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ANTI-TAKEOVER CODE IN INDIA: A NEED OF THE HOUR?

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ABSTRACT

In recent years, both domestic and foreign corporations have significantly increased the number of takeover attempts on the Indian economy. Takeovers can boost the economy, but they can have unfavorable effects also. In order to protect the interests of all parties concerned, this paper tries to highlight the necessity of comprehensive anti-takeover legislation in India. Anti-takeover aims to guard shareholders' interests by preventing hostile takeovers. There are few takeover guidelines laid down in the SEBI Regulations for the Substantial Acquisition of Shares and Takeovers (SAST), and it is applicable to all listed firms there. The Code outlines specific guidelines for buying shares or voting rights in publicly listed firms with the intention of encouraging fairness and openness in the takeover process.

But the regulation lacks attention towards the minority shareholders. In order to protect the interests of all the concerned parties, this paper tries to highlight the necessity of a comprehensive anti-takeover legislation in India. Anti-takeover will not only help in protecting the rights of the minority shareholders but also promote fair play among the buyers and the sellers. It will protect national interest as well as maintain stability in the financial market.The paper discusses the instances where the need for the legislation has been felt the most and an analysis of the countries with an anti-takeover regulation and the impact thereupon.

Keywords: Anti-takeover, SEBI, Takeover, Minority Shareholders, Financial Market.

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INTRODUCTION

Takeover, simply, means taking over control over a company or assets of a company. M.A. Kleinberg has defined takeover as a series of transitions whereby a person or individual or a group of individuals or company acquires control over the assets of the company either by directly becoming the owner of the company or with the help of multiple shareholders. Latter can be done by way of agreement between acquirer and controller of the company, stock purchase or takeover bid. A takeover happens when one company (acquirer) makes a successful attempt to take control of or acquire the other (target) company. It commonly done with the help of the merger and acquisition process. It can take place through direct or indirect acquisition of shares, or control over the target company or voting rights. Chandratre (2010) defined takeover as succeeding to the management or ownership or taking control of; assuming control, ownership, or management of a corporation. Thus, takeover refers to the acquiring control of an existing company, through buying or exchanging shares.

Certain guidelines for takeovers are outlined in the Securities Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011. Recently, however, it has been discovered that the code makes no mention of the protection of minority shareholders. The market does not operate fairly, endangering the interests of the country. Before we can address the necessity for anti-takeover rules with regard to India, we must first define what a takeover is and what takeover restrictions are currently in place.

EXISTING TAKEOVER REGULATIONS

The Securities and Exchange Board of India (SEBI) realized the need to revamp the existing rules to keep them in tandem with the continuously changing global scenario. In September 2011, the SEBI amended the new set of takeover rules i.e.; the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.[2]

The, abovementioned,SEBI (SAST) Regulation lays down certain rules regarding the takeover process and conditions regarding the same. The main purpose is to prevent hostile takeovers and at the same time, provide some more opportunities of exit to innocent

[2] Ahmad, Tabrez and Swain, Satya Ranjan, The Takeover Code in India : A Comprehensive Overview International Journal of Mainstream Social Science, USA Vol 2, Number 1:Spring, PP. 27-42 (2012).

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shareholders who do not wish to be associated with a particular acquirer. In the wake of these rules, promoters as well as public shareholders of a public-listed company shall be eligible to receive the equal price for their stocks. The takeover regulations do not apply to a company which is listed without making a public issue on the institutional trading platform and companies listed on Innovators Growth Platform (IGP).

Machiraju (2007) stated that corporate ownership and restructuring assume many forms. The traditional approach through horizontal and vertical mergers to realize synergy has been extended to cover takeovers, management control and change in ownership structure of the company. Business combinations, corporate restructuring, mergers, acquisitions, takeovers are rather significant milestones in the growth trajectory of a business organization.

IMPORTANT PROVISIONS:

Acquirer: An acquirer is an individual, legal entity or a corporate company that either by itself or with Persons Acting in Concert (PACs) acquires voting rights or shares or control over a target company, either directly or indirectly.

