

India mergers and acquisitions: Simplification of share swaps boosts structuring avenues and opportunities

Share swaps: Growing in popularity

Global trends reveal ‘share swaps’ have emerged as an attractive proposition for implementing Mergers and Acquisitions (“M&A”) for several commercial, strategic and regulatory reasons. Several landmark transactions, both globally¹ and in India², involving share-swap arrangements have been implemented.

In India, the rules around cross-border share swaps have been considerably liberalised over the years. The era of liberalisation which started in 2015 when the foreign exchange rules permitted limited types of ‘share-swaps’ culminated with substantial liberalisation of the norms in 2024. Some of the remaining uncertainties have been further clarified, as recent as in January 2025. Only a handful of share-swap structures remain under the ‘approval’ route. This opens exciting new structuring opportunities for structuring M&A transactions, particularly for start-ups. Further, growth-stage companies with limited liquidity are often inclined towards swap routes for undertaking strategic acquisitions. The reforms are likely to provide a fillip to such companies for relocation to India (‘reverse’ flipping in common parlance).

Swaps: Understanding the mechanics

The term ‘swap’ means ‘an act of exchange, interchange or switch’. Therefore, a share swap is a mechanism for acquiring shares of a company in exchange for shares of another company. The consideration for such transaction may or may not involve cash.

¹ Based on publicly available information, notable overseas transactions involving swap arrangements are: Disney’s acquisition of 21st Century Fox (<https://thewaltdisneycompany.com/the-walt-disney-company-signs-amended-acquisition-agreement-to-acquire-twenty-first-century-fox-inc-for-71-3-billion-in-cash-and-stock/>), Verizon Communications’ acquisition of 45% stake in Vodafone from Verizon Wireless (<https://www.bbc.com/news/business-23933955>) and merger of Glaxo Wellcome and SmithKline Beecham (<https://www.nytimes.com/2000/01/17/business/glaxo-and-smithkline-agree-to-form-largest-drugmaker.html>).

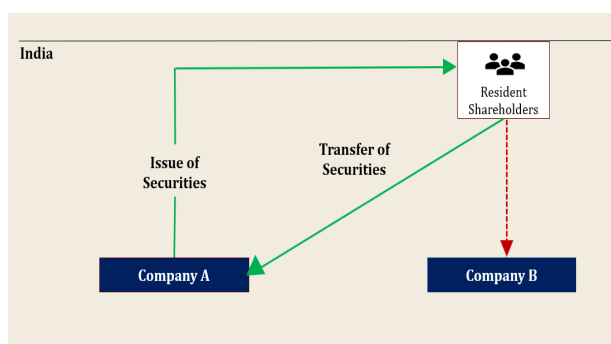
² Based on publicly available information, notable transactions in India involving swap arrangements are: Zomato’s acquisition of Blinkit (https://techcrunch.com/2022/06/24/zomato-blinkit/?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAEijfwoAlsYhcPTYP-fwU0UYiz-a1QLspNhjc_7ClS2EPmk_7kFnU2lg7zTbrgjMYay-iHYW5YcVhQUdYzeQV3qqOf2WdO-ReZvWxSQOAZ3q9dAo1FbkohXVB0ua2cPgJfGod3H-96JnbFckZpxUlsdJ36PzLymAESnmWdj3PN), merger of HDFC Limited into HDFC Bank (<https://www.thehindu.com/business/Industry/hdfc-bank-completes-merger-formalities-rebrands-hdfc-ltd-offices-branches/article67030718.ece>) and merger of Vodafone India and Idea Cellular (<https://www.motilaloswal.com/site/rreports/HTML/636256836571462603/index.htm>).

There are 2 (two) types of share swaps: (a) a domestic share swap; and (b) a cross-border share swap. In a 'domestic share swap', the shares of companies incorporated in India gets exchanged and the transaction involves 'resident' parties. A 'cross-border share swap' involves 'non-resident parties' dealing with the shares of a company incorporated in India ("Indian Company") or 'resident parties' dealing with the shares of a foreign company with limited liability ("Foreign Company").

