THE TECHNOLOGY M&A REVIEW

THIRD EDITION

Editors
Michael J Kennedy and Dana Kromm

THE LAWREVIEWS

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PREFACE

Welcome to the third annual *Technology M&A Review*. As was the case in prior editions, much of the comparative data we use is based on a 'half-year' convention, with liberal reference to calendar year over calendar year data. Although certainly not by design or foresight, this 'half-year' convention better highlights the ups and downs caused by covid-19 in 2020, the incredible tech M&A bounce-back in 2021, and 2022's half-year bevy of negative factors – inflation, the Ukraine war, and their compounded effect on the supply chain and production and productivity.

Whereas 2021 demonstrated technology M&A's 'champions jog' around the M&A track, the first half of 2022 revealed some porosity in the tech armour and its slowed pace. After at least 20 years of accommodating monetary policy (i.e., cheap money), the Federal Reserve (the US central bank) has been forced to raise interest rates to combat the highest US inflation since the 1970s. The geopolitical power calculus also changed in an instant with Russia's invasion of Ukraine, China's quasi-alignment with Russia and its more aggressive posture on the world stage. In addition, we should not downplay covid's continuing effects on social and government relationships nor its and the invasion of Ukraine's impact on global trade and increasing the appetite for protectionism.

In the United States, the public markets continue to deal with these issues and their weight (with an overall downward value slope from their peak). Depending on when one measures during the first half of 2022, large technology companies such as Facebook and Google lost roughly US$1.5 trillion in value. This is from an all-time high base. However, by mid-August 2022, the Nasdaq had rallied and was up 20 per cent from its June 2022 low, and was 'only' down 16 per cent for the year.

Under the Biden administration, the US antitrust authorities have been and will continue to be aggressive in challenging M&A technology transactions under various theories, but other regulatory authorities, as well as individual states, also have technology in their cross hairs from a tax, content, 'buy America', privacy and patriotic perspective. For the first time since 2011, venture capitalists are cutting back on technology and growth investments. In addition to the publicly announced hiring freezes, it is common knowledge to those who practice in the technology area that other hiring freezes and lay-offs are underway. Despite these headwinds, technology still accounted for approximately 47 per cent of worldwide M&A value in the first half of 2022.

While the technology M&A sector shares its DNA with other sectors, it is a growth sector and is designed to be changeable. We all intuitively know one cannot change the design of a gas turbine on the fly, but one can change a lot in the technology space very quickly. For most technology applications that do not involve life or death functions, there is no competitive limit on the rate of change. There was, in effect, no social media industry in

2000, and now it is quite difficult to actually describe it – and yet it is huge. There have been unbelievable advances in, inter alia, food production and power plants since 2000, but no one considers these growth industries. These industries' advances are considered, consciously or unconsciously, recipients of technology but not creators.

This book's goal is to both highlight the similarities and differences between technology M&A and 'normal' M&A, without taking too much time to try to define what technology and 'normal' M&A are. One of its unstated premises is that because of technology's importance, effective M&A technology lawyering necessarily involves and requires a broad set of legal skills across many practice disciplines; that requirement will likely increase as governments and interest groups from all areas focus on the sector. The sector is critical because it is 'where the money is', where the anticipated growth is and where, at least in the Western world, the political battles are and will be waged.

At least in August 2022, technology M&A in the United States is robust compared to other sectors. Despite any further changes in regulation or monetary policy, compared to other sectors its prospects are, and will continue to be, relatively better.

Michael J Kennedy and Dana Kromm
Paul Hastings LLP
San Francisco
August 2022

Chapter 7

INDIA

Arnav Dayal, Sanjna Vijh and Yashita Gour[1]

I OVERVIEW

In 2021, India's economy performed seemingly well despite global macroeconomic headwinds and supply chain shortages. As of 2022, India has overtaken the United Kingdom to become the fifth largest economy in the world.[2] The pandemic resulted in a noticeable surge in digital adoption of technology. With a return to normalcy in the post-pandemic era, the uptick in technology seems to have normalised to some extent. Increased inflation and monetary tightening across the globe has also meant that the free-flowing approach of funding technology start-ups has seen some rationalisation.

