PREFACE

Corporate Restructuring, Valuation and Insolvency in the course of Company Secretaryship provides the framework for understanding of the laws which govern the mergers and insolvency in India.

For academic point of view, this book covers professional level important aspects of the module of the subject, as published by the Institute of Company Secretaries of India as well as detailed explanations of concepts, flow charts, learning techniques, relevant judicial pronouncements as to make the subject material more understanding.

The main features of the book are as under –

- The entire syllabus has been covered in a these books.
- It provides comprehensive and critical study of the syllabus.
- All important and relevant judicial pronouncements, circulars, notifications, clarifications, explanations etc. have been incorporated.
- This book is incomplete without the notes of the students on the blank pages left for them. The same is done with a purpose of helping the students stay attentive, alert and to pen down concepts, charts and short forms in the way they can best learn and memorize.

The author craves the indulgence of the students/ readers of any error or imperfection which might have, despite the best possible endeavors, crept in this work. Any suggestion for improvement of this book could be emailed at **sukhlecha.shubham@gmail.com,** and the same shall be great fully welcomed.

With best wishes-

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CORPORATE RESTRUCTURING, VALUATION & INSOLVENCY

IMPORTANT M&A

LESSON 1 - TYPES OF CORPORATE RESTRUCTURING

INTRODUCTION

There are primarily two ways of growth of business organization, i.e. organic and inorganic growth.

Organic growth is through internal strategies, which may relate to business or financial restructuring within the organization that results in enhanced customer base, higher sales, increased revenue, without resulting in change of corporate entity.

Inorganic growth provides an organization with an avenue for attaining accelerated growth enabling it to skip few steps on the growth ladder. Restructuring through mergers, amalgamations etc., constitute one of the most important methods for securing inorganic growth.

Corporate Restructuring is an expression that connotes a restructuring process undertaken by business enterprise. It is the process of redesigning one or more aspects of a company. Hence, Corporate Restructuring is a comprehensive process by which a company can consolidate its business operations and strengthen its position for achieving its short-term and long-term corporate objectives.

Restructuring as per Oxford dictionary means reorganization of a company with a view to achieve greater efficiency and profit, or to adapt to a changing market. According to Peter F Drucker, the management guru, the greatest change in corporate culture and the way business is being conducted, is the strategic intervention and relationship based not on ownership, but on partnership.

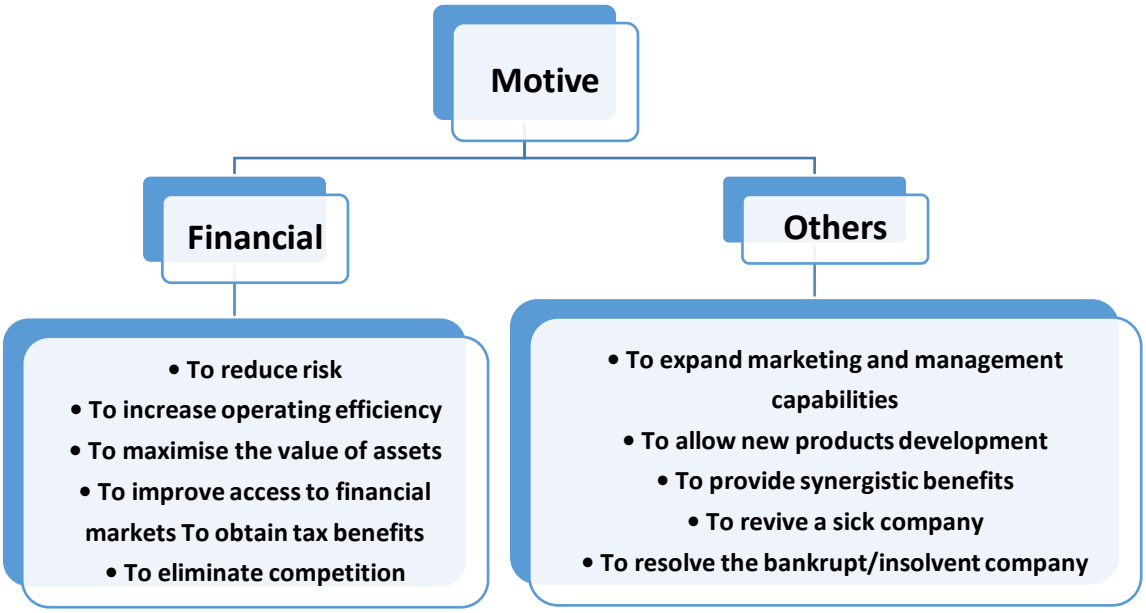
Corporate restructuring is the process of significantly changing a company's business model, management team or financial structure to address challenges and increase shareholder value. Corporate restructuring is an inorganic growth strategy.

NEED AND SCOPE

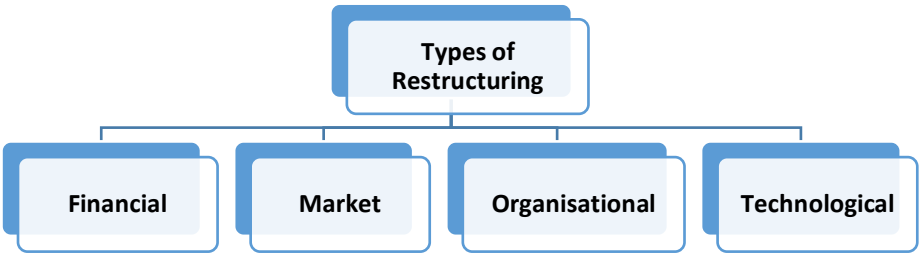
Corporate Restructuring is concerned with arranging the business activities of the Corporate as a whole so as to achieve certain pre-determined objectives at corporate level. Objectives may include the following:

- To enhance shareholders value
- Deploying surplus cash from one business to finance profitable growth in another
- Exploiting inter-dependence among present or prospective businesses
- Risk reduction
- Development of core-competencies
- To obtain tax advantages by merging a loss-making company with a profit-making company
- Revolution in information technology has made it necessary for companies to adopt new changes for improving corporate performances.
- To become globally competitive
- To increase the market share
- Convertibility of rupee has attracted medium-sized companies to operate in the global markets.
- Competitive business necessitated to have sharp focus on core business activities, to gain synergy benefits, to minimize the operating costs, to maximize efficiency in operation and to tap the managerial skill to the best advantage of the firm.
- By diversification of business activities, the minimization of business risk is possible and it enables the firm to achieve at least the minimum targeted rate of return
- With the integration of sick unit into the successful unit, the adjustment of unabsorbed depreciation and write off of accumulated loss is possible and thereby the successful unit can have strategic tax planning.

Motives behind Corporate Restructuring



TYPES OF RESTRUCTURING



I. Financial Restructuring

Financial restructuring deals with restructuring of capital base and raising finance for new projects. Financial restructuring helps a firm to revive from the situation of financial distress without going into liquidation.

Financial restructuring is done for various business reasons:

- Poor financial performance
- External competition
- Erosion or loss of market share
- Emerging market opportunities

It involves Equity Restructuring like buy-back, Alteration/Reduction of capital and Debt Restructuring like restructuring of the secured long-term borrowing, long-term unsecured borrowings, Short term borrowings.

II. Market and Technological Restructuring

Market Restructuring involves decisions with respect to the product market segments where the company plans to operate on its core competencies and technological restructuring occurs when a new technology is developed that changes the way an industry operates. This type of restructuring usually affects employees, and tends to lead to new training initiatives, along with some layoffs as the company improves efficiency. This type of restructuring also involves alliances with third parties that have technical knowledge or resources.

Indian technology major Tata Consultancy Services Limited has embarked upon the process of restructuring and focusing on three core areas Cloud, agile and automation. The restructuring plan of the company focuses on the manufacturing capacity and on product, technical and technological, financial, employment, organizational, purchasing and management restructuring activities. Disney's global technology group, parks-and-resorts division is undergoing a reorganization which results in some employees losing their jobs. It is eliminating some positions and replacing them with others that help the company reach more long-term technology goals.

III. Organisational Restructuring

Organizational Restructuring involves establishing internal structures and procedures for improving the capability of the personnel in the organization to respond to changes. These changes need to have the cooperation of all levels of employees. Some companies shift organizational structure to expand and create new departments to serve growing markets. Other companies reorganize corporate structure to downsize or eliminate departments to conserve overheads.

MOST COMMONLY APPLIED TOOLS OF CORPORATE RESTRUCTURING

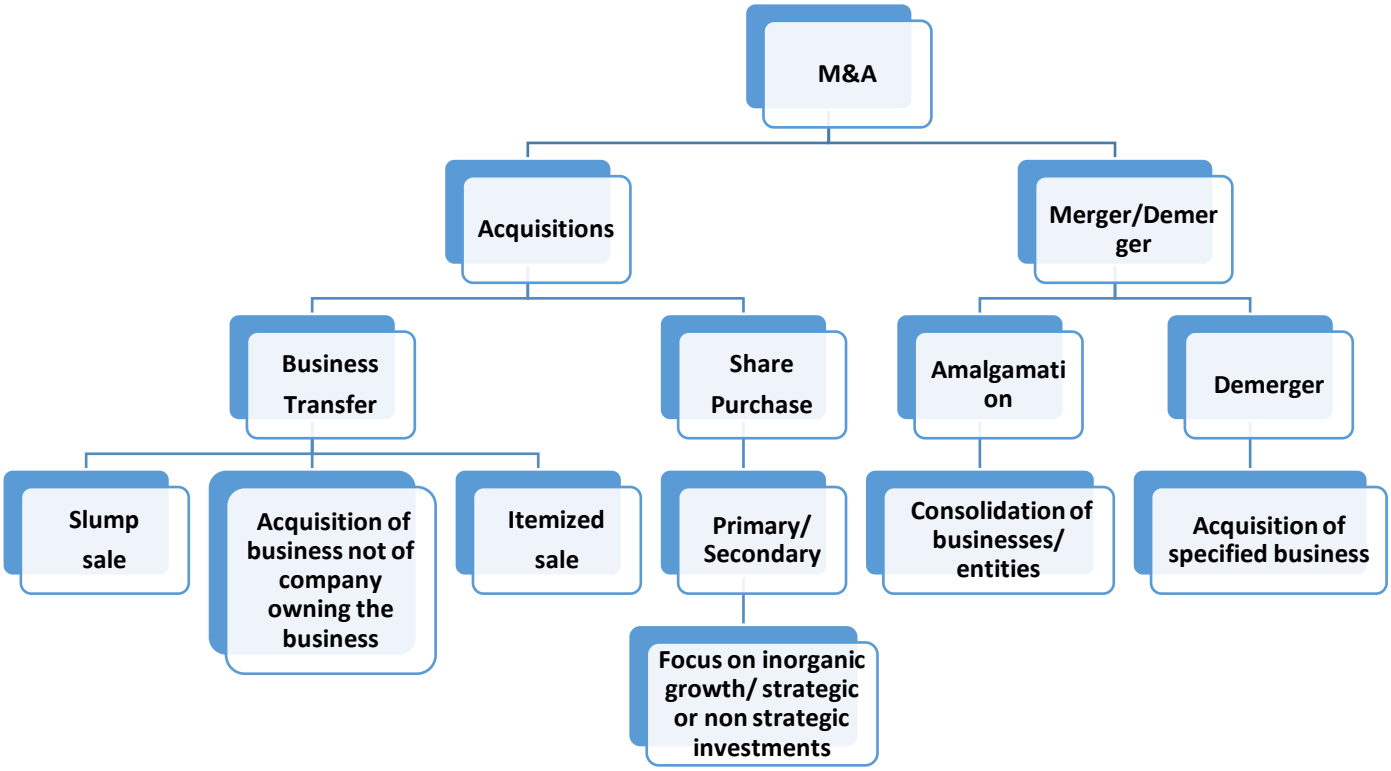
Mergers/Acquisitions and Amalgamation

Mergers and Acquisitions (M&A) are transactions in which the ownership of companies, other business organizations or operating units are transferred or combined. As an aspect of strategic management, M&A allow enterprises to grow, shrink, and change the nature of the business or competitive position. It refers to the consolidation of two companies.

Reasons for Mergers & Acquisitions

Regardless of their category or structure, all mergers and acquisitions have one common goal: **they are all meant to create synergy that makes the value** of the combined companies greater than the sum of the two parts. The success of a merger or acquisition depends on whether this synergy is achieved. Synergy takes the form of revenue enhancement and cost savings. By merging, the companies hope to benefit from the following:

- **Becoming bigger:** Many companies use M&A to grow in size and leapfrog their rivals. While it can take years or decades to double the size of a company through organic growth, this can be achieved much more rapidly through mergers or acquisitions.
- **Pre-empted competition:** This is a very powerful motivation for mergers and acquisitions, and is the primary reason why M&A activity occurs in distinct cycles.
- **Domination:** Companies also engage in M&A to dominate their sector. However, since a combination of two behemoths would result in a potential monopoly, such a transaction would have to face regulatory authorities.
- **Tax benefits:** Companies also use M&A for tax purposes, although this may be an implicit rather than an explicit motive.
- **Economies of scale:** Mergers also translate into improved economies of scale which refers to reduced costs per unit that arise from increased total output of a product.
- **Acquiring new technology:** To stay competitive, companies need to stay on top of technological developments and their business applications. By buying a smaller company with unique technologies, a large company can maintain or develop a competitive edge.
- **Improved market reach and industry visibility:** Companies buy other companies to reach new markets and grow revenues and earnings. A merger may expand two companies' marketing and distribution, giving them new sales opportunities. A merger can also improve a company's standing in the investment community: bigger firms often have an easier time raising capital than smaller ones.



M&A take place:	M&A include a number of different transactions such as:
1. by purchasing assets 2. by purchasing common shares 3. by exchange of shares for assets 4. by exchanging shares for shares	1. Mergers 2. Acquisitions 3. Amalgamation 4. Consolidations 5. Tender offers 6. Purchase of assets 7. Management buy-out

1. MERGERS

The term merger and amalgamation has not been defined under the Act. M&A is often known to be a single terminology. However, there is a thin difference between the two. 'Merger' is the fusion of two or more companies, whereby the identity of one or more is lost resulting in a single company whereas 'Amalgamation' signifies the blending of two or more undertaking into one undertaking, blending enterprises loses their identity forming themselves into a separate legal identity. There may be amalgamation by the transfer of two or more undertakings to a new or existing company. **'Transferor company'** means the company which is merging also known as amalgamating company in case of amalgamation and **'transferee company'** is the company which is formed after merger or amalgamation also known as amalgamated company in case of amalgamation.

A merger is a legal consolidation of two entities into one entity which can be merged together either by way of amalgamation or absorption or by formation of a new company. The Board of Directors of two companies approve the combination and seek shareholders' approval. After the merger, the acquired company ceases to exist and becomes part of the acquiring company. Some recent examples are acquisition of eBay India by Flipkart, Vodafone-Idea merger and Axis Bank's acquisition of freecharge, State Bank of India merger with all its subsidiary banks etc.

Types of Mergers

Horizontal Merger	Vertical Merger	Conglomerate Merger	Congeneric Merger	Reverse Merger

a) **Horizontal Merger:** Horizontal Merger is a merger between companies selling similar products in the same market and in direct competition and share the same product lines and markets. It decreases competition in the market. The main objectives of horizontal merger are to benefit from economies of scale, reduce competition, achieving monopoly status and control of the market.

> Facebook's acquisition of Instagram in 2012 for a reported $1 billion. Both Facebook and Instagram operated in the same industry and were in similar production stages in regard to their photo-sharing services. Facebook, looking to strengthen its position in the social media and social sharing space, saw the acquisition of Instagram as an opportunity to grow its market share, increase its product line, reduce competition and access potential new markets.

b) **Vertical Merger:** Vertical Merger is a merger between companies in the same industry, but at diff stages of production process. In another words, it occurs between companies where one buys or sells something from or to the other.

> suppose XYZ Ltd. produces shoes and ABC Ltd. produces leather. ABC has been XYZ's leather supplier for many years, and they realize that by entering into a merger together, they could cut costs and increase profits. They merge vertically because the leather produced by ABC is used in XYZ's shoes.

c) **Conglomerate Merger:** Conglomerate merger is a merger between two companies that have no common business areas. It refers to the combination of two firms operating in industries unrelated to each other. The business of the target company is entirely different from the acquiring company. The main objective of a conglomerate merger is to achieve big size e.g., a watch manufacturer acquiring a cement manufacturer, a steel manufacturer acquiring a software company, etc.

d) **Congeneric Merger:** Congeneric merger is a merger between two or more businesses which are related to each other in terms of customer groups, functions or technology e.g., combination of a computer system manufacturer with a UPS manufacturer.

> An example of a congeneric merger is when banking giant Citicorp merged with financial services company Travelers Group in 1998. In a deal valued at $70 billion, the two companies joined forces to create Citigroup Inc. While both companies were in the financial services industry, they had different product lines.

e) **Reverse Merger:** A reverse merger is a merger in which a private company becomes a public company by acquiring it. It saves a private company from the complicated process and expensive compliance of becoming a public company. Instead, it acquires a public company as an investment and converts itself into a public company.

> Example of a reverse merger was when ICICI merged with its arm ICICI Bank in 2002. The parent company›s balance sheet was more than three times the size of its subsidiary at the time.

2. ACQUISITION

Acquisition occurs when one entity takes ownership of another entity's stock, equity interests or assets. It is the purchase by one company of controlling interest in the share capital of another existing company. Even after the takeover, although there is a change in the management of both the firms, companies retain their separate legal identity. The companies remain independent and separate; there is only a change in control of the companies. When an acquisition is 'forced' or 'unwilling', it is called a takeover.

Examples:

- Snapdeal and Freecharge ($400 million)
- Flipkart and Myntra ($300 to 330 million)
- Ola and TaxiForSure ($200 million)

Difference between a Merger and an Acquisition:

Merger	Acquisition
A merger occurs when two separate entities, usually of comparable size, combine forces to create a new, joint organization in which both are equal partners	An acquisition refers to the purchase of one entity by another (usually, a smaller firm by a larger one)
Old company cease to exist and a new company emerges	A new company does not emerge
It requires two companies to consolidate into a new entity with a new ownership and management structure	It occurs when one company takes over all of the operational management decisions of another
It the takeover is friendly, it is called merger	If the takeover is hostile, it is called as an acquisition

3. AMALGAMATION

Amalgamation is defined as the combination of one or more companies into a new entity. It includes:

i. Two or more companies join to form a new company.
ii. Absorption or blending of one by the other.

Amalgamation is a legal process by which two or more companies are joined together to form a new entity or one or more companies are to be absorbed or blended with another as a consequence the amalgamating company loses its existence and its shareholders become the shareholders of new company or amalgamated company.

The word "amalgamation" is not defined under the Companies Act 2013 whereas section 2(1B) of Income Tax Act, 1961 defines Amalgamation as: "amalgamation", in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that

i. all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;
ii. all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation;
iii. shareholders holding not less than three-fourths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation. Otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company.

Amalgamation includes absorption. The Institute of Chartered Accountants of India has issued Accounting Standard (AS) 14 on Accounting for Amalgamations.

4. CONSOLIDATION

A consolidation creates a new company. Stockholders of both companies approve the consolidation, and subsequent to the approval, receive common equity shares in the new firm. Example: In 1998 Citicorp and Traveler's Insurance Group announced a consolidation, which resulted in Citigroup.

5. TENDER OFFER

One company offers to purchase the outstanding stock of the other firm at a specific price. The acquiring company communicates the offer directly to the other company's shareholders. Example: Johnson & Johnson made a tender offer in 2008 to acquire Omrix Biopharmaceuticals for $438 million.

6. ACQUISITION OF ASSETS

In a purchase of assets, one company acquires the assets of another company. The company whose assets are being acquired, obtain approval from its shareholders. The purchase of assets is typical during bankruptcy proceedings, where other companies bid for various assets of the bankrupt company, which is liquidated upon the final transfer of assets to the acquiring firm(s).

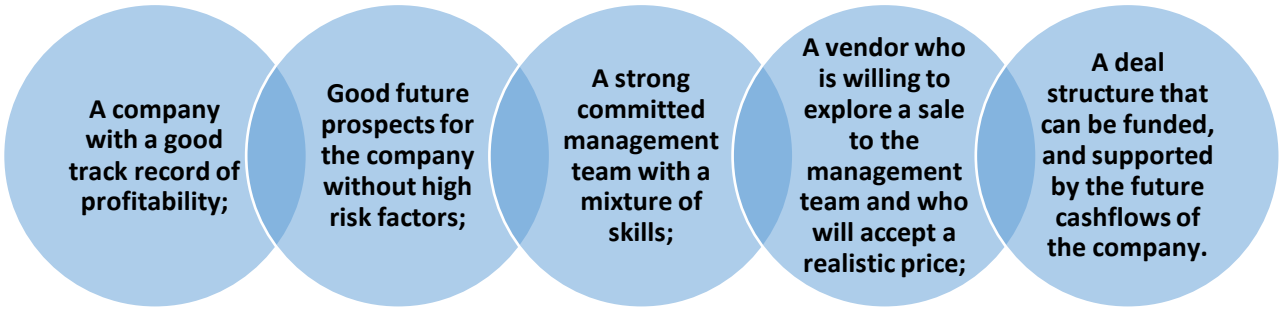
7. MANAGEMENT BUYOUT

A management buyout (MBO) is a transaction where a company's management team purchases the assets and operations of the business they manage. MBO is appealing to professional managers because of the greater potential rewards from being owners of the business rather than employees.

When looking to exit, a business owner has a number of options. One of these is to sell the company to the existing management team. A sale to management may be preferred to a trade sale for a variety of reasons, for example, the number of potential trade buyers may be limited, the vendors may be nervous about approaching competitors and disclosing sensitive information or they may feel strongly that the company and its staff carry on independently in what they believe to be "safe hands".

In its simplest form, a management buyout (MBO) involves the management team of a company combining resources to acquire all or part of the company they manage. Most of the time, the management team takes full control and ownership, using their expertise to grow the company and drive it forward.

Factors that makes a successful MBO:



8. PURCHASE OF COMPANY AS RESOLUTION APPLICANT UNDER IBC LAW

The basic objective behind the Insolvency and Bankruptcy Code 2016 is to revive the insolvent company by approving the effective resolution plan and maximization of assets of the corporate debtor. As per the Code, the company under insolvency can be purchased by the resolution applicant by participating in the bid process by submitting the most effective resolution plan. This way the insolvent company can be revived by some other company/group/individuals.,

Example: Tata Steel has taken over the bankrupt Bhushan Steel for ₹35,200 crore,

EXAMPLE-MERGERS AND ACQUISITIONS IN INDIA

Tata Group/Air India

Tata Group, India's largest conglomerate, acquired the nationalised airline Air India in 2022. Tata also announced the merger of Air India with Vistara, a joint venture between Tata Sons and Singapore Airlines. Air India had been struggling for years, and the travel restriction during the COVID-19 pandemic only added to its woes. However, Tata is doing everything possible to restore Air India to its former glory.

Adani Group/Ambuja Cement

Gautam Adani is fast-rising in the world. In a span of a few years, he has claimed a spot as one of the richest people in the world. Along with the acquisition of NDTV, the Adani Group also acquired a majority stake in Ambuja Cements and its subsidiary, ACC Ltd. Adani is now the second largest cement manufacturer in the country after Aditya Birla Group's UltraTech.

Vodafone India and Idea Cellular

- Vodafone India and Idea Cellular decided to merge and form country's largest telecom operator 'Vodafone India Ltd.' worth of more than $23 billion with a 35 per cent market share and it is the top M&A deal of 2017-18.
- Vodafone and the Aditya Birla Group will have a joint control of this combined company. Combining the Vodafone and idea customers, the merged entity is the biggest telecom company in India.

- The merged entity have over 408 million customers, nearly 42% customer market share (CMS) and nearly 33% revenue market share (RMS), leaving it stronger placed to take on competitive pressures triggered by Jio, with 160 million subscribers and over 16% CMS and 15.3% RMS. Airtel has a CMS of 29.5% and an RMS of 31.5%.
- The Idea-Vodafone merger has been cleared by the stock exchanges, Securities and Exchange Board of India, Competition Commission of India, foreign direct investment clearance from the department of industrial policy and promotion, approval given by DoT as licensor and the merger after approval of NCLT is complete in August 2018.

Flipkart and eBay

- Indian e-commerce major Flipkart acquired the Indian wing of eBay. The transaction was announced in April 2017 and completed in August 2017.
- eBay and Flipkart have also entered into an agreement for cross-border sale. In exchange of equity stake in Flipkart, eBay had made cash investment of $500 million and sold its eBay. in business to Flipkart.
- As a result, Flipkart customers get expanded product choices with the wide array of global inventory available on eBay while eBay customers will have access to a more unique Indian inventory from Flipkart sellers.

DEMERGER

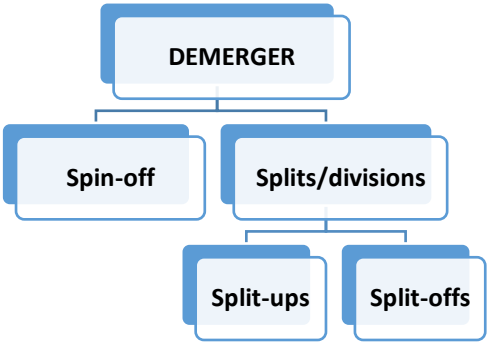
It is a business strategy in which a single business is broken into components, either to operate on their own, to be sold or to be dissolved. Demerger is an arrangement whereby some part / undertaking of one company is transferred to another company which operates completely separate from the original company. Shareholders of the original company are usually given an equivalent stake of ownership in the new company. The contracts relating to the demerged undertaking would get automatically transferred to the resulting company, unless the underlying contract has stipulated specific restrictions. A demerged company is said to be one whose undertakings are transferred to the other company, and the company to which the undertakings are transferred is called the resulting company.

Demerger under Section 2(19AA) of the Income tax Act, 1961 means the transfer, pursuant to a scheme of arrangement under section 230 to 232 of the Act, by a demerged company of its one or more undertakings to the resulting company in such a manner that:-

I. All the property of the undertaking, being transferred by the demerged company, immediately before the demerger, becomes the property of the resulting company by virtue of demerger;
II. All the liabilities relatable to the undertaking, being transferred by the demerged company, immediately before the demerger, become the liabilities of the resulting company by virtue of the demerger;
III. The property and the liabilities of the undertaking or undertakings, being transferred by the demerged company are transferred at values appearing in its books of account immediately before the demerger;
IV. The resulting company issues, in consideration of the demerger, its shares to the shareholders of the demerged company on a proportionate basis except where the resulting company itself is a shareholder of the demerged company;
V. The shareholders holding not less than three-fourth in value of shares in the demerged company (other than shares already held therein immediately before the demerger, or by a nominee for, the resulting company or, its subsidiary) become shareholders of the resulting company or companies by virtue of the demerger; otherwise than as a result of the acquisition of the property or assets of the demerged or any undertaking thereof by the resulting company;
VI. the transfer of the undertaking is on a going concern basis;
VII. Demerger in accordance with the conditions notified under Section 72A(5) of Income Tax Act, 1961.

Examples:

- Reliance Industries demerged to Reliance Industries and Reliance Communications Ventures Ltd, Reliance Energy Ventures Ltd, Reliance Capital Ventures Ltd, Reliance Natural Resources Ltd.
- In April 2018, Whitbread plc. announced to de-merge Costa Coffee from their stable of businesses.
- Pfizer sold their infant nutrition business to Nestle.



Types of Demerger

1. Divestiture

Divestiture means selling or disposal of assets of the company or any of its business undertakings/divisions, usually for cash (or for a combination of cash and debt). It is explained in detail in further.

2. Spin-offs

- The shares of the new entity are distributed to the shareholders of the parent company on a pro-rata basis. The parent company also retains ownership in the spun-off entity.
- There are two approaches in which Spin offs may be conducted.
  a) In the first approach, the company distributes all the shares of the new entity to its existing shareholders on a pro rata basis. This leads to the creation of two different companies holding the same proportions of equity as compared to the single company existing previously.
  b) The second approach is the floatation of a new entity with its equity being held by the parent company. The parent company later sells the assets of the spun off company to another company.
- A spinoff may occur for various reasons. A company may conduct a spinoff so it can focus its resources and better manage the division that has more long-term potential.
- A corporation creates a spinoff by distributing 100% of its ownership interest in that business unit as a stock dividend to existing shareholders. It can also offer its existing shareholders a discount to exchange their shares in the parent company for shares of the spinoff. For example, an investor could exchange $100 of the parent's stock for $110 of the spinoff's stock. Spinoffs tend to increase returns for shareholders because the newly independent companies can better focus on their specific products or services.
- The downside of spinoffs is that their share price can be more volatile and can tend to underperform in weak markets and outperform in strong markets.

3. Splits/divisions

Splits involve dividing the company into two or more parts with an aim to maximize profitability by removing stagnant units from the mainstream business. Splits can be of two types, Split-ups and Split-offs.

- **Split-ups:** It is a process of reorganizing a corporate structure whereby all the capital stock and assets are exchanged for those of two or more newly established companies resulting in the liquidation of the parent corporation.
- **Split-offs:** It is a process of reorganizing a corporate structure whereby the capital stock of a division or subsidiary of corporation or of a newly affiliated company is transferred to the stakeholders of the parent corporation in exchange for part of the stock of the latter. Some of the shareholders in the parent company are given shares in a division of the parent company which is split off in exchange for their shares in the parent company.

4. Equity Carve-Outs

Equity carve-outs are referred to a percentage of shares of the subsidiary company being issued to the public. This method leads to a separation of the assets of the parent company and the subsidiary entity. Equity carve outs result in publicly trading the shares of the subsidiary entity.

Examples:

1. Indiabulls carved out commercial office business into a separate firm under the name of Indiabulls Commercial Assets Limited.
2. India's largest engineering and construction company Larsen and Toubro Ltd (L&T) adopted "asset-light strategy" by separating business units into independent subsidiaries by selling a stake in businesses. The company, which is

considered a corporate proxy for the broader economy, divested its assets as a way to generate capital for investing in fresh projects.

SLUMP SALE

The transfer of the undertaking concerned as going concern is called "Slump sale". Slump sale is one of the methods that are widely used in India for corporate restructuring where the company sells its undertaking. The main reasons of slump sale are generally undertaken in India due to following reasons:

- It helps the business to improve its poor performance.
- It helps to strengthen financial position of the company.
- It eliminates the negative synergy and facilitates strategic investment.
- It helps to seek tax and regulatory advantage associated with it.

Section 2 (42C) of the Income Tax Act, 1961, recognizes 'Slump-sale' as a transfer of an 'undertaking' i.e. a part or a unit or a division of a company, which constitutes a business activity when taken as a whole. It is a transfer of one or more undertakings as a result of sale for a lump sum consideration, without values being assigned to the individual assets and liabilities in such sale. Sale includes transfer of an asset from one person to another for some consideration, where consideration can be in kind or cash.

The Act does not define a slump sale but has included in its ambit slump sale by way of section 180(1) and provides for the procedure and approval required for selling, leasing or disposing of the whole or substantially whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any such undertakings.

BUSINESS SALE/DIVESTITURE

Divestiture means selling or disposal of assets of the company or any of its business undertakings/ divisions, usually for cash (or for a combination of cash and debt) and not against equity shares to achieve a desired objective, such as greater liquidity or reduced debt burden. Divestiture is normally used to mobilize resources for core business or businesses of the company by realizing value of non-core business assets.

Reasons for Divestitures

- Huge divisional losses
- Continuous negative cash flows from a particular division
- Difficulty in integrating the business within the company
- Unable to meet the competition
- Better alternatives of investment
- Lack of technological upgradations due to non-affordability
- Lack of integration between the divisions
- Legal pressures

E.g. Nestle is selling its US chocolate business, which includes brands such as BabyRuth, Butterfinger, and Crunch to Ferrero for $2.8 billion. The deal is part of Nestle's strategy to sell underperforming brands and refocus on healthier products and fast-growing markets.

JOINT VENTURE

A joint venture (JV) is a business or contractual arrangement between two or more parties which agree to pool resources for the purpose of accomplishing a specific task may be a new project or any other business activity. In a joint venture (JV), each of the participants is responsible for profits, losses and costs associated with it. Company enters into a joint venture when it lacks required knowledge, human capital, technology or access to a specific market that is necessary to be successful in pursuing the project on its own.

Types of Joint Ventures

Equity-based joint ventures	Non-equity joint ventures
• It is a type of joint venture in which two or more parties set-up a separate legal company to act as the vehicle for carrying out the project. • This new company would usually be located in the same country as one of the two partner companies, with the purpose of mutually establishing an activity with its own objectives: marketing and distribution, research, manufacturing, etc. • It benefits foreign and/or local private interests, or members of the general public through capital.	• It is also known as cooperative agreements, seek technical service arrangements, franchise, brand use agreements, management contracts, rental agreements, or one- time contracts, e.g., for construction projects, non-equity arrangements in which some companies are in need of technical services or technological expertise than capital. • It may be modernizing operations or starting new production operations.

Example:

- Vistara airlines is an Indian Joint Venture with a foreign company. Vistara is the brand name of Tata SIA Airlines Ltd, a JV between India's corporate giant Tata Sons and Singapore Airlines (SIA).
- Tata Starbucks Pvt. Ltd is a joint venture of Tata with Starbucks Corporation, USA which runs a chain of Starbucks brand coffee shops across India.

STRATEGIC ALLIANCE

Nike, the world's largest producer of athletic foot-wear, does not produce a single shoe. Boeing, the giant aircraft company, makes little more than cockpits and wing bits. These organizations, like a number of other businesses nowadays, have created strategic alliances with their suppliers to do much of their actual production for them.

A strategic alliance is an arrangement between two companies that have decided to share resources to undertake a specific, mutually beneficial project. It is an excellent vehicle for two companies to work together profitably. It can help companies develop and exploit the unique strengths. Organizations get an opportunity to widen customer base or utilize the surplus capacity.

E.g. Etihad Airways, based in Abu Dhabi, has completed an investment in India's Jet Airways. This alliance will provide considerable benefits for both carriers, as it opens Etihad to 23 cities in India, and offers Jet Airways passengers connection possibilities to the US, Europe, Middle East and Africa that were previously unavailable.

ICICI Bank and Vodafone India entered into a strategic alliance to launch a unique mobile money transfer and payment service called 'm-pesa'.

REVERSE MERGER

A reverse merger is a merger in which a private company becomes a public company by acquiring it. It saves a private company from the complicated process and expensive compliance of becoming a public company. Instead, it acquires a public company as an investment and converts itself into a public company.

However, there is another angle to the concept of a reverse merger. When a weaker or smaller company acquires a bigger company, it is a reverse merger. In addition, when a parent company merges into its subsidiary or a loss-making company acquires a profit-making company, it is also termed as a reverse merger.

The reason for reverse merger are:

- To carry forward tax losses of the smaller firm, this allows the combined entity to pay lower taxes. Tax savings under Income Tax Act, 1961
- Economies of scale of production
- Marketing network
- To protect the trademark rights, licence agreements, assets of small/loss making company.

Examples:

1. In 2023, the reverse merger of HDFC with its subsidiary HDFC Bank, resulting in a combined business worth over 41 lakh crore.
2. Merging of Oil exploration company Cairn India with parent Vedanta India

FINANCIAL RESTRUCTURING

Corporate financial restructuring is any substantial change in a company's financial structure, or ownership or control, or business portfolio, designed to increase the value of the firm, i.e., debt and equity restructuring. Internal reconstruction of a company is the simplest form of financial restructuring. Under this, various liabilities are reduced after negotiating with various stakeholders such as banks, financial institutions, creditors, debenture holders and shareholders. It deals with the restructuring of capital base and raising finance for new projects

Debt Restructuring

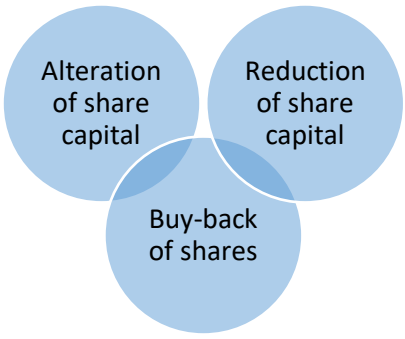
It involves a reduction of debt and an extension of payment terms or change in terms and conditions, which is less expensive. It is nothing but negotiating with bankers, creditors, vendors. It is the process of reorganizing the whole debt capital of the company. It involves the reshuffling of the balance sheet items as it contains the debt obligation of the company. Debt capital of the company includes secured long term borrowing, unsecured long-term borrowing, and short term borrowings

- Restructuring of the secured long-term borrowing for improving liquidity and increasing the cash flows for a sick company and reducing the cost of capital for healthy companies. Restructuring of the unsecured long-term borrowings.
- Restructuring of the long-term unsecured borrowings can be in form of public deposits and/or private loans (unsecured) and privately placed, unsecured bonds or debentures.
- Restructuring of other short-term borrowings: the borrowings that are very short in nature are generally not restructured these can indeed be renegotiated with new terms. These types of short term borrowings include inter-corporate deposits clean bills & clean overdraft.
- Best method for corporate debt restructuring is Debt-equity swap. In the case of an debt-equity swap, specified shareholders have right to exchange stock for a predetermined amount of debt (i.e. bonds) in the same company. In debt-equity swap debt /bonds are exchanged with shares/stock of the company.

EQUITY RESTRUCTURING

It is a process of reorganizing the equity capital. It includes a reshuffling of the shareholders capital and the reserves that are appearing on the balance sheet. Restructuring equity means changing how the firm's residual cash flows are divided and distributed among the firms shareholders, with the goal of increasing the overall market value of the firms common stock. Restructuring of equity and preference capital becomes complex process involving a process of law and is a highly regulated area.

The following comes under equity restructuring:



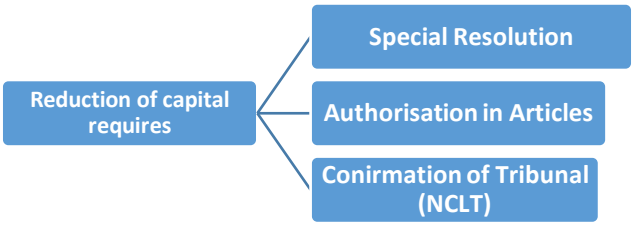
REDUCTION OF SHARE CAPITAL

Capital Reduction is the process of decreasing a company's shareholder's equity through share cancellations and share repurchases. The reduction of share capital means reduction of issued, subscribed and paid up share capital of the company. In simple words it can be regarded as 'Cancellation of Uncalled Capital' i.e. part of subscribed share capital. The act of capital reduction is enacted by reducing the amount of issued share capital in a response to a permanent reduction in a company's operations or a revenue loss that cannot be recovered from a company's future earnings.

The need of reducing share capital arise in following situations:

- Returning of surplus to shareholders;
- Eliminating losses, which may be preventing the payment of dividends;

- As part of scheme of compromise or arrangements.



Legal Provisions

- Section 66 of the Companies Act, 2013; Reduction by way of cancellation of shares
- Rule 2 to 6 of the National Company Law Tribunal (Procedure for Reduction of Share Capital of Company) Rules, 2016
- SEBI (LODR) Regulations, 2015.

Modes of Reduction of Capital

A company limited by shares or a company limited by guarantee and having a share capital may, if authorised by its articles, by special resolution, and subject to its confirmation by the Tribunal on petition, reduce its share capital in any way and in particular:

a) extinguish or reduce the liability on any of its shares in respect of the share capital not paid-up; or
b) either with or without extinguishing or reducing liability on any of its shares;
c) cancel any paid-up share capital which is lost or is unrepresented by available assets; or
d) pay off any paid-up share capital which is in excess of the wants of the company, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

Reduction of capital without sanction of the Tribunal

The following are cases which amount to reduction of share capital but where no confirmation by the Tribunal is necessary:

a) **Surrender of shares** – "Surrender of shares" means the surrender of shares already issued, to the company, by the registered holder of shares. Where shares are surrendered to the company, whether by way of settlement of a dispute or for any other reason, it will have the same effect as a transfer in favour of the company and amount to a reduction of capital. But if, under any arrangement, such shares, instead of being surrendered to the company, are transferred to a nominee of the company then there will be no reduction of capital [Collector of Moradabad v. Equity Insurance Co. Ltd., (1948) 18 Com Cases 309: AIR 1948 Oudh 197]. Surrender may be accepted by the company under the same circumstances where forfeiture is justified. It has the effect of releasing the shareholder whose surrender is accepted for further liability on shares. The Companies Act contains no provision for surrender of shares. Thus surrender of shares is valid only when Articles of Association provide for the same and:
   i. where forfeiture of such shares is justified; or
   ii. when shares are surrendered in exchange for new shares of same nominal value. Both forfeiture and surrender lead to termination of membership. However, in the case of forfeiture, it is at the initiative of company and in the case of surrender it is at the initiative of member or shareholder.
b) **Forfeiture of shares** – A company may if authorised by its articles, forfeit shares for non-payment of calls 4and the same will not require confirmation of the Tribunal.
c) **Diminution of capital** – Where the company cancels shares which have not been taken or agreed to be taken by any person.
d) Redemption of redeemable preference shares.
e) **Buy-back of its own shares** within the specified percentage of capital permitted by the Act.

Creditors' right to object to reduction:

After passing the special resolution for the reduction of capital, the company is required to apply to the Tribunal by way of petition for the confirmation of the resolution under Section 66 of the Companies Act, 2013. if the Tribunal so directs, the creditors having a debt or claim admissible in winding-up are entitled to object. To enable them to do so, the Tribunal will settle a list of creditors entitled to object. If any creditor objects, then:

a. either his consent to the proposed reduction should be obtained or
b. he should be paid off or
c. his payment be secured.

The Tribunal, in deciding whether or not to confirm the reduction will take into consideration the minority shareholders and creditors.

The Tribunal shall give notice of every application made to it under section 66(1) to the Central Government, Registrar and to the Securities and Exchange Board, in the case of listed companies, and the creditors of the company and shall take into consideration the representations, if any, made to it by them within a period of three months from the date of receipt of the notice: However, where no representation has been received within the said period, it shall be presumed that they have no objection to the reduction.

There is no limitation on the power of the Court to confirm the reduction except that it must first be satisfied that all the creditors entitled to object to the reduction have either consented or been paid or secured **[British and American Trustee and Finance Corpn. v. Couper, (1894)].**

When exercising its discretion, the Tribunal must ensure that the reduction is fair and equitable. In short, the Court shall consider the following, while sanctioning the reduction:

(i) The interests of creditors are safeguarded;
(ii) The interests of shareholders are considered; and
(iii) Lastly, the public interest is taken care of.

Confirmation and registration

Section 66(3) of the Companies Act, 2013 states that if the Tribunal is satisfied that either the creditors entitled to object have consented to the reduction, or that their debts have been determined, discharged, paid or secured, it may confirm the reduction of share capital on such terms and conditions as it deems fit.

Application for reduction of share capital shall not be sanctioned by the Tribunal unless the accounting treatment, proposed by the company for such reduction is in conformity with the accounting standards specified in section 133 or any other provision of this Act and a certificate to that effect by the company›s auditor has been filed with the Tribunal.

Section 66(4) of the Companies Act, 2013 states that the order of confirmation of the reduction of share capital by the Tribunal shall be published by the company in such manner as the Tribunal may direct. Section 66(5) of the Companies Act, 2013 states that the Company shall deliver a certified copy of Tribunal order confirming the reduction together with the minutes giving the details of the company's

a) amount of share capital;
b) number of shares into which it is to be divided;
c) amount of each share; and
d) amount, if any, at the date of registration deemed to be paid-up on each share,

to the Registrar within 30 days of receipt of the order of Tribunal who will register them. The reduction takes effect only on registration of the order and minutes, and not before. The Registrar will then issue a certificate of registration which will be a conclusive evidence that the requirements of the Act have been complied with and that the share capital is now as set out in the minutes. The Memorandum has to be altered accordingly.

BUY-BACK

According to Section 68(1) of the Companies Act, 2013, a company whether public or private, may purchase its own shares or other specified securities (hereinafter referred to as "buy-back") out of:

(i) its free reserves; or
(ii) the securities premium account; or
(iii) the proceeds of any shares or other specified securities.

However, no buy-back of any kind of shares or other specified securities can be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities. Thus, the company must have at the time of buy-back, sufficient balance in any one or more of these accounts to accommodate the total value of the buy-back.