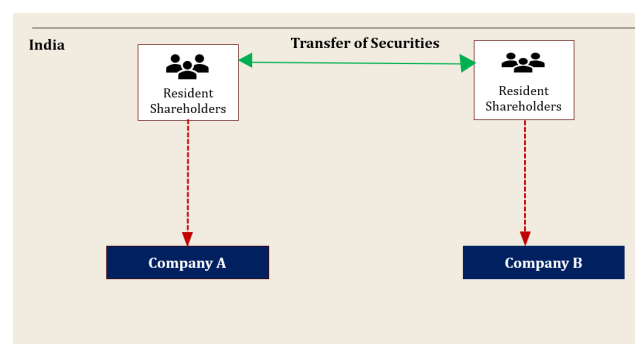
Permissible structures

1. **Domestic share swaps:** This share swap is devoid of any exchange control limb. It is purely domestic and hence, governed solely by the (Indian) Companies Act, 2013 ("**Companies Act**"). In such a situation, a swap may be, *inter alia*, undertaken as follows:
 - a) an Indian Company A can issue fresh securities to a resident shareholder (i.e., individual as well as entities) and the resident shareholder can pay for the same by transferring the securities it holds in an Indian Company B;
 - b) a resident shareholder can purchase the securities of an Indian Company A held by a resident shareholder and pay for the same by transferring the securities it holds in an Indian Company B; and
 - c) an Indian Company B can purchase the securities of an Indian Company A held by a resident shareholder and pay for the same by issuing and/or allotting securities of itself.

Domestic share swap by primary issuance



Domestic share swap by secondary transfer



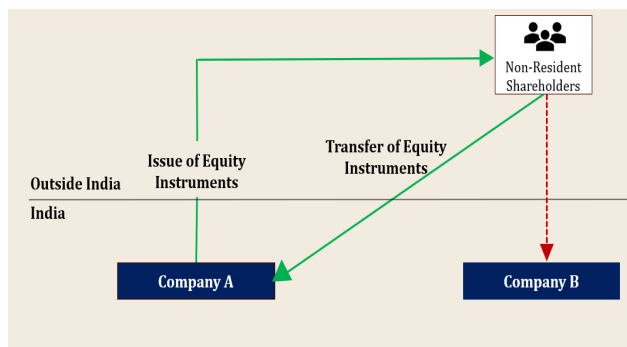
Any issuance of securities will be considered a 'private placement' of securities under the Companies Act. Accordingly, the rules with respect to a private placement must be complied with. Any transfer of securities must be executed by way of relevant securities transfer form/dematerialisation instruction, as the case may be, after paying relevant stamp duty on the transfer.

2. Cross-border share swaps

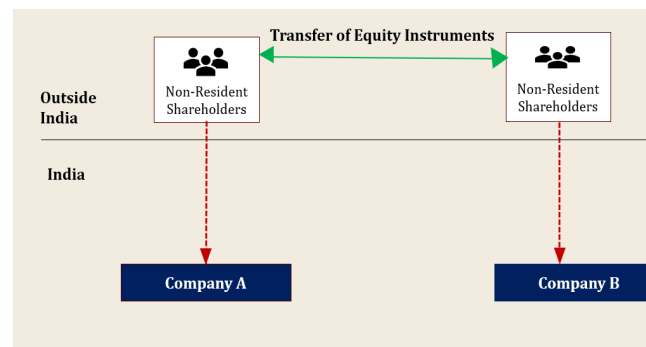
- a) **Inbound share swap:** Where one or more parties involved in a swap arrangement is a non-resident entity, the Foreign Exchange Management (Non-Debt Rules), 2018 ("**NDI Rules**") apply. The NDI Rules, *inter alia*, permits swap of 'equity instruments' of Indian Companies. 'Equity instruments' under NDI Rules is defined to mean "equity shares, convertible debentures, preference shares and share warrants issued by an Indian company". Accordingly, swap may be undertaken, *inter alia*, as provided below:
 - i) an Indian Company A can issue fresh equity instruments to a non-resident shareholder (i.e., individual as well as entities) and the non-resident shareholder can pay for the same by transferring the equity instruments it holds in an Indian Company B; and

- ii) the equity instruments of an Indian Company A held by a non-resident shareholder can be transferred in consideration for the equity instruments held by shareholders of another Indian Company B.

