REIMAGINING INDIAN M&A: A SANDBOX MODEL FOR GROWTH, EFFICIENCY AND GLOBAL COMPETITIVENESS

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This article critically examines the historical trajectory and contemporary challenges within India's Merger and Acquisition landscape, particularly focusing on the persisting hurdle of the 90% shareholder approval requirement despite recent regulatory amendments. In response to these challenges, the study proposes the establishment of an M&A regulatory sandbox, drawing inspiration from successful international models, such as those implemented in Singapore, Australia, and the UK. This proposed regulatory sandbox is conceptualised as a controlled testing environment that aims to expedite and optimise M&A transactions, offering a platform for streamlined processes, regulatory compliance testing, and encouraging innovative practices in the M&A domain. The analysis encompasses a thorough evaluation of the multifaceted impact of regulatory reforms, the liberalization of foreign investment policies, and the Insolvency and Bankruptcy Code, 2016 ('IBC') on the dynamic M&A sector in India. The proposed M&A regulatory sandbox is positioned as a strategic response to these challenges, with the potential to not only overcome existing hurdles but also position India as a global leader in M&A innovation. By adapting successful international sandbox models to the unique Indian context, the study underscores the transformative potential of this forward-thinking strategy. In conclusion, the article contends that the adoption of an M&A regulatory sandbox reflects a proactive and visionary approach, aligning with India's commitment to fostering economic growth through an agile and innovation-driven M&A landscape.

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I. INTRODUCTION

India's Merger and Acquisition ('M&A') landscape has evolved significantly, originating post-World War II and facing challenges due to regulatory gaps and restrictive trade practices. The late 1980s and early 1990s marked a turning point with economic reforms, fostering competition and foreign investments.[1] In the 2010s, regulations like the Securities and Exchange Board of India Act, 1992[2] ('SEBI') and Competition Act, 2002 played a pivotal role, with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 2011[3] and an amendment to the Competition Act, providing a framework for M&A transactions.

This article examines historical challenges, including legal complexities, approval processes, and taxation issues. It analyses the impact of reforms like the Companies Act, 2013,[4] foreign investment liberalisation, and the Insolvency and Bankruptcy Code, 2016 ('IBC'). Despite positive changes, obstacles like the 90% shareholders or at least 9/10th of the creditors' approval requirement persist under section 233 of the Companies Act, 2013.[5] This makes the process futile and inefficient because if the creditors fail to attend the meeting, resources will go to waste. Furthermore, achieving the threshold is particularly challenging for public and listed companies due to their large number of shareholders.

For instance, in 2023, India witnessed a substantial decline in deals, with a staggering $70.9 billion drop, marking a 63% decrease from the previous year.

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[1] Rabi Kar and Amit Soni, 'Mergers and Acquisitions in India: A Strategic Impact Analysis for The Corporate Enterprises in the Post Liberalisation Period' (2010) <www.igidr.ac.in/conf/oldmoney/MERGERS%20AND%20ACQUISITIONS%20IN%20INDIA.pdf> accessed 8 January 2024.

[2] Securities Exchange Board of India Act 1992.

[3] Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation 2011.

[4] Companies Act 2013.

[5] Companies Act 2013, s 233.

Elevated interest rates and geopolitical tensions stemming from ongoing conflicts were identified as the primary drivers behind this decline. Consequently, Growthpal's data indicates a shift towards smaller deals in India, attributed to the ease and strategic advantages associated with processing smaller transactions compared to large-scale mergers or takeovers.[6]

Given the challenges posed by delays and a lack of technological advancements in the M&A sector, the article proposes the adoption of a regulatory sandbox for M&A transactions, drawing inspiration from successful models in Singapore, Australia, and the UK. This controlled environment aims to provide market participants with the opportunity to test and refine strategies, ensuring compliance while fostering innovation. The implementation of such a framework could potentially streamline the M&A process, attract investments, and promote responsible innovation, ultimately enhancing India's appeal to both investors and businesses. While India may not directly adopt these models due to differing conditions, analysing their frameworks could benefit India by streamlining its M&A process, mitigating regulatory complexities, and enhancing appeal to investors. Despite socioeconomic and political differences, leveraging successful sandbox experiences could help India navigate uncertainties in its evolving M&A landscape.

II. FAST TRACK MERGERS VS. TRADITIONAL MERGERS: UNDERSTANDING THE DIFFERENCE

Within the Indian corporate landscape, a clear distinction separates traditional mergers from their expedited counterparts—fast-track mergers. Designed to address the inherent delays associated with standard mergers, these streamlined procedures provide a swifter and less complex option for certain categories of companies.

Whereas regular mergers necessitate approval from the National Company Law Tribunal ('NCLT'), a judicial body, fast-track mergers bypass this step entirely.[7] This significantly reduces the time and cost associated with the process. The traditional route involves a comprehensive hearing before the

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[6] Salil Panchal, 'India M&A deal activity slides but 2024 outlook better: Experts' *Forbes India* (22 December 2023) <https://www.forbesindia.com/article/take-one-big-story-of-the-day/india-ma-deal-activity-slides-but-2024-outlook-better-experts/90485/1> accessed 8 January 2024.