Modes of Buy-Back

Tender Offer	Open Market Purchase
In tender offer, the company makes an offer to buy a certain number of shares/securities at a specific price directly from security holders on proportionate basis. Share buyback ensures all shareholders are treated equally, however small they are.	In open market purchase, the company acquires a certain number of shares. Fixes a price cap and buy for any price up to the upper limit. Most companies prefer the open market route. The biggest difference between the two - tender offer and open market purchase- is that the price in the tender route is fixed. Buy-back from open market can be made through: • Book Building Process • Stock exchange

Legal Framework for Buy-back

- Companies Act, 2013.
- The Companies (Share Capital and Debentures) Rules, 2014.
- Securities and Exchange Board of India (Buy-back of Securities) Regulations, 2018.

Authorisation

- The primary requirement is that the articles of association of the company should authorise buy-back. In case, such a provision is not available, it would be necessary to alter the articles of association to authorise buy-back.
- Buy-back can be made with the approval of the Board of directors at a meeting and/or by a special resolution passed by shareholders in a general meeting, depending on the quantum of buy-back.
- In case of a listed company, approval of shareholders shall be obtained only by postal ballot.

Quantum of Buy-back

a) Board of directors can approve buy-back up to 10% of the total paid-up equity capital and free reserves of the company and such buyback has to be authorized by the board by means of a resolution passed at the meeting.

b) Shareholders by a special resolution can approve buy-back up to 25% of the total paid-up capital and free reserves of the company. In respect of any financial year, the shareholders can approve by special resolution up to 25% of total equity capital in that year.

Post buy-back debt-equity ratio

The ratio of the aggregate of secured and unsecured debts owed by the company after buy-back should not be more than twice the paid-up capital and its free reserves i.e. the ratio shall not exceed 2:1. However, the Central Government may, by order, notify a higher ratio of the debt to capital and free reserves for a class or classes of companies; All the shares or other specified securities for buy-back are to be fully paid-up.

Buy-back by listed/unlisted companies

The buy-back of the shares or other specified securities listed on any recognized stock exchange is in accordance with the regulations made by the Securities and Exchange Board in this behalf; and The buy-back in respect of shares or other specified securities other than listed securities is in accordance with such rules made under Chapter IV of the Companies Act, 2013.

Time gap

No offer of buy-back under this sub-section shall be made within a period of one year reckoned from the date of the closure of the preceding offer of buy-back, if any.

Buy-back Procedure for Private & Unlisted Public Companies

Filing letter of offer	the company which has been authorized by a special resolution shall, before the buy- back of shares, file with the Registrar of Companies a letter of offer in Form No. SH-8, along with the fee as prescribed. Such letter of offer shall be dated and signed on behalf of the Board of directors of the company by not less than two directors of the company, one of whom shall be the managing director, where there is one.

Filing Declaration of Solvency with SEBI/ROC	The Company shall, before making buy- back, file with the Registrar and SEBI (in case of listed companies), a declaration of solvency in Form No. SH-9 signed by at least two directors of the company, one of whom shall be the managing director, if any, in such form as may be prescribed.
Dispatch of letter of Offer	The letter of offer shall be dispatched to the shareholders or security holders immediately after filing the same with the Registrar of Companies but not later than 21 days from its filing with the Registrar of Companies.
Validity	The offer for buy-back shall remain open for a period of not less than 15 days and not exceeding 30 days from the date of dispatch of the letter of offer. Provided that where all members of a company agree, the offer for buy-back may remain open for a period less than 15 days.
Acceptance on proportional basis	In case the number of shares or other specified securities offered by the shareholders or security holders is more than the total number of shares or securities to be bought back by the company, the acceptance per shareholder shall be on proportionate basis out of the total shares offered for being bought back.
Time limit for verification [Rule 17(7)]	The company shall complete the verifications of the offers received within 15 days from the date of closure of the offer and the shares or other securities lodged shall be deemed to be accepted unless a communication of rejections made within 21 days from the date of closure of the offer.
Payment of consideration/ returning of share certificates	The company shall within seven days of the time limit of verification: (a) make payment of consideration in cash to those shareholders or security holders whose securities have been accepted, or (b) return the share certificates to the shareholders or security holders whose securities have not been accepted at all or the balance of securities in case of part acceptance.
Separate Account [Rule 17(8)]	The company shall immediately after the date of closure of the offer, open a separate bank account and deposit there in, such sum, as would make-up the entire sum due and payable as consideration for the shares tendered for buy-back.
Other conditions [Rule 17(10)]	The rules further provide that the company shall ensure that— a) the company shall not issue any new shares including by way of bonus shares from the date of passing of special resolution authorizing the buy-back till the date of the closure of the offer under these rules, except those arising out of any outstanding convertible instruments; b) the company shall not withdraw the offer once it has announced the offer to the shareholders; c) the company shall not utilize any money borrowed from banks or financial institutions for the purpose of buying back its shares; and the company shall not utilize the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities for the buy-back.
Time limit for completion of buy-back [Section 68(4)]	Every buy-back shall be completed within a period of one year from the date of passing of the special resolution, or as the case may be, the resolution passed by the Board
Methods of buy-back [Section 68(5)].	**The buy-back may be —** a) from the existing shareholders or security holders on a proportionate basis; b) from the open market; c) by purchasing the securities issued to employees of the company pursuant to a scheme of stock option or sweat equity.
Extinguishment of securities bought back [Section 68(7)]	When a company buys back its own shares or other specified securities, it shall extinguish and physically destroy the shares or securities so bought back within seven days of the last date of completion of buy-back.
Prohibition of further issue of	When a company completes a buy-back of its shares or other specified securities it shall not make a further issue of the same kind of shares or other securities including allotment of new shares

shares or securities [Section 68(8)]	under clause (a) of sub- section (1) of section 62 or other specified securities within a period of six months except by way of a bonus issue or in the discharge of subsisting obligations such as conversion of warrants, stock option schemes, sweat equity or conversion of preference shares or debentures into equity shares.
Register of buy-back [Section 68(9)]	The Company shall maintain a register of buy- back in form SH-10 at the registered office of the company and shall be kept in the custody of the secretary of the company or any other person authorized by the board in this behalf.
Return of buy back [Section 68 (10)]	The company shall file with the Registrar, and in case of a listed company with the Registrar and the SEBI, a return in the Form No. SH-11 along with the 'fee'. Along with the return there should be annexed a certificate in Form No. SH-15 signed by two directors of the company including the managing director, if any, certifying that the buy-back of securities has been made in compliance with the provisions of the Act and rules made thereunder.
Penal Provisions [Section 68 (11)]	If a company makes any default in complying with the provisions of this section or any regulation made by the Securities and Exchange Board, in case of listed companies, the company shall be punishable with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees.

Transfer to and application of Capital Redemption Reserve Account (Section 69)

When a company purchases its own shares out of free reserves or securities premium account, a sum equal to the nominal value of the shares so purchased shall be transferred to the capital redemption reserve account and details of such transfer shall be disclosed in the balance sheet. The capital redemption reserve account may be applied by the company, in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

CIRCUMSTANCES PROHIBITING BUY BACK (SECTION 70)

- No company shall directly or indirectly purchase its own shares or other specified securities—
  (i) through any subsidiary company including its own subsidiary companies;
  (ii) through any investment company or group of investment companies; or
  (iii) if a default, is made by the company, in the repayment of deposits accepted either before or after the commencement of this Act, interest payment thereon, redemption of debentures or preference shares or payment of dividend to any shareholder, or repayment of any term loan or interest payable thereon to any financial institution or banking company:

  However, the buy-back is not prohibited, if the default is remedied and a period of three years has lapsed after such default ceased to subsist.
- No company shall, directly or indirectly, purchase its own shares or other specified securities in case such company has not complied with the provisions of sections 92 (Annual Return), 123 (Declaration of Dividend), 127 (punishment for failure to distribute dividend) and section 129 (Financial Statement) of the Companies Act, 2013.

BUY-BACK PROCEDURE FOR LISTED SECURITIES

All the listed companies are required to comply with SEBI (Buy Back of Securities) Regulations, 2018, in addition to the provisions of the Companies Act, 2013. These regulations broadly cover the following aspects:

1. Special resolution and its additional disclosure requirements.
2. Methods of buy back including buy back through reverse book building, from existing shareholders through tender offer, etc.
3. Filing of offer documents, public announcement requirements.
4. Offer procedure/opening of escrow account, etc.
5. General obligations of company, merchant banker, etc.

Methods of Buy-Back (Regulation 4)

A company may buy back its own shares or other specified securities by any one of the following methods:

a) from the existing shareholders or other specified securities holders on a proportionate basis through the tender offer;

b) from the open market through:

(i) book-building process

(ii) stock exchange

c) from odd-lot holders.

It may be noted that no offer of buy back for 15% or more of paid up capital and free reserves, shall be made from the open market.

Buy-back from existing security-holders through tender offer (Regulation 6)

According to Regulation 6 of the Regulations, a company may buy-back its securities from its existing security holders on a proportionate basis in accordance with the provisions of the Regulations. It may be noted that fifteen per cent of the number of securities which the company proposes to buy back or number of securities entitled as per their shareholding, whichever is higher, shall be reserved for small shareholders.

Public Announcement and Filing of Offer Documents (Regulation 7 & 8)

- The company which has been authorized by a special resolution or a resolution passed by the Board of Directors at its meeting shall make a public announcement within **two working days** from the date of declaration of results of the postal ballot for special resolution/board of directors resolution in at least one English National Daily, one Hindi National Daily and a Regional language daily all with wide circulation at the place where the Registered office of the company is situated and shall contain all the material information as specified in Schedule II.
- A copy of the public announcement in electronic mode file with the Board and stock exchanges on which its shares/securities are listed.
- The company shall within two working days of the public announcement file with the Board a letter of offer, containing disclosures as specified in Schedule III through a merchant banker who is not associated with the company, a declaration of solvency in the prescribed form and in a manner provided in section 68(6) of the Companies Act, 2013.

Offer Procedure (Regulation 9)

1. A company making a buyback offer shall announce a record date in the public announcement for the purpose of determining the entitlement and the names of the security holders, who are eligible to participate in the proposed buy- back offer.
2. The letter of offer along with the tender form shall be dispatched to the security holders who are eligible to participate in the buy-back offer
3. The date of the opening of the offer shall be not later than four working days from the date of dispatch of letter of offer.
4. The offer for buy back shall remain open for a period of five working days.
5. The company shall accept shares or other specified securities from the security holders on the basis of their entitlement as on record date.
6. The shares proposed to be bought back shall be divided in to two categories;
   a) reserved category for small shareholders and
   b) the general category for other shareholders, and the entitlement of a shareholder in each category shall be calculated accordingly.
7. After accepting the shares or other specified securities tendered on the basis of entitlement, shares or other specified securities left to be bought back, if any in one category shall first be accepted, in proportion to the shares or other specified securities tendered over and above their entitlement in the offer by security holders in that

category and thereafter from security holders who have tendered over and above their entitlement in other category.

Payment to the Security holders (Regulation 10)

1. The company shall immediately after the date of closure of the offer, open a special account with a SEBI registered banker to an issue and deposit therein, such sum as would, together with **ninety percent** of the amount lying in the escrow account make up the entire sum due and payable as consideration for the buy-back and for this purpose, may transfer the funds from the escrow account.
2. The company shall complete the verifications of offers received and make payment of consideration to those security holders whose offer has been accepted and return the remaining shares or other specified securities to the security holders within seven working days of the closure of the offer.

Extinguishing of bought-back securities (Regulation 11)

- The company shall extinguish and physically destroy the security certificates so bought back in the presence of a Registrar to issue or the Merchant Banker and the Statutory Auditor within fifteen days of the date of acceptance of the shares or other specified securities.
- The company shall also ensure that all the securities bought-back are extinguished within seven days of expiry of buy-back period. The aforesaid period of fifteen days shall in no case extend beyond seven days of expiry of buy-back period.
- The shares or other specified securities offered for buy-back if already dematerialised shall be extinguished and destroyed in the manner specified under the SEBI (Depositories and Participants) Regulations,1996, and the bye-laws, the circulars and guidelines framed thereunder.
- The company shall, furnish a certificate to the Board certifying compliance as specified above and duly certified and verified by-
  (i) the registrar and whenever there is no registrar by the merchant banker;
  (ii) two directors of the company one of whom shall be a managing director where there is one;
  (iii) the statutory auditor of the company
  The certificate shall be furnished to the Board within seven days of extinguishment and destruction of certificates.
- The company shall furnish, the particulars of the security certificates extinguished and destroyed, to the stock exchanges where the shares of the company are listed within seven days in which the securities certificates are extinguished and destroyed.

LESSON 2 - ACQUISITION OF COMPANY/BUSINESS

INTRODUCTION

Takeover concept in India emerged only around the twentieth century. In fact, Lord Swaraj Paul was one of the first to attempt a hostile takeover when he tried to obtain control over DCM Ltd. and Escorts Ltd. The term 'Takeover' has not been defined under the said Regulations; the term basically envisages the concept of an acquirer acquiring shares with an intention of taking over the control or management of the target company. When an acquirer, acquires substantial quantity of shares or voting rights of the target company, it results in the substantial acquisition of shares. Substantial is again not defined in the Regulations and what is substantial for one company may not be substantial for another company. It can therefore not be quantified in terms of number of shares.

OBJECTS OF TAKEOVER

The objects of a takeover may inter alia include:

- To effect savings in overheads and other working expenses on the strength of combined resources;
- To achieve product development through acquiring firms with compatible products and technological/ manufacturing competence
- To diversify through acquiring companies with new product lines as well as new market areas,;
- To improve productivity and profitability by joint efforts of technical and other personnel of both companies;
- To create shareholder value and wealth by optimum utilisation of the resources of both companies;
- To achieve economies of scale by mass production at economical costs;
- To secure substantial facilities as available to a large company compared to smaller companies;
- To achieve market development by acquiring one or more companies in new geographical territories or segments, in which the activities of acquirer are absent or do not have a strong presence.

KINDS OF TAKEOVER

Takeovers may be broadly classified into three kinds:

1. **Friendly Takeover:** Friendly takeover is with the consent of target company. In friendly takeover, there is an agreement between the management of two companies through negotiations and the takeover bid may be with the consent of majority or all shareholders of the target company. This kind of takeover is done through negotiations between two groups. Therefore, it is also called negotiated takeover.
2. **Hostile Takeover:** When an acquirer company does not offer the target company the proposal to acquire its undertaking but silently and unilaterally pursues efforts to gain control against the wishes of existing management.
3. **Bailout Takeover:** Takeover of a financially sick company by a profit earning company to bail out the former is known as bailout takeover. There are several advantages for a profit making company to takeover a sick company. The price would be very attractive as creditors, mostly banks and financial institutions having a charge on the industrial assets, would like to recover to the extent possible.

TAKEOVER OF UNLISTED COMPANIES

Unlisted Entities are governed by the framework stipulated under Companies Act, 2013. Section 236 of the Companies Act contains a compulsory acquisition mode for the transferee company to acquire the shares of minority shareholders of Transferor Company.

- Where the scheme has been approved by the holders of not less than nine tenth (90%) in value of the shares of the transferor company whose transfer is involved, the transferee company, may, give notice to any dissenting shareholders that transferee company desires to acquire their shares.
- The scheme shall be binding on all the shareholders of the transferor company (including dissenting shareholders), unless the Tribunal orders otherwise (i.e. that the scheme shall not be binding on all shareholders).
- Accordingly, the transferee company shall be entitled and bound to acquire these shares on the terms on which it acquires under the scheme (the binding provision).

- When a Company intends to takeover another Company through acquisition of 90% or more in value of the shares of that Company, the procedure laid down under Section 235 of the Act could be beneficially utilized. When one Company has been able to acquire more than 90% control in another Company, the shareholders holding the remaining control in the other Company are reduced to a minority. They do not even command a 10% stake so as to make any meaningful utilization of the power. Such minority cannot even call an extraordinary general meeting under Section 100 of the Act nor can they constitute a valid strength on the grounds of their proportion of issued capital for making an application to the Tribunal under Section 241 of the Act alleging acts of oppression and/or mismanagement. Hence, the statute itself provides them a meaningful exit route.
- The advantage of going through the route is the facility for acquisition of minority stake. But even without going through this process, if an acquirer is confident of acquiring the entire control, there is no need to go through Section 235 of the Act. It is purely an option recognized by the statute.
- Section 235 lays down two safeguard in respect of expropriation of private property (by compulsory acquisition of majority shares). First the scheme requires approval of a large majority of shareholders. Second the Tribunal's discretion to prevent compulsory acquisition. The following are the important ingredients of the Section 235 route:

a) The Company, which intends to acquire control over another Company by acquiring share, held by shareholders of that another Company is known under Section 235 of the Act as the "Transferee Company".

b) The Company whose shares are proposed to be acquired is called the "Transferor Company".

c) The "Transferee Company" and "Transferor Company" deliberate and discuss together at the Board level and come out with a scheme or contract.

d) Every offer or every circular containing the terms of the scheme shall be duly approved by the Board of Directors of the companies and every recommendation to the members of the transferor Company by its directors to accept such offer. It shall be accompanied by such information as provided under the said Act. The circular shall be sent to the dissenting shareholders in Form No: CAA 14 to the last known address of the dissenting shareholder.

e) Rule 26 A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 deals with purchase of minority shareholding held in DEMAT form. According to Rule 26A:

1. The company shall within two weeks from the date of receipt of the amount equal to the price of shares to be acquired by the acquirer, under section 236 of the Act, verify the details of the minority shareholders holding shares in dematerialised form.
2. After verification under sub-rule (1), the company shall send notice to such minority shareholders by registered post or by speed post or by courier or by email about a cut-off date, which shall not be earlier than one month after the date of sending of the notice, on which the shares of minority shareholders shall be debited from their account and credited to the designated DEMAT account of the company, unless the shares are credited in the account of the acquirer, as specified in such notice, before the cut-off date.
3. A copy of the notice served to the minority shareholders under sub-rule (2), shall also be published simultaneously in two widely circulated newspapers (one in English and one in vernacular language) in the district in which the registered office of the company is situated and also be uploaded on the website of the company, if any.
4. The company shall inform the depository immediately after publication of the notice under subrule (3) regarding the cut-off date and submit the following declarations stating that:
   a) the corporate action is being effected in pursuance of the provisions of section 236 of the Act;
   b) the minority shareholders whose shares are held in dematerialised form have been informed about the corporate action a copy of the notice served to such shareholders and published in the newspapers to be attached;
   c) the minority shareholders shall be paid by the company immediately after completion of corporate action;
   d) any dispute or complaints arising out of such corporate action shall be the sole responsibility of the company.
5. For the purposes of effecting transfer of shares through corporate action, the Board shall authorise the Company Secretary, or in his absence any other person, to inform the depository under sub-rule (4), and to submit the documents as may be required under the said sub-rule.
6. Upon receipt of information under sub-rule (4), the depository shall make the transfer of shares of the minority shareholders, who have not, on their own, transferred their shares in favour of the acquirer, into the designated DEMAT account of the company on the cut-off date and intimate the company.

7. After receiving the intimation of successful transfer of shares from the depository under sub-rule (6), the company shall immediately disburse the price of the shares so transferred, to each of the minority shareholders after deducting the applicable stamp duty, which shall be paid by the company, on behalf of the minority shareholders, in accordance with the provisions of the Indian Stamp Act, 1899.
8. Upon successful payment to the minority shareholders under sub-rule (7), the company shall inform the depository to transfer the shares of such shareholders, kept in the designated DEMAT account of the company, to the DEMAT account of the acquirer. Explanation: The company shall continue to disburse payment to the entitled shareholders, where disbursement could not be made within the specified time, and transfer the shares to the DEMAT account of acquirer after such disbursement.
9. In case, where there is a specific order of Court or Tribunal, or statutory authority restraining any transfer of such shares and payment of dividend, or where such shares are pledged or hypothecated under the provisions of the Depositories Act, 1996, the depository shall not transfer the shares of the minority shareholders to the designated DEMAT account of the company under sub-rule (6).

f) Every offer shall contain a statement by or on behalf of the Transferee Company, disclosing the steps it has taken to ensure that necessary cash will be available. This condition shall apply if the terms of acquisition as per the scheme or the contract provide for payment of cash in lieu of the shares of the Transferor Company which are proposed to be acquired.

g) Any person issuing a circular containing any false statement or giving any false impression or containing any omission shall be punishable with fine.

h) After the scheme or contract and the recommendation of the Board of Directors of the transferor Company, if any, shall be circulated and approval of not less than 9/10th in value of "Transferor Company" should be obtained within 4 months from the date of circulation. It is necessary that the Memorandum of Association of the transferee company should contain as one of the objects of the company, a provision to take over the controlling shares in another company. If the memorandum does not have such a provision, the company must alter the objects clause in its memorandum, by convening an extraordinary general meeting. The approval is not required to be necessarily obtained in a general meeting of the shareholders of the Transferor Company.

i) Once approval is available, the 'Transferee Company' becomes eligible for the right of compulsory acquisition of minority interest. The Transferee Company has to send notice to the shareholders who have not accepted the offer (i.e. dissenting shareholders) intimating them the need to surrender their shares.

j) Once the acquisition of shares in value, not less than 90% has been registered in the books of the transferor Company, the transferor Company shall within one month of the date of such registration, inform the dissenting shareholders of the fact of such registration and of the receipt of the amount or other consideration representing the price payable to them by the transferee Company.

k) The transferee Company having acquired shares in value not less than 90% is under an obligation to acquire the minority stake as stated aforesaid and hence it is required to transfer the amount or other consideration equal to the amount or other consideration required for acquiring the minority stake to the transferor Company.

l) The amount or consideration required to be so transferred by the transferee Company to the transferor Company, shall not in any way, less than the terms of acquisition offered under the scheme or contract. Any amount or other consideration received by the Transferor Company in the manner aforesaid shall be paid into a separate bank account.

m) Any such sums and any other consideration so received shall be held by the transferor Company in trust for the several persons entitled to the shares in respect of which the said sums or other consideration were respectively received.

The takeover achieved in the above process through Section 235 of the Act will not fall within the meaning of amalgamation under the Income Tax Act, 1961 and as such benefits of amalgamation provided under the said Act will not be available to the acquisition under consideration. The takeover in the above process will not enable carrying forward of unabsorbed depreciation and accumulated losses of the transferor Company in the transferee Company for the reason that the takeover does not result in the transferor Company losing its identity.

TAKEOVER OF LISTED COMPANIES

Takeover of listed companies is regulated by the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Therefore, before planning a takeover of a listed company, any acquirer should understand the compliance requirements under the Regulations and also the requirements under the SEBI (Listing Obligations and Disclosure

Requirements) Regulations, 2015 and the Companies Act, 2013. There could also be some compliance requirements under the Foreign Exchange Management Act, 1999 if the acquirer is a person resident outside India. As per Regulation 38 of SEBI LODR, the listed entity shall comply with the minimum public shareholding requirements ("MPS") as specified in Rule 19(2) and Rule 19A of the Securities Contracts (Regulations) Rules, 1957 in the manner as specified by the Board from time to time. This provision shall not apply to entities listed on Innovators Growth Platform without making a public issue.

Important Definitions

"Target Company" means a company and includes a body corporate or corporation established under a Central legislation, State legislation or Provincial legislation for the time being in force, whose shares are listed on a stock exchange. [Regulation 2(1)(z)]

"Persons Acting in Concert" means persons who, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company. [Regulation 2(1)(q)]

"Acquirer" means any person who, directly or indirectly, acquires or agrees to acquire whether by himself, or through, or with persons acting in concert with him, shares or voting rights in, or control over a target company.

"Acquisition" means, directly or indirectly, acquiring or agreeing to acquire shares or voting rights in, or control over, a target company. [Regulation 2(1)(b)]

"Maximum permissible non-public shareholding" means such percentage shareholding in the target company excluding the minimum public shareholding required under the Securities Contracts (Regulation) Rules, 1957. [Regulation 2(1)(o)]

"Tendering period" means the period within which shareholders may tender their shares in acceptance of an open offer to acquire shares made under these regulations.

"Offer Period" means the period between the date of entering into an agreement, formal or informal, to acquire shares, voting rights in, or control over a target company requiring a public announcement, or the date of the public announcement, as the case may be, and the date on which the payment of consideration to shareholders who have accepted the open offer is made, or the date on which open offer is withdrawn, as the case may be. [Regulation 2(1)(p)]

"Disinvestment" means the direct or indirect sale by the Central Government or any State Government or by a government company, as the case may be, of shares or voting rights in, or control over, a target company, which is a public sector undertaking. [Regulation 2(1)(g)]

"Public Sector Undertaking" means a target company in which, directly or indirectly, majority of shares or voting rights or control is held by the Central Government or any State Government or Governments, or partly by the Central Government and partly by one or more State Governments [Regulation 2(1)(u)]

"Frequently Traded Shares" means shares of a target company, in which the traded turnover on any stock exchange during the twelve calendar months preceding the calendar month in which the public announcement is required to be made under these regulations, is at least ten per cent of the total number of shares of such class of the target company: Provided that where the share capital of a particular class of shares of the target company is not identical throughout such period, the weighted average number of total shares of such class of the target company shall represent the total number of shares [Regulation 2(1)(j)]

SUBSTANTIAL ACQUISITION OF SHARES OR VOTING RIGHTS

Regulation 3(1) provides for Substantial acquisition of shares or voting rights. It states that no acquirer shall acquire shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him and by Persons Acting in Concert (PACs) with him in such target company, entitle them to exercise **25%** or more of the voting rights in such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.

Regulation 3(2) provides that no acquirer, who together with persons acting in concert with him, has acquired and holds in accordance with these regulations shares or voting rights in a target company entitling them to exercise twenty-five per cent or more of the voting rights in the target company but less than the maximum permissible non-public shareholding, shall acquire within any financial year additional shares or voting rights in such target company entitling them to exercise more than five per cent of the voting rights, unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations:
However, the acquisition beyond five per cent but up to ten per cent of the voting rights in the target company shall be permitted for the financial year 2020-21 only in respect of acquisition by a promoter pursuant to preferential issue of equity shares by the target company. However, such acquirer shall not be entitled to acquire or enter into any agreement to acquire shares or voting rights exceeding such number of shares as would take the aggregate shareholding pursuant to the acquisition above the maximum permissible non-public shareholding.
Regulation 3(3) provides that, acquisition of shares by any person, such that the individual shareholding of such person acquiring shares exceeds the stipulated thresholds, shall also be attracting the obligation to make an open offer for acquiring shares of the target company irrespective of whether there is a change in the aggregate shareholding with persons acting in concert.
This regulation shall not apply to acquisition of shares or voting rights of a company by the promoters or shareholders in control, in terms of the provisions of Chapter VI-A of Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009.
For the purpose of this regulation, any reference to "25%" in case of listed entity which has listed its specified securities on Innovators Growth Platform shall be read as "49%".

ACQUISITION OF CONTROL (REGULATION 4)

Irrespective of acquisition or holding of shares or voting rights in a target company, no acquirer shall acquire, directly or indirectly, control over such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.

INDIRECT ACQUISITION OF SHARES OR CONTROL (REGULATION 5)

Regulation 5 states that for the purposes of regulation 3 and regulation 4, acquisition of shares or voting rights in, or control over, any company or other entity, that would enable any person and persons acting in concert with him to exercise or direct the exercise of such percentage of voting rights in, or control over, a target company, the acquisition of which would otherwise attract the obligation to make a public announcement of an open offer for acquiring shares under these regulations, shall be considered as an indirect acquisition of shares or voting rights in, or control over the target company. In the case of an indirect acquisition attracting the provisions of sub-regulation (1) where,—

1. the proportionate net asset value of the target company as a percentage of the consolidated net asset value of the entity or business being acquired;
2. the proportionate sales turnover of the target company as a percentage of the consolidated sales turnover of the entity or business being acquired; or
3. the proportionate market capitalisation of the target company as a percentage of the enterprise value for the entity or business being acquired; is in excess of eighty per cent, on the basis of the most recent audited annual financial statements, such indirect acquisition shall be regarded as a direct acquisition of the target company for all purposes of these regulations including without limitation, the obligations relating to timing, pricing and other compliance requirements for the open offer.

DELISTING OFFER (REGULATION 5A)

Notwithstanding anything contained in these regulations and the Delisting Regulations, in the event the acquirer makes a public announcement of an open offer, the acquirer may seek the delisting of the target company by making a delisting offer in accordance with this regulation: However, the acquirer shall have declared his intention to so delist the target company at the time of making such public announcement of an open offer as well as at the time of making the detailed public statement. A subsequent declaration of delisting for the purpose of the delisting offer proposed to be made shall not suffice:
If the open offer is for an indirect acquisition that is not a deemed direct acquisition, the declaration of the intent to so delist shall be made initially only in the detailed public statement.

However, The acquirer shall not, in such target company during the preceding two years from the date of the public announcement made under this regulation, be:

I. a promoter / promoter group / person(s) in control, or
II. directly / indirectly associated with the promoter or any person(s) in control, or
III. a person(s) holding more than twenty-five percent shares or voting rights.

The acquirer shall not acquire joint control along with an existing promoter / person in control of the company.

The delisting offer obligations shall be fulfilled by the acquirer in the following manner:

A. the public announcement, the detailed public statement and the letter of offer shall mention the open offer price determined in accordance with regulation 8 of these regulations and the indicative price for delisting:
   However, if the open offer is for an indirect acquisition that is not a deemed direct acquisition, the open offer price and indicative price shall be notified by the acquirer at the time of making the detailed public statement and in the letter of offer:
   However, the indicative price shall include a suitable premium reflecting the price that the acquirer is willing to pay for the delisting offer with full disclosures of the rationale and justification for the indicative price so determined that can also be revised upwards by the acquirer before the start of the tendering period which shall be duly disclosed to the shareholders.
B. In case the response to the offer leads to the delisting threshold as provided under regulation 21 of the Delisting Regulations :
   I. being met, all shareholders who tender their shares shall be paid the indicative price;
   II. not being met, all shareholders who tender their shares shall be paid the open offer price. It may be noted that –
   Delisting offer is said to be not successful when:
   a) on account of the non–receipt of the prior approval of shareholders; or
   b) on account of non-receipt of the prior in-principle approval of the relevant stock exchange; or
   c) the threshold as specified of the Delisting Regulations is not achieved;
   the acquirer shall, within two working days in respect of such failure, make an announcement in all the newspapers in which the detailed public statement was made and comply with all the applicable provisions of these regulations in relation to completing of the open offer.

Regulation 5(4) states that where a competing offer is made in terms of sub-regulation (1) of regulation 20 of these regulations:

a) the acquirer shall not be entitled to delist the target company;
b) the acquirer shall not be liable to pay interest to the shareholders on account of delay due to the competing offer; and
c) the acquirer shall comply with all the applicable provisions of these regulations and make an announcement in this regard, within two working days from the date of public announcement made in terms of sub-regulation (1) of regulation 20, in all the newspapers where the detailed public statement was made.

The shareholders who have tendered shares in acceptance of the offer, shall be entitled to withdraw such shares tendered, within five working days from the date of the announcement. Regulation 5(6) Where the target company fails to get delisted pursuant to a delisting offer under sub-regulation (1), but which results in the shareholding of the acquirer exceeding the maximum permissible non-public shareholding threshold:

a) the acquirer may undertake a further attempt to delist the target company in accordance with the Delisting Regulations during the period of twelve months from the date of completion of the open offer, subject to the acquirer continuing to exceed the maximum permissible non-public shareholding in the target company.
b) such further delisting attempt shall be successful subject to the following conditions:
   I. the delisting threshold as provided under regulation 21 of the Delisting Regulations is met; and
   II. fifty percent of the residual public shareholding is acquired.
c) upon failure of the further delisting attempt, the acquirer shall ensure compliance of the minimum public shareholding requirement of the target company under the Securities Contract (Regulation) Rules, 1957 within a period of twelve months from the end of the period referred to at clause (a).
d) the floor price for a further delisting attempt as referred to at clause (a) shall be higher of the following:
   I. the indicative price offered under the first delisting attempt;
   II. the floor price determined under the Delisting Regulations as on the relevant date of the subsequent attempt; and

III. the book value of the company as computed based on the method stated in explanation to clause (a) under sub-regulation 2.

While undertaking delisting for the first or subsequent attempt, all the provisions of the Delisting Regulations shall mutatis-mutandis be applicable, save as otherwise provided in this regulation.

VOLUNTARY OFFER

- Regulation 6 states that an acquirer, who together with persons acting in concert with him, holds shares or voting rights in a target company entitling them to exercise twenty-five per cent or more but less than the maximum permissible non-public shareholding, shall be entitled to voluntarily make a public announcement of an open offer for acquiring shares in accordance with these regulations, subject to their aggregate shareholding after completion of the open offer not exceeding the maximum permissible non-public shareholding:
- However, where an acquirer or any person acting in concert with him has acquired shares of the target company in the preceding fifty-two weeks without attracting the obligation to make a public announcement of an open offer, he shall not be eligible to voluntarily make a public announcement of an open offer for acquiring shares under this regulation:
- Provided further that during the offer period such acquirer shall not be entitled to acquire any shares otherwise than under the open offer.
- An acquirer and persons acting in concert with him, who have made a public announcement under this regulation to acquire shares of a target company shall not be entitled to acquire any shares of the target company for a period of six months after completion of the open offer except pursuant to another voluntary open offer:
- such restriction shall not prohibit the acquirer from making a competing offer upon any other person making an open offer for acquiring shares of the target company.
- Shares acquired through bonus issue or stock splits shall not be considered for purposes of the dis-entitlement set out in this regulation.
- For the purpose of this regulation, any reference to “twenty-five per cent” in case of listed entity which has listed its specified securities on Innovators Growth Platform shall be read as “forty-nine per cent”.

Regulation 6A states that notwithstanding anything contained in these regulations, no person who is a wilful defaulter shall make a public announcement of an open offer for acquiring shares or enter into any transaction that would attract the obligation to make a public announcement of an open offer for acquiring shares under these regulations:

It may be noted that –

- This regulation shall not prohibit the wilful defaulter from making a competing offer.
- A person who is a fugitive economic offender shall not make a public announcement of an open offer or make a competing offer for acquiring shares or enter into any transaction, either directly or indirectly, for acquiring any shares or voting rights or control of a target company.

OFFER SIZE (REGULATION 7)

The open offer for acquiring shares shall be **for at least 26%** of total shares of the target company, as of tenth working day from the closure of the tendering period:

The total shares of the target company as of tenth working day from the closure of the tendering period shall take into account all potential increases in the number of outstanding shares during the offer period contemplated as of the date of the public announcement: Provided further that the offer size shall be proportionately increased in case of an increase in total number of shares, after the public announcement, which is not contemplated on the date of the public announcement.

The open offer made under regulation 6 shall be for acquisition of at least such number of shares as would entitle the holder thereof to exercise an additional ten per cent of the voting rights in the target company, and shall not exceed such number of shares as would result in the post-acquisition holding of the acquirer and persons acting in concert with him exceeding the maximum permissible non- public shareholding applicable to such target company:

However, in the event of a competing offer being made, the acquirer who has voluntarily made a public announcement of an open offer under regulation 6 shall be entitled to increase the number of shares for which the open offer has been made to such number of shares as he deems fit: However, that such increase in offer size shall have to be made within a period of fifteen working days from the public announcement of a competing offer, failing which the acquirer shall not be entitled to increase the offer size.

Regulation 7(3) states that upon an acquirer opting to increase the offer size under sub-regulation (2), such open offer shall be deemed to have been made under sub-regulation (2) of regulation 3 and the provisions of these regulations shall apply accordingly. Regulation 7(4) states that in the event the shares accepted in the open offer were such that the shareholding of the acquirer taken together with persons acting in concert with him pursuant to completion of the open offer results in their shareholding exceeding the maximum permissible non-public shareholding, the acquirer shall be required to bring down the non-public shareholding to the level specified and within the time permitted under Securities Contract (Regulation) Rules, 1957.

However, if the open offer has been made by an acquirer and the acquirer has stated upfront his intention to retain the listing of the target company in the public announcement and the detailed public statement issued pursuant to an open offer in accordance with these regulations, the acquirer may alternatively undertake a proportionate reduction of the shares or voting rights to be acquired pursuant to the underlying agreement for acquisition/ subscription of shares or voting rights and the purchase of shares so tendered, upon the completion of the open offer process such that the resulting shareholding of the acquirer in the target company does not exceed the maximum permissible non-public shareholding prescribed under the Securities Contract (Regulation) Rules, 1957:

Provided further that in case of a preferential allotment pursuant to a Share Subscription Agreement which may trigger an open offer as envisaged in the above proviso, the Board Resolution and shareholder resolution shall be appropriately worded, so as to include the effective date of allocation/allotment and the quantum thereof.

Notwithstanding anything contained in regulation 170 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, in case of undertaking a scale down of subscription of shares or voting rights from the agreement, the period of fifteen days for allotment of shares shall be counted from the date of the closure of the tendering period for the open offer.

Regulation 7(5) states that subject to regulation 5A, the acquirer whose shareholding exceeds the maximum permissible non-public shareholding, pursuant to an open offer under these regulations, shall not be eligible to make a voluntary delisting offer under the Delisting Regulations, unless a period of twelve months has elapsed from the date of the completion of the offer period.

Regulation 7(6) states that any open offer made under these regulations shall be made to all shareholders of the target company, other than the acquirer, persons acting in concert with him and the parties to any underlying agreement including persons deemed to be acting in concert with such parties, for the sale of shares of the target company.

OFFER PRICE

Regulation 8(1) states that the open offer for acquiring shares shall be made at a price not lower than the price determined in accordance with sub-regulation (2) or sub-regulation (3), as the case may be.

Regulation 8(2) states that in the case of direct acquisition of shares or voting rights in, or control over the target company, and indirect acquisition of shares or voting rights in, or control over the target company where the parameters referred to in sub-regulation (2) of regulation 5 are met, the offer price shall be the highest of,—

a) the highest negotiated price per share of the target company for any acquisition under the agreement attracting the obligation to make a public announcement of an open offer;
b) the volume-weighted average price paid or payable for acquisitions, whether by the acquirer or by any person acting in concert with him, during the fifty-two weeks immediately preceding the date of the public announcement;
c) the highest price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, during the twenty- six weeks immediately preceding the date of the public announcement;
d) the volume-weighted average market price of such shares for a period of sixty trading days immediately preceding the date of the public announcement as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, provided such shares are frequently traded; However, the price determined as per clause (d) shall not apply in the case of disinvestment of a public sector undertaking by the Central Government or a State Government, as the case may be: Provided further that this proviso shall apply only in case of a change in control in the public sector undertaking.
e) where the shares are not frequently traded, the price determined by the acquirer and the manager to the open offer taking into account valuation parameters including, book value, comparable trading multiples, and such other parameters as are customary for valuation of shares of such companies; and

f) the per share value computed under sub-regulation (5), if applicable. Regulation 8(3) states that, in the case of an indirect acquisition of shares or voting rights in, or control over the target company, where the parameter referred to in sub-regulation (2) of regulation 5 are not met, the offer price shall be the highest of—
   a) the highest negotiated price per share, if any, of the target company for any acquisition under the agreement attracting the obligation to make a public announcement of an open offer;
   b) the volume-weighted average price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, during the fifty-two weeks immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain;
   c) the highest price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, during the twenty-six weeks immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain;
   d) the highest price paid or payable for any acquisition, whether by the acquirer or by any person acting in concert with him, between the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, and the date of the public announcement of the open offer for shares of the target company made under these regulations;
   e) the volume-weighted average market price of the shares for a period of sixty trading days immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, provided such shares are frequently traded; Provided that the price determined as per clause (e) shall not apply in the case of disinvestment of a public sector undertaking by the Central Government or a State Government, as the case may be: Provided further that this proviso shall apply only in case of a change in control in the public sector undertaking; and
   f) the per share value computed under sub-regulation (5). Regulation 8(4) states that, in the event the offer price is incapable of being determined under any of the parameters specified in sub-regulation (3), without prejudice to the requirements of sub-regulation (5), the offer price shall be the fair price of shares of the target company to be determined by the acquirer and the manager to the open offer taking into account valuation parameters including, book value, comparable trading multiples, and such other parameters as are customary for valuation of shares of such companies.

Regulation 8(5) states that, in the case of an indirect acquisition and open offers under sub-regulation (2) of regulation 5 where—

a) the proportionate net asset value of the target company as a percentage of the consolidated net asset value of the entity or business being acquired;
b) the proportionate sales turnover of the target company as a percentage of the consolidated sales turnover of the entity or business being acquired; or
c) the proportionate market capitalization of the target company as a percentage of the enterprise value for the entity or business being acquired; is in excess of fifteen per cent, on the basis of the most recent audited annual financial statements, the acquirer shall, notwithstanding anything contained in sub-regulation (2) or sub-regulation (3), be required to compute and disclose, in the letter of offer, the per share value of the target company taken into account for the acquisition, along with a detailed description of the methodology adopted for such computation.

For the purposes of sub-regulation (2) and sub-regulation (3), the price paid for shares of the target company shall include any price paid or agreed to be paid for the shares or voting rights in, or control over the target company, in any form whatsoever, whether stated in the agreement for acquisition of shares or in any incidental, contemporaneous or collateral agreement, whether termed as control premium or as non-compete fees or otherwise. Where the acquirer has acquired or agreed to acquire whether by himself or through or with persons acting in concert with him any shares or voting rights in the target company during the offer period, whether by subscription or purchase, at a price higher than the offer price, the offer price shall stand revised to the highest price paid or payable for any such acquisition:

However, no such acquisition shall be made after the third working day prior to the commencement of the tendering period and until the expiry of the tendering period.

The price parameters under sub-regulation (2) and sub-regulation (3) may be adjusted by the acquirer in consultation with the manager to the offer, for corporate actions such as issuances pursuant to rights issue, bonus issue, stock consolidations, stock splits, payment of dividend, de-mergers and reduction of capital, where the record date for effecting such corporate actions falls prior to three working days before the commencement of the tendering period: However, no adjustment shall be made for dividend declared with a record date falling during such period except where the dividend per share is more than fifty per cent higher than the average of the dividend per share paid during the three financial years preceding the date of the public announcement.

Where the acquirer or persons acting in concert with him acquires shares of the target company during the period of twenty-six weeks after the tendering period at a price higher than the offer price under these regulations, the acquirer and persons acting in concert shall pay the difference between the highest acquisition price and the offer price, to all the shareholders whose shares were accepted in the open offer, within sixty days from the date of such acquisition: However, this provision shall not be applicable to acquisitions under another open offer under these regulations or pursuant to the Delisting Regulations, or open market purchases made in the ordinary course on the stock exchanges, not being negotiated acquisition of shares of the target company whether by way of bulk deals, block deals or in any other form.

Where the open offer is subject to a minimum level of acceptances, the acquirer may, subject to the other provisions of this regulation, indicate a lower price, which will not be less than the price determined under this regulation, for acquiring all the acceptances despite the acceptance falling short of the indicated minimum level of acceptance, in the event the open offer does not receive the minimum acceptance.

In the case of any indirect acquisition, other than the indirect acquisition referred in sub-regulation (2) of regulation 5, the offer price shall stand enhanced by an amount equal to a sum determined at the rate of ten per cent per annum for the period between the earlier of the date on which the primary acquisition is contracted or the date on which the intention or the decision to make the primary acquisition is announced in the public domain, and the date of the detailed public statement, provided such period is more than five working days.

The offer price for partly paid up shares shall be computed as the difference between the offer price and the amount due towards calls-in-arrears including calls remaining unpaid with interest, if any, thereon. The offer price for equity shares carrying differential voting rights shall be determined by the acquirer and the manager to the open offer with full disclosure of justification for the price so determined, being set out in the detailed public statement and the letter of offer:

MODE OF PAYMENT

Regulation 9(1) provides the offer price may be paid, —

a) in cash;
b) by issue, exchange or transfer of listed shares in the equity share capital of the acquirer or of any person acting in concert;
c) by issue, exchange or transfer of listed secured debt instruments issued by the acquirer or any person acting in concert with a rating not inferior to investment grade as rated by a credit rating agency registered with the Board;
d) by issue, exchange or transfer of convertible debt securities entitling the holder thereof to acquire listed shares in the equity share capital of the acquirer or of any person acting in concert; or
e) a combination of the mode of payment of consideration stated in clause (a), clause (b), clause (c) and clause (d):

Provided that where any shares have been acquired or agreed to be acquired by the acquirer and persons acting in concert with him during the fifty-two weeks immediately preceding the date of public announcement constitute more than ten per cent of the voting rights in the target company and has been paid for in cash, the open offer shall entail an option to the shareholders to require payment of the offer price in cash, and a shareholder who has not exercised an option in his acceptance shall be deemed to have opted for receiving the offer price in cash: Provided further that in case of revision in offer price the mode of payment of consideration may be altered subject to the condition that the component of the offer price to be paid in cash prior to such revision is not reduced.

