



BMR Advisors

M&A Edge

Round up of M&A developments and relevant regulatory updates
for October – December 2011





Dear Readers,

Seasons' Greetings!

We are pleased to bring to you our second newsletter covering M&A and regulatory developments in the last quarter of calendar year 2011.

We closed the last calendar with a pronounced feeling of a slow down in M&A activity. The mood is a result of several factors both macro-economic and policy related on the domestic level, and the overall environment globally. However, as our sector specific coverage reveals, some pockets remain buoyant proving that deals and propositions with good fundamentals would always be transacted environment notwithstanding. While there are differing views on how 2012 would shape up, we do hope that the headwinds abate in the ensuing quarters, and we are back on track.

On the tax and regulatory front, we saw two land-mark developments (FDI in multi-brand retail and Companies Bill) being pushed into the backburner thanks to political exigencies facing the current regime. Though the Government has increased the foreign investment ceiling in Single Brand Retail Trade from 51% to 100%, subject to Government approval, this comes with an onerous condition of having to source 30% of value of products sold from 'Indian small industries'. Another setback is the RBI and the Government taking differing points of view on option arrangements linked to foreign equity investments, though the FDI policy was revised (and re-revised) to establish that such arrangements should be permissible subject to pricing norms. On the positive side, we saw progressive stance on several interpretive issues by SEBI (in relation to the recently introduced takeover code) and CCI (in relation to M&A transactions coming within its ambit). Other important developments are the opening of new routes by SEBI for promoters to increase public shareholding to 25%, for compliance with listing norms, and the introduction of QFI route, which enables specified individual and non institutional investors to directly access equity markets, and deal in Indian equity shares on the stock market or in public offer.

In summary, we had an eventful though a mixed 2011, and hope that the ensuing calendar brings in a more positive environment.

Rohit Berry
National Leader, M&A

CONTENTS

Q3 2012 M&A and PE Review - Summary	3
M&A Review - Sector wise analysis	4
Corporate Law	7
Competition Law and Securities Laws	9
FDI and exchange control norms	10
Income tax	11

M&A Summary

Barring a few sectors and specific deals, overall the Q3 of Fiscal 2012 (FY12) witnessed a significant slowdown in M&A activity. In terms of the metrics, Q3 was the lowest in value terms in previous 8 quarters, indicating that the trajectory is heading markedly downwards.

- YTD FY12 Q3 vs YTD FY11 Q3, deal value slumped by 52% and volume remained flat
- In Q3 FY12 on a sequential basis the deal value slumped by 59% and deal volume by 6%

A notable element in Q3 FY12 was a sharper decline in outbound deal activity (80% in value terms on sequential basis). While some of it could be attributed to big ticket deals in Q2 FY12, we sense that the mood has become cautious and decision making is taking longer. In addition, fund raising for Indian companies has become a challenge, given the macro-economics. These factors notwithstanding, as we discuss in our 'auto/ auto-components' coverage, acquisition proposals are still being considered (with opportunities created in select geographies such as Europe), though with a fair degree of deliberation.

On the bright side, India-Japan corridor remains steady as Japanese companies look to strengthen their foothold in 'traditional' sectors such as metals, chemicals and engineering.

An analysis of the sectors where BMR has a focused industry or market practice is outlined in the next section.

PE/ VC Summary

As with M&A, Q3 FY12 witnessed a loss of momentum in the PE/ VC space, reversing the resurgence witnessed in the first six months of FY12. To illustrate, in Q3-FY12 on a sequential basis, aggregate deal value fell by 35%, and the deal volume slumped by 60%.

Capital market conditions have obviously eroded investor confidence, which has impacted overall activity. This has also accentuated the gap of the valuation expectations between promoters and investors. Nonetheless, select sectors continue to be in focus, and investors are still chasing quality assets.

Power and Energy, Technology & BPO, and Real Estate continue to be preferred themes for investors this quarter. Some of the notable PE deals announced during the current quarter included \$75 Mn in Samhi Hotels by Equity International, \$71 Mn in Endurance Technologies by Actis (happy to note a large deal in the auto-component space after a long hiatus!) and \$70 Mn in Greenko Group by Standard Chartered PE.

This quarter also saw private equity major Warburg Pincus encashing on its India investments through a number of partial exits from Kotak Mahindra Bank, Max India, Punj Lloyd and WNS (shelf registration filed with SEC).

Summary

Sector	YTD FY12 Q3	Q3 FY11 (\$ Bn)
Inbound	6.60	1.13
Outbound	8.18	0.72
Domestic	5.42	1.43
Total	20.20	3.29

Sector wise M&A activity (BMR Focus sectors)

Sector	YTD Q3 (Apr-Dec 2011)		Q3-FY12 (Oct -Dec 2011)	
	Deal count	Deal value (\$ Mn)	Deal count	Deal value (\$ Mn)
Technology & BPO	88	1,969	28	112
Logistics	18	2,474	5	183
Auto & Auto Components	17	479	7	239
Media	31	707	7	148
Education	10	227	4	129