[7] Raimeen Maradiya, 'Merger and Amalgamation under Section 233 (Fast Track Merger)' <https://www.icsi.edu/media/filer_public/e4/aa/e4aa40cc-1d8d-4a31-b829-69a1cfc285e9/merger_and_amalgamation_under_section_233_fast_autosaved.pdf> accessed 8 January 2024.

NCLT, allowing for potential objections from stakeholders to be addressed. In contrast, fast-track mergers rely on the Registrar of Companies ('ROC') and the Official Liquidator ('OL') for scrutiny, placing the onus on them to raise any objections.

A key differentiating factor is applicability. Regular mergers are open to companies of any size and structure. Fast-track mergers, however, cater to specific categories like:

1. Mergers between two or more small companies;
2. Mergers between a holding company and its wholly-owned subsidiary;
3. Mergers involving two or more startups; and
4. Mergers between a single startup and a small company.

While both routes necessitate shareholder and creditor consent, the thresholds differ. Fast-track mergers demand a high bar of approval, requiring at least 90% of shareholders and 9/10th of creditors (by value) in each merging company to agree. This ensures widespread support for the proposed merger. Regular mergers may have varying approval thresholds depending on the specific merger scheme.

The fast-track approach offers a clear advantage in terms of speed. Bypassing the NCLT stage leads to a generally faster turnaround time. Recent amendments strive to further expedite the process by mandating quicker responses from the ROC and OL. In comparison, traditional mergers can be considerably time-consuming due to the NCLT hearings and potential legal challenges that might arise. To illustrate this distinction, consider an analogy. Undertaking a fast-track merger is akin to taking a flight on a clear day - a swift and straightforward journey. Conversely, a regular merger resembles navigating through heavy traffic, encountering various checkpoints and clearances that can lead to delays.

Fast-track mergers cater to situations where companies prioritize a swift and cost-effective merger process. However, it is crucial to acknowledge the trade-off. The streamlined nature of this approach comes with a caveat—reduced regulatory oversight compared to a standard merger. This implies that potential concerns raised during a traditional NCLT hearing might not be addressed as comprehensively in a fast-track merger.

Therefore, companies seeking to leverage the advantages of speed and cost-efficiency should carefully evaluate their specific circumstances. While fast-

track mergers offer an attractive option, a thorough analysis is essential to ensure the chosen path aligns with the complexities of the proposed merger and the potential risks associated with a less rigorous approval process.

III. FROM RUDIMENTARY TO STREAMLINED: DEVELOPMENT OF FAST TRACK MERGERS IN INDIA

The inception of M&A in India can be traced back to the Second World War[8] when informal transactions gained momentum due to socio-political and economic conditions. Pre-independence, in 1946, the British government's sale of holdings to Indian entrepreneurs signalled a growing interest in asset acquisition, aligning with the broader trend of decolonisation.[9]

Despite subsequent M&A growth in the textiles, banking, electricity, and tea industries, a regulatory framework was lacking. The 1960s and 1970s faced challenges due to government policies, such as the Monopolistic and Restrictive Trade Practices ('MRTP') Act, 1969,[10] which introduced cumbersome M&A procedures.

In 1988, a significant takeover occurred as Swaraj Paul of Escorts Ltd acquired DCM Ltd;[11] it was one of the first ineffective, unfriendly bids because of political influence and legal uncertainties.[12] In 1983, Swaraj Paul, a London-based industrialist, acquired a 7.50% stake in Escorts Limited and a 13.00% stake in Delhi Cloth Mills Limited under the NRI portfolio investment scheme, surpassing the founders' stakes due to a large government share. This aggressive acquisition strategy was rare at the time. While the economic reforms of the 1990s[13] fuelled M&A growth, dedicated legislation was absent until the early 1990s and 2000s, when the SEBI Act, 1992, and the Competition Act, 2002, indirectly regulated M&A. At present, there is no separate regulation for M&A. The Companies Act, 1956,[14] governed M&A but with perceived complexity and time-consuming processes, acting as deterrents for potential deals. The pivotal

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[8] Companies Act 2013, s 233.
[9] ibid.
[10] Monopolies and Restrictive Trade Practices Act 1969.
[11] Simone Reis and Ishita Kashyap, 'Don't Mind: You've been Acquired!' (Nishith Desai Associates 2020) <www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Don_t-Mind-You_ve-been-Acquired.pdf> accessed 23 June 2024.
[12] ibid 10.
[13] Arvind Panagariya, 'India in the 1980s and 1990s: A triumph of Reforms' (IMF Working Paper 2004) <https://www.imf.org/external/pubs/ft/wp/2004/wp0443.pdf> accessed 08 January 2024.
[14] Companies Act 1956.

roles of the SEBI Act and Competition Act became prominent in 2011 with the introduction of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulation, 2011, and Sections 5[15] and 6 of the Competition Act.[16] These provisions addressed acquisitions in listed companies, emphasizing fair disclosure, open offer requirements, and preventing anti-competitive practices.