Regulation 9(2) provides that, for the purposes of clause (b), clause (d) and clause (e) of sub-regulation (1), the shares sought to be issued or exchanged or transferred or the shares to be issued upon conversion of other securities, towards payment of the offer price, shall conform to the following requirements, —

a) such class of shares are listed on a stock exchange and frequently traded at the time of the public announcement;
b) such class of shares have been listed for a period of at least two years preceding the date of the public announcement;
c) the issuer of such class of shares has redressed at least ninety five per cent. of the complaints received from investors by the end of the calendar quarter immediately preceding the calendar month in which the public announcement is made;
d) the issuer of such class of shares has been in material compliance with the listing regulations for a period of at least two years immediately preceding the date of the public announcement: Provided that in case where the Board is of the view that a company has not been materially compliant with the provisions of the listing regulations, the offer price shall be paid in cash only;
e) the impact of auditors' qualifications, if any, on the audited accounts of the issuer of such shares for three immediately preceding financial years does not exceed five per cent. of the net profit or loss after tax of such issuer for the respective years; and
f) the Board has not issued any direction against the issuer of such shares not to access the capital market or to issue fresh shares.

Regulation 9(3) provides that, where the shareholders have been provided with options to accept payment in cash or by way of securities, or a combination thereof, the pricing for the open offer may be different for each option subject to compliance with minimum offer price requirements under regulation 8:

Provided that the detailed public statement and the letter of offer shall contain justification for such differential pricing. Regulation 9(4) provides that, in the event the offer price consists of consideration to be paid by issuance of securities, which requires compliance with any applicable law, the acquirer shall ensure that such compliance is completed not later than the commencement of the tendering period: Provided that in case the requisite compliance is not made by such date, the acquirer shall pay the entire consideration in cash.

Regulation 9(5) provides that, where listed securities are offered as consideration, the value of such securities shall be higher of:

I. the average of the weekly high and low of the closing prices of such securities quoted on the stock exchange during the six months preceding the relevant date;
II. the average of the weekly high and low of the closing prices of such securities quoted on the stock exchange during the two weeks preceding the relevant date; and
III. the volume-weighted average market price for a period of sixty trading days preceding the date of the public announcement, as traded on the stock exchange where the maximum volume of trading in the shares of the company whose securities are being offered as consideration, are recorded during the six-month period prior to relevant date and the ratio of exchange of shares shall be duly certified by an independent merchant banker (other than the manager to the open offer) or an independent chartered accountant having a minimum experience of ten years.

Explanation— For the purposes of this sub-regulation, the "relevant date" shall be the thirtieth day prior to the date on which the meeting of shareholders is held to consider the proposed issue of shares under sub-section (1A) of Section 81 of the Companies Act, 2013

GENERAL EXEMPTIONS

Under Regulation 10(1) the following acquisitions shall be exempt from the obligation to make an open offer under regulation 3 and regulation 4 subject to fulfillment of the conditions stipulated therefor,—

a) acquisition pursuant to inter se transfer of shares amongst qualifying persons, being,—

I. immediate relatives;
II. persons named as promoters in the shareholding pattern filed by the target company in terms of the listing regulations or as the case may be, the listing agreement or these regulations for not less than three years prior to the proposed acquisition;
III. a company, its subsidiaries, its holding company, other subsidiaries of such holding company, persons holding not less than fifty per cent of the equity shares of such company, other companies in which such persons hold not less than fifty per cent of the equity shares, and their subsidiaries subject to control over such qualifying persons being exclusively held by the same persons;
IV. persons acting in concert for not less than three years prior to the proposed acquisition, and disclosed as such pursuant to filings under the listing regulations or as the case may be, the listing agreement;

V. shareholders of a target company who have been persons acting in concert for a period of not less than three years prior to the proposed acquisition and are disclosed as such pursuant to filings under the listing regulations or as the case may be, the listing agreement, and any company in which the entire equity share capital is owned by such shareholders in the same proportion as their holdings in the target company without any differential entitlement to exercise voting rights in such company: Provided that for purposes of availing of the exemption under this clause,—

a) If the shares of the target company are frequently traded, the acquisition price per share shall not be higher by more than twenty-five per cent of the volume-weighted average market price for a period of sixty trading days preceding the date of issuance of notice for the proposed inter se transfer under sub-regulation (5), as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, and if the shares of the target company are infrequently traded, the acquisition price shall not be higher by more than twenty- five percent of the price determined in terms of clause (e) of sub-regulation (2) of regulation 8; and the transferor and the transferee shall have complied with applicable disclosure requirements set out in Chapter V.

b) acquisition in the ordinary course of business by,—

I. an underwriter registered with the Board by way of allotment pursuant to an underwriting agreement in terms of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;

II. a stock broker registered with the Board on behalf of his client in exercise of lien over the shares purchased on behalf of the client under the bye-laws of the stock exchange where such stock broker is a member;

III. a merchant banker registered with the Board or a nominated investor in the process of market making or subscription to the unsubscribed portion of issue in terms of Chapter XB of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;

IV. any person acquiring shares pursuant to a scheme of safety net in terms of regulation 44 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;

V. a merchant banker registered with the Board acting as a stabilising agent or by the promoter or pre-issue shareholder in terms of regulation 45 of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009;

VI. by a registered market-maker of a stock exchange in respect of shares for which he is the market maker during the course of market making;

VII. a Scheduled Commercial Bank, acting as an escrow agent; and

VIII. invocation of pledge by Scheduled Commercial Banks or Public Financial Institutions as a pledgee.

c) acquisitions at subsequent stages, by an acquirer who has made a public announcement of an open offer for acquiring shares pursuant to an agreement of disinvestment, as contemplated in such agreement: Provided that,—

I. both the acquirer and the seller are the same at all the stages of acquisition; and

II. full disclosures of all the subsequent stages of acquisition, if any, have been made in the public announcement of the open offer and in the letter of offer.

d) acquisition pursuant to a scheme,—

I. made under section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985 or any statutory modification or re-enactment thereto;

II. of arrangement involving the target company as a transferor company or as a transferee company, or reconstruction of the target company, including amalgamation, merger or demerger;

III. pursuant to an order of a court or a tribunal under any law or regulation, Indian or foreign; or

IV. of arrangement not directly involving the target company as a transferor company or as a transferee company, or reconstruction not involving the target company's undertaking, including amalgamation, merger or demerger, pursuant to an order of a court or a tribunal or under any law or regulation, Indian or foreign, subject to,—

a) the component of cash and cash equivalents in the consideration paid being less than twenty-five per cent of the consideration paid under the scheme; and

b) where after implementation of the scheme of arrangement, persons directly or indirectly holding at least thirty-three per cent of the voting rights in the combined entity are the same as the persons who held the entire voting rights before the implementation of the scheme.

e) acquisition pursuant to a resolution plan approved under section 31 of the Insolvency and Bankruptcy Code, 2016;
f) acquisition pursuant to the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ;
g) acquisition pursuant to the provisions of the Delisting Regulations;
h) acquisition by way of transmission, succession or inheritance;
i) acquisition of voting rights or preference shares carrying voting rights arising out of the operation of sub-section (2) of section 47 of the Companies Act, 2013;
j) Acquisition of shares by the lenders pursuant to conversion of their debt as part of a debt restructuring implemented in accordance with the guidelines specified by the Reserve Bank of India:
k) Increase in voting rights arising out of the operation of sub-section (1) of section 106 of the Companies Act, 2013 or pursuant to a forfeiture of shares by the target company, undertaken in compliance with the provisions of the Companies Act, 2013 and its articles of association.

An increase in the voting rights of any shareholder beyond the threshold limits stipulated in sub-regulations (1) and (2) of regulation 3, without the acquisition of control, pursuant to the conversion of equity shares with superior voting rights into ordinary equity shares, shall be exempted from the obligation to make an open offer under regulation 3.

Any acquisition of shares or voting rights or control of the target company by way of preferential issue in compliance with regulation 164A of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018 shall be exempt from the obligation to make an open offer under sub- regulation (1) of regulation 3 and regulation 4.

Under Regulation 10(3), an increase in voting rights in a target company of any shareholder beyond the limit attracting an obligation to make an open offer under sub-regulation (1) of regulation 3, pursuant to buy-back It may be noted that the Board may at the expense of the acquirer, require valuation of shares by an independent merchant banker other than the manager to the offer or any independent chartered accountant in practice having a minimum experience of 10 years. of shares by the target company shall be exempt from the obligation to make an open offer provided such shareholder reduces his shareholding such that his voting rights fall to below the threshold referred to in subregulation (1) of regulation 3 within ninety days from the date of the closure of the said buy-back offer.

Under Regulation 10(4), the following acquisitions shall be exempt from the obligation to make an open offer under sub-regulation (2) of regulation 3, —

a) acquisition of shares by any shareholder of a target company, upto his entitlement, pursuant to a rights issue;
b) acquisition of shares by any shareholder of a target company, beyond his entitlement, pursuant to a rights issue, subject to fulfillment of the following conditions—
   I. the acquirer has not renounced any of his entitlements in such rights issue; and
   II. the price at which the rights issue is made is not higher than the ex-rights price of the shares of the target company, being the sum of—
   a) the volume weighted average market price of the shares of the target company during a period of sixty trading days ending on the day prior to the date of determination of the rights issue price, multiplied by the number of shares outstanding prior to the rights issue, divided by the total number of shares outstanding after allotment under the rights issue: Provided that such volume weighted average market price shall be determined on the basis of trading on the stock exchange where the maximum volume of trading in the shares of such target company is recorded during such period; and
   b) the price at which the shares are offered in the rights issue, multiplied by the number of shares so offered in the rights issue divided by the total number of shares outstanding after allotment under the rights issue:
c) increase in voting rights in a target company of any shareholder pursuant to buy- back of shares:
   Provided that,—
   I. such shareholder has not voted in favour of the resolution authorising the buy-back of securities under section 68 of the Companies Act, 2013;
   II. in the case of a shareholder resolution, voting is by way of postal ballot;
   III. where a resolution of shareholders is not required for the buy- back, such shareholder, in his capacity as a director, or any other interested director has not voted in favour of the resolution of the board of directors of the target company authorising the buy-back of securities under section 68 of the Companies Act, 2013; and

IV. the increase in voting rights does not result in an acquisition of control by such shareholder over the target company: However, where the aforesaid conditions are not met, in the event such shareholder reduces his shareholding such that his voting rights fall below the level at which the obligation to make an open offer would be attracted under sub-regulation (2) of regulation 3, within ninety days from the date of closure of the buy-back offer by the target company, the shareholder shall be exempt from the obligation to make an open offer.

c) acquisition of shares in a target company by any person in exchange for shares of another target company tendered pursuant to an open offer for acquiring shares under these regulations;

d) acquisition of shares in a target company from state-level financial institutions or their subsidiaries or companies promoted by them, by promoters of the target company pursuant to an agreement between such transferors and such promoter;

e) acquisition of shares in a target company from a venture capital fund or category I Alternative Investment Fund or a foreign venture capital investor registered with the Board, by promoters of the target company pursuant to an agreement between such venture capital fund or category I Alternative Investment Fund or foreign venture capital investor and such promoters.

Under Regulation 10(5), acquisitions under clause (a) of sub-regulation (1), and clauses (e) and (f) of subregulation (4), the acquirer shall intimate the stock exchanges where the shares of the target company are listed, the details of the proposed acquisition in such form as may be specified, at least four working days prior to the proposed acquisition, and the stock exchange shall forthwith disseminate such information to the public.

Under Regulation 10(6), any acquisition made pursuant to exemption provided for in this regulation, the acquirer shall file a report with the stock exchanges where the shares of the target company are listed, in such form as may be specified not later than four working days from the acquisition, and the stock exchange shall forthwith disseminate such information to the public.

EXEMPTIONS BY THE BOARD

According to Regulation 11(1), the Board may for reasons recorded in writing, grant exemption from the obligation to make an open offer for acquiring shares under these regulations subject to such conditions as the Board deems fit to impose in the interests of investors in securities and the securities market.

According to Regulation 11(2), the Board may for reasons recorded in writing, grant a relaxation from strict compliance with any procedural requirement under Chapter III and Chapter IV subject to such conditions as the Board deems fit to impose in the interests of investors in securities and the securities market on being satisfied that,—

a) the target company is a company in respect of which the Central Government or State Government or any other regulatory authority has superseded the board of directors of the target company and has appointed new directors under any law for the time being in force, if,—

I. such board of directors has formulated a plan which provides for transparent, open, and competitive process for acquisition of shares or voting rights in, or control over the target company to secure the smooth and continued operation of the target company in the interests of all stakeholders of the target company and such plan does not further the interests of any particular acquirer;

II. the conditions and requirements of the competitive process are reasonable and fair;

III. the process adopted by the board of directors of the target company provides for details including the time when the open offer for acquiring shares would be made, completed and the manner in which the change in control would be effected; and

b) the provisions of Chapter III and Chapter IV are likely to act as impediment to implementation of the plan of the target company and exemption from strict compliance with one or more of such provisions is in public interest, the interests of investors in securities and the securities market.

For seeking exemption under sub-regulation (1), the acquirer shall, and for seeking relaxation under sub-regulation (2) the target company shall file an application with the Board, supported by a duly sworn affidavit, giving details of the proposed acquisition and the grounds on which the exemption has been sought.

The acquirer or the target company, as the case may be, shall along with the application referred to under sub-regulation (3) pay a non-refundable fee of rupees five lakh, by way of direct credit in the bank account through NEFT/RTGS/IMPS or any other mode allowed by RBI or by way of a banker's cheque or demand draft payable in Mumbai in favour of the Board.

The Board may after affording reasonable opportunity of being heard to the applicant and after considering all the relevant facts and circumstances, pass a reasoned order either granting or rejecting the exemption or relaxation sought as expeditiously as possible:

However, the Board may constitute a panel of experts to which an application for an exemption, if considered necessary, be referred to make recommendations on the application to the Board. The order passed under sub-regulation (5) shall be hosted by the Board on its official website.

OPEN OFFER PROCESS

MANAGER TO THE OPEN OFFER

Regulation 12(1) states that, prior to making a public announcement, the acquirer shall appoint a merchant banker registered with the Board, who is not an associate of the acquirer, as the manager to the open offer.

TIMING

Regulation 13(1) states that, the public announcement shall be made in accordance with regulation 14 and regulation 15, on the date of agreeing to acquire shares or voting rights in, or control over the target company. Regulation 13(2) states that, such public announcement—

a) in the case of market purchases, shall be made prior to placement of the purchase order with the stock broker to acquire the shares, that would take the entitlement to voting rights beyond the stipulated thresholds;

b) pursuant to an acquirer acquiring shares or voting rights in, or control over the target company upon converting convertible securities without a fixed date of conversion or upon conversion of depository receipts for the underlying shares of the target company shall be made on the same day as the date of exercise of the option to convert such securities into shares of the target company;

c) pursuant to an acquirer acquiring shares or voting rights in, or control over the target company upon conversion of convertible securities with a fixed date of conversion shall be made on the second working day preceding the scheduled date of conversion of such securities into shares of the target company;

d) pursuant to a disinvestment shall be made on the same day as the date of executing the agreement for acquisition of shares or voting rights in or control over the target company;

e) in the case of indirect acquisition of shares or voting rights in, or control over the target company where none of the parameters referred to in sub-regulation (2) of regulation 5 are met, may be made at any time within four working days from the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain;

f) in the case of indirect acquisition of shares or voting rights in, or control over the target company where any of the parameters referred to in sub- regulation (2) of regulation 5 are met shall be made on the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain;

g) pursuant to an acquirer acquiring shares or voting rights in, or control over the target company, under preferential issue, shall be made on the date on which the board of directors of the target company authorises such preferential issue;

h) the public announcement pursuant to an increase in voting rights consequential to a buy-back not qualifying for exemption under regulation 10, shall be made not later than the ninetieth day from the date of closure of the buy-back offer by the target company;

i) the public announcement pursuant to any acquisition of shares or voting rights in or control over the target company where the specific date on which title to such shares, voting rights or control is acquired is beyond the control of the acquirer, shall be made not later than two working days from the date of receipt of intimation of having acquired such title.

Regulation 13(2A) states that, notwithstanding anything contained in sub-regulation (2), a public announcement referred to in regulation 3 and regulation 4 for a proposed acquisition of shares or voting rights in or control over the target company through a combination of,-

I. an agreement and any one or more modes of acquisition referred to in sub- regulation (2) of regulation 13, or

II. any one or more modes of acquisition referred in clause (a) to (i) of sub-regulation(2) of regulation 13, shall be made on the date of first such acquisition, provided the acquirer discloses in the public announcement the details of the proposed subsequent acquisition.

The public announcement made under regulation 6 shall be made on the same day as the date on which the acquirer takes the decision to voluntarily make a public announcement of an open offer for acquiring shares of the target company. Pursuant to the public announcement made, a detailed public statement shall be published by the acquirer through the manager to the open offer in accordance with regulation 14 and regulation 15, not later than five working days of the public announcement:

Provided that the detailed public statement pursuant to a public announcement shall be made not later than five working days of the completion of the primary acquisition of shares or voting rights in, or control over the company or entity holding shares or voting rights in, or control over the target company.

PUBLICATION (REGULATION 14)

The public announcement shall be sent to all the stock exchanges on which the shares of the target company are listed, and the stock exchanges shall forthwith disseminate such information to the public. A copy of the public announcement shall be sent to the Board and to the target company at its registered office within one working day of the date of the public announcement. The detailed public statement pursuant to the public announcement referred to in subregulation (4) of regulation 13 shall be published in all editions of any one English national daily with wide circulation, any one Hindi national daily with wide circulation, and any one regional language daily with wide circulation at the place where the registered office of the target company is situated and one regional language daily at the place of the stock exchange where the maximum volume of trading in the shares of the target company are recorded during the sixty trading days preceding the date of the public announcement. Simultaneously with publication of such detailed public statement in the newspapers, a copy of the same shall be sent to,—

I. the Board through the manager to the open offer,
II. all the stock exchanges on which the shares of the target company are listed, and the stock exchanges shall forthwith disseminate such information to the public,
III. the target company at its registered office, and the target company shall forthwith circulate it to the members of its board

FILING OF LETTER OF OFFER WITH THE BOARD

Regulation 16(1) provides that, within five working days from the date of the detailed public statement made under sub-regulation (4) of regulation 13, the acquirer shall, through the manager to the open offer, file with the Board, a draft of the letter of offer containing such information as may be specified along with a non-refundable fee, as per the following scale, by way of direct credit in the bank account through NEFT/RTGS/IMPS or any other mode allowed by RBI or by way of a banker's cheque or demand draft payable in Mumbai in favour of the Board,—

Sl. No.	Consideration payable under the Open Offer	Fee (Rs.)
a.	Upto ten crore rupees	Five Lakh rupees
b.	More than ten crore rupees, but less than or equal to one thousand crore rupees.	0.5 per cent of the offer size
c.	0.5 per cent of the offer size	Five crore rupees plus 0.125 per cent of the portion of the offer size in excess of one thousand crore rupees.

The consideration payable under the open offer shall be calculated at the offer price, assuming full acceptance of the open offer, and in the event the open offer is subject to differential pricing, shall be computed at the highest offer price, irrespective of manner of payment of the consideration: However, in the event of consideration payable under the open offer being enhanced owing to a revision to the offer price or offer size the fees payable shall stand revised accordingly, and shall be paid within five working days from the date of such revision.

The manager to the open offer shall provide soft copies of the public announcement, the detailed public statement and the draft letter of offer in accordance with such specifications as may be specified, and the Board shall upload the same on its website. The Board shall give its comments on the draft letter of offer as expeditiously as possible but not later than fifteen working days of the receipt of the draft letter of offer and in the event of no comments being issued by the Board within such period, it shall be deemed that the Board does not have comments to offer:

However, in the event the Board has sought clarifications or additional information from the manager to the open offer, the period for issuance of comments shall be extended to the fifth working day from the date of receipt of satisfactory reply to the clarification or additional information sought.

In the case of competing offers, the Board shall provide its comments on the draft letter of offer in respect of each competing offer on the same day. In the event the disclosures in the draft letter of offer are inadequate the Board may call for a revised letter of offer and shall deal with the revised letter of offer in accordance with sub-regulation (4).

PROVISION OF ESCROW

- The acquirer shall create an escrow account not later than two working days prior to the date of the detailed public statement, towards security for performance of his obligations under these regulations, and deposit in escrow account such aggregate amount as per the following scale:

Sl. No.	Consideration payable under the Open Offer	Escrow Amount
a.	On the first 500 crore rupees	an amount equal to 25% of the consideration
b.	On the balance consideration	an additional amount equal to 10% of the balance consideration

- However, where an open offer is made conditional upon minimum level of acceptance, 100% of the consideration payable in respect of minimum level of acceptance or 50% of the consideration payable under the open offer, whichever is higher, shall be deposited in cash in the escrow account.
- In case of indirect acquisitions where public announcement has been made, an amount equivalent to hundred per cent of the consideration payable in the open offer shall be deposited in the escrow account.
- Under Regulation 17(2), the consideration payable under the open offer shall be computed as provided for in sub-regulation (2) of regulation 16 and in the event of an upward revision of the offer price or of the offer size, the value of the escrow amount shall be computed on the revised consideration calculated at such revised offer price, and the additional amount shall be brought into the escrow account prior to effecting such revision.
- Under Regulation 17(3), the escrow account referred to in sub-regulation (1) may be in the form of,—
  a) cash deposited with any scheduled commercial bank;
  b) bank guarantee issued in favour of the manager to the open offer by any scheduled commercial bank; or
  c) deposit of frequently traded and freely transferable equity shares or other freely transferable securities with appropriate margin
- The deposit of securities shall not be permitted in respect of indirect acquisitions where public announcement has been made in terms of clause (e) of sub-regulation (2) of regulation 13 of these regulations
- The cash component of the escrow account as referred to in clause above may be maintained in an interest bearing account, subject to the merchant banker ensuring that the funds are available at the time of making payment to the shareholders.
- In the event of the escrow account being created by way of a bank guarantee or by deposit of securities, the acquirer shall also ensure that at least one per cent of the total consideration payable is deposited in cash with a scheduled commercial bank as a part of the escrow account.
- For such part of the escrow account as is in the form of a cash deposit with a scheduled commercial bank, the acquirer shall while opening the account, empower the manager to the open offer to instruct the bank to issue a banker's cheque or demand draft or to make payment of the amounts lying to the credit of the escrow account, in accordance with requirements under these regulations
- For such part of the escrow account as is in the form of a bank guarantee, such bank guarantee shall be in favour of the manager to the open offer and shall be kept valid throughout the offer period and for an additional period of thirty days after completion of payment of consideration to shareholders who have tendered their shares in acceptance of the open offer.
- For such part of the escrow account as is in the form of securities, the acquirer shall empower the manager to the open offer to realise the value of such escrow account by sale or otherwise, and in the event there is any shortfall in the amount required to be maintained in the escrow account, the manager to the open offer shall be liable to make good such shortfall.
- The manager to the open offer shall not release the escrow account until the expiry of 30 days from the completion of payment of consideration to shareholders who have tendered their shares in acceptance of the open offer, save and except for transfer of funds to the special escrow account as required under regulation 21.

- In the event of non-fulfilment of obligations under these regulations by the acquirer the Board may direct the manager to the open offer to forfeit the escrow account or any amounts lying in the special escrow account, either in full or in part.

The escrow account deposited with the bank in cash shall be released only in the following manner,—

a) the entire amount to the acquirer upon withdrawal of offer in terms of regulation 23 as certified by the manager to the open offer: Provided that in the event the withdrawal is pursuant to clause (c) of sub-regulation (1) of regulation 23, the manager to the open offer shall release the escrow account upon receipt of confirmation of such release from the Board;

b) for transfer of an amount not exceeding ninety per cent of the escrow account, to the special escrow account in accordance with regulation 21;

c) to the acquirer, the balance of the escrow account after transfer of cash to the special escrow account, on the expiry of thirty days from the completion of payment of consideration to shareholders who have tendered their shares in acceptance of the open offer, as certified by the manager to the open offer;

d) the entire amount to the acquirer upon the expiry of thirty days from the completion of payment of consideration to shareholders who have tendered their shares in acceptance of the open offer, upon certification by the manager to the open offer, where the open offer is for exchange of shares or other secured instruments;

e) the entire amount to the manager to the open offer, in the event of forfeiture for non-fulfillment of any of the obligations under these regulations, for distribution in the following manner, after deduction of expenses, if any, of registered market intermediaries associated with the open offer,—

I. one third of the escrow account to the target company;

II. one third of the escrow account to the Investor Protection and Education Fund established under the Securities and Exchange Board of India (Investor Protection and Education Fund) Regulations, 2009; and

III. one third of the escrow account to be distributed pro-rata among the shareholders who have accepted the open offer.

OTHER PROCEDURES (REGULATION 18)

1. Simultaneously with the filing of the draft letter of offer with the Board, the acquirer shall send a copy of the draft letter of offer to the target company at its registered office address and to all stock exchanges where the shares of the target company are listed.
2. The letter of offer shall be dispatched to the shareholders whose names appear on the register of members of the target company as of the identified date, not later than seven working days from the receipt of comments from the Board or where no comments are offered by the Board, within **seven working days** from the expiry of the period stipulated in sub-regulation (4) of regulation 16:
3. Where local laws or regulations of any jurisdiction outside India may expose the acquirer or the target company to material risk of civil, regulatory or criminal liabilities in the event the letter of offer in its final form were to be sent without material amendments or modifications into such jurisdiction, and the shareholders resident in such jurisdiction hold shares entitling them to less than five per cent of the voting rights of the target company, the acquirer may refrain from dispatch of the letter of offer into such jurisdiction:
4. Simultaneously with the dispatch of the letter of offer, the acquirer shall send the letter of offer to the custodian of shares underlying depository receipts, if any, of the target company.
5. Irrespective of whether a competing offer has been made, an acquirer may make upward revisions to the offer price, and subject to the other provisions of these regulations, to the number of shares sought to be acquired under the open offer, at any time prior to the commencement of the last one working day before the commencement of the tendering period.
6. **In the event of any revision of the open offer, whether by way of an upward revision in offer price, or of the offer size, the acquirer shall,—**

   a) make corresponding increases to the amount kept in escrow account under regulation 17 prior to such revision;

   b) make an announcement in respect of such revisions in all the newspapers in which the detailed public statement pursuant to the public announcement was made; and

   c) simultaneously with the issue of such an announcement, inform the Board, all the stock exchanges on which the shares of the target company are listed, and the target company at its registered office.

7. The acquirer shall disclose during the offer period every acquisition made by the acquirer or persons acting in concert with him of any shares of the target company in such form as may be specified, to each of the stock exchanges on which the shares of the target company are listed and to the target company at its registered office within twenty-four hours of such acquisition, and the stock exchanges shall forthwith disseminate such information to the public:
8. However, the acquirer and persons acting in concert with him shall not acquire or sell any shares of the target company during the period between three working days prior to the commencement of the tendering period and until the expiry of the tendering period. Also, the acquirer shall facilitate tendering of shares by the shareholders and settlement of the same, through the stock exchange mechanism as specified by the Board.
9. The acquirer shall issue an advertisement in such form as may be specified, **one working day before the commencement of the tendering period,** announcing the schedule of activities for the open offer, the status of statutory and other approvals, if any, whether for the acquisition attracting the obligation to make an open offer under these regulations or for the open offer, unfulfilled conditions, if any, and their status, the procedure for tendering acceptances and such other material detail as may be specified: However, such advertisement shall be,—
    a) published in all the newspapers in which the detailed public statement pursuant to the public announcement was made; and
    b) simultaneously sent to the Board, all the stock exchanges on which the shares of the target company are listed, and the target company at its registered office.
10. The tendering period shall start not later than twelve working days from date of receipt of comments from the Board under sub-regulation (4) of regulation 16 and shall remain open for ten working days.
11. The shareholders who have tendered shares in acceptance of the open offer shall not be entitled to withdraw such acceptance during the tendering period.
12. the acquirer shall, **within ten working days** from the last date of the tendering period, complete all requirements under these regulations and other applicable law relating to the open offer including payment of consideration to the shareholders who have accepted the open offer.
13. The acquirer shall be responsible to pursue all statutory approvals required by the acquirer in order to complete the open offer without any default, neglect or delay:
14. However, where the acquirer is unable to make the payment to the shareholders who have accepted the open offer within such period owing to non- receipt of statutory approvals required by the acquirer, the Board may, where it is satisfied that such non-receipt was not attributable to any willful default, failure or neglect on the part of the acquirer to diligently pursue such approvals, grant extension of time for making payments, subject to the acquirer agreeing to pay interest to the shareholders for the delay at such rate as may be specified:
15. Where the statutory approval extends to some but not all shareholders, the acquirer shall have the option to make payment to such shareholders in respect of whom no statutory approvals are required in order to complete the open offer.
16. In case the acquirer is unable to make payment to the shareholders who have accepted the open offer within such period, the acquirer shall pay interest for the period of delay to all such shareholders whose shares have been accepted in the open offer, at the rate of ten per cent per annum:
17. In case the delay was not attributable to any act of omission or commission of the acquirer, or due to the reasons or circumstances beyond the control of acquirer, the Board may grant waiver from the payment of interest. Provided further that the payment of interest would be without prejudice to the Board taking any action under regulation 32 of these regulation or under the Act.
18. Sub clause 12 states that, the acquirer shall issue a post offer advertisement in such form as may be specified within five working days after the offer period, giving details including aggregate number of shares tendered, accepted, date of payment of consideration. Such advertisement shall be,—
    I. published in all the newspapers in which the detailed public statement pursuant to the public announcement was made; and
    II. simultaneously sent to the Board, all the stock exchanges on which the shares of the targ1et company are listed, and the target company at its registered office.

CONDITIONAL OFFER (REGULATION 19)

- An acquirer may make an open offer conditional as to the minimum level of acceptance:
- However, where the open offer is pursuant to an agreement, such agreement shall contain a condition to the effect that in the event the desired level of acceptance of the open offer is not received the acquirer shall not acquire any shares under the open offer and the agreement attracting the obligation to make the open offer shall stand rescinded.
- Where an open offer is made conditional upon minimum level of acceptances, the acquirer and persons acting in concert with him shall not acquire, during the offer period, any shares in the target company except under the open offer and any underlying agreement for the sale of shares of the target company pursuant to which the open offer is made.

COMPETING OFFERS

Upon a public announcement of an open offer for acquiring shares of a target company being made, any person, other than the acquirer who has made such public announcement, shall be entitled to make a public announcement of an open offer within fifteen working days of the date of the detailed public statement made by the acquirer who has made the first public announcement.

The open offer made under sub-regulation (1) shall be for such number of shares which, when taken together with shares held by such acquirer along with persons acting in concert with him, shall be at least equal to the holding of the acquirer who has made the first public announcement, including the number of shares proposed to be acquired by him under the offer and any underlying agreement for the sale of shares of the target company pursuant to which the open offer is made.

No person shall be entitled to make a public announcement of an open offer for acquiring shares, or enter into any transaction that would attract the obligation to make a public announcement of an open offer for acquiring shares under these regulations, after the period of fifteen working days referred to in sub-regulation (1 and until the expiry of the offer period for such open offer. Unless the open offer first made is an open offer conditional as to the minimum level of acceptances, no acquirer making a competing offer may be made conditional as to the minimum level of acceptances.

No person shall be entitled to make a public announcement of an open offer for acquiring shares, or enter into any transaction that would attract the obligation to make a public announcement of an open offer under these regulations until the expiry of the offer period where—

I. the open offer is for acquisition of shares pursuant to disinvestment,; or
II. the open offer is pursuant to a relaxation from strict compliance with the provisions of Chapter III or Chapter IV granted by the Board under sub- regulation (2) of regulation 11.

The schedule of activities and the tendering period for all competing offers shall be carried out with identical timelines and the last date for tendering shares in acceptance of every competing offer shall stand revised to the last date for tendering shares in acceptance of the competing offer last made. Upon the public announcement of a competing offer, an acquirer who had made a preceding competing offer shall be entitled to revise the terms of his open offer provided the revised terms are more favourable to the shareholders of the target company: Provided that the acquirers making the competing offers shall be entitled to make upward revisions of the offer price at any time up to one working day prior to the commencement of the tendering period. Except for variations made under this regulation, all the provisions of these regulations shall apply to every competing offer.

PAYMENT OF CONSIDERATION

Regulation 21 stipulates, for the amount of consideration payable in cash, the acquirer shall open a special escrow account with a banker to an issue registered with the Board and deposit therein, such sum as would, together with cash transferred, make up the entire sum due and payable to the shareholders as consideration payable under the open offer, and empower the manager to the offer to operate the special escrow account on behalf of the acquirer for the purposes under these regulations.

The acquirer shall complete payment of consideration whether in the form of cash, or as the case may be, by issue, exchange or transfer of securities, to all shareholders who have tendered shares in acceptance of the open offer, within ten working days of the expiry of the tendering period. Any unclaimed balances lying to the credit of the special escrow account referred to in sub-regulation (1) at the end of seven years from the date of deposit thereof, shall be

transferred to the Investor Protection and Education Fund established under the Securities and Exchange Board of India (Investor Protection and Education Fund) Regulations, 2009.

COMPLETION OF ACQUISITION

Under Regulation 22 (1), the acquirer shall not complete the acquisition of shares or voting rights in, or control over, the target company, whether by way of subscription to shares or a purchase of shares attracting the obligation to make an open offer for acquiring shares, until the expiry of the offer period:

However, in case of an Competing offer made, pursuant to a preferential allotment, the offer shall be completed within the period as provided under sub-regulation (1) of regulation 170 of the SEBI (Issue of Capital and Disclosure requirements) Regulations, 2018, subject to the non-obstante clause in sub-regulation (4) of regulation 7 of these regulations.

However, in case of a delisting offer made under regulation 5A, the acquirer shall complete the acquisition of shares attracting the obligation to make an offer for acquiring shares in terms of sub-regulation (1) of regulation 3, regulation 4 or regulation 5, only after making the public announcement regarding the success of the delisting proposal made in terms of sub-regulation (4) of regulation 17 of the Delisting Regulations.

Notwithstanding anything contained in sub-regulation (1), subject to the acquirer depositing in the escrow account under regulation 17, cash or providing unconditional and irrevocable bank guarantee issued in favour of the manager to the open offer by any scheduled commercial bank, subject to the approval of the Reserve Bank of India, of an amount equal to the entire consideration payable under the open offer assuming full acceptance of the open offer, the parties to such agreement may after the expiry of twenty-one working days from the date of detailed public statement, act upon the agreement and the acquirer may complete the acquisition of shares or voting rights in, or control over the target company as contemplated.

However, in case of proportionate reduction of the shares or voting rights to be acquired in accordance with the relevant provision under sub-regulation (4) of regulation 7, the acquirer shall undertake the completion of the scaled down acquisition of shares or voting rights in the target company.

Under Regulation 22(2A), notwithstanding anything contained in sub-regulation (1), an acquirer may acquire shares of the target company through preferential issue or through the stock exchange settlement process, subject to,-

I. such shares being kept in an escrow account,
II. the acquirer not exercising any voting rights over such shares kept in the escrow account:

However, such shares may be transferred to the account of the acquirer, subject to the acquirer complying with requirements specified. The acquirer shall complete the acquisitions contracted under any agreement attracting the obligation to make an open offer not later than twenty-six weeks from the expiry of the offer period:

However, in the event of any extraordinary and supervening circumstances rendering it impossible to complete such acquisition within such period, the Board may for reasons to be published, may grant an extension of time by such period as it may deem fit in the interests of investors in securities and the securities market.

WITHDRAWAL OF OPEN OFFER

An open offer for acquiring shares once made shall not be withdrawn except under any of the following circumstances—

a) statutory approvals required for the open offer or for effecting the acquisitions under these regulations have been refused;
b) the acquirer, being a natural person, has died;
c) any condition stipulated in the agreement for acquisition attracting the obligation to make the open offer is not met for reasons outside the reasonable control of the acquirer, and such agreement is rescinded.
d) such circumstances as in the opinion of the Board, merit withdrawal.

In the event of withdrawal of the open offer, the acquirer shall through the manager to the open offer, within two working days—

a) make an announcement in the same newspapers in which the public announcement of the open offer was published, providing the grounds and reasons for withdrawal of the open offer; and
b) simultaneously with the announcement, inform in writing to—
   i. the Board;
   ii. all the stock exchanges on which the shares of the target company are listed, and the stock exchanges shall forthwith disseminate such information to the public; and
   iii. the target company at its registered office.

OTHER OBLIGATIONS

Directors of the Target Company

1. During the offer period, no person representing the acquirer or any person acting in concert with him shall be appointed as director of the target company, whether as an additional director or in a casual vacancy:
2. However, after an initial period of 15 working days from the date of detailed public statement, appointment of persons representing the acquirer or persons acting in concert with him on the board of directors may be effected in the event the acquirer deposits in cash in the escrow account, the entire consideration payable under the open offer:
3. where the acquirer has specified conditions to which the open offer is subject in terms of clause (c) of sub-regulation (1) of regulation 23, no director representing the acquirer may be appointed to the board of directors of the target company during the offer period unless the acquirer has waived or attained such conditions and complies with the requirement of depositing cash in the escrow account.
4. Where an open offer is made conditional upon minimum level of acceptances, the acquirer and persons acting in concert shall, notwithstanding anything contained in these regulations, and regardless of the size of the cash deposited in the escrow account referred to regulation 17, not be entitled to appoint any director representing the acquirer or any person acting in concert with him on the board of directors of the target company during the offer period.
5. During the pendency of competing offers, notwithstanding anything contained in these regulations, and regardless of the size of the cash deposited in the escrow account referred to in regulation 17, by any acquirer or person acting in concert with him, there shall be no induction of any new director to the board of directors of the target company:
6. However, in the event of death or incapacitation of any director, the vacancy arising therefrom may be filled by any person subject to approval of such appointment by shareholders of the target company by way of a postal ballot.
7. In the event the acquirer or any person acting in concert is already represented by a director on the board of the target company, such director shall not participate in any deliberations of the board of directors of the target company or vote on any matter in relation to the open offer.

OBLIGATIONS OF THE ACQUIRER

- Prior to making the public announcement of an open offer for acquiring shares under these regulations, the acquirer shall ensure that firm financial arrangements have been made for fulfilling the payment obligations under the open offer and that the acquirer is able to implement the open offer, subject to any statutory approvals for the open offer that may be necessary.
- In the event the acquirer has not declared an intention in the detailed public statement and the letter of offer to alienate any material assets of the target company or of any of its subsidiaries whether by way of sale, lease, encumbrance or otherwise outside the ordinary course of business, the acquirer, where he has acquired control over the target company, shall be debarred from causing such alienation for a period of two years after the offer period:
- However, in the event the target company or any of its subsidiaries is required to so alienate assets despite the intention to alienate not having been expressed by the acquirer, such alienation shall require a special resolution passed by shareholders of the target company, by way of a postal ballot and the notice for such postal ballot shall inter alia contain reasons as to why such alienation is necessary.

- The acquirer shall ensure that the contents of the public announcement, the detailed public statement, the letter of offer and the post-offer advertisement are true, fair and adequate in all material aspects and not misleading in any material particular, and are based on reliable sources, and state the source wherever necessary.
- The acquirer and persons acting in concert with him shall-
  I. not sell shares of the target company held by them, during the offer period.
  II. be jointly and severally responsible for fulfillment of applicable obligations under these regulations.

OBLIGATIONS OF THE TARGET COMPANY

Following are the obligations of a target company –

1. The board of directors of target company shall ensure that during the offer period, the business of the target company is conducted in the ordinary course consistent with past practice.
2. During the offer period, unless the approval of shareholders of the target company by way of a special resolution by postal ballot is obtained, the board of directors of either the target company or any of its subsidiaries shall not,—
   a) alienate any material assets whether by way of sale, lease, encumbrance or otherwise or enter into any agreement therefor outside the ordinary course of business;
   b) effect any material borrowings outside the ordinary course of business;
   c) issue or allot any authorised but unissued securities entitling the holder to voting rights:
   d) The target company or its subsidiaries may,—
      I. issue or allot shares upon conversion of convertible securities issued prior to the public announcement of the open offer, in accordance with pre-determined terms of such conversion;
      II. issue or allot shares pursuant to any public issue in respect of which the red herring prospectus has been filed with the Registrar of Companies prior to the public announcement of the open offer; or
      III. issue or allot shares pursuant to any rights issue in respect of which the record date has been announced prior to the public announcement of the open offer.
   e) implement any buy-back of shares or effect any other change to the capital structure of the target company;
   f) enter into, amend or terminate any material contracts to which the target company or any of its subsidiaries is a party, outside the ordinary course of business, whether such contract is with a related party, within the meaning of the term under applicable accounting principles, or with any other person; and
   g) accelerate any contingent vesting of a right of any person to whom the target company or any of its subsidiaries may have an obligation, whether such obligation is to acquire shares of the target company by way of employee stock options or otherwise
3. In any general meeting of a subsidiary of the target company in respect of the matters referred to in sub-regulation (2), the target company and its subsidiaries, if any, shall vote in a manner consistent with the special resolution passed by the shareholders of the target company.
4. The target company shall be prohibited from fixing any record date for a corporate action on or after the third working day prior to the commencement of the tendering period and until the expiry of the tendering period.
5. The target company shall furnish to the acquirer within two working days from the identified date, a list of shareholders as per the register of members of the target company containing names, addresses, shareholding and folio number, in electronic form, wherever available, and a list of persons whose applications, if any, for registration of transfer of shares are pending with the target company: Provided that the acquirer shall reimburse reasonable costs payable by the target company to external agencies in order to furnish such information.
6. Upon receipt of the detailed public statement, the board of directors of the target company shall constitute a committee of independent directors to provide reasoned recommendations on such open offer, and the target company shall publish such recommendations: Provided that such committee shall be entitled to seek external professional advice at the expense of the target company. Provided further that while providing reasoned recommendations on the open offer proposal, the committee shall disclose the voting pattern of the meeting in which the open offer proposal was discussed.
7. The committee of independent directors shall provide its written reasoned recommendations on the open offer to the shareholders of the target company and such recommendations shall be published in such form as may be specified, at least two working days before the commencement of the tendering period, in the same newspapers where the public announcement of the open offer was published, and simultaneously, a copy of the same shall be sent to,—

I. the Board;
II. all the stock exchanges on which the shares of the target company are listed, and the stock exchanges shall forthwith disseminate such information to the public; and
III. to the manager to the open offer, and where there are competing offers, to the manager to the open offer for every competing offer.

8. The board of directors of the target company shall facilitate the acquirer in verification of shares tendered in acceptance of the open offer.
9. The board of directors of the target company shall make available to all acquirers making competing offers, any information and co-operation provided to any acquirer who has made a competing offer.
10. Upon fulfillment by the acquirer, of the conditions required under these regulations, the board of directors of the target company shall without any delay register the transfer of shares acquired by the acquirer in physical form, whether under the agreement or from open market purchases, or pursuant to the open offer.

DISCLOSURES OF SHAREHOLDING AND CONTROL

Disclosure-related provisions (Regulation 25)

The disclosures under this Chapter shall be of the aggregated shareholding and voting rights of the acquirer or promoter of the target company or every person acting in concert with him. For the purposes of this Chapter, the acquisition and holding of any convertible security shall also be regarded as shares, and disclosures of such acquisitions and holdings shall be made accordingly. Upon receipt of the disclosures required under this Chapter, the stock exchange shall forthwith disseminate the information so received.

Disclosure of Acquisition and Disposal (Regulation 29)

1. Any acquirer, together with persons acting in concert with him acquiring shares or voting rights in a target company, which taken together aggregates to five per cent or more of the shares of such target company, shall disclose their aggregate shareholding and voting rights in such target company in such form as may be specified:

   However, in case of listed entity which has listed its specified securities on Innovators Growth Platform, any reference to “five per cent” shall be read as “ten per cent”

2. Any person together with persons acting in concert with him, holds shares or voting rights entitling them to five per cent or more of the shares or voting rights in a target company, shall disclose the number of shares or voting rights held and change in shareholding or voting rights, even if such change results in shareholding falling below five per cent, if there has been change in such holdings from the last disclosure made under subregulation (1) or under this sub-regulation; and such change exceeds two per cent of total shareholding or voting rights in the target company, in such form as may be specified.