However, the omnipresent nature of technology today and the burgeoning market for technology products has ensured that the momentum will continue. With 17 unicorns minted in the first half of 2022, the total number of Indian unicorns has crossed a century, with 103 unicorns that have a combined valuation of US$339 billion.[3]

II YEAR IN REVIEW

Deal volume and value continues to be robust. The overall deal value in 2021 increased 14.2 per cent from 2020 levels. In 2022, the figure has already crossed US$151 billion, marking an increase of 20 per cent from 2021 levels.[4] Deal value in the technology sector hit US$51 billion in 2022, an increase of 21 per cent compared to 2020 levels, but a decrease of 13.5 per cent from 2021 levels.[5]

Larsen & Toubro announced the merger of two of its software firms – L&T Infotech and Mindtree – forming a combined entity worth approximately US$4 billion.[6] Additionally, Reliance's retail unit acquired Addverb Technologies (a robotics company) for US$132 million,

1 Arnav Dayal is a partner, Sanjna Vijh is a senior associate and Yashita Gour is an associate at Trilegal. The authors would like to thank Ekjot Dang, Mahima Nair and Devesh Kumar – all lawyers at Trilegal – for their invaluable assistance.
2 https://www.bloomberg.com/news/articles/2022-09-02/uk-slips-behind-india-to-become-world-s-sixth-biggest-economy.
3 Indian Tech Start-up Funding Report (H1 2022), Inc42 https://inc42.com/reports/indian-tech-startup-funding-report-h1-2022/#:~:text=With%20900%20funding%20deals%20totalling,reached%20an%20all%2Dtime%20high.
4 Mergermarket data, https://members.mergermarket.com/india-ma.
5 ibid.
6 ibid.

and Clovia (an e-commerce player) for US$125 million.[7] Following the exit of Tiktok from the Indian market due to the tightening of regulatory policies concerning Chinese start-ups in India, the Indian short video company (Mohalla Tech), which operates the apps Sharechat and Moj, acquired another short video app company, MxTakatak, for US$700 million.

Some notable themes of dealmaking that emerged during the year include:

a consolidation among start-ups, with Zomato's acquisition of Blinkit, a grocery delivery platform, for US$569.28 million and Shiprocket's acquisition of e-commerce logistics provider Pickr for US$200 million;

b an increase in the average size of late-stage technology deals in 2021, relative to 2020;[8] and

c while 2020 witnessed a slowdown in early-stage technology deals, funding for early-stage start-ups appears to be re-emerging.[9]

In forward-looking deal developments, the Competition Commission of India (CCI) recently approved payments service provider PayU's US$4.7 billion acquisition of online payments firm BillDesk.[10]

III LEGAL AND REGULATORY FRAMEWORK

The legal and regulatory framework governing M&A broadly comprises the Companies Act 2013 (the Companies Act), which, among other things, regulates M&A and the general governance of companies and is administered by the Ministry of Corporate Affairs (MCA), Government of India (GoI); securities laws that regulate acquisitions and takeovers of listed companies, as well as listing and delisting norms, and are administered by the Securities and Exchange Board of India (SEBI); and the Foreign Exchange Management Act 1999 (FEMA), which regulates foreign capital flows and is administered by the Reserve Bank of India (RBI) and the GoI.

The past year has witnessed significant developments in the legal framework governing the technology sector. Certain key developments include the following.

i E-commerce

The regulatory framework in relation to e-commerce entities has evolved over time. To boost investment in the sector, the GoI has, over the years, liberalised the regime for marketplace e-commerce and single-brand retail trading. This has often been met with opposition from smaller traders and retailers. Accordingly, the GoI has had to carry out a balancing act between its objectives of developing the e-commerce sector and protecting the interests of small traders and retailers. The result has been a policy pursuant to which e-commerce entities are permitted to act as marketplaces but not to sell products to customers directly or

7 Indian Tech Start-up Funding Report (H1 2022), Inc42 https://inc42.com/reports/indian-tech-startup-funding-report-h1-2022/#:~:text=With%20900%20funding%20deals%20totalling,reached%20an%20all%2Dtime%20high.

8 https://www.business-standard.com/article/companies/late-stage-technology-deals-at-an-all-time-high-in-india-ivca-ey-report-121090800568_1.html.

9 ibid.

10 https://www.livemint.com/news/india/cci-clears-payu-s-4-7-billion-acquisition-of-billdesk11662384459930.html.

have any control over inventory. On account of differing interpretations of such regulations, a complex loop has developed where regulations are tweaked and the e-commerce entities, in turn, modify their business models to address such tweaks, while the GoI looks to further curb potential loopholes in the revised business models.

