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A balancing act on foreign capital

Rules on public offerings mean private equity groups have to weigh simple direct investment against the flexibility of an offshore vehicle

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LEGAL VIEW

India is a land of opportunity for cross-border legal practitioners and investment bankers. Take mergers and acquisitions, for example. American and British private equity groups are focusing on investment opportunities in India, while Indian companies are increasingly looking abroad for acquisition targets.

Those seeking to exploit capital market opportunities have also gathered momentum, with growing numbers of Indian companies expected to list overseas, and more and more India-dedicated investment platforms raising capital outside the country.

Entities seeking capital overseas include both India-based companies and groups organised outside India whose operations are conducted principally inside the country.

Indian companies cannot list equity shares abroad, and must therefore issue either American or Global Depositary Receipts (ADRs, GDRs) for an offshore listing. Those conducting an initial public offering in India can also access the global institutional market through institutional placements of equity shares, without a formal non-Indian listing.

Groups organised outside India can list in the US, London, Hong Kong or Singapore, for example, without an existing Indian listing. But India-based companies – under rule changes promulgated last year – can conduct an offshore offering and listing of ADRs or GDRs simultaneously with, or following, an Indian listing, but not before. A few early entrants to the Nasdaq market in the US opted to list directly there without a local listing, but that option is no longer available.

It follows that a private equity investor considering its exit in evaluating a potential investment will want to weigh the flexibility of investing through a non-Indian vehicle against the simplicity, but constraints, of a direct investment in an Indian company.

These constraints also include the inability to include in an IPO secondary shares held for less than one year. Moreover, for all shares not sold as part of the IPO, lock-ups of between one and three years are mandated by the rules of the Securities and Exchange Bureau of India (SEBI). As part of its calculation of the timing of its return, the private equity investor will need to evaluate its ability to sell quickly after an IPO, within the rules on public flotations.

The SEBI guidelines governing public offerings in India are comprehensive. The regulator tightens or loosens restrictions in a continuous effort to balance the pressures for market growth with the need to maintain certainty and stability.

As the role of foreign capital in India and cross-border activity by Indian companies continue to expand rapidly, this balancing process will be tested in the months and years to come.

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