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ELP KNOWLEDGE SERIES

India Update

Part 2 of 2019

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FOREWORD

Dear Reader,

We welcome you to the latest edition of ELP Knowledge Series, a quarterly analysis of curated topics pertaining to critical legal and regulatory developments that can create risk for businesses in India.

With a distinct focus on governance, this iteration of 'India Update – Part 2 of 2019' examines key attributes of audit governance framework in India through creation of the National Financial Reporting Authority, emerging role of forensics in due diligence and compliance heath audits.

We also share our perspective on emerging issues around REITs, hostile takeovers, indirect tax considerations in M&A transactions, corporate succession planning and the increased role of mediation in India's efforts to promote alternate dispute resolution.

We conclude by discussing the mitigation strategies that businesses can deploy for managing supply chain risks emanating from global trade developments, legal considerations in commercial applications of drones and competition law concerns permeating India's pharmaceuticals sector.

We hope you will find this information helpful. For any comments, clarification or further information, please connect with your point of contact at ELP or reach out to us at insights@elp-in.com.

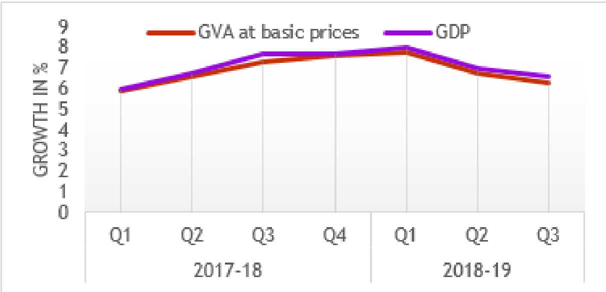
Regards,

Team ELP

INDIAN ECONOMY - A SNAPSHOT

ECONOMIC GROWTH

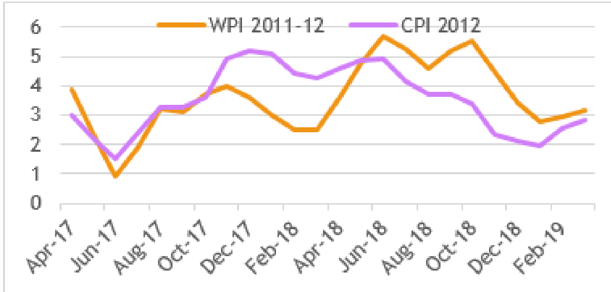
Quarterly Growth of GDP and GVA (%) at constant '11-12 prices



Source: Central Statistical Organisation (CSO)

INFLATION

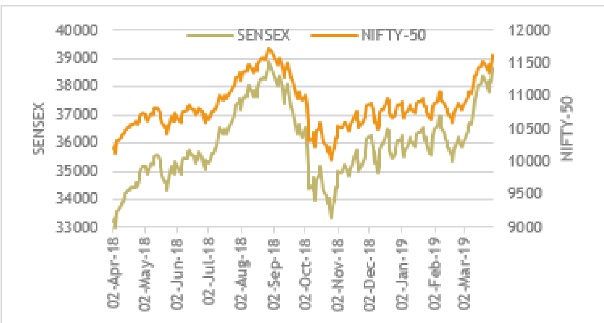
Inflation in WPI and CPI (%)



Source: Office of Economic Adviser- DIPP and CSO

SHARE MARKET

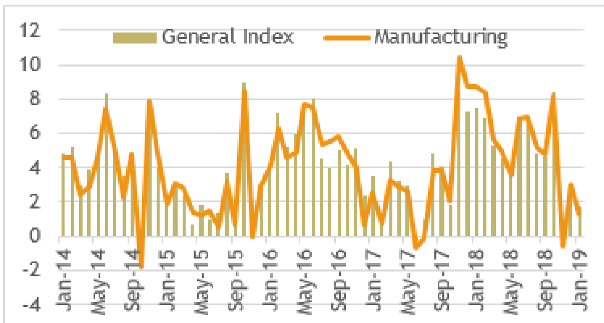
SENSEX and NIFTY-50



Source: BSE and NSE

PRODUCTION GROWTH

Index of Industrial Production (IIP) growth in %

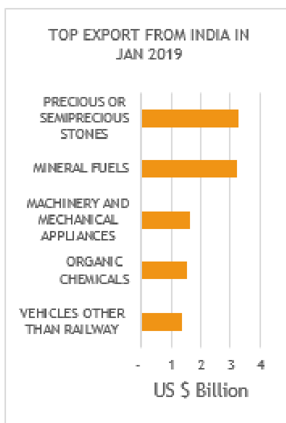


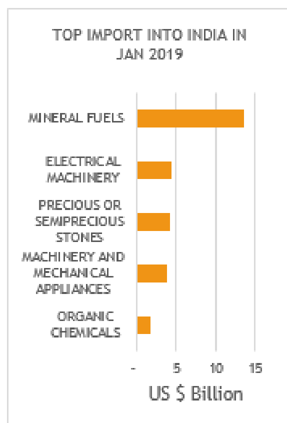
Source: CSO

EXTERNAL TRADE

Source: Ministry of Commerce

MAJOR GOODS TRADED





Source: Ministry of Commerce

The National Financial Reporting Authority – A case of new audit governance In India

The Standing Committee on Finance's 21st Report on the Companies Bill, 2009, recommended the need for an independent body to monitor the quality of audit undertaken across the corporate sector in India. Following the recommendation and in consonance with the global best practices, the National Financial Reporting Authority (**NFRA**) was first provided recognition under section 132 of the Companies Act, 2013 (**Act**). In a related development, the Apex Court, in the matter of S. Sukumar v/s The Secretary, Institute of Chartered Accountants of India, ordered the Government of India to constitute a committee (**Committee**) to look and deliberate into the aspects of audit system in India. The Committee submitted its report on October 25, 2018 (**Report**), and thereafter, within a span of a little over two weeks, the Ministry of Corporate Affairs, on November 13, 2018, notified the National Financial Reporting Authority Rules, 2018 (**Rules**) to lay down the powers, jurisdiction, roles, and duties of the NFRA.

The NFRA is meant to act as the watchdog for protecting public interest and interests of investors, creditors and others associated with the companies or bodies corporate falling within its purview. This article analyzes key attributes of NFRA and its remit of curbing audit mishaps and bringing in stronger audit framework in India.

NON-OBSTANTE AND PENALIZING POWERS OF THE NFRA

As things stand today, there are several regulators overseeing the audit governance of companies (NFRA, ICAI, MCA, SEBI). However, the Act has given NFRA over-riding powers to establish its supremacy over other laws with respect to its various functions and powers, such as recommendations for accounting and auditing standards, enforcement of compliance with accounting and auditing standards, overseeing of professionals in this sphere, investigation into professional misconducts and imposingpenalties and debarment. The ambiguity created by multiple regulators needs to be addressed to ensure optimal progress in the process of cleaning up the audit governance in India.

JURISDICTION OF THE NFRA: PRIVATE COMPANIES OUSTED, EXTRA-TERRITORIAL APPLICABILITY

As provided by the Rules, the NFRA will regulate accounting, audit standards and quality of service of auditors of:

- Listed companies whose securities are listed on any stock exchange in India or outside India Certain unlisted public companies having paid-up capital of not less than INR 500 Crore, or an annual turnover of not less than INR 1000
- Crore, or aggregate outstanding loans, debentures and deposits of not less than INR 500 Crore as on the March 31st of immediately preceding financial year
- Companies governed by other regulators (insurance, banking, power generation, companies governed by any special statute)
- Entities referred by Central Government
- Offshore associate or subsidiaries of the aforementioned entities, and any body-corporate incorporated or registered outside India which is a subsidiary or associate company of any of the aforementioned entities if income or net worth of such subsidiary or associate company exceeds 20% of the consolidated income or consolidated net worth of the relevant entities

INVESTIGATIVE POWERS: ICAI AND NFRA'S POWERS TO TAKE DISCIPLINARY ACTIONS

The NFRA has the power to investigate all cases of professional or other misconduct against auditors of all companies who fall within its purview. It can conduct investigations into any matter of professional or other misconduct in case of:

- A reference from the Central Government
- Pursuant to its compliance or oversight activities
- Suo motu investigations

These powers are quite wide in scope and will require clear parameters for their exercise. The NFRA is empowered to review financial statements of the entities falling within its purview, for the purpose of monitoring and enforcing compliance with accounting standards. It can also direct such entities as well as their auditors to provide further information or explanation or any relevant documents, and direct auditors to take measures for improvement of audit quality, including changes to the audit processes, quality control, and audit reports.

