PUBLIC INTEREST OR POLITICAL INTEREST: A CRITICAL ANALYSIS OF THE PUBLIC INTEREST MERGERS IN INDIA UNDER SECTION 237(1) OF THE COMPANIES ACT, 2013

Akanksha Tiwari, LL.B. (Hons.), OP Jindal Global University

ABSTRACT

Mergers and acquisitions are increasingly accepted by the Indian businesses as a critical tool for momentous growth and profits. As per Section 237 (1) of the Companies Act, 2013, the Central Government is empowered to order amalgamation, if necessary, in the *'public interest.'* The phrase public interest is not explicitly defined in the Companies Act. While the ***HDFC Bank and Centurion Bank of Punjab merger*** highlight the importance of this Section for economic and fiscal objectives, the lack of clear guidelines has opened doors for ambiguities and arbitrariness. The vesting of such broad powers within the authority of the Central Government allows for the politicisation of corporate restructuring and an unchecked pattern of arbitrary mergers. Further, excessive powers in the hands of the Central Government can negatively impact the ease of doing business in India thereby, resulting in loss of investment and employment. Hence, the goal of this Article is four-fold: (i) to critique the nebulous understanding of *'public interest'* in clause 1 of Section 237 of the Companies Act, 2013 (ii) to trace the evolution of the provision from its predecessor, Section 396 of the Companies Act 1956 (iii) to analyse the judicial contributions to the definition of *'public interest'* thereby revealing the enduring ambiguity in the phrase and (iv) to prove the hypothesis that the Section is counter-productive to the objectives of the Companies Act, 2013. This paper finds that the lack of proper understanding of *'public interest'* has often been misused by the Central Government as illustrated in the case of ***63 Moons Technologies Ltd. v Union of India & Ors.*** While this paper critiques the ambiguities presented by Section 237(1), it concludes by advocating for clear guidelines for exercising authority and active intervention of courts and tribunals in the amalgamation process as recognised in the case of ***Wiki Kids Ltd. and Ors. vs. Regional Director, South East Region and Ors.***

Keywords: Mergers, Public Interest, Ambiguities, Arbitrariness, Section 237(1), Central Government, Discretionary powers, Judicial Interventions.

I. Introduction

India in the year 2018 witnessed the largest telecom merger between Vodafone India and Idea Cellular.[1] In 2020, the Union Bank merged Andhra Bank and Corporation Bank to become the fifth largest[2] public sector bank mergers in India. In 2024, the National Company Law Tribunal (NCLT) approved the Air India-Vistara merger[3], paving the way for the world's largest airline groups. Thus, the above-mentioned instances reflect how the fast-paced expansion of the business and commercial landscape has increasingly coerced large companies into mergers or amalgamations. While the terms 'amalgamation' or 'mergers' are not explicitly defined, it involve the fusion of two or more companies to establish a new incorporated body created by the operation of law.[4] Thus, Mergers and Acquisitions (M&A) serves as an essential tool in the 21st century to enhance operations, broaden market reach, enter new markets, encourage efficiency and facilitate business restructuring.

The goal of this research is four-fold: firstly, to trace the evolution of the provision; secondly, to critique the nebulous understanding of *'public interest'*; thirdly, to analyse the judicial contributions and finally, to prove the hypothesis that the Section is counter-productive to the objectives of the Companies Act, 2013. This paper finds that the lack of proper understanding of *'public interest'* has often been misused by the Central Government as illustrated in the case of ***63 Moons Technologies Ltd. v Union of India & Ors.***[5] While the paper critiques the ambiguities presented by Section 237(1), it concludes by advocating for clear guidelines for exercising authority and active intervention of courts and tribunals in the amalgamation process as recognised in the case of ***Wiki Kids Ltd. and Ors. vs. Regional Director, South East Region and Ors.***[6]