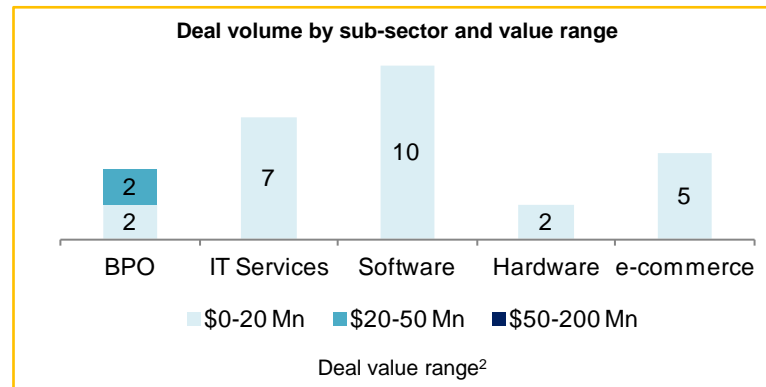
Sector wise PE activity (BMR Focus sectors)

Sector	YTD-Q3 (Apr-Dec 2011)		Q3-FY12 (Oct -Dec 2011)	
	Deal count	Deal value (\$ Mn)	Deal count	Deal value (\$ Mn)
Technology & BPO	87	963	38	339
Logistics	9	337	1	NA
Auto & Auto Components	3	73	2	73
Media	15	462	5	23
Education	21	135	5	9

Technology & BPO

M&A in the Technology & BPO sector which began with a bang this fiscal has steadily dropped in value and volume terms, through the year. On a sequential basis Q3 FY12, the deal volume remained flat, the deal value slumped by 46%. The big-ticket deals in the sector have dried up as the focus shifted to tuck-in acquisitions.

- **BPO:** The M&A theme in this segment was 'consolidation'. Genpact-High Performance Partners (HPP) (offering consolidation in platform based mortgage), Infosys-Portland (offering consolidation in procurement BPO and market expansion in Australia) and Spi-Laserwords (delivery and market consolidation)
- **IT Services:** Mid and small sized companies (Rev <\$200 Mn) were acquisitive. Some notable deals in this segment were – QuEST-GKN Aerospace (creating aerospace vertical depth and Europe market expansion in engineering design) and Aditi Technologies-Cumulux (expansion in the emerging area of cloud services)
- **Software:** It was the most active in terms of deal volume and was dominated by acquisitions in BFSI (Polaris-Indigo, Dion Global-Investmaster, CARE-Kalypto Risk Technologies) and mobile (Altruist-Mobisoft, MobileWave-Ariose, Location Labs-Wirkle)
- **E-commerce:** Amongst the well funded and relatively early stage segments, e-commerce companies are pursuing M&A to enhance offerings. For eg Flipkart-Mime360 & Chakpak Media (addition of a new vertical – “digital distribution”). MakeMyTrip-My Guest House Accommodations (strengthens position in hotel room booking space)



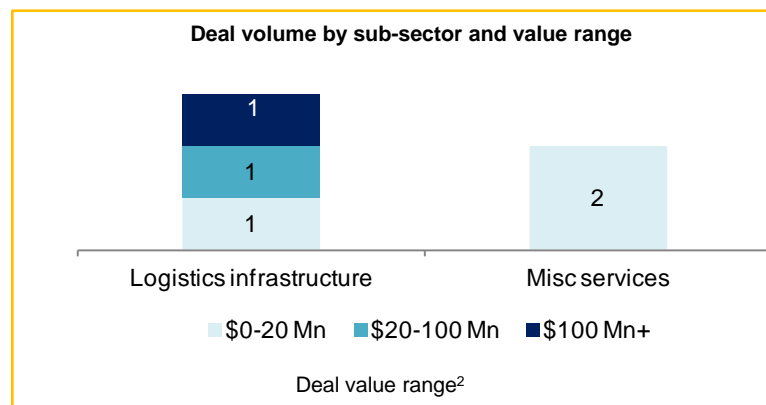
The overall deal activity in the next few quarters is expected to be muted as companies could prefer to be conservative in an uncertain environment. It is expected that few companies (propelled by factors specific to them) might make concerted efforts to grow inorganically for eg Infosys, Wipro, Mphasis, etc.

Logistics

In Q3 FY12, M&A activity in the logistics sector was muted in line with general trend in M&A. On a sequential basis, the deal volume dropped by 44% to 5 deals (only 2 notable deals) and the deal value by 45% to \$183 Mn in Q3-FY12.

In continuation of the consolidation trends, this quarter witnessed acquisition of the logistics business of ETA Engineering by Infrastructure India Plc owned Vikram Logistics. On the outbound transactions segment, IL&FS Transportation Networks acquired 49% stake in Chongqing Expressway Group, China.

In the forthcoming period, M&A activity is expected to remain tepid due to the global risk uncertainties. While the undercurrents remain strong, culmination of transactions is likely to assume a longer duration than usual.