It is noteworthy that no other institute or body can initiate or continue any proceedings in such matters if NFRA has initiated an investigation. All cases of professional or other misconduct against auditors of companies or body corporates who do not fall within the ambit of the NFRA shall be dealt with ICAI, unless a specific reference is made to the NFRA by the Central Government.

DISCIPLINARY PROCEEDINGS AGAINST AUDITORS AND AUDIT FIRMS: RESPONSIBILITIES OF PARTNERS/ EMPLOYEES

The Rules have empowered the NFRA to initiate disciplinary proceedings not just against individual auditors but also audit firms – which addresses one of the critical limitations of ICAI – based on the reference received from the Central Government or findings of its monitoring or enforcement or oversight activities, or on the basis of material otherwise available on record. Upon initiation of such action against the firm, it is required to disclose names of the concerned partners, whether erstwhile or present, who shall be responsible for answering the allegations. If no partner names are disclosed, the entire firm – all partners and employees –as on the date of occurrence of alleged misconduct will be responsible for answering the allegations. This may result in heavily negotiated employment contracts of top officials meant to limit their personal liability.

PENALTIES

In case professional or other misconduct has been proven with respect to a person/entity falling within its ambit, the NFRA can:

- Impose a penalty of not less than INR 1,00,000, which may extend to 5 times of the fees received, in case of individuals
- Impose a penalty of not less than INR 5,00,000, which may extend to 10 times of the fees received, in case of firms
- Debar individuals or firms from practice as member of the ICAI for a minimum period of 6 months or for such higher period not exceeding 10 years in case a professional or other misconduct has been proven with respect to itself

ABSENCE OF NETWORK LIABILITY IN THE RULES

The Committee had considered the concept of auditor and audit firm operating in India as a member/part of an international network and made below recommendations:

- **Monetary penalties on international network/entity:** The Committee recommended imposition of civil liability in the form of monetary penalties on the international network/entity with whom the Indian audit firm has entered into networking/membership arrangement, if any audit failure or fraud is found to have been caused due to any faulty methodology being followed by that particular network. The penalty could be up to 5 times the amount of penalty imposed on the audit firm

- **Annual Transparency Report to the NFRA:** Another recommendation from the Committee was that every auditor and audit firm which is operating in India as a member/part of an international network, must submit an annual transparency report to the NFRA.

In a curious twist, both these recommendations are missing from the Rules, which may prove counter-productive considering the significant influence of such networks in the country's audit governance space.

CONCLUSION

Whilst the aforementioned efforts look commendable, they are delayed in their introduction. As an independent audit regulator, it will be expected that the NFRA enhances an investor's confidence and bring more transparency and accountability in the auditing profession. Although the NFRA is mandated to not publish proprietary or confidential information, however, at the same time, it is given the power to do so in the public interest if it has reasons for the same. It is a power that will need to be exercised with great caution given the potential for significant reputational damage. As we see more complex and multi-layered structures and increased corporate governance, it will be interesting to see the implementation and effectiveness of the NFRA vis-à-vis the increased roles and responsibilities of auditors.

Article published in Business World

Hostile takeovers in India – A brief overview

Hostile takeovers have been a staple of corporate life in many western jurisdictions, most notably, the United States. In the Indian context, however, such takeovers have been relatively rare given the fact that most Indian companies tend to be majority-controlled by promoters, which essentially ensures that hostile takeovers only occur in the limited context of a promoter block (or significant shareholder) selling its shares to third party.

Recent news about a hostile takeover being attempted in the country's IT sector has spurred keen interest in such transactions. While considering the legal regime for hostile takeovers in India, various questions emerge: When does a hostile takeover also trigger an open offer? Can the board of directors or the promoters employ 'poison pill' defences to prevent such a takeover? What is the role of the board of directors in such a scenario?

As things stand, there is not enough jurisprudence dealing with many of these issues. The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (**Takeover Regulations**) provide some guidance on such transactions and deal with the obligations of various stakeholders.

TRIGGERING AN OPEN OFFER UNDER THE TAKEOVER REGULATIONS

The regulations place certain obligations on an acquirer in the event of acquisition of shares of a listed company. The requirement of an open offer to other shareholders is triggered in the following circumstances:

- When an acquirer, together with persons acting in concert (**PAC**), intends to directly or indirectly acquire shares or voting rights in the target company, which will entitle them to exercise 25% or more of the voting rights – inclusive of pre-existing shareholding/voting rights – in the target company
- When an acquirer/PAC who holds between 25% and 75%[1] of the shares or the voting rights in the target company, further acquires shares in the target company in any financial year which increases their voting rights by an additional 5% or more
- When an acquirer/PAC gains direct or indirect 'control'[2] over the target company

The open offer is required to be for at least 26% of the total shares of the target company. The Takeover Regulations even permit an acquirer to make the open offer subject to a minimum level of acceptance.

STANDSTILL OBLIGATIONS AND SHAREHOLDER APPROVAL

The Takeover Regulations place obligations on the board of directors of the target company to ensure that during the offer period, the business of the target company is conducted 'in the ordinary course consistent with past practice'. This prevents the board from taking any 'ambitious' steps, such as employing a poison pill defence (a poison pill – also known as shareholder rights plan – may take several forms, including issuance of additional securities to existing shareholders, with the underlying goal of making the target company 'unattractive' by raising the cost of the proposed acquisition and reducing deal-certainty) to thwart a takeover bid.

Further, the Takeover Regulations require that during the offer period, the target company and any of its subsidiaries shall not take the following steps without a special resolution of the shareholders by way of postal ballot:

[1] The minimum public float of any listed public company in India is 25%, which means the promoter may hold a maximum of 75% in any listed public company in India. In certain cases, listed public companies are permitted to have a lesser minimum public float based on the size of the issue but even they are required to ensure that they comply with the minimum public float of 25% within 3 years from the listing of securities.
[2] The term "control" includes the right to appoint majority of the directors or to control the management or policy decisions by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.

- Alienate any material assets (including by way of lease or encumbrance) outside the ordinary course of business
- Effect any material borrowings outside the ordinary course of business
- Issue or allot any unissued securities entitling the holder to voting rights (though issue and allotment of shares pursuant to conversion of convertible securities issued prior to public announcement is permitted)
- Implement any buy-back of shares or effect any other change to the capital structure of the target company
- Enter into, amend or terminate any material contracts to which the target company or any of its subsidiaries is a party
- Accelerate any contingent vesting of a right of any person to whom the target company or any of its subsidiaries may have an obligation

This practically leaves the target company only with the 'white knight' defence – a competing offer to the shareholders by a person that is 'friendly' to the board or the promoters.

OBLIGATIONS OF THE BOARD OF THE TARGET COMPANY

The Takeover Regulations require the board of the target company to form a committee of independent directors (which is entitled to seek external professional advice) to provide reasoned recommendations on the open offer.

In Revlon, Inc. v MacAndrews & Forbes Holdings, the Supreme Court of Delaware held that when a hostile takeover becomes imminent, the role of the board of directors changes from being 'defenders of the corporate bastion' to 'auctioneers charged with getting the best price for the stockholders at a sale of the company'. In other words, in case of an imminent hostile takeover, the board of directors must seek to maximise the consideration payable to shareholders while considering any competing bids. This is also known as the 'Revlon Rule'.

The cardinal principle is that the board must act in the best interests of the shareholders at large and the company, rather than securing its own interests or the interests of any set of shareholders. Accordingly, it is imperative that the directors analyse the nature of the takeover and its effect on the company while making its recommendations on the open offer.

CONCLUSION

Recently, calls for SEBI (India's securities market regulator) to permit issuance of shares with differential voting rights (**DVRs**) have become shriller. DVRs, or dual class share structures, will enable companies to give higher dividends but no voting rights to one class of shares while allowing the other class to retain voting rights. This would enable companies to retain control while enabling them to raise capital. Such dual class share structures have been adopted by a number of technology companies in western jurisdictions. If Indian IT industry's first hostile bid is successful, it may encourage other acquirers sitting on cash to consider similar moves. Accordingly, it is pertinent for companies to consider taking steps that may dissuade potential acquirers.