[1] Chhavi Mehta, Monika Chopra, & Sanjay Dhamija, *The Curious Case of Vodafone Idea Merger: Is It a Saga of Turbulence or a Move Towards Potence?*, 49(1), 67-78 (2024). <https://doi.org/10.1177/02560909241236548> (accessed April 3, 2025).
[2] *Banking Mergers in India*, Groww, https://groww.in/p/savings-schemes/banking-mergers-in-india, (accessed April 3, 2025).
[3] PTI, NCLT approves Air India-Vistara merger, The Indian Express, June 06, 2024. (accessed April 3, 2025).
[4] Md Nazrul Islam Khan, Amalgamation of companies: Public interest should be the deciding factor, The Financial Express, June 02, 2019. (accessed April 3, 2025).
[5] 63 Moons Technologies Ltd. v Union of India & Ors, (2019) 18 SCC 401.
[6] Wiki Kids Ltd. and Ors. v. Regional Director, South East Region and Ors., MANU/NL/0228/2017.

II. Historical Evolution: Legislative Interpretation, Judicial Analysis and Current Legal Trends

Mergers and acquisitions are increasingly accepted by Indian businesses as a critical tool for momentous growth and profits. Thus, to simplify the complexities surrounding the mergers of companies based on public interest, the Companies Act under Section 237 (1)[7] empowers the Central Government to order amalgamation. Section 237 is carried forward from its erstwhile provision Section 396 of the Companies Act, 1956[8] with only *cosmetic* changes.[9] The provisions laid down under Section 396 are extraordinary considering that it questions the very foundation of corporate autonomy by vesting such broad powers within the authority of the Central Government allowing for the politicisation of corporate restructuring and an unchecked pattern of arbitrary mergers.

The landmark judgement in the case of ***63 Moons Technologies Ltd. v Union of India & Ors.***[10] is the very first instance that upheld the power vested under Section 396 to amalgamate two private, non-governmental corporations. Through this case, the apex court bench consisting of Justice R. F. Nariman and Justice Vineet Saran discussed the scope and application of the term *"public interest."* It laid down two-pronged grounds for amalgamation - *firstly*, it must be of public interest and secondly, it must be essential. Justice Nariman laid down the essence of public interest as the welfare of the public or society at large as opposed to the selfish interest of the private individual. It categorised the promotion of national welfare; production of essential goods and services; and generation of employment as parameters central to the idea of public interest. Eventually, after the 2013 amendment, the essence of public interest mergers is now captured by Section 237 (1).

The amalgamation of the ***HDFC Bank and the Centurion Bank of Punjab (CBOP)***[11] in the year 2008 witnessed a successful merger under the said Section on the grounds of the formation of a stronger bank with a broader geographical presence, enhanced technology and a diversified

[7] Companies Act, 2013, § 237(1).
[8] Companies Act 1956, § 396.
[9] Abhijeet Singh Rawaley, *A Curious Case of 'Public Interest' in Indian Corporate Law*, INDIACORPLAW (Feb. 1, 2018), https://indiacorplaw.in/2018/02/curious-case-public-interest-indian-corporate-law.html (accessed April 4, 2025).
[10] 63 Moons Technologies Ltd. v Union of India & Ors, (2019) 18 SCC 401.
[11] Shubham Goyal, *Public Interest in Flux: A Critique of Section 237 and Recommendations for Reform*, Jus Corpus (Dec. 19, 2023), //efaidnbmnnnibpcajpcglclefindmkaj/https://www.juscorpus.com/wp-content/uploads/2024/02/37.-Shubham-Goyal.pdf, (accessed April 4, 2025).

portfolio. While the case highlights the importance of this Section for commercial, economic and fiscal objectives, the lack of clear guidelines has opened doors for ambiguities and arbitrariness. Further, excessive powers in the hands of the Central Government can negatively impact the ease of doing business in India thereby, resulting in loss of investment and employment. Thus, the Section is counter-productive to the overall objective of the Companies Act.

Since public interest is not defined within the Act, various judicial and quasi-judicial decisions contribute to the growing literature around the understanding of what constitutes public interest. The absence of set guidelines has allowed the National Company Law Appellate Tribunal (NCLAT) to break free from the conventional understanding of restrictive review for cases falling under Section 237(1). Rather, the following cases are prominent in widening the scope of review, especially by the National Company Law Tribunal (NCLT).

