. Acquisitions have been particularly successful, as exemplified by Flipkart's acquisition of eBay India, Axis Bank's acquisition of payments wallet FreeCharge and Ola's acquisition of Foodpanda, and India Inc. has been increasingly using this tool for hiring new talent, entering into new segments, technology and brands, among other things. With 944 deals, it is estimated that the M&A activity reached US$46.5 billion in 2017, which is a 165% increase from 2016. A Baker McKenzie report attributes this growth to the Indian government's targeted policies aimed at making the country a favourable investment destination. Indeed, with a liberalised foreign direct investment regime involving faster pace of approvals, simplification of the indirect tax structure due to introduction of the Goods and Services Tax, complete overhaul of the insolvency process for corporates under the Insolvency and Bankruptcy Code, 2016, and other initiatives under the "Make in India" programme, there is no looking back. India will continue to experience a boom in M&A, both in terms of the number of deals and the size of the transactions, especially in areas such as infrastructure, healthcare, financial services and e-commerce.

The law on M&A in India is young compared to other developed fields of law. It includes within its capacious content the rights of various stakeholders during an M&A deal, the distribution of the collective resources and the liability which can be cast on any stakeholder. There might not be any specific statute governing only M&A, but various aspects of M&A are dealt with in the Companies Act, 2013, the Income Tax Act, 1961, the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, and so on. Further, with the advent of time and recent contemporary laws, there are various inter-linkages which cannot be catered to with a narrow understanding of the law. Each and every facet of an M&A deal needs to be studied from all viewpoints, be it labour law, insolvency law, securities and investment law, or anti-trust law, for all these considerations have a bearing on the mechanics of a deal.

This book is a compilation of the papers selected by the National Law Institute University, Bhopal, India (NLIU) as part of the NLIU Trilegal Summit on Mergers and Acquisitions, 2018, organised in association with Trilegal, one of the premier law firms in India. The Summit is an annual event wherein students from different law schools in India present their papers on niche issues in the area of M&A. In its 2018 edition, under the broad theme of *Emerging Challenges in M&A*, authors had the opportunity to delve into sub-themes such as anti-trust trends in M&A, M&A projections in the real estate market, impact of General Anti-Avoidance Rules on M&A, regulatory developments affecting M&A transactions, and M&A activity in the light of the new insolvency regime under the Insolvency and Bankruptcy Code, 2016. The various papers in the book and the treatment of the issues examined therein clearly reveal that the authors have deciphered the most intricate details involved in any M&A transaction. Every fundamental provision has been brought down to the most generic level, to enable clarity and understanding, looked at and explained in an articulate manner. There are various interesting and illuminating parts lying in the authors' works, which throw light on upcoming fusions and challenges in M&A. This book can be attributed to only the authors and their industrious energy and vigour.

CHAPTER I

DECRYPTING THE LIBERALISED FOREIGN DIRECT INVESTMENT POLICY AS A FACILITATOR OF CROSS-COUNTRY MERGERS AND ACQUISITIONS: MAXIMUM GOVERNANCE AND MINIMUM GOVERNMENT

ABHINANDAN JAIN AND DRISHMEET BUTTAR

Abstract

The incessantly evolving economic framework entails in its fold the increasing contribution of mergers and acquisitions (M&A). The same, in the contemporary corporate era, stands overhauled in the light of the adoption of a politically driven economic philosophy of maximum governance and minimum government, having been remarkably inducted in the extant policy framework. The present discussion is a novice and humble attempt at decrypting the upshots of the ceaselessly evolving foreign direct investment (FDI) regime of the country on cross-border M&A deals, specifically inbound transactions. In pursuance of the same, this work presents an exhaustive study of the recently staged FDI policy framework (II), while also emphasising its inputs in FDI-inducive sectors in terms of value and volume of inbound deals, underlining the news-making transactions (III). In consideration of the fact that an isolated evaluation of the consolidated FDI policy would be tantamount to unsound forecasts (thereby, conjectures), the compatibility between the extant FDI regime and foremost economic reforms in acting as catalysts in increasing cross-border M&A transactions is also the focus of analysis and assessment (IV). As a disclaimer, owing to the topic's dynamism, the predictions as

expressed by the work of the authors are subject to changes in economic frameworks, both domestic and international.

Introduction

"Economic change creates winners and losers, even as society improves on a broader level."
—Robert Rubin, former United States Treasury Secretary

The vigorously evolving landscape of cross-border M&A has, of late, been under the globally casted watchful eyes of financial and economic geniuses. The on-going scrutiny is a natural genesis of the exponential growth and emergence that it has experienced in economies across the globe, to which India, in all certainty, is no exception. This stance stands reaffirmed by an increment of roughly 3% in the initial nine months of 2017—the greatest increase in terms of deal value since 2010, with inbound M&A activity having hit a decade high of $24.5 billion, up 61.6% from the previous year.[1] There is, however, much more to this figure than what meets the eye. Exceedingly cyclical, rhythmic and dynamic, cross-border M&A are subject to an economy's legally determined regulatory framework.

It is of immense importance to assess the robustness of the same in light of breakthrough measures in the form of a series of structural, banking, infrastructural and fiscal reforms of the current as well as preceding financial year (FY). This assessment mandates the worthy mention of the extant FDI Policy, which has subtly injected the optimum dosage of liberalisation and deregulation of the foreign investment regime, of which cross-country M&A form a substantial part. A novice assessment, thus, ensures that if FDI is the genus, inbound M&A transactions are the species. If favourable cross-border M&A are a means of achieving higher FDI, the FDI regulatory regime is the means of attaining a surge in such cross-border M&A deals.