Mediation as an effective alternate dispute resolution mechanism

Through the Code of Civil Procedure (Amendment) Act, 1999, Section 89 was introduced in the Code of Civil Procedure, 1908 (**Code**) which allowed a court to refer parties to arbitration, conciliation, judicial settlement including settlement through Lok Adalat or mediation. The constitutional validity of the said Amendment Act was challenged before the Supreme Court and while upholding the amendments, the apex court also impressed upon the need for alternate dispute resolution (**ADR**) in India[3].

In no uncertain terms, the apex court observed that all cases which are filed before a court of law need not be decided by the court itself. This was one of the earliest instances where a clear push towards ADR was exhibited by both the legislature and the highest judicial office after the enactment of Arbitration and Conciliation Act, 1996 (**Act**). Although used interchangeably at times, the Act provides statutory rules for Conciliation whereas Mediation remains predominantly a party driven process in which the disputing parties attempt to resolve their disputes before a neutral 'Mediator'.

Even though a possible set of mediation rules remain uncodified by way of a legislation in India, there are several laws which call upon disputing parties to explore mediation as a mechanism for resolving disputes:

- Section 30(1) of the Act explicitly states that an arbitral tribunal may use mediation as a method of settlement of dispute between the parties
- Industrial Disputes Act 1947, provides for mediation of industrial disputes by officers appointed by the government
- Section 442 of the Companies Act 2013 provides for referral of company disputes to mediation by the National Company Law Tribunal and Appellate Tribunal read with the Companies (Mediation and Conciliation) Rules, 2016 (notified on 09thSeptember, 2016)
- Section 12A of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015, provides for mandatory pre-institution mediation in those cases where no urgent interim relief (such as an injunction) is being sought by the parties to the dispute

ADVANTAGES OF MEDIATION

Perceivably, mediation avoids the drawbacks of any litigation, namely, delay, expenses and the rigidity of procedures. It's a process which indeed calls for an active party participation towards seeking an amicable solution.

- **Flexible approach given lack of procedural rigidity:** Courts have traditionally placed a great deal of emphasis on the application of defined procedures for dispensation of justice, resulting in increasing procedural rigidity. Mediation, on the other hand, recognizes that a 'Mediator' is not a judge but someone chosen by the disputing parties and has at his command, a set of flexible rules with the ultimate aim of resolution of issues without adherence to strict or highly technical rules of procedure, as may be followed before a court of law.

- **Party driven process:** Courts allow for a limited participatory role for parties. The adversarial system presumes the presentation of rival submissions from lawyers, involving conflicting views, necessary for the Court to investigate facts, determine law and arrive at outcomes which are in consonance with justice. While an individual client may get marginalized in a litigation, mediation on the other hand mandates an active participation from both parties and is initiated through consenting parties (although in some situations, it could be mandated through a court or the relevant

[3] Salem Bar Association, Tamil Nadu v. Union of India AIR 2003 SC 189

- **Reduced timelines:** One of the paramount reasons why mediation as an ADR has gained popularity in India is perhaps because of judicial delays. Even an arbitration process under the Act, may take a minimum of 12 to 18 months which can further be extended by a court of law and subsequently entail a scrutiny of the arbitral award and the necessary applications for enforcement of the award. Mediation promises a quicker resolution as parties do not have to go through the rigmarole of following a defined procedure and the process ultimately leads to a mutually agreeable result.

- **Rationalized expenses:** Any litigation before any court of law compulsorily requires the payment of a court fee, lawyers' fees and other expenses. In an arbitration, expenses may also entail costs of venue, tribunal's fees and costs and in certain cases, payment of an arbitral institutional fee as well. As against this, mediation may only involve a mediator's fees and only in some situations, will involve remittance towards an institution under the aegis of which a mediation may be conducted. The shorter time span of such proceedings further

INSTANCES OF MEDIATION IN INDIA

Given the above attributes, mediation as an ADR platform has been consistently gaining ground. Several noteworthy instances are recounted here:

- The apex court in the year 2011 laid emphasis on the confidential nature of a mediation proceeding and held that only an executed settlement agreement or alternatively a statement that the mediation proceedings were unsuccessful, should be provided to the court by the mediator.[4]
- Recently, in March 2019, the apex court in the Babri Masjid Demolition case called upon the parties to nominate mediators and subsequently reserved orders on the same[5]. After observing that the dispute primarily relates to a property, the court held that the issue could be resolved through mediation. However, the modalities and process to be adopted for such mediation remains to be seen.
- The Law Commission of India in its 129th Report recommended that it should be made obligatory for the Court to refer disputes to mediation for settlement. The report was referred in the apex court decision in *Afcons Infra Ltd v. M/S Cherian Varkey Constructions,* where the court held that all cases relating to trade, commerce and contracts, consumer disputes and even tortious liability could normally be mediated.[6]
- In a landmark decision in the case of *B.S. Krishnamurthy v. B.S. Nagaraj*, the apex court directed the Family Courts to strive to settle matrimonial disputes via mediation and to also introduce parties to mediation centers with consent of the parties, especially in matters concerning maintenance, child custody and the lot.[7]
- Indian pharmaceutical companies resorted to mediation as a method for dispute settlement regarding patent infringement in disputes involving *Hoffman La Roche*[8] and *Cipla and Merck and Glenmark*[9]

CONCLUSION

Over the years, mediation has certainly gained increasing prominence under the Indian jurisprudence. The 2015 amendment to the Act was a turning point and while it does not concern mediation per se, it certainly was indicative of a positive approach towards ADR in India. The past years have also seen several arbitral institutions coming up with their own procedures for arbitration and mediation. Undoubtedly, mediation as an ADR is highly advantageous to a country like India where a number of commercial disputes drag on for years. A quicker mechanism to resolve such disputes will not only benefit the parties but will go on to benefit the economy as well.

[4] Moti Ram (D) Tr. LRs and Anr. Vs Ashok Kumar and Anr (Civic Appeal No. 1095 of 2008)
[5] https://www.livemint.com/news/india/sc-suggests-mediation-option-in-ayodhya-case-1551200699002.html
[6] Afcons Infra Ltd v. M/S Cherian Varkey Constructions 2010 (8) SCC 24
[7] B.S. Krishnamurthy v. B.S. Nagaraj S.L.P. Civil) No(s).2896 OF 2010
[8] F.Hoffman La Roche Ltd. and Anr v. Cipla Ltd. 2015 SCC OnLine Del 13619 : (2015) 225 DLT 391 (DB)
[9] Glenmark Pharmaceuticals Limited v. Merck Sharp and Dohme Corporation and Anr 2015 (6) Supreme Court Cases 807:2015 SCC OnLine SC 493

Increasing role of forensics in due diligence

The famous contract law principle 'caveat emptor' – Buyer Beware – is often used in commercial transactions involving M&A and other financial and strategic investment deals. Information asymmetry between a buyer and seller necessitates robust due diligence exercise on targets and promoters pre and post such transactions. While traditional methods of due diligences help in uncovering broader business, financial and legal risks, recent times of increased liability of directors, calls for transparency, reporting requirements have magnified the relevance of micro-level due diligence.

Forensics has emerged as an important and effective tool for conducting comprehensive due diligences and helping investors have a microscopic view of target companies, their assets, liabilities, compliance gaps, suspicious transactions including those with related parties, investigations, shams, corporate frauds, if any. Following trends are noteworthy:

- **Post-closing compliance audit:** While pre-closing findings from a due diligence help an investor take an informed decision and allocate risk in transaction documents, it is important to also consider post closing compliance audits in light of sunset period associated with indemnity claims. Such an exercise also can be a mitigation tool for the company and/or the new owners to protect them from exposure to the risk of a continuing offence, as deemed knowledge could be attributable to them.
- **Criticality of electronic evidence:** During investigations, authorities first and foremost target the IT systems of the company to gather electronic evidence and bolster cases against individuals and organisations, more so in cases of competition, income tax, CBI and SFIO matters. While existence of back-up data in archives of a company could attribute knowledge and amount to deliberate concealment of facts, lack of diligence and failure to maintain appropriate risk management systems can trigger consequent liabilities. This makes it critical to identify any damaging data through a vendor diligence exercise.
- **Counterparty KYC and due diligence:** Another aspect that businesses need to consider is keeping checks and conducting appropriate KYC/due diligence on counterparties to contracts. If one is aware that its counterparty is engaging in any activity that could be considered as an offence of bribery, corruption or the like and the same is connected to the business of the entity in any manner whatsoever, non-disclosure of such information and continuing to deal with such counterparty could be construed as deliberate concealment and amount to abetting the offence, which is punishable under Prevention of Corruption Act, 1988.