Prior to 2013, the Indian M&A market experienced relative stagnation for various reasons:

1. *Legal Framework***:** The Companies Act, 1956, governing M&A activity, lacked clarity and specific provisions, leading to delays and uncertainties in the approval process.
2. *Approval Processes*: Pre-2013, M&A transactions required approvals from multiple regulatory bodies, creating a cumbersome and lengthy process involving government departments like the Ministry of Corporate Affairs, Reserve Bank of India ('RBI'), and the Competition Commission of India ('CCI'). The lack of streamlined procedures impeded the execution and closure of M&A deals.
3. *Competition Regulations:* The Competition Act, 2002, and its subsequent amendments established the CCI to regulate M&A transactions, but stringent interpretation and implementation led to delays in obtaining necessary clearances. The CCI's scrutiny of M&A deals and focus on potential market dominance caused apprehension among investors.
4. *Foreign Direct Investment ('FDI') Restrictions:* Pre-2013, restrictions on FDI in various sectors limited foreign investors' participation, particularly in critical sectors like retail, insurance, and aviation, curbing potential M&A opportunities and limiting foreign capital inflow.
5. *Judicial Intervention:* M&A transactions faced frequent legal challenges, leading to lengthy litigations. Overloaded courts and contentions over interpretations of the law further delayed deal completions. For instance, the failure of the RCOM and Aircel Merger[17] was due to the lengthy and time-consuming process, caused by the number of permissions that had

[15] Competition Act 2002, s 5.
[16] Competition Act 2002, s 6.
[17] Joshi M, 'RCom-Aircel merger collapses, doubts on debt repayment rise' (*Mint*, 1 October 2017) <www.livemint.com/Industry/AlvCOy7DfPTsxYmnE8K7EP/RComAircel-merger-called-off-due-to-regulatory-legal-uncer.html> accessed 23 June 2024.

to be sought from the courts and Department of Telecommunications ('DOT').

6. *Documentation Requirements:* M&A processes involved extensive documentation without standardized templates, lengthening the time taken for document preparation and review.

7. *Taxation Issues:* Ambiguities in tax laws often deterred parties from pursuing M&A transactions, with disputes and uncertainties discouraging potential investors.[18] For example, the Snapdeal and Flipkart deal failed due to huge tax liabilities on the Snapdeal investors because of the complex taxation rules.[19]

The development of fast-track mergers in India resulted from a confluence of factors, exemplifying the concept of 'punctuated equilibrium.'[20] Analogous to the abrupt shifts observed in biological evolution, this legislative intervention, in the form of the fast-track merger provision in the Companies Act, 2013, disrupted the prolonged stability in the M&A domain, marking a departure from the intricate and prolonged merger processes.

Punctuations in the M&A landscape, triggered by technological advances, regulatory changes, or economic influences, have the capacity to reshape industry ecosystems through strategic consolidations and transformative acquisitions. Technology adoption, particularly artificial intelligence ('AI'), plays a pivotal role in improving M&A outcomes by analysing datasets for target identification, risk assessment, and integration optimisation. Continuous adaptation is essential to prevent technological obsolescence, requiring proactive measures for sustained competitiveness in the dynamic M&A environment.

The impetus for the development of fast-track mergers stemmed from a combination of factors, including economic imperatives to streamline M&A activity for growth and competitiveness, global trends in corporate restructuring, and recognition of the need to address delays and inefficiencies

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[18] Sodhani A and Agarwalla I, 'Tax Issues in M&A Transactions' (Nishith Desai Associates 2022) <https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Tax_Issues_in_M_A.pdf> accessed June 23, 2024.

[19] Press Trust of India, 'Snapdeal Merger Called off to Avoid Millions of Dollars in Tax Liability?' *Business Standard* (New Delhi, 11 August, 2017).

[20] Stephen Jay Gould and Niles Elderdge, 'Punctuated Equilibria: The Tempo and Mode of Evolution Reconsidered' (1977) 3(2) Paleobiology 115 <http://www.jstor.org/stable/2400177> accessed 08 January 2024.

in the traditional merger process. Before the introduction of fast-track mergers in 2013, the merger process in India was time-consuming and cumbersome, involving multiple regulatory approvals and lengthy court procedures, often resulting in delays or abandoned deals.