In light of this, the present document is a humble attempt at decoding the repercussions of the ceaselessly evolving FDI regime of the country on cross-border M&A deals, particularly inbound transactions, by undertaking an exhaustive study of the newly staged FDI regime, while also emphasising its contribution to each specific sector in terms of value

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[1] FE Bureau, "Mergers and Acquisitions Deal Value Highest Since 2010 in Jan-Sept Period at $43.2 Bn," *Financial Express,* October 7, 2017, http://www.financialexpress.com/industry/mergers-and-acquisitions-deal-value-highest-since-2010-in-jan-sept-period-at-43-2-bn/885531/.

and volume of inbound deals. In consideration of the fact that an isolated evaluation of the consolidated FDI policy would be tantamount to unsound forecasts (and therefore, conjectures), the compatibility between the extant FDI regime and foremost economic reforms in acting as catalysts in increasing cross-border M&A transactions will also be elucidated upon.

I. How "Unregulated" is the Regulatory Framework under the Reformed FDI Policy: Focal Features and Plausible Implications of Cross-Border M&A

A painstakingly exhaustive analysis of the contemporary global scenario shows the significant impact of the domestic FDI regime on cross-country M&A. Undeniably, the potential entrants are discouraged and rejected by an extensively regulated environment under the FDI regime.[2] A classic instance of state-controlled economy with a cumbersome bureaucracy, the FDI approval process in India has been perceived and documented as the major cause of concern and repulsion for foreign investors.[3] Involving numerous nominally distinct approval procedures for national and local agencies, this process is taxing and lengthier than that of other Asian economies, including Japan and China.[4] The deferrals and delays in the approval and implementation process of foreign investment deals is attributed to the undeniable existence of corruption and "red-tapism" in the Indian administrative fabric,[5] thereby hampering the potential of the Indian investment climate to facilitate cross-border M&A.

On the basis of this assessment, and seeking a steady and mounting momentum in inbound and outbound M&A activities in India, the Government of India has positioned the most radical sectors of the Indian economy under the "automatic approval route" in the lately consolidated FDI policies. Discerning between "automatic route" and "government

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[2] "Economic and Other Impacts of Foreign Corporate Takeovers in OECD Countries," Organisation for Economic Co-operation and Development, 2007, https://www.oecd.org/daf/inv/investment-policy/40476100.pdf.

[3] "FDI Confidence Index," Global Business Policy Council: A.T. Kearney 7 (October 2004).

[4] Rohit Sachdev, "Comparing the Legal Foundations of Foreign Direct Investment in India and China: Law and the Rule of Law in the Indian Foreign Direct Investment Context," *Columbus Business Law Review*. BUS. L. REV. (August 2006): 209–11.

[5] Ajay Sharma, "Comparative Analysis of the Chinese and Indian FDI Regimes," *Chicago-Kent Journal of International and Comparative Law* 15, no. 3 (January 2015): 16.

route", it should be stated that the investment in the capital of resident entities by non-resident entities can be made without the prior approval of the government in the former, unlike the latter.[6] The foreign investment norms have further been eased by increasing the foreign investment limits across various sectors in anticipation of heightening the cross-country M&A activities in India. This notion is ideologically reaffirmed by contemporary research literature, which avers that the absence of capital controls facilitates the unrestricted funding of investments abroad, paving the way for cross-country acquisitions. Having "coincided with an increased attention to FDI protection and promotion",[7] liberalisation of the investment regime was hailed by the South-East Asian economies in the 1960s, followed by the rest of the Asian countries and Latin America in the 1980s and 1990s.[8]

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[6] Consolidated FDI Policy of 2017, F. No. 5(1)/2017-FC-1, 2.1.20, Department of Industrial Policy and Promotion (2017), http://dipp.nic.in/sites/default/files/CFPC_2017_FINAL_RELEASED_28.8.17.pdf.
[7] Dirk Willem te Velde, "Foreign Direct Investment and Development: An historical perspective," *Overseas Development Institute,* January 30, 2006, https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/850.pdf, 10.
[8] te Velde, "Foreign Direct Investment and Development," 10.

Table showing comparative analysis of the consolidated FDI policies of 2015,[9] 2016[10] and 2017[11] on strategic sectors of the economy in terms of % of equity and entry route

S. No.	SECTOR	% OF EQUITY/ FDI CAP			ENTRY ROUTE		
		2015	**2016**	**2017**	**2015**	**2016**	**2017**
1.	Civil Aviation a. Airports (existing projects) b. Non-Scheduled Air Transport Service	100	100	100	Automatic up to 74%	Automatic up to 74%	Automatic (100%)
2.	Pharmaceuticals (Brownfield)	100	100	100	Government	Automatic up to 74%	Automatic up to 100%
3.	Defence	49	49	100	Government route up to 49% Above 49% to Cabinet Committee on Security (CCS)	Automatic up to 49% Above 49% under Government route	Automatic up to 49% Above 49% under Government route (*elimination of condition of access to "state-of-the-art" technology*)

[9] See Consolidated FDI Policy of 2015, F. No. 5(1)/2015-FC-1, Department of Industrial Policy and Promotion (2015), http://dipp.nic.in/sites/default/files/FDI_Circular_2015.pdf.
[10] See Consolidated FDI Policy of 2016, F. No. 5(1)/2016-FC-1, Department of Industrial Policy and Promotion (2016), http://dipp.nic.in/sites/default/files/FDI_Circular_2016%281%29.pdf.
[11] See Consolidated FDI Policy of 2017 (see n. 6).