Standard Bank case: This case demonstrates the consequences that can be faced by companies and/or their parent group for not following appropriate KYC/due diligence processes while consummating deals. Standard Bank Group Ltd, publicly owned company registered in South Africa was also the ultimate parent of Stanbic Bank Tanzania Ltd, a Tanzanian company based in Dar es Salaam ("Stanbic"). Stanbic was not licensed to deal with non-local foreign investors in the debt capital markets and such role was to be undertaken by Standard Bank. Standard Bank and Stanbic put forward a proposal by which they would be mandated to raise funds for the Government of Tanzania by way of a sovereign note private placement. Though the potential for corruption practices in this kind of a deal was huge, it was found that Standard bank had failed to prevent bribery and had not conducted KYC and due diligence on counterparties where obvious red flags for bribery risk were present.

It was found that applicable policies at Standard Bank did not provide sufficient specific guidance and the company did not undertake an enhanced due diligence exercise to deal with the presence of any corruption red flags regarding involvement of a third party in the said government transaction. The case was resolved through mechanism of a deferred prosecution agreement (DPA) and the requirements falling upon Standard Bank to fulfil were interalia payment of compensation of USD 6 million plus interest of USD 1,153,125, disgorgement of profit on the transaction of USD 8.4 million and payment of a financial penalty of USD 16.8 million.

- **Risk on nominee directors:** Investors and their nominee directors are increasingly insisting on regular audits and compliance health checks. Duties of directors as codified under Section 166 of the Companies Act, 2013 (Act) do not distinguish between an executive and a non-executive director, which increases the risk for the latter even when they have a rather limited role in day to day management. Although the term "officer in default" applies only to executive directors under the Act, independent and non-executive directors (including nominee directors) can also be held liable under section 149(12) of the Act if acts or omissions by a company: (i) occur with the knowledge of such independent and non-executive directors that are "attributable through board processes", and with the consent or connivance of such independent and non-executive directors; or (ii) where such independent and non-executive directors have "not acted diligently".

CONCLUSION

Companies routinely generate large amounts of information on a daily basis, which creates a digital footprint of possible compliance gaps that can prove damaging in subsequent investigations. The onus is on organizations to deploy effective tools – including forensic analysis – to discover such gaps in order to analyze and mitigate present and future risk.

Turbulence in global trade – Effective strategies for navigating through the headwinds

Let us start with some statistics about India's economy: (a) Starting from USD 452 billion in 1999, India's GDP crossed USD 2.6 trillion by 2017 – a growth of almost 6 times[10] during a period when global GDP increased by only 2.5 times; (b) Per capita income nearly trebled in the past two decades; and (c) Total exports from India (merchandise and services) have increased 8.73 per cent year-on-year in 2018-19 (up to February 2019) to reach USD 483.92 billion, while total imports have increased by 9.42 per cent year-on-year to USD 577.31 billion[11].

Such significant trade volume and capital flows underline the crucial role of foreign trade policy in country's economic growth. While these numbers are indeed impressive, they cannot be seen in isolation. The world is witnessing increasingly protectionist measures – in the past few years, we have witnessed significantly higher tariffs (including export taxes) and have experienced many trade barriers (including imposition of quality conditions, unreasonable/unjustified packaging, labelling and product standards, and requirement of additional trade documents like Certificates of Origin and Authenticity). This, compounded by the US-China trade dispute, uncertainty surrounding Brexit and a slowdown in China and Europe, has contributed to the lowest global trade volumes in 9 years.[12]

In this mileu, businesses are well advised to review their exposure to global trade risks from a supply chain perspective, input cost perspective and a broader regulation perspective, in order to ensure that effective response and mitigation strategies are in place.

EXPECTATIONS OVER THE SHORT AND MEDIUM TERM

- Tariff to continue either in the form of customs duties, along with the increase of trade actions such as anti-dumping, countervailing or safeguard actions
- Non-Tariff Barriers being built and introduced to disallow or frustrate the process, coupled with delay in licensing and clearing imports timing and increase in costs of goods
- Endeavors by other regulators include bringing in customs valuation investigations for changes in related party contracts and transfer pricing regulations
- Increase in restriction of data flow by way of compulsory storage of data locally, compulsory setting up of offices, mandated compliance of privacy, tax and audit compliances, all of which have high cost implications
- Over-regulating laws for the use of emerging technology such as Artificial Intelligence, Blockchain and IOT; restricting data flows on E-commerce and introducing privacy regulations irrespective of individual data or commercial data sets
- Tougher IPR regulations and restrictions on the transfer of technology restricting investments into strategic sectors or blacklisting the firms
- Country Sanctions including but not limited to export control sanctions which can impact the flow of trade and inward bound capital

STRATEGIES AND MITIGATION STEPS TO BE MINDFUL OF:

- **A fair assessment of costs pertaining to raw materials should be done. The following factors should be taken into consideration:** A fair assessment should of costs pertaining to raw materials should take the following factors into consideration:
  - Is it procured locally or internationally?
  - How many sources of inputs?
  - Expected availability and price patterns
  - Duties and taxes
  - Upcoming regulations and notifications which will have an impact on the raw materials or on the final product

  This will necessarily involve a detailed study of the businesses' supply chain so as to optimize costs along each element of the sourcing

[10] The World Bank
[11] The Ministy of Commerce, Government of India
[12] The World Trade Organisation

network. It is equally important to map alternative sources of procurement so as to minimize sole dependency on one particular method.

- **Influencing policy outcomes through regular engagement with Government and concerned agencies:** The current global scenario presents a perfect opportunity for companies, sectors and industry associations to engage with Governments to monitor domestic policies and regulations as well as guide them on positions being taken by them for proposed Free Trade Agreements (FTAs) / Regional Trade Agreements (RTAs) being negotiated. By way of illustration, India has been one of the key participants in the Regional Comprehensive Economic Partnership, i.e. ASEAN plus China PR, Japan, Australia, New Zealand and Korea RP that is being negotiated. In this situation, it is critical for sectoral leaders to take a position and open a dialogue with Governments to provide their inputs on negotiating FTAs and RTAs. An opportunity - risk matrix mapping can help the industry in approaching governments and putting forth their recommendations for securing and gaining market access during trade negotiations.
- **Trade compliance programs:** Trade compliance can broadly be divided into two silos: internal hygiene compliances and international trade compliances. There have been several instances where compliance programs have been critical in resolving issues of export control and sanctions, including country sanctions as well as financial crimes. Such programs typically include a quantitative element (cost reduction and optimization) as well as a qualitative element (correct classification of goods, valuation or country of origin). Fines are applicable if import procedures are followed incorrectly, if false or negligent drawback claims are submitted and/or if inaccurate preferential trade agreement claims are made due to incorrect or fraudulent certificates of origin. Crucial to compliance would be clear communication between suppliers and buyers.
- **Emerging framework on data regulation:** There are regulations being introduced world over in areas of data privacy and cybersecurity. Businesses will need to be prepared for complying with data privacy requirements in both domestic and external jurisdictions. To be future ready, companies will need to consider factors such as source of data, consent of the data provider and data security. Failure to take – and prove – effective steps can result in class actions suits, massive fines and reputational risks.

CONCLUSION

Protectionist measures across the globe will increase, compliance requirements will become more stringent, regulatory uncertainty may persist – however, success comes to the prepared. In this scenario businesses need to now be 'hyper' prepared. The next generation market will be for businesses which have started thinking ahead of the curve. It will also be imperative build mitigating and compliance strategies and simultaneously keep a focus on costs. Engaging with industry regulators and dialogue with the Government are important factors to close this loop. Internal and external conditions non withstanding – its all about efficiency, profitability and market access.

Fundamental tenets and laws of succession planning

Succession planning for safeguarding and optimal transitioning of wealth and control are emerging as a critical consideration for businesses in India, many of which are family owned/controlled and are characterized by significant promoter family stakes. While wealth preservation, ring fencing key assets and tax-optimized transfer to next generation were the guiding features of such exercises earlier on, modern businesses look at corporate succession planning with the added lens of ensuring business continuity and operational competitiveness. In this context, promoters and companies need to reflect upon additional factors such as choice of successors (who may not necessarily be only from the family), composition for the board post-transition and rights that the promoters (including their successors), amongst others.