The case of ***Wiki Kids Ltd. and Ors. vs. Regional Director, South East Region and Ors.***[12] reiterated that the National Company Law Tribunal (NCLT) is empowered to widely examine the compliance to the amalgamation scheme and is obligated to refuse any mergers that are not in alignment with the public interest. The case denied amalgamation as it served to benefit only a certain class of people without serving any public interest. The precedent was upheld in a recent ruling in July 2024 where the NCLT rejected a proposed merger among three interconnected entities - ***Hologram Holdings Private Limited, Swen Holdings Private Limited and Sulphur Securities Private Limited.***[13] Unlike any other cases where the NCLT usually focuses on mere statutory compliance, this case marked a notable shift from its usual pattern. In this particular instance, the NCLT, in addition to verifying technical compliance, delved into critical scrutiny and examination based on facts and reports from the Ministry of Corporate Affairs (MCA) and the Income Tax Department (ITD).[14] This accentuated a new trend in the procedural approach undertaken by the NCLT where it no longer restricts it to examination over technical complaints but also strict scrutiny to ensure the scheme is in consonance with the larger objective of public interest.

[12] Wiki Kids Ltd. and Ors. v. Regional Director, South East Region and Ors., MANU/NL/0228/2017.
[13] Arjim Jain & Shruti Asati, *NCLT's Shift: A Deeper Dive into Merger Schemes and Public Interest*, INDIACORPLAW (Nov.2, 2024), https://indiacorplaw.in/2024/11/nclts-shift-a-deeper-dive-into-merger-schemes-and-public-interest.html, (accessed April 4, 2025).
[14] *Id.*

Although the Supreme Court in the case of ***Miheer H. Mafatlal v. Mafatlal Industries Limited***[15] noted that the statutory wisdom and intention behind merger schemes envisaged under Section 237 should be respected, the NCLT has continued to show that it will proactively intervene in schemes violating the essence of public interest.

Through the above-mentioned cases, it can be concluded that the absence of clearly defined guidelines has paved the way for the NCLT to adopt strict mechanisms to prevent any misuse. Such scrutiny has compelled applicants to provide strong evidence to substantiate how the merger can benefit the business environment and serve the public interest. Given that the approach is contemporary and the understanding of NCLT's involvement in determining the validity of mergers is still at nascent stages, there is a need for proper guidelines to demarcate the role and powers of such quasi-judicial bodies. Thus, the ambiguities surrounding the provisions of the Section and the role of independent regulatory agencies have often rendered the section ineffective.

III. Legal Analysis: Critiquing Section 237(1)

To prove the hypothesis that Section 237(1) is contradictory to the objectives of the Companies Act, 2013, the primary inconsistencies can be trisected under the following heads-

Firstly, the understanding of *'public interest'* in clause 1 of Section 237 of the Companies Act, 2013 is nebulous and ambiguous.[16] The expression is too wide and susceptible to limitless consequences. Public Interest, as per Black's Law Dictionary, is defined as matters that impact the legal rights and liabilities of the community at large and not just the individual alone. This expansive provision reveals that the expression is overly broad to be construed within a provision that suggests compulsory amalgamation. Such vagueness can potentially compel serious civil consequences including forced mergers thereby, compromising the autonomy of companies and the rights of the shareholders. The observation by Justice Felix Frankfurter of the U.S. Supreme Court[17] regarded the idea of public interest as *"vague, impalpable, but all-controlling consideration."* He propounded that construing such a term within the ambit of the Companies Act 2013 fails to align with the nature of power and authority vested under section 237(1). It can be established that Public Interest in its current statutory usage and placement,

[15] Miheer H. Mafatlal v. Mafatlal Industries Limited, (1997) 1 SCC 579.
[16] Goyal, *supra* note 11.
[17] Rawaley, *supra* note 9.

lacks clarity and definitional precision. Thus, the term in such broad conceptualisation is at complete loggerheads with the statutory principles of certainty and predictability and ultimately creates scepticism regarding the threshold for its invocation.