4.	Finance a. Asset Reconstruction Companies b. Insurance	100 49	100 49	100 49	Automatic up to 49% Automatic up to 26%	Automatic Automatic	Automatic Automatic
5.	Trading of food products manufactured in India	-	-	100	-	-	Government approval route for trading, including through e-commerce
6.	LLP insectors where 100% FDI is allowed	100	100	100	Government	Automatic	Automatic
7.	Private Security Agencies	49	49	74	Government	Government	Automatic up to 49%

Additionally, the Single Brand Retail Trading (SBRT) sector has been substantially relaxed by the recently announced FDI policy of August 2017, which does away with the previous 70:30 rule, which demanded that an Indian single-brand retailer manufacture at least 70% of the products in-house and outsource the remaining 30% in order to qualify for FDI. Having unlocked the doors for products having "state-of-the-art" and "cutting-edge" technology for which local sourcing is impractical,[12] the new regime has also granted permission to SBRT entities operating through brick-and-mortar stores to undertake retail trading through e-commerce.[13]

Tactfully paving the way for cross-border M&A, the unanimous object of the tools of the "automatic approval route" and "liberalised capital control regime" for the aforementioned sectors is further expedited by parallel relaxations under the FDI policy of 2017. Specifically, they have stimulated the simplification of the process for establishing offices in India for the leading businesses in the defence, telecom, private security, and information and broadcasting sectors by eliminating the necessity for approval from the Reserve Bank of India in cases where the government approval or license/permission from the concerned ministry/regulator has already been granted.[14]

What is strikingly noteworthy is yet another development which has, in consideration of share swapping as a facilitator of cross-country M&A, remarkably injected liberalisation and deregulation into the investment process by "swap of share" under the FDI regime of 2016 (followed by that of 2017). It has hard-headedly excluded the requirement of government approval for investment in automatic-route sectors by way of swap of shares.[15]

Another emblematically exemplary reform under the regime of 2017 has been the abolishment of the 25-year ancient Foreign Investment Promotion Board (FIPB), thus slackening the aggressively regulated environment for 11 notified sectors requiring government approval which shall now be controlled by the concerned ministries/departments in consultation with the Department of Industrial Policy and Promotion **(**DIPP**)**. Endorsing the "maximum governance and minimum government" model,[16] the government pondered and ultimately effected the abolition of

[12] See Consolidated FDI Policy of 2017, 5.2.15.3 (see n. 6).
[13] Consolidated FDI Policy of 2016, 5.2.15.3 (2)(f) (see n. 10).
[14] Consolidated FDI Policy of 2017, 3.7.2 (see n. 6).
[15] Consolidated FDI Policy of 2017, Annexure 4, 6 (see n.6).
[16] S. Arun, "Govt Approves Phasing Out Of 25-Year-Old Foreign Investment Promotion Board," *The Hindu,* May 24, 2017,

FIPB in view of the belief that, "Once the Board is history, red-tapism will shrink, ease of doing business will improve and investors will find India more attractive."[17] The rationale behind such an averment stands best explained by the logically expounded standpoint that heavily regulated business entry is associated with higher corruption, thus leading to weaker governance, which lowers the investment potential of an economy.[18]

In summary, liberalisation and deregulation of the FDI regime are reflective of a higher degree of market access and openness, which indeed are paramount determinants of outward FDI, of which cross-country M&A is, as repeatedly specified, an essential element.[19] The same can be substantiated by the policy landscape of India's Asian counterpart, Korea, one of the leading beneficiaries of M&A-associated FDI in the continent. The robust hike in the sales amounts of cross-border M&A from US$192 million in the year 1995 to US$10.1 billion in the year 1999 was largely credited to the incorporation of an "open-door policy" in the Korean FDI regime.[20] On an analogous appraisal and rationale, the policy makers in India have undertaken the similar route of relaxation under its existing FDI regime, so as to facilitate the process of cross-country M&A.

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http://www.thehindu.com/business/Economy/cabinet-approves-abolition-of-fipb/article18561815.ece.

[17] Editor, "Abolishing FIPB: Red-tape Herring?" *The Hindu,* May 27, 2017, http://www.thehindu.com/opinion/editorial/red-tape-herring/article18586348.ece.

[18] S. Djankov and B. Hoekman, "Foreign Investment and Productivity Growth in Czech Enterprises," *World Bank Economic Review* 14, Issue 1 (January 2000): 49–64.

[19] Dimitrios Kyrkilis et al., "Macroeconomic Determinants of Outward Foreign Direct Investment," *International Journal of Social Economics* 30, no. 7 (July 2003): 831; Paula Neto, "The Macroeconomic Determinants of Cross Border Mergers and Acquisitions and Greenfield Investments," *FEP Working Papers,* no. 281 (June 2008): 9; N. Aminian et al., "Macroeconomic Determinants of Cross-Border Mergers and Acquisitions – European and Asian Evidence", International Conference at the University of Le Havre(September 2005); C. Culem, "The Locational Determinants of Direct Investment among Industrialized Countries," *European Economic Review* 32 (1988): 885–904; R. Biswas, "Determinants of Foreign Direct Investment," *Review of Development Economics* 6, no. 3 (2002): 492–504.

[20] Hwy-Chang Moon et al., "Cross-Border Mergers & Acquisitions: Case Studies of Korea, China, and Hong Kong," *Asia-Pacific Economic Corporation* (September 2003): 2.

II. Assessing the Influence of the FDI Regulatory Framework on Key Economic Sectors: An Insight into FDI-Stimulated News-Making Inbound Deals

Amalgamation of one entity with another is a cumbersome and subtle process, whether the entity is merging, acquiring or being acquired. The same process is bound to involve more intricacies and technical hitches when the concerned parties resolve to engage in a cross-border merger or acquisition. By virtue of the notification in section 234 of the Companies Act, 2013, with effect from April 13, 2017, it has now become plausible to undertake, in addition to an inbound merger (i.e., foreign company merging into an Indian company with the latter as the extant entity), an outbound merger (i.e., Indian company merging into a foreign company located in an approved jurisdiction with the latter as the extant entity), which hitherto was not legally recognised. Of late, cross-border deals have seen a considerable upsurge, especially in the years 2016 and 2017, owing to multifarious factors, *viz.* eased credit conditions, a stable capital market situation, liberalised FDI policies in 2016 and 2017, the Union Budget of 2016–17, and persistent improvement in economic policy reforms. The buoyant momentum and rise in the M&A value in cross-border activity can be assessed and deciphered from the impact on different sectors of the economy, which have been elucidated upon hereunder in light of the recently reformed FDI policy.