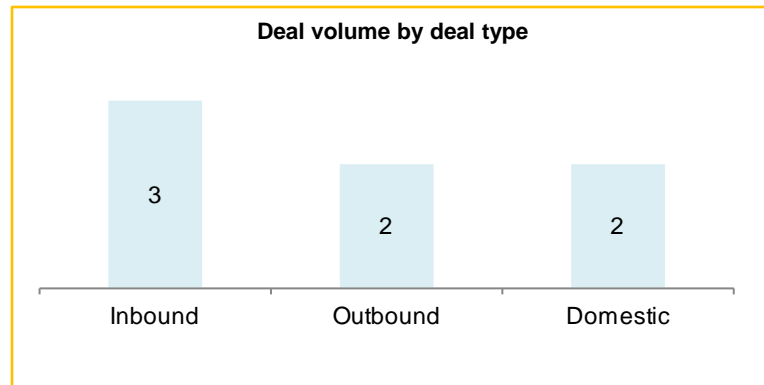
Auto & Auto Components

The domestic auto industry is witnessing a sentiment corrosion (for the near term outlook), especially in the passenger vehicles segment. This has resulted in a cautious approach towards fresh investments/ expansions in general, and therefore, M&A decision making is taking longer than usual. While decision making is cautious, M&A proposals are still on the table, with well funded Indian companies looking for overseas acquisitions, and also, foreign players seeking an expansion of their footprint in the Indian market.

On inbound M&A, India remains a priority market for global companies as several companies have established green-field facilities and are on the look-out for M&A opportunities. Also, Indian companies continue to look for foreign collaborations to gain access to technology for niche products. With these drivers, we saw transactions involving JV formation/ restructuring of JV relationships, which have also been the core M&A theme for this sector for some time.

On the outbound front, while the big ticket acquisitions disappeared, the volumes have picked up and the interest for such acquisitions remains strong, as Indian companies are scouting for cheap assets overseas, specially in Europe.

In terms of notable deals, we witnessed another significant split with Force Motors selling off its 50% stake in Man Force Trucks, a JV for heavy commercial vehicles, to its 50% JV partner, Man Truck and Bus AG (Germany). Ashok Leyland also increased its stake in the UK based bus maker Optare from 26% to 75%.

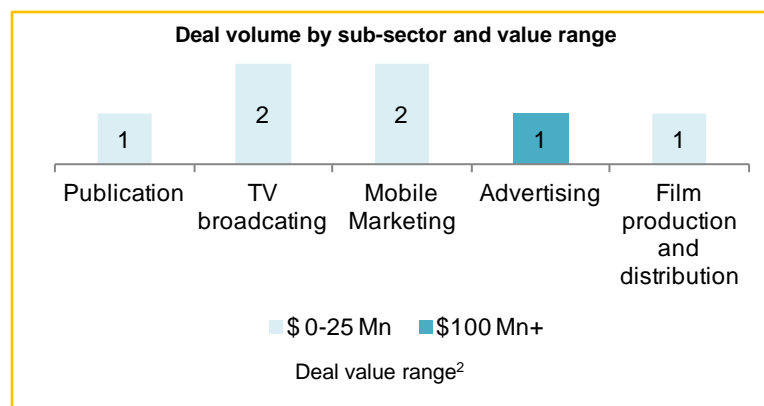


Media

Q3 FY12 saw a drop in M&A deal count. On a sequential basis, the deal volume dropped by 33% to 8 deals. The quarter witnessed a fairly large number of small sized deals, with the exception of a big ticket deal in the Indian advertisement space (Omnicom acquisition of ADAG group's Mudra Arts).

The acquisition of majority stake in Mudra Arts by Omnicom reinforces the interest of large foreign players in the growing Indian advertising market. Mudra Arts was the last major home grown advertising network to be acquired by a foreign player. The traditional media sub-segment, TV broadcasting witnessed a couple of small sized deals during the quarter.

In January, Media sector witnessed a major deal wherein Network 18 group announced its intention to acquire regional news channels (non-Telugu), general entertainment channels (non-Telugu) and a significant stake in Telugu channels owned by Eenadu group. Estimated deal value is \$395 Million. Promoters of Network 18 group have entered into a separate agreement with Independent Media Trust, controlled by Reliance Industries Limited, to secure funding for their subscription portion.



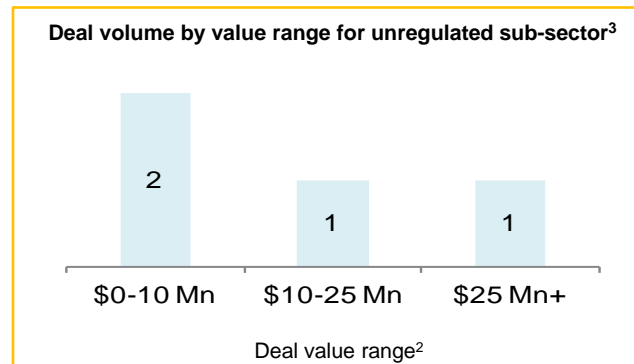
Education

M&A deal value more than trebled sequentially during Q3 FY12, while deal volume remained at similar levels. The increase was on account of one large deal in which NIIT's Element Corp business was sold to SkillSoft Corporation for \$110 Mn.

Other than the NIIT – SkillSoft deal, similar trends as the previous quarter continued where large companies and education groups leveraged the inorganic route to mark their entry or expand their bouquet of education services. Deal activity continued to be centered around the unregulated part of the sector.