The most significant development in the recent past is the launch of the Open Network for Digital Commerce (ONDC)[11] by the Department for Promotion of Industry and Internal Trade (DPIIT). The ONDC is proposed to be an open and interoperable network allowing widespread participation of sellers and buyers in a decentralised space. The thrust of the effort is towards establishing an e-commerce platform where even brick and mortar stores can be onboarded and a buyer can access a larger pool of sellers, rather than only those who list themselves on specific e-commerce platforms such as Amazon and Flipkart. The ONDC launched a test run in April 2022 in six cities in India, and it is yet to be seen how it disrupts the e-commerce space while making efforts to integrate the interoperability within the current e-commerce environment. The GoI is also reportedly in the final stages of preparing a new e-commerce policy,[12] following criticism from stakeholders and contrary viewpoints within different ministries over the previous draft of the e-commerce policy released in 2019 and the Consumer Protection (E-commerce) Rules 2020.

ii Antitrust

The merger control framework is primarily governed by the Competition Act 2002 (the Competition Act). Parties undertaking M&A activity must seek prior approval of the Competition Commission of India (CCI) for a transaction if thresholds, based on asset and turnover metrics, are breached.

Certain amendments to the current framework were proposed in August 2022 with an aim to tackle antitrust issues arising in the technology sector, which may have an impact on mergers and acquisitions in India going forward. One of the proposed amendments provides for a deal value threshold (i.e., transactions in the technology sector with a deal value in excess of 20 billion Indian rupees will have to be notified to the CCI). This threshold is applicable irrespective of the existing thresholds for the target's asset value and turnover being met.

In March 2022, the MCA extended the *de minimis* exemption for an additional five years, until March 2027.[13] Businesses are exempted from obtaining prior merger control approvals if the value of the target enterprise's assets in India is less than 3.5 billion Indian rupees or if its annual revenue is less than 10 billion Indian rupees.

On the enforcement front, the CCI initiated various investigations in 2021 and 2022 related to the technology sector. For instance, in December 2021, the CCI authorised an investigation against Apple for alleged abuse of dominant position with respect to the mandatory use policy of Apple's proprietary in-app purchase mechanism for using paid features.[14] In January 2022, it authorised an investigation into Google based on the claim

11 https://pib.gov.in/Pressreleaseshare.aspx?PRID=1814143.
12 https://www.business-standard.com/article/companies/e-com-policy-may-bar-e-marketplaces-from-selling-own-products-on-platform-122072501001_1.html.
13 https://egazette.nic.in/WriteReadData/2022/234300.pdf.
14 https://www.reuters.com/technology/exclusive-apple-hit-with-antitrust-case-india-over-in-app-payments-issues-2021-09-02/.

that it is abusing its position through a unilateral method of determining advertisement revenue to be shared with online news publishers and using news publishers' website snippets in its search results without sharing adequate revenue.[15]

Further, in December 2021, the CCI suspended the approval granted in 2019 for Amazon's acquisition of a 49 per cent stake in Future Coupons Private Limited,[16] on the basis that Amazon suppressed information while seeking approval for the transaction. The CCI imposed a penalty of US$25 million for Amazon's failure to notify the combination in the requisite terms and also imposed two penalties of US$125,000 each for suppressing the actual scope and purpose of the combination. This order of the CCI was upheld by the National Company Law Appellate Tribunal[17] and is currently pending challenge before the apex court.[18]

iii Digital payments

The digital payments industry continues to be a key contributor to India's growth story and has witnessed multiple developments in the past year with considerable focus on innovation, increasing competition and user safety. A key intermediary in the payments space is the National Payments Corporation of India (NPCI), set up by the RBI and the Indian Banks Association, with all major banks in India being shareholders.[19] As part of its responsibilities of providing infrastructure for payment and settlement systems and bringing innovations in retail payment systems, the NPCI has launched RuPay (India's indigenous card payment network), the immediate payment service (IMPS) and the unified payments interface system (UPI). Within the existing NPCI framework, volume-caps on third-party app providers (TPAPs) like Google Pay and PhonePe have been imposed to ensure that the total transaction volume initiated through a TPAP does not exceed 30 per cent of overall transactions processed in the UPI during the preceding three months. A detailed standard operating procedure has also been issued by the NPCI for ensuring compliance with the volume caps.[20]

The NPCI is also planning to make the UPI a cross-border payment platform, making it a home-grown alternative to SWIFT.[21] The UPI also signed a memorandum of understanding with France, adding it to the list of countries including Singapore, the UAE, Bhutan and Nepal to adopt its payment system.