A. Infrastructure Sector

The infrastructure sector, in the past as well as in the near future, is unquestionably expected to be the focal point of concentration, being the engine of India's economic development and progress. The Indian infrastructure sector recorded deals worth approximately US$4 billion in 2016, the deal value surging by nearly 78% as compared to 2015.[21] Power, roads and renewable segments harnessed a substantial share, and, within that, 88% of the transactions which took place were via M&A.[22] Within

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[21] "Transactions 2017: Inbound M&A Takes Center Stage," Ernst & Young, http://www.ey.com/Publication/vwLUAssets/ey-transaction-2017/$FILE/ey-transaction-2017.pdf.

[22] Shailaja Sharma, "Infrastructure Sector Sees Deals Worth $3.49 billion in FY17," *Livemint,* April 07, 2017, http://www.livemint.com/Companies/0B0ebU1CJ412AyYRv9JSKL/Infrastructure-sector-sees-deals-worth-349-billion-in-FY1.html.

infrastructure, the power division hogged the limelight as it collectively accounted for 53% of the total disclosed value and 86% of the M&A in the sector.[23] The power sector maintained its supremacy in the first quarter of 2017 as well, with its disclosed deal value of US$589.5 million out of the overall revealed US$647.4 million, depicting an augmentation in the infrastructure sector when compared to the same time period in 2016.[24]

During the previous three years, the FDI regime has undergone liberalisation, with relaxation in 87 FDI rules across 21 sectors, including civil aviation, defence, construction and development; the deal environment appears to be productive based on a strong economic outlook, accommodative economic policy and salutary capital markets, as also depicted in the datum above. The relaxed FDI regime in the civil aviation sector, enforceable from August 2017, for instance, has triggered the interest of Turkey's Celebi Aviation Holding in buying state-owned Air India's ground handling operations, as revealed by India's aviation secretary Rajiv Nayan Choubey.[25]

The renewable energy segment forms a dominant part of this sector. On June 30, 2016, the World Bank extended its largest-ever financial assistance in terms of solar energy by agreeing to invest US$1 billion in solar energy projects.[26] Domestically, in September 2016, the Adani Group set up the world's largest solar power plant in Tamil Nadu by investing approximately Rs. 4,550 crores.[27] Inasmuch as inbound deals are concerned, Sembcorp Green Infra, which is the subsidiary of a Singapore-based company, acquired a 74% stake in the Mulanur Renewable Energy

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[23] "Recent Mergers & Acquisition in India," Bank Exams Today, July 14, 2017, http://www.bankexamstoday.com/2017/07/recent-mergers-and-acquisition-in-india.html.

[24] "Transactions Quarterly: A Perspective on the Indian Transactions Market January - March 2017," Ernst &Young, http://www.ey.com/Publication/vwLUAssets/ey-transaction-quarterly-1-q-17/$File/ey-transaction-quarterly-1-q-17.pdf.

[25] Reuters staff, "Deals of the Day—Mergers and Acquisitions," *Reuters,* September 8, 2017, https://in.reuters.com/article/deals-day/deals-of-the-day-mergers-and-acquisitions-idINL4N1LP3TM.

[26] "Solar Energy to Power India of the Future," World Bank, June 30, 2016, http://www.worldbank.org/en/news/feature/2016/06/30/solar-energy-to-power-india-of-the-future.

[27] Virendra Pandit, "Adani Dedicates to Nation World's Largest Solar Plant in TN," *The Hindu Business Line*, September 21, 2016, http://www.thehindubusinessline.com/companies/adani-dedicates-to-nation-worlds-largest-solar-power-plant-in-tn/article9131623.ece.

Private Limited for around Rs. 1.581 billion in August 2016.[28] With the aim of fructifying and habituating the use of renewable sources of energy, the Ministry of New and Renewable Energy is on a persistent mission offering incentives such as ones based on capital and interest, generation-based incentives, concessional finance, and fiscal incentives in order to encourage the private investors.[29]

Without a doubt, the Indian market is expanding at an incessant pace, the corollary of which is the unremitting upsurge in the demand for transportation and warehousing services, thereby breeding the potential for intensification in the logistics segment. The statistical figures are a testament to the same, as out of the 22 deals, six deals amounting to US$38 million in total had been completed in the first quarter of 2017.

The immediate outcome of the reformed FDI regime is thus corroborated by the increases in the deal volumes and values as also signified above, and, in view of the government engrossing itself in the infrastructure sector, the country is expected to be the recipient of investments via diverse economic means.

B. Oil and Gas Sector

In 2016 there was a tremendous upswing in the oil and gas sector, inasmuch as cross-border deals and their value are concerned, as evidenced from the conceded fact that inbound deals occupied the limelight by concluding transactions to the tune of US$12.936 million (4 deals), whereas outbound deals totalled US$5.46 million (5 deals), the value conquering the market landscape in comparison to preceding years.

The growth in the afore-stated sector is due primarily to the cross-country agreements betwixt companies of Indian and Russian origin, wherein the latter assumed the status of an acquirer in one deal, while

[28] "Sembcorp Green Infra Acquires Wind Power Assets in Tamil Nadu," Sembcorp Green Infra press release, August 8, 2016, http://www.sembcorp.com/en/media/384997/sembcorp-green-infra-acquires-wind-power-project-in-tamil-nadu.pdf.