Some notable deals during the current quarter included the following:

- IT training company, NIIT sold stake in its US based step down subsidiary Element K to Ireland's SkillSoft for \$110 Mn. NIIT had acquired Element K for ~\$40 Mn in 2006. Simultaneously, NIIT entered into a long-term services and licensing agreements with SkillSoft to work together for producing new content for SkillSoft's e-learning content collections for Business, IT and Desktop skills
- One of India's leading test preparation institutes, T.I.M.E purchased a majority stake in English language training company VETA for \$13 Mn. T.I.M.E's strength in content development and franchisee management is expected to bring synergistic benefits for the future growth strategy of VETA



India - Japan

Deal activity in the Indo-Japan corridor remained steady. Japanese interest in M&A remains strong in the 'traditional' sectors such as metals, chemicals and engineering, with a string of acquisitions and collaborations. India's appetite for Japanese technology in these sectors remains strong, as does the opportunity for Japanese players to build a base in India. Some notable deals during this period were:

- Mahindra UGINE is offloading its steel business into a three-way JV; Sanyo Special Steel and Mitsui & Co will hold 29% stake and 20% stake respectively in the JV with Mahindra UGINE holding the remaining 51%. Mahindra will take care of general management, Sanyo will lead the manufacturing function and Mitsui will support the marketing process of the JV. *BMR Advisors was the advisor to Mahindra UGINE*
- Establishment of a 50:50 JV between JSW Steel and Marubeni-Itochu Steel for setting up a steel processing centre in North India; The JV will process flat steel products like hot rolled, cold rolled and coated products for sectors such as auto, white goods and construction
- Establishment of a 51:49 JV between Anupam Industries Ltd and Mitsubishi Heavy Industries Ltd ("MHI") to manufacture port cranes and heavy duty material handling equipment; MHI has already licensed related technologies to Anupam Industries and this JV is aimed at exploring the Indian and other Asian/ MENA (Middle-East and North Africa) markets and enhancing the product cost competitiveness

Target	Investor	Deal type	Inbound/Outbound	Target industry	Deal Value (\$Mn)
Mahindra UGINE – Steel Business	Sanyo Special Steel & Mitsui	JV	Inbound	Metals	41
JSW Steel & Marubeni-Itochu	-	JV	Inbound	Metals	25
Anupam Industries & Mitsubishi	-	JV	Inbound	Construction Equipment	NA
Ambit Holdings & Nikko AM	-	JV	Inbound	BFSI	NA
Meghmani Organics/ Kaneka Corp/ Mitsui	-	JV	Inbound	Chemicals	NA
Suvidhaa Infoserve	Mitsui	Min Stake	Inbound	Retail	12
Market Xcel Data Matrix	Nomura Research Institute	Min Stake	Inbound	Marketing services	10
Rayves Automotive Textile	T B Kawashima	Maj/Acq	Inbound	Auto	NA
Hi-Rel Electronics	Hitachi	Maj/ Acq	Inbound	Electricals & Electronics	NA

Companies Bill 2011 – Still not law!

The much anticipated 'The Companies Bill 2011' ("Bill"), set to replace the 55 year old legislation 'The Companies Act, 1956' ("Existing Law") was tabled in the winter session of the Parliament. The Bill proposed sweeping changes to the Existing Law providing for increased management accountability, strengthening corporate governance and tightening corporate restructuring provisions.

However, the Government withdrew the Bill in face of 'technical' objections from the opposition, and the same has now been referred back to the Standing Committee on Finance, which would seek to amend certain provisions of the Bill. Ministry of Corporate Affairs is now targeting to introduce the Bill in Parliament during forthcoming Budget session.

Summarized below are key proposals, which could impact corporate M&A:

Certain restructuring forms specifically permitted/ prohibited

Cross border mergers permitted

- The Bill permits merger of Indian companies into foreign companies incorporated in specified jurisdictions (to be notified), and vice versa. Under Existing Law, an Indian company could not have amalgamated into a foreign company. Also, both forms of cross border mergers would now require approval of Reserve Bank of India ("RBI")
- This is a progressive move, however, the Government's approach while notifying list of permissible jurisdictions would need to be seen, as also enabling provisions in those particular jurisdictions. Government may continue to have a cautious approach towards tax havens and countries with less stringent regulatory regimes
- Once enacted, effective implementation would also warrant facilitating changes to other statutes (income tax, exchange control norms etc)

Restriction on layers of investment companies

The Bill restricts layers of investment companies to 'two', in case of certain class of companies (to be prescribed), and provides that a company cannot make investment through more than two layers of investment companies.

This could impact multi-layered domestic structures which are commonly used for facilitating financial/ strategic investment at various levels, and sometimes tax efficiency. Outbound structures and inbound structures (with layers outside India) have been excluded.

'Buyback' pursuant to a scheme would be subject to buyback provisions

Buybacks pursuant to a scheme have now been subjected to buyback provisions. Court approval route was sometimes used by companies as a bypass to the provisions of section 77A of Existing Law.

Restriction on 'Treasury Stock'

The Bill prohibits holding of treasury shares (which arose in case of mergers/ demergers where the transferor/ transferee/ both companies held shares in the other) by the transferee company through a 'trust' or any other manner. This change essentially puts an end to the practice of creating 'trust structures' which were often used (especially in listed companies) to retain control, or for future monetization.

Restructuring involving listed and unlisted companies

Merger of listed company into unlisted company has been permitted, subject to exit option being provided to minority shareholders.