These factors contributed to a significant decline in M&A deals in India before 2013, reaching a low of $31.5 bn in 2013, with domestic M&A hitting its lowest point since 2009 at $21.5 bn.[21] The primary reasons for this decrease included slow business growth, an uncertain economic environment, and volatility in foreign exchange rates. Additionally, the absence of fast-track merger laws further hampered M&A activity. The enactment of such laws in the Companies Act, 2013, marked a turning point, contributing to a 28.5% increase in M&A deals in the latter half of that year.[22]

The Vodafone–Hutchison Essar Merger case[23] centred on tax liability in cross-border M&A, highlighting uncertainties in the legal environment. This prompted regulatory reforms for greater clarity and transparency, leading to amendments in the Income Tax Act through the Finance Act, 2012; still, no direct regulation or amendment to M&A was made. Recognising challenges in regulatory clearances, the CCI pledged to streamline approval processes in its 2012-2013 annual report.[24] Furthermore, the Foreign Investment Promotion Board ('FIPB'), responsible for approving FDI proposals, faced criticism for its slow and inefficient decision-making process, contributing to the slow pace of M&A activity, and was abolished in 2017.[25]

It was in the latter part of 2013 that the Indian M&A market experienced substantial growth, with a 214.3% sequential increase in overall domestic M&A during the second half of the year, reaching US$15.3 billion. This surge was

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[21] Press Trust of India, '2013 M&As down 11.5% to 31.5 billion; lowest since 2009' *Business Standard* (Mumbai, 03 January 2014).

[22] ibid.

[23] Geoffrey T Loomer, 'The Vodafone Essar Dispute: Inadequate Tax Principles Create Difficult Choices for India.' (2009) 21(1) National Law School of India Review 89 <http://www.jstor.org/stable/44283690> accessed 08 January 2024.

[24] Competition Commission of India, *Annual Report 2012-2013* (2013).

[25] Kartik Jain, 'FIPB abolition: Will the wheels of foreign investment approval slow down' *The Economic Times* (15 July 2017) <https://economictimes.indiatimes.com/small-biz/legal/fipb-abo
lition-will-the-wheels-of-foreign-investment-approval-slow-down/articleshow/59605833.cms> accessed 8 January 2024.

significantly higher than the 12.3% growth observed in the first quarter at US$20.1 billion.[26] Several factors contributed to this upswing:

Regulatory Reforms: The Indian government has undertaken comprehensive reforms to enhance the business environment. The introduction of the Companies Act in 2013 and subsequent amendments streamlined the M&A process, offering clarity and simplifying regulations. These reforms facilitated smoother mergers and acquisitions by providing a structured framework for companies.

The implementation of the Companies Act, 2013, in phases to replace the older Companies Act, 1956, was a significant step as it activated 90 sections, including Chapter XV (Sections 230-240) on M&A, in December 2016. The accompanying Companies (Compromises, Arrangements and Amalgamations) Rules, 2016,[27] outlined regulations for M&A transactions. The salient features include provisions for the regulation and approval of M&A transactions, the role of the NCLT in overseeing the process, disclosure requirements, and the protection of stakeholder's interests.[28] Notably, pending M&A proceedings under the 1956 Act were transferred to the NCLT, bringing efficiency to dispute resolution and marking a significant shift in M&A regulations in India.[29]

Following the enactment of the Companies Act, 2013, M&A deals in India experienced a notable upswing. In 2014, Grant Thornton India reported a 22% increase in deal value and a 13% rise in volume.[30] Ernst and Young ('EY') noted a substantial 215% surge in domestic M&A deals from 2015 to 2019, totalling US$107 billion. The international M&A landscape also expanded, reaching US$6.2 billion in the same period. Despite a temporary slowdown in 2020 due to the COVID-19 impact, India rebounded in 2021, recording 598 deals valued at US$112.8 billion—a historic high. In 2022, India sustained momentum with a 38% increase, reaching a total of US$170.6 billion. However, Bloomberg reported a 63% decline in deal value in 2023 compared to 2022, citing factors

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[26] ibid 14.

[27] Companies (Compromise, Arrangements and Amalgamations) Rules 2016.

[28] ibid 25.

[29] ibid 25.

[30] Press Trust of India, 'M&A deal activity likely to revive in sectors like telecom, aviation and retail in 2014: Grant Thornton' *The Economic Times* (4 February 2014) <https://economictimes.indiatimes.com/news/company/corporate-trends/ma-deal-activity-likely-to-revive-in-sectors-like-telecom-aviation-and-retail-in-2014-grant-thornton/articleshow/29863462.cms> accessed 8 January 2024.

such as inflation, geopolitical tensions, and a lack of technological advancements.[31]

Liberalisation of Foreign Investment Policies: The Indian government progressively liberalised its foreign investment policies, permitting higher levels of FDI in various sectors such as retail, e-commerce, financial services, and telecommunications. This liberalisation attracted foreign investors and facilitated cross-border M&A transactions.