   However, in case of listed entity which has listed its specified securities on Innovators Growth Platform, any reference to “five per cent” shall be read as “ten per cent” and any reference to “two per cent” shall be read as “five per cent”.

The above disclosures required shall be made within two working days of the receipt of intimation of allotment of shares, or the acquisition or the disposal of shares or voting rights in the target company to,—

a) every stock exchange where the shares of the target company are listed; and
b) the target company at its registered office.

For the purposes of this regulation, shares taken by way of encumbrance shall be treated as an acquisition, shares given upon release of encumbrance shall be treated as a disposal, and disclosures shall be made by such person accordingly in such form as may be specified: However, such requirement shall not apply to a scheduled commercial bank or public financial institution or a housing finance company or a systemically important non-banking financial company as pledgee in connection with a pledge of shares for securing indebtedness in the ordinary course of business.

DEFENSE STRATEGIES TO TAKEOVER BIDS

A hostile bid made directly to the shareholders of the target company with or without previous overtures to the management of the company has become a means of creating corporate combinations. Hence, there has been considerable interest in developing defense strategies by actual and potential targets.

FINANCIAL DEFENSE MEASURES

Adjustments in Asset and Ownership Structure

1. It means, developing defense structures that create barriers specific to the bidder. These include purchase of assets that may cause legal problems, purchase of controlling shares of the bidder itself, and sale to their party of assets which made the target attractive to the bidder and issuance of new securities with special provisions conflicting with the aspects of the takeover attempt. However, as per the Regulation 26(2) of the SEBI (SAST) Regulations, 2011, the target company cannot alienate its assets, make any material borrowings, issue any new shares with voting rights or terminate any material contract during the offering period except with the approval of shareholders by way of a special resolution passed by Postal Ballot. Hence it would be almost impossible to bring about adjustments in Assets and Ownership structure in India.
2. A second common method is to **create a consolidated vote block allied with target management**. Thus, securities are issued through private placements to parties friendly or in business alliance with management or to the management itself. Moreover, another method can be to repurchase publicly held shares to increase an already sizeable management block in place. However, as per the Regulation 26(2) of the SEBI (SAST) Regulations, 2011, the target company cannot, issue any new shares with voting rights or terminate any material contract during the offering period and can also not make a buy-back of shares from the public shareholders except with the approval of shareholders by way of a special resolution passed by Postal Ballot. Hence it would be almost impossible to bring about adjustments in Assets and Ownership structure in India. However, in anticipation of a perceived threat of takeover, the management can issue shares or convertible securities beforehand so that they can be converted once the public announcement for an open offer is made.
3. A third common theme has been the dilution of the bidders vote percentage through issuance of new equity shares. However, this option will not work in India due to the strict procedures laid down in Regulation 26(2) of the SEBI (SAST) Regulations, 2011.
4. **The "Crown Jewel" Strategy** : The central theme is this strategy is to divest the most coveted asset by the bidder, commonly known as the "crown jewel". Consequently, the hostile bidder is deprived of the primary intention behind the takeover bid. A variation of the crown jewel strategy is the more radical "scorched earth approach", vide which approach, the target sells off not only the crown jewel, but also properties to diminish its worth. Such a radical step may however be self-destructive and unwise in the company's interest. However as per the Companies Act, 2013, selling of whole or substantially the whole of its undertaking requires the approval of the shareholders in a general meeting by way of a special resolution and Regulation 26(2) of the SEBI (SAST) Regulations, 2011, the target company cannot alienate any of its material assets during the offering period (which commences once the public announcement is made) and can also not make a buy-back of shares from the public shareholders except with the approval of shareholders by way of a special resolution passed by Postal Ballot. Hence it would be almost impossible to use the "Crown Jewel" Strategy as a defense mechanism in India.
5. **The Pacman Defence**: This strategy although unusual attempts to purchase the shares of the raider company. This is usually the scenario if the raider company is smaller than the target company and the target company has a substantial cash flow or liquidable asset. Regulation 26(2) of the SEBI (SAST) Regulations, 2011, however prohibits the target company to enter into any agreement which is not in the ordinary course of business during the offering period (which commences once the public announcement is made) except with the approval of shareholders by way of a special resolution passed by Postal Ballot. Hence it would be almost impossible to use the "Pacman Defense" Strategy as a defense mechanism in India.
6. **Targeted Share Repurchase or "Buy-back"**: This strategy is one in which the management of the target company uses up a part of the assets of the company on the one hand to increase its holding and on their hand it disposes of some of the assets that make the target company unattractive to the raider. The strategy therefore involves a creative use of buyback of shares to reinforce its control and detract a prospective raider. But "Buyback" would involve the use of the free reserves of the company and would be an expensive proposition for the target company. Further as per Regulation 26(2) of the SEBI (SAST) Regulations, 2011, the target company cannot implement a buy-back during the offer period except with the approval of shareholders by way of a special resolution passed by Postal Ballot. Hence it would be almost impossible to use this defense mechanism also in India.
7. **Golden Parachutes**: These are separation clauses of an employment contract that compensate managers who lose their jobs under a change of management scenario. The provision usually calls for a lump-sum payment or payment over a specified period at full and partial rates of normal compensation. Target Companies invoke this provision and pay off a huge compensation to large number of employees so as to make themselves unattractive

to the raider. However section 192 and Section 202 of the Companies Act, 2013 provide for compensation to be paid for loss of office only to a Managing Director, Whole Time Director or a Manager and not the entire senior management, as is the practice in the United States of America. Hence this defense mechanism is of no consequence in India.

ANTI TAKEOVER AMENDMENTS OR SHARK REPELLANTS

An increasingly used defense mechanism being used is anti-takeover amendments to the company's constitution or articles of association, popularly called as "shark repellants". This practice consists of changing the articles of associations, regulations, bye-laws, etc. to be less attractive to the raider / hostile bidder. This again may not work out in India as any change to the Articles of Association or the Memorandum of Association would require approval of the shareholders.

1. **Supermajority Amendments**: These amendments require shareholder approval by at least 2/3rds vote and sometimes as much as 90% of the voting power of outstanding capital for all transactions involving change of control. In most existing cases, however the super majority agreements have a board out clause which provides the board with the power to determine when and if the super majority provisions will be in effect. Pure or inflexible super majority provisions would seriously limit the management's scope of options and flexibility in takeover negotiations.
2. **Classified Boards**: Another type of anti-takeover amendments provides for a staggered or classified board of directors to delay effective transfer and control in a takeover. The much touted management rationale in proposing a classified board is to ensure continuity of policy and experience in the USA. The legal position of such classified or staggered boards is quite flexible.
3. **Authorisation of Preferred Stock:** The Board is authorised to create a new class of securities with special voting rights. This security, typically preferred stock may be issued to a friendly party in a control context. This is referred to as issuance of Shares with Differential Voting Rights, which is subject to restrictions under the Companies Act, 2013 and SEBI (ICDR) Regulations, 2009 and hence has been rendered unattractive over a period of time.
4. **Poison Pill Defenses:** This is a controversial but popular defense mechanism. These pills provide their holders with special rights exercisable only after a period of time following the occurrence of a triggering event. These rights take several forms but all are difficult and costly to acquire control of the issuer or the target company. Poison pills are generally adopted by the Board of Directors without shareholder approval. Usually the rights provided by the poison pill can be altered quickly by the Board or redeemed by the Company any time after they become exercisable following the occurrence of the triggering event.

LESSON 3 - PLANNING & STRATEGY

INTRODUCTION

The process of merging with another company or acquiring a company is complex. In addition to the legal ramifications, companies must be aware of the potential tax implications as well as ensuring that the terms of the deal benefit both parties. Often companies rely on strategic advisors, lawyers and professionals to negotiate on their behalf in order to obtain the best possible deal within the framework of the applicable laws.

Strategic assessments of companies, industry expertise, due diligence, merger integration, and operational improvements represent areas where knowledge and skills are required for the success of a merger or acquisition.

The Indian business environment is undergoing massive change with almost all relevant corporate laws/ regulations Whatever may be the reason for any M&A, the benefits are multifold, to enumerate a few:

1. Economies of scale
2. Operational synergies and efficiencies
3. Access to new markets, new products, new business
4. Access to foreign capital

Mergers and Acquisitions – Primary Factors to be considered

Merger or amalgamation is undertaken for acquiring cash resources, eliminating competition, saving on taxes or influencing the economies of large-scale operations. Therefore, there are host of factors, which require consideration before initiating a merger or amalgamation exercise. A detailed list of the primary factors requiring consideration before initiating a merger or amalgamation from the economic, commercial and legal perspective is explained as follows:

(i) **Identification of Parties:** Will one or more businesses be transferred to an existing firm or a newly formed entity? Consider drafting heads of terms, do you require a confidentiality agreement? Do you require an exclusivity agreement? Review financial liability of the parties - undertake appropriate searches and enquiries.

(ii) **Due Diligence:** Carry out legal, commercial, tax and financial due diligence on the parties entering into the transaction. This will help in identifying risk areas along with any necessary consent you will need to obtain.

(iii) **Any third-party consents required?:** Ascertain if any third-party consents or no objections would be required such as from banks, business contracts, partner/shareholder consents. These should emerge from due diligence. Consider also regulatory consents/licences that may be required.

(iv) **Taxation:** It will be necessary to ascertain the most suitable tax structure for the transaction and, in particular, the way in which the consideration should be structured, at an early stage, therefore consider consulting tax advisors.

(v) **Risk Sharing of risk :** What kind of indemnities/warranties/representations be considered? Should there be a cap on such indemnities and warranties?

(vi) **Will the transaction impact on existing loan/finance arrangements?:** Check loan documents and constitution documents to see whether any proposed borrowing would be a breach of any existing funding. What will happen in relation to third party funding of the Seller business? Confirm that there are no restrictions on the disposal of the target business or any of its assets. How will the merged business be funded?

(vii) **Existing Charges/Modifications over the assets to be acquired:** Are there any mortgages, charges or debentures over any of the business assets? If yes, obtain copies and consider how they are to be satisfied/discharged. If there are floating charges, obtain certificates of non-crystallisation/release. Whether there is any pledge on shares? Obtain a Search Report from a Practicing Company Secretary.

(viii) **Guarantees and indemnities (bank or other):** Has the Seller given or received any guarantees or indemnities in relation to the business? If yes, then obtain copies (including details of arrangements) and consider in particular, how to ensure the business continues to have the benefit of relevant guarantees.

(ix) **Licences:** Will the Buyer have all other licences which it needs to operate the business?

(x) **Supply contracts:** Will supply contracts be transferred or need to be terminated? How will this be done?

(xi) **What IP is used in the business?:** Obtain a full list of trademarks, service marks, patents, designs, domain names, copyright and other registered and unregistered intellectual property used in the business. Carry out trade mark and patent searches as may be appropriate through an IPR Attorney

PROCESS OF FUNDING

The process of funding in the case of mergers and takeovers may be arranged by a company in a number of ways. Broadly we can divide them into three categories as described below:

- **Internal accruals:** The retained earnings and free reserves accumulated over a period of time by well-managed companies may be utilized for the purpose of restructuring.
- **Borrowings:** The required funds could be raised from banks and financial institutions or through external commercial borrowings or by issue of debentures.
- **Issue of securities:** Funds may also be raised through issue of equity shares, preference shares and other securities, depending upon the quantum and urgency.

CASH DEAL VS. STOCK DEAL FOR ACQUISITION

An all cash, all stock offer is an offer by one company to purchase all of another company's shares from its shareholders for cash. In this type of proposal, one way for the acquiring company to try to get uncertain shareholders to agree to a sale is to offer a premium over the price for which the shares are presently trading. The acquired company's shareholders may earn a capital gain if the combined entity realizes cost savings. The prices of the shares of the company being acquired may rise, particularly if the company was bought at a premium. Premium is offered for making the deal lucrative for the seller company and is beneficial for the acquirer in the long run

The acquiring company may not have all of the cash on its balance sheet to make an all cash, all stock acquisition. In such a situation, a company can tap into the capital markets or creditors to raise the necessary funds. If the acquiring company was not a publicly-traded company already, it could issue an IPO whereby they would issue shares of stock to investors and receive cash in return. Existing public companies could issue additional shares (by way of preferential issue or otherwise) to raise cash for an acquisition as well.

FUNDING THROUGH VARIOUS TYPES OF FINANCIAL INSTRUMENTS

Funding may be made through various types of financial instruments. Funding may be done through any of the following modes:

- Funding through Equity Shares.
- Funding through Preferential Shares.
- Funding through Options or Securities with Differential Rights.
- Funding though Swaps or Stock to Stock Mergers.
- Funding through External Commercial Borrowings (ECBs) and Depository Receipts (DRs).
- Funding through Financial Institutions and Banks.
- Funding through Rehabilitation Finance.
- Funding through Leveraged Buyouts.

PREFERENTIAL ALLOTMENT

Preferential allotment, in simple words, is an offer for allotment to a select group of identified persons, and does not include public issue, rights issue, ESOP, employee stock purchase scheme or an issue of sweat equity shares or bonus shares or depository receipts issued in a country outside India or foreign securities.

The provisions of preferential allotment are laid under section 62(1)(c) read with Rule 13 of Chapter IV- The Companies (Share Capital and Debentures) Rules, 2014. This further leads us to follow provisions of Section 42 read with Rule 14 of the Chapter III-Companies (Prospectus and Allotment of Securities) Rules, 2014, which deals with private placement. Hence, for any preferential offer, we need to compulsorily follow the provisions of private placement. Further, listed companies have to comply with the provisions of the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 for the preferential allotment. Listed companies may also raise funds by way of qualified institutional placement. Qualified institutional placement is the special type of the preferential allotment made only to the qualified institutional buyers (QIB).

SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 is applicable for preferential allotment in case of listed companies. Listed companies in addition to Companies Act, 2013 also need to follow these regulations. Some of its important features have been mentioned below:

Sl. No.	Particulars	Description
1	Definition of preferential issue	It means an issue of specified securities by a listed issuer to any select person or group of persons on a private placement basis. It does not include an offer of specified securities made through a public issue, rights issue, bonus issue, employee stock option scheme, employee stock purchase scheme or qualified institutions placement or an issue of sweat equity shares or depository receipts issued in a country outside India or foreign securities.
2	Preliminary conditions	A listed company can make preferential issue only if following conditions are satisfied: a) a special resolution has been passed by its shareholders; b) all the equity shares, if any, held by the proposed allottees in the issuer are in dematerialised form; c) the issuer is in compliance with the conditions for continuous listing of equity shares as specified in the listing agreement with the recognised stock exchange where the equity shares of the issuer are listed; d) the issuer has obtained the Permanent Account Number of the proposed allottees.
3	Restriction	The issuer shall not make preferential issue of specified securities to any person who has sold any equity shares of the issuer during the six months preceding the relevant date.
4	Allotment	Allotment pursuant to the special resolution shall be completed within a period of fifteen days from the date of passing of such resolution

FUNDING THROUGH OPTIONS OR SECURITIES WITH DIFFERENTIAL RIGHTS

Indian companies are allowed to issue derivatives or options plus the shares and quasi-equity instruments with differential rights as to dividend and/or voting. Companies may also issue non-voting shares or the shares with differential voting rights to shareholders of Transferor Company. Such issue gives companies an additional source of fund without interest cost and without the obligation to repay, as these are other forms of the equity capital.

The promoters of the companies may be interested in such form of consideration as it does not impose any kind of obligation and there is no loss/dilution of control in case of non-voting shares.

Option is a derivative contract: An option gives the holder the right but not the obligation to buy or sell something in the future. There are two types of Options:

1. **Put option-** is one which gives holder the right to sell particular number of shares (or any other commodity) at a given price and typically one buys put options, if the price of the stock is expected to decline.
2. **Call option-** gives the holder the right to buy the shares at a predetermined period of time and at a predetermined price. Typically, one buys call options if the price of the underlying stock is expected to rise.

Definition given by the Securities Contracts (Regulation) Act, 1956 (SCRA): The term derivative has been defined under section 2(ac) in Securities Contracts (Regulation) Act, 1956 as follows:

a) a security derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences or any other form of security;
b) a contract which derives its value from the prices, or index of prices, of underlying securities.

c) commodity derivatives; and
d) such other instruments as may be declared by the Central Government to be derivatives.

Further in terms of section 2(d) of the Securities Contracts (Regulation) Act, 1956 "option in securities" means a contract for the purchase or sale of a right to buy or sell, or a right to buy and sell, securities in future, and includes a teji, a mandi, a teji mandi, a galli, a put, a call or a put and call in securities.

Section 20 of the SCRA which had dealt with prohibition of options in securities had been omitted by the Securities Laws (Amendment) Act, 1995. It means that the options in securities were permitted after the omission of the Section 20 of SCRA.

SECURITIES WITH DIFFERENTIAL RIGHTS

Section 48 of the Companies Act, 2013 deals with the variation of shareholders' rights. This section deals with the procedure involved, when a company intends to vary rights attached with any class of shareholders. The features have been explained below:

1. **Approval of class of shareholders -** The rights attached to the shares of any class may be varied with the consent in writing of the holders of not less than three-fourths of the issued shares of that class or by means of a special resolution passed at a separate meeting of the holders of the issued shares of that class —
   a) if provision with respect to such variation is contained in the memorandum or articles of the company; or
   b) in the absence of any such provision in the memorandum or articles, if such variation is not prohibited by the terms of issue of the shares of that class
2. **Impact on rights of other class -** The section provides that if variation by one class of shareholders affects the rights of any other class of shareholders, the consent of three-fourths of such other class of shareholders shall also be obtained and the provisions of this section shall apply to such variation.
3. **Cancellation of variation -** Variation may be cancelled if, holders of not less than ten per cent of the issued shares of a class did not consent to such variation or vote in favour of the special resolution for the variation. They may apply to the Tribunal to cancel the variation, and where any such application is made, the variation shall not have effect unless and until it is confirmed by the Tribunal. The decision of the Tribunal on any such application shall be binding on the shareholders. The company shall, within thirty days of the date of the order of the Tribunal, file a copy thereof with the Registrar.

EQUITY SHARES WITH DIFFERENTIAL RIGHTS:

Companies may issue equity shares with differential rights as to dividend, voting or otherwise in compliance with Rule 4 of the Companies (Share Capital and Debentures) Rules, 2014 Some of its important features are listed below:

Sl. No.	Particulars	Description
1	Authority to issue	The articles of association of the company authorizes the issue of shares with differential rights.
2	Approval of shareholders	The issue of shares is authorized by an ordinary resolution passed at a general meeting of the shareholders: However, where the equity shares of a company are listed on a recognized stock exchange, the issue of such shares shall be approved by the shareholders through postal ballot.
3	Impact on postissue capital	The shares with differential rights shall not exceed seventy-four per cent of the total post-issue paid up equity share capital including equity shares with differential rights issued at any point of time.
4.	No default in statutory filings	The company has not defaulted in filing financial statements and annual returns for three financial years immediately preceding the financial year in which it is decided to issue such shares
5	No default in payment of statutory dues	The company has no subsisting default in the payment of a declared dividend to its shareholders or repayment of its matured deposits or redemption of its preference shares or debentures that have become due for redemption or payment of interest on such deposits or debentures or payment of dividend.
6	No default in repayment of borrowings	The company has not defaulted in payment of the dividend on preference shares or repayment of any term loan from a public financial institution or State level financial institution or scheduled Bank that has become repayable or interest payable thereon

		or dues with respect to statutory payments relating to its employees to any authority or default in crediting the amount in Investor Education and Protection Fund to the Central Government. However, a company may issue equity shares with differential rights upon expiry of five years from the end of the financial Year in which such default was made good.
7	No penalization	The company has not been penalized by Court or Tribunal during the last three years of any offence under the Reserve Bank of India Act, 1934, the Securities and Exchange Board of India Act, 1992, the Securities Contracts Regulation Act, 1956, the Foreign Exchange Management Act, 1999 or any other special Act, under which such companies being regulated by sectoral regulators
8	No conversion	The company shall not convert its existing equity share capital with voting rights into equity share capital carrying differential voting rights and vice versa.
9	Disclosure in Board report	The holders of the equity shares with differential rights shall enjoy all other rights such as bonus shares, rights shares etc., which the holders of equity shares are entitled to, subject to the differential rights with which such shares have been issued.
10	Register of Members	Register of Members shall contain all the relevant particulars of such shares along with details of the shareholders.

FUNDING THROUGH EXTERNAL COMMERCIAL BORROWINGS (ECBs) RECEIPTS

ECBs are commercial loans raised by eligible resident entities from recognised non-resident entities and should conform to parameters such as minimum maturity, permitted and non-permitted end-uses, maximum all-in-cost ceiling, etc. The parameters apply in totality and not on a standalone basis. The framework for raising loans through ECB comprises the following three tracks:

- **Track I:** Medium term foreign currency denominated ECB with minimum average maturity of 3/5 years.
- **Track II:** Long term foreign currency denominated ECB with minimum average maturity of 10 years.
- **Track III:** Indian Rupee (INR) denominated ECB with minimum average maturity of 3/5 years.

Various types of ECB: ECBs can be raised as:

1. Loans, e.g., bank loans, loans from equity holder, etc.
2. Capital market instruments, e.g. (a) Securitized instruments (e.g. floating rate notes/fixed rate bonds/non-convertible, optionally convertible or partially convertible preference shares/debentures) (b) FCCB (c) FCEB
3. Buyers' credit/suppliers' credit.
4. Financial lease. However, ECB framework is not applicable in respect of the investment in non-convertible debentures (NCDs) in India made by Registered Foreign Portfolio Investors (RFPIs).

AVAILABLE ROUTES FOR RAISING ECB:

Under the ECB framework, ECBs can be raised either under the automatic route or under the approval route.

For the automatic route, the cases are examined by the Authorised Dealer Category-I (AD Category-I) banks.

Under the approval route, the prospective borrowers are required to send their requests to the RBI through their ADs for examination.

While the regulatory provisions are mostly similar, there are some differences in the form of amount of borrowing, eligibility of borrowers, permissible end-uses, etc. under the two routes. Except FCEBs which can be issued only under the approval route, all other forms of borrowings mentioned above can be raised both under automatic and approval routes.

Eligible Borrowers: The list of entities eligible to raise ECB under the three tracks is set out in the following table

Track I	Track II	Track III
I. Companies in manufacturing and software development sectors. II. Shipping and airlines companies. III. Small Industries Development Bank of India (SIDBI).	I. All entities listed under Track I. II. Real Estate Investment Trusts (REITs) and Infrastructure Investment Trusts (INVITs) coming under the regulatory framework of the	I. All entities listed under Track II. II. AllNon-Banking Financial Companies (NBFCs) coming under the regulatory purview of the Reserve Bank. III. NBFCs-Micro Finance Institutions (NBFCs- MFIs), Not for Profit companies registered under the Companies Act, 1956/2013, Societies, trusts and

IV. Units in Special Economic Zones (SEZs). V. Export Import Bank of India (Exim Bank) (only under the approval route). VI. Companies in infrastructure sector, Non-Banking Financial Companies - Infrastructure Finance Companies (NBFCIFCs), NBFCs-Asset Finance Companies (NBFC - AFCs) , Holding Companies and Core Investment Companies (CICs). Also, Housing Finance Companies, regulated by the National Housing Bank, Port Trusts constituted under the Major Port Trusts Act, 1963 or Indian Ports Act, 1908.	Securities and Exchange Board of India (SEBI).	cooperatives (registered under the Societies Registration Act, 1860, Indian Trust Act, 1882 and State- level Cooperative Acts/ Multi- level Cooperative Act/State-level mutually aided Cooperative Acts respectively), Non-Government Organisations (NGOs) which are engaged in micro finance activities. IV. Companies engaged in miscellaneous services viz. research and development (R&D), training (other than educational institutes), companies supporting infrastructure, companies providing logistics services. V. (v) Developers of Special Economic Zones (SEZs)/ National Manufacturing and Investment Zones (NMIZs).

ECB FRAMEWORK

It has been decided, in consultation with the Government of India, to rationalise the extant framework for ECB and Rupee Denominated Bonds in light of the experience gained to improve the ease of doing business. The new framework is instrument neutral and would further strengthen the AML/CFT framework. Salient features of the revised ECB guidelines are as under:

I. **Merging of Tracks:** Merging of Tracks I and II as "Foreign Currency denominated ECB" and merging of Track III and Rupee Denominated Bonds framework as "Rupee Denominated ECB".

II. **Eligible Borrowers:** This has been expanded to include all entities eligible to receive FDI. Additionally, Port Trusts, Units in SEZ, SIDBI, EXIM Bank, registered entities engaged in micro-finance activities, viz., registered not for profit companies, registered societies/trusts/cooperatives and non-government organisations can also borrow under this framework.

III. **Recognised Lender:** The lender should be resident of FATF or IOSCO compliant country. Multilateral and Regional Financial Institutions, Individuals and Foreign branches/subsidiaries of Indian banks can also be lenders.

IV. **Minimum Average Maturity Period (MAMP):** MAMP will be 3 years for all ECBs. However, for ECB raised from foreign equity holder and utilised for specific purposes, as detailed in the Annex, the MAMP would be 5 years. Similarly, for ECB up to USD 50 million per financial year raised by manufacturing sector, which has been given a special dispensation, the MAMP would be 1 year.

V. **Late Submission Fee (LSF) for delay in Reporting:** Any borrower, who is otherwise in compliance of ECB guidelines, except for delay in reporting drawdown of ECB proceeds before obtaining LRN or Form ECB 2 returns, can regularize the delay by payment of LSF as per the laid down procedure.

MASALA BONDS

In 2017, RBI revised the norms for masala bonds. Masala bonds are rupee denominated bonds sold to offshore investors, who take the foreign exchange risk to earn higher interest rates compared with dollar- denominated overseas bond sales. After a review, the RBI declared that from October 3, 2017 masala bonds will no longer form part of the limit for Foreign Portfolio Investment (FPI) investments in corporate bonds and it will form part of ECB.

The proceeds of these bonds can be used for all purposes except for the following:

a) Real estate activities other than for development of integrated township/affordable housing projects;
b) Investing in capital market and using the proceeds for equity investment domestically;
c) Activities prohibited as per the Foreign Direct Investment (FDI) guidelines;
d) On-lending to other entities for any of the above objectives; and
e) Purchase of land.

DEPOSITORY RECEIPT

'Depository Receipt' means a foreign currency denominated instrument, whether listed on an international exchange or not, issued by a foreign depository in a permissible jurisdiction on the back of permissible securities issued or transferred to that foreign depository and deposited with a domestic custodian and includes 'Global Depository Receipt' as defined in section 2(44) of the Companies Act, 2013 as any instrument in the form of a depository receipt, by whatever name called, created by a foreign depository outside India and authorised by a company making an issue of such depository receipts.

The rules relating to the GDR are contained in Depository Receipts Scheme, 2014, which was issued vide Notification No. F. No. 9/1/2013-ECB dated 21st October, 2014.

Eligibility:

1. The following persons are eligible to issue or transfer permissible securities to a foreign depository for the purpose of issue of depository receipts:
   a) any Indian company listed or unlisted, private or public;
   b) any other issuer of permissible securities;
   c) any person holding permissible securities; which has not been specifically prohibited from accessing the capital market or dealing in securities.
2. Unsponsored depository receipts on the back of listed permissible securities can be issued only if such depository receipts:
   a) give the holder the right to issue voting instructions; and
   b) are listed on an international exchange.

Issue: The following is the procedure for the issue of depository receipts:

- A foreign depository may issue depository receipts by way of a public offering or private placement or in any other manner prevalent in a permissible jurisdiction;
- An issuer may issue permissible securities to a foreign depository for the purpose of issue of depository receipts by any mode permissible for issue of such permissible securities to investors;
- The holders of permissible securities may transfer permissible securities to a foreign depository for the purpose of the issue of depository receipt, with or without the approval of issue of such permissible securities through transactions on a recognized stock exchange, bilateral transactions or by tendering through a public platform.

Limits: The aggregate of permissible securities which may be issued or transferred to foreign depositories for issue of depository receipts, along with permissible securities already held by persons resident outside India, shall not exceed the limit on foreign holding of such permissible securities under the Foreign Exchange Management Act, 1999.

Pricing: The permissible securities shall not be issued to a foreign depository for the purpose of issuing depository receipts at a price less than the price applicable to a corresponding mode of issue of such securities to domestic investors under the applicable laws.

FUNDING THROUGH FINANCIAL INSTITUTIONS AND BANKS

- Banks and Financial Institutions may provide end-to-end advisory services to the client in mergers and acquisitions involving target search, analysis of the target and potential synergies for the client, value analysis, pricing strategy, review of the transaction documents, negotiation support, documentation and closure of the transaction.
- Funding of a merger or takeover with the help of loans from financial institutions, banks, etc. has its own merits and demerits.
- Takeover of a company could be achieved in several ways and while deciding the takeover of a going concern, there are matters such as the capital gains tax, stamp duty on immovable properties and the facility for carrying forward of accumulated losses.
- With parameters playing a critical role, the takeover should be organized in such a way that best suits the facts and circumstances of the specific case and also it should meet the immediate needs and objectives of the management.
- If borrowings from domestic banks and financial institutions have been identified as the inevitable choice, all the financial and managerial information must be placed before the banks and financial institutions for the purpose of getting the necessary resources.

The advantage of funding is that the period of such funds is definite which is fixed at the time of taking such loans. Therefore, the Board of the company is assured about continued availability of such funds for the predetermined

period. On the negative side, the interest burden on such loans is quite high which must be kept in mind by the Board while deciding to use borrowed funds from financial institution. Such funding should be thought of and resorted to only when the Board is sure that the merged company or the target company will give adequate returns i.e., timely payment of periodical interest on such loans and re-payment of the loans at the end of the term for which such loans have been taken.

FUNDING THROUGH REHABILITATION FINANCE

- The Insolvency and Bankruptcy Code, 2016 (IBC) seeks to consolidate the existing multiple framework by creating a single law for insolvency and bankruptcy. This law is a one stop solution for insolvency of corporates, individuals, partnerships and other entities. It received the President's assent on 28 May, 2016 and is operation from December 2016.
- With the enactment of The Sick Industrial Companies (Special Provisions) Repeal Act, 2003, the Sick Industrial Companies (Special Provisions) Act, 1985 came to an end with effect from the 1st December, 2016 and with this BIFR and AIFR also stand dissolved.
- Section 252 of the Insolvency and Bankruptcy Code, 2016, which has been notified w.e.f. November 1st, 2016 states that the Sick Industrial Companies (Special Provisions) Repeal Act, 2003 shall be amended in the manner specified in the Eighth Schedule.
- Part II of the Code consisting of Sections 4 to 77 deals with the Insolvency Resolution and Liquidation for Corporate Persons. The Code has become a potential generator for mergers and acquisitions as it opens up stressed asset acquisition opportunities and borrowings/internal accruals may be used as rehabilitation financing by the investors/ resolution applicants to effect the acquisition.

FUNDING THROUGH LEVERAGED BUYOUTS (LBOs)

Leverage is an investment strategy of using borrowed money, specifically, the use of various financial instruments or borrowed capital to increase the potential return of an investment. When one refers to something (a company, a property or an investment) as "highly leveraged," it means that item has more debt than equity.

A Leveraged Buyout (LBO) is the acquisition of a company in which the buyer puts up only a small amount of money and borrows the rest. The buyer can achieve this desirable result because the targeted acquisition is profitable and throws off ample cash used to repay the debt. The expectation with leveraged buyouts is that the return generated on the acquisition will more than outweigh the interest paid on the debt, hence making it a very good way to experience high returns whilst only risking a small amount of capital

In 2000, a landmark deal was witnessed in the Indian corporate history, when Tata Tea acquired the UK brand Tetley for 271 million pounds. This deal was the largest cross border acquisition by any India Company. Apart from the size of the deal, what made it particularly special was the fact that it was the first ever leveraged buyout by any Indian company.

Structure of the deal: Tata Tea created a Special Purpose Vehicle (SPV)-christened Tata Tea (Great Britain) to acquire all the properties of Tetley. The SPV was capitalised at 70 mn pounds, of which Tata tea contributed 60 mn pounds; this included 45 mn pounds raised through a GDR issue. The US subsidiary of the company, Tata Tea Inc. had contributed the balance 10 mn pounds.

What Companies Make Good LBO Targets?

Considering that the buyer will put a large amount of debt on the company, it is critical that the company be stable and able to pay off its future debts otherwise it will likely default and go into bankruptcy. With that in mind, below are some types of companies that make good targets:

- Stable, strong cash flow business.
- Company with low debt levels.
- Non-cyclical businesses.
- Companies with large economic moats.
- Companies with good existing management teams.
- Companies with a large asset base that can be used for collateral.
- Distressed companies in good industries.

MINORITY AND 'MINORITY INTEREST' UNDER COMPANIES ACT, 2013

The term "minority" and "minority interest" are not clearly defined in the Companies Act, 2013 or rules made thereunder. However, in various provisions of the Act, members are given various collective statutory rights which can be exercised even if they are not in majority (i.e. holding more than 50% of the numbers/shares/voting rights). In another way, minority can be identified as those members who are not in the control or management of the affairs of the company.

The following are some of the provisions where minority interest is recognised in the Act:

1. At present as per Section 244 of the Companies Act, 2013, in case of a company having share capital, not less than 100 members or not less than 1/10th of total number of members, whichever is less or any member or members holding not less than 1/10th of issued share capital have the right to apply to NCLT in case of oppression and mismanagement. In case of companies not having share capital, not less than 1/5th of total number of members has the right to apply.
2. To reflect the interest of the "Minority", 10% criteria in case of companies having share capital and 20% criteria in the case of other companies is provided for in the Act. To help the Minority shareholders, proviso to Section 244(1) of the Companies Act, 2013 empowers NCLT to allow application by shareholders who are not otherwise eligible (i.e. holding less than 10%-20% as aforesaid). This really opens up possibility of minority actions in deserving cases of oppression and mismanagement.

Oppression and Mismanagement

Although Companies Act, 2013 gives power to the voting decision made by the majority shareholders in general meetings but at the same time it also empowers the minority shareholders by protecting their interests and rights. Section 241 - 246 of the Act has laid down such provisions which will be discussed in detail in the following paras.

Oppression: Remedy against oppression is available in section 241(1)(a) of the Act. Oppression may be defined as conducting the company's affairs in a manner prejudicial to public interest or in a manner oppressive to any member or members or prejudicial to the interests of the company.

Mismanagement: Remedy against mismanagement is available in Section 241(1)(b) of the Act. Mismanagement may be defined as any change which takes place in the management or control of the Company, which will not be in the interests of members. Few more points relevant in this context are:

1. If an application is made to the Tribunal, then it may waive all or any of the requirements specified in the aforementioned table for an eligible member.
2. Any share or shares held by two or more persons jointly, shall be counted only as one member.
3. Any one or more members may make the application on behalf of other members.

CLASS ACTION

On June 1, 2016, the Ministry of Corporate Affairs, notified section 245 of the Companies Act, 2013, enlisting the provisions of class action suits in India. A class action suit is one where the shareholders or depositors of a company collectively institute a suit against the company in Tribunal.

The requirement for this provision was felt in 2009 when the Satyam scam occurred. It was felt class action suits will safeguard the interests of shareholders, whenever the company or its directors participate in any fraudulent, unlawful act, or commit an act which is against the interest of the shareholders. In fact, such suits would be the most effective remedy for raising the voice of the company's shareholders.

The legal framework for class action suits is covered in section 245 of Companies Act, 2013 as well as National Company Law Tribunal Rules, 2016. After going through section 241 and 245 of the Act, we can question as to why a separate provision was required for class action, although both the provisions look similar Section 245 is much wider in scope and a major difference is the option of getting monetary compensation or damages owing to the fraudulent actions of a company.

The provisions of class action come under the head of oppression and mismanagement but there are some differences between the remedies sought under class action under Section 245 and under the general provisions of oppression and mismanagement under Section 242. While under Section 242 the NCLT can order acquisition of the company's shares, restrict transferability or allotment of shares, removal of managing director and other directors of the company, in class action, the orders will mainly be restraining orders. An added advantage of the provisions on class action suit is that they cover depositors also.

PURCHASE OF MINORITY SHAREHOLDING HELD IN DEMAT FORM

Rule 26A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 provides that:

1. The company shall within two weeks from the date of receipt of the amount equal to the price of shares to be acquired by the acquirer, under section 236 of the Act, verify the details of the minority shareholders holding shares in dematerialised form.
2. After verification the company shall send notice to such minority shareholders by registered post or by speed post or by courier or by email about a cut-off abcaus.in date, which shall not be earlier than one month after the date of sending of the notice, on which the shares of minority shareholders shall be debited from their account and credited to the designated DEMAT account of the company, unless the shares are credited in the account of the acquirer, as specified in such notice, before the cut-off date.
3. A copy of the notice served to the minority shareholders shall also be published simultaneously in two widely circulated newspapers (one in English and one in vernacular language) in the district in which the registered office of the company is situated and also be uploaded on the website of the company, if any.
4. The company shall inform the depository immediately after publication of the notice regarding the cut-off date and submit the following declarations stating that:
   a) the corporate action is being effected in pursuance of the provisions of section 236 of the Act; It may be noted that Corporate Action means any action taken by the company relating to transfer of shares and all the benefits accruing on such shares namely, bonus shares, split, consolidation, fraction shares and right issue to the acquirer.
   b) the minority shareholders whose shares are held in dematerialised form have been informed about the corporate action a copy of the notice served to such shareholders and published in the newspapers to be attached;
   c) the minority shareholders shall be paid by the company immediately after completion of corporate action;
   d) any dispute or complaints arising out of such corporate action shall be the sole responsibility of the company.
5. For the purposes of effecting transfer of shares through corporate action, the Board shall authorise the Company Secretary, or in his absence any other person, to inform the depository and to submit the documents as may be required under the said sub-rule.
6. Upon receipt of information, the depository shall make the transfer of shares of the minority shareholders, who have not, on their own, transferred their shares in favour of the acquirer, into the designated DEMAT account of the company on the cut-off date and intimate the company.
7. After receiving the intimation of successful transfer of shares from the depository the company shall immediately disburse the price of the shares so transferred, to each of the minority shareholders after deducting the applicable stamp duty, which shall be paid by the company, on behalf of the minority shareholders, in accordance with the provisions of the Indian Stamp Act, 1899 (2 of 1899).
8. Upon successful payment to the minority shareholders, the company shall inform the depository to transfer the shares of such shareholders, kept in the designated DEMAT account of the company, to the DEMAT account of the acquirer. Explanation. -The company shall continue to disburse payment to the entitled shareholders, where disbursement could not be made within the specified time, and transfer the shares to the DEMAT account of acquirer after such disbursement.
9. In case, where there is a specific order of Court or Tribunal, or statutory authority restraining any transfer of such shares and payment of dividend, or where such shares are pledged or hypothecated under the provisions of the Depositories Act, 1996 (22 of 1996), the depository shall not transfer the shares of the minority shareholders to the designated DEMAT account of the company under sub-rule (6). Explanation. -For the purposes of this rule, if "cut-off date" falls on a holiday, the next working day shall be deemed to be the "cut-off date".

Determination of price for purchase of minority shareholding

Rule 27 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 provides that for the purposes of sub-section (2) of section 236 of the Act, the registered valuer shall determine the price (hereinafter called as offer price) to be paid by acquirer, person or group of persons referred to in sub-section (1) of section 236 of the Act for purchase of equity shares of the minority shareholders of the company, in accordance with the following rules:

1. In case of a listed company;
   I. The offer price shall be determined in the manner as may be specified by the Securities and Exchange Board of India under the relevant regulations framed by it, as may be applicable; and

II. The registered valuer shall also provide a valuation report on the basis of valuation addressed to the board of directors of the company giving justification for such valuation.

2. In the case of an unlisted company and a private company,
   I. the offer price shall be determined after taking into account the following factors:-
   a) the highest price paid by the acquirer, person or group of persons for acquisition during last twelve months;
   b) the fair price of shares of the company to be determined by the registered valuer after taking into account valuation parameters including return on net worth, book value of shares, earning per share, price earning multiple vis-à-vis the industry average, and such other parameters as are customary for valuation of shares of such companies; and
   II. the registered valuer shall also provide a valuation report on the basis of valuation addressed to the board of directors of the company giving justification for such valuation.

PROTECTION OF MINORITY INTEREST

Section 232(3)(e) authorises the Tribunal to make provision for any person who dissent from the scheme. Thus, the Tribunal has to play a very vital role. It is not only a supervisory role but also a pragmatic role which requires the forming of an independent and informed judgment as regards the feasibility or proper working of the scheme and making suitable modifications in the scheme and issuing appropriate directions with that end in view **[Mafatlal Industries Ltd. In re. (1995) 84 Comp. Cas. 230 (Guj.)]**.

The Tribunal considers minority interest while approving the scheme of merger

As per existing provisions of the Act, approval of Tribunal is required in case of corporate restructuring (which, inter-alia, includes, mergers/amalgamations, etc.) by a company. The Scheme is also required to be approved by shareholders, before it is filed with the Tribunal. The scheme is circulated to all shareholders along with statutory notice of the court convened meeting and the explanatory statement under section 230(3) read with Rule 6 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 of the Act for approving the scheme by shareholders.

The notice of hearing of petition (in form CAA-2) is also required to be published in the newspaper. As per proviso to Section 230(4) of the Act, members holding 10% or more of the shareholding are entitled to file their objection before NCLT as a matter of right.

FAMILY HOLDINGS AND THEIR MANAGEMENT

For any family-owned business, transition is a crucial aspect that every founder or owner should keep in mind while pursuing the strategic business objectives of growth, diversification, expansion or sale. In the present context, passing the baton is clearly a priority for family business owners since the succession can make or break a family business and can have serious implications on the family as well. Thus, a structured approach in determining the transition plan and its communication to stakeholders is essential for managing the succession and survival of the family business and family from generation to generation. Whether selling the business, keeping the business in the family or transitioning leadership to identified heirs or a non-family stakeholder, the issues are immense and certainly not simple. As a result, 95% of family businesses do not survive the third generation of ownership.

In terms of ownership and governance protocols for family members, typically, a trust or similar entity form becomes pivotal to the succession plan since it can provide a good balance between owners' desires, professional management, responsible business decision matrix and healthy family dynamics. **The following are some of the key benefits of succession planning under a trust structure for continuing business legacy and smooth transition of the business from the hands of one generation to another:**

1. **Continuity planning:** Consolidation of ownership and control under a trust allows the founder/owner and the family to set a clear vision and ensure commitment from the next generation of family members. This results in continued planning from one generation to another, resulting in harmony between goals, objectives, targets, etc., between generations, thereby reducing conflicting objectives/interests between family members.
2. **Generational change:** Family-owned firms can struggle to keep pace with global mega trends like demographic shifts and digital technology without the involvement of the new generation. At the same time, the current generation may not always have confidence in the ability of the new generation to take over the business, and may also have limitations relating to their ideas of change and growth. This calls for professionalization of the family firm by introducing external talent, leading to better governance and a more rigorous decision-making process in areas like finance, wealth management and personal expenses.

3. **Conflict management:** A trust would lay out specific protocols governing decision making and, in the case of any difference of opinion or deadlock, the process to manage the conflict. This ensures that the business does not suffer even during a phase where family members are not aligned.
4. **Security of family/personal assets:** A trust structure can also facilitate ring-fencing of family assets, protecting them from a creditor's claims as well as providing safeguards against claims from family members upon disability, divorce/ partition, etc.
5. **Pooling and simplicity:** A trust also serves as a means for pooling of assets and funds un der a common control. This can provide heirs the benefit of property without loss of control and helps to avoid the probate or court process in the event of death. It can also simplify asset holding for legal heirs in multiple jurisdictions.

CASE STUDIES/JUDICIAL PRONOUNCEMENTS

There have been occasions when the minority shareholders have raised objections and have succeeded in preventing the implementation of a scheme of arrangement. A lone minority shareholder of **Tainwala Polycontainers Ltd (TPL), Dinesh V Lakhani,** had apparently forced the company to call off its merger plans with Tainwala Chemicals and Plastics (India) Ltd. (TCPL). Lakhani had opposed the proposed merger on several grounds including allegations of willful suppression of material facts and malafide intention of promoters in floating separate companies (TPL and TCPL)

In case of Parke-Davis India Limited

In 2003, Parke-Davis India Limited and Pfizer Limited were considering implementation of a Scheme of Merger. The Minority shareholders of Parke-Davis India Ltd objected to the Scheme on the grounds that the approval from the requisite majority as prescribed under the Companies Act, 1956 had not been obtained. They filed an urgent petition before the division bench of the Bombay High Court. The division bench of the Bombay High Court by its order executed a stay order in March 2003 restraining the company from taking further steps in the implementation of the scheme of amalgamation, which was further extended till September 2003. The dissenting shareholders filed a Special Leave Petition with the Supreme Court. The turmoil came to an end when the Supreme Court dismissed the petition filed by the shareholders. Parke- Davis then proceeded to complete the implementation of the scheme of amalgamation with Pfizer.

