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# MERGERS AND ACQUISITIONS An Overview

**KEYWORDS** Mergers, Acquisitions, Amalgamations, Multinational, Conglomerate, Congeneric, Horizontal, Vertical, Market-extension, Target Company, Consolidation, Corporations.

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**ABSTRACT** Having an overview of certain laws that would be of significance to Mergers and Acquisitions in India. Mergers and acquisitions are modes by which distinct businesses may be done. Joint ventures are another way for two businesses to work organized to achieve progress as partners in progress, though a joint venture is more of a contractual procedure between two or more businesses. So the author intends to give a proper evaluation of the Mergers and Acquisitions and its further validation down the years. The author further deals with the conceptual overview and also the related cases. There is substantive interpretation in this paper by the author. In-depth analysis and validity of the provisions in Indian scenario would closely dealt in this paper.

## INTRODUCTION

### A. Mergers and Amalgamations

The term 'merger' is not well-defined under the Companies Act, 1956 and under Income Tax Act, 1961. However, the Companies Act, 2013 without strictly defining the term explains the concept. A 'merger' is a blend of two or more entities into one; the desired effect being not just the accumulation of assets and liabilities of the distinct entities, but organization of such unit into one business. The possible purposes of mergers are diverse - economies of scale, acquisition of technologies, access to sectors / markets etc. Generally, in a merger, the merging entities would end to be in existence and would merge into a single surviving entity.

The Income Tax Act (ITA), does however defines the corresponding term 'amalgamation': the merger of one or more companies with another company, or the merger of two or more additional companies to form one company. The ITA goes on to specify certain other conditions that must be satisfied for an 'amalgamation' to profit from beneficial tax treatment. Laws envision mergers can occur in more than one way, for example in a condition in which the assets and responsibilities of a company (merging company) are conferred in another company (the merged company). The merging company loses its individuality and its shareholders become shareholders of the merged company. Another way could be, when the assets and liabilities of two or more companies (merging companies) become conferred in another new company (merged company). The merging companies lose their individuality. The shareholders of the integration companies become shareholders of the fused company. The CA 1956 (Sections 390 to 394) and CA 2013 (Sections 230 to 234), deal with the systems of arrangement or compromise between a company, its shareholders and/or its creditors.

### HORIZONTAL MERGERS

Also denoted to as a 'horizontal integration', this kind of merger takes place between units engaged in competing businesses which are at the same stage of the industrial process.[1] A horizontal merger takes a company a stage closer towards monopoly by eliminating a competitor and establishing a stronger presence in the market. The other assistances of this form of merger are the advantages of economies of scale and economies of scope. These forms of merger are heavily examined by the competition commission.

### VERTICAL MERGERS

Vertical mergers refer to the grouping of two entities at dissimilar stages of the industrial or production process. For example, the merger of a company involved in the construction business with a company engaged in production of brick or steel would lead to vertical integration. Companies stand to improvement on account of lower transaction costs and synchronization of demand and supply. Moreover, vertical integration helps a formation move towards greater independence and self-sufficiency.

### CONGENERIC MERGERS

These are mergers between entities involved in the same general industry and somewhat interrelated, but having no mutual customer-supplier association. A company uses this type of merger in directive to use the resulting ability to use the same sales and delivery channels to reach the customers of both businesses.[2]

### CONGLOMERATE MERGERS

A conglomerate merger is a merger between two entities in unconnected industries. The major reason for a conglomerate merger is utilization of financial resources, expansion of debt capacity, and increase in the value of outstanding shares by increased force and earnings per share, and by lowering the average cost of capital.[3] A merger with a wide-ranging business also helps the company to foray into varied businesses without having to incur large start-up costs typically associated with a new business.

### CASH MERGER

In a 'cash merger', also known as a 'cash-out merger', the shareholders of one unit receives cash instead of shares in the merged entity. This is effectually an exit for the cashed out shareholders.

### TRIANGULAR MERGER

A triangular merger is often used to, for supervisory and tax reasons. As the name suggests, it is a three-way arrangement in which the target merges with a subsidiary of the acquirer. Based on which entity is the survivor after such union, a triangular merger may be forward (when the target merges into the lesser and the subsidiary survives), or reverse (when the lesser merges into the target and the target survives).

