THE INDIAN CROSS BORDER MERGER REGIME: IN LIGHT OF FOREIGN EXCHANGE REGULATIONS

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ABSTRACT

Mergers and amalgamations date long back. We hear about the merging of companies making rounds of the news each day. With the increasing frequency of these transactions happening on a day to day basis, while it may seem to be a fairly simple phenomenon, these transactions certainly don't happen overnight. Myriad laws along with various legal and regulatory compliances are required to be complied for such mergers and it may take over months or even a few years for the enforcement of a merger. In this era, mergers are happening across jurisdictions and it has become crucial to develop stringent laws and rules for regulation of such international transactions. The Ministry of Corporate Affairs recently enforced Section 234 of Companies Act, 2013, thereby opening the gates in India to a cross border merger regime. Subsequently, the Reserve Bank of India, also released the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 to prescribe a detailed mechanism for the implementation of cross border mergers. Through this paper, the authors aim to shed some light on the Indian cross border merger regime in light of the newly notified laws and the key takeaways therefrom.

INTRODUCTION

<u>What is a merger – back to basics!</u>

'Mergers and Amalgamations'are often used synonymously in the context of Indian commercial law and simplistically mean combination of businesses including all assets and liabilities of two or more entities into one. Typically, in a merger, as the name suggests, one or more entities merge themselves into a surviving entity such that the surviving entity retains its corporate existence whereas the merging entities cease to exist post the merger. Let's take an example to understand this better. In a merger of a Company **A** with Company **B**, all the businesses of Company **A** will merge with the business of Company **B**, such that Company **A** will cease to exist and all its businesses will be carried out by Company **B** instead. As consideration for the transfer of all assets and liabilities of the merging entities into the surviving entity, the surviving entity issues its securities to the security holders of the merging entities and accordingly, the security holders of the merging entities become the security holders of the surviving company.

The possible objectives of mergers are manifold - greater economies of scale, reduction in administrative expenses, operational synergies, diversification of businesses, access to sectors / markets, to name a few. Mergers may be of several types- horizontal (in the same industry), vertical (in the same line of process), triangular (subsidiary merges with another company and ceases to exist) etc.

<u>Framework of mergers: Companies Act, 2013</u>

Sections 230 to 232 of Companies Act, 2013 (“**Act**”)read with the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (“**Rules**”)set out the procedure for implementation of mergers. The National Company Law Tribunal (“**Tribunal**”) has been appointed as the adjudicating authority to enforce a scheme of merger. Under the Act, a merger process may be initiated either by the companies involved in the merger or their respective members or creditors, by filing an application with the jurisdictional Tribunal. After the board of directors of the companies involved in the merger have approved the proposed merger scheme, it is required to be approved by such number and percentage of their members and creditors as prescribed under the Act, either by way of meeting called by the Tribunal or by way of procuring their consents / no-objections. Once the members and creditors of the companies are on board, governmental and sectoral authorities are given an opportunity to provide their suggestions / comments on the proposed scheme of merger. Thereafter, the merger scheme is sanctioned by the jurisdictional Tribunal. If any of the companies involved in the merger scheme is a listed company, then in addition to the procedure prescribed under the Act and the Rules, the procedure prescribed under laws framed by the Securities and Exchange Board of India are also required to be complied with.

With the globalization of economies and growth & expansion of businesses beyond local markets, mergers are no longer limited to domestic jurisdictions and cross border mergers have now become a very popular choice. The increasing inflow of foreign direct investment in India is one of the main factors for changing the M&A landscape in India making the companies open to options of merging with foreign body corporates. Countries, either through amendment of their domestic laws or by being signatories to various bilateral trade treaties or multilateral conventions, have introduced various laws to regulate such international transactions and protect the interest of the parties involved.

INDIAN CROSS BORDER MERGER REGIME

Companies Act 2013: Section 234

The Ministry of Corporate Affairs, Government of India (“**MCA**”) vide its notification dated 13 April 2017, has enforced Section 234 of the Act, thereby permitting cross-border mergers. In addition, the MCA vide its notification dated 13 April 2017 has also amended the existant Rules by insertion of Rule 25 A to prescribe for the cross border merger regime.

The erstwhile regime on mergers and acquisitions as prescribed under Companies Act 1956, permitted inbound mergers i.e., merger of a foreign transferor company with an Indian transferee company. However, outbound mergers i.e, merger of an Indian transferor company with a foreign transferee company were not provided for under Companies Act 1956. In contrast to this, Section 234 of the Act permits both, inbound cross border mergers as well as outbound cross borders, subject to prior approval of the Reserve Bank of India (“**RBI**”).

Foreign Exchange Management (Cross Border Merger) Regulations, 2018 ("Cross Border Regulations")

The introduction of cross border mechanism under the Act and the Rules, necessitated a need for a corresponding change to the existant foreign exchange control laws as prescribed under the Foreign Exchange Management Act, 1999 read with the regulations framed there under ("**FEMA**"). Accordingly, on 20 March 2018, RBI issued the Cross Border Regulations which set out in detail the procedure to be followed for implementation of cross border mergers. We have highlighted below some of the key provisions of the Cross Border Regulations.

CROSS BORDER REGULATIONS: KEY PROVISIONS

Key definitions

'Cross border merger' has been defined under the Cross Border Regulations to mean any merger, amalgamation or arrangement between an Indian company and foreign company in accordance with the Rules. 'Resultant company' means the Indian company or the foreign company which takes over the assets and liabilities of the companies involved in the cross border merger. Where the resultant company is an Indian company, the merger is an 'inbound merger' and where the resultant company is a foreign company, the merger is an 'outbound merger'. An outbound merger is permitted with only such foreign companies which are incorporated in certain permitted jurisdictions as prescribed under the Rules.

