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## Freedom

Sixty years ago, our founding fathers gave us an opportunity. An opportunity to close the door of the past and open a door into the future. An opportunity to make changes, as a result we have emerged as a stronger and in a much better position to grow in the years ahead. It has been a period of far-reaching changes in commercial law, with the Direct Taxes Code and the IFRS (International Financial Reporting Standards) being adopted by 2011 and now the publication of the Draft Takeover Regulations, 2010 ("Draft Code"). Hot on its trail, businesses are anticipating the Companies Bill and competition law merger regulation guidelines which would complete the four corners of major changes to corporate law and life in 2010-11.

**We are evolving for a more confident India**

*Happy independence day to an emerging economic power and the world's largest free and democratic nation*

### Highlights

- To strengthen the existing M&A framework threshold of the open offer has been increased from current 15 percent to 25 percent. Complementing the above recommendation is the increase in the open offer requirement for 100 per cent of the shares upon crossing the threshold of 25 per cent.
- Through a single application only Indian trademark applicants may choose to register their trademarks in any 84 countries which are member of the Madrid Protocol and vice versa applicants of other member countries can also register their trademarks in India.
- As India prepares to host multiple major international sporting events, with the Commonwealth Games 2010 round the corner in October and the Cricket World Cup 2011 next year in March-April, the controversial practice of "ambush" marketing will come under the scanner.
- Professional firms who do not even have a permanent establishment in India are liable to being taxed for services rendered offshore for Indian projects
- Individual foreign investors should be allowed to buy shares directly in Indian companies, a panel has recommended, opening the possibility of increased portfolio flows into India.
- Setting up special economic zones in smaller cities is set to become more attractive after the Government has decided to reduce the minimum built up area requirement for sector specific zones such as IT, Gems & Jewellery and bio-tech in tier-2 and tier 3 cities.

### Will the takeover code hit M&As?



In order to achieve 9 per cent-plus GDP growth, India's corporate governance and regulatory framework need to be benchmarked to global standards to attract both domestic and international capital. M&A will be a critical lever for inorganic growth as the country will perhaps continue to be one of the key regions for global economic activity. Hence Takeover Regulatory Advisory Committee (TRAC) recommendations should be seen in the overall context of providing an efficient and effective framework for future M&A activity.

One of the key recommendations of TRAC is to increase the threshold of the open offer to 25 per cent from the current 15 per cent. The increased threshold will provide a meaningful trigger level beyond which a shareholder will certainly have positive control in the affairs of the company. Another collateral benefit will be for the financial and strategic investors who can invest in companies to provide capital, technology and know-how for growth and value creation without affecting the control of the company. It is obviously important for the incumbent shareholders of the company to ensure such investors do not have shadow control on the company at the expense of the other shareholders.

Complementing the above recommendation is the increase in the open offer requirement for 100 per cent of the shares upon crossing the threshold of 25 per cent. This provides a fair opportunity to all shareholders to exit the firm, which is fair and equitable for the incumbent shareholders.

TRAC has also proposed a tight framework for the price paid to exiting shareholders so that there is no disguised consideration paid differentially to any group of shareholders, this will lead to further development of capital markets in India with new financing structures and instruments like acquisition-related equity raising, issuance of convertible debt instruments, and will also promote the usage of other non-cash considerations like exchange of equity.

TRAC has also recommended that the creeping acquisition provisions continue to be available to shareholders in control to enable them to consolidate their holdings. One of the best defence mechanisms for any company in the long term is not regulatory protection but continued value creation for all the shareholders.

Finally, TRAC has proposed that it would be mandatory for the board of the target company to provide its reasoned view of the takeover proposal and make a recommendation to the shareholders of the company. This puts significant responsibility on the boards, especially the independent directors, to provide corporate stewardship in takeover situations. This will perhaps set the scene for new standards in corporate governance in the country.

### Trademark Amendment Bill: India Stepping Into Global Trademark Regime

Aug. 2010, government of India has passed the Trademark (Amendment) Bill, 2009 in the Parliament. The proposed legislative amendment will certainly expand the realm of Indian Intellectual property regime to 84 countries which are member of the Madrid Protocol. Through a single application only Indian trademark applicants may choose to register their trademarks in any other member country and vice versa applicants of other member countries can also register their trademarks in India. This procedure is analogous to the trademark application procedure of Patent Cooperation Treaty (PCT). Thereby it will lead to the scenario where overseas Trademark applicant seeking to register their trademark in India would face least hindrances in registering their trademarks.





## Ambush Marketing: a threat for sponsors

*“Ambush marketing is a means of getting the maximum bang for the buck while stealing some of a rival’s thunder”*

As India prepares to host multiple major international sporting events, with the Commonwealth Games 2010 round the corner in October and the Cricket World Cup 2011 next year in March-April, the controversial practice of “ambush” marketing will come under the scanner.

Since the cost of becoming an official sponsor has galloped to unprecedented heights in the last few years, sponsors are now faced with problems of ambush marketing whereby rival companies milk an event to their benefit, creating doubts in the minds of the customers. Ambush marketers does not directly seek connection with an event, but gives a great impact to its own brand, and exposes it to the people who are interested in the event. This way they don’t take any authorization from the organizers of the event.