The entire Raymond group dispute between father-son duo is a prime example, a recent statement made by the promoter and chairman Gautam Hari Singhania highlights the gravity with which the succession planning needs to be looked at: *"Tomorrow morning if I die, God forbid, there are identified people who will take charge of everything. Raymond can run independently and competitively. My children are very young. I have a responsibility to my wife and children, to my employees and shareholders, my banks, institutions and customers"*. Similarly, Yes Bank is deciding the fate of who will be at the helm of affairs after the erstwhile promoter and managing director Rana Kapoor had to step down after the RBI's directions.

BRIEF OVERVIEW OF LOCAL SUCCESSION LAWS

The origin of Indian succession laws can be traced back to the year 1865 when a draft of the Indian Succession Bill was first submitted by the third law commission in its first report for the year 1854-55. Originally it was proposed as the Indian Civil Code, a title which was later altered to Indian Succession Act, 1865. A number of legislations relating to succession were passed from the year 1865 to 1925 and all these legislations were consolidated in the year 1925 and the Indian Succession Act, 1925 (**Succession Act**) was enacted.

A separate legislation governing Hindus – including Buddhists, Jains and Sikhs – was enacted in the year 1956 namely the Hindu Succession Act, 1956 (**Hindu Succession Act**). Accordingly, Hindus are governed by the Hindu Succession Act and certain other provisions of the Succession Act. Muslims have their own textual law of inheritance while Parsees, Christians and the persons whose marriage is solemnized under the Special Marriage Act, 1954 are covered under the Succession Act.

SUCCESSION IS PRIMARILY OF TWO TYPES:

- **Testamentary succession:** This means succession by way of a 'Will'. A Will is a legal declaration of the intention of the testator (an individual who makes a will) with respect to his property which he desires to be carried into effect after his death. The registration of a Will is not compulsory but if so desired it may be registered by the testator during his lifetime.
- **Intestate succession:** When a person dies without making a Will, his property devolves as per the provisions of Succession Act and Hindu Succession Act (applicable to Hindus) and it is known as intestate succession. In case of intestate succession, (a) if the deceased was governed by Succession Act, a letter of administration is required to be obtained from the court of competent jurisdiction for administration of the property of the deceased; or (b) if the deceased was governed by Hindu Succession Act, the property devolves in accordance with the provisions of the Hindu Succession Act, to Class I heirs, Class II heirs, agnates or cognates, as the case may be.

CRITICAL DISCUSSION POINTS AND TAKEAWAYS

A weak succession plan can lead to adverse implications for both the successors as well as the business. Following factors need to be borne in consideration:

- **Nominees vs successors:** On many occasions, the underlying wealth in a succession plan comprises of shares held by promoters. In such instances, the nominee of shares should not be confused with the successor as per the succession laws. While the Companies Act provides for a provision to nominate a person, the Division Bench of the Bombay High Court in its ruling pronounced on December 1, 2016, held that successor under the succession laws will prevail even if there is a nominee provided by the shareholder. It held that the object of the nominee provision is to ensure that the deceased shareholder is represented by someone as the value of the shares is subject to market forces and to ensure that the commerce does not suffer due to delay on the part of the legal heirs in establishing their rights of succession and claiming the shares of a company. It also clarified that usage of the term 'vesting' under the Companies Act is not intended to create a third mode of succession and that the Companies Act has nothing to do with the law of succession.
- **Income-tax considerations:** As of today, India's Income-tax Act, 1961 (**IT Act**) does not contain any provisions pertaining to inheritance tax and no tax implications will arise on legal heirs on receipt of any property under a Will or pursuant to intestate succession. However, it is rumoured that an inheritance tax is being contemplated by the government. If and when such legislation is enacted, succession plans will need to account for inheritance tax and undertake efforts to optimize the potential impact.
- **Use of 'trusts' in succession planning:** While preparation of a Will indeed helps reduce disputes between legal representatives and heirs, devolution of assets still needs to be structured appropriately to ensure smooth transition. A private trust under the Indian Trusts Act, 1882, is a popular route to structure succession planning. Trust structure is quite flexible (offering the possibility of various permutations to meet stated objectives of any succession plan) and is also tax neutral. Following the amendments to the IT Act, it has been provided that any property received from an individual by a trust created solely for the benefit of the relative of the individual (the term 'relative' has also been defined under the IT Act) will not give rise to any tax implications in the hands of the trust. Tax implications on the beneficiaries at the time of distribution of assets will, of course, have to be analysed based on the trust structure.
- **IPR arrangements in succession plans:** Promoter interest in a business can also be in the form of intellectual property rights (IPRs), where family members have IPR sharing arrangements for their separate businesses. In such cases, the importance of dealing with IPR arrangements becomes a critical factor and should be accounted for properly, in order to avoid litigation and disputes.
- **Timing of the plan coming into effect:** While choosing a successor is important, it is equally imperative to decide the time when the planning should be put in place, keeping in mind the dynamic economic and legal circumstances.

CONCLUSION

Many companies have announced the presence of such plans recently, in order to assure their investors and other stakeholders that promoters and management are thinking to the future. Succession planning should indeed be considered as a must-have for any organization for ensuring continuing management, growth and development of the business without any disruptions.

This article has been published in ET Online

CCI's tryst with India's pharmaceuticals sector

INDIAN PHARMACEUTICAL SECTOR: A SNAPSHOT

Indian pharmaceutical industry has charted a substantial growth trajectory with the industry expected to rise at a rate of CAGR of 29% during 2015-20. This industry comprises of both innovators and generic drug manufacturers with the latter accounting for 42% of worldwide production and 20% of global exports in generic drugs, making India's pharmaceutical industry the largest provider of generic medicines globally. The pharmaceutical sector in India is heavily regulated with a plethora of central and state level laws and regulations, which govern every facet of this industry from sale, manufacturing, import, distribution to pricing. In this mix, the role of CCI – India's competition regulator – becomes critical given the fragmented nature of the industry (top 10 companies from an estimated 24,000 entities enjoy 1/3rd market share) and its attendant potential for skewing competition and affordability.

CCI'S INTERVENTION THUS FAR

From the perspective of India's competition laws, pharmaceutical manufacturers have been the subject of significant scrutiny, primarily with regard to supply chain related cases. Since its inception, the CCI has received fifty-two cases pertaining to the pharmaceutical and healthcare sector and has passed final orders in seventeen.[13] While a majority of these cases pertain to conduct of chemist and druggist associations and pharmaceutical companies while appointing stockists, CCI has also had the opportunity to explore several other issues which are important for the industry to bear in consideration.

- **Role of trade associations in drug supply chain:** India's drug supply chain is characterized by a few peculiarities on the part of chemist & druggist associations (including All India Organization of Chemists and Druggist or **AICOD**), such as (a) NOC or welcome/congratulatory letter given by trade association prior to appointment of a stockist by a pharma company, (b) mandatory collection of product information service (**PIS**) charges and (c) fixing of trade margins. Taking cognizance of these practices, the CCI in *Santuka v AIOCD*[14], penalized the trade association and its office bearers and directed them to cease and desist after finding such industry practices to be anti-competitive which directly or indirectly determined the purchase or sale prices of drugs and limited and controlled the supply of drugs in the market in contravention of sections 3(3)(a) and 3(3)(b) read with section 3(1) of the Competition Act, 2002 (later set aside by the appellate tribunal on procedural grounds). Given limited adherence to these directions by trade associations, the CCI has now started assigning accountability to pharmaceutical companies, where penalties (often a % of topline) can be much more significant in quantum and inviting these companies to red flag instances of non-compliance by the associations. This is likely to remain on the regulator's radar for some time and is forcing the industry to re-evaluate the contours of the supply chain.

- **Upholding the need for innovation:** Giving due regard to the need for innovation in this sector, the CCI deviating from its practice (which state a 2-3 year non-compete period) granted a 4-year non-compete in *Orchid/ Hospira*[15], in addition to ensuring that the non-compete did not extend to development of new molecules which did not exist during the time of the transaction.