Inbound share swap by primary issuance



Inbound share swap by secondary transfer



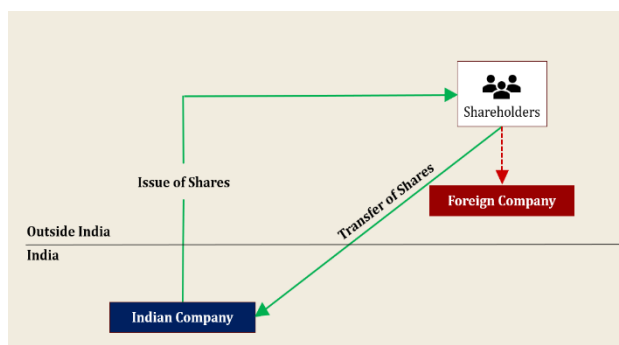
- b) **Outbound share swap:** An outbound swap may be a Foreign Direct Investment (“FDI”) - Overseas Direct Investment (“ODI”) Swap (“FDI-ODI Swap”) (or vice-versa) or an ODI-ODI Swap as explained below:

- i) **FDI-ODI Swap:** The ‘equity instruments’ of an Indian Company gets exchanged for ‘equity capital’ of a Foreign Company (the swap, “FDI-ODI Swap”). Therefore, on the one hand, NDI Rules apply for the receipt of foreign investment (or transfer thereof) and on the other hand, Overseas Investment Laws (*defined below*) apply for the outbound leg of the investment.

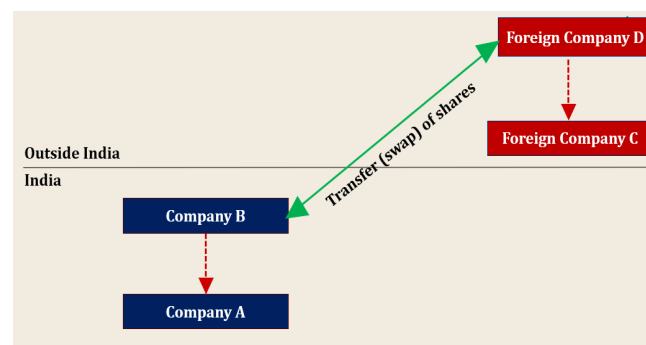
The regulations governing overseas investment by an Indian entity (“**Overseas Investment Laws**”) permit an Indian Company to undertake overseas direct investment by investment in ‘equity capital’ of a Foreign Company. Such ODI may be made or held, *inter alia*, by way of swap of securities. The term ‘equity capital’ is defined to mean “*equity shares or perpetual capital or instruments that are irredeemable or contribution to non-debt capital of a foreign entity in the nature of fully and compulsorily convertible instruments*”. The swap may be undertaken, *inter alia*, as provided below:

- an Indian Company may issue its equity instruments in exchange for equity capital held by the shareholder entity of a Foreign Company. Similarly, a Foreign Company may issue its equity capital in exchange for equity instruments held by the shareholder entity of an Indian Company;
- a shareholder entity B of an Indian Company A may purchase the equity capital of a Foreign Company C held by its shareholder entity D and pay for the same by transferring the equity instruments it holds in the Indian Company A.

Outbound share swap by primary issuance



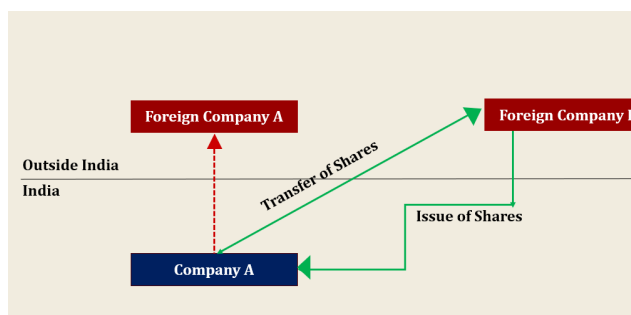
Outbound share swap by secondary transfer