In case of Tomco with HLL Merger

Similarly, in the case of the merger of Tomco with HLL, the minority shareholders put forward an argument that, as a result of the amalgamation, a large share of the market would be captured by HLL. However, the court turned down the argument and observed that there was nothing unlawful or illegal about it.

Fair and reasonable Scheme made in good faith

Any scheme which is fair and reasonable and made in good faith will be sanctioned if it could reasonably be supported by sensible people to be for the benefit to each class of the members or creditors concerned.

In **Sussex Brick Co. Ltd., Re, (1960)** it was held, inter alia, that although it might be possible to find faults in a scheme that would not be sufficient ground to reject it. It was further held that in order to merit rejection, a scheme must be obviously unfair, patently unfair, unfair to the meanest intelligence.

It cannot be said that no scheme can be effective to bind a dissenting shareholder unless it complies with the basic requirements to the extent of 100 per cent. It is the consistent view of the Courts that no scheme can be said to be fool-proof and it is possible to find faults in a particular scheme but that by itself is not enough to warrant a dismissal of the petition for sanction of the scheme. If the court is satisfied that the scheme is fair and reasonable and in the interests of the general body of shareholders, the court will not make any provision in favour of the dissentients. For such a provision is not a sine qua non to sanctioning a fair and reasonable scheme, unless any special case is made out which warrants the exercise of court's discretion in favour of the dissentients. **[Re, Kami Cement & Industrial Co. Ltd., (1937)].**

Minority Protection:

Majority Rule: In order to redress a wrongdoer to a company or to recover monies or damages alleged to be due to the company, the action should prima facie be brought by the company itself. **[Foss v. Harbottle [1843]]**

Exception to the Rule:

- **Ultra vires acts:** If the majority of shares are controlled by those against whom the relief is sought, the complaining shareholders may sue in their own names, but must show that the acts complained of are of a fraudulent character or beyond the powers of the company. There is no need to consult the views of the majority before instituting the suit, if from the allegations in the plaint it would appear that the act complained of was ultra vires. **[Dhaneswari Cotton Mills Ltd. v. Nilkamal Chakravarthy [1937] 7 Comp. Cas. 417 (Cal).]**
- **Fraud on Minority:** Where a minority shareholder files a suit alleging fraud, suit should be tried even if majority has affirmed the transactions. [Cook v. Deeks [1916]]
- **Wrongdoer in Control:** Where majority is wrongdoer and pocket property of company, an individual shareholder has right to file a suit. **[Menier v. Hooper's Telegraph Works [1874]]**
- A minority of shareholder in saddle of power cannot be allowed to pursue a policy of venturing into a litigation to which the majority of the shareholders were opposed. **[Life Insurance Corp of India v. Escorts Ltd [1986]]**

Oppression:

- Mere lack of confidence between majority shareholders and minority shareholders would not be enough unless lack of confidence springs from oppression of a minority by a majority in management of company's affairs. **[Shanti Prasad Jain v. Kainga Tubes Ltd. [1965]]**
- A series of illegal acts can lead to conclusion that they are part of same oppressive transaction. **[Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holdings Ltd. [1981]]**
- When a complaint is made as regards violations of statutory or contractual right, shareholder may initiate a proceeding in a civil court but a proceeding under section 397 would be maintainable only when an extraordinary situation is bought to notice of court keeping in view wide and far-reaching power of court in relation to affairs of the company and in this situation, it is necessary that alleged illegality in conduct of majority shareholders is pleaded and proved with sufficient clarity and precision. **[Sangramsingh P. Gaekwad v. Shantadevi P. Gaekwad [2005]]**

LESSON 4 - PROCESS OF M&A TRANSACTIONS

MERGER AND ACQUISITION

Process of Merger & Acquisition involves corporate control, strategy, corporate finance and management. It involves consolidation of companies i.e. business combination, division and demerger of two or more companies. The merger and amalgamation requires various regulatory approvals and procedures as enunciated in the Companies Act, 2013. Merger being a strategy, it has to be object oriented and it dwells upon the concept of synergy, which means value of two companies together will be more than of an individual company. Merger & Acquisition could be by way of business purchase/share purchase agreement or by way of sanction of Scheme of Arrangement through the court route.

Merger & Acquisition process is normally proceeded by formulation of strategy, identification of cost benefit analysis, carrying out due diligence, conducting valuation and considering the aspects of stamp duty and other applications. Moreover, the integration issue after the merger exercise is also to be taken care of.

PREREQUISITES OF MERGER AND ACQUISITION

1. **Due Diligence:** It refers to the investigating effort made to gather all relevant facts and information that can influence a decision to enter into a transaction or not. Exercising due diligence is not a privilege but an unsaid duty of every party to the transaction. For instance, while purchasing a food item, a buyer must act with due diligence by checking the expiry date, the price, the packaging condition, etc. before paying for the product. It is not the duty of the seller to ask every buyer every time to check the necessary details. M&A due diligence helps to avoid legal hassles due to insufficient knowledge of important information.
2. **Business Valuation:** Business valuation or assessment is the first step of merger and acquisition. This step includes examination and evaluation of both the present and future market value of the target company. A thorough research is done on the history of the company with regards to capital gains, organizational structure, market share, distribution channel, corporate culture, specific business strengths, and credibility in the market.
3. **Planning Exit:** When a company decides to sell its operations, it has to undergo the stage of exit planning. The company has to take firm decision as to when and how to make the exit in an organized and profitable manner. In the process the management has to evaluate all financial and other business issues like taking a decision of full sale or partial sale along with evaluating on various options of reinvestments.
4. **Structuring Business Deal:** After finalizing the merger and the exit plans, the new entity or the take-over company or target company has to take initiatives for marketing and creating innovative strategies to enhance business and its credibility. The entire phase emphasize on structuring of the business deal.
5. **Stage of Integration:** This stage includes both the company coming together with their own parameters. It includes the entire process of preparing the document, signing the agreement, and negotiating the deal. It also defines the parameters of the future relationship between the two.

DUE DILIGENCE

Diligence: It means prudence; vigilant activity; attentiveness; or care, of which there are infinite shades, from the slightest momentary thought to the most vigilant anxiety. (**People v. Hewitt)**

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case. **(Perry v. Cedar Falls)**

Due diligence is an investigation of a business or person prior to signing a contract, or an act with a certain standard of care. It can be a legal obligation, but the term will more commonly apply to voluntary investigations. A common example of due diligence in various industries is the process through which a potential acquirer/ investor evaluates a target company including its assets for an acquisition. The theory behind due diligence holds that performing this type of investigation contributes significantly to informed decision making by enhancing the amount and quality of information available to decision makers and by ensuring that this information is systematically used to deliberate in a reflexive manner on the decision at hand and all its costs, benefits, and risks.

Due diligence is integral to business. It is exercised in a simple over-the-counter transaction or a complicated merger and acquisition transaction. For instance, while acquiring a company, the buyer must do thorough research of the credentials of the company, its market valuation, status of accounts receivables, product and brand involved, position in the debt market, status of legal and statutory compliances, past performance, etc. It is also essential to study the previous financial reports to analyze the company's performance, to check the company background, its promoters, general reputation, and return to the existing shareholders.

TYPES OF DUE DILIGENCE

The different types of Due Diligence may be as follows:

1. **Legal Due Diligence:** Legal Due Diligence is used to ensure that there are no legal issues in buying a business or investing in it. In this, the potential purchaser will review the important legal documents of the target firm such as employment contracts, board meeting minutes, articles and memorandum of association and patents and copyrights or any other property related documents compliance status of the applicable laws etc.
2. **Tax Due Diligence:** This is aimed at ensuring that there are no past tax liabilities in the seller firm that might have materialized due to mistakes or deception and could hold the acquirer liable for it.
3. **IP Due Diligence:** IP due diligence is focused on establishing what rights the company may have in various intellectual property and where it might rely on the intellectual property of another entity. Typical areas of interest are patent, copyright and trademark filings; descriptions of the company's IP protection processes; licensing agreements, IP Assignment document, etc.
4. **Operational Due Diligence:** Operational due diligence (ODD) is the process by which a potential purchaser reviews the operational aspects of a target company during mergers and acquisitions. The ODD review looks at the main operations of the target company and attempts to confirm (or not) that the business plan that has been provided is achievable with the existing operational facilities plus the capital expenditure that is outlined in the business plan.
5. **Commercial Due Diligence:** This aims at understanding the market the target business is operating in. This looks the current market status and the forecast of the market growth in future and the target's position in the market with relation to its competitors. This also involves interaction with the significant customers of the business to understand their opinion about the business.
6. **Information Technology (IT) Due Diligence:** This aims at identifying if there are any IT issues in the target business. This involves into matters such as scalability of systems, robustness of the processes, availability of ERP, IT base and infrastructure, capacity of server, the level of documentation of processes, compliance with the legislation and ability to integrate various systems.
7. **HR Due Diligence:** This aims at understanding the impact of human capital on the proposed deal. This involves review of number and type of manpower, skills, employment records, compensation schemes, HR processes, ongoing HR litigations, effectiveness of the sales force and cultural factors.

MANAGING THE DUE DILIGENCE PROCESS

As due diligence is wholesome exercise that require specialized knowledge, expertise & experience to complete the task in time bound & effective manner, therefore during the due diligence process the following points are worth consideration:

- Constitute a due diligence team comprising of technical, legal, financial and taxation experts, etc.
- Assign the task to each of the member and the co-ordination among the members be supervised by a senior level officer.
- Collect the data of the target company with reference to the:
  - ✓ Corporate records
  - ✓ Promoter's holding
  - ✓ Stockholder information
  - ✓ Important contracts including IP, Sales, Purchase, IT, etc.
  - ✓ Compliance record
  - ✓ HR record
  - ✓ Finance record including access of softwares/ERP, etc.
  - ✓ History of litigation

- ✓ Insurance information
- ✓ Financials and leases.

- Analyse the above information/ statistics, assess the future prospects and the benefit in acquiring with reference to the market size and cutting of the competition.
- If the proposal, found feasible, follow the regulatory requirements as mentioned in the Companies Act, 2013 and the SEBI Regulations, RBI regulations, FDI guidelines & competition laws as applicable.

CONTENTS OF THE DUE DILIGENCE REPORT

The contents of a due diligence report should more or less include certain points which would draw the attention of the intending buyer, viz:

- Comments on the management and organisation,
- Details of key managerial/ technical personnel,
- Details of marketing efforts undertaken,
- Details of financial liabilities and commitments that the intending buyer would have to meet after takeover and which are not disclosed in the audited accounts,
- Deviations from the generally accepted accounting policies/ practices,
- Analysis of major expenditure/costs,
- details of major/critical customers and suppliers,
- Compliance of taxation and other statutory laws as well as status and impact of all litigation in this respect,
- Benefits enjoyed by the intending seller which the intending buyer may lose on takeover and vice versa,
- List of adjustments to the latest financial statements compiled on the basis of all findings, which have an impact on the "price" of the target acquisition to be considered by the intending buyer.
- Number and type of litigations,
- Details of key assets and customers takeaways.

REGULATORY FRAMEWORK FOR MERGER/ AMALGAMATION

The Regulatory framework of Mergers and Amalgamations covers:

1. Companies Act, 2013

Chapter XV of Companies Act, 2013 comprising Sections 230 to 240 contains provisions on Compromises, Arrangements and Amalgamations. The scheme of Chapter XV is as follows:

1. Section 230-231 deals with compromise or arrangements with creditors and members and power of the Tribunal to enforce such a compromise or arrangement.
2. Section 232 deals with mergers and amalgamation including demergers.
3. Section 233 is relating to the merger or amalgamation of small companies or between the holding company and its wholly owned subsidiary (also called fast track mergers)
4. Section 234 deals with amalgamation with foreign company (also called cross border mergers).
5. Section 235 deals with acquisition of shares of dissenting shareholders.
6. Section 236 deals with purchase of minority shareholding.
7. Section 237 contains provisions as to the power of the Central Government to provide for amalgamation of companies in public interest.
8. Section 238 deals with registration of offer of schemes involving transfer of shares.
9. Section 239 deals with preservation of books and papers of amalgamated companies.
10. Section 240 deals with liability of officers in respect of offences committed prior to merger, amalgamation, etc.

2. Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (read with National Company Law Tribunal Rules, 2016)

Rules 3 to Rule 29 contain provisions dealing with the procedure for carrying out a scheme of compromise or arrangement including amalgamation or reconstruction.

3. Income Tax Act, 1961

The Income Tax Act, 1961 covers aspects such as tax relief to amalgamating/amalgamated companies, carry forward of losses, exemptions from capital gains tax, etc. For example, when a scheme of merger or demerger involves the

merger of a loss making company or a hiving-off of a loss making division, it is necessary to check the relevant provisions of the Income Tax Act and the Rules for the purpose of ensuring, inter alia , the availability of the benefit of carrying forward the accumulated losses and setting of such losses against the profits of the Transferor Company.

4. SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

SEBI has notified SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (Listing Regulations) on September 2, 2015. Companies are required to comply with the following:

- Scheme of Arrangement (Regulation11)
- Draft scheme of arrangement & scheme of arrangement (Regulation 37)
- Minimum Public Shareholding (Regulation 38).

5. Indian Stamp Act, 1899

It is necessary to refer to the Indian Stamp Act, 1899 to check the stamp duty payable on transfer of undertaking through a merger or demerger.

6. Competition Act, 2002

The provisions of Competition Act, 2002 and the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 are to be complied with.

PROVISIONS OF THE COMPANIES ACT, 2013

Chapter XV, comprising of sections 230 to 240 read with the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, deals with Compromises, Arrangements and Amalgamations.

SECTION 230 - POWER TO COMPROMISE OR MAKE ARRANGEMENTS WITH CREDITORS AND MEMBERS

1. Application to the Tribunal for convening meetings of members/creditors

Where a company or a creditor or a member of the company proposes a compromise or arrangement between it and its creditors or between it and its members or with any class of the creditors or any class of members, the company or the creditor or member, or where the company is being wound-up, the liquidator may make an application to the Tribunal. On such application, the Tribunal may order a meeting of the creditors or members or any class of them as the case may be and such meetings shall be called, held and conducted in such manner as the Tribunal may direct.

When a company is ordered to be wound-up, the liquidator is appointed and once winding-up commences liquidator takes charge of the company in all respects and therefore it is he who could file any application of any compromise or arrangement in the case of a company which is being wound-up. A company which is being wound-up would mean a company in respect of which the court has passed the winding-up order.

2. Disclosures to the Tribunal by applicant

The company or any other person, who makes an application shall disclose by affidavit to the Tribunal:

a) all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;

b) reduction of share capital of the company, if any, included in the compromise or arrangement;

c) any scheme of corporate debt restructuring consented to by not less than seventy-five percent of the secured creditors in value, including—

   I. a creditor's responsibility statement in the prescribed form;

   II. safeguards for the protection of other secured and unsecured creditors;

   III. report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;

   IV. where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and

   V. a valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

3. Notice of the meeting

Notice of the meeting called in pursuance of the order of the tribunal shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by

1. a statement disclosing the details of the compromise or arrangement,
2. a copy of the valuation report, if any, and
3. explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture holders and
4. the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture trustees, and
5. such other matters as may be prescribed:

Such notice and other documents shall also be placed on the website of the company, if any, and in case of a listed company, these documents shall be sent to the Securities and Exchange Board and stock exchange where the securities of the companies are listed, for placing on their website and shall also be published in newspapers in such manner as may be prescribed:

When the notice for the meeting is also issued by way of an advertisement, it shall indicate the time within which copies of the compromise or arrangement shall be made available to the concerned persons free of charge from the registered office of the company.

4. Notice to provide for voting by themselves or through proxy or through postal ballot

The notice shall provide that the persons to whom the notice is sent may vote in the meeting either themselves or through proxies or by postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice.

Provided that any objection to the compromise or arrangement shall be made only by persons holding not less than 10%. of the shareholding or having outstanding debt amounting to not less than 5% per cent of the total outstanding debt as per the latest audited financial statement

5. Notice to be sent to the regulators seeking their representations

The notice along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2002, if necessary, and such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representations to make on the proposals.

6. Approval and sanction of the scheme

When at a meeting held, majority of persons representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, agree to any compromise or arrangement and if such compromise or arrangement is sanctioned by the Tribunal by an order, the same shall be binding on the company, all the creditors, or class of creditors or members or class of members, as the case may be, or, in case of a company being wound-up, on the liquidator appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be and the contributories of the company.

7. Order of the tribunal sanctioning the scheme to provide for the certain matters

An order made by the Tribunal shall provide for all or any of the following matters, namely:

a) where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable;
b) the protection of any class of creditors;
c) if the compromise or arrangement results in the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48;

d) if the compromise or arrangement is agreed to by the creditors under sub-section (6), any proceedings pending before the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act,1985 shall abate;

e) such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement.

No compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

8. The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.
9. **The Tribunal may dispense with calling of meeting of creditors**
   The Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least ninety percent value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.
10. Compromise in respect of buy back is to be in compliance with section 68. No compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal unless such buy-back is in accordance with the provisions of section 68.
11. Any compromise or arrangement may include takeover offer made in such manner as may be prescribed. In case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.

COMPANIES (COMPROMISES, ARRANGEMENTS AND AMALGAMATIONS) RULES, 2016

Rule 3 provides that an application under section 230-

1. may be submitted in Form no. NCLT-1 along with:
   I. a notice of admission in Form No. NCLT-2;
   II. an affidavit in Form No. NCLT-6,
   III. a copy of scheme of compromise or arrangement, which should include disclosures as per subsection (2) of section 230 of the Act and certified true copies of all the enclosures; and
   IV. fee as prescribed in the Schedule of Fees.
2. Where more than one company is involved in a scheme in relation to which an application is being filed, such application may, at the discretion of such companies, be filed as a joint-application.
3. Where the company is not the applicant, a copy of the notice of admission and of the affidavit shall be served on the company, or, where the company is being wound up, on its liquidator, not less than fourteen days before the date fixed for the hearing of the notice of admission.
4. The applicant shall also disclose to the Tribunal in the application the basis on which each class of members or creditors has been identified for the purposes of approval of the scheme.
5. A member of the company shall make an application for arrangement, for the purpose of takeover offer in terms of sub-section (11) of section 230, when such member along with any other member holds not less than three-fourths of the shares in the company, and such application has been filed for acquiring any part of the remaining shares of the company.
6. An application of arrangement for takeover offer shall contain:
   a) the report of a registered valuer disclosing the details of the valuation of the shares proposed to be acquired by the member after taking into account the following factors:
      I. the highest price paid by any person or group of persons for acquisition of shares during last twelve months;
      II. the fair price of shares of the company to be determined by the registered valuer after taking into account valuation parameters including return on net worth, book value of shares, earning per share, price earning multiple vis-d-vis the industry average, and such other parameters as are customary for valuation of shares of such companies.
   b) details of a bank account, to be opened separately, by the member wherein a sum of amount not less than one-half of total consideration of the takeover offer is deposited.

Rule 4 provides that the creditor's responsibility statement in Form No. CAA. 1 shall be included in the scheme of corporate debt restructuring.

Rule 6 provides that

1. Where a meeting of any class or classes of creditors or members has been directed to be convened, the notice of the meeting pursuant to the order of the Tribunal to be given in the manner provided in sub-section (3) of section 230 of the Act shall be in Form No. CAA.2 and shall be sent individually to each of the creditors or members.
2. The notice shall be sent by the Chairperson appointed for the meeting, or, if the Tribunal so directs, by the company (or its liquidator), or any other person as the Tribunal may direct, by registered post or speed post or by courier or by e-mail or by hand delivery or any other mode as directed by the Tribunal to their last known address at least one month before the date fixed for the meeting. Explanation: - It is hereby clarified that the service of notice of meeting shall be deemed to have been effected in case of delivery by post, at the expiration of forty eight hours after the letter containing the same is posted.
3. The notice of the meeting to the creditors and members shall be accompanied by a copy of the scheme of compromise or arrangement and a statement disclosing Explanation- For the purposes of this rule, disclosure required to be made by a company shall be made in respect of all the companies, which are part of the compromise or arrangement.

Rule 7 provides that the notice of the meeting shall be advertised in Form No. CAA.2 in at least one English newspaper and in at least one vernacular newspaper having wide circulation in the State in which the registered office of the company is situated, or such newspapers as may be directed by the Tribunal and shall also be placed, not less than thirty days before the date fixed for the meeting, on the website of the company (if any) and in case of listed companies also on the website of the SEBI and the recognized stock exchange where the securities of the company are listed:
Provided that where separate meetings of classes of creditors or members are to be held, a joint advertisement for such meetings may be given.

Rule 8 provides that for the purposes of sub-section (5) of section 230 of the Act, the notice shall be in Form No. CAA.3, and shall be accompanied with a copy of the scheme of compromise or arrangement, the explanatory statement and the disclosures mentioned under rule 6, and shall be sent to.-

I. the Central Government, the Registrar of Companies, the Income-tax authorities, in all cases;
II. the Reserve Bank of India, the Securities and Exchange Board of India, the Competition Commission of India, and the stock exchanges, as may be applicable;
III. other sectoral regulators or authorities, as required by Tribunal.

(2) The notice to the authorities mentioned in sub-rule (1) shall be sent forthwith, after the notice is sent to the members or creditors of the company, by registered post or by speed post or by courier or by hand delivery at the office of the authority.

(3) If the authorities referred to under sub-rule (1) desire to make any representation under sub-section (5) of section 230, the same shall be sent to the Tribunal within a period of thirty days from the date of receipt of such notice and copy of such representation shall simultaneously be sent to the concerned companies and in case no representation is received within the stated period of thirty days by the Tribunal, it shall be presumed that the authorities have no representation to make on the proposed scheme of compromise or arrangement.

SECTION 231 – POWER OF THE TRIBUNAL TO ENFORCE COMPROMISE OR ARRANGEMENT

As per section 231(1) when the Tribunal makes an order under section 230 sanctioning a compromise or an arrangement in respect of a company, it –

a) shall have power to supervise the implementation of the compromise or arrangement; and
b) may, at the time of making such order or at any time thereafter, give such directions in regard to any matter or make such modifications in the compromise or arrangement as it may consider necessary for the proper implementation of the compromise or arrangement.

Sub-section (2) states that if the Tribunal is satisfied that the compromise or arrangement sanctioned under section 230 cannot be implemented satisfactorily with or without modifications, and the company is unable to pay its debts as per the scheme, it may make an order for winding-up the company and such an order shall be deemed to be an order made under section 273.

SECTION 232 – MERGER AND AMALGAMATION OF COMPANIES

Section 232(1)-Tribunal's power to call meeting of creditors or members, with respect to merger or amalgamation of companies:

When an application is made to the Tribunal under section 230 for the sanctioning of a compromise or an arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal—

a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of the company or companies involving merger or the amalgamation of any two or more companies; and

b) that under the scheme, the whole or any part of the undertaking, property or liabilities of any company (hereinafter referred to as the transferor company) is required to be transferred to another company (hereinafter referred to as the transferee company), or is proposed to be divided among and transferred to two or more companies, the Tribunal may on such application, order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct and the provisions of sub-sections (3) to (6) of section 230 shall apply mutatis mutandis.

Section 232(2)-Circulation of documents for members/creditors meeting

When an order has been made by the Tribunal, merging companies or the companies in respect of which a division is proposed, shall also be required to circulate the following for the meeting so ordered by the Tribunal, namely:

a) the draft of the proposed terms of the scheme drawn up and adopted by the directors of the merging company;

b) confirmation that a copy of the draft scheme has been filed with the Registrar;

c) a report adopted by the directors of the merging companies explaining effect of compromise on each class of shareholders, key managerial personnel, promoters and non-promoter shareholders laying out in particular the share exchange ratio, specifying any special valuation difficulties;

d) the report of the expert with regard to valuation, if any;

e) a supplementary accounting statement if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purposes of approving the scheme.

Section 232(3)-Sanctioning of scheme by Tribunal

Section 232(3) states that the Tribunal, after satisfying itself that the procedure specified in sub-sections (1) and (2) has been complied with, may, by order, sanction the compromise or arrangement or by a subsequent order, make provision for the following matters, namely:—

a) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of the transferor company from a date to be determined by the parties unless the Tribunal, for reasons to be recorded by it in writing, decides otherwise;

b) the allotment or appropriation by the transferee company of any shares, debentures, policies or other like instruments in the company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person:

No transferee company can hold shares in its own name or under any trust. A transferee company shall not, as a result of the compromise or arrangement, hold any shares in its own name or in the name of any trust whether on its behalf or on behalf of any of its subsidiary or associate companies and any such shares shall be cancelled or extinguished;

c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company on the date of transfer;

d) dissolution, without winding-up, of any transferor company;

e) the provision to be made for any persons who, within such time and in such manner as the Tribunal directs, dissent from the compromise or arrangement;

f) where share capital is held by any non-resident shareholder under the foreign direct investment norms or guidelines specified by the Central Government or in accordance with any law for the time being in force, the allotment of shares of the transferee company to such shareholder shall be in the manner specified in the order;

g) the transfer of the employees of the transferor company to the transferee company;

h) when the transferor company is a listed company and the transferee company is an unlisted company,— the transferee company shall remain an unlisted company until it becomes a listed company; if shareholders of the transferor company decide to opt out of the transferee company, provision shall be made for payment of the value of shares held by them and other benefits in accordance with a pre- determined price formula or after a valuation is made, and the arrangements under this provision may be made by the Tribunal: The amount of payment or

valuation under this clause for any share shall not be less than what has been specified by the Securities and Exchange Board under any regulations framed by it;

i) where the transferor company is dissolved, the fee, if any, paid by the transferor company on its authorised capital shall be set-off against any fees payable by the transferee company on its authorised capital subsequent to the amalgamation; and

j) such incidental, consequential and supplemental matters as are deemed necessary to secure that the merger or amalgamation is fully and effectively carried out.

No compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133.

Section 232(4)-Transfer of property or liabilities

An order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to the transferee company and the liabilities shall be transferred to and become the liabilities of the transferee company and any property may, if the order so directs, be freed from any charge which shall by virtue of the compromise or arrangement, cease to have effect

Section 232(5)-Certified copy of the order to be filed with the registrar.

Section 232(5) states that every company in relation to which the order is made shall cause a certified copy of the order to be filed with the Registrar for registration within thirty days of the receipt of certified copy of the order.

Section 232(6)-Effective date of the scheme.

The scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.

In Marshall Sons & Co. India Ltd. v. ITO, it was held by the Hon'ble Supreme Court that every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place, and that such date may precede the date of sanctioning of the scheme by the Court, the date of filing of certified copies of the orders of the Court before the Registrar of Companies, and the date of allotment of shares, etc. It was observed therein that, the scheme, however, would be given effect from the transfer date (appointed date) itself.

In another case, in the matter of amalgamation of Equitas Housing Finance Limited and Equitas Micro Finance Limited with Equitas Finance Limited, the Hon'ble Madras High Court held that the provisions of section 394 (1) of the Companies Act, 1956 (corresponding to section 232 of the Companies Act, 2013) provided enough leeway to a company to delay the date on which the scheme of amalgamation shall take effect and tie the same to the occurrence of an event. Thus, the Court rejected the argument that the 'appointed date' in the scheme should necessarily be a specific calendar date.

Section 232(6) of the Act states that the scheme shall be deemed to be effective from the 'appointed date' and not a date subsequent to the 'appointed date'. This is an enabling provision to allow the companies to decide and agree upon an 'appointed date' from which the scheme shall come into force.

In view of the above, it was clarified that:

a) The provision of section 232(6) of the Act enables the companies in question to choose and state in the scheme an 'appointed date'. This date may be a specific calendar date or may be tied to the occurrence of an event such as grant of license by a competent authority or fulfillment of any preconditions agreed upon by the parties, or meeting any other requirement as agreed upon between the parties, etc., which are relevant to the scheme.

b) The 'appointed date' identified under the scheme shall also be deemed to be the 'acquisition date' and date of transfer of control for the purpose of conforming to accounting standards (including IndAS 103 Business Combinations.

c) where the 'appointed date' is chosen as a specific calendar date, it may precede the date of filing of the application for scheme of merger/amalgamation in NCLT. However, if the 'appointed date' is significantly ante-dated beyond a year from the date of filing, the justification for the same would have to be specifically brought out in the scheme and it should not be against public interest.

d) The scheme may identify the 'appointed date' based on the occurrence of a trigger event which is key to the proposed scheme and agreed upon by the parties to the scheme. This event would have to be indicated in the scheme itself upon occurrence of which the scheme would become effective. However in case of such event based

date being a date subsequent to the date of filing the order with the Registrar under section 232(5), the company shall file an intimation of the same with the Registrar within 30 days of such scheme coming into force.

Annual statement certified by CA/CS/CWA to be filed with Registrar every year until the completion of the scheme. Section 232(7) states that every company in relation to which the order is made shall, until the completion of the scheme, file a statement in such form and within such time as may be prescribed with the Registrar every year duly certified by a chartered accountant or a cost accountant or a company secretary in practice indicating whether the scheme is being complied with in accordance with the orders of the Tribunal or not.

PENAL PROVISION:

If a company fails to comply with sub-section (5), the company and every officer of the company who is in default shall be liable to a penalty of twenty thousand rupees, and where the failure is a continuing one, with a further penalty of one thousand rupees for each day after the first during which such failure continues, subject to a maximum of three lakh rupees.

SECTION 233 –MERGER OR AMALGAMATION OF CERTAIN COMPANIES

Section 233 prescribes simplified procedure for Merger or amalgamation of two or more small companies, or between a holding company and its wholly-owned subsidiary company, or such other class or classes of companies as maybe prescribed.

As per rule 25(1)(1A) of Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2021, a scheme of merger or amalgamation under section 233 of the Act may be entered into between any of the following class of companies, namely:-

I. two or more start-up companies; or
II. one or more start-up company with one or more small company.

Note: For detailed procedure under section 2refer chapter 10

SECTION 234: MERGER OR AMALGAMATION OF A COMPANY WITH A FOREIGN COMPANY

Section 234(1) states that the provisions of this Chapter XV of the Companies Act, 2013 unless otherwise provided under any other law for the time being in force, shall apply mutatis mutandis to schemes of mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government. The Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this section.

Section 234(2) states that subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the Reserve Bank of India, merge into a company registered under this Act or vice versa and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the share holders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may be, as per the scheme to be drawn up for the purpose.

SECTION 235: POWER TO ACQUIRE SHARES OF SHAREHOLDERS DISSENTING FROM SCHEME OR CONTRACT APPROVED BY MAJORITY

Section 235 of the Companies Act, 2013 prescribes the manner of acquisition of shares of shareholders dissenting from the scheme or contract approved by the majority shareholders holding not less than nine tenth in value of the shares, whose transfer is involved. It includes notice to dissenting shareholders, application to dissenting shareholders to tribunal, deposit of consideration received by the transferor company in a separate bank account etc.

SECTION 236: PURCHASE OF MINORITY SHAREHOLDING

Section 236 prescribes the manner of notification by the acquirer (majority) to the company, offer to minority for buying their shares, deposit an amount equal to the value of shares to be acquired, valuation of shares by registered valuer, etc.

SECTION 237: POWER OF CENTRAL GOVERNMENT TO PROVIDE FOR AMALGAMATION OF COMPANIES IN PUBLIC INTEREST

When the Central Government is satisfied that it is essential in the public interest that two or more companies should amalgamate, the Central Government may, by order notified in the Official Gazette, provide for the amalgamation of those companies into a single company with such constitution, with such property, powers, rights, interests, authorities and privileges, and with such liabilities, duties and obligations, as may be specified in the order.

- **Continuation of legal proceedings:** the order may also provide for the continuation by or against the transferee company of any legal proceedings pending by or against any transfer or company and such consequential, incidental and supplemental provisions as may, in the opinion of the Central Government, be necessary to give effect to the amalgamation.
- **Interest or rights of members, creditors, debenture holders not to be affected:** Every member or creditor, including a debenture holder, of each of the transferor companies before the amalgamation shall have, as nearly as may be, the same interest in or rights against the transferee company as he had in the company of which he was originally a member or creditor, and in case the interest or rights of such member or creditor in or against the transferee company are less than his interest in or rights against the original company, he shall be entitled to compensation to that extent, which shall be assessed by such authority as may be prescribed and every such assessment shall be published in the Official Gazette, and the compensation so assessed shall be paid to the member or creditor concerned by the transferee company.
- **Appeal to Tribunal:** Any person aggrieved by any assessment of compensation made by the prescribed authority may, within a period of thirty days from the date of publication of such assessment in the Official Gazette, prefer an appeal to the Tribunal and thereupon the assessment of the compensation shall be made by the Tribunal.
- **Conditions for order:** No order shall be made under this section unless —
  a) a copy of the proposed order has been sent in draft to each of the companies concerned;
  b) the time for preferring an appeal has expired, or where any such appeal has been preferred, the appeal has been finally disposed off; and
  c) the Central Government has considered, and made such modifications, if any, in the draft order as it may deem fit in the light of suggestions and objections which may be received by it from any such company within such period as the Central Government may fix in that behalf, not being less than two months from the date on which the copy aforesaid is received by that company, or from any class of share holders therein, or from any creditors or any class of creditors thereof.
- **Copy of order before each house of Parliament:** The copies of every order made under this section shall, as soon as may be after it has been made, be laid before each House of Parliament.

SECTION 238: REGISTRATION OF OFFER OF SCHEMES INVOLVING TRANSFER OF SHARES

Section 238(1) states that in relation to every offer of a scheme or contract involving the transfer of shares or any class of shares in the transferor company to the transferee company under section 235, —

a) every circular containing such offer and recommendation to the members of the transferor company by its directors to accept such offer shall be accompanied by such information and in such manner as may be prescribed;
b) every such offer shall contain a statement by or on behalf of the transferee company, disclosing the steps it has taken to ensure that necessary cash will be available; and
c) every such circular shall be presented to the Registrar for registration and no such circular shall be issued until it is so registered:

However, the Registrar may refuse, for reasons to be recorded in writing, to register any such circular which does not contain the information required to be given under clause (a) or which sets out such information in a manner likely to give a false impression, and communicate such refusal to the parties within thirty days of the application. An appeal shall lie to the Tribunal against an order of the Registrar refusing to register any circular under sub-section (1).

The director who issues a circular which has not been presented for registration and registered under clause (c) of sub-section(1), shall be liable to a penalty of one lakh rupees.

SECTION 239: PRESERVATION OF BOOKS AND PAPERS OF AMALGAMATED COMPANIES

As per section 239, the books and papers of a company which has been amalgamated with, or whose shares have been acquired by, another company under this Chapter **shall not be disposed of without the prior permission of the Central**

Government and before granting such permission, that Government may appoint a person to examine the books and papers or any of them for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with the promotion or formation, or the management of the affairs, of the transferor company or its amalgamation or the acquisition of its shares.

SECTION 240: LIABILITY OF OFFICERS IN RESPECT OF OFFENCES COMMITTED PRIOR TO MERGER, AMALGAMATION, ETC.

As per Section 240, notwithstanding anything in any other law for the time being in force, the liability in respect of offences committed under this Act by the officers in default, of the transferor company prior to its merger, amalgamation or acquisition shall continue after such merger, amalgamation or acquisition.

APPROVALS IN SCHEME OF AMALGAMATION

Merger or amalgamation of companies involves various issues including the regulatory approvals. These regulatory approvals are to be obtained not only from the sector in which the company is operating (for example in case of merger of two banks, RBI's approval is needed) but from other departments like Income Tax, SEBI, ROC, etc. The companies are required to obtain following approvals in respect of the scheme of amalgamation:

(i) Authorisation	• Pre-approval authorisation about appointment of intermediaries, advisors, etc. • Approval of Valuation Report by Audit Committee.
(ii) Approval of Board of Directors	• Approval of scheme of amalgamation by the Board of both the companies. • Board resolution should, besides approving the scheme, authorise a Director/Company Secretary/ other officer to make application to Tribunal, to sign the application and other documents and to do every thing necessary or expedient in connection therewith, including changes in the scheme.
(iii) Approval of Shareholders/Creditors, etc	Members' and creditors' approval to the scheme of amalgamation is sine qua non for Tribunal's sanction. This approval is to be obtained at specially convened meetings held as per Tribunal's directions [Section 230(1)]. However, the Tribunal may dispense with meetings of members/creditors [Section 230(9)]. The scheme of compromise or arrangement has to be approved as directed by the Tribunal, by– • the members of the company; or • the members of each class, if the company has different classes of shares; and the creditors; or • each class of creditors, if the company has different classes of creditors. The approval of the members and creditors (or each class of them) has to be obtained at specially convened meetings as per the Tribunal directions. An application seeking directions to call, hold and conduct meetings is made to the Tribunal, which has jurisdiction having regard to the location of the registered office of the company. The steps include: • First motion petition before the Tribunal • Scrutinizers report about the approval by the shareholders/creditors, etc. • Second motion petition before the Tribunal Notices should be sent to various stakeholders, public inviting any objections to the scheme.
(iv) Approval of the Stock Exchanges	A listed entity desirous of undertaking a scheme of arrangement or involved in a scheme of arrangement, shall file the draft scheme of arrangement, proposed to be filed before Tribunal with the stock exchange(s).
(v) Approval of Financial Institutions	The approval of the Financial Institutions, trustees to the debenture holders and banks, investment corporations would be required if the Company has borrowed funds either as term loans, working capital requirements and/ orhave issued debentures to the public and have appointed any one of them as trustees to the debenture holders.
(vi) Approval from the Land Holders	If the land on which the factory is situated is the lease-hold land and the terms of the lease deed so specifies, the approval from the lessor will be needed.

(vii) Approval of the Tribunal	• Both companies (amalgamating as well as amalgamated) involved in a scheme of compromise or arrangement or reconstruction or amalgamation is required to seek approval of the respective Tribunal for sanctioning the scheme. • Every amalgamation, except those, which involve sick industrial companies, requires sanction of Tribunal which has jurisdiction over the State/area where the registered office of a company is situated. • If transferor and transferee companies are under the jurisdiction of different Tribunals, separate approvals are necessary. • The notice of every application filed with the Tribunal has to be given to the Central Government (Regional Director, having jurisdiction of the State concerned). • After the hearing is over, the Tribunal will pass an order sanctioning the Scheme of amalgamation, with such directions in regard to any matter and with such modifications in the Scheme as the Judge may think fit to make for the proper working of the Scheme. [Section 230; Rule 5, Companies (Compromises, Arrangements and Amalgamations) Rules, 2016]. The Tribunal under Section 230-234 of the Act is also empowered to order the transfer of undertaking, property or liabilities either wholly or in part, allotment of shares or debentures and on other supplemental and incidental matters.
(viii)Approval of Reserve Bank of India	Where the scheme of amalgamation envisages issue of shares/cash option to Non-Resident Indians, the amalgamated company is required to obtain the permission of Reserve Bank of India subject to conditions prescribed under the Regulations issued by RBI.
(ix) Approvals from Competition Commission of India (CCI)	The provisions relating to regulation of combination as provided under Sections 5 and 6 of the Competition Act, 2002 would also be required to be complied with by companies, if applicable.

STEPS INVOLVED IN MERGER/AMALGAMATION

STEP – 1: Holding of Board Meeting

To consider the proposal for Merger of the Company. It must be ensured that the companies under the consolidation must have a strong clause in the Memorandum of Association of their organization to merge although their absence will not be an obstacle, but this will make things work smoothly.

- In-Principle approval for Merger
- Decide on jurisdiction of NCLT Benches
- Appointment of Registered Valuer
- Appointment of professionals such as chartered accountant in practice, consultants, lawyers etc
- Consultants to structure the Roadmap and draft the restructuring Scheme.

STEP – 2

Holding of Independent Directors Committee Meeting

- Report from the Committee of Independent Directors recommending the draft Scheme, taking into consideration, inter alia, that the scheme is not detrimental to the shareholders of the listed entity.

Holding of Audit Committee Meeting

- Valuation Report to be placed before Audit Committee.
- Audit Committee to give its recommendation on Draft scheme/ Share Entitlement Ratio, taking into consideration the Valuation Report.
- The Audit Committee report shall also comment on the following:
  - ✓ Need for the merger/demerger/amalgamation/arrangement
  - ✓ Rationale of the scheme
  - ✓ Synergies of business of the entities involved in the scheme
  - ✓ Impact of the scheme on the shareholders
  - ✓ Cost benefit analysis of the scheme.

Holding of Second Board Meeting

- Approval of Exchange Ratio
- Approval of Valuation Report
- Approval of Scheme of Arrangement
- Public Co. to file copy of Board Resolution with ROC [Section 117(3) (g) read with Section 179(3) (i)]
- Authorisations to sign documents, make representation and enter appearances
- File copy of scheme with ROC [Section 232(2)(b)]
- In-Principle approval of Sock Exchange
- Consider the Fairness Opinion of the Merchant Banker
- Accept the recommendation of Audit Committee
- Choose one of the Stock Exchange having nation-wide trading terminals as the Designated Stock Exchange.

STEP 3 – FILINGS, INTIMATIONS AND WEBSITE UPDATIONS

- Intimation to Stock Exchange on the decision of the Board within 24 hours of the meeting
- Filing of Form No. MGT-14 to ROC in accordance with Section 179 of the Companies Act, 2013 within 30 days
- Company to submit the Draft Scheme along with documents to Stock Exchange in accordance with Regulation 37 of SEBI (LODR) Regulations, 2015, Simultaneously, the company shall upload all the following documents filed with Stock Exchange on its website;
  a) Draft Scheme of arrangement/ amalgamation/ merger/ reconstruction/ reduction of capital, etc.;
  b) Valuation Report;
  c) Report from the Audit Committee recommending the Draft Scheme, taking into consideration, inter alia, the Valuation Report. The Valuation Report is required to be placed before the Audit Committee of the listed entity;
  d) Fairness opinion by a SEBI Registered merchant banker on valuation of assets / shares done by the valuer for the listed entity and unlisted entity;
  e) Pre and post amalgamation shareholding pattern of unlisted entity;
  f) Audited financials of last 3 years (financials not being more than 6 months old) of unlisted entity;
  g) Auditor's Certificate;
  h) Detailed Compliance Report duly certified by the Company Secretary, Chief Financial Officer and the Managing Director.
- Any complaints received by the Company (i.e. Directly or Indirectly through Stock Exchange/SEBI) shall be submitted by company as 'Complaints Reports' to the stock exchanges within 7 days of expiry of 21 days from the date of filing of Draft Scheme with Stock Exchange(s)
- In case of unpaid dues / fines / penalties, the listed entity shall submit to stock exchanges a 'Report on the Unpaid Dues' which shall contain the details of such unpaid, prior to obtaining Observation Letter from stock exchanges on the draft scheme. The report on unpaid dues, shall be submitted by listed entity to the stock exchanges along with the draft scheme.

STEP 4 – FIRST MOTION APPLICATION

Preparation and filing of first motion application:

- Consent letter of shareholders and creditors by way of affidavit.
- Certificate from Chartered Accountant certifying creditors.
- Certification from auditors to the effect that the accounting treatment is in conformity with accounting standards
- Drafting of First Motion Application (NCLT 1), Notice of Admission (NCLT 2) & Affidavit (NCLT 6) - pray for dispensation of meeting.
- No dispensation- order for individual notices to the shareholders/creditors
- Copy of the scheme of compromise or arrangement
- Creditors responsibility statement (Form CAA 1) in case a compromise or arrangement is proposed between company and its creditors or between company and its members
- Advertisement in Newspaper (Form CAA-2).

Contents of First Motion Application

- Details of the Companies.
- Jurisdiction of NCLT Bench.
- Limitation
- Fact of the case including benefit, rationale, etc.
- Relief & prayer (Dispensation) – Specific prayer regarding dispensation for each meeting (in the matter of JVA Trading Private Limited)
- Relief & payer (Meeting) - Direction for service of notice, approval of Newspaper for advertisement.

Documents/ Annexure(s) to First Motion Application

Documents/ Annexures includes:

a) Memo of parties/Brief synopsis
b) Joint application
c) Affidavit verifying application
d) Board Resolution of all the Companies
e) Certificate from Chartered Accountants
f) Certificate from Auditors
g) Audited and/or unaudited financial statement of all the Companies
h) Memorandum and Article of Association of all the Companies
i) List of shareholders of all the companies along with their consent/NOC by way affidavits.
j) List of Creditors (Secured, unsecured).
k) Scheme of Arrangement
l) Copy of valuation Report
m) List of directors
n) Memorandum of Appearance & power of Attorney / Vakalatnama
o) Notice of Admission in NCLT 2.