Amendments impacting corporate restructuring implementations

- Simple and short process for merger of 'small companies'; merger of parent companies and subsidiaries – such mergers can be effected without involving the Tribunal (High Court in the current context)
- Power to Tribunal to grant dispensation to creditors' meeting in case of receipt of consent of $\geq 90\%$ (in value) of creditors – Threshold has been defined. Practically, this power was exercised by most state High Courts anyways, though no such defined threshold was in place
- Restriction on capacity of minority shareholders/ small creditors to object to restructuring schemes – objections to a restructuring can now be done only by shareholders holding $>10\%$ stake or creditors owed $>5\%$
- Participation in shareholders'/ creditors' meeting permitted through postal ballot; the same is likely to facilitate increased participation
- Statutory auditor's certificate, certifying the conformity of accounting provisions to applicable accounting standards, has been made mandatory for all companies
- Additional disclosures have been prescribed for explanatory statement of the notice calling shareholders'/ creditors' meetings. Mandatory requirement to attach a copy of valuation report
- Companies would be required to file notices/ explanatory statements along with prescribed documents with regulatory bodies [including Competition Commission of India ("CCI") (where applicable), Income Tax, RBI, SEBI, Central Government etc]
A mandatory 30 day period has been provided for regulatory bodies to revert (beyond which it shall be presumed that there are no representations from them)
- In cases of capital reduction, a time limit of 3 months has been provided to regulatory bodies (as against 30 days proposed for restructuring schemes)

While income tax department has been excluded for the purpose of capital reduction, time limit of 3 months seems to be high compared to 30 days for regular restructuring schemes

Companies Bill 2011 – Continued

Protective provisions for minority shareholders

- Exit option is to be provided to minority shareholders in case of listed company merging into an unlisted company, when the transferee company remains unlisted
- Provisions for exit window for minority in case of >90% acquisition contained in section 395 of the Existing Law have now been broadened with specific inclusion of (a) amalgamations, conversions etc as triggers, and (b) acquisition of shareholding by non-corporate acquirers as well

Additionally, procedures have been streamlined, and it has been provided that pricing for exercising exit option shall be based on valuation by registered valuer.

Other key changes

▪ Buyback – Mandatory ‘cooling off period’ of one year

The Bill provides for a mandatory ‘cooling-off period’ of one year from the date of closure of preceding buyback offer. The Existing Law provided a window to undertake multiple buybacks with minimal intervals, which was used by many companies.

▪ Recognition to inter-se shareholders’ arrangements on transferability

The Bill gives recognition to transfer restrictions inter-se shareholders in case of public companies. This would hopefully clear the existing ambiguity on legal enforceability of transfer restrictions (such as Right of First Refusal) typically forming part of any joint venture/ investment agreement in case of public companies.

▪ Rationalization of Sickness law

- Sickness provisions now cover ‘any company’ and not only ‘industrial company’
- Dispensation of net worth criteria (erosion of 50% net worth) for declaring company sick. Now, secured creditors representing $\geq 50\%$ debt of the company and whose debt has not been paid within 30 days, can apply to Tribunal
- Application by company, where secured creditors $\geq 50\%$ debt are not paid

- **Entrenchment provisions introduced** – The Articles of any company can contain entrenchment provisions ie Articles can provide a stringent mechanism (other than special resolution) for alteration of specific provisions. This would provide an additional layer of protection for investors holding less than 25%, with respect to terms agreed under shareholders’ agreement

▪ Recognition of Class Action suits

Such provisions were otherwise available only for small shareholders in Existing Law as a part of Oppression and Mismanagement. The Bill lays down an enabling framework, where aggrieved stakeholders (shareholders or depositors) can directly approach the Tribunal. Damages/ compensation can be sought against the company, its directors, auditors or advisors, who have assisted in wrongdoings.

- **Restriction on issue of shares at discount has been introduced (other than sweat equity)**

Recent amendments

Guidelines for preferential issue by unlisted public companies notified

Guidelines for preferential issues have now been notified in line with proposals of the Companies Bill 2011, though with significantly different provisions from the draft guidelines, published earlier in May 2011.

- Issue of convertible instruments are also covered within norms for preferential allotment, and would require special resolution at issuance
- Payment for subscription is to be through banking channels only and not by cash
- A 60 day time period has been specified for allotment; interest payable @ 12% subsequently
- Significant restrictions placed on advertisements prior to the issue

Amendment to accounting norms to provide relief from depreciation in rupee

The recent depreciation in Indian Rupee has had a severe impact on income statements of various companies. To provide relief to such companies facing foreign exchange losses, time limit for deferment/ capitalization of exchange differences arising on long-term monetary items (captured under transitional provision of Accounting Standard 11) has been extended to March 2020 from March 2012.

Participation in meetings through electronic mode – Amendments

- Earlier, listed companies were mandatorily required to provide video conferencing facility for shareholder meetings after 2011-12 – Facility made optional, even after 2011-12
- Any agency (earlier only NSDL and CDSL were specified), which obtains requisite certification, would now be permitted to provide this facility to corporates

Delhi High Court – Selective capital reduction is acceptable (Reckitt Benckiser)

Key arguments by dissenting shareholders and High Court ruling

- Capital reduction was effectively a route to squeeze out minority, and hence, a buyback should be carried out on a proportionate basis – *High Court held that buyback law does not apply to a Court approved capital reduction process*
- Promoter shareholders and minority shareholders could not be placed in the same basket while passing the capital reduction resolution, since only minority shareholders’ rights are being affected, and hence they are a different class – *High Court held that prescribed super majority (75%) approval is required from all shareholders, and there are no specific “class meetings” prescribed*

Competition Law

This quarter saw CCI examining and approving combination proposals in the form of mergers for the first time, since introduction of regulations in May 2011.