- **Bespoke definition of appreciable adverse effect on competition (AAEC):** While assessing AAEC, the CCI considers market overlaps at molecular level and therapeutic level[16] , as the case may be. In the context of generic products transaction (*Sun/Ranbaxy*[17]), the CCI noted that as

[13] See, https://www.cci.gov.in/sites/default/files/POLICY_NOTE.pdf
[14] See https://www.cci.gov.in/sites/default/files/202011_0.pdf
[15] See https://www.cci.gov.in/sites/default/files/C-2012-09-79_0.pdf.
[16] See https://www.cci.gov.in/sites/default/files/C-2014-07-188_0.pdf.
[17] See https://www.cci.gov.in/sites/default/files/C-2014-05-170_0.pdf .

competition takes place between different brands based on the same molecule and therefore, formulations based on the same molecule can be considered substitutable. As against this, in *Novartis/Eli Lilly*[18] , the CCI noted that as the transaction pertained to different molecule-based brands, the market overlaps should be defined in terms of intended therapeutic effect and mode of administration.

- **Emerging issues:** At present, the CCI is considering a multitude of issues pertaining to this sector, some of which have already been scrutinized in the US and EU but are starting to emerge in the Indian context as well. Adjudication of these issues will likely have an industry-wide impact, which is motivating companies to maintain a close watch on the proceedings.

  - Co-marketing agreements: CCI's investigation of allegation of price fixing of an anti-diabetic drug, Vildagliptin, against its patent owner and its co-licensors (as reported in the media) is likely to produce the first decision on competition issues concerning co-marketing agreements between a patent holder and other co-marketers.
  - Denial of market access: In 2017[19] , the CCI directed an investigation against *F. Hoffmann-La Roche AG* (**Roche**), noting that Roche as a drug originator and dominant entity indulged in strategies to delay or oust the entry of generics/ bio-similars amounting to prima facie denial of market access to Mylan and Biocon (on appeal to a writ court, the investigation into this matter is currently stayed).
  - Reverse payment settlements: It was reported in 2014[20] that the CCI may be examining a patent dispute settlement between Roche and Cipla to assess if such agreements restrict access to affordable healthcare. Such reverse payment settlements – also referred to as 'pay for delay' arrangements – are novel to India, but likely to gain ground in the future.
  - Differential pricing: This practice is quite prevalent in India and is presently being investigated[21] by CCI in the context of differential pricing of disposable syringes when compared with in-house pharmacy shops at a hospital vis-à-vis pharmacy shops outside the hospital.

OUTLOOK

Given the underlying sensitivities in the context of access to affordable healthcare, we can expect the CCI to have an increased focus on pharmaceutical sector. In fact, the CCI recently released a policy note on affordable healthcare, collating inputs from stakeholders and identified issues such as role of intermediaries in drug pricing, flooding of 'branded' generics, vertical arrangements in healthcare and provided concomitant recommendations.[22]

The CCI rulings on some of the new issues in this sector (identified above) will have a significant impact in shaping the policies and operations of pharmaceutical industry in India. As Indian generic manufacturers eye the huge market opportunity from drugs worth USD 130 billion are expected to go off patent between 2017 to 2022, companies need to pay due heed to these developments to ensure proper risk management and mitigation plans are in place.[23]

[18] See https://www.cci.gov.in/sites/default/files/faq/C-2015-07-289A.pdf
[19] See CCI's initiation order https://www.cci.gov.in/sites/default/files/68%20of%202016_0.pdf.
[20] See https://www.livemint.com/Companies/RVVDhRh7oTfpqlIphkb6jM/CCI-to-scan-drug-patent-settlements.html
[21] See https://www.cci.gov.in/sites/default/files/772015.pdf
[22] See supra FN 1.
[23] See http://www.makeinindia.com/sector/pharmaceuticals

A PE investor's perspective on regulatory framework governing REITs

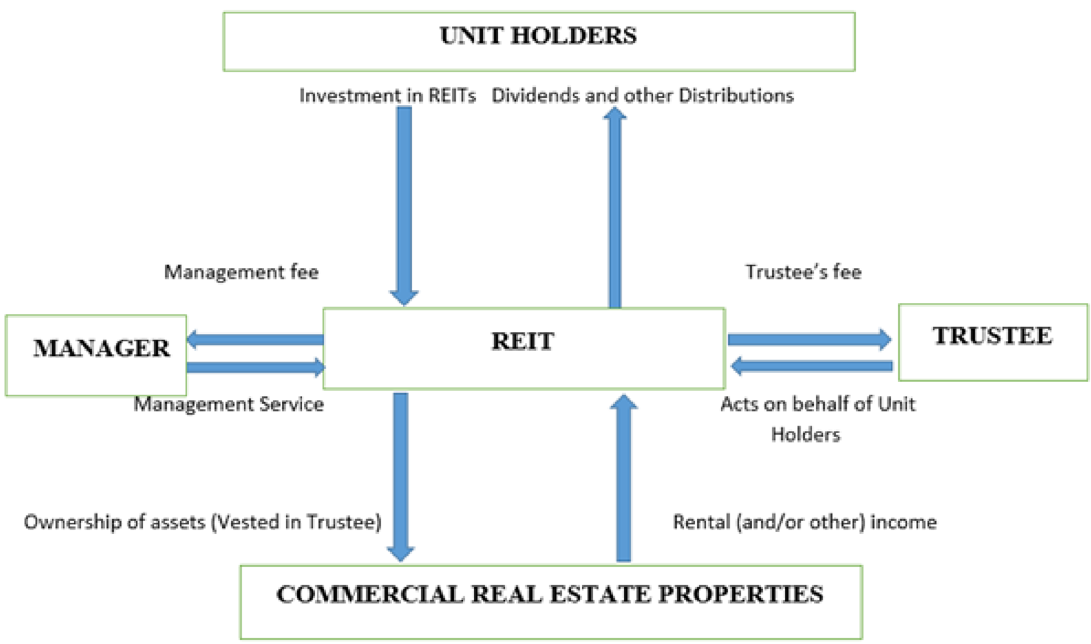
INTRODUCTION

Real Estate Investment Trusts (**REITs**) were established as an investment class in India in 2014 when the Securities and Exchange Board of India (**SEBI**) introduced the SEBI (Real Estate Investment Trusts) Regulations, 2014 (**Regulations**) to govern the framework for such trusts. These Regulations have been amended several times since then, in a bid to attract interest. As an example, SEBI reduced the minimum investment limit in REIT to ₹50,000 from ₹2 lakh in the latest amendment on 1 March 2019.

REITs form a new avenue for investments by private equity investors, who have traditionally invested in the Indian real estate market in the form of equity linked investments or debt instruments. Investor interest has picked up over the recent past, following the announcement of India's first REIT IPO.

INDICATIVE STRUCTURE OF A REIT

At its core, REITs are essentially securities linked to real estate that are listed and can be traded by investors. REITs are often compared to mutual funds and the two indeed share quite a few similarities, with the key difference being that REITs necessarily need to have physical real estate as the underlying asset and money collected has to be deployed in income-generating real estate. This income – comprising of rents, leases as well as gains from capital appreciation of underlying real estate assets – is then distributed among the unit holders. A typical REIT structure is as follows:



REITS' REGULATORY FRAMEWORK - A PE INVESTOR'S PERSPECTIVE

While domestic investors do not have investment restrictions in investing in the real estate busines activities, off-shore investors can invest only in the construction-development projects or in industrial parks or in REITS or in entities earning rental income on lease of property but not in real estate business or constructions of farm houses. In this context, it becomes important to understand the current regulatory framework applicable to REITs in India.

LISTED V/S UNLISTED REITS

Initial offer to public: The Regulations contemplate issue of its units by way of an initial offer of the units of a REIT to the public (i.e. more than 200 subscribers) for subscription. The initial offer is subject to certain conditions such as:

- Value[24] of the REIT assets is not less than INR 5,000,000,000
- Minimum number of unit holders other than sponsors, its related parties and its associates, is not less than 200
- Offer size is not less than INR 2,500,000,000[25] Initial offer of the units to the public should be
- at least 25% of the total outstanding units if the post issue capital of the REIT calculated at the offer price is less than INR 16,000,000,000; if the post issue capital of the REIT is equal to or more than INR 400,000,000, the initial offer to the public cannot be less than 10%

Listing: After the initial offer it is mandatory for all units of REITs to be listed on a recognised stock exchange. Therefore, if a private equity investor intends to invest in REIT units, it can do so either as an anchor investor or as an institutional investor, if the initial offer contemplates allocations to such investors.