STEP 5 - NCLT WILL GIVE ORDER ON THE APPLICATION OF THE COMPANY ON THE FOLLOWING:

a) Date, time and venue of the meeting
b) Appointment of the Chairman
c) Time within which the Chairman of the meetings will give his report
d) Dispensation of meeting for the unlisted Company

The order of the Tribunal shall be filed with the Registrar by the company within a period of 30 days of the receipt of the order.

STEP 6- Notice of First Motion Application

- No dispensation – Notice of meeting of arrangement or compromise shall be given to:
- Shareholders & Creditors
- Central Government
- Income Tax Authorities
- Reserve Bank of India
- Securities and Exchange Board of India The Registrar Official Liquidator Competition Commission of India Advertisement in Newspaper (Form CAA-2).

The notice to statutory authorities shall be in Form CAA 3 and shall be accompanied with a copy of the scheme of compromise or arrangement, the explanatory statement and the prescribed disclosures

STEP 7 – Holding of Meeting

Process of Meeting

- Court appointed Chairman/ Alternate Chairman to preside over.
- Quorum, as decided by the Tribunal.
- Public shareholders consent by Postal Ballot (Listed Co.) and through e-voting (if required) as per SEBI norms
- Scrutinizer, as appointed by the Tribunal

- Report of the Scrutinizer to the Chairman
- Report of the Chairman to be filed with Tribunal within the time fixed by the tribunal, or where no time has been fixed, within three days after the conclusion of the meeting submit a report to the Tribunal on the result of the meeting in Form CAA 4

STEP 8- FILING OF SECOND MOTION APPLICATION

Where the proposed compromise or arrangement is agreed to by the members or creditors or both as the case maybe with or without modification, the company (or its liquidator), shall:

Within 7 days of receipt of certified true copy of order of NCLT and / or filing of report by the Chairperson, as the case may be, the second motion petition must be filed in Form CAA.5 for sanction of the scheme praying for appropriate orders and directions under section 230 read with section 232 of the Companies Act, 2013 [Rule 15 of the Companies (Compromise, Arrangement and Amalgamation) Rule, 2016]

Where the company fails to present the petition for confirmation of the compromise or arrangement as aforesaid, it shall be open to any creditor or member as the case may be, with the leave of the tribunal, to present the petition and the company shall be liable for the cost thereof.

STEP 9- HEARING ON ADMISSION OF SECOND MOTION

- NCLT shall fix a date of hearing of the petition, and
- Order to advertise the notice of hearing in such newspaper as the NCLT may think fit, not less than 10 days before the date of hearing of petition [Rule 16 of the Companies (Compromise, Arrangement and Amalgamation) Rule, 2016] Publish the advertisement in Form NCLT-3A, place the same on the Website, if any and file an affidavit of compliance in relation to the same, not less than 3 days before the fixed for hearing [Rule 35 of the National Company Law Tribunal Rules, 2016].

STEP 10- APPROVAL OF REGULATORY AUTHORITIES

- Filing of First motion, second motion along with notice with all the authorities.
- Report of ROC to office of Regional Director.
- Query letter and its reply to office of Regional Director
- Query letter and its reply to office of official Liquidators
- Report of RD and OL to be filed with Tribunal.

STEP 11- FINAL HEARING

NCLT may, if it thinks fit, sanction the scheme and pass an Order in Form CAA 7, with such variations as the circumstance may require.

The order shall direct that a certified copy of the same shall be filed with the registrar of companies within 30 days from the date of the receipt of copy of the order, or such other time as maybe fixed by the tribunal.

STEP 12- FILING WITH SCHEME & OTHER COMPLIANCE

- Board Meeting to take note of the Copy of Order, fixation of records date and board meeting of Resulting Company for allotment of shares to the members of Demerged Company
- File the certified true copy of order of NCLT with ROC in From INC-28, within 30 days from the date of the receipt of certified true copy of order [Section 232(5) of the Companies Act, 2013]
- Filing of Form PAS 3, SH. 7
- Change of Name, Conversion, Consolidation of share, reclassification of share, reduction of share, if any
- Dispatch of Share Certificates to the allottees or entering the name of allottees as beneficial owner in the records of depositories
- Apply to Stock Exchange for Listing of Shares of Resulting Company within 30 Days of Receipt of Order of the NCLT sanctioning the Scheme;
- Before commencement of Trading, advertisement is required to be given in one Hindi and one English newspaper having nationwide circulation and one regional newspaper with the wide circulation at the place where the registered office of the Resulting Company is situated
- Formalities for commencement of trading shall be completed within 45 Days of the order of NCLT

STEP 13: CERTIFICATION OF COMPLIANCE OF SCHEME

- A statement (Form CAA 8) is to be filed with Registrar in regard to compliance of scheme in accordance with the orders of the Tribunal every year until the scheme is fully implemented.
- It must be certified by a chartered accountant or a cost accountant or a company secretary in practice indicating whether the Scheme is being complied in accordance with the orders of the Tribunal or not.

REVISED ORGANIZATION CHART

One modification that has great potential to affect the new business is a change in the organizational structure. Regardless of whether the changes are large or small, planningand an intense analysis are vital to creating a decision-making and communication framework that will support post-merger objectives and help the new business grow.

Structural Change Considerations

An organizational structure refers to the levels of hierarchy, chain of command, management systems and job structures and roles. In response to a merger, duplicate departments need to be merged or eliminated, and at least some employees from both companies will either transfer to new positions or leave the company. Communication patterns will typically change as managers acquire new employees and everyone adapts to changes in policies and procedures designed to fit the new company.

Premerger Due Diligence

Review the organizational structures of both businesses to see how well each compares to the mission and long-term objectives for the new company. Analyze hierarchies and reporting relationships to see where the existing structures clash and where they're synchronized. Once an initial review is completed, appoint an integration team to speak with core employees and get their perspective on what works and what doesn't work in their respective structures. Make preliminary decisions about which features best support the new business.

Structural Change Options

Organizational structure change options include starting from scratch, eliminating one in favor of the other and combining the best features of both structures into one. Which is the best option depends on the size, complexity and objectives of the new business. For example, two small businesses with flat organizational structures may need to convert to a more hierarchical and organized structure that allows for greater internal controls and division of responsibilities. It is also useful when the owners or chief executive officer delegates some decision-making responsibilities.

The Three Phases of Change

Changing an organizational structure due to a merger involves much more than creating a new organizational chart. Although the chart will reflect decisions made about how the new business's employees will communicate with one another and make decisions, this typically occurs in multiple phases.

- ✓ The first phase is awareness, during which employees from both businesses come to understand the new company's direction and what it will mean to them.
- ✓ The goal of the second phase is acceptance, as the integration team works to build new relationships and employees at every level transition into new roles and new ways of getting work done.
- ✓ In the final phase, the merger is complete and the new organizational structure becomes fully adopted.

EMPLOYEE COMPENSATION, BENEFITS AND WELFARE ACTIVITIES

Employee's compensation in the two companies varies. For example in the case of merger between the Bank of Rajasthan Ltd. (BoR) and the ICICI Bank Ltd which was held in 2010, the BoR employees were aligned with the Indian Bank Association (IBA), while the ICICI Bank was having its own compensation and not linked with the IBA compensation policy. In order to have consistency in compensation policy the merged bank employees were forced to adopt the compensation policy of the acquiring bank. Whatever the strategy is adopted, companies need to be sensitive with regard to terms and conditions of employment.

ALIGNING COMPANY POLICIES

After merger the merged entity is usually forced to adopt the policies of the merging company. The accounting software and policies of the amalgamating companies are to be aligned with that of the amalgamated company in a phased manner. For example in the case of the merger of the two banking companies, the acquiring bank imposes its

accounting software (like Finacle) on the merged bank and also various policies like Deposit Policy, Loan Policy, Recovery & Compromise Policy, etc. in order to have uniformity in serving the customers.

ALIGNING ACCOUNTING AND INTERNAL DATABASE MANAGEMENT SYSTEMS

Besides passing appropriate accounting entries to capture the merger/ acquisition/ financial structure, the company may need to adopt accounting policies, practices based on those followed by its new parent organization post acquisition. The company needs to understand any reporting and database requirements of acquiring company or merged entity to provide relevant data to the new management and to align existing systems with those of the parent/ merged entity. This may involve providing suitable training to concerned personnel and understanding issues, if any, to avoid incorrect reporting.

INTEGRATION OF BUSINESSES AND OPERATIONS

The integration of business and operations after merger is the crucial part and many points require attention on the issue. These may be list out as under:

- Assessment of the future cash flow generation in order to have organic growth after having gone through the process of inorganic growth.
- Integration of the accounting software, accounting policy.
- Integration of various other software.
- The customer retention of the merged entity and acquisition of more customers.
- Satisfaction of the human resources and retaining of the talent.

POST-MERGER SUCCESS AND VALUATION

Every merger is not successful. The factors which are required to measure the success of any merger are briefly discussed below:

- The earning performance of the merged company can be measured by return on total assets and return on net worth. It has been found that the probability of success or failure in economic benefits was very high among concentric mergers. Simple vertical and horizontal mergers were found successful whereas the performance of concentric mergers was in between these two extremes i.e. failure and success.
- Whether the merged company yields larger net profit than before, or a higher return on total funds employed or the merged company is able to sustain the increase in earnings.
- The capitalisation of the merged company determines its success or failure. Similarly, dividend rate and payouts also determines its success or failure.
- Whether merged company is creating a larger business organisation which survives and provides a basis for growth.
- Comparison of the performance of the merged company with the performance of similar sized company in the same business
- Fair market value is one of the valuation criteria for measuring the success of post merger company. Fair market value is understood as the value in the hands between a willing buyer and willing seller, each having reasonable knowledge of all pertinent facts and neither being under pressure or compulsion to buy or sell. Such valuation is generally made in pre-merger cases.
- In valuing the whole enterprise, one must seek financial data of comparable companies in order to determine ratios that can be used to give an indication of the company position. The data is analyzed to estimate reasonable future earnings for the subject company. The following information must be made available and analyzed for post-merger valuation:
  a) All year-end balance sheets and income statements, preferably audited, for a period of five years and the remaining period up to the valuation date.
  b) All accounting control information relating to the inventory, sales, cost, and profit contribution by product line or other segment; property cost and depreciation records; executives and managerial compensation; and corporate structure.
  c) All records of patents, trademarks, contracts, or other agreements.
  d) A history of the company, including all subsidiaries.

Analysis of these items provides data upon which forecasts of earnings, cash flow, etc. can be made.

- Gains to shareholders have so far been measured in terms of increase or decrease in share prices of the merged company. However, share prices are influenced by many factors other than the performance results of a company. Hence, this cannot be taken in isolation as a single factor to measure the success or failure of a merged company.
- In some mergers there is not only increase in the size of the merged or amalgamated company in regard to capital base and market segments but also in its sources and resources which enable it to optimize its end earnings.
- In addition to the above factors, a more specific consideration is required to be given to factors like improved debtors realisation, reduction in non-performing assets, improvement due to economies of large scale production and application of superior management in sources and resources available relating to finance, labour and materials.

HUMAN AND CULTURAL ASPECTS

Human Aspects: A merger can be the horizontal merger or vertical merger. A horizontal merger decreases competition in the market, while vertical merger is a merger between companies in the same industry, but at different stages of production process. However the most neglected part in the merger story is the human aspect. The employees of the amalgamated entity face secondary treatment in the amalgamating company. They are harassed, transferred recklessly and demoted one or two scale lower, which leads to frustration and are forced to take voluntary retirement. In this way the company losses the good employees too.

Cultural Aspects: Implementation of structural nature may be financially and legally successful. But if cultural issues are ignored, the success may only be transient. Culture of an organisation means the sum total of things the people do and the things the people do not do. Behavioural patterns get set because of the culture. These patterns create mental blocks for the people in the organization. Pre-merger survey and summarization of varying cultures of different companies merging, needs to be carried out. People belonging to the each defined culture need to be acquainted with other cultures of other merging companies. They need to be mentally prepared to adopt the good points of other cultures and shed the blockades of their own cultures. Such an open approach will make the fusion of cultures and ethos easy and effective.

MEASURING POST-MERGER EFFICIENCY

The criterion to judge a successful merger differs in different conditions. Different factors may be considered for making value judgements such as growth in profit, dividend, company's history, increase in size, base for growth, etc. Several studies suggest different parameters to assess the success of mergers:

- Successful merger creates a larger industrial organization than before, and provides a basis for growth [Edith Perirose].
- In Arthur Dewing's study, three criteria were considered viz. (a) merger should give a larger net profit than before (b) merger should provide a higher return on total funds (c) there should be a sustained increase in earnings.
- Earnings on capitalization and dividend records determine the success of merger [Shaw L.].

During the studies in late 1960s, two types of efficiency improvements were expected to result from mergers:

1. Improvements due to economies of large scale production
2. Application of superior management skills to a larger organisation.

In order to ensure progress, a conscious and concerted effort to keep track of several key elements is required, along with answers to the following questions:

1. What impact is the integration (merger/acquisition) having on key indicators of business performance? Whether synergies which were hypothesized during the valuation are being realized?
2. Are the activities and milestones developed with the integration process on target?
3. What are the major issues emerging during the integration, requiring considerable attention?
4. What important facts have emerged during the merger or acquisition that can be used to improve subsequent mergers or acquisition?

MEASURING KEY INDICATORS

The main purpose of a merger or acquisition is to deliver the expected financial results namely earnings and cash flow. However, there are certain other measures that serve as key indicators and they also need to be measured. The indicators may be grouped as:

I. Financial outcomes.
II. Component measures of these outcomes namely revenues, costs, net working capital and capital investments.
III. Organisational indicators such as customers, employees and operations.

All the areas being integrated and both the acquirer and target, or in a merger, both partners, should be brought within the ambit of continuous appraisal. Also, the appraisal should be based on benchmarks to ensure that merger or acquisition are yielding the financial and strategic objective so intended and are not resulting in value leakage.

LESSON 5 - DOCUMENTATION – MERGER & AMALGAMATION

INTRODUCTION

Documentation is an important aspect in fulfilment of legal requirements and obligations in merger and amalgamation. The quantum of such obligations will depend upon the size of company, debt structure and profile of its creditors, compliances under the corporate laws, controlling regulations, etc. In all or in some of these cases legal documentation would be involved. In this way, while drafting the scheme of merger and amalgamation the transferor and transferee would have to ensure that they meet legal obligations in all related and requisite areas.

STAGES INVOLVED IN MERGERS AND AMALGAMATION UNDER THE COMPANIES ACT, 2013

In brief, it can be said that there are broadly eight stages involved in merger and amalgamation, which are listed below:

Stage 1 – Drafting of the Scheme

Stage 2 – Obtaining the approval of the Board of Directors of the companies involved

Stage 3 – Obtaining approval of the stock exchanges in case of listed companies

Stage 4 – Application / Petition for convening the meeting of members/creditors shall be filed with NCLT

Stage 5 – Convening meetings of the Shareholders and Creditors and obtaining their consent on

Stage 6 – Scheme Approvals or No objection from Regional Director / Official Liquidator

Stage 7 – Filing of final petition with NCLT for approving the Scheme

Stage 8 – Obtaining order for approval for scheme of merger/amalgamation from the NCLT.

LIST OF DOCUMENTS FILED IN CASE OF A SCHEME OF AMALGAMATION

In this case there are two companies to the amalgamation, i.e., the Transferor (1st Applicant) and the Transferee (2nd Applicant)

S. No	Document
1.	Memorandum and Articles of Association of the First Applicant Company
2.	Audited Balance Sheet of the First Applicant Company – latest
3.	Board Resolution for approval and authorization of the scheme by the First Applicant Company
4.	List of Equity Shareholders of the First Applicant Company
5.	Consent Affidavits filed by the Equity Shareholders of the First Applicant Company
6.	Auditors Certificate stating out the no. of Secured Creditors in the First Applicant Company
7.	Auditor's Certificate listing out the no. of Unsecured Creditor in the First Applicant Company
8.	Consent Affidavit filed by no. of Unsecured Creditor of the First Applicant Company
9.	Auditors Certificate of the 1st Applicant Company in relation to the accounting treatment proposed in the Scheme of Amalgamation
10.	Memorandum and Articles of Association of the Second Applicant Company
11.	Audited Balance Sheet of the Second Applicant Company
12.	Board Resolution for approval and authorization of the Scheme by the Second Applicant Company
13.	List of Equity Shareholders of the Second Applicant Company
14.	Auditors Certificate listing out the no. of Secured Creditors in the Second Applicant Company
15.	Consent Affidavit filed by the no. of Secured Creditor of the Second Applicant Company
16.	Auditors Certificate listing out the no. of Unsecured Creditors in the Second Applicant Company
17.	Consent Affidavit filed by the no. of Unsecured Creditor of the Second Applicant Company
18.	Auditors Certificate of the 2nd Applicant Company in relation to the accounting treatment proposed in the Scheme of Amalgamation
19.	Certificate of the Chartered Accountant for Non-Applicability of obtaining a Valuation Report
20.	Fairness Opinion issued by the Merchant Banker on the Scheme of Amalgamation

21.	Undertaking regarding the Non-Applicability of paragraph I(A) 9(a) of Annexure I of SEBI Circular No. CIR/CFD/CMD/16/2015 dated 30 November 2015
22.	Observation Letter issued by the Stock Exchanges approving the Scheme of Amalgamation
23.	Scheme of Amalgamation.

PERSONS ELIGIBLE FOR FILING THE PETITION BEFORE NCLT

1. An application for merger & amalgamation shall be filed with Tribunal (NCLT) by both the transferor(s) and the transferee company in the form of petition under section 230-232 of the Companies Act, 2013 for the purpose of sanctioning the scheme of amalgamation.
2. Where more than one company is involved in a scheme, such application may, at the discretion of such companies, be filed as a joint-application.

In case, the registered office of the companies involved is in different states, there will be two Tribunals having the jurisdiction over those. Both the companies shall have to file separate petition with the respective Tribunals. However as a matter of practice and smother the process, first registered office of companies may be shifted as per section 12 of the Companies Act, 2013 to a single jurisdiction.

DRAFTING OF SCHEME

The Scheme of amalgamation would comprise of various parts containing details about Transferor Company, Transferee Company. The Scheme in particular would comprise of the following in detail:

Introductory Part	Operating Part – The Scheme
1. Basic Details of the Transferor & Transferee company like date of incorporation, CIN and registered office and address for service of notice 2. Main objects in Memorandum of Association of Transferor and Transferee Company 3. Jurisdiction of the Bench 4. Limitation 5. Facts of the case - reason in brief for going into merger or amalgamation 6. Nature of business 7. Share Capital of the companies involved and shareholding relationship between the companies involved 8. Definition Clause	9. Appointed Date - The scheme shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date. 10. Transfer of the undertaking of the Transferor Company or transfer of the Transferor Company per se 11. Transfer of assets 12. Transfer of debts and liabilities 13. Transfer of licenses, approvals / permissions 14. Transferor of Company's staff, workmen and employees 15. The transfer of undertaking or the Transferor Company not to affect the transaction / contracts of transferor Company 16. Enforcement of contracts, deeds, bonds and other instruments 17. Enforcement of Legal Proceedings 18. Issue and Allotment of Shares under the Scheme 19. Increase in Authorized Share Capital 20. Accounting Treatment 21. Conduct of business by the transferor Company till effective date 22. Dissolution of Transferor Company 23. Effect of Scheme 24. Expenses relating to the Scheme 25. Scheme conditional upon approval / sanctions 26. Effect of non-receipt of approvals 27. General terms and conditions applicable for the scheme Prayer / Relief Part 28. Approval of scheme 29. Particulars of Bank draft evidencing payment of fee for the Application.

Following are the standard guidelines for presenting an application or petition before NCLT, prescribed in National Company Law Tribunal Rules, 2016 and Companies (Compromises, Arrangements and Amalgamations) Rules, 2016:-

1. The petition / application shall fall under the proper territorial jurisdiction of NCLT Bench
2. The petition / application and all enclosures shall be legibly typewritten in English language.
3. The petition / application / appeal / reply shall be printed in double line spacing on one side of the standard petition paper with an inner margin of about 4 cms width on top and with a right margin of 2.5 cm left margin of 5 cm and duly paginated, indexed and stitched together in paper book form.

4. The petition/ application shall be filed in prescribed form with stipulated fee in triplicate by duly authorised representative of the companies or by an advocate duly appointed in this behalf.
5. The petition shall also be accompanied by an index and memo of the parties.
6. The cause title of the petition/application shall be "Before the National Company Law Tribunal" and it shall also specify the Bench to which it is presented.
7. All the relevant provisions of the Companies Act, 2013 / NCLT Rules, 2016 shall be clearly mentioned in the petition / application.
8. The petition/application shall be divided into paragraphs and shall be numbered consecutively and each paragraph shall contain a separate fact or point.
9. The foot of petition / application shall have name and signature of the authorized representative.
10. The name of the petitioner / applicant along with complete address, viz, the name of the road street lane and municipal division or ward, municipal door and other number of the house, the name of the town or village; the post office; postal district and pin code shall be mentioned in the petition / application.
11. The fax number, mobile number, valid email addresses of the petitioner / applicant shall also be mentioned.
12. Every interlineations, eraser or correction or deletion in petition / application shall be initialed by the party or his authorized representative.
13. The affidavit verifying the petition in Form NCLT-6 shall be drawn on non-judicial /stamp paper of requisite value duly attested by Notary public / Oath Commissioner
14. Full name, parentage, age, description of each party, date, address and in case a party sues or being sued in a representative character, has been set out in accordance to Rule 20(5) of the NCLT Rules, 2016.
15. Petition / application / appeal reply has been drawn in the prescribed form i.e. Form No. NCLT.1 with stipulated fee given in the Schedule of these rules. The fee is to be paid by way of demand draft / PO drawn in favour of the "The Pay & Accounts Officer, Ministry of Corporate Affairs, New Delhi" or can be paid through online at nclt.gov.in.
16. The documents attached with petition / application shall be duly certified by the authorized representative or advocate filing the petition or application.
17. The annexure to the petition / application shall be serially numbered.
18. The Vakalatnama shall bear court fee stamp.
19. The documents with regard to shareholding/paid-up capital/latest balance sheet of the petitioner/ applicant shall be attached.
20. Document other than in English language shall be duly translated and accordingly a translated copy duly certified shall be attached with petition/application.

SUBMISSION OF APPLICATION / PETITION

Petition to the Tribunal for merger & amalgamation shall be submitted in Form No. NCLT-1 along with following documents:

1. A notice of admission in Form No. NCLT -2
2. An affidavit in Form No. NCLT-6
3. A copy of Scheme of compromise and arrangement (Merger & Amalgamation)
4. The applicant shall also disclose to the Tribunal in the application, the basis on which each class of members or creditors has been identified for the purposes of approval of the scheme

CALLING OF MEETING BY TRIBUNAL

The Tribunal upon hearing the application may either give relevant directions / order for conducting the meeting of the creditors or class of creditors, or of the members or class of members or may dismiss the application for any appropriate reason.

Drafting of Notice of Meeting

The Notice of the meeting pursuant to the order of Tribunal shall be given in Form No. CAA-2. The table below provides basic information about Notice of Meeting:

Person entitled to receive the notice	The notice shall be sent individually to each of the Creditors or Members and the debenture-holders at the address registered with the company

Person authorized to send the notice	Chairman of the Meeting or if Tribunal so directs- by the Company or liquidator or by any other person
Modes of sending of notice	By Registered post, or by Speed post, or by courier, or By e-mail, or by and delivery, or by hand delivery, any other mode as directed by the Tribunal
Minimum time of notice	At least one month before the date fixed for meeting

REPORT OF THE RESULT OF THE MEETING BY THE CHAIRPERSON

The Chairperson of the meeting shall within the time fixed by the Tribunal, or where no time has been fixed, within three (3) days after the conclusion of the meeting, submit a report to the Tribunal on the result of the meeting in Form no. CAA.4.

PETITION FOR CONFIRMING COMPROMISE OR ARRANGEMENT

Where the proposed compromise or arrangement is agreed to by the members or creditors or both as the case may be, the company shall within seven (7) days of filing of report by the Chairperson, present a petition to the Tribunal in Form no. CAA.5.

BASIC PRINCIPLES OF DRAFTING OF APPLICATION AND PETITION

Before any professional commences drafting of Petition, Written Statement, Replication/Rejoinder or Miscellaneous application (cumulatively called pleadings), it is absolutely necessary to keep in mind the provisions of Companies Act, 2013, Code of Civil Procedure , Limitation Act, Indian Evidence Act, National Company Law Tribunal Rules, 2016 and Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 procedural laws and certain basic and fundamental principles of drafting and pleadings must be kept in mind.

Order 6 (Pleading Generally & Associates Rules of CPC)

1. As per Order 6 Rule 2 of CPC every pleading shall contain only a statement in a concise form of material facts on which the party is relying upon., (a) every pleading shall be divided into paragraphs, numbered consecutively, each allegation should be in a separate paragraph (b) dates, sums and numbers shall be expressed in a pleading in figures as well as in words.
2. However, as per Order 6 Rule 4 of CPC, in all cases, where the party alleges, mis-representation, fraud, breach of trust, willful default, undue influence, the party alleging any of these, must state clearly and specifically time, date month or year when any of the aforesaid happened - however, merely vague allegations are not sufficient and adequate and the court will not take cognizance.
3. Before any one proceed to commence drafting, it is absolutely necessary to gather information/ documents/ papers by having extensive discussions with the clients. The information could be gathered by asking the questions on the following points:
   - Whether all Factual Details have been taken out
   - Whether basic details of the parties have collated
   - All Evidence Necessary for Drafting
   - Appointment of Additional Directors
   - Cessation of Office of Existing Directors
   - Removal of Promoter Directors
   - Illegal Transfer of Shares / Removal of Directors Information can be obtained under Right to Information Act, 2005.
4. As per Order 6 Rule 14 of CPC Every pleading shall be signed by the party and his pleader, if any, provided that where a party pleading is, by reason of absence or for other good cause; unable to sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf.

FINAL ORDER OF TRIBUNAL

On the date of final hearing, if the Tribunal is satisfied that meeting of creditors or members has been held as per the prescribed procedure and required disclosures were made to them, then the Tribunal may, by order, sanction the compromise or arrangement. The order shall be in Form No. CAA. 6. The order may include directions in regard to any

matter or such modifications in the compromise or arrangement for the proper working of the compromise or arrangement.

Statement of compliance in mergers and amalgamations

Every company in relation to which an order has been made by the Tribunal sanctioning the scheme shall file with the Registrar of Companies a statement in Form No. CAA.8, until the scheme is fully implemented within 210 days from the end of each financial year. The statement shall be duly certified by a chartered accountant or a cost accountant or a company secretary in practice indicating whether the scheme is being complied with in accordance with the orders of the Tribunal or not.

NOTE: REFER THE SPECIMEN DOCUMENTS PROVIDED IN MODULE

LESSON 6 - ACCOUNTING IN CORPORATE RESTRUCTURING: CONCEPT AND ACCOUNTING TREATMENT

INTRODUCTION

Accounting for corporate restructuring is dealt with in the following accounting standards:

a) Accounting for Amalgamation (AS-14) - Applicable to those who have to comply with Companies (Accounting Standards) Amendment Rules, 2016

b) Business Combinations (IND AS-103) - Applicable to those who have to comply with Companies (Indian Accounting Standards) Rules, 2015

Accounting Standard-14 (AS-14) deals with accounting for amalgamations. According to AS-14 amalgamation may be either in the nature of merger or in the nature of purchase. Indian Accounting Standard - 103 (IND AS-103) lays down the accounting principles for business combination and not for asset combination.

APPLICABILITY

- Accounting Standard-14 'Accounting for Amalgamations' lays down the accounting and disclosure requirements in respect of amalgamations of companies and the treatment of any resultant goodwill or reserves.
- Business Combinations (IND AS-103) applies to a transaction or other event that meets the definition of a business combination.

Exception

This standard does not deal with cases of acquisitions which arise when there is a purchase by one company (acquiring company) of the whole or part of the shares, or the whole or part of the assets, of another company (acquired company) in consideration by payment in cash or by issue of shares or other securities in the acquiring company or partly in one form and partly in the other. The distinguishing feature of an acquisition is that the acquired company is not dissolved and its separate entity continues to exist.

Business Combinations (IND AS-103) does not apply to the following:

a) The formation of a joint venture.

b) The acquisition of an asset or a group of assets that does not constitute a business. In such cases the acquirer shall identify and recognise the individual identifiable assets acquired (including those assets that meet the definition of, and recognition criteria for, intangible assets in Ind AS 38 Intangible Assets) and liabilities assumed. The cost of the group shall be allocated to the individual assets and liabilities on the basis of their relative fair values at the date of purchase. Such a transaction or event does not give rise to goodwill.

c) Accounting for combination of entities or business under common control.

ACCOUNTING STANDARD-14 ACCOUNTING FOR AMALGAMATIONS

Types of Amalgamation

Accounting Standard (AS)-14 recognizes two types of amalgamation:

a) Amalgamation in the nature of merger.

b) Amalgamation in the nature of purchase.

An amalgamation should be considered to be an amalgamation in the nature of merger when all the following conditions are satisfied:

I. All the assets and liabilities of the transferor company become, after amalgamation, the assets and liabilities of the transferee company.

II. Shareholders holding not less than 90% of the face value of the equity shares of the transferor company (other than the equity shares already held therein, immediately before the amalgamation, by the transferee company or its subsidiaries or their nominees) become equity shareholders of the transferee company by virtue of the amalgamation.

III. The consideration for the amalgamation receivable by those equity shareholders of the transferor company who agree to become equity shareholders of the transferee company is discharged by the transferee company wholly

by the issue of equity shares in the transferee company, except that cash may be paid in respect of any fractional shares.

IV. The business of the transferor company is intended to be carried on, after the amalgamation, by the transferee company.

V. No adjustment is intended to be made to the book values of the assets and liabilities of the transferor company when they are incorporated in the financial statements of the transferee company except to ensure uniformity of accounting policies.

An amalgamation should be considered to be an amalgamation in the nature of purchase, when any one or more of the conditions specified above is not satisfied.

METHODS OF ACCOUNTING FOR AMALGAMATION

There are two main methods of accounting for amalgamations:

a) the pooling of interests method; and

b) the purchase method.

The pooling of interests method is used in case of amalgamation in the nature of merger. The purchase method is used in accounting for amalgamations in the nature of purchase.

THE POOLING OF INTERESTS METHOD

1. Since merger is a combination of two or more separate business, there is no reason to restate carrying amounts of assets and liabilities. Accordingly, only minimal changes are made in aggregating the individual financial statements of the amalgamating companies.
2. In preparing the transferee company's financial statements, the assets, liabilities and reserves (whether capital or revenue or arising on revaluation) of the transferor company should be recorded at their existing carrying amounts and in the same form as at the date of the amalgamation.
3. The balance of the Profit and Loss Account of the transferor company should be aggregated with the corresponding balance of the transferee company or transferred to the General Reserve, if any.
4. If, at the time of the amalgamation, the transferor and the transferee company have conflicting accounting policies, a uniform set of accounting policies should be adopted following the amalgamation.
5. The effects on the financial statements of any changes in accounting policies should be reported in accordance with Accounting Standard (AS-5), Net Profit or Loss for the Period 'Prior Period Items and Changes in Accounting Policies'
6. The difference between the amount recorded as share capital issued (plus any additional consideration in the form of cash or other assets) and the amount of share capital of the transferor company should be adjusted in reserves.
7. It has been clarified that the difference between the issued share capital of the transferee company and share capital of the transferor company should be treated as capital reserve. The reason given is that this difference is a kin to share premium. Furthermore, reserve created on amalgamation is not available for the purpose of distribution to shareholders as dividend and/or bonus shares. It means that if consideration exceeds the share capital of the transferor company (or companies), the unadjusted amount is a capital loss and adjustment must be made, first of all in the capital reserves and in case capital reserves are insufficient, in the revenue reserves. However, if capital reserves and revenue reserves are insufficient, the unadjusted difference may be adjusted against revenue reserves by making addition thereto by appropriation from profit and loss account.
8. There should not be direct debit to the profit and loss account. If there is insufficient balance in the profit and loss account also, the difference should be reflected on the assets side of the balance sheet in a separate heading.

THE PURCHASE METHOD

1. In preparing the transferee company's financial statements, the assets and liabilities of the transferor company should be incorporated at their fair value or, alternatively, the consideration should be allocated to individual identifiable assets and liabilities on the basis of their fair values at the date of amalgamation.

2. The reserves (whether capital or revenue or arising on revaluation) of the transferor company, other than the statutory reserves, should not be included in the financial statements of the transferee company except as in case of statutory reserve.
3. Any excess of the amount of the consideration over the fair value of the net assets of the transferor company acquired by the transferee company should be recognized in the transferee company's financial statements as goodwill arising on amalgamation in the nature of purchase.
4. If the amount of the consideration is lower than the negotiated value of the net assets acquired, the difference should be treated as Capital Reserve. The goodwill arising on amalgamation should be amortised to income on a systematic basis over its useful life.
5. The amortization period should not exceed five years unless a somewhat longer period can be justified.
6. The reserves of the transferor company, other than statutory reserve should not be included in the financial statements of the transferee company.
7. The statutory reserves refer to those reserves which are required to be maintained for legal compliance. The statute under which a statutory reserve is created may require the identity of such reserve to be maintained for a specific period. Where the requirements of the relevant statute for recording the statutory reserves in the books of the transferee company are complied with, such statutory reserves of the transferor company should be recorded in the financial statements of the transferee company by crediting the relevant statutory reserve account.
8. The corresponding debit should be given to a suitable account head (e.g., 'Amalgamation Adjustment Account) which should be disclosed as a part of "miscellaneous expenditure" or other similar category in the balance sheet as a separate line item. When the identity of the statutory reserves is no longer required to be maintained, both the reserve and the aforesaid account should be reversed.

CONSIDERATION FOR AMALGAMATION

The consideration for amalgamation means the aggregate of the shares and other securities issued and the payment made in the form of cash or other assets by the transferee company to the shareholders of the transferor company. In determining the value of the consideration, assessment is made of the agreed value or negotiated value of its various elements.

The consideration for the amalgamation should include any non-cash element at fair value. The fair value may be determined by a number of methods. For example, in case of issue of securities, the value fixed by the statutory authorities may be taken to be the fair value. In case of other assets, the fair value may be determined by reference to the market value of the assets given up, and where the market value of the assets given up cannot be reliably assessed, such assets may be valued at their respective net book values.

While the scheme of amalgamation provides for an adjustment to the consideration contingent on one or more future events, the amount of the additional payment should be included in the consideration if payment is probable and areas on able estimate of the amount can be made. In all other cases, the adjustment should be recognized as soon as the amount is determinable.

TREATMENT OF RESERVES ON AMALGAMATION

- **If the amalgamation is an 'amalgamation in the nature of merger':** the identity of the reserves is preserved and they appear in the financial statements of the transferee company in the same form in which they appeared in the financial statements of the transferor company. As a result of preserving the identity, reserves which are available for distribution as dividend before the amalgamation would also be available for distribution as dividend after the amalgamation. The difference between the amount recorded as share capital issued (plus any additional consideration in the form of cash or other assets) and the amount of share capital of the transferor company is adjusted in reserves in the financial statements of the transferee company

- **If the amalgamation is an 'amalgamation in the nature of purchase':** the identity of the reserves, other than the statutory reserves is not preserved, dealt within the certain circumstances mentioned below.
  - Certain reserves may have been created by the transferor company pursuant to the requirements of, or to avail of the benefits under, the Income-tax Act, 1961; for example, Development Allowance Reserve, or Investment Allowance Reserve. The Act requires that the identity of the reserves should be preserved for a specified period.

- Certain other reserves may have been created in the financial statements of the transferor company in terms of the requirements of other statutes. Though, normally, in an amalgamation in the nature of purchase, the identity of reserves is not preserved, an exception is made in respect of reserves of the afore said nature (referred to herein after as 'statutory reserves') and such reserves retain their identity in the financial statements of the transferee company in the same form in which they appeared in the financial statements of the transferor company, so long as their identity is required to be maintained to comply with the relevant statute.
- This exception is made only in those amalgamations where the requirements of the relevant statute for recording the statutory reserves in the books of the transferee company are complied with.
- In such cases the statutory reserves are recorded in the financial statements of the transferee company by a corresponding debit to a suitable account head (e.g., 'Amalgamation Adjustment Account') which is disclosed as a part of 'miscellaneous expenditure' or other similar category in the balance sheet.
- When the identity of the statutory reserves is no longer required to be maintained, both the reserves and the aforesaid account are reversed.
- The amount of the consideration is deducted from the value of the net assets of the transferor company acquired by the transferee company. If the result of the computation is negative, the difference is debited to goodwill arising on amalgamation and dealt with in the manner stated below undertreatment of goodwill on amalgamation. If the result of the computation is positive, the difference is credited to Capital Reserve.

GOODWILL ON AMALGAMATION

Goodwill arising on amalgamation represents a payment made in anticipation of future income and it is appropriate to treat it as an asset to be amortised to income on a systematic basis over its useful life. Due to nature of goodwill, it is difficult to estimate its useful life, but estimation is done on a prudent basis. Accordingly, it should be appropriate to amortise goodwill over a period not exceeding five years unless a somewhat longer period can be justified. The following factors are to be taken into account in estimating the useful life of goodwill:

i. the foreseeable life of the business or industry;
ii. the effects of product obsolescence, changes in demand and other economic factors;
iii. the service life expectancies of key individuals or groups of employees;
iv. expected actions by competitors or potential competitors; and
v. legal, regulatory or contractual provisions affecting the useful life.

Balance of Profit and Loss Account

In the case of an 'amalgamation in the nature of merger', the balance of the Profit and Loss Account appearing in the financial statements of the transferor company is aggregated with the corresponding balance appearing in the financial statements of the transferee company. Alternatively, it is transferred to the General Reserve, if any. In the case of an 'amalgamation in the nature of purchase', the balance of the Profit and Loss Account appearing in the financial statements of the transferor company, whether debit or credit, loses its identity.

DISCLOSURE REQUIREMENTS

a) For amalgamations of every type following disclosures should be made in the:
   i. first financial statements after the amalgamation;
   ii. names and general nature of business of the amalgamating companies;
   iii. effective date of amalgamation for accounting purposes;
   iv. the method of accounting used to reflect the amalgamation; and
   v. particulars of the scheme sanctioned under a statute.

b) In case of amalgamations accounted for under the pooling of interests method, the following additional disclosures are required to be made in the first financial statements following the amalgamation:
   (i) description and number of shares issued, together with the percentage of each company's equity shares exchanged to effect the amalgamation;
   (ii) the amount of any difference between the consideration and the value of net identifiable assets acquired, and the treatment thereof.

c) In case of amalgamations accounted for under the purchase method the following additional disclosures are required to be made in the first financial statements following the amalgamations:
   i. consideration for the amalgamation and a description of the consideration paid or contingently payable, and
   ii. the amount of any difference between the consideration and the value of net identifiable assets acquired, and the treatment thereof including the period of amortization of any goodwill arising on amalgamation.

Amalgamation after the Balance Sheet Date

While an amalgamation is effected after the balance sheet date but before the issuance of the financial statements of either party to the amalgamation, disclosure should be made as per the provisions of AS-4, 'Contingencies and Events Occurring after the Balance Sheet Date', but the amalgamation should not be incorporated in that financial statements. In certain circumstances, the amalgamation may also provide additional information affecting the financial statements themselves, for instance, by allowing the going concern assumption to be maintained.

INDIAN ACCOUNTING STANDARD 103- BUSINESS COMBINATIONS

Ind AS 103 defines business combination which has a wider scope when compared to AS-14 which deals only with amalgamation. Business combination is the process under which two or more business organisations or their net assets are brought under common control in a single business entity.

Business and Business Combination as per IND AS 103

Business: A business consists of inputs and process applied to those inputs that have the ability to create outputs. Thus, a business has three elements:

a) **Input:** An economic resource that creates or has the ability to create outputs when one or more processes are applied to it. Example Non-current assets.
b) **Process:** Any system, standard, protocol, convention or rule that when applied to an input or inputs, creates or has the ability to create outputs. Example: Strategic management processes.
c) **Output:** The results of inputs and processes applied to those inputs that provide or have the ability to provide a return in the form of dividend, lower costs or other economic benefits directly to investors or other owners, members or participants.

Business Combination: A transaction or other event in which an acquirer obtains control of one or more business. Transactions sometimes referred to as true mergers or mergers of equals are also business combinations as that term is used in this IND AS. A business combination is an act of bringing together of separate entities or business into one reporting unit. The result of business combination is one entity obtains control of one or more businesses. If an entity obtains control over other entities which are not business, the act is not a business combination. In such a case the reporting entity will account it as asset acquisition

DIFFERENCE BETWEEN IND AS-103 BUSINESS COMBINATIONS AND IND AS-110 CONSOLIDATED FINANCIAL STATEMENTS

It may seem that Ind AS-110 Consolidated Financial statements and Ind AS-103 Business Combinations deal with the same thing which is not accurate.

- Ind AS 110 deals with accounting aspect of consolidation of businesses whereas Ind AS 103 deals with scope of business combinations.
- While Ind AS-110 defines a control and prescribes specific consolidation procedures, Ind AS-103 is more about the measurement of the items in the consolidated financial statements, such as goodwill, non-controlling interest, etc.
- While preparing consolidated financial statements, first you have to apply Ind AS-103 for measurement of assets and liabilities acquired, non-controlling interest and goodwill/bargain purchase then the consolidation procedure as per Ind AS-110.

ACQUISITION METHOD OF BUSINESS COMBINATION AS PER IND AS 103

An entity shall account for each business combination by applying the acquisition method. Applying the acquisition method requires the following:

a) Identifying the acquirer
b) Determining the acquisition date
c) Identification and measurement of consideration transferred
d) Recognising and measuring the identifiable assets acquired, liabilities assumed and any noncontrolling interest in the acquiree; and
e) Recognising and measuring goodwill or a gain from a bargain purchase.

(a) Identifying the acquirer

- For each Business Combination one of the combining entities shall be identified as the acquirer.
- Acquirer is the entity that obtains control of business.
- The guidance in Ind AS 110 shall be used to identify the acquirer — the entity that obtains control of another entity, i.e., the acquiree.

As per Ind AS 110 'Consolidated Financial Statements', an investor controls an investee if and only if the investor has all the following:

a) power over the investee;
b) exposure, or rights, to variable returns from its involvement with the investee; and
c) the ability to use its power over the investee to affect the amount of the investor's returns.

The above definition is very wide and control assessment does not depend only on voting rights instead it depends on the following as well:

- Potential voting rights;
- Rights of non-controlling shareholders; and
- Other contractual right of the investor if those are substantive in nature.

When it is not clear from Ind AS 110, the following factors should be considered under Ind AS 103:

a) In a business combination effected primarily by transferring cash or other assets or by incurring liabilities, the acquirer is usually the entity that transfers the cash or other assets or incurs the liabilities.
b) In a business combination effected primarily by exchanging equity interests, the acquirer is usually the entity that issues its equity interests.
c) The acquirer is usually the combining entity whose owners have the ability to elect or appoint or to remove a majority of the members of the governing body of the combined entity.
d) The acquirer is usually the combining entity whose (former) management dominates the management of the combined entity.
e) The acquirer is usually the combining entity that pays a premium over the pre-combination fair value of the equity interests of the other combining entity or entities.
f) The acquirer is usually the combining entity whose relative size (measured in, for example, assets, revenues or profit) is significantly greater than that of the other combining entity or entities.

(b) Determining the acquisition date

- The acquirer shall identify the acquisition date, which is the date on which it obtains control of the acquiree.
- The date on which the acquirer obtains control of the acquiree is generally the date on which the acquirer legally transfers the consideration, acquires the assets and assumes the liabilities of the acquiree—the closing date. However, the acquirer might obtain control on a date that is either earlier or later than the closing date.
- The acquisition date is a very important step in the business combination accounting because it determines when the acquirer recognises and measures the consideration, the assets acquired and liabilities assumed. The acquiree's results are consolidated from this date. The acquisition date materially impacts the overall acquisition accounting, including post-combination earnings.