As a measure of enhancing competition and the decentralisation of systems, the RBI is in the process of enabling the participation of private players in developing additional

15 https://www.thehindu.com/news/national/cci-orders-probe-into-googles-alleged-abuse-of-position-in-online-news-market/article65260335.ece.

16 https://economictimes.indiatimes.com/industry/services/retail/competition-commission-suspends-amazons-2019-deal-with-future-citing-suppression-of-information/articleshow/88342181.cms?from=mdr.

17 https://economictimes.indiatimes.com/industry/services/retail/amazon-future-coupons-case-nclat-upholds-cci-order-directs-e-commerce-giant-to-pay-rs-200-crore/articleshow/92172736.cms?from=mdr.

18 https://www.livemint.com/companies/news/amazon-files-petition-against-nclat-ruling-in-future-case-11659077520704.html.

19 www.npci.org.in/who-we-are/about-us (For banks' shareholding, see: www.npci.org.in/PDF/npci/corporate-governance/shareholding-pattern.pdf).

20 Standard Operating Procedure (SOP) – Market Share Cap for third Party Application Providers (TPAP), 25 March 2021.

21 https://www.business-standard.com/article/economy-policy/alternative-to-swift-npci-plans-to-take-the-upi-system-to-32-million-nris-122070600175_1.html.

payment systems, through new umbrella entities (NUEs).[22] These NUEs will, among other things, be responsible for setting up and operating new payment systems and payment methods in addition to those launched by the NPCI. Several banks, fintech companies and foreign investors have expressed interest in setting up such NUEs.

IV KEY TRANSACTIONAL ISSUES

i Company structures

Corporate entities in India have traditionally been set up as private limited companies (having a minimum of two shareholders) or public limited companies (having a minimum of seven shareholders). In 2008 a third type of corporate structure was introduced in the form of limited liability partnerships (LLPs), which combines characteristics of partnerships with those of limited liability corporations. However, there are still certain ambiguities associated with regulations pertaining to LLPs. Accordingly, limited companies tend to be the most common form of corporate entity.

Historically, a number of Indian businesses have been set up with an overseas holding structure (with Mauritius and Singapore being the preferred jurisdictions), on account of the relative ease of raising and pooling overseas capital and flexibility in listing in overseas jurisdictions, as well as to take advantage of preferential tax treatment available under bilateral tax treaties between India and such overseas jurisdictions. These advantages are getting neutralised on account of changes in the Indian regulatory and tax regime. This includes changes made to enable direct overseas listing of Indian companies, without having to first list on Indian bourses (while enabling provisions have been introduced in the Companies Act, detailed guidelines are awaited) and revisions to tax laws and a renegotiation of India's bilateral tax treaties with Mauritius and Singapore, which have curtailed the beneficial tax treatment on capital gains that was previously available for such overseas holding structures.

A parliamentary committee set up to review corporate laws in its recent report has made recommendations to introduce legislative provisions to amend the existing corporate laws to facilitate and regulate the special purpose acquisition company (SPAC) model.[23] It aims to introduce an enabling provision to recognise SPACs under the Companies Act, and to allow entrepreneurs to list a SPAC incorporated in India or domestic and global exchanges.

ii Deal structures

The choice of deal structure is largely driven by tax and commercial considerations. Stock acquisitions are the most prevalent form of deal structure. A stock purchase or a primary investment is the default mode of acquisition, unless there are specific considerations that merit a different mode of acquisition, such as an asset or business transfer, or merger.

Stock purchases tend to be the fastest and most straightforward method of getting a deal done. However, investments in certain sensitive sectors (including news broadcasting, telecom, insurance, defence and multi-brand retail) beyond prescribed thresholds require prior approval of the GoI, which could be time consuming. In the case of a publicly listed

22 Draft Framework for authorisation of a pan-India New Umbrella Entity (NUE) for Retail Payment Systems, 18 August 2020, RBI, www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11954&Mode=0.

23 https://www.mca.gov.in/bin/dms/getdocument?mds=bwsK%252FBEAFTV dpdKuv5IR5w%253D%253D&type=open.

company, an acquirer seeking to secure control in a publicly listed company or acquire a stake of 25 per cent or more is required to tender a public offer to further acquire at least an additional 26 per cent stake.

Business transfers are most often structured as a 'slump sale' (i.e., sale of a business undertaking as a going concern for a lump-sum consideration). These have tax advantages over transactions involving the transfer of individual assets, in that no goods and service tax is payable. Relative to stock purchases, business transfers tend to be more complicated and time consuming, given that these typically require consent from business counterparties and local government authorities (including for transfer of real estate, etc.). Business transfers also tend to involve a higher incidence of stamp duty compared to stock purchases.