Additionally, the Mumbai Bench of NCLT, in the case of ***Subrata Sarkar v KND Engineering Technologies Limited***,[18] prescribes public interest as a pre-condition for amalgamating the companies. However, it fails to define the scope and ambit of such public interest requirements. This lack of clarity allows for whimsical, unchecked and excessive granting of power to the government even when the general public interest is not being served.

Secondly, throughout the course of the discussion of this paper, it can therefore be derived that Section 237(1) grants excessive discretionary powers to the Central government. A mere reading of sub-clause 1 of Section 237 of the Companies Act, 2013, *'Where the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate….'* indicates that the legislative intent is to provide broad and flexible powers to the Central Government. In this regard, the J.J. Irani Report, submitted in 2005, put forth a significant legislative amendment to the erstwhile section 396, proposing that the process of amalgamation should only be strictly supervised by courts or tribunals.[19] The intention behind this recommendation is to mitigate the possibility of such powers being exercised politically rather than judicially. By emphasizing judicial oversight, the report ensures that such essential processes are conducted with utmost fairness and transparency thereby upholding the principles of corporate governance. The misuse of such vested powers by the government can have dire consequences and negatively impact the rights and obligations of the interested parties and stakeholders involved. Such practices can affect the ease of doing business in India, causing a loss of investment and a decline in employment. When companies are forcefully engaged in amalgamation and winding up processes that threaten their operational viability, it fosters a relationship plagued with instability and distrust and is most likely to create a trend of bad business and commerce in the country. Therefore, it is essential to regulate the powers vested with the Central government, ensuring judicial usage for the benefit of the parties involved.

[18] Subrata Sarkar v KND Engineering Technologies Limited, (2017) SCC OnLine NCLT 74.
[19] Ministry of Company Affairs, Report of Expert Committee on Company Law 2005 (2005), https://www.mca.gov.in/Ministry/reportonexpertcommitte/chapter10.html, (accessed April 5, 2025).

Thirdly, the section is silent in terms of the specific form of amalgamation it contemplates.[20] The essence of the provision lies in empowering the government to order a compulsory amalgamation but fails to specify the kind of amalgamation proposed. While mergers and amalgamation are used interchangeably, they legally serve distinct purposes. The former refers to an agreement where two entities merge and form a new entity upon absorbing the target entity whereas the latter refers to a large corporation taking over other small entities to form a brand-new company.[21] *Halsbury's Laws of England* suggests that amalgamation occurs in two ways - either by transferring undertakings to an existing company or transferring undertakings to a new company. As per Section 904 of the UK Companies Act 2006, the former is classified as *"merger by absorption"* and the latter as emerging through the *"formation of a new company."* This distinction is not merely semantic, rather it is directly relevant in interpreting *"interest"* referred to in Section 237(1) and (3). To elaborate, in the case of 'merger by absorption,' the notional interest of the interested parties remains static however, in the case of a newly created entity, the interest of members changes with the incorporation of a new corporate body.[22] Hence, such a distinction remains relevant and the lack of explicit delineation within the ambit of the said section creates utmost uncertainty leaving the corporations and the stakeholders vulnerable to arbitrary decisions.

IV. Suggestions

The element of *'public interest'* remains unexplored within the Indian Corporate law jurisprudence. Although the Section holds significant importance in ensuring economic stability and preventing corporate failures, there is a desperate need for a well-defined and coherent scheme required for efficient implementation. The suggestions can be broadly categorised as -

Firstly, devising clear guidelines for government authorities - the term, in its current statutory usage, provides for a very open-ended interpretation instead of vesting concrete and specific powers with the government. Thus, for ease of implementation and to avoid unchecked practices eroding the democratic fabric, the Central government must prescribe clear guidelines for invoking amalgamation on grounds of public interest. Inspiration can be taken from

[20] Rawaley, *supra* note 9.
[21] Neha Kate, *Difference between Merger, Acquisition & Amalgamation*, Medium (Jun. 11, 2022), https://medium.com/@kateneha/difference-between-merger-acquisition-amalgamation-5f24e75ba82e (accessed April 4, 2025).
[22] Rawaley, *supra* note 9.

comprehensive guidelines such as in the case of lifting of the corporate veil and grounds for fraud to improve operational effectiveness. Certain legally ascertained standards to enhance operational effectiveness and cost reduction should also be laid down before the amalgamation process. This could allow the government to engage in a smoother transition process. A carefully curated plan of amalgamation will eventually encourage multiple small-scale industries to participate in this process. The government's proactive approach would help these small-scale industries to reduce competition, expand market presence, and improve financial stability at a minimal cost.