Persons Acting in Concert (PACs): Persons acting in concert, abbreviated as PACs, are natural persons or business entities or other legal entities who come together with the common purpose of acquiring shares or voting rights in or gain control over a target company. Their mutual agreement can be formal or informal and their cooperation can be direct or indirect.

Target Company: A company or corporation with public-listed equity shares that attracts the bidding interest of a potential acquirer is called the target company.

Control: The term "Control" implies the power to exercise certain rights with respect to the target company. These rights include the right to appoint a majority of the directors, the right to managerial control and the right to policy-related decision making. These rights can rest with any individual or PACs or corporate or legal entities by way of shareholding, voting agreements, shareholders'agreements, or management rights or through any other legal way. These rights can be exercised either directly or indirectly.

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The main objective of the Takeover Code is to guarantee that the shareholders of a listed business have access to all pertinent information on the upcoming shift of ownership of a firm and to give them a getaway path, although one with some restrictions, if they so choose. According to the law, there are many takeover methods that are outlined below:

i) Mandatory offer: The purchasing business must provide the other shareholders with an escape option when making an offer to buy their shares, as required by the Takeover Code. Under the following conditions, this requirement to make an obligatory open offer becomes effective:

a. Initial trigger: Initial trigger: When a target company's shares or voting rights are purchased, the purchasing company and the PAC are given the right to exercise 25% or more of the target company's voting rights.

b. Creeping Acquisition: Any acquisition of additional shares or voting rights that gives the acquirer and PAC the ability to exercise more than 5% of the target company's voting rights in any fiscal year, as long as the acquirer already owns 25% or more but less than 75% of the target's shares or voting rights.

c. Acquisition of control: Acquisition of control of a target business is not permissible if the acquiring party gains control over the target company, regardless of the acquiring party's degree of ownership of that company. 'Control' is typically a subjective concept that fluctuates from situation to situation. Control is defined by the Takeover Code as the "right to appoint a majority of the directors, the right to control the management or policy decisions exercisable by a person or PAC, whether directly or indirectly, due to their stockholding, management rights, voting agreements, shareholder agreements, or in through any other valid mechanisms."

ii. Indirect acquisition of shares or voting rights: As per the Takeover Code, there are clear guidelines to manage indirect acquisitions. As per the guidelines,"any acquisition of shares or control over a company, business or entity that would enable a person and persons acting in concert with him to exercise such percentage of voting rights or control over the target company, which if directly acquired in the target company would have otherwise necessitated a public announcement for open offer, shall be considered an indirect acquisition of voting rights or control of the target company."

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iii. Voluntary open offer:[3]"A shareholder may make an open offer to buy more shares if they possess 25-75% or more of the voting or share capital of the firm. After the open offer is concluded, the overall shareholding should not, however, exceed 75% since doing so would violate the maximum non-public shareholding restriction. A minimum of 10% of the shares must be offered. According to SEBI's Takeover Code, any shareholder with less than 25% of the voting or ownership rights may also submit a voluntary open offer to buy more shares. The parameters for determining the offer price to be paid to the public shareholders are outlined in Regulation 8 of the Takeover Code.

IMPACT OF TAKEOVER

Before we understand the need of anti-takeover code in India, we need to understand the impact of a takeover first. A takeover may significantly affect the target firm, its workers, its shareholders, and the whole economy. It might have several effects, including:

Management changes: The acquirer frequently appoints its own executives to take the place of the target company's current management team. The culture, strategy, and business operations of the corporation may all alter significantly as a consequence.

Employment changes: A takeover may result in job losses as the acquirer looks to reduce costs by cutting jobs or simplifying processes.

Share price changes: Following the announcement of a takeover, the share prices of both the target and acquiring businesses may shift. Shares of the target firm may rise in value in some circumstances while falling in value in other circumstances.