Mergers have a distinct advantage in that these can be structured as cash and tax neutral transactions. However, their implementation involves a process before a quasi-judicial body – the National Company Law Tribunal, which can be time consuming relative to the other structures.

iii Acquisition agreement terms

Consideration

Consideration for an M&A transaction may be discharged by payment of cash or otherwise, depending upon tax and commercial considerations. Cash deals are most common, although mergers are predominantly implemented in a cash-neutral manner, through exchange of stock. Besides mergers, there are regulatory limitations pursuant to Indian exchange control regulations on structures involving non-cash consideration (including share swaps and the like) that limit structuring options in cross-border M&A deals. In addition, these regulations prescribe conditions for the pricing of share deals, and require discovery of a 'fair value' by independent accountants, with that fair value acting as a floor for consideration that can be paid by an overseas acquirer to an Indian seller, and as a cap for consideration that can be paid to an overseas seller by an Indian acquirer. Deferral of consideration is often resorted to, although Indian exchange control regulations limit the quantum and time period for any such deferral to 25 per cent of the total consideration and 18 months from execution of definitive agreements, respectively.

Pricing mechanism and earn-out

The completion accounts mechanism, with adjustments for working capital and net debt levels, is commonly used for price adjustments in private M&A transactions. Locked-box pricing has been gaining traction in instances where the seller possesses bargaining power, such as in auction sales, although it is more commonly resorted to in sectors where the target has a steady and predictable revenue stream. Earn-outs are also utilised as a tool to bridge valuation gaps between the seller and the purchaser and are often resorted to in technology deals, although there is limited flexibility on account of exchange control regulations imposing limitations on the quantum and time period for deferral of consideration.

Warranty and indemnity

Warranty and indemnity insurance is at a relatively nascent stage in India. However, the market for such insurance products is growing rapidly, particularly given the increase in stressed asset acquisitions. Policy premium has witnessed a downward trend, making these products more attractive, especially in transactions involving start-up promoters or private equity investors looking to exit without tail liabilities. For deals that are not backed by warranty and indemnity insurance, seller indemnity obligations are sometimes secured by escrow arrangements. These face similar limitations as to quantum and time period as those applicable to deferred payments under Indian exchange control regulations.

Break fee

Break fees are a matter of commercial negotiation. While not uncommon, break fees are not the norm for M&A transactions in India. Broadly, such fees are enforceable where the quantum is determined as a compensation for the cost and effort spent on a transaction. On the other hand, fees that assume the nature of a penalty are likely to be struck down by Indian courts. Reverse break fees are rare and generally limited to auction sales.

iv Financing

It is common to see financing for M&A transactions through equity, debt or a combination of the two. Both modes of funding are available for domestic as well as foreign acquirers. Foreign acquirers, however, are restricted from pledging shares of the Indian target entity for obtaining acquisition financing. For a domestic acquirer, while acquisition financing from banks is prohibited, they have the option of approaching non-banking financial companies (shadow banks for this purpose).

v Tax and accounting

The chief tax consideration in M&A deals is the levy of capital gains tax, which is applicable on transfers of capital assets situated in India and governed by the Income Tax Act 1961 (ITA), as well as double tax avoidance treaties, which India has entered into with specific jurisdictions.

Capital gains tax is computed on the difference between the sale consideration and the costs of acquisition. Further, depending on the holding period of the capital assets, capital gains are taxed as short-term capital gains[24] or long-term capital gains, with short-term capital gains attracting a significantly higher rate of tax.[25]

Additionally, transactions involving transfer of shares of a foreign company, which derive their value substantially from assets located in India,[26] are susceptible to capital gains tax in India as indirect transfers. The GoI's stand on retrospective taxation of indirect transfers has been a cause of concern for foreign investors. Pursuant to a Supreme Court ruling disallowing a tax demand on indirect transfers,[27] the GoI specifically amended the ITA in 2012 to permit retrospective taxation of M&A deals that substantially derive their value from

24 For transfer of securities listed on any recognised stock exchange in India, short-term capital gains arise if such asset is held for a period of 12 months or less, and, in the case of transfer of unlisted securities in India, short-term capital gains arise if such asset is held for a period of 24 months or less.

25 For transfer of securities listed on any recognised stock exchange in India, long-term capital gains arise if such asset is held for more than 12 months and, in the case of transfer of unlisted securities in India, long-term capital gains arise if such asset is held for more than 24 months.

