EXPLORING THE DISTINCTIONS AND INTERPLAY BETWEEN TAKEOVERS AND ACQUISITIONS OF PUBLIC COMPANIES IN INDIA

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ABSTRACT

Globalisation and technological advancements have resulted in an increase in M&A activity all around the globe. In Indian corporate law, takeovers and acquisitions are distinct concepts with specific legal implications. A takeover refers to the acquisition of a substantial quantity of shares or voting rights of a company by any person or group of persons acting in concert, resulting in a change in control of the target company. An acquisition refers to the purchase or acquisition of shares or voting rights by any person or group of persons acting in concert, which does not result in a change in control of the target company. In an acquisition, the control of the target company remains unchanged despite the share acquisition. This research paper explores the distinctions and interplay between takeovers and acquisitions of public companies in India through a comparative analysis. The study aims to shed light on the nuances and implications of these two corporate transactions in the Indian context. The core of the paper presents a comparative analysis of takeovers and acquisitions, highlighting the distinctions between the two. Factors influencing the choice between these strategies are explored, and a comparison of the legal and regulatory requirements for takeovers and acquisitions in India is provided.

INTRODUCTION

Takeovers and acquisitions are fundamental corporate strategies that have a profound impact on the dynamics of public companies in India. In the competitive business landscape of India, these transactions play a pivotal role in reshaping industries, enhancing market share, and driving growth.

Takeovers and acquisitions are often used interchangeably, but they have distinct characteristics and implications. Takeovers involve the acquisition of a controlling stake in a target company by another entity, enabling the acquirer to gain control over the target's operations and decision-making processes. Acquisitions, on the other hand, encompass a

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broader spectrum of transactions in which one company purchases another, resulting in a change of ownership and control. In India, takeovers and acquisitions are governed by the Securities and Exchange Board of India (SEBI) regulations, specifically the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. These regulations aim to ensure transparency, fairness, and protection of minority shareholders' interests. They establish thresholds for triggering mandatory open offers, prescribe the process for conducting takeovers, and define the obligations of acquirers and target companies.

The last 18 months have seen a significant increase in M&A deals in Asia-Pacific (2.4 Trillion in value)[1]. The ever-changing policy framework with liberalization, globalization and technological advancements have contributed to a stable increase in M&A activity in India. The year 2022 saw 93 control deals in the listed space implemented through the tender offer route under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Takeover Regulations)[2]. This is the highest number of tender offers that we have seen in the last five years.

The Securities and Exchange Board of India (substantial Acquisitions of Shares and Takeovers) Regulations, 2011 governs the mergers and acquisitions transactions that involve the acquisition of a publicly listed company. When the acquirer acquires 5% or more of the targeted company then it has to make full disclosure of all its holdings within 2 days of acquisition of shares.

THE GIST OF TAKEOVERS AND ACQUISITIONS

Definition and Concepts of Takeovers and Acquisitions: Takeovers refer to the acquisition of a controlling stake in a target company by another entity, granting the acquirer control over the target's operations and decision-making processes. Acquisitions, on the other hand, encompass a broader range of transactions in which one company purchases another, resulting in a change of ownership and control.

Takeovers can occur through various mechanisms, such as open market purchases, negotiated agreements, or hostile actions. They can be classified as friendly takeovers when the target's

[1] IMAA Institute, 'Mergers and Acquisitions Statistics' (Year) IMAA Institute https://imaa-institute.org/mergers-and-acquisitions-statistics/ accessed 14June 2023.
[2] Cyril Shroff & Gautam Gandotra, 'Takeover of Publicly Traded Companies: Flashback 2022' (2023) Cyril AmarchandMangaldas Corporate Blog https://corporate.cyrilamarchandblogs.com/2023/01/takeover-of-publicly-traded-companies-flashback-2022/ accessed June 14 2023.

management supports the acquisition or hostile takeovers when the target's management opposes the transaction. Acquisitions, similarly, can take different forms, including mergers, asset purchases, stock purchases, or tender offers. The concepts of takeovers and acquisitions are intertwined with corporate governance, strategic management, and finance. They involve considerations of valuation, pricing, due diligence, integration, risk assessment, and shareholder interests. Understanding these concepts is crucial for analysing the nuances and implications of takeovers and acquisitions in the Indian context.