(c) Identification and measurement of consideration transferred

The consideration transferred in a business combination is the sum of the fair values of assets transferred, liabilities incurred, and equity issued by the acquirer. The consideration transferred in a business combination shall be measured at fair value, which shall be calculated as the sum of the acquisition-date fair values of the assets transferred by the acquirer, the liabilities incurred by the acquirer to former owners of the acquiree and the equity interests issued by the acquirer.

- The consideration transferred may include assets or liabilities of the acquirer that have carrying amounts that differ from their fair values at the acquisition date (for example, non-monetary assets or a business of the acquirer). If so, the acquirer shall remeasure the transferred assets or liabilities to their fair values as of the acquisition date and recognize the resulting gains or losses, if any, in profit or loss.
- Further, any items that are not part of the business combination be accounted separately from business combination (example: acquisition related costs)
- Contingent consideration (Obligation by the acquirer to transfer additional assets or equity interest, if specified future events occur or conditions are met), if any, should also be measured at fair value at acquisition date. The acquirer shall classify an obligation to pay contingent consideration as a liability or as equity on the basis of the definitions of an equity instrument and a financial liability in accordance with the requirement of Ind AS 32 Financial Instruments: Presentation, or other applicable Indian Accounting Standards.

(d) Recognising and measuring the identifiable assets acquired, liabilities assumed and any non-controlling Interest in the acquiree

As of the acquisition date, the acquirer shall recognise, separately from goodwill, the identifiable assets acquired, the liabilities assumed and any non-controlling interest in the acquiree. The identifiable assets acquired and liabilities assumed must meet the definitions of assets and liabilities in the Framework for the Preparation and Presentation of Financial Statements in accordance with Indian Accounting Standards issued by the Institute of Chartered Accountants of India at the acquisition date.

(e) Recognising and measuring goodwill or a gain from a bargain purchase;

The acquirer shall recognise goodwill as of the acquisition date measured as the excess of (a) over (b) below:

a) the aggregate of:
   i. the consideration transferred;
   ii. the amount of any non-controlling interest in the acquiree; and
   iii. in a business combination achieved in stages, the acquisition-date fair value of the acquirer's previously held equity interest in the acquiree.

b) the net of the acquisition-date amounts of the identifiable assets acquired and the liabilities assumed measured in accordance with this Ind AS.

In extremely rare circumstances, an acquirer will make a bargain purchase in a business combination in which the amount in (b) exceeds the aggregate of the amounts specified in (a). If that excess remains, the acquirer shall recognise the resulting gain (as bargain purchase) in other comprehensive income on the acquisition date and accumulate the same in equity as capital reserve. The gain shall be attributed to the acquirer.

MEASUREMENT OF NON-CONTROLLING INTEREST (NCI)

- Non-Controlling Interest (NCI) is the portion of equity ownership in a subsidiary not attributable to the parent company, who has a controlling interest (greater than 50% but less than 100%) and consolidates the subsidiary's financial results with its own.
- Ind AS 103 allows the acquirer to measure a non-controlling interest in the acquiree at its fair value at the acquisition date.
- Sometimes an acquirer will be able to measure the acquisition-date fair value of a non-controlling interest on the basis of a quoted price in an active market for the equity shares (ie those not held by the acquirer).
- In other situations, however, a quoted price in an active market for the equity shares will not be available. In those situations, the acquirer would measure the fair value of the non-controlling interest using other valuation techniques.
- The fair values of the acquirer's interest in the acquiree and the non-controlling interest on a per share basis might differ.
- The main difference is likely to be the inclusion of a control premium in the per-share fair value of the acquirer's interest in the acquiree or, conversely, the inclusion of a discount for lack of control (also referred to as a noncontrolling interest discount) in the per-share fair value of the non-controlling interest if market participants would take into account such a premium or discount when pricing the non-controlling interest.

STEP ACQUISITIONS

In the case an entity acquires an entity step by step through series of purchase then the acquisition date will be the date on which the acquirer obtains control. Till the time the control is obtained the Investment will be accounted as per the requirements of other Ind AS 109, if the investments are covered under that standard or as per Ind AS 28, if the investments are in Associates or Joint Ventures.

If a business combination achieved in stages, the acquirer shall remeasure its previously held equity interest in the acquiree at its acquisition-date fair value and recognise the resulting gain or loss, if any, in profit or loss or other comprehensive income, as appropriate. In prior reporting periods, the acquirer may have recognised changes in the value of its equity interest in the acquiree in other comprehensive income. If so, the amount that was recognised in other comprehensive income shall be recognised on the same basis as would be required if the acquirer had disposed directly of the previously held equity interest.

BUSINESS COMBINATION OF ENTITIES UNDER COMMON CONTROL

Common control business combination means a business combination involving entities or businesses in which all the combining entities or businesses are ultimately controlled by the same party or parties both before and after the business combination, and that control is not transitory.

Common control business combinations will include transactions, such as transfer of subsidiaries or businesses, between entities within a group. The extent of non-controlling interests in each of the combining entities before and after the business combination is not relevant to determining whether the combination is not relevant to determining whether the combination involves entities under common control. This is because of partially-owned subsidiary in nevertheless under the control of the parent entity.

METHOD OF ACCOUNTING FOR COMMON CONTROL BUSINESS COMBINATIONS

Business combinations involving entities or businesses under common control shall be accounted for using the pooling of interest method. The pooling of interest method is considered to involve the following:

a) The assets and liabilities of the combining entities are reflected at their carrying amounts.
b) No adjustments are made to reflect fair values or recognise any new assets or liabilities. The only adjustments that are made are to harmonise accounting policies.
c) The financial information in the financial statements in respect of prior periods should be restated as if the business combination had occurred from the beginning of the earliest period presented in the financial statements, irrespective of the actual date of the combination. However, if business combination had occurred after that date, prior period information shall be restated only from that date.

The consideration for the business combination may consist of securities, cash or other assets. Securities shall be recorded at nominal value. In determining the value of the consideration, assets other than cash shall be considered at their fair values.

The balance of the retained earnings appearing in the financial statements of the transferor is aggregated with the corresponding balance appearing in the financial statements of the transferee. Alternatively, it is transferred to General Reserve, if any.

The identity of the reserves shall be preserved and shall appear in the financial statements of the transferee in the same form in which they appeared in the financial statements of the transferor. The excess, if any, between the amount recorded as share capital issued plus any additional consideration in the form of cash or other assets and the amount of share capital of the transferor is recognised as goodwill in the financial statements of the transferee entity; in case of any deficiency, the same shall be treated as capital reserve.

Disclosures

The following disclosures shall be made in the first financial statements following the business combination:

a) Names and general nature of business of the combining entities;
b) The date on which the transferor obtains control of the transferee;
c) Description and number of shares issued, together with the percentage of each entity's equity shares exchanged to effect the business combination; and
d) The amount of any difference between the consideration and the value of net identifiable assets acquired, and the treatment thereof

Reverse Acquisition

A reverse acquisition occurs when the entity that issues securities (the legal acquirer) is identified as the acquiree for accounting purposes. The entity whose equity interests are acquired (the legal acquiree) must be the acquirer for accounting purposes for the transaction to be considered a reverse acquisition.

For example, reverse acquisitions sometimes occur when a private operating entity wants to become a public entity but does not want to register its equity shares. To accomplish that, the private entity will arrange for a public entity to acquire its equity interests in exchange for the equity interests of the public entity. In this example, the public entity is the legal acquirer because it issued its equity interests, and the private entity is the legal acquiree because its equity interests were acquired. However, application of the guidance in paragraphs B13–B18 of Ind AS 103 results in identifying:

a) the public entity as the acquiree for accounting purposes (the accounting acquiree); and

b) the private entity as the acquirer for accounting purposes (the accounting acquirer).

The accounting acquiree must meet the definition of a business for the transaction to be accounted for as a reverse acquisition, and all of the recognition and measurement principles in Ind AS103, including the requirement to recognise goodwill, apply.

Business Combination after the balance sheet date

When a business combination is effected after the balance sheet but before the approval of the financial statements for issue by either party to the business combination, disclosure is made in accordance with Ind AS 10 Events after the reporting period, but the business combination is not incorporated in the financial statements. In certain circumstances, the business combination may also provide additional information affecting the financial statements themselves, for instance, by allowing the going concern assumption to be maintained.

RECENT DEVELOPMENT'S IN M&A ACCOUNTING

AS-14 Accounting for amalgamations did not provide guidance in many situations such as demerger, reverse acquisition. With the introduction of IND-AS 103 – Business combination and Companies Act, 2013 accounting treatment of Mergers and Acquisitions have undergone a drastic change. Section 232 of the Companies Act 2013 provides that accounting treatment prescribed in the court approved scheme for merger, demerger, amalgamation or group restructuring should be in accordance with the notified accounting standards prescribed in the Companies Act, 2013. Certain other developments in M&A accounting are as below:

(a) Method of Accounting for business combination	Under AS-14 many companies were able to account for business combination between commonly controlled enterprises using purchase method. As a result of this, tax benefits for goodwill amortisation was available while computing book profit for MAT purpose. Under IND AS-103 it is mandatory to use pooling of interest method for business combination between commonly controlled enterprises. As a result of this accounting alternatives gets restricted and the consequent tax benefits will also be not available.
(b) Appointed date v. Effective date	The date from which the scheme of amalgamation comes into force (and is usually specified in the scheme of amalgamation). It also denotes the date on which the amalgamation takes place or, in other words, the property, assets, and liabilities of the Transferor-Company vest in and are transferred to the Transferee Company. In court approved merger, demerger and other restructuring accounting was done from the appointed date once the court order became effective. The effective date is the date when the amalgamation/merger is completed in all respects after having gone through the formalities involved and the transferor company having been liquidated by the Registrar of Companies, based on the approval of the NCLT and filing the necessary documents thereof with the Registrar of Companies. With the implementation of IND-AS 103 Business combination this is going to change. As per IND-AS 103 accounting for business combination should be done on the date on which the acquirer obtains control.
(c) Accounting for goodwill	AS-14 provided an accounting choice to compute the goodwill at the fair value of the assets taken over or at the net asset value of the assets taken over. However, this choice is not available in IND AS 103 Business combination, as the goodwill has to be computed using the fair value of the net assets taken over. AS-14 provides for amortisation of goodwill over a period of five years. IND-AS 103 Business combination prohibits amortisation of goodwill and is required to test goodwill for impairment annually. This will result in a volatile profit and loss account. Goodwill

	amortisation was available as tax deductible item while computing MAT liability. This will not be available in the IND-AS regime
(d) Common control business combinations	IND AS prescribes specific accounting principles for common control business combinations. It mandates the use of the pooling of interest method with restatement of the comparative period presented for the period the entities were in common control. The requirement to restate comparative may not be fully in sync with the tax treatment of considering the merger or amalgamation only from the appointed date.
(e) Income Taxes	As per the requirement of Ind AS 12, no deferred tax consequence should be recorded on initial recognition of deferred tax except assets and liabilities acquired during business combination. Accordingly, the acquirer shall recognise and measure a deferred tax asset or liability arising from the assets acquired and liabilities assumed in a business combination in accordance with Ind AS 12, Income Taxes. The acquirer shall account for the potential tax effects of temporary differences and carry forwards of an acquiree that exist at the acquisition date or arise as a result of the acquisition in accordance with Ind AS 12.
(e) Indemnification assets	The seller in a business combination may contractually indemnify the acquirer for the outcome of a contingency or uncertainty related to all or part of a specific asset or liability. For example, the seller may indemnify the acquirer against losses above a specified amount on a liability arising from a particular contingency; in other words, the seller will guarantee that the acquirer's liability will not exceed a specified amount. As a result, the acquirer obtains an indemnification asset. The acquirer shall recognise an indemnification asset at the same time that it recognises the indemnified item measured on the same basis as the indemnified item, subject to the need for a valuation allowance for uncollectible amounts.
(f) Intangible assets	The acquirer shall record separately from Goodwill, the identifiable intangible acquired in a business combination. An intangible asset is identifiable if it meets either the separability criterion or the contractual-legal criterion.
(g) Share based payment transactions	The acquirer shall measure a liability or an equity instrument related to share-based payment transactions of the acquiree or the replacement of an acquiree's share-based payment transactions with share-based payment transactions of the acquirer in accordance with the method in Ind AS 102, Share-based Payment, at the acquisition date.
(h) Assets held for sale	The acquirer shall measure an acquired non-current asset (or disposal group) that is classified as held for sale at the acquisition date in accordance with Ind AS 105, Non-current Assets Held for Sale and Discontinued Operations, at fair value less costs to sell in accordance with that Ind AS.

IFRS 3- BUSINESS COMBINATION

The principles of IND- AS 103 Business combination and IFRS 3 are same to a very great extent. There are only few carve out in IND-AS 103 when compared to IFRS 3. They are as follows:

- IFRS-3 excludes from its scope business combinations of entities under common control. Ind AS 103 (Appendix C) gives the guidance in this regard.
- IFRS-3 requires bargain purchase gain arising on business combination to be recognised in profit or loss account. IND-AS 103 requires that the bargain purchase gain to be recognised in other comprehensive income and accumulated in equity as capital reserve, unless there is no clear evidence for the underlying reason for classification of the business combination as a bargain purchase, in which case, it shall be recognised directly in equity as capital reserve.
- The main reason for this carve out is, the recognition of such gains in profit or loss would result into recognition of unrealised gains as the value of net assets is determined on the basis of fair value of net assets acquired.

DEMERGER

Demerger is a method of corporate restructuring by which a business unit or subsidiary of a company becomes an independent entity from its parent's entity. The parent firm distributes shares of subsidiary to its shareholders through a stock dividend. In most cases demerger unlocks hidden shareholder value. For the parent company, it sharpens the management focus. For the new entity, it gets independence to make decisions, explore new opportunities based on its strength. The word demerger has got statutory recognition in the Income Tax Act, 1961. As per Income Tax Act, 1961 demerger in relation to companies, means the transfer, pursuant to a scheme of arrangement under Companies

Act, 2013 by a demerged company of its one or more undertakings to any resulting company subject to conditions specified. As per various court decisions AS-14 -Accounting for Amalgamations is not applicable to demergers.

Applicability of IND-AS 103 for Demerger Transactions

As discussed above the concept of demerger is recognised in the Income Tax Act, 1961. However, tax benefits are available only if the conditions of demerger provided in section 2(19AA) are met. One such condition is that assets and liabilities are to be recorded by the transferee company at the book value of the transferor company. The requirement to record assets and liabilities at fair value in case of non-common control business combination under IND-AS 103 may create problem in achieving a most tax efficient demerger

LESSON 7 - TAXATION & STAMP DUTY ASPECTS OF CORPORATE RESTRUCTURING

TAXATION ASPECTS OF MERGERS AND AMALGAMATIONS

Section 2(1B) of the Income Tax Act, 1961 defines the term 'amalgamation' as follows:

"Amalgamation" in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company), in such a manner that –

i. all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;

ii. all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation;

iii. shareholders holding not less than $3/4^{th}$ in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become shareholders of the amalgamated company by virtue of the amalgamation, otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first mentioned company.

CARRY FORWARD AND SET OFF OF ACCUMULATED LOSS AND UNABSORBED DEPRECIATION ALLOWANCE (SECTION 72A)

(A) Amalgamation

1. Where there has been an amalgamation of—
   a) a company owning an industrial undertaking or a ship or a hotel with another company; or
   b) a banking company referred in the Banking Regulation Act, 1949 with a specified bank; or
   c) one or more public sector company or companies with one or more public sector company or companies; or
   d) An erstwhile public sector company with one or more company or companies, if the share purchase agreement entered into under strategic disinvestment restricted immediate amalgamation of the said public sector company and the amalgamation is carried out within five years from the end of the previous year in which the restriction on amalgamation in the share purchase agreement ends,

   then, the accumulated loss and the unabsorbed depreciation of the amalgamating company shall be deemed to be the loss or, as the case may be, allowance for unabsorbed depreciation of the amalgamated company for the previous year in which the amalgamation was effected, and other provisions of this Act relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly:

   However, in case of an amalgamation referred to in clause (d), the allowance for un-absorbed depreciation of the amalgamated company, shall not be more than the accumulated loss and unabsorbed depreciation of the public sector company as on the date on which the public sector company ceases to be a public sector company as a result of strategic disinvestment.

2. The accumulated loss shall not be set off or carried forward and the unabsorbed depreciation shall not be allowed in the assessment of the amalgamated company unless—
   a) the amalgamating company—
      i. has been engaged in the business, in which the accumulated loss occurred or depreciation remains unabsorbed, for **three** or more years;
      ii. has held continuously as on the date of the amalgamation at least three-fourths of the book value of fixed assets held by it two years prior to the date of amalgamation.

b) the amalgamated company—

I. holds continuously for a minimum period of **five years** from the date of amalgamation at least three-fourths of the book value of fixed assets of the amalgamating company acquired in a scheme of amalgamation;

II. continues the business of the amalgamating company for a minimum period of five years from the date of amalgamation.

III. fulfils such other conditions as may be prescribed to ensure the revival of the business of the amalgamating company or to ensure that the amalgamation is for genuine business purpose.

3. In a case where above conditions are not complied with, the set off of loss or allowance of depreciation made in any previous year in the hands of the amalgamated company shall be deemed to be the income of the amalgamated company chargeable to tax for the year in which such conditions are not complied with.

(B) DEMERGER

1. In the case of a demerger, the accumulated loss and the allowance for unabsorbed depreciation of the demerged company shall—
   a) where such loss or unabsorbed depreciation is directly relatable to the undertakings transferred to the resulting company, be allowed to be carried forward and set off in the hands of the resulting company;
   b) where such loss or unabsorbed depreciation is not directly relatable to the undertakings transferred to the resulting company, be apportioned between the demerged company and the resulting company in the same proportion in which the assets of the undertakings have been retained by the demerged company and transferred to the resulting company, and be allowed to be carried forward and set off in the hands of the demerged company or the resulting company, as the case may be.
2. The Central Government may by notification in the Official Gazette, specify such conditions as it considers necessary to ensure that the demerger is for genuine business purposes.

(C) REORGANISATION OF BUSINESS

In the case of reorganisation of business, whereby, a firm or a proprietary concern is succeeded by a company then, the accumulated loss and the unabsorbed depreciation of the predecessor firm or the proprietary concern, as the case may be, shall be deemed to be the loss or allowance for depreciation of the successor company for the purpose of previous year in which business reorganisation was effected and other provisions relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly:

However, if any of the conditions laid down in section 47 are not complied with, the set off of loss or allowance of depreciation made in any previous year in the hands of the successor company, shall be deemed to be the income of the company chargeable to tax in the year in which such conditions are not complied with.

CARRY FORWARD AND SET OFF OF ACCUMULATED BUSINESS LOSSES AND UNABSORBED DEPRECIATION IN A SCHEME OF AMALGAMATION IN CERTAIN CASES [SECTION 72AA]

(1) Applicability: This section provides for carry forward and set off of accumulated loss and unabsorbed depreciation allowance where there has been an amalgamation of –

I. one or more banking company with—
   a) any other banking institution under a scheme sanctioned and brought into force by the Central Government under the Banking Regulation Act, 1949; or
   b) any other banking institution or a company subsequent to a strategic disinvestment, wherein the amalgamation is carried out within a period of five years from the end of the previous year during which such strategic disinvestment is carried out; or

II. one or more corresponding new bank or banks with any other corresponding new bank under a scheme brought into force by the Central Government under section 9 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 or under section 9 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 or both, as the case may be; or

III. one or more Government company or companies with any other Government company under a scheme sanctioned and brought into force by the Central Government under section 16 of the General Insurance Business (Nationalisation) Act, 1972.

(2) Allowability of carry forward and set-off of accumulated loss and unabsorbed depreciation in case of amalgamation: The accumulated loss and the unabsorbed depreciation of such banking company or companies or amalgamating corresponding new bank or banks or amalgamating Government company or companies shall be deemed to be the loss or, as the case may be, allowance for depreciation of such banking institution or company or amalgamated corresponding new bank or amalgamated Government company for the previous year in which the scheme of amalgamation was brought into force and other provisions of this Act relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly.

CAPITAL GAINS TAX

Capital gains tax is leviable if there arises capital gain due to transfer of capital assets. Capital gain arises only when a capital asset is transferred. If the asset transferred is not a capital asset, it will not be taxed as capital gain.

In an amalgamation, capital gain arises if there is a transfer of capital asset. However, section 47 of the Income Tax Act, 1961 treats certain transactions from amalgamation as not transfer and hence capital gains tax will not be applicable. They are as under:

I. any transfer in a scheme of amalgamation of a capital asset by the amalgamating company to the amalgamated company, if the amalgamated company is an Indian company.

II. any transfer, in a scheme of amalgamation, of a capital asset being a share or shares held in an Indian company, by the amalgamating foreign company to the amalgamated foreign company, if–
   a) at least twenty-five per cent of the shareholders of the amalgamating foreign company continue to remain shareholders of the amalgamated foreign company; and
   b) such transfer does not attract tax on capital gains in the country, in which the amalgamating company is incorporated;

III. any transfer, in a scheme of amalgamation of a banking company with a banking institution sanctioned and brought into force by the Central Government under sub-section (7) of section 45 of the Banking Regulation Act, 1949, of a capital asset by the banking company to the banking institution.

IV. any transfer, in a scheme of amalgamation, of a capital asset, being a share of a foreign company, referred to in the Explanation 5 to clause (i) of sub-section (1) of section 9, which derives, directly or indirectly, its value substantially from the share or shares of an Indian company, held by the amalgamating foreign company to the amalgamated foreign company, if–
   a) at least twenty-five per cent of the shareholders of the amalgamating foreign company continue to remain shareholders of the amalgamated foreign company; and
   b) such transfer does not attract tax on capital gains in the country in which the amalgamating company is incorporated;

V. any transfer, in a demerger, of a capital asset by the demerged company to the resulting company, if the resulting company is an Indian company.

VI. any transfer in a demerger, of a capital asset, being a share or shares held in an Indian company, by the demerged foreign company to the resulting foreign company, if–
   a) the shareholders holding not less than three-fourths in value of the shares of the demerged foreign company continue to remain shareholders of the resulting foreign company; and
   b) such transfer does not attract tax on capital gains in the country, in which the demerged foreign company is incorporated: Provided that the provisions of sections 230 to 232 of the Companies Act, 2013 shall not apply in case of demergers referred to in this clause.

VII. any transfer in a business reorganisation, of a capital asset by the predecessor co-operative bank to the successor co-operative bank or to the converted banking company;

VIII. any transfer by a shareholder, in a business reorganisation, of a capital asset being a share or shares held by him in the predecessor co-operative bank if the transfer is made in consideration of the allotment to him of any share or shares in the successor co-operative bank or to the converted banking company.

IX. any transfer in a demerger, of a capital asset, being a share of a foreign company, which derives, directly or indirectly, its value substantially from the share or shares of an Indian company, held by the demerged foreign company to the resulting foreign company, if–

a) the shareholders, holding not less than three-fourths in value of the shares of the demerged foreign company, continue to remain shareholders of the resulting foreign company; and

b) such transfer does not attract tax on capital gains in the country in which the demerged foreign company is incorporated: Provided that the provisions of sections 230 to 232 of the Companies Act, 2013 shall not apply in case of demergers referred to in this clause.

X. any transfer or issue of shares by the resulting company, in a scheme of demerger to the shareholders of the demerged company if the transfer or issue is made in consideration of demerger of the undertaking

XI. any transfer by a shareholder, in a scheme of amalgamation, of a capital asset being a share or shares held by him in the amalgamating company, if–

a) the transfer is made in consideration of the allotment to him of any share or shares in the amalgamated company except where the shareholder itself is the amalgamated company, and

b) the amalgamated company is an Indian company

Amortisation of Preliminary Expenses

The benefit of amortization of preliminary expenses under section 35D of the Income-tax Act, 1961 are ordinarily available only to the assessee who incurred the expenditure. However, the benefit will not be lost in case the undertaking of an Indian company which is entitled to the amortization is transferred to another Indian company in a scheme of amalgamation within the 5 years period of amortisation. In that event, the deduction in respect of previous year in which the amalgamation takes place and the following previous year within the 5 years period will be allowed to the amalgamated company and not to the amalgamating company.

Capital Expenditure on Scientific Research

In the case of an amalgamation, if the amalgamating company transfers to the amalgamated company, which is an Indian company, any asset representing capital expenditure on scientific research, provision of section 35 of the Income-tax Act, 1961 would apply to the amalgamated company as they would have applied to amalgamating company if the latter had not transferred the asset

Expenditure on Amalgamation

Section 35DD of the Income-tax Act, 1961 provides that where an assessee being an Indian company incurs any expenditure, on or after the 1st day of April, 1999, wholly and exclusively for the purposes of amalgamation or demerger of an undertaking, the assessee shall be allowed a deduction of an amount equal to one-fifth of such expenditure for each of the five successive previous years beginning with the previous year in which the amalgamation or demerger takes place.

Expenditure for obtaining Licence to Operate Telecommunication Services (Section 35 ABB)

The provisions of the section 35ABB of the Income Tax Act, 1961 relating to deduction of expenditure, incurred for obtaining licence to operate communication services shall, as far as may be, apply to the amalgamated company as they would have applied to the amalgamating company if the latter had not transferred the licence.

Expenditure for obtaining Spectrum (Section 35 ABA)

The provisions of the section 35ABA of the Income Tax Act, 1961 relating to deduction of expenditure, incurred for obtaining spectrum to operate communication services shall, as far as may be, apply to the amalgamated company as they would have applied to the amalgamating company if the latter had not transferred the spectrum.

Deduction for expenditure on prospecting, etc., for certain minerals (Section 35E)

The provisions of section 35E of the Income Tax Act, 1961 relating to expenditure on prospecting, etc., for certain minerals shall, as far as may be, apply to the amalgamated company as they would have applied to the amalgamating company as if the amalgamation has not happened.

TAX ASPECTS ON SLUMP SALE

Section 180(1) of the Companies Act, 2013 empowers the Board of Directors of a company, after obtaining the consent of the company by a special resolution to sell, lease or otherwise dispose off the whole or substantially the whole of the undertaking(s) of a company.

Section 2(42C) of the Income Tax Act, 1961 defines slump sale as a means of transfer of one or more undertakings by any means for a lump sum consideration without values being assigned to the Individual assets and liabilities in such transfer.

"undertaking" shall mean an undertaking in which the investment of the company exceeds twenty per cent. of its net worth as per the audited balance sheet of the preceding financial year or an undertaking which generates twenty per cent of the total income of the company during the previous financial year;

the expression "substantially the whole of the undertaking" in any financial year shall mean twenty per cent. or more of the value of the undertaking as per the audited balance sheet of the preceding financial year.

The transaction in this case, is normally of either of the following type:

a) **Sale of a Running Concern:** This type provides for the continuation of the running of the undertaking without any interruption. But there is always a problem of fixing a value in the case of a running concern for all tangible and intangible assets. In view of all this, the seller normally fixes a lump sum price called 'slump price'. A slump sale or a slump transaction would, therefore, mean a sale or a transaction which has a lump sum price for consideration.

b) **Sale of a concern which is being wound-up:** A sale in the course of winding up, is nothing but a realization sale aimed at collecting the maximum price for distributing to the creditors and the balance to the contributories (the shareholders). By the very nature of the transaction, this is a piecemeal sale and not a slump sale. In this case, there will be liability to tax as per the various provisions of the Income Tax Act and the criteria which is applicable to a slump sale is not applicable here.

The gain or loss resulting out of a slump sale shall be a Capital Gain/Loss under the Income Tax Act. The computation has been prescribed as follows:

Particulars	Amount
Full Value of Consideration	XXXX
(-) Expenses in relation to transfer	XXXX
Net Consideration	Xxxx
Cost of Acquisition / net worth	Xxxx
Capital Gain or (Loss)	xxxx

Sale consideration to be calculated as per the Fair Market Value computation which includes monetary as well as non-monetary considerations. The capital gain or loss as computed above will be either long term or short-term depending upon the period for which the undertaking is held. If the undertaking is held for more than 36 months, the resulting capital gain or loss shall be long-term and if it is held for less than 36 months, the resulting capital gain or loss shall be short term. Further, there will be no indexation benefit available in the computation of the capital gains.

TAX ASPECTS OF DEMERGER

Tax concession/incentives in case of demerger Section 2(19AA) of the Income Tax Act, 1961 defines the term demerger as follows:

"demerger", in relation to companies, means the transfer, pursuant to a scheme of arrangement under sections 231 to 232 of the Companies Act, 2013, by a demerged company of its one or more undertakings to any resulting company in such a manner that–

i. all the property of the undertaking, being transferred by the demerged company, immediately before the demerger, becomes the property of the resulting company by virtue of the demerger;

ii. all the liabilities relatable to the undertaking, being transferred by the demerged company, immediately before the demerger, become the liabilities of the resulting company by virtue of the demerger;

iii. the property and the liabilities of the undertaking or undertakings being transferred by the demerged company are transferred at values appearing in its books of account immediately before the demerger; Provided that the provisions of this sub-clause shall not apply where the resulting company records the value of the property and the liabilities of the undertaking or undertakings at a value different from the value appearing in the books of account of the demerged company, immediately before the demerger, in compliance to the Indian Accounting Standards specified in Annexure to the Companies (Indian Accounting Standards) Rules, 2015.

iv. the resulting company issues, in consideration of the demerger, its shares to the shareholders of the demerged company on a proportionate basis except where the resulting company itself is a shareholder of the demerged company;

v. the shareholders holding not less than three-fourths in value of the shares in the demerged company (other than shares already held therein immediately before the demerger, or by a nominee for, the resulting company or, its subsidiary) become shareholders of the resulting company or companies by virtue of the demerger, otherwise than as a result of the acquisition of the property or assets of the demerged company or any undertaking thereof by the resulting company;

vi. the transfer of the undertaking is on a going concern basis;

vii. the demerger is in accordance with the conditions, if any, notified under sub-section (5) of section 72A by the Central Government in this behalf.

If any demerger takes place within the meaning of section 2(19AA), the tax concessions shall be available to:

1. Demerged company.
2. Shareholders of demerged company.
3. Resulting company.

These concessions are on similar lines as are available in case of amalgamation. However, some concessions available in case of amalgamation are not available in case of demerger.

1. TAX CONCESSION TO DEMERGED COMPANY

i. **Capital gains tax not attracted:** the transfer of capital asset by the demerged company to the resulting company, will not be regarded as a transfer for the purpose of capital gain provided the resulting company is an Indian company.

ii. **Tax concession to a foreign demerged company:** Where a foreign company holds any shares in an Indian company and transfers the same in a demerger to another resulting foreign company, such transaction will not be regarded as transfer for the purpose of capital gain under section 45 if the following conditions are satisfied:

   a) the shareholders holding not less than three-fourths in value of the shares of the demerged foreign company continue to remain shareholders of the resulting foreign company; and

   b) such transfer does not attract tax on capital gains in the country, in which the demerged foreign company is incorporated:

iii. any transfer in a demerger, of a capital asset, being a share of a foreign company, which derives directly or indirectly its values substantially from the share or shares of an Indian Company, held by the demerged foreign company to the resulting foreign company will not be regarded as transfer for the purpose of capital gains if the following conditions are satisfied:

   a) Shareholders holding not less than three-fourths in value of the shares of the demerged foreign company, continue to remain shareholders of the resulting foreign company; and

   b) Such transfer does not attract tax on capital gains in the country in which the demerged foreign company is incorporated.

iv. **Reserves for shipping business:** Where a ship acquired out of the reserve is transferred in a scheme of demerger, even within the period of eight years of acquisition there will be no deemed profits to the demerged company.

2. TAX CONCESSIONS TO THE SHAREHOLDERS OF THE DEMERGED COMPANY

Any transfer or issue of shares by the resulting company, in a scheme of demerger to the shareholders of the demerged company shall not be regarded as a transfer if the transfer or issue is made in consideration of demerger of the undertaking. In the case of demerger, the existing shareholders of the demerged company will hold after demerger:

a) shares in resulting company; and

b) shares in demerged company.

And in case the shareholder transfers any of the above shares subsequent to the demerger, the cost of such shares shall be calculated as under: –

a) **Cost of acquisition of shares in the resulting company:** The cost of acquisition of the shares in the resulting company shall be the amount which bears to the cost of acquisition of shares held by the assessee in the demerged company the same proportion as the net book value of the assets transferred in a demerger bears to the net worth of the demerged company immediately before such demerger.

b) **Cost of acquisition of shares in the demerged company:** The cost of acquisition of the original shares held by the shareholder in the demerged company shall be deemed to have been reduced by the amount as so arrived at

under sub-section (2C). For the above purpose, net worth shall mean the aggregate of the paid-up share capital and general reserves as appearing in the books of account of the demerged company immediately before the demerger.

c) Period of holding of shares of the resulting company: In the case of a capital asset, being a share or shares in an Indian company, which becomes the property of the assessee in consideration of a demerger, there shall be included the period for which the share or shares held in the demerged company were held by the assessee.

3. TAX CONCESSIONS TO THE RESULTING COMPANY

The resulting company shall be eligible for tax concessions only if the following two conditions are satisfied:

i. The demerger satisfies all the conditions laid down in section 2 (19AA); and

ii. The resulting company is an Indian company.

The following concessions are available to the resulting company pursuant to a scheme of demerger:

a) **Expenditure for obtaining licence to operate telecommunication services**: The provisions of the section 35ABB of the Income Tax Act, 1961 relating to deduction of expenditure, incurred for obtaining licence to operate communication services shall, as far as may be, apply to the resulting company as they would have applied to the demerged company, if the latter had not transferred the licence.

b) **Expenditure for obtaining Spectrum to operate telecommunication services** The provisions of the section 35ABA of the Income Tax Act, 1961 relating to deduction of expenditure, incurred for obtaining spectrum to operate communication services shall, as far as may be, apply to the resulting company as they would have applied to the demerged company if the latter had not transferred the spectrum.

c) **Amortisation of certain preliminary expenses:** The benefit of amortization of preliminary expenses under section 35D of the Income-tax Act, 1961 are ordinarily available only to the assessee who incurred the expenditure. However, the benefit will not be lost in case the undertaking of an Indian company which is entitled to the amortization is transferred to another Indian company in a scheme of demerger within the 5 years period of amortisation. In that event the deduction in respect of previous year in which the demerger takes place and the following previous year within the 5 years period will be allowed to the resulting company and not to the demerged company.

d) **Treatment of expenditure on prospecting, etc. of certain minerals:** The provisions of section 35E of the Income Tax Act, 1961 relating to expenditure on prospecting, etc., for certain minerals shall, as far as may be, apply to the resulting company as they would have applied to the demerged company as if the demerger has not happened.

e) **Treatment of bad debts** : Where due to demerger ,the debts of the demerged company have been taken over by the resulting company and subsequently by such debt or part of debt becomes bad such bad debt will be allowed as a deduction to the resulting company.

f) **Amortisation of expenditure in case of amalgamation or demerger:** Where an assessee, being an Indian company, incurs any expenditure wholly and exclusively for the purposes of demerger of an undertaking, the assessee shall be allowed a deduction of an amount equal to one-fifth of such expenditure for each of the five successive previous years beginning with the previous year in which the demerger takes place

g) **Carry forward and set off of business losses and unabsorbed depreciation of the demerged company:** Notwithstanding anything contained in any other provisions of this Act, in the case of a demerger, the accumulated loss and the allowance for unabsorbed depreciation of the demerged company shall–

   a) where such loss or unabsorbed depreciation is directly relatable to the undertakings transferred to the resulting company, be allowed to be carried forward and set off in the hands of the resulting company;

   b) where such loss or unabsorbed depreciation is not directly relatable to the undertakings transferred to the resulting company, be apportioned between the demerged company and the resulting company in the same proportion in which the assets of the undertakings have been retained by the demerged company and transferred to the resulting company, and be allowed to be carried forward and set off in the hands of the demerged company or the resulting company, as the case may be.

   The Central Government may, for the purposes of this Act, by notification in the Official Gazette, specify such conditions as it considers necessary to ensure that the demerger is for genuine business purposes.

h) **Deduction available under section 80 - IA (I2) or 80 - IB (I2):** Deductions in respect of profits and gains from industrial undertakings or enterprises engaged in infrastructure development, etc.:

Where any undertaking of an Indian company which is entitled to the deduction under this section is transferred, before the expiry of the period specified in this section, to another Indian company in a scheme of amalgamation or demerger–

a) no deduction shall be admissible under this section to the amalgamating or the demerged company for the previous year in which the amalgamation or the demerger takes place; and

b) the provisions of this section shall, as far as may be, apply to the amalgamated or the resulting company as they would have applied to the amalgamating or the demerged company if the amalgamation or demerger had not taken place. However, nothing contained in sub-section (12) of sec 80IA shall apply to any enterprise or undertaking which is transferred in a scheme of amalgamation or demerger on or after the 1st day of April, 2007.

i) **Deduction in respect of profits and gains from certain industrial undertakings other than infrastructure development undertakings: Section 80-IB(12):** Where any undertaking of an Indian company which is entitled to the deduction under this section is transferred, before the expiry of the period specified in this section, to another Indian company in a scheme of amalgamation or demerger–

a) no deduction shall be admissible under this section to the amalgamating or the demerged company for the previous year in which the amalgamation or the demerger takes place; and

b) the provisions of this section shall, as far as may be, apply to the amalgamated or the resulting company as they would have applied to the amalgamating or the demerged company if the amalgamation or demerger had not taken place.

DIVIDEND & DEEMED DIVIDEND

Section 2(22) of the Income Tax Act, 1961 defines the term dividend. Dividend includes—

a) any distribution by a company of accumulated profits, whether capitalised or not, if such distribution entails the release by the company to its shareholders of all or any part of the assets of the company;

b) any distribution to its shareholders by a company of debentures, debenture-stock, or deposit certificates in any form, whether with or without interest, and any distribution to its preference shareholders of shares by way of bonus, to the extent to which the company possesses accumulated profits, whether capitalised or not;

c) any distribution made to the shareholders of a company on its liquidation, to the extent to which the distribution is attributable to the accumulated profits of the company immediately before its liquidation, whether capitalised or not;

d) any distribution to its shareholders by a company on the reduction of its capital, to the extent to which the company possesses accumulated profits which arose after the end of the previous year ending next before the 1st day of April, 1933, whether such accumulated profits have been capitalised or not;

e) any payment by a company, not being a company in which the public are substantially interested, of any sum (whether as representing a part of the assets of the company or otherwise) made after the 31st day of May, 1987, by way of advance or loan to a shareholder, being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power, or to any concern in which such shareholder is a member or a partner and in which he has a substantial interest (hereafter in this clause referred to as the said concern) or any payment by any such company on behalf, or for the individual benefit, of any such shareholder, to the extent to which the company in either case possesses accumulated profits ;

but "dividend" does not include—

I. a distribution made in accordance with sub-clause (c) or sub-clause (d) in respect of any share issued for full cash consideration, where the holder of the share is not entitled in the event of liquidation to participate in the surplus assets;

II. a distribution made in accordance with sub-clause (c) or sub-clause (d) in so far as such distribution is attributable to the capitalised profits of the company representing bonus shares allotted to its equity shareholders after the 31st day of March, 1964, and before the 1st day of April, 1965;

III. any advance or loan made to a shareholder or the said concern by a company in the ordinary course of its business, where the lending of money is a substantial part of the business of the company;

IV. any dividend paid by a company which is set off by the company against the whole or any part of any sum previously paid by it and treated as a dividend within the meaning of sub-clause (e), to the extent to which it is so set off;

V. any payment made by a company on purchase of its own shares from a shareholder in accordance with the provisions of the Companies Act,;
VI. any distribution of shares pursuant to a demerger by the resulting company to the shareholders of the demerged company (whether or not there is a reduction of capital in the demerged company).

TAXABILITY

- Finance Act, 2018 has bought the deemed dividend within the ambit of dividend distribution tax under section 115-O, at the rate of 30% in the hands of the closely held companies.
- As per the provisions of Section 10(34), dividend income under section 2(24)(e) is 100% exempt in the hands of the shareholders as it is charged to Dividend Distribution Tax under section 115-O of the Income Tax Act, 1961.
- In Budget 2021, the burden of paying tax on dividend is transferred to the shareholders. Now the companies are not liable to pay Dividend Distribution Tax (DDT) while distributing dividends to the shareholders, i.e. DDT is abolished. These amendment has put all this to rest.

STAMP DUTY ASPECTS OF MERGER AND AMALGAMATIONS

CONSTITUTIONAL BACKGROUND ON LEVY OF STAMP DUTY ON AMALGAMATION AND MERGERS

Article 265:

Article 265 of the Constitution prohibits levy or collection of tax except by authority of law. Article 246, read with the Seventh Schedule of the Constitution provides legislative powers to be exercised by the Parliament and the State Legislatures.

The Seventh Schedule consists of three lists viz., List I-Union List, List II-State List and List III-Concurrent List. List I is the exclusive domain of the Parliament to make laws in relation to that matter and it becomes a prohibited field for the State Legislature. List II is within the exclusive competence of the State Legislature and Parliament is prohibited to make any law with regard to the same except in certain circumstances. In List III, both Parliament and State Legislature can make laws subject to certain conditions. Matters not mentioned in any of the three lists fall within the exclusive domain of the Parliament.

Article 372:

All the laws in force immediately before the commencement of the Constitution continue to be in force until altered or repealed or amended by a competent Legislature or other competent authority. Accordingly, the Indian Stamp Act, 1899 is continuing to this extent. The relevant entries in the Seventh Schedule regarding stamp duty are as follows:

List I Entry 91 "91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts."

List II Entry 63

"63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty."

List III Entry 44

"44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty."

In exercise of power conferred by Entry 63, List II, the State Legislature can make amendment in the Indian Stamp Act, 1899 under article 372, in regard to the rates of stamp duty in respect of documents other than those specified in provisions of List I.

Stamp duty is levied in India on almost all, except a few documents, by the States and hence the rate and incidence of stamp in different states vary. The State Legislature has jurisdiction to levy stamp duty under entry 44, List III of the Seventh Schedule of the Constitution of India and prescribe rates of stamp duty under entry 63, List II.

Under the provisions of the Companies Act, 1956 it has been decided that by sanctioning of amalgamation scheme, the property including the liabilities are transferred as provided in sub-section (2) of section 394 of the Companies Act and on that transfer instrument, stamp duty is levied.

Therefore, it cannot be said that the State Legislature has no jurisdiction to levy such duty on an order of the High Court sanctioning a scheme of compromise or arrangement under section 394 of the Companies Act, 1956. [Li Taka Pharmaceuticals Ltd. and another v. State of Maharashtra and others ibid]

STAMP DUTY PAYABLE ON A TRIBUNAL ORDER SANCTIONING AMALGAMATION

Section 232 of the Companies Act, 2013 is the corresponding section to the Section 394 of the Companies Act, 1956 and for understanding the payment of Stamp duty on Tribunal Order sanctioning Amalgamation, it is necessary to take reference of the judicial pronouncement under the Companies Act, 1956, which is as under:

1. In amalgamation the undertaking comprising property, assets and liabilities, of one (or more) company (amalgamating or Transferor Company) are absorbed by the transferee company and transferor company merges into or integrates with the Transferee Company. The former loses its entity and is dissolved (without winding-up).
2. The transfer and vesting of Transferor Company's property, assets, etc. into Transferee Company takes place "by virtue of" the High Court's order. Thus, the vesting of the property occurs on the strength of the order of the High Court sanctioning the scheme of amalgamation, without any further document or deed. Property includes every kind of property, rights and powers of every description.
3. For the purpose of conveying to the transferee company the title to the immovable property of the transferor company, necessary registration in the lands records in the concerned office of the State in which the property is situated, will be done on the basis of the High Court order sanctioning the amalgamation. If any stamp duty is payable under the Stamp Act of the State in which the property is situated, it will be paid on the copy of the High Court order.
4. An order of the High Court under section 394 is founded and based on the compromise or arrangement between the two companies for transferring assets and liabilities of the transferor company to the transferee company and that order is an instrument as defined in Section 2(1) of the Bombay Stamp Act, 1958 which included every document by which any right or liability is transferred **[Li Taka Pharmaceuticals Ltd. v. State of Maharashtra (1996)].**
5. Thus, an order of the High Court sanctioning a scheme of amalgamation under Section 394 of the companies Act, 1956 is liable to stamp duty only in those States where the states stamp law provides.
6. The company will provide to the Collector of Stamps–
   - application for adjudication of the High Court order for determination of stamp duty payable;
   - proof of the market value of equity shares of the transferor company (Stock Exchange quotation or a certificate from Stock Exchange) as of the appointed day;
   - certificate from an approved valuer or valuation of the immovable property being transferred to the transferee company.
7. The Collector thereafter will adjudicate the order and determine stamp duty.
8. The stamp duty will be paid in the manner prescribed under the Stamp Rules. The duty-paid Order will be registered with the Sub-Registrar of Assurances where the lands and buildings are located.