26 As per Section 9, Income Tax Act 1961, a foreign company's share or interest is said to derive its value substantially from underlying Indian assets, if the value of such Indian assets exceeds 100 million rupees and constitutes 50 per cent of the total value of assets owned by that foreign company.

27 *Vodafone International Holdings BV v. Union of India* [2012] 1 SCR 573.

assets in India. Recently, the GoI amended the tax regime to scrap retrospective taxation on indirect transfer (i.e., no M&A transaction involving an indirect transfer of shares in India, which was concluded prior to the 2012 amendment, would be subject to capital gains tax).[28]

Further, taxation of technology companies that shift their bases and offices to low tax jurisdictions has also been debated intensely, nationally and globally. In this regard, the GoI imposed an equalisation levy of 2 per cent on the consideration receivable by a non-resident e-commerce operator from supply or services made, provided or facilitated to Indian residents and non-residents (where an Indian internet protocol address is involved).[29]

Further, the ITA has been amended to add 'significant economic presence' as a criteria to tax a non-resident entity, with recently notified thresholds[30] (i.e., generating more than approximately US$267,000 in a financial year) from transactions in respect of any goods, services or property, including provision of download of data or software in India, or where such non-resident entity through systematic and continuous business activities is soliciting or engaging in interaction with more than 300,000 users in India.[31] It remains to be seen how the global minimum tax negotiations under the Organisation for Economic Co-operation and Development and G20 initiative will impact these developments.

vi Cross-border issues

Foreign direct investment (FDI) in India is permitted through the automatic route (i.e., without prior government approval) and the approval route. Investment in most sectors falls under the automatic route, other than certain sensitive sectors, where investment beyond a certain threshold of ownership requires prior government approval. Foreign investment in the technology sector and allied sectors (other than telecom and news broadcasting services) is permitted through the automatic route.

Deals involving the issuance or transfer of securities to a non-resident are subject to the determination of 'fair value' in accordance with pricing guidelines under the foreign exchange regulations (discussed in Section IV.iii). These guidelines do not apply to transfer of securities between non-residents.

In 2020, pursuant to an amendment to the FDI policy, the GoI mandated prior government approval for investments from acquirers based out of a country that shares a land border with India (i.e., China (including Hong Kong), Nepal, Bhutan, Bangladesh, Myanmar, Afghanistan and Pakistan) or from entities that have their 'beneficial ownership' in these jurisdictions. This position has now been entrenched into several corporate laws, and notably, directors in any company who are nationals of a country that shares a land border with India now require security clearance from the Ministry of Home Affairs of the GoI.[32]

On the other hand, there have been certain relaxations in the FDI policy for specific sectors, including telecom, with investments now permitted up to 100 per cent of the share capital of the target company under the automatic route.

28 The Taxation Laws (Amendment) Act 2021, https://egazette.nic.in/WriteReadData/2021/228986.pdf.

29 Part VI, Chapter VI, the Finance Act 2020.

30 Effective from 1 April 2022.

31 Section 9, Income Tax Act 1961 read with notification No. GSR 314(E) dated 3 May 2021 issued by the Central Board of Direct Taxes.

32 https://www.mca.gov.in/bin/dms/getdocument?mds=1QPa%252Fckqk4ob6rHXFQrVew%253D%253D&type=open.

V IP PROTECTION

India is a party to various international intellectual property (IP) conventions, including the Paris Convention for Protection of Industrial Property (the Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Work, and has modelled its domestic IP legislations accordingly. Under the Indian IP regime, copyrights enjoy protection without any registration requirements. Similarly, while registration of trademarks is provided under the IP framework, unregistered marks can also be protected through common law or contractual obligations. Patents are protected by domestic statute with additional protection under international conventions, such as the right of priority under the Paris Convention, given to an applicant filing a patent application. Other key elements of IP – know-how and trade secrets – are not protected under specific legislation but are recognised under common law and can be protected through contractual obligations. The 161st parliamentary committee report, 'Review of the Intellectual Property Rights Regime in India', was released in July 2021, with the committee making several recommendations to review the IP regime in India. In April 2022, the same parliamentary committee presented its 169th Report on actions taken by the GoI on the 161st report recommendations.[33] Some of the actions taken in relation to the recommendations as per the report, are: (1) the GoI is set to initiate consultations with stakeholders to establish a Central Coordination Committee as recommended by the committee in July 2021 to deal with counterfeiting and piracy; (2) the GoI has clarified its stance that AI innovations cannot be granted IP protection, and protection can only be granted to works authored by natural persons under the Copyright Act 1957; and (3) the GoI has consulted with stakeholders to specifically address the issue of simplifying the procedure of trademark filing and registration in drafting a prospective amendment to the Trade Marks Act 1999.

