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Rewriting the Takeover Code: key implications

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The Takeover Regulations Advisory Committee (TRAC) published a report (the TRAC Report) on 19 July 2010 proposing some sweeping changes to India's Takeover Code, which regulates acquisitions of Indian public listed companies. These changes, if effective, will impact international merger and acquisition activity that involves a public listed company in India (the target company) in the following ways.

Indirect acquisitions are acquisitions of a public company triggered because of an acquisition of its parent entity. However, where the target company's net asset value, sales turnover or market capitalization exceed 80 percent of that of its parent company, the indirect acquisition will be deemed as a direct acquisition and the timing, pricing and other provisions applicable to direct acquisitions would apply.

An indirect acquisition **offer price** is linked to materiality of the target company as part of the business acquired, or 52 weeks' volume weighted average price, as at the date of announcement of the acquisition of the parent company in order to avoid price ramping risk.

The **minimum threshold** triggering the open offer requirement would be increased from 15 percent to 25 percent of the shares, voting rights or control in the target company.

The concept of **control** has been expanded to include not only the right to appoint a majority of the directors on the Board of the target company, but also the direct or indirect ability to appoint a majority of the directors on the Board of the target company or the ability to control the management or policy decisions of the target company. This expansion will mean greater lack of clarity in distinguishing between mere financial versus other investors.

The **open offer size**, in cases of triggered offers, would be increased to 100 percent of the outstanding shares of the target company held by all its shareholders, as against the existing requirement of 20 percent. For foreign companies, where the Indian tender offer is an incidental consequence of an offshore global transaction, a triggered offer for 100 percent of the share capital of the target company presents a significant financial drawback from the existing regime (where the offer only needs to be made for 20 percent). However, where the offer must be made pursuant to a voluntary consolidation of shareholding by the promoters, the offer size would be 75 percent of the target company.

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In a bid to **align the delisting** (going private) **rules** with the Takeover Code, the TRAC Report has recommended automatic delisting if post-acquisition public shareholding in the target company falls below listing requirements if the acquirer has, in the public announcement, stated its intention to delist upon this eventuality.

The TRAC Report has also sought to rationalize the Takeover Code's provisions for hostile or competing bids. The transaction triggering the open offer is to be given effect to only after the expiry of the period for making a competing bid, and if no competing bid is made. Competing acquirers are allowed to negotiate and acquire shares tendered to the other acquirer within 21 business days of the expiry of open offer at the same price as was offered to the public by the initial acquirer.

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