Cross Border M&A – Trends and Challenges in India

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Foreign Investment in India - Growth

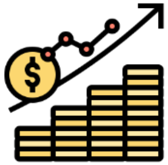
Ease of Doing Business in India

- Goods & Services Tax - Unified Tax Regime
- Liberalising FDI Policy
- Reducing Compliances
- Digitisation of Government Filings & Services
- Insolvency and Bankruptcy Code

Sectors Driving Growth:

- E-commerce
- Retail
- Telecommunications

2018



6%

India

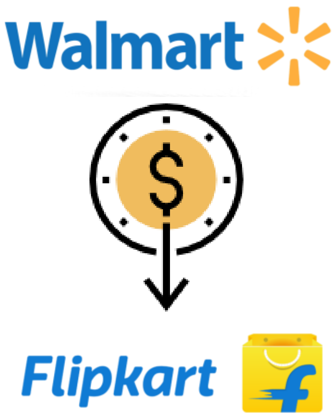
(-13%)

Global

Flipkart Acquisition

A Bright Spot in India’s M&A Ordeals

- Walmart acquired India’s largest e-commerce Company, Flipkart, for USD 16 billion
- World's biggest purchase of an e-commerce company
- Validated the Indian legal and regulatory environment’s capacity to absorb such a deal
  - Merger Control Approval
  - FDI Compliance- despite complex structure pushing the policy envelope
  - Tax Compliance
- Deal contributed towards 33.1% of the total inbound M&A activity of India



Non-Cash Mergers & Acquisitions

- **Recent Changes in Cross Border Merger Framework:**
  - Deemed approval by India's banking regulator, the Reserve Bank of India ("**RBI**"), if prescribed parameters are met, against the dual approval required earlier from both RBI and Indian courts.
  - A period of 2 years provided to make overseas borrowings compliant with the prescribed regulations.
  - No remittance for repayment of such overseas borrowings can be made from India during the 2-year period- curtailing ability to acquire stressed assets.
  - Valuation to be conducted by members of a recognised professional body in the jurisdiction of the transferee company and in accordance with internationally accepted principles- adding another layer to the process.

- **Share Swaps:**
  - General permission has been granted for share swap arrangements at fair market for sectors falling under the automatic approval route.

Paternalistic Hangovers: Key Concerns/ Challenges

- **Pricing Controls:**
  - Repatriation of capital permissible, subject to fair market value floor.
  - Price/conversion formula of convertible instruments required to be determined upfront at the time of issue of the instruments.
  - Price at the time of conversion should not be lower than the fair market value.

- **Approval Route:**
  - Government approval is required for takeovers of pharmaceutical companies where more than 75% of the share capital is involved.
  - In 2017, Shanghai Fosun Pharmaceutical Group decided to scale down its proposed buyout of Gland Pharma to a 74% stake as the Cabinet Committee on Economic Affairs raised some national security concerns and did not give approval.

- **Overseas Direct Investment:**
  - The RBI maintains an enterprise level limit on how much money can be remitted for JV and M&A transactions. This limit is frequently fiddled with to tackle Indian currency stability and makes it hard to plan aggressive overseas expansion.

Assured Returns Conundrum

From RBI's perspective, an assured return on an equity investment makes it similar to a loan. A fair market valuation ceiling had been imposed on exit transactions.

