ROLE OF SEBI: CROSS BORDER MERGER, TAKEOVER CODE

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Introduction

With the beginning of the twenty-first century, we have witnessed a new period of progress and liberalisation, as the Indian economy has experienced extraordinary and constant growth. All of this has resulted in a significant increase in the structure of Indian companies, as well as an increased desire to grow faster in order to compete with others, whether within or outside our borders. As a result, companies have switched to new methods of expansion and restructuring, with takeover or merger being the most recent method chosen by our companies to be competitive with foreign companies. With the global economy contracting, cross-border mergers are becoming more common. In addition, India is steadily improving its ease of doing business rankings and is increasingly becoming a preferred commercial location. The expansion of cross-border mergers has been aided by an enabling economic climate. The two companies will be able to build capabilities that will provide them with a competitive edge and help them flourish in the global market by integrating these operations.

A transaction in which a rising firm buys a controlling stake or the whole business of an existing company in another country is known as an acquisition[1].

MEANING OF CROSS BRODER MERGER & ACQUISITION-

In simple terms, a cross-border merger is a merging of corporations located in different countries that results in the formation of a third company. A cross-border merger might include an Indian company merging with a foreign one or vice versa. An entity (some other business) from several foreign locations might be received by a company in a single country. The surrounding business might be private, public, or government-owned. Pass-border mergers and acquisitions occur when a company merges or acquires another company with foreign

[1]"Cross-Border Mergers in Light of the Fallout ... - Manupatra" <http://docs.manupatra.in/newsline/articles/Upload/D0209C2A-DB81-4C66-9DAB-52B38C6A97DC.pdf> accessed January 29, 2022

investors. A cross-border merger will result in a shift in control and authority in the management of the merged or acquired firm. That makes, the assets and liabilities of two companies from two different countries are combined into a new legal entity, whereas in terms of a Coss border acquisition, the assets and liabilities of a local company are transformed into those of a foreign company (foreign investor), and the local company is automatically affiliated.

Indian Framework

In India, Cross border is primarily regulated under **(i)** the Companies Act 2013; (ii) SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011; **(iii)** Competition Act 2002; **(iv)** Insolvency and Bankruptcy Code 2016; **(v)**The Department of Industrial Policy and Promotion (*DIPP*); **(vi)** Income Tax Act 1961;; (vii) Transfer of Property Act 1882; **(viii)** Indian Stamp Act 1899 **(ix)** Foreign Exchange Management Act 1999 (FEMA) and other allied laws as may applicable based on the merger structure[2]**.**

Types of cross-border mergers

There are mainly two types of cross border mergers mentioned in companies rules,2016 under companies act 2013:

(i) Inbound merger[3]- It refers to a merger that happens between foreign company and Indian company that result in formation of Indian Company.

Eg. Daiichi Acquired Ranbaxy

Key provisions:

Issuance of Securities-

As a consideration, the Indian firm would issue or transfer securities to the transferor entity's shareholders, which might include both Indian and non-Indian citizens. The issuing of

[2] "Cross Border Merger – Meaning, Types, Procedure & Main Rules & Regulation" (*TaxGuru*) <https://taxguru.in/company-law/cross-border-merger-meaning-types-procedure-main-rules-regulation.html> accessed January 29, 2022

[3] (*Reserve Bank of India - notifications*) <https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11235&Mode=0> accessed January 29, 2022

securities by a person residing outside of India must follow the price standards, sectoral caps, and other applicable guidelines set forth in the Cross-Border Regulation. If the foreign firm is a joint venture or a wholly owned subsidiary, it must adhere to the restrictions set out in the Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004.

Furthermore, if the inward merger of the JV/WOS leads in the Resultant Indian firm acquiring one or more step-down subsidiaries of the Indian party, such purchase must comply with Regulations 6 and 7 of the ODI Regulations.

Assets & Liabilities-

- Any borrowings or guarantees of the transferor firm will become the resulting business's borrowings or guarantees. To comply with the external commercial borrowings compliance, a two-year schedule has been specified. In such circumstances, the end-use limitations would not apply.

- Any asset purchased by the resulting corporation can be transferred in any way allowed by the Act or regulations. If such an asset is not authorised to be bought, the resulting business must sell it within two years of the National Company Law Tribunal (NCLT) issuing the decision, and the sale revenues must be immediately returned to India through banking channels. Where the resultant firm is not authorised to have any responsibility outside of India, the liability may be erased from the sale profits of such foreign assets within two years.

- For a maximum of two years after the NCLT approves the plan, the resultant business is allowed to open a bank account in the other country's jurisdiction to manage activities linked to the merger.

Valuation-

The valuation shall be performed in accordance with Rule 25A of the Companies (Compromises, Arrangements, and Amalgamations) Rules 2016, that is, by Registered Valuers who are members of recognised professional bodies in the transferee company's prescribed jurisdictions, and in accordance with internationally accepted accounting and valuation principles.

(ii) Outbound merger- It refers to a merger that happens between foreign company and Indian company that result in formation of Foregin Company.

Eg.The acquisition of Jaguar and Land Rover by Tata Motors in 2011

Key provisions:

Issuance of Securities-

As a consideration, the Foreign Company would issue securities to the Indian entity's shareholders, which might include both Indian and non-Indian residents. If shares are purchased by a person who is a resident of India, they will be subject to the RBI's ODI Regulations.