### B. Acquisitions

An 'acquisition' or 'takeover' is the buying by one person, of regulatory interest in the share capital, or all or considerably all of the assets and/or liabilities, of the target. An appropriation may be friendly or hostile, and may be caused through agreements between the offeror and the main shareholders, purchase of shares from the open market, or by making an offer for attainment of the target's shares to the entire body of shareholders.

Acquisitions may be by way of achievement of shares of the target, or acquisition of assets and liabilities of the target. In the latter case the business of the target is usually attained on a going concern basis. Such a transfer is referred to as a 'slump sale' under the Income Tax Act and benefits from favourable taxing provisions vis-à-vis other transfers of assets/liabilities. Section 2(42C) of the ITA outlines slump sale as a "transfer of one or more undertakings as a result of the sale for a lump sum consideration deprived of values being assigned to the individual assets and liabilities in such sales".

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An acquirer may also obtain a greater mark of control in the target than what would be associated with the acquirer's stake in the target, e.g., the acquirer may clasp 26% of the shares of the target but may enjoy uneven voting rights, management rights or veto rights in the target.

Another form of attainments may be by way of demerger. A demerger is the opposite of a merger, involving the severing up of one entity into two or more entities. An entity which has more than one business, may choose to 'spin off' one of its businesses into a new entity. The shareholders of the original entity would generally obtain shares of the new entity.

If one of the businesses of a company is economically sick and the other business is economically sound, the ailing business may be demerged from the company.

This facilitates the rearrangement or sale of the sick business, without affecting the assets of the healthy business. Conversely, a demerger may also be commenced for moving a lucrative business into a separate entity. A demerger may be completed through a court procedure under the Merger Provisions or contractually by way of a business handover agreement.

**C. Joint Ventures**

A joint venture is the coming together of two or more businesses for a specific persistence, which may or may not be for a limited duration. The purpose of the joint scheme may be for the entry of the joint undertaking parties into a new business, or the entry into a new market, which requires the precise skills, expertise or the investment of each of the joint venture parties. The implementation of a joint venture agreement setting out the rights and obligations of each of the parties is a norm for most joint ventures. The joint venture parties may also integrate a new company which will engage in the proposed business. In such a case, the regulations of the joint venture company would integrate the agreement between the joint venture parties.

**2. MERGERS AND AMALGAMATIONS: KEY CORPORATE AND SECURITIES**

**I. COMPANY LAW**

Sections 390 to 394 of the Company's Act, 1956 (the Merger Provisions) and Section 230 to 234 of CA 2013 rule mergers and schemes of arrangements between a company, its shareholders and/or its creditors. Though, considering that the provisions of CA 2013 have not yet been informed, the implementation of the same remains to be tested. The currently appropriate Merger Provisions are in fact worded so widely, that they would provide for and control all kinds of corporate restructuring that a company can possibly undertake, such as mergers, amalgamations, demergers, spin-off/hive off, and every other compromise, settlement, agreement or arrangement between a company and its members and/or its creditors.

**A. Procedure under the Merger Provisions**

Since a merger fundamentally involves an arrangement between the merging companies and their respective shareholders, each of the companies suggesting to merge with the others must make an application to the Company Court[4] having jurisdiction over such company for calling assemblies of its respective shareholders and/or creditors. The Court may then order a assembly of the creditors/shareholders of the company. If the majority in number representing 3/4th in worth of the creditors and shareholders present and voting at such meeting agrees to the merger, then the merger, if authorised by the Court, is binding on all creditors/shareholders of the company. The Merger Provisions establish a comprehensive code in themselves, and under these supplies Courts have full power to sanction any alterations in the corporate structure of a company. For example, in ordinary conditions a company must seek the approval of the Court for effecting a reduction of its share capital. However, if a decrease of share capital forms part of the corporate restructuring proposed by the company under the Merger Provisions, then the Court has the power to favour and sanction such decrease in share capital and separate proceedings for reduction of share money would not be required.