Data from the Department for Promotion of Industry and Internal Trade ('DPIIT') indicated a steady increase in FDI inflows into India since 2014, driven by policy changes like the Make in India campaign, GST implementation, and ease of doing business reforms. In the financial year 2019-2020, India received approximately $74.39 billion in FDI, reflecting increased investor confidence.[32] This trend continued in 2020-2021, with a growth of 10% amounting to $82 billion.[33] In 2022-2023, India attracted $71 billion in FDI, representing a remarkable 100% increase over the last nine financial years (2014-2023), signalling a significant surge in foreign investments.[34]

Insolvency and Bankruptcy Code, 2016: The implementation of the IBC emerged as a significant driver for M&A activity in India. The IBC introduced a time-bound and structured mechanism for resolving distressed assets, expanding the scope for acquisitions of insolvent companies.

Data from the Insolvency and Bankruptcy Board of India ('IBBI') reveals a total of 6,815 cases admitted under the IBC as of June 2023.[35] These cases led to successful acquisitions and resolution plans, contributing to the recovery of distressed assets and the revitalisation of businesses.

*Growth of the Indian Economy***:** India's robust and sustained economic growth played a pivotal role in driving M&A activity. The country's flourishing economy, coupled with rising consumer demand and the emergence of a

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[31] Ernst and Young, 'M&A activity remains resilient in 2022, but further shocks could derail outlook' (6 September 2022) <https://www.ey.com/en_ro/newsroom/2022/07/m-a-activity-remains-resilient-in-2022-but-further-shocks-could> accessed 8 January 2024.

[32] Special Correspondent, 'FDI inflow touches $82 bn in FY21' *The Hindu* (New Delhi, 25 May 2021).

[33] ibid.

[34] Livemint, 'FDI flows plummets 16% in FY23 to USD 71 billion' *Mint* (24 May 2023).

[35] Surabhi, 'Over 65% of IBC cases have been ongoing for than 270 days' *Business Today* (22 August 2023).

middle-class population, attracted both domestic and international investors seeking growth opportunities.

India has maintained its status as one of the fastest-growing major economies globally, with the IMF projecting a Real GDP growth rate of 6.3% in the financial years 2023/24 and 2024/25.[36] This reflects India's ongoing efforts to implement structural reforms and invest in key sectors like infrastructure, manufacturing, and technology. The demographic dividend, characterised by a large young population with a median age of 28 years, contributes to the increasing trend of M&A in the country. Coupled with a burgeoning middle class, India presents a lucrative market for businesses. The government's emphasis on ease of doing business and various policy initiatives aimed at attracting foreign investments have further bolstered positive investor sentiment. With a sustainable and robust growth outlook, India continues to offer immense potential for investors seeking long-term opportunities.

IV. FAST-TRACK MERGERS, SLOW-MOVING APPROVALS: THE CREDITOR CONUNDRUM IN INDIA

The Companies Act of 2013 is a key legislative framework governing M&A in India. Although the Act and subsequent amendments introduced significant changes, challenges persisted in fast-track M&A, encompassing regulatory compliance, approval processes, valuation, minority shareholder protection, legal adherence, and post-merger integration. Despite the absence of specific M&A laws or direct amendments to the Companies Act of 2013 to address these challenges, the Ministry of Corporate Affairs recently issued amendments to Rule 25 of the Companies (Compromises, Arrangements and Amalgamation) Rules, 2016. These amendments, related to Section 233 of the Companies Act, 2013, focus on regulating fast-track mergers, indicating a proactive step towards addressing the M&A intricacies.[37]

The introduced amendments represent a constructive stride towards streamlining and expediting the M&A processes in India. Specifically, the amendment entails a reduction in the stipulated timeline for the central government's confirmation or rejection of the merger scheme. Another noteworthy modification is the introduction of the concept of deemed approval.

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[36] Reuters, 'IMF raises India's FY24 GDP growth forecast to 6.3%: Report' *The Times of India* (10 October 2023).

[37] Companies Act 2013, s 233.

This implies that a meticulously presented scheme automatically attains approval if not addressed within a predefined timeframe. In essence, the amendment establishes specific timelines, mitigating past issues where delayed confirmation from the Registrar of Companies ('RoC') or Official Liquidator ('OL') caused significant delays. If the objections are not raised within the stipulated period, the scheme is deemed approved by the central government, enhancing efficiency and certainty in the M&A transactions.[38]

While the amendment addresses delays arising from the delayed responses of the RoC or OL, a substantial challenge persists under Section 233 of the Companies Act, 2013. This challenge involves obtaining approval from a minimum of 90% of shareholders or 9/10th of creditors or designated classes of creditors for each involved company. This requirement poses logistical hurdles, particularly in convening creditor meetings and ensuring their attendance, especially when creditors are dispersed geographically. The challenge is more pronounced in publicly traded companies where shareholders are widely scattered and may not actively engage in company decisions. From a Public Choice Theory perspective,[39] the challenges posed by arranging a creditor meeting and ensuring attendance can be viewed in terms of the transaction costs and decision-making costs incurred. These costs can hinder effective decision-making, reduce shareholder engagement, and potentially lead to suboptimal outcomes for the company and its stakeholders. Efforts should be made to minimise these costs by implementing efficient mechanisms for communication, coordination, and participation in order to promote transparent and accountable decision-making processes.