Valuation

The valuation of the Indian company and the foreign company should be conducted in accordance with internationally accepted principles on accounting and valuation, by valuers who are members of a recognized professional body in the jurisdiction of the resultant company[1].

Issuance of security by resultant company

In an inbound merger, the Indian resultant company may issue or transfer any security / foreign security to a person resident outside India, subject to compliance with the conditions for foreign investment prescribed under FEMA, including pricing guidelines, entry routes, sectoral caps, and reporting requirements. Additionally, where the foreign transferor company is a joint venture / wholly owned subsidiary of the Indian resultant company, then conditions prescribed for the transfer of shares of such joint venture / wholly owned subsidiary under FEMA must also be complied with.

In an outbound merger, a person resident in India is allowed to acquire or hold securities of the foreign resultant company in accordance with the provisions of FEMA. However, where such person resident in India is a resident individual, then the fair market value of such securities should be within the limits of the liberalized remittance scheme prescribed under FEMA.

Office of the transferor company

In case of an inbound merger, pursuant to the scheme of cross border merger, the office of the foreign transferor company outside India is deemed to be the branch / office outside India of the Indian resultant company in accordance with FEMA.

[1]Rule 25A, TheCompanies (Compromises, Arrangements and Amalgamations) Rules, 2016 (India)

Conversely, in case of an outbound merger, the office in India of the Indian transferor company is be deemed to be a branch office in India of the foreign resultant company in accordance with FEMA. Accordingly, the Indian or foreign resultant company, as the case be, is allowed to undertake any transaction as permitted to a branch / office under FEMA.

Guarantees / outstanding borrowings of the transferor company

In an inbound merger, the guarantees or outstanding borrowings of the foreign transferor company which become the liabilities of the Indian resultant company are required to comply with the norms on external commercial borrowings and foreign borrowings, within a period of 2 (Two) years. Within such period of 2 (Two) years, no remittance for repayment of such liability can be made from India.

In an outbound merger, the guarantees or outstanding borrowings of the Indian transferor company which become the liabilities of the foreign resultant company are required to be repaid in accordance with the manner set out in the scheme of merger. Additionally, the foreign resultant company cannot acquire any liability of the Indian transferor company payable towards a lender in India in rupees which is not in conformity with FEMA and a no-objection certificate to this effect has to be obtained from the lenders in India of the Indian transferor company.

Acquisition of assets by the resultant company

In an inbound merger, the Indian resultant company can acquire and hold any asset outside India, which it is permitted to acquire under FEMA. Such assets can also be transferred for undertaking transactions which are permitted under FEMA. If the Indian resultant company is not permitted to acquire or hold any asset or security outside India, then the Indian resultant company is required to sell such asset or security within 2 (Two) years from the date of sanction of the scheme of cross border by the Tribunal and the sale proceeds are required to be repatriated to India immediately through normal banking channels. Further, where any liability outside India is not permitted to be held by the Indian resultant company, the same may be extinguished from the sale proceeds of such overseas assets within a period of 2 (Two)years from the date of sanction of the scheme of cross border.

Conversely, in an outbound merger, the foreign resultant company can acquire and hold any asset inside India, which it is permitted to acquire under FEMA. Such assets can also be transferred for undertaking transactions which are permitted under FEMA. If the foreign resultant company is not permitted to acquire or hold any asset or security inside India, then the foreign resultant company is required to sell such asset or security within 2 (Two) years from the date of sanction of the scheme of cross border by the Tribunal and the sale proceeds are required to be repatriated outside India immediately through normal banking channels. Further, the Cross Border Regulations also permit the repayment of Indian liabilities from the sale proceeds of such assets or securities within 2 (Two) years.

Opening of bank account

In an inbound merger, the Indian resultant company is permitted to open a bank account in foreign currency in the overseas jurisdiction for a period of 2 (Two) years from the date of sanction of the scheme of cross border by the Tribunalfor putting through transactions identical to the cross border merger.

In an outbound merger, the foreign resultant company is permitted to open a special non-resident rupee account for a period of 2(Two) years from the date of sanction of the scheme of cross border by the Tribunalfor putting through transactions under the Cross Border Regulations.

Deemed RBI approval

If a transaction on account of a cross border merger is undertaken in accordance with the Cross Border Regulations, it shall be deemed to have the prior approval of RBI and an express prior approval from the RBI will not be required. However, the companies are required to furnish a certificate from the managing director / whole time director and company secretary, if applicable, ensuring compliance with the Cross Border Regulations along with the application made to the Tribunalunder the Act.

Reporting requirements

The companies involved in the cross border are required to furnish such reports as may be prescribed by RBI from time to time.

CONCLUSION

In the backdrop of a rapidly globalizing economy, the notification of Section 234 of the Act and the subsequent release of the Cross Border Regulation is definitely a welcome move. With outbound mergers now being permitted under the Act, the foreign direct investment in India is likely to see a huge boost. Further, the mechanism for deemed RBI approval is expected to considerably narrow down timelines which otherwise would have been incurred, thereby increasing the efficiency and efficacy of the merger process. At the same time, it is important to note that certain loopholes exist in the prescribed regime, which we hope will only be resolved with time. What remains unclear is whether arrangements including demerges will also be covered under the Cross Border Regulations. What is also unclear is what could be the possible implications of tax and other intersecting laws on such cross border transactions. The practical ramifications of the Cross Border Regulations remain untested. How these will eventually play out will only be answered in due course.

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