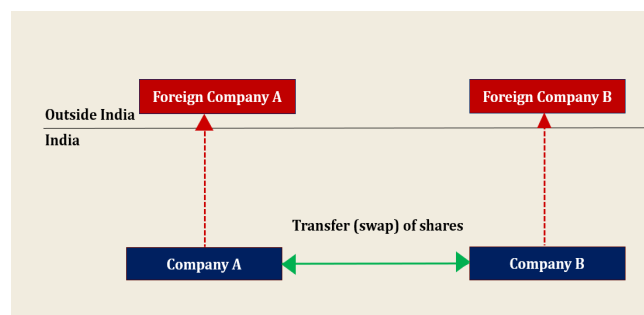
ii) **ODI-ODI Swap:** Schedule I of the Foreign Exchange Management (Overseas Investment) Rules, 2022 describes the manner in which the overseas investment can be made. It provides that ODI may be held or made by way of 'swap of securities'. It is pertinent to note that the Overseas Investment Laws do not expressly use the term 'swap of equity capital'. That said, since the intention of the Government has been to liberalise the rules for swap and make it easier for Indian companies to use this structure, a broader and more purposive interpretation of the expression "securities" can be applied. Accordingly, the 'equity capital' of a Foreign Company held by an Indian Company may be exchanged for 'equity capital' of a Foreign Company B ("**ODI-ODI Swap**"). In such a case, the Overseas Investment Laws will apply. These swaps may, *inter alia*, be undertaken as follows:

- An Indian Company 'A' can transfer the equity capital held by it in a Foreign Company 'A' to a Foreign Company 'B' as consideration for allotment of equity capital in Foreign Company 'B'.
- An Indian Company 'A' can transfer the equity capital held by it in a Foreign Company 'A' to an Indian Company 'B' as consideration for acquiring equity capital held by Indian Company 'B' in Foreign Company 'B'.

Outbound share swap by primary issuance

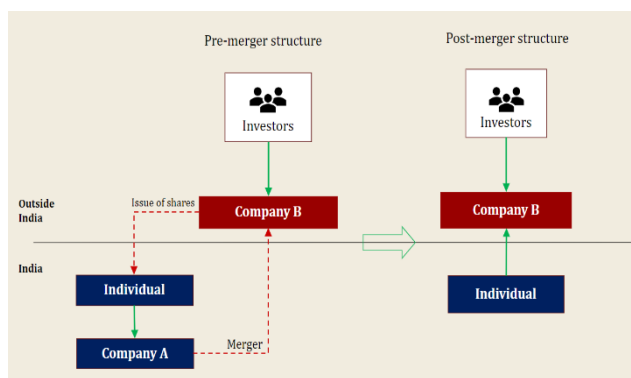


Outbound share swap by secondary transfer

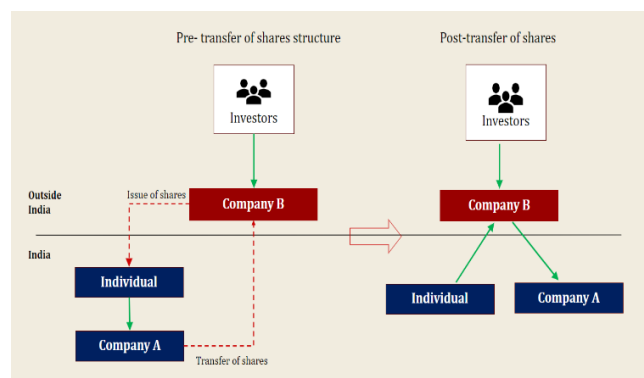


iii) **Swaps involving a 'resident' individual:** The Overseas Investment Laws permits a resident individual to undertake overseas investment in 'equity capital' of a Foreign Company. Such overseas investment may be made or held by way of 'swap of securities' only in case of merger, demerger, amalgamation and liquidation. Outside of this context, swap of securities by 'resident individuals' where Overseas Investment Laws apply can only take place under the 'approval' route. The merger, demerger and / or the amalgamation is required to be undertaken in accordance with the Companies Act and the RBI's Foreign Exchange Management (Cross Border Merger) Regulations, 2018.

A structure permitted for resident individuals



A structure not permitted for resident individuals



- iv) **Swaps involving an FOCC:** Pursuant to a recent amendment to the Master Directions on Foreign Investment in India³, it has been clarified that downstream investment may be undertaken by swap of equity instruments and, or equity capital, as applicable. Accordingly, FDI-ODI Swap or ODI-ODI Swap referred in sub-paragraphs i) and ii) above may also be undertaken by an Indian Company that is a 'foreign owned and / or controlled' ("**FOCC**"). Where the swap of equity instruments and, or equity capital is resulting in a downstream investment, the NDI Rules governing downstream investment should be strictly complied with, including that downstream investment is not undertaken by usage of borrowed funds.