**B. Applicability of Merger Provisions to foreign companies.**

Sections 230 to 234 of Company's Act 2013 identify and permit a merger/reconstruction where a foreign company merges into an Indian company. Although the Merger Provisions do not license an Indian company to merge into a foreign company, the merger requirements under Section 234 of the CA 2013 do envisage this, subject to rules completed by the Government of India. However, neither is Section 234 currently in control nor have any rules been formulated by the Government of India.

**II. SECURITIES LAWS**

**A. Takeover Code**

The Securities and Exchange Board of India (the SEBI) is the nodal authority regulating units that are listed and to be listed on stock exchanges in India. The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 restricts and controls the acquisition of shares, voting rights and control in listed companies. Acquisition of shares or voting rights of a listed company, permitting the acquirer to exercise 25% or more of the voting rights in the target company or achievement of control, obligates the acquirer to make an offer to the residual shareholders of the target company.

The offer must be to further obtain at least 26% of the voting capital of the company.[5] Yet, this obligation is subject to the exceptions provided under the Takeover Code. Exemptions from open offer condition under the Takeover Code inter alia include acquisition pursuant to a scheme of arrangement approved by the Court.

**3. ACQUISITIONS: KEY CORPORATE AND SECURITIES LAWS CONSIDERATIONS**

**I. COMPANY LAW**

**A. Acquisition of Shares.**

Acquisitions may be via an acquisition of prevailing shares of the target, or by contribution to new shares of the target.

*i. Transferability of shares*

Generally speaking, an Indian company is established up as a private company or as a public company. Membership of a private company is limited to 200 members[6] and a private company is essential by the CA 2013 to restrict the transferability of its shares. A restriction on transferability of shares is thus inherent to a private company, such restrictions being delimited in its articles of association (the regulations of the company), and usually in the form of a preventive right in favour of the other shareholders. With the introduction of CA 2013, although shares of a public company are freely moveable, share transfer restrictions for even public establishments have been granted statutory sanction. The articles of association may prescribe certain actions relating to transfer of shares that must be adhered to in order to affect a transfer of shares. While obtaining shares of a private company, it is therefore advisable for the acquirer to guarantee that the non-selling shareholders surrender any rights they may have under the articles of association. Any transfer of shares, whether of a private company or a public company, must obey with the procedure for transfer under its articles of association.

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[1] 'Corporate Mergers Amalgamations and Takeovers', J.C Verma, 4th edn., 2002, p.59

[2] 'Financial Management and Policy-Text and Cases', V.K Bhalla, 5th revised edn.

[3] Ibid, note 4, at p. 59 The High Court of each Indian State will usually designate a specific bench of

[4] the High Court as the Company Court, to which all such applications will be made. Upon the constitution

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and notification of the National Company Law Tribunal (NCLT), the competent authority for filing this application will be the NCLT and not the Company Court.

[5] Regulation 3

[6] Not including employees and former employees.

*ii. Squeeze out provisions*

**a. Section 395 of the CA 195619**

Section 395 envisions a complete takeover or squeeze out without resort to court procedures. Section 395 provides that if a arrangement or contract involving the transfer of shares or a class of shares in a company (the 'transferor company') to another company (the 'transferee company') is accepted by the holders of at least 9/10ths (in value) of the shares whose handover is involved, the transferee company may give poster to the dissenting shareholders that it desires to acquire the shares held by them. Once this notice is supplied, the transferee company is not only allowed, but also bound, to acquire such shares. In calculating 90% (in value) of the shareholders as cited above, shares held by the acquirer, contenders of the acquirer and subsidiaries of the acquirer must be excluded.

If the transferee already holds additional than 10% (in value) of the shares (being of the same session as those that are being acquired) of **the transferor, then the following circumstances must also be met:**

- The transferee offers the same terms to all owners of the shares of that course whose transfer is involved; and
- The shareholders holding 90% (in worth) who have approved the scheme/contract must also be not less than 3/4th in number of the holders of those shares (not counting the acquirer).
- The scheme or contract mentioned to above should be approved by the shareholders of the transferee company inside 4 months from the date of the offer. The uncooperative shareholders have the right to make an application to the Court within one month since the date of the notice, if they are distressed by the standings of the offer. If no submission is made, or the application is dismissed within single month of issue of the notice, the transferee company is entitled and guaranteed to acquire the shares of the disobedient shareholders.
- Section 395 does not normalise the pricing of the offer made by the acquirer, and the powers of the court are limited if an objection is made by a dissenting shareholder. The court cannot through the acquirer to pay a price that has not been offered. The Court would be directed by the fairness of the scheme including the valuation offered. However, if an overpowering majority has approved the scheme, it would be a hefty burden on the dissenting shareholder to establish why his shares should not be forcibly acquired.
- Section 395 of the CA 1956 offers that the 'transferor company' can be any body corporate, whether or not unified under Indian law. Therefore the target can also be a distant company. However, a 'transferee company' (i.e. the acquirer), must be an Indian company.