Obtaining the requisite quorum and approval poses challenges, with potential cost implications and resource intensiveness, especially if multiple meetings are necessary. The concern over liabilities being transferred, not extinguished, underscores the necessity for flexibility. High approval thresholds may impede smooth liability transfer, complicating the restructuring process. Additionally, disclosing such decisions can influence market perception, impacting shareholder behaviour amidst market fluctuations. Striking a balance

[38] Kirti, 'MCA streamlines approvals for mergers vide Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2023' (*SCC Online*, 17 May 2023) <https://www.scconline.com/blog/post/2023/05/17/mca-notified-companies-compromises-arrangements-and-amalgamations-amendment-rules-2023-legal-news/> accessed 8 January 2024.

[39] Jane S Shaw, 'Public Choice Theory' (*The Concise Encyclopedia of Economics)* <https://www.econlib.org/library/Enc1/PublicChoiceTheory.html> accessed 8 January 2024.

between creditor interests and restructuring feasibility is paramount. Introducing flexibility in approval thresholds accommodates attendance variations, preventing undue delays or costs.

A Company Law Committee Report dated March 21, 2022, suggested an amendment to Section 233 of the Act. The report suggested including twin tests, requiring:

a) Approval from at least 75% of shareholders present and voting at such meeting; and

b) Approval from more than 50% of total shareholders of a company.[40]

The Ministry of Corporate Affairs has not proposed amendments addressing these suggestions. Despite specifying approval timelines and introducing deemed approval, the current onerous requirement of 90% shareholder approval remains a hindrance.

V. M&A SANDBOXES: INDIA'S KEY TO FASTER AND SMOOTHER DEALS

In recent years, India has experienced a notable surge in M&A activities across various sectors, reflecting a strategic approach to growth as companies endeavour to expand operations, enter new markets, and optimize resources. Despite the existence of legal frameworks and regulations aimed at facilitating M&A transactions, numerous challenges persist, making the navigation of these complexities a daunting task.

To expedite and streamline M&A transactions, it is proposed that the government initiate the establishment of an M&A regulatory sandbox. This innovative approach seeks to provide a controlled environment wherein market participants can test proposed M&A transactions, ensuring compliance with existing regulations while simultaneously fostering innovation and efficiency. The M&A regulatory sandbox would balance regulatory flexibility with necessary oversight. It encourages experimentation through waivers, defines parameters for testing, and ensures participant eligibility. Regulatory authorities actively monitor transactions, requiring regular reports on progress and compliance. Collaboration fosters a dynamic exchange of insights, and a

[40] Ravi Shah, Devanshi Dalal and Dhwani Shah, 'Mergers on a fast-track' (*Cyril Amarchand Mangaldas*, 26 June 2023) <https://corporate.cyrilamarchandblogs.com/2023/06/mergers-on-a-fast-track/> accessed 8 January 2024.

structured graduation process ensures the seamless integration of successful innovations into the standard M&A regulatory landscape.

Establishing an M&A regulatory sandbox is deemed advantageous. As previously discussed, the analogy between fast-track mergers and Punctuated Equilibrium underscores extended stability preceding significant changes.[41] Currently, M&A transformation occurs gradually with minor adjustments. Implementing a regulatory sandbox would ensure continuous technological evolution, as opposed to sporadic alterations. Rapid technological evolution would further necessitate perpetual innovation for business competitiveness. Introducing an M&A sandbox therefore facilitates a proactive approach to technological advancements, fostering a dynamic environment for transformative changes. This is pivotal for businesses to keep pace with rapid technological developments and sustain competitiveness in the evolving M&A landscape.

An M&A regulatory sandbox would facilitate innovation by offering temporary waivers on certain regulations, fostering a controlled testing ground with defined boundaries and guidelines. Despite relaxed regulations, it would maintain regulatory oversight to uphold fairness and investor protection. Eligibility criteria would ensure responsible participation; while reporting and compliance measures would monitor progress and adherence to existing regulations. Collaboration and feedback mechanisms would encourage dialogue between participants and regulators, promoting continuous improvement. A clear graduation and transition framework would conclude the testing phase, ensuring a smooth return to the regular M&A regulatory framework.

In India, various regulatory bodies such as the RBI,[42] SEBI, etc., have introduced the concept of a regulatory sandbox for sector-specific innovations and technological advancements.[43] Further, the Telecom Regulatory Authority of India Consultation Paper in June 2023[44] and the Draft National Strategy on

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[41] ibid 18.

[42] RBI, *Draft Enabling Framework for Regulatory Sandbox* (Report by inter-regulatory Working Group 2018).