[29] Press Information Bureau, "A New Dawn in Renewable Energy- India Attains 4th Position in Global Wind Power Installed Capacity; 46.33 GW grid-interactive power; 7,518 MW of grid-connected power; 1502 MW Wind power capacity added; Small hydro power capacity reaches 4323 MW, 92305 Solar Pumps installed, 38,000 crore Green Energy Corridor is being set up; Surya Mitra mobile App launched, Solar Tariff as low as Rs 3/unit," Ministry of New and Renewable Energy press release, December 18, 2016, http://pib.nic.in/newsite/PrintRelease.aspx?relid=155612.

positioning itself as the target nation in three outbound deals. On the inbound front, the deal in which a consortium led by Russia's national oil company, Rosneft, acquired a 98% stake in Essar Oil Ltd. for US$13 billion, the sale of which was concluded on August 21, 2017, has been termed the grandest foreign direct investment.[30] Insofar as the noteworthy outbound deals in this segment are concerned, they include, firstly, the acquisition of an additional 11% shares in JSC Vankorneft by ONGC Videsh, raising its percentage of shares up to 26% and, secondly, the consortium led by Oil India Ltd., in which a subsidiary company of Bharat Petroleum Corporation Ltd. (BPCL) successfully acquired a 29.9% stake in Taas Yuryakh and a 23.9% stake in Vankorneft from the Rosneft Oil Company.[31]

In an effort to encourage and captivate FDI and inbound transactions in the sector, the FDI policy has undergone liberalisation; henceforth, instead of seeking an approval from Foreign Investment Promotion Board, foreign direct investment under the automatic route, inasmuch as petroleum refining by Central Public Sector Enterprises is concerned, has been permitted with 49% foreign equity. In 2016, during April–November, India happened to be the recipient of US$76 million in FDI in this sector, which statistically was approximately 62% overhead in comparison to FDI inflows during the analogous period in the previous year (US$49 million).[32] In addition, the government authorises 100% FDI in upstream and private-sector refining projects.[33] These favourable policy measures would, in all likelihood, be able to stimulate cross-border transactions in an efficacious manner.

Keeping in mind the current scenario, the accomplishment of the affluent Rosneft-Essar transaction is likely to extend a fillip to the erstwhile mushrooming M&A landscape, with the FDI inflows having an optimistic impact across diverse sectors. The curiosity and faith demonstrated and

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[30] ET Bureau, "Essar Oil Completes $13 Billion Sale to Rosneft-Led Consortium in Largest FDI Deal," *The Economic Times,* August 22, 2017, https://economictimes.indiatimes.com/markets/stocks/news/essar-oil-completes-sale-of-india-assets-to-rosneft-for-12-9-bn/articleshow/60154679.cms.

[31] Press Trust of India, "OVL completes acquisition of 11% additional stake in Vankor," *The Economic Times,* October 31, 2016, https://economictimes.indiatimes.com/industry/energy/oil-gas/ovl-completes-acquisition-of-11-additional-stake-in-vankor/articleshow/55153801.cms.

[32] "Annual Report 2016-2017," Ministry of Petroleum and Natural Gas, Government of India, 17–19, http://petroleum.nic.in/sites/default/files/AR16-17.pdf.

[33] "Oil & Gas," India Brand Equity Foundation, April 21, 2017, https://www.ibef.org/download/Oil-and-Gas-April-2017.pdf.

reposed by the oil-rich nations in securing the Indian market for production purposes, on account of a drop in the price of crude oil and other commodities, has endured to be the propelling factor in the rising of deal values. Relying upon the BP Statistical Review of World Energy's report, which considers India to be the leading nation in terms of oil consumption by 2035, and the statistical fact that it has outdistanced Japan to capture the rank of the third-largest oil consumer in the previous year, it can categorically be stated that inbound deals are bound to increase as investors envisage potential economic profitability in the approaching epoch in the oil and gas sector.

C. Pharmaceutical Sector

The Indian pharmaceutical industry has garnered an impeccable worldwide reputation for its expertise and proficiency in the generic medicines, low-cost manufacturing and research services, ranking third for volume and 14th in terms of value,[34] further constituting nearly 70–80% of the branded generics markets. In the aftermath of throwing open of the pharmaceutical sector to 100% FDI in 2001 and proactively familiarising itself with the conceptual and policy differences between "greenfield" and "brownfield" investments in 2011, the FDI regime of 2016 was further relaxed by relocating the latter (brownfield) from the government approval route to the automatic approval route for investment up to 74%.

Analysing the influence of the same on cross-country M&A deals, it is imperative to mention that in spite of the marginal decrease in the number of inbound deals from 11 (2015) to 9 (2016), a rampant rise in the aggregate inbound deal value from US$1.155 billion (2015) to US$2.099 billion (2016) is noteworthy.[35] The same accounts for the announcement and subsequent accomplishment of two large sterile injectable cross-border inbound deals, the first one being the revised key foreign investment from China in the Indian manufacturing asset, which is visible in the acquisition of a stake of approximately 74% in Gland Pharma (Hyderabad-based company) by the Chinese drug firm Fosun Pharma for

[34] Manish Panchal, Charu Kapoor, and Mansi Mahajan, "Success Strategies For Indian Pharma Industry in an Uncertain World," *Business Standard,* February 17, 2014, http://www.business-standard.com/content/b2b-chemicals/-114021701557_1.html.

[35] "Transactions 2017," Ernst & Young.

US$1.1 billion on September 18, 2017.[36] The second deal was one wherein Ahmedabad-based pharma player Claris Lifesciences Ltd. was acquired for US$625 by Baxter International Inc. (US) on July 28, 2017.[37] The datum from Grant Thornton Advisory Pvt. Ltd has completely overturned the estimations of a speculated boost in 2017, asserting that until September 2017 there have been 27 M&A deals in the pharma and healthcare sector, valued at $719 million,[38] which is much lower than the 34 deals, valued at $2.675 billion, that took place in the first three quarters of 2016. This is credited to the overpowering influence of recently adopted financial alterations, chief among which is the implementation of the Goods and Services Tax in August 2017, justifying the "wait and watch" approach of the foreign investors, thus subduing the continued impact of the relaxed FDI regime of 2016.