Given the current drafting of Competition Law and regulations, there have been concerns on applicability of exemptions (intra group transactions etc) to mergers. A strict interpretation of law suggests that exemptions are available only to combinations through acquisitions since mergers are not specifically mentioned, even though a merger can be argued as another form of acquisition.

This aspect has been examined by CCI in its order pertaining to merger of Wyoming Mauritius (a Mauritius company) with Tata Chemicals. CCI has clarified that mergers are outside the purview of exemptions (which are specifically provided for acquisitions), and would require filing with CCI, even where an exemption may, otherwise, be applicable.

Securities Laws

FAQs issued for new Takeover Regulations

Securities and Exchange Board of India (“SEBI”), has issued Frequently Asked Questions (“FAQs”) on the SEBI Takeover Regulations, 2011 (“New TOC”). Key clarifications are:

- Persons holding <25% of shares/ voting rights in a target company can make a public offer voluntarily for minimum 26% share capital, while persons holding ≥25% may make a voluntary public offer for minimum 10%, subject to conditions
- Trigger limits for disclosures would include shareholding based on fully diluted capital, including convertible instruments and warrants
- Acquisitions triggering public offer may not be executed by way of bulk/ block deals on the floor of stock exchange as the same are settled within 2 days of the transaction date and not upon expiry of offer period as required under New TOC
- Disclosures for encumbrances would include pledge of shares of holding company of listed company, and not just shares of listed company
- Non Disposal Undertakings in respect of shares are to be disclosed as encumbrance only in case of related side arrangements, and hence carrying risk of sale or appropriation by 3rd party

Note that FAQs seek to provide guidance to investors, and cannot be treated as binding opinion/ interpretation of law.

Investment by Qualified Foreign Investors (“QFI”) in Indian equity shares

Specified QFIs (not being SEBI registered FII or sub-accounts or residents of India) have been permitted to directly access equity markets, and deal in Indian equity shares on the stock market or in public offer.

For detailed analysis, please refer our [FSI Alert](#)

SEBI Buyback Regulations to stand amended (January 2012)

Buyback provisions for listed companies to be amended to provide that a “buyback ratio” would be prescribed for each shareholder (based on existing shareholding and total shares to be bought back). Additional shares (over buyback ratio) tendered by a shareholder would be bought back based on residual shares (after settling buyback ratio related tenders) for buy back and additional shares tendered by all shareholders. Timelines have been reduced, and concept of “record date” introduced.

Two additional modes for promoters to increase public shareholding to 25%, for compliance with listing norms (January 2012)

- **Institutional Placement Programme:** Envisages fresh share issuance or offer for sale by promoters to QIBs, for increasing public shareholding ≤10%
- **Offer for sale of shares on floor of stock exchange:** Eligibility criteria of ≥1% of paid-up capital with minimum cap of Rs 250 Million. Offers also permitted for promoters of top 100 companies (average market cap basis) for sale of stake, in addition to promoters requiring compliance with 25% public shareholding norms

Select pronouncements

- **Takeover Regulations – Supreme Court ruling on Subhkam Ventures continues the debate on “negative control” through affirmative rights**

The Subhkam ruling was expected to be one of the landmark rulings, which would settle the debate regarding “negative control” or control through affirmative rights.

While SEBI had held that certain affirmative rights resulted in control and hence a public offer was required, Securities Appellate Tribunal (“SAT”) had ruled in favor of the investor to state that there was no acquisition of control.

SEBI filed an appeal with the Supreme Court challenging this order by appellate authorities. During the appeal, there was a change in material facts since Subhkam Ventures sold substantial shareholding and did not exercise any powers. Also, during this period, a public offer had been made by an acquirer, who acquired majority shareholding and control over the listed target company. Accordingly, Supreme Court did not give its judgment on the question of law and further clarified that the earlier order by SAT would not be treated as a precedent.

- **Insider Trading – SAT ruling on model code of conduct (Hindustan Dorr Oliver)**

Per model code of conduct (Insider Trading Regulations), trading window is required to be closed by listed company for seven specified matters, and not in respect of other price sensitive information, which only needs to be disclosed. Disclosure of price sensitive information and closure of trading window are independent matters.

FDI Policy

≤51% FDI in Multi-Brand Retail Trading (“MBRT”) – Decision to open MBRT struck down by political parties

The Indian Government made a very significant (and controversial) reform by deciding to open up FDI in MBRT, subject to prior Government approval and following conditions:

- **Minimum investment** – USD 100 Mn; 50% to be in backend infrastructure
- **Retail sales locations** – cities with a population of more than 1 Mn as per 2011 census (53 cities qualify)
- **Procurement of agricultural products** – first right to continue with Government

FDI in MBRT was opposed by political parties, and this policy has been withdrawn

100% FDI (increased from 51%) in Single Brand Retail Trading (“SBRT”) permitted

100% FDI in SBRT would now be permitted with prior Government approval. An Indian company with FDI >51% would be mandatorily required to source 30% of value of products sold from ‘Indian small industries’, having a total investment in plant and machinery ≤USD 1 Mn, or from “Village Industries”, artisans and craftsmen.