[43] SEBI, 'Regulatory Sandbox Framework' <https://www.sebi.gov.in/sebi_data/meetingfiles/feb-2020/1582714278455_1.pdf> accessed 8 January 2024.

[44] PIB, 'TRAI releases Consultation Paper on "Encouraging Innovative Technologies, Services, Use Cases, and Business Models through Regulatory Sandbox in Digital Communication Sector"' (*PIB*, 22 June 2023) <https://pib.gov.in/PressReleasePage.aspx> accessed 8 January 2024.

Robotics, in its recommendations released in September 2023,[45] recommended the use of a regulatory sandbox for technological innovations and advancements. As a starting point, adapting to the existing regulatory sandbox framework for M&A could offer a perspective to address the challenges.

Introducing an M&A regulatory sandbox can address concerns surrounding creditors' approval by offering a flexible alternative to the current 90% shareholder and 9/10th creditor thresholds. Particularly beneficial for SMEs and startups, the sandbox allows for a proportionality-based approach, varying approval requirements based on factors like company size, transaction complexity, and public interest implications. For instance, in a hypothetical scenario involving two tech startups, ABC Tech and XYZ Software, seeking a fast-track merger, the sandbox could explore adjusting thresholds to, for example, a 75% shareholder approval and a tiered creditor system. This tailored approach within the sandbox has the potential to facilitate smoother SME mergers, promote innovation, and contribute insights for future policy refinements.

Further, this approach to developing M&A regulatory sandbox could also lead to an increase in cross-border M&A deals because the current rigid approval thresholds in India can stall these deals, especially for small players. Therefore, adjusting thresholds based on factors like company size, deal complexity, and even national security implications. So basically, according to this, there would be lower thresholds for M&A involving smaller Indian companies compared to M&A impacting strategic sectors like infrastructure. This would also ensure a fair playing field for entities and help reduce cost implications.

VI. A WAY FORWARD: JURISDICTIONAL PERSPECTIVE ON SANDBOX FRAMEWORKS

Moving forward, India should strategically implement the proposed M&A regulatory sandbox to invigorate its M&A landscape. Conducting thorough stakeholder consultations will be essential to tailor the sandbox framework to the specific needs of the Indian market. Leveraging insights from existing sector-specific sandboxes and integrating advanced technologies will enhance

[45] Ministry of Information Technology, 'Draft National Strategy on Robotics'<https://www.meity.gov.in/writereaddata/files/Draft-National-Strategy-Robotics.pdf> accessed on 8 January 2024.

efficiency and effectiveness. A gradual rollout or pilot project will allow for careful monitoring and evaluation, facilitating iterative improvements.

Flexible approval thresholds, aligned with company size and complexity, can address the challenge of obtaining shareholder and creditor approvals. Collaborating with international regulatory bodies will ensure global alignment and facilitate cross-border transactions. For instance, to develop a threshold-based M&A sandbox, the agencies could develop a mechanism like the RBI's sandbox, which enables a regulator to create ad-hoc thresholds for different cohorts i.e. it allows for flexibility in selecting products for testing within the regulatory sandbox, allowing for the tailoring of criteria.

Secondly, during the viability testing, the thresholds for compliance can be elevated, to ensure that only genuinely beneficial and stable products receive approvals.[46] For instance, several criticisms have been raised against the regulatory sandbox proposed by the Telecom Regulatory Authority of India ('TRAI'), such as mandatory participation, potential regulatory exploitation, and lack of global precedent for the telecom regulatory sandboxes, which might lead to increased regulatory intervention and might also favour non-licensed entities, creating an uneven playing field.[47] When creating an M&A sandbox, the authorities could consider these issues and form testing requirements accordingly.

The authorities in India could also analyse the frameworks present in other jurisdictions and form a regulatory sandbox considering its socio-economic and political conditions. For instance, India could refer to Singapore's FinTech Regulatory Sandbox introduced by The Monetary Authority of Singapore ('MAS') as a compass to build its own robust M&A sandbox.[48] This is because Singapore's FinTech Regulatory Sandbox is revolutionising the legal landscape of M&A in the financial sector. It provides a controlled environment for firms to test their M&A innovations, like AI-powered due diligence or blockchain-based deal platforms, while mitigating risks and protecting the

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[46] ibid 41.

[47] Subhayan Chakraborty, 'Telecom service providers wary of regulatory sandbox proposed by TRAI' *Business Standard* (New Delhi, 16 August 2023) <https://www.business-standard.com/industry/news/telecom-service-providers-wary-of-regulatory-sandbox-proposed-by-trai-123081600635_1.html> accessed on 8 January 2024.

[48] Monetary Authority of Singapore, 'Overview of Regulatory Sandbox' <https://www.mas.gov.sg/development/fintech/regulatory-sandbox> accessed 8 January 2024.

system. This fosters collaboration with regulators, shaping future M&A frameworks adapted to new technologies.