Follow-on offers and fund raising: Once the REIT units are listed, a REIT can undertake a further fund raise via a follow-on offer, or preferential issue to a select group of persons on a private placement basis or a qualified institutional placement to qualified institutional buyer[26] . In such

institutional buyer[26] . In such further fund raise, a private equity investor can participate either via a private placement route or, if qualified then as qualified institutional buyer in a qualified institutional placement.

REITs vs INVITs: Unlike SEBI infrastructure investment trusts (**INVITs**) which can raise funds via an initial offer by private placement to a select group of persons, REITs cannot raise funds via initial offer by private placement. The Regulations do not contemplate a private/unlisted REIT offer of units and compulsorily the REIT initial offer of the units is required to be offered to the public by way of listed units.

IMPACT OF PE INVESTOR PROTECTION RIGHTS

Private equity investors usually enter into shareholders' agreement with promoters/sponsors of the investee company which set out investor protection rights such as affirmative investor vote on certain matters, share transfer rights such as tag along right, right of first offer/right of first refusal, tag along rights etc.

In the context of granting a registration of REIT, SEBI considers a number of eligibility criteria, for example, the sponsor details, sponsor's holding in the REITs post the initial offer, manager's details, trustee's details, 'fit and proper' criteria of the parties to the REIT. One of the criteria which SEBI considers is that (a) no unit holder has superior voting or other rights over another unit holder and (b) there are no multiple classes of units of REIT. This casts a doubt on whether PE investor will be able to negotiate contractual rights as enumerated above at the time of the initial public offer or in case of further fund raise via a preferential issue or a qualified institutional placement.

APPLICABILITY OF SEBI (PROHIBITION OF INSIDER TRADING) REGULATIONS, 2015 (PIT REGULATIONS)

Conceptually, the prohibition on insider trading has been introduced to ensure that investors

[24] Such value will be the value of the specific proportion of the holding of REIT in the underlying asset or the SPVs.
[25] This condition and the ownership of asset can be complied at any point of time but prior to allotment of the units. However, in such a case, appropriate disclosures in the offer document has to be made along with a disclosure to SEBI and designated stock exchanges and a binding agreement amongst the parties is entered to the effect that the above condition will be fulfilled prior to the allotment of the units.
[26] This includes SEBI registered venture capital fund, alternate investment fund, foreign venture capital fund,

investors have parity of information in the context of trading or investing in securities of a listed company, such that no investor is able take benefit from information which is not generally available and which materially affects the price of such securities.

In this context, the PIT Regulations prohibit:

- Communication of 'unpublished price sensitive information' (**UPSI**) (**Communication Restriction**) i.e. information which is not generally available and which upon becoming available is likely to materially affect the price of 'securities'
- 'Trading' in 'securities' when in possession of UPSI (**Trading Restriction**)

Whilst the Trading Restriction is absolute, the Communication Restriction has certain exceptions; for example if the communication of UPSI is for due diligence purposes of a proposed transaction in which case certain conditions have been prescribed for the communicating the UPSI.

As per the PIT Regulations, securities is defined to mean securities as per the Securities Contract (Regulations) Act, 1956 (**SCRA**) and specifically excludes units of a mutual fund. Further, SCRA does not specifically include units of REITs in the definition of securities. Therefore, strictly speaking, the applicability of PIT Regulations to REITS or trading in the units of REITs is unclear. This question become especially important when a REIT intends to undertake further fund raise from an investor via private placement/qualified institutional placement and such investor seeks due diligence information which is not generally available to other investors.

CONCLUSION

REITs have been a staple feature in investment space globally for quite some time, and the first REIT IPO in India is expected to lead to increasing prominence for this investment class. While there is no history of performance thus far, the stringent regulatory framework should help minimize investment risks.

Indirect tax considerations in M&A transactions

From a taxation perspective, M&A transactions are generally disproportionately focused on direct tax considerations, with indirect tax issues often relegated to the background. This trend is beginning to change with businesses increasingly considering the critical role of indirect tax aspects across supply and sourcing chains, operational efficiencies and tax optimization strategies, which can significantly impact the commercial assumptions driving a transaction. In this article, we have discussed critical indirect tax considerations that can impact both pre-transaction due diligence as well as post-transaction integration.

DUE DILIGENCE

Before effecting any M&A deal, it is sine qua none for businesses to carry out due diligence for the other entity(s) to identify and determine possible liabilities that exist or may arise in future based on the past actions of such entity(s). From an indirect tax perspective, due diligence should encompass the following:

- Goods & Service Tax (**GST**) related issues
  - GST positions
  - Input tax credits
  - GST implication of carried forward credits
- Past litigation
  - Litigation related to Excise, Service Tax, Entry Tax, VAT, etc.
  - Issues relating to procurement of declaration Forms, viz., C/F/H/I
- Customs law related past litigation and issues
- Foreign Trade Policy related obligations
- Other State Incentives/SEZ related obligations

Based on the findings, parties can take appropriate action to ring-fence their liability, ranging from debt-like adjustment to the agreed consideration, taking appropriate indemnities from the seller or creating an escrow mechanism, as agreed upon between the parties.

APPLICABILITY OF GST ON DIFFERENT TYPES OF M&A TRANSACTIONS

While ascertaining the impact of GST, it is imperative to understand whether any activity/transaction is a 'supply' within the meaning of Section 7 of the Central Goods & Service Tax Act, 2017 (**CGST Act**), which will determine the impact of GST on such an activity. There may exist the following M&A scenarios:

- **Sale of securities:** Per the CGST Act, it is understood that securities are specifically excluded from the definitions of 'goods' as well as 'services'. Under the GST law, the taxable event is that the transaction should have been effected by virtue of 'supply' of goods or services or both. Since, securities are neither considered to be goods nor services per se, no GST can be levied when businesses are acquired through sale of securities. Moreover, in instances where the ownership of the company is transferred, the assets still belong to the company and there is no change in the ownership of assets and thus no supply takes place in relation to the underlying assets.

- **Slump sale:** In a slump sale, there is a transfer of whole business for a lump sum consideration without assigning values to the individual assets and liabilities. As per Para 4(c) of Schedule II to the CGST Act, transfer of assets when the business is transferred as a going concern (GC) are not treated as supply of goods[27]. Further, services by way of transfer of a going concern as a whole or an independent part is exempt from GST[28]. Thus, no GST may be payable in case of sale of business as a 'going concern' or a slump sale.

[27]The Hon'ble Authority for Advance Rulings in M/s. Rajashri Foods Pvt. Ltd. (AR No. KAR ADG 06/2018) dealt with similar issue and ruled that there shall be no GST levied on transfer of business on a going concern basis.
[28]Exempted from levy of GST in terms of serial no. 2 of the Notification No. 9/2017 – Integrated Tax (Rate) dated 28.06.2017.

DEFINITION OF 'GOING CONCERN' UNDER GST

It is noteworthy that the terms 'going concern' is not defined under the GST law. In common understanding, it is a new entity's ability to continue operations as such after transfer. There are, however, internationally accepted guidelines (VAT Notice 700/9) issued by HM Revenue and Customs to treat a transfer as GC. As per the guidelines, the attributes include:

- Assets must be sold as part of the transferred as GC
- Buyer intends to use the assets in carrying a same kind of business
- Where only part of business is sold, it must be capable of operating separately
- There must not be a series of immediately consecutive transfer

While each situation would need to be specifically examined to determine their taxability, these points may be taken as guiding factors while concluding whether a transfer is a 'transfer as GC'.

- **Piecemeal sale:** A piecemeal sale of assets includes transfer of specific assets on the basis of individual values assigned to each. The assets can be further classified into movable or immovable assets for determination of their chargeability under the GST law. Every kind of movable property other than money and securities is covered under the scope of goods and thus transfer of movable assets of business shall be exigible to GST. Sale of Immovable property such as land and building is not considered as 'supply' as per Schedule III to the CGST Act and thus no GST is chargeable on transfer of immovable assets from the transferor to the transferee.

INPUT TAX CREDIT (ITC)

One of the key considerations pertains to the manner of the transfer of ITC from the transferor entity to the resulting entity. In this regard, Section 18(3) of the CGST Act provides for the transfer of unutilized ITC lying in the Electronic Credit Ledger[29] of the Transferor company in cases of sale, merger, de-merger, amalgamation, amalgamation, etc. to the Electronic Credit Ledger of the Transferee/resulting company, including death[30] of sole proprietor. It should be ensured that ITC related to inputs and capital goods so transferred should be duly accounted for in the books of the transferee company.