Vesting of Assets & Liabilities-

- The guarantees or borrowings of the resulting firm must be repaid according to the NCLT-approved procedure. Furthermore, they should not take on any obligation that is not in accordance with the Act or the rules. The Indian company's lenders in India should provide a no objection certificate to this effect.

- Any asset acquired may be transferred in any way permitted by the Act or the rules enacted thereunder. If the resultant firm is unable to hold or buy it, it must be sold within two years of the NCLT's approval of the plan, and the sale funds must be quickly remitted outside India through banking channels. It will be possible to repay Indian debts with earnings from the sale of such assets or securities within two years.

Valuation-

The valuation shall be carried out in accordance with Rule 25A of the Companies (Compromises, Arrangements, and Amalgamations) Rules 2016, that is, by registered valuers who are members of recognised professional bodies in the transferee company's prescribed jurisdictions, and in accordance with internationally accepted accounting and valuation principles.

SEBI's Takeover Code:

SEBI published a take-over rule for the regulation of major acquisitions of shares on November 4, 1994, with the goal of improving transparency and reducing the incidence of secret agreements. According to the code's requirements, every purchase in a firm that increases the acquirer's aggregate ownership to more than 15% requires the acquirer to make a public offer. Negotiated takeovers, open market takeovers, and bail-out takeovers are all covered by the takeover code[4].

Meaning- The term ***"takeover"*** refers to the purchase or exchange of shares to gain control of a company that is already registered. In order to seize control of a corporation, a takeover typically involves acquiring or purchasing the shares of the firm's shareholders at a stipulated price to the degree of at least controlling interest[5].

The necessity of Takeover Code- With the declaration of a globalisation strategy, the Indian economy became more accessible to foreign investment. However, in order to compete on a global basis, the company's size had to be enlarged. Given the time element required in grasping the opportunities made accessible by globalisation, mergers and acquisitions were the greatest choice open to corporations in this new environment.

Although the corporate armoury proved to be advantageous, predators with large amounts of discretionary income quickly took advantage of the opportunity, to the detriment of regular investors. This necessitated some regulation to protect investors' interests and ensure that the process of takeovers and mergers is utilised to develop rather than destroy the securities market. With the approval of the SEBI Act in 1992, SEBI was established as a regulatory organisation to promote the growth of the securities industry and to safeguard the interests of investors in the securities market.It also has the authority to enact rules to achieve the aforementioned goals. As a result, SEBI established a committee chaired by P.N. Bhagwati to evaluate the impact of takeovers and mergers on the securities market and propose legislation to regulate them.

[4] India legal S (*Cross border mergers and takeovers*) <http://www.legalservicesindia.com/article/1851/Cross-Border-Mergers-and-Takeovers.html#:~:text=SEBI's%20Takeover%20Code%20for%20substantial,the%20occurrence%20of%20clandestine%20deals.> accessed January 29, 2022

[5] "SEBI Takeover Code- Detailed Analysis" (*TaxGuru*) <https://taxguru.in/sebi/sebi-takeover-code.html> accessed January 29, 2022

Major Reasons-

- The belief of retail investors in the capital market is a critical determinant in its growth. As a result, it is necessary to safeguard their interests.
- The acquirer must verify that it has the financial means to pay the investors the acquisition price.
- To make an educated decision, all significant facts pertaining to the open offer must be fully disclosed and truthfully disclosed.
- Acquisitions and mergers must be completed within a certain amount of time.
- If investors do not want to continue with the new management system then an exit opportunity shall be provided to them.

Fundamental objectives of the Proposed Takeover Regulations[6]-

- To provide a clear legal framework that will make takeovers easier;
- In the context of major acquisitions of shares in, and takeovers of, listed firms, to balance the opposing aims and interests of many stakeholders.
- Provide acquirers with a clear legal framework in which to buy shares in or control of the target firm and make an open offer;
- When a target firm is the subject of an open offer, to guarantee that the target business's affairs are conducted in the regular course;
- To guarantee that only those acquirers who are capable of carrying out their Takeover Regulations duties make open bids.

[6] Shenoy S, "Cross Border Mergers – Key Regulatory Aspects to Consider - Corporate/Commercial Law - India" (*Welcome to Mondaq*April 25, 2018) <https://www.mondaq.com/india/maprivate-equity/695282/cross-border-mergers-key-regulatory-aspects-to-consider> accessed January 29, 2022

Conclusion

To effectively accomplish cross-border mergers, a variety of challenging obstacles must be overcome. Each cross-border merger is unique, and how these challenges are handled will be determined in large part by the facts, dynamics, scale, and geographic extent of both organisations. Because the Cross-Border Regulations are still relatively new, many practical concerns have yet to be uncovered and will be handled as they arise. This should serve as a wake-up call for Indian policymakers, as the current situation of globalisation necessitates that it not be a one-time occurrence. Complex merger strategies are preferred by companies in order to better serve their commercial goals[7].

As a result, the need of the hour is to make required changes to the law and regulatory procedures that are interconnected and do not result in a scenario where one legislation modification contradicts another. To avoid such a situation from reoccurring, and to discourage businesses from attempting rear door admissions when a legally controlled front door access is available, a comprehensive strategy is required.

[7] "Cross-Border Mergers in Light of the Fallout ... - Manupatra" <http://docs.manupatra.in/newsline/articles/Upload/D0209C2A-DB81-4C66-9DAB-52B38C6A97DC.pdf> accessed January 29, 2022