Deliberating upon the strategic surge in the above-analysed scenario of 2016 in the light of that year's liberalised FDI regime, an upswing in inbound M&A deals in the fourth quarter **(**Q4**)** of 2017 and subsequent year is foreseeable, or, more accurately, perceptible on account of an increase in the FDI limit from 74% to 100% under the automatic route with effect from August 28, 2017. This standpoint stands remarkably confirmed by the news-breaking inauguration of Q4 by the acquisition of the domestic business of Ahmedabad-based Unichem Laboratories by Torrent Pharma for Rs. 3,600 crores.[39] Envisioned to swell to US$55 billion (or beyond) by 2020 at the current pace, it is unequivocally averred

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[36] News Desk, "Fosun Pharma to Buy 74% Stake in Gland for $1.09 Billion," *Business Fortnight,* September 19, 2017, http://businessfortnight.com/fosun-pharma-to-buy-74-stake-in-gland-for-1-09-billion/.

[37] *Business Line*, "Claris Sells Global Generic Injectables Business to Baxter for $625 mn," *The Hindu Business Line,* July 28, 2017, http://www.thehindubusinessline.com/companies/claris-sells-global-generic-injectables-business-to-baxter-for-625-mn/article9792328.ece.

[38] P. B. Jayakumar, "Larger Merger and Acquisitions Back in Indian Pharma," *Business Today,* November 6, 2017, http://www.businesstoday.in/sectors/pharma/large-merger-and-acquisitions-back-in-indian-pharma/story/263399.html.

[39] Divya Rajgopal, "Torrent Pharma Walks Away with Unichem's Domestic Business for Rs. 3,600 Crore," *The Economic Times,* November 8, 2017, https://economictimes.indiatimes.com/industry/healthcare/biotech/pharmaceuticals/torrent-pharma-to-buy-unichem-labs-india-business-for-558-million/articleshow/61489554.cms.

that the pharmaceutical market may, contrariwise, be depressed in a "pessimistic scenario characterized by regulatory controls."[40]

D. Telecommunication Sector

In the wake of heightened competition and mounting consolidation in the telecom sector, the mergers and acquisition deals have witnessed a conspicuous upsurge in the preceding two years. In 2016, insofar as the telecom sector is concerned, 19 M&A deals have been transacted, the inbound deal activity hovering at an approximate value of US$1.083 billion.[41] The ballooning growth of data consumption, newly issued guidelines permitting the mobile phone companies to trade spectrum among themselves, and the need to survive the cut-throat environment brought on by Reliance Jio (acquisition of Tikona Digital's 4G airwaves by Bharti Airtel for US$244.5 million to compete with Jio and Vodafone-Idea Cellular) are positioned to be the major factors behind the escalating deals in relation to the spectrum acquisition. The same stands proven by the promising beginning to the first quarter of FY17, wherein the sector commandeered deals worth US$13.6 billion (the deal of Vodafone-Idea dominating the share percentage of US$11.6 billion), as compared to US$60 million a year ago.

The consolidation wave gaining momentum in 2016 has undauntedly driven the deal activity in the telecommunications sector in the current year as well, which can be evidenced from the statistical figure of the third quarter, clearly depicting that, despite a slowdown in the overall M&A activity, the telecom sector remained the most industrious and agile division, witnessing a 115% surge in the initial nine months from the corresponding period in FY16. As consolidation and sustainability in the sector occupies the centre stage, the FDI policy retains the 100% cap in telecom services with the subscriber base revealing a vigorous growth, and exponential inflows are expected from foreign investors; as a consequence of the latter, the inbound deals are likely to be the preferred mode of foreign direct investment.

The hike in the velocity of FDI in the telecom sector is already perceptible from the noteworthy factual situation, as recorded in the

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[40] Vikas Bhadoria, Ankur Bhajanka, Kaustubh Chakraborty, and Palash Mitra, "India Pharma 2020: Propelling access and acceptance, realising true potential," McKinsey & Company report, http://online.wsj.com/public/resources/documents/McKinseyPharma2020ExecutiveSummary.pdf.

[41] "Transactions 2017," Ernst & Young.

government statistics, clearly showing the growth of the overseas funds in the telecom sector, which is three times larger than the preceding fiscal year, touching the US$10 billion mark in the initial three quarters of 2016–17. The ground-breaking inbound deal in the sector is Kohlberg Kravis Roberts & Co's massive investment to the tune of US$948 million in Bharti Infratel Ltd. for a 10.3% stake.[42] Of late, the American Tower Company (ATC) has struck an agreement with Vodafone and Idea Cellular for acquiring their mobile tower assets, which have an estimated value of Rs. 7,850 crores. Post-acquisition, ATC is bound to be graded as the second-biggest standalone mobile tower company, with a portfolio of 80,000 towers. As a matter of fact, India's telecom industry is the second-largest worldwide in terms of the number of subscribers, thereby showcasing the potentiality of the telecom market.