GST REGISTRATIONS PURSUANT TO M&A

The registration scheme provided under GST law is PAN based and hence is non-transferrable to any other person. Sub-sections (3) and (4) of the Section 22 of the CGST Act provide for taxpayer's responsibility to obtain registration in case of M&A transactions. Succinctly, the section provides that if the transfer is on account of succession as a going concern, the liability to register arises from the date of such transfer or succession and if the transfer is pursuant to the scheme of amalgamation/de-merger pursuant to a Court Order, the liability to register arises on the date on which the ROC issues the Certificate of Incorporation for the resultant entity. Practically speaking, following situations may arise in relation to GST registrations in any M&A deal:

- **When the target company ceases to exist:** In such a scenario, the existing GST registration of the acquiring company will continue to exist. The acquirer company will however be required to file an application for amendment in the existing registration to add the premises of target Co as its own 'additional place of business'. The GST registration of the target company is required to be surrendered.

- **Both acquirer and target Co cease to exist and form a new entity:** In this scenario, the resultant entity shall be required to obtain fresh GST registration and both the acquiring, and the target company shall surrender their existing GST registrations.

- **Existing Co demerges into a new Entity:** In this scenario, the new entity shall be liable to obtain new GST registration. The existing company will continue to hold its GST registration as it is.

[29] The transfer of ITC to the transferee company can be done by filing of Form ITC-02 online the GSTN porta.
[30] The CBIC has issued Circular No. 96/15/2019- GST dated 28.03.2019 clarifying transfer of ITC in case of death of sole proprietor.

SUITABLE INTIMATION TO THE TAX AUTHORITIES

It is essential for the companies entering into M&A deals to inform the tax authorities regarding the transaction, so as to ensure smooth amendment/surrender of existing registrations or for procurement of new registrations. The M&A would also impact the ongoing litigations and therefore, companies should also pro-actively inform the authorities and other relevant fora as regards the merger, de-merger, amalgamation or transfer of business. This is especially relevant for companies across sectors that enjoy concessions or exemptions from tax based on licenses or certificates obtained from their parent ministry under prescribed tax rules, in order to ensure that the benefits are not denied later.

CONCLUSION

A range of additional activities are often required to be undertaken from indirect tax perspective during the post-transaction integration period. These may include booking of all sales and purchase invoices by the entities till the date of the transaction and duly reporting thereof in relevant GST returns; settlement of Inter-company transactions (if any); common credits to be fully booked and duly distributed through Input Service Distributor route prior to effective date of merger; and closure of books of accounts, among others.

Given that indirect tax implications arising from M&A vary on the basis of the structure of the deal and how the transaction is being undertaken, the application of relevant legal provisions to specific cases would continue to throw up peculiar issues. It is thus imperative that indirect tax implications in M&A are dealt with a suitably devised strategy to mitigate the risks and reap all likely benefits.

Civilian use of drones – Understanding the privacy perspective

CIVIL USE OF DRONES IN INDIA SET AGAINST THE BACKDROP OF INDIA'S PRIVACY LAWS

Following the introduction of the policy released by the Directorate General of Civil Aviation (**DGCA**) that came into effect on 1st December 2018, the use of Remotely Piloted Aircraft Systems (**RPAS**) commonly referred to as drones, has been legalized in India subject to certain conditions. DGCA has also issued a subsequent version of the Policy in a draft stage (for public comments), aimed at further liberalizing some of these conditions. This policy if released, is likely to open up a huge market for drone usage in civilian applications, ranging from crop monitoring to infrastructure project reviews to commercial deliveries.

Privileges, however, come hand in hand with responsibility. With their invention and popularization, the commercial use of drones has opened a pandora's box of issues which lawmakers are expected to address. The several Acts and Rules that govern aerospace, air transport and privacy do not specifically account for devices such as drones (they may address similar applications, but further clarity is needed). Amongst others, some of the key regulatory issues which need to be addressed include privacy, standardization & quality control, damages & consequential damages, legal liabilities, insurance, penalties for operating rogue drones, threat management and air traffic management. Similarly, one must understand the rules and liabilities/ penalties for failing to comply with these laws. ELP herewith attempts to analyse the existing laws applicable to each of these issues and comprehends any gaps that may be required to be plugged.

This article only addresses the issue of drones in the context of India's privacy laws. our subsequent Knowledge Series publications.

DRONES AND PRIVACY LAWS

Since operating a drone may involve capturing video images of objects in its path, invariably the images of individuals may also get recorded in the process. Another concern is that the potential use of drones by Government agencies for security or other purposes, may potentially violate an individuals' privacy. Against this backdrop, it is important to understand the concept of right to privacy and the law governing the right to privacy in India.

RIGHT TO PRIVACY AGAINST STATE

The right to privacy is not new. It has been a common law concept, and an invasion of privacy gives a right to the individual to claim tort-based damages. The concept of privacy further developed in England in the 19th century and has been well established in today's world. If there is an intrusion in a situation where a person can reasonably expect his privacy to be respected, that intrusion will be capable of giving rise to liability unless the intrusion can be justified[31]. Further, in the year 2017, in the case of *K.S. Puttaswamy (Retd.) v Union of India*[32], the Supreme Court of India concluded that right to privacy is a fundamental right protected under Article 21 of the Constitution of India, however as all fundamental rights, the right to privacy is not absolute. While the State may intervene to protect legitimate state interests, (a) there must be a law in existence to justify an encroachment on privacy, (b) the nature and content of the law which imposes the restriction must fall within the zone of reasonableness, and (c) the means which are adopted by the legislature must be proportional to the object and needs sought to be fulfilled by the law[33].

[31] Campbell v. MGN, 2004 UKHL 22
[32] (2015) 8 SCC 735.
[33] Supra note 10, at para 447.

CURRENT STATUS OF INDIA'S PRIVACY LAWS

It should be noted that the aforementioned protection has been granted from the perspective of State intervention. As regards intervention by private players, India does not have a comprehensive data privacy mechanism. The main enactment that deals with protection of data is the Information Technology Act, 2000 and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal information) Rules, 2011 (**IT Rules**).

Since the images and video footage captured by the drones could be identifiable as to pertaining to a particular individual, the same will come within the purview of 'personal information'. Under the IT Rules, any body corporate that collects, receives, possess, stores, deals or handles personal information needs to have in place (a) a privacy policy for handling of or dealing in personal information and (b) reasonable security practices and procedures to protect such information.

India is in the process of enacting a comprehensive data protection legislature and with that intent, the expert committee set-up under the chairmanship of Justice Srikrishna for formulation of data protection regime in India has released the Personal Data Protection Bill, 2018 (**Proposed Bill**) in August 2018.

Under the Proposed Bill, 'personal data' can be collected, inter alia

- On the basis of consent, if obtained in the manner prescribed under the Proposed Bill
- If necessary, for the function of the State
- If explicitly mandated by Indian law or required for compliance of an order of the court or tribunal in India
- For reasonable purposes as notified by the data protection authority

Also, once the personal data is collected, the data fiduciary[34] needs to give effect to the rights of the data principal[35] prescribed under the Proposed Bill and meet the prescribed transparency, security and accountability standards. Presently, it is not clear as to the final form in which the law will be enacted, however, it is expected the Proposed Bill may undergo a lot of changes before being approved by the both houses of the parliament.

As of now, for the State to use drones which results in infringement of privacy of individuals, there needs to be an enabling provision of law, whose constitutionality might later on be tested by the courts. Similarly, with regard to private industry/individuals' use of drones which results in infringement of privacy of individuals, there are no specific safeguards at present, save for the limited protection under IT Rules discussed above. In this context, implementing the government's intent of promoting (and regulating) the use of drones by non-State actors might require legislative intervention at an opportune time – the Proposed Bill is sector and technology agnostic and it remains to be seen if it will stand the test of time or will require adaptation.

CONCLUSION

As mentioned earlier, privacy is just one aspect which needs to be considered. It would be prudent to also look outwards and study prevailing policy mechanisms in other countries to adopt their best practices as it formalises its regulatory framework.

Since drone regulations are yet in their nascent stage, the Government can nip all the potential problems by in the bud by amending its existing laws and imposing harsher penalties to serve as a deterrent. Underpinning this entire process, however, will be effective implementation.

[34] A person/ entity which determines the purpose and means of processing data.
[35] The natural person to whom the personal data relates

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