To streamline the adjudication of IP disputes, the Delhi High Court has notified the Intellectual Property Rights Division Rules 2022.[34] These rules were notified in the backdrop of recent abolition of Intellectual Property Appellate Board. Now, a separate division of the Delhi High Court will entertain matters pertaining to IP protection. One of the key developments pertains to mandatory mediation, which may be ordered by the court in its discretion to settle cases outside the adjudication process expediently.[35] The parliamentary committee referred to above has also recommended that similar rules be issued to set up similar IP divisions across all high courts in the country.

VI EMPLOYMENT ISSUES

The labour welfare framework in India is presently undergoing an overhaul pursuant to the introduction of four new labour codes framed with the intention of simplifying compliance by reducing the number of legislations, registrations and implementing authorities. Notably, the codes recognise gig workers, platform workers and home-based workers and enable the framing of social security schemes for such workers. The codes also seek to increase the statutory benefits payable to contractual and fixed-term employees and significantly increase

33 https://rajyasabha.nic.in/rsnew/Committee_site/Committee_File/ReportFile/13/159/169_2022_4_16.pdf.

34 Delhi High Court Intellectual Property Rights Division Rules, 2022 https://egazette.nic.in/WriteReadData/2022/233739.pdf.

35 Rule 37, Delhi High Court Intellectual Property Rights Division Rules, 2022.

penalties for non-compliance. The codes were meant to be notified on 1 July 2022; however, the roll-out of these codes is currently in abeyance as state legislatures are still in the process of formulating rules to implement these codes in their respective jurisdictions.[36]

M&A deals require careful consideration of employment issues and labour law compliance. Employees and their IP is key to technology companies, and transaction documents often provide for non-compete and non-solicitation covenants on the outgoing management, protection of trade secrets or other commercially valuable information. Indian law places restrictions on the scope of post termination non-compete provisions, other than in transactions involving a sale of business goodwill and the structuring and scope of such provisions require detailed consideration.

Employee incentivisation is also a key focus area in M&A deals – these are mostly implemented through employee stock option programmes (ESOPs). Under company law, such stock options can only be issued to permanent employees and directors of a company but not to promoters and directors who hold more than 10 per cent of the outstanding equity shares of the company.[37] However, certain start-ups are exempt from the restriction on issuing stock options to promoters and directors for a period of 10 years from the date of their incorporation or registration. For employees engaged with a foreign company or working for Indian subsidiaries of a foreign company, the foreign exchange laws permit acquisition of shares under ESOP schemes put in place by that foreign company for its global employees.

VII DATA PROTECTION

At present, there is no dedicated legislation dealing with data protection and privacy, with the existing regime finding its source in specific provisions of the Information Technology Act 2000. Pursuant to this act, regulations have been formulated requiring entities to put in place accredited security practices and procedures for the collection, storage and transfer of personal data. At the same time, India is in the midst of overhauling the regime by introducing dedicated data privacy legislation.

The Personal Data Protection Bill 2019 (the PDP Bill), which was similar in many respects to the European Union's General Data Protection Regulation, had been hotly debated. However, seemingly in light of the many unresolved points of contention in the PDP Bill (such as provisions around data localisation, regulation of non-personal data and the exemption of government authorities from several of its provisions), the PDP Bill has been withdrawn in its entirety. However it has been reported that a new data protection bill will be introduced by the GoI in the near future.

The regulatory regime for intermediaries has also changed significantly. Pursuant to, among other things, growing concerns around risks of malicious 'fake news', the GoI enacted the Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules 2021 (Intermediary Rules). These primarily aim to (1) increase accountability of social media platforms (such as Facebook, Instagram and Twitter); (2) introduce a three-tier redressal mechanism; and (3) regulate digital media. The provisions placing the onus on social media platforms to identify originators of information have come under some criticism, with platforms contesting that such provisions would require breaking end-to-end encryption,

36 https://economictimes.indiatimes.com/news/economy/policy/labour-codes-face-delay-as-states-fail-to-frame-rules/articleshow/81317732.cms?from=mdr.