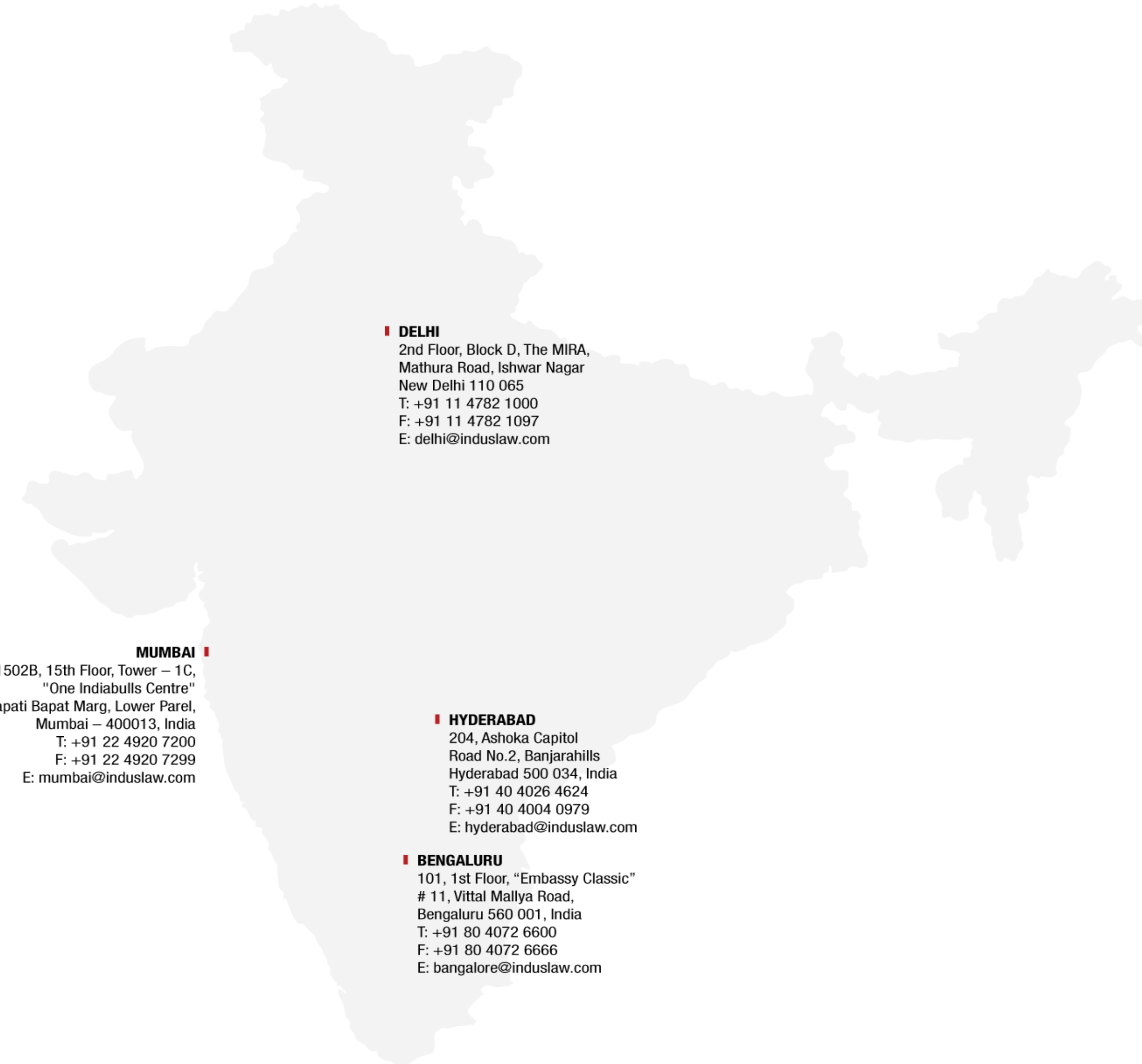
- **Put/Exit Option:**

  In the Tata-DOCOMO case, an exit option was contractually agreed between the investors and the promoters/ company. However, certain challenges were faced while enforcing such a positive obligation:

  - RBI approval was required for purchase of shares for a price higher than the fair market value (as contractually agreed upon), which approval was denied by RBI.
  - The Delhi High Court rejected RBI's application and decided the case in DOCOMO's favour. The award was in the nature of damages (and not specific performance requiring purchase of shares).

- **Liquidation Preference:**

  - The investors' interest is protected by way of liquidation preference, whereby the investors are entitled to receive their contribution prior to other shareholders with an agreed rate of return.
  - However, this is a contractual right and its actual working may need reliance on the DOCOMO method rather than the contract itself.



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