Modifications to the dynamics of the industry: A takeover may have larger effects on the industry in which the target business works. For instance, the purchase of a significant company in a market might result in market dynamics adjustments and consolidation.[4]

On Minority Shareholders:

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[3]Bhagwan Chowdhary and Narasimhan Jegadeesh, Pre-Tender Offer Share Acquisition Strategy in Takeovers, Journal of Financial and Quantitative Analysis, Volume 29, Issue 1, pp. 117-129 (1994).
[4]Linn and McConnell, "An empirical investigation of the impact of `antitakeover' amendments on common stock prices," Journal of Financial Economics, 11, pp. 361-99 (1983).

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Abovementioned are the general effects of a takeover, however, minority shareholders, who frequently own a very small fraction of the target company's shares, can be significantly impacted by a takeover. The following are some possible effects of a takeover on minority shareholders:

Dilution of ownership: Minority shareholders' ownership percentages may be diminished if the acquirer purchases a large portion of the target company's shares, diminishing their ability to influence corporate decisions and voting rights.

Share price variations: Following the announcement of a takeover, the share prices of both the target and acquiring businesses may shift. If the purchase price is less than the market price, minority shareholders could not gain even though the share price of the target firm may rise. Minority stockholders may suffer a loss in value as a result of this.

Limited knowledge: Minority shareholders might not have access to as much information as bigger shareholders or the acquirer, which might make it challenging for them to decide whether to accept or reject the offer.

Lack of control: Minority shareholders may occasionally feel as though their interests are not sufficiently reflected in discussions around the takeover. This could make you feel helpless and frustrated.

Legal and regulatory challenges: Minority shareholders who oppose the takeover may also encounter legal and regulatory obstacles, such as the need to contest the open offer price in court or regulatory forums.

Overall, a number of variables will affect how a takeover may affect minority shareholders and thus, it is important that their interest is protected during the takeover process.

NEED OF ANTI-TAKEOVER CODE

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Now to understand the need of the anti-takeover code, we are going to look at some of the cases wherein the need of a robust anti-takeover code was felt. And we will also be discussing various takeover defenses available currently.

Hostile Takeover:

A purchase of a target firm that is opposed by the target company's management and board of directors is referred to as a hostile takeover. In a hostile takeover, the acquirer approaches the target company's shareholders directly rather than the management or board of directors in an effort to gain control. In a typical hostile takeover situation, the acquirer can present a tender offer to the target company's shareholders that is more than the share's current market value. Shareholders may choose to accept or reject the tender offer, which is typically open for a brief time. When a public offer is made and vigorously rejected by the target company, hostility can often be felt. As a result, indications of a clash and takeover are closely connected.[5]

The target company's current management team and board of directors may be replaced if the acquirer is successful in purchasing a majority share in the target business with its own executives and directors. The operations, strategy, and culture of the target organization may all undergo major changes as a consequence. The target firm, its owners, and the overall economy may all be significantly impacted by hostile takeovers, which are frequently viewed as aggressive and disruptive. Additionally, they are frequently the focus of legal and regulatory investigation, particularly if the acquirer employs strategies that are thought to be unfair or deceptive.[6]

Minority shareholders are the ones who are most concerned about hostile takeovers since they are often in the danger of losing out and left out in the case of a takeover. In a hostile takeover, the acquiring firm tries to take over the target business against the management and board of directors' desires. Minority shareholders might consequently be compelled to sell their shares at a price they believe is too low or they could end up with a lesser position in the firm after the acquisition. Following are a few instances wherein a hostile takeover had a significant implication on the minority shareholders.

[5] Gravey& Hank, "Capital Structure and Corporate Control: The Effect of Antitakeover statutes on firm leverage, " Jrn'l of Finance & Accounting, 23, pp. 45-63 (1997).
[6] Atanassov, J. "Do Hostile Takeovers Stifle Innovation? Evidence from Antitakeover Legislation and Corporate Patenting." Journal of Finance, 68, 1097-1131 (2013).