In 1996 Cricket World Cup in India, though Coca-Cola was the official sponsor, rival Pepsi launched a huge advertising campaign with the punch line ‘nothing official about it. Therefore, the profits earned by them were much bigger than that of Coke.

### IPRs and Ambush Marketing

The current protection available under the IPR regime can be enumerated as:

- To protect the goodwill of the business,
- To protect consumers from deception, i.e., to prevent the purchasing of goods or services by the public in the mistaken belief that they originate from another trader (passing off).

### The common and illegal practices of ambush marketing include:

Unauthorised use of any kind of logo or symbol associated with any event.

- Commercial use of rights, benefits without authorization
- Use of words, symbols or pictorials confusingly similar to the event
- Unauthorised use of the sportsperson or sports celebrity appearance during the event for the advertisement purpose.
- Attempt to associate with an event without a license.

The production of print publication of television features about the event by the companies without paying the sponsorship fee.

### Cases under Indian Scenario:

*ICC Development (International) Ltd. vs. Arvee Enterprises and Anr.*<sup>1[1]</sup>: In this case the Appellants sought relief against the Defendant Company, which had hoisted slogans such as ‘Philips: Diwali Manao World Cup Jao’ or ‘ By Philips electronics item and win a ticket to the World Cup). Once again the Court held that just the logo of the World Cup whose copyright was with International Cricket Council (ICC), was protected under the Indian Copyright Act and the plea of ambush marketing was not upheld. While recognising the alleged act as ambush marketing categorically stated that such acts were not in fact prohibited under current Indian law.

### A need for stronger protection in wake of Commonwealth Games, 2010 and ICC Cricket World Cup, 2011

As India prepares to host multiple major international sporting events in the next few years, the controversial practice of “ambush” marketing will come under the scanner. The Commonwealth Games in 2010 and the ICC Cricket World Cup in 2011 will both be multi-thousand-crore rupee events and there will be calls for official event sponsors to receive special legal protection. Therefore, it is more than imminent at the moment that strong legislations are brought in to curb ambush marketing and follow global trends in protecting intellectual property rights.

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### Even offshore services are taxable

Recently, Income Tax Tribunal held those professional firms who do not even have a permanent establishment in India are liable to being taxed for services rendered offshore for Indian projects. Two conditions to be satisfied for taxability of related profits are (i) the services should be similar or relatable to the services rendered by the PE in India; and (ii) the services should be directly or indirectly attributable to the Indian PE i.e. rendered to a project or client in India. The result is that the entire profits relating to services rendered by the assessee, whether in India or outside, in respect of Indian projects is taxable in India.

### Foreign individuals may get direct access to equity markets

Individual foreign investors should be allowed to buy shares directly in Indian companies, a panel has recommended, opening the possibility of increased portfolio flows into India.

The recommendation has suggested a more liberal framework for foreign investment in India but strict disclosure rules for investors. It also wants foreign portfolio investment not to be counted for the computation of sectoral foreign investment limits, putting it at odds with the consolidated FDI policy of the government. That policy says that overseas investment of any type — portfolio or direct — should count in the computation of sectoral foreign investment caps.

The whole idea is to do away with the current norms that distinguish between the same type of capital coming under different garbs.

Extending the portfolio regime that includes repatriation benefit further would be a progressive step consistent with the liberalisation policy of the government.

*India is seen as a promising investment destination given its strong economic growth at a time when the developed world is struggling.*

Foreign institutional investors, or FIIs, have already pumped in over \$ 11 billion into the Indian stock market since January.

*Direct equity market access to foreign individual investors will create demand for domestic brokerages and banks to expand overseas, besides increasing the volumes on stock exchanges*

### In a big boost to non-metros, Government allows smaller SEZs:

Setting up special economic zones in smaller cities is set to become more attractive after the Government has decided to reduce the minimum built up area requirement for sector specific zones such as IT, Gems & Jewellery and bio-tech in tier-2 and tier 3 cities.

The guidelines have also given a 10 year deadline to developers for setting up the required infrastructure in a bid to weed out non-serious SEZ players.

With the reduction of the required built up area by half for tier 2 cities (relatively small cities usually with less than one million population) and by a fourth for even small tier 3 cities, investments in such zones have become more attractive. SEZs in tier 2 cities such as Madurai, Varansi, Raipur, Amritsar, Agra and Asansol will have a minimum built up area half of the earlier requirement. This means that IT SEZs, which earlier had to have a built up area of one lakh square meter, will now have to have infrastructure over only 50,000 square meter in such cities.

Similarly, gems & jewellery SEZs, requiring a built up area of 50,000 square meters, would now have a reduced requirement of 25,000 square meters in tier 2 cities. In tier 3 cities such as Jaipur, Ghaziabad and Kochi, the minimum built up area requirement has been brought down further to 25% of the original requirement. However, for big cities such as Delhi, Kolkata, Mumbai, Chennai and Bangalore, the old dispensation would continue.

The government's move to ensure that the built up area requirement is respected by developers by setting a ten-year deadline for its completion would oust non-serious players.