37 Rule 12, Companies (Share Capital and Debenture) Rules, 2014.

thereby compromising users' privacy. Further, the rules also require significant social media intermediaries to appoint officers resident in India who are in charge of securing compliance and consumer redressal.

VIII SUBSIDIES

The GoI has introduced various schemes to attract investors and usher growth, such as special economic zones (SEZs), export-oriented schemes and software technology parks. These offer wide-ranging tax benefits, including duty-free enclaves offering a 100 per cent income tax exemption on export revenue for the initial five years and 50 per cent for the next five years.

In addition, the International Financial Services Centre (IFSC) at the Gujarat International Finance Tech (GIFT) City has been envisaged by the GoI and government of Gujarat as a global financial and technology hub. Entities looking to set up base in the GIFT City are entitled to several benefits, including a 10-year tax holiday on 100 per cent of profits, a minimum alternate tax (MAT) of 9 per cent of profit-booking, no goods and services tax on goods and services supplied to overseas clients, and no capital gains tax.[38]

In early 2021, the GoI also implemented the Production Linked Incentive Scheme for electronic and technology products specifically to attract investment in the electronics manufacturing sector. The scheme, among other things, extends an incentive ranging from 1 per cent to 4 per cent on net incremental sales of goods manufactured in India for a period of six years and will be in place till 2026.[39]

A significant step towards strengthening India's position in electronics manufacturing has been taken with the India Semiconductor Mission, with a government-approved outlay of US$760 billion for developing semiconductors and display manufacturing facilities and the semiconductor design ecosystem in the country. The state of Gujarat in India issued its semiconductor policy with significant subsidies to attract investors, and reportedly, the Vedanta Group has partnered with Taiwan's Foxconn to invest US$19.5 billion to set up semiconductor plants in Gujarat.[40]

IX DUE DILIGENCE

While the extent of diligence depends on several factors, including the mode of acquisition and deal dynamics (including the competitive nature of the bid), for tech M&A, conducting IP diligence of the relevant technology is essential. Information about the target's IP, including confirmation of title, can to some extent be obtained from public databases maintained by relevant IP authorities established by the GoI. Further, a public database search is also required to identify litigation involving the target entity. While the process of digitisation of court records has been initiated at the higher judiciary levels, the number of courts and tribunals and the lack of a central database make the task of finding details of litigation difficult and time-consuming. Thus, primary reliance is generally placed on information provided by the target and sellers.

38 www.giftgujarat.in/tax-benifits.

39 https://www.meity.gov.in/writereaddata/files/Notification_Extension_of_PLI_Scheme_23-09-2021.pdf.

40 https://www.reuters.com/world/india/vedanta-foxconn-sign-mou-with-modis-home-state-20-bln-chip-foray-2022-09-13/.

X DISPUTE RESOLUTION

Parties to M&A transactions in India generally prefer arbitration as a mode to resolve disputes given the time and cost efficiencies, confidentiality and procedural flexibility involved, especially in cross-border transactions.

India is a signatory to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the NY Convention), and the Indian Arbitration and Conciliation Act 1996 (ACA) provides for enforcement of foreign arbitral awards based on the principle of reciprocity, which currently extends to around 48 contracting states to the NY Convention.[41]

The GoI has been taking steps to introduce legislation around cross-border insolvency resolution and has invited public comments to its report recommending incorporation of several provisions of the UNCITRAL Model Law on Cross-Border Insolvency 1997 into domestic insolvency legislation.[42]

XI OUTLOOK

Covid-19 has accelerated digitisation and permanently transformed the way of conducting business across sectors. Deal volumes in the first half of 2022 are indicative of a promising road ahead for the technology sector. Several successful exits, especially in the technology sector, such as Sequoia's exit from 1mg (e-pharmacy) and Softbank's exit from BigBasket (online grocery store), both acquired by the Tata Group, are also indicators of the health and maturity of the ecosystem. The growth of the technology sector should also fuel interest in the allied businesses (such as data centres, warehousing and logistics service businesses). Regulators in India now have an important role to play in facilitating the growth of the technology sector by focusing on legitimate control over anticompetitive practices, while steering clear of overreach and protectionist measures.

41 https://library.iccwbo.org/content/dr/COUNTRY_ANSWERS/CA_3erEd_India.htm?l1=Country+Answers&l2=India; https://www.newyorkconvention.org/list+of+contracting+states.

42 https://www.mca.gov.in/bin/dms/getdocument?mds=0hVFo4x3MM7YCWEE9nXqAA%253D%253D&type=open.

Appendix 1

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