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SATYAM SCANDAL

One of India's most well-known business scandals in the past decade is the Satyam Computer Services scandal. When Satyam's founder and chairman, Ramalinga Raju, acknowledged to faking the company's records over a period of years, the issue was made public in January 2009. Satyam's share price fell as a result of Raju's confession, which shocked India's corporate sector. Following the controversy, Satyam was placed up for sale, and other businesses indicated interest in buying it. A competing IT services firm, Tech Mahindra, ended up winning in a hostile takeover effort to purchase Satyam.

The purchase, meanwhile, was not without criticism. A lot of Satyam's minority owners believed they had been overlooked and had not been paid a fair price for their shares. There were also worries that Mahindra Satyam, the business that took over for Satyam following the incident, would not be able to repair the company's reputation. Despite these worries, Tech Mahindra was able to turn the business around and repair its reputation. Mahindra Satyam is currently one of India's top providers of IT services, and Tech Mahindra has grown to become one of the industry's biggest employees.[7]

The Satyam scandal had a major effect on corporate responsibility and governance in India. However, new regulations focusing on corporate governance and transparency and disclosures were laid down by the Government after this incident.

DAIICHI – RANBAXY CASE[8]

In 2008, Ranbaxy Laboratories, an Indian pharmaceutical enterprise, was the target of a hostile takeover effort by the Japanese pharmaceutical corporation Daiichi Sankyo. The action was controversial and the first hostile takeover attempt by a Japanese business of an Indian enterprise. Initially, the Singh family, the company's founders and largest owners, sold Daiichi Sankyo a 34.8% interest in Ranbaxy. The Singh family, who still had a sizable minority share and opposed the transaction, nonetheless. Some Ranbaxy stockholders and

[7]Dr. Madan Bhasin, Corporate Accounting Scandal at Satyam: A case study of India's Enron, European Journal of Business and Social Sciences, Vol. 1, No. 12, pp 25-47 (2013).
[8] Shah, Shreyash and Jain, Gautam and Tambade, Amit and Khatri, Chitra and Fakih, Shuaib M., The Ranbaxy - Daiichi Sankyo Deal: Where Do They Go Now? (2009).

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workers opposed the transaction as well because they were worried about how it would affect the company's operations and culture.

Despite the resistance, Daiichi Sankyo persisted in growing its ownership in Ranbaxy until it eventually acquired a controlling 63.9% share in the business. The current management group and board of directors were replaced as part of the acquisition by Daiichi Sankyo's own executives and directors. There were difficulties with the acquisition. Ranbaxy was involved in a number of disputes about the grade of its goods, and Daiichi Sankyo was subject to intense regulatory scrutiny in both India and the US due to the purchase. In 2013, Ranbaxy admitted admission to criminal charges regarding the production and distribution of contaminated pharmaceutical drugs in the US and made a $500 million monetary payment.

LTI – MINDTREE MERGER

A hostile takeover offer for, the IT services firm, Mindtree was made in 2019 by Larsen & Toubro (L&T), a renowned Indian engineering and construction business. Given that Mindtree was renowned for its distinctive culture and principles and that many of its workers and stockholders opposed the takeover, the decision was again controversial. Minority Mindtree shareholders, who held a sizable amount of the company's shares, were concerned about how the takeover might affect their interests. Many believed that L&T's original bid to purchase a 51% interest in Mindtree for Rs 980 per share undervalued the firm. The board of directors of Mindtree rejected the offer, citing the firm's promising development potential and distinctive culture as justifications for their decision.

L&T persisted in the buyout despite the resistance, and ultimately acquired a controlling 60% interest in Mindtree. Minority shareholders that opted out of the transaction were left with a lesser ownership position in the business, which they believed to be overvalued. Minority shareholders have also expressed worry about how the takeover may affect the company's culture and values.

The L&T acquisition of Mindtree brought attention to how crucial it is to safeguard minority owners in a takeover. In response, the Securities and Exchange Board of India (SEBI) suggested revisions to the takeover law that would mandate that, in case of a change in control of the firm, acquirers make an open offer to all shareholders. In case of a takeover, the

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idea should be intended to ensure that minority shareholders are treated properly and are not at a disadvantage.