Compliance with laws

Unless the swap is devoid of any exchange control limb (as in the case of 'Domestic Swaps' discussed above), both the legs of the swap transaction would need to comply with FEMA (i.e., NDI Rules and, or Overseas Investment Laws, as applicable). Importantly, the swap arrangements would need to comply with the key conditions provided below for such swap arrangements to be permissible:

1. In respect of swaps where NDI Rules apply:
 - a) the Indian investee company is engaged in the 'automatic' sector;
 - b) the swap resulting in investment in India would be subject to sectoral caps, entry routes, pricing guidelines and reporting requirements stipulated under NDI Rules. The valuation would need to be undertaken by a chartered accountant, practising cost accountant, merchant banker registered with the Securities and Exchange Board of India or an investment banker outside India registered with the appropriate regulatory authority in the host country, as the case may be; and
 - c) a swap that results in investment from an entity that is incorporated in a country which shares land border with India ("**Restricted Country**") or if the 'beneficial owner' of such foreign investment is situated in or is a citizen of a Restricted Country would fall under the 'Government approval route'.
2. In respect of swaps where Overseas Investment Laws apply:
 - a) the foreign entity must be engaged in a *bona-fide* business activity i.e., any business activity that is permissible under any law in force in India and the host country or host jurisdiction, as the case may be;
 - b) the swap arrangement must not be in breach of the restrictions governing round-tripping i.e., the overseas investment in a foreign company (which has further invested in India) shall not result in the foreign entity having more than two-layers of subsidiaries, directly or indirectly;
 - c) the swap will be subject to pricing norms i.e., require compliance with arm's length pricing taking into consideration the valuation as per any internationally accepted pricing methodology for valuation. The authorised dealers have been empowered to specify in their board approved policy, the instances where valuation may not be insisted upon, such as transfer on account of merger, amalgamation or demerger or liquidation, where the price has been approved by the competent court/tribunal as per the laws in India and/or the host jurisdiction;
 - d) the Indian Company would need to comply with the net worth requirements stipulated under the Overseas Investment Laws;
 - e) the swap will be subject to reporting requirements set out under the Overseas Investment Laws; and
 - f) particularly, a swap that results in one or more of the following would require prior Governmental approval:
 - (i) swap of securities in a foreign entity formed, registered or incorporated in Pakistan or in any other jurisdiction as prescribed by the Government from time to time; and/or
 - (ii) where the financial commitment by an Indian entity exceeds USD 1 (one) billion (or its equivalent) in a financial year.

³ Reserve Bank of India, Master Directions https://www.rbi.org.in/scripts/bs_viewmasdirections.aspx?id=11200.

Restricted structures

1. **Swaps involving a 'resident' individual.** As aforesaid, the Overseas Investment Laws permits a resident individual to undertake overseas investment in 'equity capital' of a Foreign Company by way of swap of securities only in case of merger, demerger, amalgamation and liquidation. Outside of this context, a swap of securities by 'resident individuals' where Overseas Investment Laws apply can only take place under the 'approval' route.
2. **Company vs. other forms of legal entity.** The Overseas Investment Laws permit an Indian Entity to swap the equity capital held by it in any 'foreign entity that has limited liability' (which would include a foreign LLP). However, the NDI Rules limit swap transactions to equity instruments (i.e., of Indian companies and not Indian LLPs).

Conclusion

The liberalisation of share swap rules in India has opened new doors for structuring M&A transactions, offering enhanced flexibility and opportunities for businesses. With the option to now internalise the ownership and value of companies back to India, the ease of doing business in India has increased. The upcoming financial years are likely to witness a momentum in swap deals. The trend has already begun with various upcoming deals being structured as share swaps.

Mergers and Acquisition Practice

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Our full spectrum of services includes acquisitions and divestments, Schemes of arrangement, mergers, demergers and amalgamations, Tender and exchange offers, sale and purchase of distressed assets, restructurings, including capital and debt restructuring, buy-back of securities and reduction of capital. The M&A practice collaborates with other practices and service lines, including competition laws, compliance, environment, employee and social benefits, among others so that a holistic approach is adopted to handle the transaction and we are able to provide effective guidance to clients.

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41 Ranked Lawyers



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16 Ranked Lawyers



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