**Ten biggest Mergers and Acquisitions deals in India**

- Tata Steel assimilated 100% stake in Corus Group on January 30, 2007. It was an all-cash deal which cumulatively amounted to $12.2 billion.
- Vodafone purchased directing interest of 67% owned by Hutch-Essar for a total worth of $11.1 billion on February 11, 2007.
- India Aluminium and copper giant Hindalco Industries acquired Canada-based firm Novelis Inc in February 2007. The total worth of the deal was $6-billion.
- Indian pharma industry recorded its first biggest in 2008 M&A deal through the acquisition of Japanese pharmaceutical company Daiichi Sankyo by Indian major Ranbaxy for $4.5 billion.
- The Oil and Natural Gas Corp procured Imperial Energy Plc in January 2009. The deal amounted to $2.8 billion and was considered as one of the biggest takeovers after 96.8% of London based companies' shareholders acknowledged the buyout proposal.
- In November 2008 NTT DoCoMo, the Japan based telecom firm assimilated 26% stake in Tata Teleservices for USD 2.7 billion.
- India's financial industry saw the merging of two noticeable banks - HDFC Bank and Centurion Bank of Punjab. The deal took place in February 2008 for $2.4 billion.
- Tata Motors attained Jaguar and Land Rover brands from Ford Motor in March 2008. The deal involved $2.3 billion.
- 2009 saw the attainment Asarco LLC by Sterlite Industries Ltd's for $1.8 billion making it ninth biggest-ever M&A agreement involving an Indian company.
- In May 2007, Suzlon Energy gained the Germany-based wind turbine producer Repower. The 10th largest in India, the Merger deal amounted to $1.7 billion.

**4. CONCLUSION**

There is good amount of enthusiasm and persistence in terms of what holds good for Mergers and Acquisitions in India; and also most Indian companies seem to subscribe given their successes to date in completing acquisitions and mergers. There is the urge that cannot to stop Indian companies that desire to be global names for playing the merger and amalgamation game around the world. With a surplus amount of financing options, this aspiration has become a reality for many corporate houses, who can actually boast of having the best in the industry under their wings. Indian companies have often surpassed their foreign counterparts in corporate reorganisation both within and beyond the national frontlines. Mergers and acquisitions are powerful indicators of a healthy and growing economy.

The biggest obstacle in the way of finishing a merger or an amalgamation remains with the drawn out court procedure required for the authorisation of a scheme of arrangement.

There is strong legal recommendation and recognition of 'contractual merger' (i.e., mergers without the intervention of the courts) can go a long way in eliminating the obstacles to mergers in India. It is also recommended that the right to go against a scheme of merger/ acquisition should only be available to persons holding a substantial stake in the company.

With the FDI policies becoming more relaxed, Mergers, Acquisitions and alliance talks are heating up in India and are increasing with an ever increasing cadence. They are no more inadequate to one particular type of business. The list of past and expected mergers covers every size and variety of business -- mergers are on the increase over the entire marketplace, providing platforms for the small companies being attained by bigger ones. The basic motive under mergers and acquisitions is that organizations merge and form a single entity to achieve economies of scale, widen their grasp, acquire strategic skills, and gain competitive advantage. In simple terminology, mergers are measured as an important tool by companies for purpose of increasing their operation and increasing their profits, which in front rests on the kind of companies being merged. Indian marketplaces have observed growing trend in mergers which may be due to business union by large industrial houses, consolidation of commerce by multinationals operating in India, increasing rivalry against imports and acquisition activities. Therefore, it is suitable time for business houses and corporates to watch the Indian market, and grab the opportunity.

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