Overall, the Mindtree-L&T acquisition was a contentious deal that had a big impact on both the parties' businesses and their shareholders. Despite being able to seize control of Mindtree, L&T's acquisition of the company brought up significant issues regarding the protection of minority shareholders during takeovers.

ADANI – NDTV TAKEOVER

Currently, the Adani Group has a roughly 29% interest in New Delhi Television (NDTV). To be specific, it purchased a 29.18% interest in the NDTV channel. Additionally, it has started an open offer to buy an additional 26% of the company's shares. It is claimed that NDTV was completely uninformed of the deal, nevertheless. It was done without any notice, permission, or prior discussion.

NDTV is an Indian news media company in India which is known for its honest broadcasted news delivery. A few times back, Newslaundry, an independent media organization, carried out an interesting analysis related to what forms of news is broadcasted on the news channel in India. They collected the data from all the news channels, and then checked each episode to see what was being discussed in it. It was shown that out of 88, 45 shows of Aaj Taktalked about communal issues (pertaining to Hindu-Muslim issues only). Times Now talked about communal issues in 29 out of its 68 shows. On Republic Bharat, 45 out of 96 shows focused on communal issues only. 43 out of 68 shows on News 18 and so on. But on NDTV only 23 out of 77 shows were related to the Hindu-Muslim issues. There is a huge difference as NDTV does not incite hatred between the communities. After watching the show, the audience is not left feeling hateful towards people from other religions. While other channels target the opposition by questioning them, NDTV questions the government with the right issues. Even in 2016, there was a One Day Ban put on NDTV for national security purposes. However, the acquisition of NDTV by Adani Group is tagged with a hidden agenda of the Government, we will not go into further detail and shall focus on the minority shareholders being affected by the acquisition.[9]

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[9] Securities Appellate Tribunal (Mumbai Bench, Mumbai), Dr Prannoy Roy v. SEBI, (June 18, 2019).

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As of 30th December, 2022, Adani Enterprises has accumulated a total of 64.71% shares of NDTV via AGM Media Networks Limited (AGML). The media has described the Adani group's purchase of NDTV as hostile. Hostile or not, this takeover is definitely planned. Adani offered Rs. 294 per share during the open offer of November 22 – December 5. The open offer closed on December 5. On December 30, The Roys (owners of NDTV) received Rs. 342.65 per share from the Adanis.[10] What led to questions was whether Adani Group should pay the difference to the shareholders who had tendered their holdings in the open offer. Some said it was not binding on the Adanis as the deal with Roys happened after the open offer closed while some analysts cited SEBI rules to given equitable treatment to all shareholders and no promoter or shareholder shall be paid extra.[11]

This takeover had a significant impact on the minority shareholders of NDTV. The Adani Group gained control of the target company (NDTV) operations and management by acquiring the majority shareholders. The shareholders had a potential loss of their voting rights resulting from the dilution of their control and stake. This also resulted in a loss of reputation and voice for the minority shareholders in the decision-making process of the company. Other factors which might include are uncertainties, reduced value of investments, job losses, reduced dividend payouts, and loss of voting rights.[12]

However, the Adani Group has declared that they will pay an additional Rs. 48.65 per share to the shareholders who has sold their shares in the open offer between November 22-December 5 in order to match the payment to the Roys. They will be paying an additional sum of around Rs. 26 crores to those stakeholders making it up to Rs. 785 crore – Rs. 183 crores to the minority shareholders and Rs. 602 crores to the Roys. Subsequently, the Roys resigned from the board.

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[10] https://www.deccanherald.com/national/adanis-takeover-of-ndtv-worries-journalists-1139350.html

[11] https://www.communicationstoday.co.in/takeover-of-ndtv-by-indias-richest-man-worries-journalists/

[12] P. Walsh, and J. K. Seward, "On the efficiency of internal and external corporate control mechanisms", Academy of Management Review, 15, 421-58 (1990).