E. Financial Services Sector

In 2016, the financial services sector reached its peak by recording its highest ever M&A activity, both in terms of number and value. A total of 91 deals were announced, within which outbound and inbound deals were 7 and 12 in number, respectively. Within the sector, the fundamental segments included insurance (11 deals of US$3.3 billion), non-banking financial companies (NBFC) (27 deals of US$100 million), payment solutions (8 deals of US$130 million) and capital markets (12 deals of US$83 million). An unprecedented boost in the volume and value of inbound deals in the insurance sector, particularly health, is characterised by the liberalised FDI regime of 2016; for example, an increase in the limit on FDI under the automatic route from 26% to 49% under the consolidated FDI policy of 2016 translated into the purchase of an additional stake of 23.7% for US$24 million by German firm Munich Re in Apollo Munich Health Insurance, eventually raising the stake to 49%.[43] Under the 2016 policy, 100% FDI had been assented to through the automatic route for 18 specified NBFC activities, whereas the rules adopted under the policy of

[42] The Economic Times, "India Inc seals deals worth $17.9 billion in Q1 2017: Report," April 19, 2017, https://economictimes.indiatimes.com/news/company/corporate-trends/india-inc-seals-deals-worth-17-9-billion-in-q1-2017-report/articleshow/58260904.cms.

[43] Shilpy Sinha, "Munich Re to buy additional 23.27% stake in Apollo Munich Health Insurance for Rs. 163 crore," *The Economic Times,* January 27, 2016, https://economictimes.indiatimes.com/industry/banking/finance/munich-re-to-buy-additional-23-27-stake-in-apollo-munich-health-insurance-for-rs-163-crore/articleshow/50734599.cms.

2017 have further broadened the remit by allowing overseas investment in financial activities beyond the specified NBFC activities under the automatic route. In spite of the continued liberalised FDI policy framework carried forward from 2016 to 2017, the financial sector underwent a downturn with a 51% decline in the value of M&A deals in the first nine months from the previous FY,[44] credited to co-existing regulatory changes acting as dispelling factors. What single-handedly drove the banking sector in FY2017 was the National Multi Commodity Exchange's merger with the Indian commodity exchange, creating India's third biggest commodity exchange.[45]

III. Analyzing the Regulatory Measures as Enablers or Inhibitors of the FDI Policy in Surging Inbound M&A Deals

In light of the ever-evolving landscape of the Indian economy, an isolated evaluation of the consolidated FDI policy would lead to flawed forecasts and estimations. On the policy forefront, for instance, numerous government initiatives like "Skill India", "Make in India", "Start Up India", "Digital India" and "Stand Up India" are undeniably complementing the relaxed and supportive FDI regime, thus assigning a favourable outlook to inbound investments into the country. In corroboration, the start-up sector contributed 23% of M&A volumes in January-August 2017.

It becomes significant to understand the correlation between the FDI policy and the macroeconomic environment measures so as to determine whether the latter supplements the former as catalysts in boosting the cross-border M&A transactions; this necessitates a recap of a host of structural, banking, infrastructural and fiscal reforms of the current as well as the preceding FY.

Enactment of the Insolvency and Bankruptcy Code, 2016: Attempting to assess the compatibility between the FDI policy and the Insolvency and Bankruptcy Code, 2016 (IBC) in increasing the volume and value of cross-

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[44] FE Bureau, "Mergers and acquisitions deal value highest since 2010 in Jan-Sept period at $43.2 bn," *Financial Express,* October 7, 2017, https://www.financialexpress.com/industry/mergers-and-acquisitions-deal-value-highest-since-2010-in-jan-sept-period-at-43-2-bn/885531/.

[45] Niti Kiran, "M&A values in July lowest in 73 months: Grant Thornton," *Business Today,* August 17, 2017, http://www.businesstoday.in/current/deals/m-and-a-values-in-july-lowest-in-73-months-grant-thornton/story/258529.html.

border M&A transactions, a dual-faceted moot originates. In accordance with the globally-suggested "creditor in possession" approach with an expeditious resolution process, the recently consolidated law on insolvency and bankruptcy is envisioned to enhance the inbound investment in asset reconstruction companies by strategically supplementing the FDI policies of 2016 and 2017; this has pragmatically placed this sector under the automatic approval route. The same is sought to be further augmented by the Banking Regulation (Amendment) Act, 2017, authorising the Reserve Bank of India (RBI) to direct banking companies to resolve required stressed assets by commencing the insolvency resolution process,[46] followed by the announcement of various relaxations to ease transactions involving distressed companies by the Securities and Exchange Board of India on June 21, 2017.[47] A paradoxical standpoint, however, asserts otherwise by claiming that the provision for review and reversal of undervalued transactions on a subjective determination of fraudulent debtors[48] austerely attacks the underlying idea behind the reformed FDI regime, revolving around liberalisation, deregulation and red-tape herring. The same is coupled with the "un-exempted" payment of stamp duty and other statutory costs in relation to acquisition of assets. Dubious, as it evidently is, to ascertain which of the two annotations would eventually subsist, the forthcoming years are eagerly awaited to witness the fate of the distressed cross-border M&A in India, in light of the disputed stance of the IBC as either an enabler or an inhibitor of the liberalised FDI regime.

Demonetisation and the digitisation thereof: The investment-receptive FDI regime in India in the sector of "e-commerce activities" has been complemented remarkably by the oft-debated state and structural measure of demonetisation, having taken the Asia-Pacific sub-continent by storm in the preceding year. Effecting a cashless economy, demonetisation is anticipated to reduce the cross-country M&A deals in the short term in businesses based on the "cash and delivery" payment method, thus overpowering the continued benefits of the liberalised FDI regime. Contrariwise, an observably significant implication of demonetisation is digitisation, warmly welcomed by two strategic sectors—finance and retail trading—and furthered by government initiatives such as Digital India. Catalysing "mobile banking for accessing payment, savings, insurance,

[46] The Banking Regulation Act, No. 10 of 1949, sec. 35AB, inserted by the Banking Regulation (Amendment) Act, No. 30 of 2017.
[47] Zeba Siddiqui and Abhirup Roy, "SEBI tightens rules for offshore derivatives," *Thomson Reuters (India),* June 21, 2017, https://www.reuters.com/article/india-sebi-derivatives/sebi-tightens-rules-for-offshore-derivatives-idINKBN19C1ID.
[48] The Insolvency and Bankruptcy Code, No. 31 of 2016, sec. 49.