The newly introduced sourcing requirement for >51% FDI is onerous and requires clarity on various aspects such as – Would 30% be calculated as a % of sales or total cost? Can ‘small industries’ be trading companies, or even group companies? Do sourced products need to be sold domestically or can they be exported?

For detailed analysis, refer our [Tax Edge Special](#)

Inbuilt options in equity instruments – Provision introduced, then withdrawn

FDI Policy issued on September 30, 2011 had introduced a provision that equity instruments issued under FDI regime could not have any built-in options (put, call etc) or be supported by options of any type. Such instruments would qualify as External Commercial Borrowings (“ECB”). **This provision was removed within a few days of its introduction, given the significant opposition faced from various forums.**

For detailed analysis of the Consolidated FDI Policy, please refer our [Tax Edge Special](#)

Brownfield FDI in pharmaceutical sector to require prior Government approval

Due to concerns raised on acquisitions of existing pharmaceutical companies by overseas players, FDI norms for pharmaceutical sector were amended. Prior Government approval will now be required for FDI involving brownfield projects (existing facilities). Greenfield investments continue to be under “automatic” route.

Investment by Foreign Institutional Investors (“FII”) in other securities

- FIIs permitted to invest in non-convertible debentures/ bonds issued by NBFC’s categorized as Infrastructure Finance Companies
- Lock in period on investment ≤USD 5 Billion reduced to one year (earlier three years), and will be considered from first purchase by FIIs

Exchange Control

No RBI approval required for certain share transfers

Prior RBI approval for share transfers inter-se residents and non-residents would not be required in the following cases, subject to certain conditions:

- Listed company – Relevant SEBI regulations applicable
- Listed company – Takeover Regulations applicable
- Where prior FIPB approval is to be obtained
- Share transfer of a financial services company

Issue/ transfer of ‘participating interest/ right’ in oil fields

Issuance/transfer of ‘participating interest/ right’ in oil fields to a non-resident will be considered an FDI transaction akin to a share transfer, and applicable reporting requirements will apply .

Policy for ECBs and Trade Credits relaxed, in light of economic scenario

- All-in-cost interest ceilings for ECB’s with an average maturity of 3 – 5 years increased to 350 bps (earlier 300 bps) till March 31, 2012
- All-in-cost ceiling for trade credits with average maturity ≤3 years increased to 350 bps (earlier 200 bps) till March 31, 2012
- ECBs availed for Rupee expenditure are to be brought in India immediately
- Non-residents permitted to hedge currency risk on Rupee denominated ECB

No RBI approval required for ‘set-off’ of export receivables and import payables

Bankers have now been permitted to give approvals for ‘setting-off’ export receivables against import payables, subject to conditions.

Liberalized remittance scheme – a clarification

Income and sale proceeds of assets held overseas by Non-Resident Indians can be retained and invested overseas.

Compounding of certain non-compliances delegated to regional RBI offices

Compounding of non-compliances for procedural delays (reporting inward remittance, filing of form FC GPR, shares issuance) have been delegated to regional RBI offices.

Domestic Re-organizations

Non-compete fee taxable in year relevant to effective date (JK Investo Trade)

Non-compete fee paid under a court approved scheme of arrangement held taxable as income of the year of effective date (retrospective date, from which business deemed to be transferred), since the right to receive non-compete fee accrues on the effective date although it may be received in subsequent year.

Where entire sale consideration for shares taxed as capital gains, non-compete cannot be separately taxed as business income (Savita Mandhana)

Mumbai ITAT held that bifurcation of sale consideration for shares into non-compete fee must not be allowed in case share purchase agreement does not provide separate consideration for non-compete. Hence, entire income will be taxed as capital gains.

Separately identified non-compete fees taxable as business income where right to carry on business not transferred (Ramesh D Tainwala)

In another instance, Mumbai ITAT held that distinctly identified non-compete fee under share purchase agreement (other than fee for transferring right to carry on business) was chargeable as business income, and the same could not be taxed as capital gains.

Advances received by firm taxable as deemed dividend (National Travel Services)

Delhi High Court held that advances received by a firm from a company in which the firm held shareholding (though registered in name of partners) must be taxable as deemed dividend.

Such taxability could not be disputed due to the legal compulsion that a firm could not be the registered shareholder (since shares could be registered only in name of partners), and thus the firm has to be treated as a shareholder for purposes of dividend taxability.

Advances for commercial purposes are not deemed dividend (Pradip K Malhotra)

Calcutta High Court held that gratuitous advances to shareholders, wherein shareholder enjoys benefit on account of being a beneficial owner of shares (without any other commercial consideration), could be taxable as deemed dividend.

Accordingly, advance in lieu of the company being able to mortgage shareholder's flat as collateral for a loan for itself, is not gratuitous and thus not assessable as deemed dividend.