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OTHER COUNTRIES WITH TAKEOVER REGULATIONS

Almost every country talks about anti-takeover laws either through a separate code or in their takeover regulations. Some of them are mentioned below:

The United States

US has several federal and state-level laws and regulations which also include the Williams Act and State Antitakeover statutes which regulate the conduct of takeover attempts and protect the interest of shareholders. The Securities and Exchange Commission (SEC) must get a disclosure statement from any individual or group that purchases more than 5% of a company's shares under the 1968-enacted Williams Act. The disclosure statement must include details on the rationale, conditions, and acquiring party's identity. In addition to the Williams Act, several US states have antitakeover laws in place. By restricting the ability of hostile bidders to take over a firm without the board of directors' approval, these laws are intended to safeguard the interests of shareholders and management.[13]

Antitakeover laws that are often used include:

- The Business Combination Statutes: these statutes govern an acquirer's capacity to merge or combine with the target business after purchasing a specific proportion of its shares.
- The Control Share Acquisition Statutes: these statutes limit an acquirer's ability to vote when it buys a specific proportion of a company's shares.
- The Fair Price Statutes: Under these rules, an acquirer must pay a price for the target company's shares that is reasonable in light of an independent assessment.

Overall, the US has a strong legal and regulatory system that offers extensive minority shareholder rights and guarantees that takeover efforts are done fairly and openly.

The United Kingdom

The City Code on Takeovers and Mergers (the "Takeover Code") in the UK lays out the legal framework regulating takeover efforts. The Panel on Takeovers and Mergers, an independent authority that regulates the execution of takeover bids and guarantees that they are handled in a fair and transparent way, is in charge of administering the Takeover Code.

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[13] A Simple Theory of Takeover Regulation in the United States and Europe, Cornell Int'l L.J., 42, 301 (2009).

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The Takeover Code describes several crucial principles and principles that apply to takeover attempts, such as:[14]

• The requirement that an acquirer must make an obligatory bid for the firm if it purchases more than 30% of the shares of the target company.

• The rule that an acquisition must pay the same price to all target business shareholders.

• The need for complete disclosure of the terms and circumstances of an offer, including any financial arrangements and any potential plans the offeror may have for the target company.

• The requirement that the target company's board counsel shareholders on whether to accept or reject the offer.

• The acquirer must keep shareholders and the market informed of updates and disclosures throughout the acquisition process.

There are several other rules and regulations in addition to the Takeover Code that govern the laws and that include the Companies Act 2006, and the Financial Services and Markets Act 2000. Minority shareholders are given additional rights under these rules, such as the right to fair and equitable treatment in the case of a takeover attempt.Other countries having takeover and anti-takeover regulations include Australia (Corporations Act), Canada (Canadian Business Corporations Act), France (French Commercial Code), Germany (German Stock Corporation Act), Japan, etc.

CONCLUSION

In conclusion, as India’s economy continues to expand and draw foreign investment, the country’s need for an anti-takeover code is becoming more and more obvious. Although hostile takeover efforts are still uncommon in India, they are becoming more of a worry for minority shareholders who would be without proper protections in the lack of a legislative framework.

In conclusion, a strong anti-takeover code would include safeguards to guarantee that all shareholders are treated equally and fairly in the case of a takeover offer, as well as steps to

[14]Alan J. Auerbach, Means of Payment in Takeovers: Results for the United Kingdom and the United States, University of Chicago Press, 221-264 (1988).

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give minority owners greater protection against hostile takeover efforts. Additionally, it would increase accountability and openness in the takeover process, enabling investors to decide with greater knowledge whether to accept or reject an offer.

There is still significant work to be done to guarantee that minority shareholders are appropriately safeguarded from hostile takeover efforts, despite India having made some headway in this regard with the establishment of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations. India can boost investor confidence and make sure that its expanding economy continues to draw the foreign investment it needs to maintain its development trajectory by putting in place a robust anti-takeover legislation.

To encourage innovation and healthy competition, to keep the local sector stable, and to increase investor trust in the Indian market, the Indian government must concentrate on creating and executing a thorough anti-takeover code that adheres to international best practices while also taking into consideration the particular requirements and features of the Indian market.

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