credit services and micro-finance",[49] the financial services have been manifestly digitised, and thus the current "fintech" space is forecasted to attract massive cross-country M&A transactions. This stance is supported by the news-making acquisition of Citrus Pay, a Mumbai-based payments technology player, by South African Naspers' PayU for US$130 million in an all-cash deal, thus enabling the latter to add more than 30 million people to its user base.[50] Also, a deal-making incentive in the e-retail arena is anticipated in the long run on account of demonetisation, further eased and supplemented by the FDI policy measure of allowing SBRT entities to operate through brick-and-mortar stores for the purpose of retail trading through e-commerce. The injection of digitisation by demonetisation, which has perceptibly inoculated the already liberalised FDI regime (permitting investment up to 100% under the automatic approval route in the e-commerce sector), is expected to bolster up the value and volume of cross-country M&A deals in the long run on a "digitally constructed platform".

Implementation of the Goods and Services Tax: Broadening the sectoral-confined analysis to a cumulative standpoint, light must be shed on major fiscal reforms because they have an all-pervasive impact on inbound deals in all the sectors of the economy. Stimulatingly, the eighth month of FY17 saw the simultaneous implementation of the consolidated FDI regime and the Goods and Services Tax (GST)**,** the most notable fiscal measure of all phases. In breach of the notional expectation of coherence between the two regulatory measures in increasing the volume and value of inbound deals, the latter instead overpowered and diluted the impact of the former. To put it across simply and statistically, the current September quarter drove transaction values to their lowest point in 32 quarters, standing at $2,142 billion with only 32 transactions.[51] The month of August recorded a 46% decline in the value of transactions from the corresponding period in the preceding year on account of reduced inbound deals because of the "wait and watch mode" of the investors checking the

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[49] "Transactions 2017," Ernst & Young.

[50] Biswarup Gooptu and Arun Kumar, "Naspers-owned PayU snaps up Citrus Pay for $130 million in one of the largest fintech deals in India," *The Economic Times,* September 15, 2016, https://economictimes.indiatimes.com/small-biz/startups/naspers-owned-payu-snaps-up-citrus-pay-for-130-million-in-one-of-the-largest-fintech-deals-in-india/articleshow/54321363.cms.

[51] PTI, "Mergers and Acquisitions hit by demonetization, GST rollout: Grant Thornton," *The Hindu Business Line,* October 13, 2017, http://www.thehindubusinessline.com/companies/mergers-and-acquisitions-hit-by-demonetisation-gst-roll-out-grant-thornton/article9902081.ece.

progress of GST implementation.[52] The FDI policy's inability to keep the surge in inbound M&A transactions intact is thus credited solely to the apprehensive atmosphere generated by GST implementation.

The first two quarters of the current FY deserve to be applauded for considerably elevating M&A in the initial nine months, remarkably substantiating the coordinated operation of the FDI regime in 2016 and other regulatory reforms. Regardless of the sudden dip in the M&A transactions in Q3 for reasons explicated above, the drop is short-lived, for tomorrow's predicted hike is reflected in the Ease of Doing Business Index for 2018, in which India has historically hopped 30 spots from the preceding year to 100th rank this year.[53]

V. Conclusion and Recommendations

In an attempt to accentuate and keep the already mounting cross-country transactions intact, a host of suggestions are proposed to be incorporated into the current FDI policy and the generic regulatory framework. The framework prescribing different foreign investment norms for brownfield and greenfield investment in the pharmaceutical sector should also be introduced in other key sectors of the economy so as to liberalise the investment regime in the former to eliminate trepidations in the latter. The same would, in consequence, amount to a robust boost in inbound transactions.

So as to supplement the FDI policies of 2016 and 2017, which have pragmatically placed the investment in asset reconstruction companies under the automatic approval route with a 100% equity cap, section 49 of the IBC should be amended, for it subjects undervalued transactions to cumbersome judicial scrutiny on the speculated existence of a fraudulent debtor.

With a view to providing fillip to inbound M&As by foreign investors, it is of extreme pertinence for the Indian government to direct their measures and policies towards innovation and upgradation of technology, as technological scarcity has vastly hindered the overseas companies in

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[52] PTI, "M&A deal value plunges by 46%, firms cautious after GST rollout," *The Hindu Business Line*, September 12, 2017, http://www.thehindubusinessline.com/economy/ma-deal-value-plunges-by-46-firms-cautious-after-gst-rollout/article9856092.ece.

[53] "India makes it to Top 100 in 'ease of doing business'," *The Hindu Business Line,* October 31, 2017, http://www.thehindubusinessline.com/economy/policy/india-makes-it-to-top-100in-ease-of-doing-business/article9935450.ece.

investing in capital-intensive industries, thereby keeping this segment in a virtually dormant state when viewed with respect to its potentiality.

Like the liberalised SBRT sector, the investment limit of 51% under the government approval route in the Market Brand Retail Trading (MBRT) sector should also be relaxed so as to facilitate increased inbound transactions in the retail trading sector and exploit the advantageous position that it is in following the abolition of FIPB.

The current intellectual property regime in our country is much weaker when compared to other countries such as the US and China. For this reason, having a robust and protective IP system in place would encourage innovative companies to transmit their technologies and business methods, thereby sharply augmenting the FDI inflows and inbound deals, especially in the Indian pharmaceutical sector, which undeniably would increase common peoples' access to advanced pharmaceutical drugs.

The on-going momentum in the M&A activity is likely to continue as the economy progresses through 2017, notwithstanding the short-term lull that the implementation of GST or demonetisation has exerted. The present age has revolutionised the economy by undertaking a liberalised yet governed framework, and the current FDI policy in its endeavour to boost the cross-country M&A is no exception.