Overview of the Legal and regulatory framework for Takeovers and Acquisitions in India: In India, takeovers and acquisitions are regulated by the Securities and Exchange Board of India (SEBI) through the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. These regulations provide a framework for fair and transparent transactions, protecting the interests of minority shareholders and ensuring a level playing field for all stakeholders. The SEBI regulations outline the thresholds that trigger mandatory open offers, specifying the percentage of shareholding that would require the acquirer to make an offer to minority shareholders. The regulations also define the process and timelines for conducting takeovers, including the filing of disclosures, announcement requirements, and the role of intermediaries such as merchant bankers and registered stock exchanges.

Additionally, the Companies Act, 2013, and other relevant laws and regulations govern various aspects of takeovers and acquisitions, such as shareholder approvals, competition law considerations, taxation, and disclosure requirements. These legal and regulatory frameworks provide guidelines and safeguards to prevent unfair practices, ensure transparency, and maintain the integrity of the market.

CONCEPTUAL OVERVIEW

In Indian corporate law, takeovers refer to the acquisition of a controlling stake or the transfer of control of a listed company. The regulatory framework for takeovers in India is primarily governed by the Securities and Exchange Board of India (SEBI). Under the Takeover Regulations, a takeover occurs when an acquirer, either individually or together with persons acting in concert (PAC), acquires shares or voting rights in a target company that crosses certain specified thresholds. These thresholds trigger the requirement for the acquirer to make a mandatory open offer to the shareholders of the target company.

The key definitions and concepts related to takeovers in Indian corporate law include:

1. Acquirer: Refers to any person or group of persons who intends to acquire shares or voting rights in a target company, directly or indirectly.
2. Target Company: Refers to a listed company whose shares or voting rights are sought to be acquired or whose control is sought to be acquired through a takeover.
3. Control: In the context of takeovers, control refers to the ability to direct the management or policies of a company, either by holding the majority of shares or voting rights or by having the power to appoint a majority of directors on the board of the company.
4. Open Offer: A mandatory open offer is triggered when the acquirer, individually or together with PAC, acquires shares or voting rights that result in crossing certain thresholds specified in the Takeover Regulations. The open offer requires the acquirer to make an offer to the shareholders of the target company to acquire a minimum percentage of shares from them at a specified price.
5. Public Announcement: The acquirer is required to make a public announcement of its intention to acquire shares or voting rights in the target company within a specified timeframe after the trigger of the mandatory open offer.
6. Substantial Acquisition of Shares: Refers to the acquisition of shares or voting rights in a target company by an acquirer, individually or together with PAC, which crosses certain specified thresholds (currently set at 25%, 50%, and 75% of the voting rights).

Acquisitions, on the other hand, refers to the purchase or acquisition of a substantial stake or the entire business of a company, resulting in a change of ownership and control. The regulatory framework for acquisitions in India is governed by various laws and regulations, including the Companies Act, 2013, and the Securities and Exchange Board of India (SEBI) regulations.

Key definitions and concepts related to acquisitions in Indian corporate law include:

Acquisition: Refers to the process of obtaining ownership or control of a company, either by purchasing a substantial stake in the company or by acquiring the entire business.

Transfer of Shares/Business: In the context of acquisitions, transfer refers to the sale or transfer of shares or the entire business of a company from the seller (transferor) to the buyer (transferee).

Share Purchase Agreement (SPA): An SPA is a legally binding agreement between the buyer and the seller that outlines the terms and conditions of the share acquisition, including the purchase price, payment terms, representations and warranties, and other relevant provisions.