Advance Rulings

Binding on Revenue authorities and applicant only for specific transaction in question

Mauritius treaty benefit upheld, obtaining treaty advantage by itself not objectionable

AAR upheld benefit of India-Mauritius tax treaty on sale of Indian company's shares, thereby opining that treaty benefit could not be denied even if the Mauritian transferor was formed with an objective of taking treaty advantage in future. In this case, shares of Indian company were held for more than 10 years before transfer. For detailed analysis, please refer our [Tax Edge Special](#)

Transfer of foreign company's shares having investment in Indian company held taxable in India

In the backdrop of much-awaited decision of Supreme Court in case of Vodafone on offshore transfer of shares, AAR has held transfer of shares of a French company to have resulted in alienation of assets and controlling interest of underlying Indian company, and thus considered the same as a scheme for avoidance of tax in India. Significant departures made from Supreme Court's decision in case of Azadi Bachao Andolan.

This is an interesting ruling since an application prima facie involving tax avoidance is typically not maintainable before AAR, but the AAR has still dealt with the application on merits. For detailed analysis, please refer our [Tax Edge Special](#)



Quotes

[Surveying the Field](#)

Rohit Berry, India Business Law Journal

[Kotak Mahindra Capital ties up with Evercore](#)

Rohit Berry, Financial Express

[Ncubate Capital plans to raise \\$200 m by 2012](#)

Rohit Berry, Financial Express

[New Rules Make Many Cos Vulnerable to Takeovers](#)

Vivek Gupta, Economic Times

[Cos sitting on 3.5 trillion cash. Albatross?](#)

Vivek Gupta, Daily News and Analysis

[WestBridge launches India evergreen fund](#)

Vivek Gupta, Mint

[Investors put money in smaller funds](#)

Vivek Gupta, Mint

[New companies act in a matter of days](#)

Vivek Gupta, Economic Times

[Cos Talk Fancy, Look to Force Investors Out](#)

Pankaj Jain, Economic Times

[Co Bill for refund of benefits in case of Satyam type frauds](#)

Amit Jain, Economic Times

[Execs may have to refund benefits in cases of fraud](#)

Amit Jain, Business Standard

[Key staff loss haunts Ranbaxy's India ops](#)

Seiji Ota, Financial Express

[Tokyo drift: Japanese logistics companies eye India](#)

Seiji Ota, Financial Express

[L&T shipbuilding, Mitsubishi heavy Industries to tie up](#)

Seiji Ota, Financial Express

Columns

[Companies Bill 2011: Right intent, but will it deliver?](#)

Amit Jain, Financial Express



BMR Deals - Illustrative (Q3 FY12)

Bilfinger Berger



Acquisition of Neo Structo Construction

Bilfinger Berger



Acquisition of Spetech Plant Technologies

Carnation



PE funding advisory for investment by Gaja Capital

Mahindra UGINE



Advisory for formation of JV between Musco, Sanyo Steel and Mitsui & Co

Sumitomo Chemical



Consolidation of crop protection business in India

Shriram Group



Merger of investment holding company into listed company(in process)

Bombay Stock Exchange



Structuring advisory for transfer of the Clearing & Settlement Division

Cargill



Structuring advisory for acquisition of Provimi

Indian Express



Formation of JV in hospitality events

Three C Group



Merger/ demerger of group companies

Network 18 Group



Demerger of publishing business of Infomedia18



M&A Service Offerings

- M&A Advisory
- Transaction Advisory and Support
- Business Restructuring

Read more on www.bmr advisors.com

M&A Leadership

Rohit Berry

DID: 91 124 339 5030

rohit.berry@bmr advisors.com

Rajendra Nalam

DID: 91 124 339 5023

rajendra.nalam@bmr advisors.com

Amit Jain

DID: 91 124 339 5025

amit.jain@bmr advisors.com

Vivek Gupta

DID: 91 124 339 5052

vivek.gupta@bmr advisors.com

Seiji Ota

DID: 91 124 339 5024

seiji.ota@bmr advisors.com

Nitin Savara

DID: 91 124 339 5015

nitin.savara@bmr advisors.com





BMR is a professional services firm offering a range of Tax, Risk and M&A advisory services for domestic and global businesses of all sizes. The firm enhances value for clients by focusing on solutions that are innovative, yet practical and that can be implemented. This is achieved by blending domain expertise with analytical rigour, while maintaining an uncompromising focus on quality, and by hiring and nurturing high quality professionals with a passion for excellence. BMR is committed to making a difference to clients and to its people, and delivers this through the integrity of its effort and by living its core values.

Read more on www.bmr advisors.com

Gurgaon

22nd Floor, Building No. 5
Tower A
DLF Cyber City, DLF Phase III
Gurgaon 122 002
Tel: 91 124 339 5000
Fax: 91 124 339 5001

Mumbai

3F, Contractor Building
41, R. Kamani Marg
Ballard Estate
Mumbai - 400 001
Tel: 91 22 3021 7000
Fax: 91 22 3021 7070

Bangalore

Level 3, Prestige Nebula - I
No 8-12, Cubbon Road
Opp Income Tax office
Bangalore 560 001
Tel: 91 80 4032 0000

Chennai

No.33 South Beach Avenue
MRC Nagar
Chennai 600 028
Tel: 91 44 4298 7000
Fax: 91 44 4298 7001

© 2012 BMR Advisors Private Limited, Published in India.
All rights reserved

This publication contains information in summary form and is therefore intended for general guidance only. It is not intended to be a substitute for detailed research or the exercise of professional judgment. Neither BMR Advisors Private Limited nor its associate concerns can accept any responsibility for loss occasioned to any person acting or refraining from action as a result of any material in this publication. On any specific matter, reference should be made to the appropriate advisor.