Crucially, the sandbox allows firms to seek exemptions or modifications to existing regulations hindering their M&A solutions. This opens doors for exploring new frontiers, like using AI for deal prediction or blockchain for secure cross-border transactions, all within a safe and responsible framework. By enabling responsible innovation and close regulatory oversight, Singapore positions itself as a global hub for M&A innovation, attracting cutting-edge technologies and investments while ensuring financial stability and consumer protection.

In 2017, the International Organization of Securities Commissions ('IOSCO') recognised the MAS's efforts in promoting innovation and recommended the sandbox model for other jurisdictions to consider.[49] As of September 2021, the MAS has reported that over 100 firms have participated in the regulatory sandbox, testing a range of innovative financial products and services.[50] The sandbox has facilitated the testing of various M&A solutions, including innovative technologies such as blockchain and artificial intelligence. Examples include digital platforms for M&A deal sourcing, due diligence automation, and post-M&A integration tools.

Similarly, Australia's regulatory sandbox was introduced by the Australian Securities and Investments Commission ('ASIC') in 2016.[51] The sandbox offers exemptions from certain licensing requirements, allowing fintech companies to test their products without undergoing a lengthy regulatory approval process. As a result, M&A activities in the Australian fintech sector have increased significantly.

The Australian fintech sector has witnessed a surge in M&A deals involving both domestic and international players. According to the Fintech Australia Census 2020, more than 70% of Australian fintech companies have

[49] International Organization of Securities Commissions, *IOSCO Research Report on Financial Technologies (Fintech)* (2017) <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD554.pdf> accessed 8 January 2024.
[50] ibid 47.
[51] Australian Securities and Investments Commission, 'Enhanced Regulatory Sandbox (ERS)' <https://asic.gov.au/for-business/innovation-hub/enhanced-regulatory-sandbox-ers/> accessed 8 January 2024.

reported being involved in M&A activities.[52] The regulatory sandbox creates a favourable environment for international companies to invest in and acquire Australian fintech startups. The 2019 Fintech Australia Census found that approximately 40% of Australian fintech startups have received investment or interest from overseas organisations.[53]

Moreover, the UK Financial Conduct Authority ('FCA') has also established a regulatory sandbox for financial services.[54] However, it also caters to M&A transactions. Within the sandbox, companies can also explore and test M&As in a secure and supervised manner. This process enables them to assess regulatory implications, identify potential challenges, and develop innovative solutions before finalising a transaction. The sandbox facilitates collaboration with the FCA and other regulatory bodies, ensuring a smoother M&A process, fostering compliance, and promoting overall growth and innovation within the financial services industry.

The UK also has a strict entry criterion; the regulatory sandbox is not always open to all the firms. For instance, since August 2021, the authority received about 113 applications. However, only 22 firms were accepted.[55] This this was done to ensure that firms which were genuine with their innovations would get a chance to test their creations.

By drawing inspiration from regulatory sandboxes worldwide and customizing them to align with its unique ecosystem, India possesses the potential to establish a dynamic regulatory sandbox with a specific focus on M&A activities. This strategic approach not only fosters innovation but also attracts investments by creating a streamlined environment for testing and launching new products. The sandbox, in this context, serves to alleviate the cumbersome burden of costly and time-consuming licensing requirements, providing a conducive platform for businesses to thrive.

Moreover, the streamlined processes within the M&A-focused sandbox can significantly expedite transactional activities, embodying the true essence of

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[52] Malia Forner, 'Why Australian fintechs are sufficiently robust to weather the coming storm' (*Ernst Young*, 2 November 2022) <https://www.ey.com/en_au/economics/fintech-australia-census-report-2022> accessed 8 January 2024.
[53] ibid.
[54] Financial Conduct Authority, 'Regulatory Sandbox' (27 March 2022) <https://www.fca.org.uk/firms/innovation/regulatory-sandbox> accessed 8 January 2024.
[55] ibid.

fast-tracking. To ensure the adaptability of this model to the evolving market dynamics, the implementation of ongoing review mechanisms becomes imperative. Consequently, the incorporation of successful sandbox practices into the broader regulatory landscape can be seamlessly achieved through well-timed legislative amendments. This multifaceted approach positions India to not only encourage innovation and investment in the M&A sector but also to maintain regulatory agility in response to evolving market trends.

VII. CONCLUSION

The M&A narrative in India has undergone pivotal shifts, marked by historical milestones and regulatory complexities. The introduction of a regulatory sandbox emerges as a visionary solution, borrowing insights from successful global models. This innovative framework promises to revolutionise M&A dynamics, providing a controlled space for testing strategies, ensuring regulatory compliance, and fostering a climate of responsible innovation. By addressing longstanding challenges, particularly the cumbersome 90% shareholders' approval threshold, India can elevate its appeal to investors and businesses. Embracing a forward-thinking approach through a dynamic M&A regulatory sandbox positions India at the forefront of global M&A innovation, facilitating growth, and streamlining transactions in an ever-evolving economic landscape.