Scheme of Arrangement: Acquisitions may also be structured through a scheme of arrangement, which involves a court-approved arrangement between the company and its shareholders or creditors. The scheme of arrangement sets out the terms and conditions for the acquisition and requires approval from the concerned authorities and shareholders.

Due Diligence: Prior to an acquisition, the buyer typically conducts due diligence to evaluate the financial, legal, and operational aspects of the target company. This involves a comprehensive review of the target company's books, records, contracts, intellectual property, liabilities, and other relevant information.

Competition Law Compliance: Acquisitions in India are subject to scrutiny by the Competition Commission of India (CCI) under the Competition Act, 2002. The CCI assesses the potential impact of the acquisition on competition in the relevant market and may require approval or impose conditions to ensure fair competition.

Board and Shareholder Approvals: Acquisitions often require approvals from the board of directors and shareholders of both the acquiring and target companies. The Companies Act, 2013, lays down specific procedures and requirements for obtaining such approvals.

Post-Acquisition Integration: After the completion of an acquisition, the buyer is responsible for integrating the acquired company into its operations. This process involves aligning strategies, merging business functions, and managing cultural and organizational changes.

INTERPLAY BETWEEN TAKEOVERS AND ACQUISITIONS

The interplay between takeovers and acquisitions in the Indian corporate landscape presents a dynamic and complex environment for analysing these transactions. While takeovers and acquisitions share common objectives of gaining control or ownership of a company, they exhibit distinct characteristics and implications. A comparative analysis of the two provides valuable insights into the similarities, differences, and their interplay within the Indian context.

The interplay between takeovers and acquisitions in India is evident in their complementary nature. Takeovers often involve acquiring a controlling stake in a target company through the purchase of shares, which leads to a change in control and management. On the other hand, acquisitions encompass a broader spectrum, including share purchases, asset purchases, and mergers, which can result in complete ownership of the target company. In some cases, an acquisition may follow a takeover. For instance, after gaining a controlling stake through a takeover, the acquirer may proceed with acquiring the remaining shares to achieve full ownership and integration. This interplay highlights the sequential nature of the transactions and the potential for a phased approach in consolidating control.

A comparative analysis of takeovers and acquisitions in India reveals different motivations and objectives behind these transactions. Takeovers are often driven by the acquirer's strategic intent to gain control, access new markets, or consolidate industry position. Acquisitions, on the other hand, may be motivated by the desire to acquire specific assets, expand product portfolios, or achieve synergies. Both takeovers and acquisitions in India are subject to the regulatory oversight of SEBI and other relevant laws. However, the legal and regulatory framework differs in terms of specific requirements and procedures. Takeovers are governed by the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, which mandate the disclosure of shareholding, open offer obligations, and shareholder protections. Acquisitions, on the other hand, may involve compliance with additional laws such as the Companies Act and the Competition Act, depending on the nature and size of the transaction.

CONCLUSION

Mergers and acquisitions are powerful indicators that offer a robust and growing economy. Over the last decade, there have been significant developments in mergers and acquisitions in India accompanied by relevant amendments and changes in their regulatory framework.

The interplay between takeovers and acquisitions has also evolved in response to this changing business landscape. Takeovers have become more competitive and strategic, with acquires vying for control through open offers and hostile bids. These transactions have witnessed increased shareholder activism leading to a n enhanced protection for minority shareholders. The Takeover Code has faced numerous obstacles since it was first introduced, and SEBI's efforts to keep the Takeover Code up to date with the most recent international developments in the public M&A scenario appear to be paying off.

Acquisitions on the other hand have witnessed a surge in domestic and cross-border M&A activity, driven by factors such as globalization, industry consolidation, and the need for market expansion. The Indian government's initiative to promote ease of doing business and attract foreign investment has further fuelled this trend. As a result, the M&A landscape in India has witnessed a diverse range of transactions, including mergers acquisitions, and asset purchases.