Secondly, before the commencement of the amalgamation process, the government must encourage the proposed plan to undergo public consultations to attract any views or objections from the public, creditors or stakeholders. The Court in the case of ***Wiki Kids Ltd. and Ors. vs. Regional Director, South East Region and Ors.***[23] reiterated that the restructuring scheme should not be narrowly interpreted as a mere fulfilment of statutory requirements, rather the scheme must ensure that its benefits trickle down to the respective shareholders. This process enhances participation and transparency by mobilising the *"public"* in its truest sense. Thus, only by adopting such procedures, can the scheme be in *"public interest."*

Thirdly, establishing judicial oversight and independent regulatory agencies - the biggest critique of Section 237(1) lies in granting excessive powers in the hands of the government. The provision laying down "Where the Central Government is satisfied..." emphasises the discretionary autonomy the government exercises which often leads to the politicisation of corporate restructuring and unchecked patterns of arbitrary mergers. Hence, it is necessary to restrict the power exercised by the government by establishing independent regulatory agencies. While the J.J. Irani Committee also submits a report suggesting that the amalgamation processes must be overlooked by the courts and tribunals, the reality of Courts in India cannot be ignored. The courts are already extremely burdened with a large number of pending cases before them. Entrusting the courts to approve the amalgamation scheme would contribute to its existing burden and eventually delaying the process of mergers since court procedures are lengthy and time-consuming.[24] Thus, in such circumstances, independent regulatory agencies can prove to be more efficient given that it is headed by both judicial officers and specialists having expertise in the said subject matter competency to scrutinise the

[23] Wiki Kids Ltd. and Ors. v. Regional Director, South East Region and Ors., MANU/NL/0228/2017.
[24] *supra* note 19.

authority and ensure that government intervention is in line with the legal and regulatory framework. The Court again in the case of ***Wiki Kids Ltd. and Ors. vs. Regional Director, South East Region and Ors.***[25] reinforced the principles of judicial oversight in corporate restructuring. While it limited court interference to cases of grave objections and prejudices given that the schemes are based on the expectations of concerned companies and the shareholders, the National Company Law Tribunal (NCLT) remains the authority responsible for ensuring fairness and prevention of misuse in such matters. Hence, establishing such independent bodies can limit arbitrary practices and enhance accountability and transparent decision-making.

Finally, balancing government intervention - while proposing that the scheme should ideally be handled by independent regulatory bodies, the paper does not aim to restrict government intervention altogether. Rather, it prescribes a scheme which involves the best of both worlds.

Since mergers are conducted for the benefit of the companies in light of the public interest at large, the decision to merge and amalgamate must be at the discretion of the companies involved and the interested parties such as the creditors, stakeholders and shareholders. The role of the government should thus be restricted referring the restructuring matters to the agency and in exceptional circumstances where the mergers clearly threaten the protection of public health, national interest, business competition and safety.

V. Conclusion

From the above analysis, it is safe to say that Clause 1 of Section 237 requires an amendment to ensure alignment with the principles of fairness, transparency and non-arbitrariness enshrined within Company Law. Despite multiple discussions, quasi-judicial orders, and proactive involvement of the National Company Law Tribunal to shape the discourse around the understanding of *"public interest,"* the lack of statutory clarity continues to haunt company autonomy and shareholder rights. Thus, amending Section 237(1) would not only curtail possible misuse of power but also uphold the objective of the Section to serve as a safeguard for collective welfare and not as a tool for discretionary state control.

[25] Wiki Kids Ltd. and Ors. v. Regional Director, South East Region and Ors., MANU/NL/0228/2017.