INCIDENCE OF LEVY OF STAMP DUTY

Stamp duty is levied on "Instruments". Section 3 of the Bombay Stamp Act, 1958 specifies the following essentials for the levy of stamp duty:

1. There must be an instrument
2. Such instrument is one of the instruments specified in Schedule I
3. Such instrument must be executed 4.
4. Such instrument must have either–
   a) not having been previously executed by any person in the 'State' or
   b) having been executed outside the State, relates to any property situated in the State or any matter or thing done or to be done in the State and is received in the State.

INSTRUMENT

The term 'instrument' is defined in Section 2(i) of the Bombay Stamp Act, 1958 as follows:

"Instrument" includes every document by which any right or liability is or purports to be created, transferred, limited, extended, extinguished or recorded but does not include a bill of exchange, cheque, promissory note, bill of lading, letter of credit, policy of insurance, transfer of shares, debentures, proxy and receipt."

This definition is an inclusive definition and includes any document which purports to transfer assets or liabilities considered as an instrument

ORDER OF COURT UNDER SECTION 394 OF COMPANIES ACT, 1956 - A TRANSFER

It was earlier held that when transfer takes place by virtue of a court order to a scheme of amalgamation, stamp duty is leviable. By virtue of Section 2(g), the order of the Court ordering the transfer of assets and liabilities of the transferor company to the transferee company is deemed to be a conveyance. The definition of conveyance is given below: As per Section 2(g) of the Bombay Stamp Act, 1958, "Conveyance" includes–

I. a conveyance on sale,
II. every instrument,
III. every decree or final order of any Civil Court,
IV. every order made by the High Court under Section 394 of the Companies Act, 1956 in respect of amalgamation of companies;

By which property, whether moveable or immovable, or any estate or interest in any property is transferred to, or vested in, any other person, inter vivos, and which is not otherwise specifically provided for by Schedule I.

The landmark decision of Bombay High Court in **Li Taka Pharmaceuticals v. State of Maharashtra (1996)** has serious implications for mergers covered not just by the Bombay Stamp Act, 1958 but also mergers covered by Acts of other States. The following are the major conclusions of the Court:

1. An amalgamation under an order of Court under Section 394 of the Companies Act,1956 is an instrument under the Bombay Stamp Act, 1958.
2. States are well within their jurisdiction when they levy stamp duty on instrument of amalgamation.
3. Stamp duty would be levied not on the gross assets transferred but on the "undertaking", when the transfer is on a going concern basis, i.e. on the assets less liabilities. The value for this purpose would thus be the value of shares allotted. This decision has been accepted in the Act and now stamp duty is leviable on the value of shares allotted plus other consideration paid.

STAMP DUTY ON OTHER DOCUMENTS

Usually, in a merger, several other documents, agreements, indemnity bonds, etc. are executed, depending on the facts of each case and requirements of the parties. Stamp duty would also be leviable as per the nature of the instrument and its contents

AMALGAMATION BETWEEN HOLDING AND SUBSIDIARY COMPANIES–EXEMPTION FROM PAYMENT OF STAMP DUTY

The Central Government has exempted the payment of stamp duty on instrument evidencing transfer of property between companies limited by shares as defined in the Indian Companies Act, 1913, in a case:

a) where at least 90 percent of the issued share capital of the transferee company is in the beneficial ownership of the transferor company, or
b) where the transfer takes place between a parent company and a subsidiary company one of which is the beneficial owner of not less than 90 percent of the issued share capital of the other, or
c) where the transfer takes place between two subsidiary companies each of which having not less than 90 percent of the share capital is in the beneficial ownership of a common parent company:

However, in each case a certificate is obtained by the parties from the officer appointed in this behalf by the local Government concerned that the conditions above prescribed are fulfilled.

However, stamp duty being a state subject, the above would only be applicable in those States where the State Government follows the above stated notification of the Central Government otherwise stamp duty would be applicable irrespective of the relations mentioned in the said notification.

LESSON 8 - REGULATION OF COMBINATIONS

LIMITING COMPETITION

It would be wrong to conclude that mergers limit or restrict competition from the consumers' point of view. In mergers business enterprises achieve what could be termed as a buy-out of the competitor's market shares or stake. The purpose of such acquisition could be to consolidate or to eliminate the competition posed by the acquired enterprise. It does not mean new competitive forces cannot emerge or survive. Mergers are looked at as inorganic mechanisms for diversification and growth. Following statutory provisions apply to mergers, amalgamations and acquisitions from competition law perspective:

- The Competition Act, 2002
- The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011
- The Competition Commission of India (General) Regulations, 2009
- Notifications issued by Competition Commission of India from time to time.

COMPETITION ACT, 2002

At the behest of the Directive Principles of State Policy, the first Indian competition law was enacted in 1969 and was named the Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act"). In the wake of economic reforms since 1991, i.e. the liberalization/privatization/globalization reforms, it was felt that the MRTP Act has become obsolete in the light of international economic developments which relate more particularly to competition laws and thus there was a need to shift the focus from curbing monopolies to promoting competition.

Therefore, the Competition Act, 2002 was passed by both Houses of Parliament in 2002 and received the assent of President in January 2003. It provided for setting-up of a quasi-judicial body, i.e., the CCI, comprising of a Chairperson and two to ten other Members, to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India and for matters connected therewith or incidental thereto.

> An Act to provide for, keeping in view of the economic development of the country, the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participants in market, in India, and for matters connected therewith or incidental thereto.

COMPETITION COMMISSION OF INDIA (CCI / COMMISSION)

Section 7 of the Act provides for the establishment of the Competition Commission of India ("Commission"). The Commission is a statutory body, established under the Act with the legislative mandate inter alia to prevent practices having adverse effect on competition, to promote and sustain competition in the markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in the markets, in India. To perform the above-mentioned functions, under the scheme of the Act, the Commission is vested with inquisitorial, investigative, regulatory, adjudicatory and advisory jurisdiction. As such, the purpose of filing information before the Commission is only to set the ball rolling as per the provisions of the Act. The Commission works as the overarching supervisory and regulatory framework for competition related matters in India.

NATIONAL COMPANY LAW APPELLATE TRIBUNAL (NCLAT)

The Act also provided for the establishment of Competition Appellate Tribunal ("COMPAT") which was in operation till 25th May 2017. With effect from 26th May 2017, COMPAT has been merged with the National Company Law Appellate Tribunal ("NCLAT") constituted under the Companies Act, 2013 and the NCLAT has been designated as the Appellate Authority under the Act.

KINDS OF COMBINATIONS

Based on the economic activities being carried out by the parties, combinations may be classified into three categories:

a) **Horizontal combinations:** Horizontal combinations involve the joining together of two or more enterprises engaged in producing the same goods, or rendering the same services. They may be termed as competitors to each other. They result in reduction in the number of competing firms in an industry and may create a dominant enterprise.

b) Vertical combinations: Vertical combinations involve the joining together of two or more enterprises where one of them is an actual or potential supplier of goods or services to the other. They involve enterprises operating at different levels of the production chain. The object of these combinations may be to ensure a source of supply or an outlet for products or to enhance the efficiency.

c) Conglomerate combinations: Conglomerate combinations involve the combination of enterprises not having horizontal or vertical connection. These enterprises are engaged in unrelated activities and may be affected with an objective to diversify into new areas by the acquiring enterprise. Based on the geographical location of the enterprises, the combination may be classified into two categories:

d) Domestic Combinations: Domestic combinations involve the joining together of two or more enterprises located in India only.

e) **Cross-border Combinations:** Cross-border combinations involve the joining together of two or more enterprises where one or more of them are operating from other countries. In such combinations, the combination needs to be approved by the Commission only if the overseas enterprises satisfy the local nexus test, as stated in section 5 of the Act.

COMBINATION REGULATIONS

Competition Act, 2002 requires mandatory notification of combination. Assets and turnover thresholds for such mandate are prescribed by the Act, and are modifiable by the Government as prescribed under section 20(3) of the Act. The basic concern is with the existence or likelihood of the proposed combination causing appreciable adverse effect on competition ("AAEC") in the relevant market in India. The process of combination analysis undertaken by the Commission is therefore broken down into:

a) delineation of the relevant market (product and geographic);
b) identification of overlap in the relevant market; and finally,
c) subjecting the combination to competition analysis under section 20(4) of the Act to ensure that there is no appreciable adverse effect on competition in the relevant market. The test under section 20(4) of the Act involves balancing of the benefits and the adverse effects on competition, due to the proposed combination.

To aid and assist the parties to the combination in relation to certain procedural and substantive provisions, the CCI has provided for informal non-binding pre-merger consultative process and has also provided for couple of guidance notes i.e., Introductory Note1 and Notes to Form I in order to assist the notifying parties in drafting the merger notification form(s) to be submitted to the Commission.

WHAT IS A COMBINATION?

Section 5 provides the financial thresholds and all combinations exceeding these financial thresholds are required to be mandatorily approved by the Commission.

Combination

Combinations as envisaged under section 5(a), 5(b) and 5(c) were explained by the Supreme Court in Competition Commission of **India v. Thomas Cook (India) Ltd. & Anr.** in the following manner:

- a combination is formed if the acquisition by one person or enterprise of control, shares, voting rights or assets of another person or enterprise subject to certain threshold requirement that is minimum asset valuation or turn over within or outside India.
- the combination is formed if the acquisition of control by a person over enterprise when such person has already acquired direct or indirect control over another enterprise engaged in the production, distribution or payment of a similar or identical or substitutable good provided that the exigencies provided in section 5(b) in terms of asset or turnover are met.
- merger and amalgamation are also within the ambit of combination. The enterprise remaining after merger or amalgamation subject to a minimum threshold requirement in terms of assets or turnover is covered within the purview of section 5(c).

THRESHOLDS

In exercise of its powers under section 20(3), the Central Government has vide Notification No.S.O.675(E) dated March 4, 2016, the value of assets and the value of turnover has been enhanced by 100% for the purposes of Section 5 of the

Act. Section 5 is applicable when the combined assets of the parties or the group to which the target entity would belong after the acquisition. Following table gives an overview of the present thresholds:

THRESHOLDS FOR FILING NOTICE:

		Assets		Turnover
Enterprise Level	**India**	> Rs. 2000 crore	OR	> Rs. 6000 crore
	Worldwide with India leg	> US$ 1 bn With at least Rs.1000 crore in India		> US$ 3 bn With at least Rs.3000 crore in India
OR				
Group Level	**India**	> Rs.8000 crore	OR	> Rs.24000 crore
		> US$ 4 bn With at least Rs.1000 crore in India		> US$ 12 bn With at least Rs.3000 crore in India

De Minimis Exemption: The Central Government has granted exemption to acquisition of small targets which is known as de minimis exemption. Combinations where the assets or the turnover is below the specific thresholds need not be notified to the Commission for its approval. According to Notification No.S.O.988(E) dated March 27, 2017, all forms of combinations involving assets of not more than Rs.350 crore in India or turnover of not more than Rs.1,000 crore in India, are exempt from Section 5 of the Act for a period of 5 years. Following table gives an overview of the thresholds for availing of the De Minimis exemption:

		Assets		Turnover
Target Enterprise	**In India**	< Rs. 350 crore	OR	< Rs. 1000 crore

The Government of India (MCA), through notification No. S.O. 1192(E) dated 16th March, 2022 has extended the Small Target Exemption for another five years, i.e. until March 26, 2027.

ANTI-COMPETITIVE AGREEMENTS

Section 3 of the Competition Act provides for the prohibition of certain anti-competitive agreements. Under the Act, anti-competitive agreements include any agreement related to the production, supply, storage, or control of goods or services, that can cause an appreciable adverse effect on competition in India. Any agreement between enterprises or persons engaged in identical or similar businesses will have such adverse effect on competition if it meets certain criteria. These include:

a) directly or indirectly determining purchase or sale prices,
b) controlling production, supply, markets, or provision of services, or
c) directly or indirectly leading to collusive bidding.

As per Competition (Amendment) Act, 2023, if an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of the agreement under this sub-section if it participates or intends to participate in the furtherance of such agreement. The amendment introduces an additional provision stating that an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of such anti-competitive agreements if they participate or intends to participate in the furtherance of such agreements.

GROUP & TURNOVER

- "Group" means two or more enterprises where one enterprise is directly or indirectly, in a position to——

I. exercise fifty per cent or more of the voting rights in the other enterprise; or
II. appoint more than fifty per cent of the members of the board of directors in the other enterprise; or
III. control the management or affairs of the other enterprise.

- "Turnover" means the turnover certified by the statutory auditor on the basis of the last available audited accounts of the company in the financial year immediately preceding the financial year in which the notice is filed under sub-section (2) or sub-section (4) of section 6 and such turnover in India shall be determined by excluding intra-group sales, indirect taxes, trade discounts and all amounts generated through assets or business from customers outside India, as certified by the statutory auditor on the basis of the last available audited accounts of the company in the financial year immediately preceding the financial year in which the notice is filed under sub-section (2) or sub-section (4) of section 6.

REGULATION OF COMBINATIONS

Section 6 of the Competition Act, 2002 prohibits any person or enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and if such a combination is formed, it shall be void. Section 6 read as under:

1. No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.
2. Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, after any of the following, but before consummation of the combination—
   a) approval of the proposal relating to merger or amalgamation by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;
   b) execution of any agreement or other document for acquisition or acquiring of control.
3. No combination shall come into effect until one hundred and fifty days have passed from the day on which the notice has been given to the Commission under sub-section (2) or the Commission has passed orders under section 31, whichever is earlier.
4. The Commission shall, after receipt of notice under sub-section (2), deal with such notice in accordance with the provisions contained in sections 29, 29A, 30 and 31.
5. Notwithstanding anything contained in sub-sections (2A) and (3) and section 43A, if a combination fulfils such criteria as may be prescribed and is not otherwise exempted under this Act from the requirement to give notice to the Commission under sub-section (2), then notice for such combination may be given to the Commission in such form and on payment of such fee as may be specified by regulations, disclosing the details of the proposed combination and thereupon a separate notice under sub-section (2) shall not be required to be given for such combination.
6. Upon filing of a notice and acknowledgement thereof by the Commission, the proposed combination shall be deemed to have been approved by the Commission and no other approval shall be required.
7. If within the period referred to in sub-section (1) of section 20, the Commission finds that the combination notified under sub-section (4) does not fulfil the requirements specified under that sub-section or the information or declarations provided are materially incorrect or incomplete, the approval under sub-section (5) shall be void ab initio and the Commission may pass such order as it may deem fit: Provided that no such order shall be passed unless the parties to the combination have been given an opportunity of being heard.
8. Notwithstanding anything contained in this section and section 43A, upon fulfilment of such criteria as may be prescribed, certain categories of combinations shall be exempted from the requirement to comply with sub-sections (2), (2A) and (4).
9. Notwithstanding anything contained in sub-sections (4), (5), (6) and (7)—
   I. the rules and regulations made under this Act on the matters referred to in these sub-sections as they stood immediately before the commencement of the Competition (Amendment) Act, 2023 and in force at such commencement, shall continue to be in force, till such time as the rules or regulations, as the case may be, made under this Act; and
   II. any order passed or any fee imposed or combination consummated or resolution passed or direction given or instrument executed or issued or thing done under or in pursuance of any rules and regulations made under this Act shall, if in force at the commencement of the Competition (Amendment) Act, 2023, continue to be in force, and shall have effect as if such order passed or such fee imposed or such combination consummated or such resolution passed or such direction given or such instrument executed or issued or done under or in pursuance of this Act.
10. The provisions of this section shall not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign portfolio investor, bank or Category I alternative investment fund, pursuant to any covenant of a loan agreement or investment agreement.

OPEN OFFERS

Section 6A of the Act provides that nothing contained in sub-section (2A) of section 6 and section 43A shall prevent the implementation of an open offer or an acquisition of shares or securities convertible into other securities from various sellers, through a series of transactions on a regulated stock exchange from coming into effect, if—

a) the notice of the acquisition is filed with the Commission within such time and in such manner as may be specified by regulations; and

b) the acquirer does not exercise any ownership or beneficial rights or interest in such shares or convertible securities including voting rights and receipt of dividends or any other distributions, except as may be specified by regulations, till the Commission approves such acquisition in accordance with the provisions of sub-section (2A) of section 6 of the Act.

Explanation. —For the purposes of this section, "open offer" means an open offer made in accordance with the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 2011 made under the Securities and Exchange Board of India Act, 1992.

EXEMPTIONS TO BANKING SECTOR AND OIL AND GAS SECTOR

Section 54(a) of the Act empowers the Central Government to grant exemption to any class of enterprises from all or any provisions of the Act if such exemption is necessary in the interest of security of the State or public interest. To exercise the said power, the Central Government has to issue a notification giving details about the extent of exemption and the duration of such exemption. With regard to the combinations relating to banking sector and oil and gas sectors, the Central Government has issued the following three notifications.

I. **Regional Rural Banks:** Regional Rural Banks in respect of which the Central Government has issued a notification under sub-section (1) of section 23A of the Regional Rural Banks Act, 1976 are exempted from complying with the provisions of the application sections 5 and 6 of the Competition Act, 2002 for a period of five years. - S.O. 2561(E). 10th August 2017 issued by the Ministry of Corporate Affairs.

II. **Nationalized banks:** All cases of reconstitution, transfer of the whole or any part thereof and amalgamation of nationalized banks, under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980, are exempted from complying with the provisions of the application of sections 5 and 6 of the Competition Act, 2002 for a period of five years. - S.O. 2828(E). 30th August 2017 issued by the Ministry of Corporate Affairs.

III. **Oil and Gas Sectors:** All cases of combinations under section 5 of the Act involving the Central Public Sector Enterprises (CPSEs) operating in the Oil and Gas Sectors under the Petroleum Act, 1934 and the rules made thereunder or under the Oilfields (Regulation and Development) Act, 1948 and the rules made thereunder, along with their wholly or partly owned subsidiaries operating in the Oil and Gas Sectors, are exempted from complying with the provisions of the application of sections 5 and 6 of the Competition Act, 2002 for a period of five years. - S.O. 3714(E). 22nd November 2017 issued by the Ministry of Corporate Affairs.

CONTROL

One of the most important facets of the Indian merger control regime is the element of 'control'. Control over an enterprise has the ability to change the competitive dynamics of any market, and the CCI, like all other competition regulators, gives due importance to changes in control.

Apart from the 'positive control' over an enterprise which comes from owning more than 50%of the voting rights of a company or control over more than 50% of the board of directors of a company, the CCI also considered 'negative control', i.e. control exercised contractually by way of Affi Voting Rights (AVRs) / veto rights over the strategic business decisions of the company. This is concurrent with the practice in other advanced jurisdictions such as the EU, which also follow the test of decisive control4. The CCI judges each case on its merits and circumstances, and seeks to distinguish between rights that are purely investment protection rights, and those that enable the holder to control the key strategic business decisions of the company.

As per Section 5 of the Competition Act, 2002 as amended in 2023 "Control" means the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions by—

I. one or more enterprises, either jointly or singly, over another enterprise or group;

II. one or more groups, either jointly or singly, over another group or enterprise.

Further, "group" means two or more enterprises where one enterprise is directly or indirectly, in a position to—

(i) exercise twenty-six per cent. or such other higher percentage as may be prescribed, of the voting rights in the other enterprise; or

(ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or

(iii) control the management or affairs of the other enterprise.

From the control perspective, a combination may involve acquisition of control; acquisition of joint control; transfer from joint control to sole control; or continuation of joint control even after acquisition has taken place. Based on the Regulations and the interpretation by the CCI in numerous cases, the term control can have different dimensions such as joint control, indirect control, common control, negative control, strategic control etc.

Notice to the Commission disclosing details of the proposed combination

As stated earlier, section 6(2) envisages that any person or enterprise, who or which proposes to enter into any combination, shall give a notice to the Commission disclosing details of the proposed combination, in the form prescribed and submit the form together with the fee prescribed by Regulations. Contravention of this provision would attract the result into the imposition of penalty under section 43A of the Act.

INQUIRY INTO COMBINATION BY THE COMMISSION

The Commission under section 20 of the Competition Act may inquire into the appreciable adverse effect caused or likely to be caused on competition in India as a result of combination in the following circumstances:

I. upon its own knowledge or information (suo moto); or
II. upon receipt of notice under section 6(2) relating to acquisition referred to in section 5(a); or acquiring of control referred to in section 5(b); or merger or amalgamation referred to in section 5(c) of the Act.

It has also been provided that a suo moto enquiry shall be initiated by the Commission within one year from the date on which such combination has taken effect. Thus, the Act has provided a time limit within which suo moto inquiry into combinations can be initiated. This provision dispels the fear of enquiry into combination between merging entities after the expiry of stipulated period. On receipt of the notice under section 6(2) from the person or an enterprise which proposes to enter into a combination, it is mandatory for the Commission to inquire whether the combination referred to in that notice, has caused or is likely to cause an appreciable adverse effect on competition (AAEC) within the relevant market in India.

APPRECIABLE ADVERSE EFFECT ON COMBINATION (AAEC)

The Commission shall have due regard to all or any of the following factors listed under section 20(4) for the purposes of determining whether the combination causes or is likely to cause an AAEC in the relevant market:

a) actual and potential level of competition through imports in the market;
b) extent of barriers to entry into the market;
c) level of concentration in the market;
d) degree of countervailing power in the market;
e) likelihood that the combination would result in the parties to the combination being able to significantly and sustainably increase prices or profit margins;
f) extent of effective competition likely to sustain in a market;
g) extent to which substitutes are available or likely to be available in the market;
h) market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination;
i) likelihood that the combination would result in the removal of a vigorous and effective competition or competitors in the market;
j) nature and extent of vertical integration in the market;
k) possibility of a failing business;
l) nature and extent of innovation;
m) relative advantage, by way of the contribution to the economic development, by any combination having or likely to have appreciable adverse effect on competition;
n) whether the benefits of the combination outweigh the adverse impact of the combination, if any.

The above yardsticks are to be taken into account irrespective of the fact whether an inquiry is instituted, on receipt of notice under section 6(2) or upon its own knowledge. The scope of assessment of adverse effect on competition will be confined to the "relevant market". If the benefits of the combination outweigh the adverse effect of the combination, the Commission will approve the combination. Conversely, the Commission may declare such a combination as void.

Relevant market: Relevant market is the mix of relevant geographic market and relevant product market. Sub-section (r) of section 2 defines relevant market to mean the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets.

Relevant geographic market: The relevant geographic market means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas.

Relevant product market: The relevant product market to mean a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. Competition (Amendment) Act, 2023 expands the definition of relevant product market to include the perspective of suppliers. As per revised definition "relevant product market" means a market comprising of all those products or services—

I. which are regarded as inter-changeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use; or
II. the production or supply of, which are regarded as interchangeable or substitutable by the supplier, by reason of the ease of switching production between such products and services and marketing them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices.

Filing of notice (Form): For seeking approval to the proposed combination, parties to the combination are required to give notice to the Commission by filing Form I or Form II. Format of these forms are given in Schedule II to the Combination Regulations.

- **Notice by filing of Form I: Regulation 5(2):** the notice should ordinarily be filed in Form I wherein:

a) the parties to the combination are engaged in production, supply, distribution, storage, sale or trade of similar or identical or substitutable goods or provision of similar or identical or substitutable services and the combined market share of the parties to the combination after such combination is NOT more than 15% in the relevant market;
b) the parties to the combination are engaged at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or trade in goods or provision of services, and their individual or combined market share is NOT more than 25% in the relevant market.

- **Notice by filing of Form II: Regulation 5(3):** parties to the combination may, at their option, give notice in Form II, preferably in the instances where –

a) the parties to the combination are engaged in production, supply, distribution, storage, sale or trade of similar or identical or substitutable goods or provision of similar or identical or substitutable services and the combined market share of the parties to the combination after such combination is more than 15% in the relevant market;
b) the parties to the combination are engaged at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or trade in goods or provision of services, and their individual or combined market share is more than 25% in the relevant market.

Time for forming prima facie opinion: As prescribed by regulation 19(1) of the Combination Regulations, the Commission shall form its prima facie opinion as to whether a combination is likely to cause or has caused an appreciable adverse effect on competition within the relevant market in India within thirty working days of the receipt of such notice.

Time for final order: In terms of section 31(11) of the Act, the Commission is required to pass an order or issue direction in accordance with provisions of Section 31 of the Act within two hundred and ten days from the date of the notice given to the Commission.

Form to be complete in all respect: Regulation 14 provides that the notice shall not be valid unless it is in conformity with the Combination Regulations. Therefore, it is necessary, inter alia, that information provided in the notice is complete and correct. The parties to the combination should ensure that the information contained in the notice has been carefully prepared. Lack of complete information and/or submission of incorrect information may lead to invalidation of the notice or may significantly delay the process of inquiry and examination of the notice

Filing Fee: The filing fee payable along with Form I or Form II The fee may be paid either by tendering demand draft or pay order or banker's cheque, payable in favour of the Competition Commission of India (Competition Fund), New Delhi or through Electronic Clearance Service (ECS) by direct remittance to the Competition Commission of India (Competition Fund).

CONSULTATION WITH THE COMMISSION

Consultation prior to filing of notice of the proposed combination

In accordance with international best practices, the Commission allows for an informal and verbal consultation with the staff of the Commission prior to filing of the notice to a proposed combination in terms of regulation 5 of Combinations Regulations, under section 6(2).

Such pre-filing consultations help the parties intending to file a notice with the Commission in identifying the information required for filing a complete and correct Form I/II/III as well in identifying additional information that the Commission may require to assess the likely impact of the proposed combination on competition in the relevant markets. The parties intending to file a notice with the Commission are encouraged to approach the Commission for pre- filing consultations. A request for pre-filing consultation should be made by the parties intending to file a notice at the earliest and at least 10 days before the intended date of filing, to allow time for allocating a case team for the pre-filing consultation. A copy of draft application comprising of Form I/II/, as the case may be and supporting documents should be forwarded along with the request for scheduling a pre-filing consultation. A summary of the proposed combination along with the following details should also be submitted:

a) Basic details of the proposed combination including various steps involved in the same;
b) A brief description of the relevant market(s) and sector(s) involved;
c) The likely impact of the proposed combination on competition in those markets and sectors in general terms;
d) Key issues regarding which the parties wish to seek consultation from the Commission;
e) Any other details which according to the parties may be pertinent for a meaningful consultation

PROCEDURE FOR INVESTIGATION OF COMBINATION

The Competition Commission of India (CCI) has been empowered to deal with Form I or Form II in accordance with provisions of sections 29, 30 and 31 of the Act. Section 29 prescribes procedure for investigation of combinations. Section 30 empowers the Commission to determine whether the disclosure made to it under section 6(2) is correct and whether the combination has, or is likely to have, an appreciable adverse effect on the competition. Section 31 provides that the Commission may allow the combination if it will not have any appreciable adverse effect on competition or pass an order that the combination shall not take effect, if in its opinion, such a combination has or is likely to have an appreciable adverse effect on competition. The procedure for investigation by the Commission has been stipulated under section 29 of the Act. It involves the following stages:

I. The Commission first has to form a prima facie opinion that a combination is likely to cause, or has caused an appreciable adverse effect on competition within the relevant market in India. Further, when the Commission has come to such a conclusion then it shall proceed to issue a notice to the parties to the combination, calling upon them to show cause why an investigation in respect of such combination should not be conducted.
II. After receipt of the response of the parties to the combination (within 30 days of receipt of above stated notice), the Commission may call for the report of the Director General
III. When pursuant to response of parties or on receipt of report of the Director General whichever is later, the Commission is, prima facie, of the opinion that the Combination is likely to cause an appreciable adverse effect on competition in relevant market, it shall, within seven days from the date of receipt of the response of the parties to the combinations or the receipt of the report from Director General under section 29 (1A) whichever is later, direct the parties to the combination to publish within seven days, the details of the combination, in such manner as it thinks appropriate so as to bring to the information of public and persons likely to be affected by such combination.
IV. The Commission may invite any person affected or likely to be affected by the said combination, to file his written objections within ten days of the publishing of the public notice, with the Commission for its consideration.
V. The Commission may, within seven days of the filing of written objections, call for such additional or other information as it deem fit from the parties to the said combination and the information shall be furnished by the parties above referred within ten days from the expiry of the period notified by the Commission.

VI. After receipt of all information, the Commission shall proceed to deal with the case in accordance with the provisions contained in section 29A or section 31, as the case may be.

VII. The Commission may accept appropriate modifications offered by the parties to the combination or suo motu propose modifications, as the case may be, before forming a prima facie opinion under subsection (1).

Thus, the provisions of section 29 provide for a specified timetable within which the parties to the combination or parties likely to be affected by the combination are required to submit the information or further information to the Commission to ensure prompt and timely conduct of the investigation. It further imposes on Commission a time limit of 45 working days from the receipt of additional or other information called for by it under sub-section of section 29 for dealing with the case of investigation into a combination, which may have an adverse effect of the competition.

Issue of statement of objections by Commission and proposal of modifications

- upon completion of the process under section 29, where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall issue a statement of objections to the parties identifying such appreciable adverse effect on competition and direct the parties to explain within twenty-five days of receipt of the statement of objections, why such combination should be allowed to take effect.
- where the parties to the combination consider that such appreciable adverse effect on competition can be eliminated by suitable modification to such combination, they may submit an offer of appropriate modification to the combination along with their explanation to the statement of objections issued under sub-section (1) in such manner as may be specified by regulations.
- if the Commission does not accept the modification submitted by the parties under sub-section (2) it shall, within seven days from the date of receipt of the proposed modifications under that sub-section, communicate to the parties as to why the modification is not sufficient to eliminate the appreciable adverse effect on competition and call upon the parties to furnish, within twelve days of the receipt of the said communication, revised modification, if any, to eliminate the appreciable adverse effects on competition: Provided that the Commission shall evaluate such proposal for modification within twelve days from receipt of such proposal: Provided further that the Commission may suo motu propose appropriate modifications to the combination which may be considered by the parties to the combination.

ORDERS OF COMMISSION ON COMBINATIONS

The Commission, after consideration of the relevant facts and circumstances of the case under investigation by it under section 28 or 30 and assessing the effect of any combination on the relevant market in India, may pass any of the written orders indicated herein below:

a) **Approve:** Where the Commission comes to a conclusion that any combination does not, or is not likely to, have an appreciable adverse effect on the Competition in relevant market in India, it may, approve that Combination.

b) **Reject:** Where the Commission is of the opinion that the combination has, or is likely to have an adverse effect on competition, it shall direct that the combination shall not take effect.

c) **Modify:** Where the Commission is of the opinion that adverse effect which has been caused or is likely to be caused on competition can be eliminated by modifying such combination then it shall direct the parties to such combination to carry out necessary modifications to the combination

ORDERS OF COMMISSION ON CERTAIN COMBINATIONS (SECTION 31)

1. where the Commission is of the opinion that any combination does not, or is not likely to, have an appreciable adverse effect on competition, it shall, by order, approve that combination including the combination in respect of which a notice has been given under sub-section (2) of section 6.
2. Where the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition, it shall direct that the combination shall not take effect.
3. Where the Commission is of the opinion that any appreciable adverse effect on competition that the combination has, or is likely to have, can be eliminated by modification proposed by the parties or the Commission, as the case may be, under sub-section (7) of section 29 or subsection (2) or sub-section (3) of section 29A, it may approve the combination subject to such modifications as it thinks fit.
4. Where a combination is approved by the Commission under sub-section (3), the parties to the combination shall carry out such modification within such period as may be specified by the Commission.
5. Where

a) the Commission has directed that the combination shall not take effect; or
b) the parties to the combination, fail to carry out the modification within such period as may be specified or
c) the Commission is of the opinion that the combination has, or is likely to have, an appreciable adverse effect on competition which cannot be eliminated by suitable modification to such combination,

then, without prejudice to any penalty which may be imposed or any prosecution which may be initiated under this Act, the Commission may order that such combination shall not be given effect to, or be declared void, or frame a scheme to be implemented by the parties to address the appreciable adverse effect on competition, as the case may be.

6. If no order is passed or direction issued by the Commission, within a period of one hundred and fifty days from the date of notice given to the Commission, the combination shall be deemed to have been approved by the Commission.

EXTRA TERRITORIAL JURISDICTION OF COMMISSION

Section 32 extends the jurisdiction of Competition Commission of India to inquire and pass orders in accordance with the provisions of the Act into an agreement or dominant position or combination, which is likely to have, an appreciable adverse effect on competition in relevant market in India, notwithstanding that,

a) an agreement referred to in section 3 has been entered into outside India; or
b) any party to such agreement is outside India; or
c) any enterprise abusing the dominant position is outside India; or
d) a combination has taken place outside India; or
e) any party to combination is outside India; or
f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India. have power to inquire in accordance with the provisions contained in sections 19, 20, 26, 29, 29A and 30 of the Act into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India 1 [and pass such orders as it may deem fit in accordance with the provisions of this Act.

The above clearly demonstrate that acts taking place outside India but having an effect on competition in India will be subject to the jurisdiction of Commission. The Commission will have jurisdiction even if both the parties to an agreement are outside India but only if the agreement, dominant position or combination entered into by them has an appreciable adverse effect on competition in the relevant market of India.

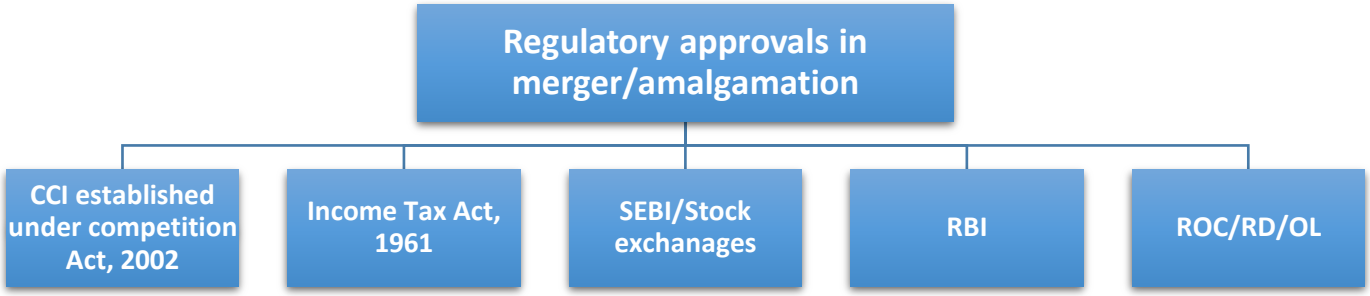
POWER TO IMPOSE PENALTY FOR NON-FURNISHING OF INFORMATION ON COMBINATION (SECTION 43A)

if any person or enterprise fails to give notice to the Commission under sub-section (2) or sub-section (4) of section 6 or contravenes sub-section (2A) of section 6 or submit information pursuant to an inquiry under sub-section (1) of section 20, the Commission may impose on such person or enterprise, a penalty which may extend to one per cent., of the total turnover or assets or the value of transaction referred to in clause (d) of section 5, whichever is higher, of such a combination: Provided that in case any person or enterprise has given a notice under sub-section (4) of section 6 and such notice is found to be void ab initio under sub-section (6) of section 6, then a notice under sub-section (2) of section 6 may be given by the acquirer or parties to the combination, as may be applicable, within a period of thirty days of the order of the Commission under sub-section (6) of that section and no action under this section shall be taken by the Commission till the expiry of such period of thirty days.

LESSON 9 - REGULATORY APPROVALS OF SCHEME

INTRODUCTION

Merger or amalgamation of companies involves various issues including the regulatory approvals. These regulatory approvals are to be obtained not only from the sector in which the company is operating (for example in case of merger of two banks, RBI's approval is needed) but from other departments like Income Tax, SEBI, ROC, etc.



THE COMPETITION COMMISSION OF INDIA (PROCEDURE IN REGARD TO THE TRANSACTION OF BUSINESS RELATING TO COMBINATIONS) REGULATIONS, 2011

- **Regulation 5(9):** Where, in a series of steps or individual transactions that are related to each other, assets are being transferred to an enterprise for the purpose of such enterprise entering into an agreement relating to an acquisition or merger or amalgamation with another person or enterprise, for the purpose of section 5 of the Competition Act, 2002, the value of assets and turnover of the enterprise whose assets are being transferred shall also be attributed to the value of assets and turnover of the enterprise to which the assets are being transferred.
- **Regulation 9(3):** In case of a merger or an amalgamation, parties to the combination shall jointly file the notice in Form I or Form II, as the case may be, duly signed by the person(s) as specified under regulation 11 of the Competition Commission of India (General) Regulations, 2009. Provided that in case of a company, apart from the persons specified under clause (c) of sub-regulation (1) of regulation 11 of the Competition Commission of India (General) Regulations, 2009, Form I or Form II may also be signed by any person duly authorised by the company.
- **Schedule I-Para 9:** A merger or amalgamation of two enterprises where one of the enterprises has more than fifty per cent (50%) shares or voting rights of the other enterprise, and/or merger or amalgamation of enterprises in which more than fifty per cent (50%) shares or voting rights in each of such enterprises are held by enterprise(s) within the same group: Provided that the transaction does not result in transfer from joint control to sole control.
- **Schedule II-Para 6.5:** Furnish copies of approval of the proposal relating to merger or amalgamation by the board of directors of the enterprise(s) concerned referred to in clause (a) of sub- section (2) of section 6 of the Act and/or agreement /other document executed in relation to the acquisition or acquiring of control referred to in clause (b) of sub-section (2) of section 6 of the Act along with the supporting documents as listed in the Notes to Form I,
- **if applicable. Form I: Registration No:** (to be assigned by the Competition Commission of India) Information required to be filled in by the notifying party(ies.
- **Form II:** Form of filing notice with the Competition Commission of India under sub-section (2) of section 6 of the Competition Act, 2002.
- **Form III:** Form for filing of details of acquisition under sub-section (5) of section 6 of the Competition Act, 2002.

APPROVAL FROM SEBI / STOCK EXCHANGE(S)

Securities Contracts (Regulation) Rules, 1957: Sub-rule (7) of rule 19 of the Securities Contracts (Regulation) Rules, 1957 provides that Securities and Exchange Board of India (SEBI) may, at its own discretion or on the recommendation of a recognised Stock Exchange, waive or relax the strict enforcement of any or all of the requirements with respect to listing prescribed by these rules.

SEBI (LISTING OBLIGATIONS AND DISCLOSURE REQUIREMENTS) REGULATIONS, 2015.

REGULATION 11: SCHEME OF ARRANGEMENT

The listed entity shall ensure that any scheme of arrangement /amalgamation /merger /reconstruction / reduction of capital etc. to be presented to any Court or Tribunal does not in any way violate, override or limit the provisions of securities laws or requirements of the stock exchange(s): Provided that this regulation shall not be applicable for the units issued by Mutual Funds which are listed on a recognised stock exchange(s).

REGULATION 37: DRAFT SCHEME OF ARRANGEMENT & SCHEME OF ARRANGEMENT

1. Without prejudice to provisions of regulation 11, the listed entity desirous of undertaking a scheme of arrangement or involved in a scheme of arrangement, shall file the draft scheme of arrangement, proposed to be filed before Tribunal under Sections 230-234 and an scheme of arrangement by way of reduction of capital under Section 66 of Companies Act, 2013, along with a non- refundable fee as specified in Schedule XI, with the stock exchange(s) for obtaining No- objection letter, before filing such scheme with any Court or Tribunal, in terms of requirements specified by the Board or stock exchange(s) from time to time.
2. The listed entity shall not file any scheme of arrangement under sections 230-234 and scheme of arrangement by way of reduction of capital under Section 66 of Companies Act, 2013, with Tribunal unless it has obtained the No-objection letter from the stock exchange(s).
3. The listed entity shall place the No-objection letter of the stock exchange(s) before the Tribunal at the time of seeking approval of the scheme of arrangement: Provided that the validity of the No-objection letter of stock exchanges shall be six months from the date of issuance, within which the draft scheme of arrangement shall be submitted to the Court or Tribunal.
4. The listed entity shall ensure compliance with the other requirements as may be prescribed by the Board from time to time.
5. Upon sanction of the Scheme by the Court or Tribunal, the listed entity shall submit the documents, to the stock exchange(s), as prescribed by the Board and/or stock exchange(s) from time to time.
6. Nothing contained in this regulation shall apply to draft schemes which solely provide for merger of a wholly owned subsidiary with its holding company: Provided that such draft schemes shall be filed with the stock exchanges for the purpose of disclosures.
7. The requirements as specified under this regulation and under regulation 94 of these regulations shall not apply to a restructuring proposal approved as part of a resolution plan by the Tribunal under section 31 of the Insolvency and Bankruptcy Code, 2016 subject to the details being disclosed to the recognized stock exchanges within one day of the resolution plan being approved

REGULATION 94: DRAFT SCHEME OF ARRANGEMENT & SCHEME OF ARRANGEMENT

1. The designated stock exchange, upon receipt of draft schemes of arrangement and the documents prescribed by the Board, shall forward the same to the Board, in the manner prescribed by the Board.
2. The stock exchange(s) shall submit to the Board its No-Objection Letter on the draft scheme of arrangement after inter-alia ascertaining whether the draft scheme of arrangement is in compliance with securities laws within thirty days of receipt of draft scheme of arrangement or within seven days of date of receipt of satisfactory reply on clarifications from the listed entity and/or opinion from independent chartered accountant, if any, sought by stock exchange(s), as applicable.
3. The stock exchange(s), shall issue No-objection letter to the listed entity within seven days of receipt of comments from the Board, after suitably incorporating such comments in the No objection letter: Provided that the validity of the No-objection letter of stock exchanges shall be six months from the date of issuance.
4. The stock exchange(s) shall bring the objections to the notice of Court or Tribunal at the time of approval of the scheme of arrangement.
5. Upon sanction of the Scheme by the Tribunal, the designated stock exchange shall forward its recommendations to the Board on the documents submitted by the listed entity in terms of subregulation (5) of regulation 37.

REGULATORY APPROVALS FROM RBI

Procedure for amalgamation of banking companies. —

The Reserve Bank has discretionary powers to approve the voluntary amalgamation of two banking companies under the provisions of Section 44A of the Banking Regulation Act, 1949. Section 44A provides that:

1. Notwithstanding anything contained in any law for the time being in force, no banking company shall be amalgamated with another banking company, unless a scheme containing the terms of such amalgamation has been placed in draft before the shareholders of each of the banking companies concerned separately, and approved by a resolution passed by a majority in number representing two-thirds in value of the shareholders of each of the said companies, present either in person or by proxy at a meeting called for the purpose.
2. Notice of every such meeting shall be given to every shareholder of each of the banking companies concerned in accordance with the relevant articles of association indicating the time, place and object of the meeting, and shall also be published at least once a week for three consecutive weeks in not less than two newspapers which circulate in the locality or localities where the registered offices of the banking companies concerned are situated, one of such newspapers being in a language commonly understood in the locality or localities.
3. Any shareholder, who has voted against the scheme of amalgamation at the meeting or has given notice in writing at or prior to the meeting of the company concerned or to the presiding officer of the meeting that he dissents from the scheme of amalgamation, shall be entitled, in the event of the scheme being sanctioned by the Reserve Bank, to claim from the banking company concerned, in respect of the shares held by him in that company, their value as determined by the Reserve Bank when sanctioning the scheme and such determination by the Reserve Bank as to the value of the shares to be paid to the dissenting shareholder shall be final for all purposes.
4. If the scheme of amalgamation is approved by the requisite majority of shareholders in accordance with the provisions of this section, it shall be submitted to the Reserve Bank for sanction and shall, if sanctioned by the Reserve Bank by an order in writing passed in this behalf, be binding on the banking companies concerned and also on all the shareholders thereof.
5. On the sanctioning of a scheme of amalgamation by the Reserve Bank, the property of the amalgamated banking company shall, by virtue of the order of sanction, be transferred to and vest in, and the liabilities of the said company shall, by virtue of the said order be transferred to, and become the liabilities of, the banking company which under the scheme of amalgamation is to acquire the business of the amalgamated banking company, subject in all cases to the provisions of the scheme as sanctioned.
6. Where a scheme of amalgamation is sanctioned by the Reserve Bank under the provisions of this section, the Reserve Bank may, by a further order in writing, direct that on such date as may be specified therein the banking company (hereinafter in this section referred to as the amalgamated banking company) which by reason of the amalgamation will cease to function, shall stand dissolved and any such direction shall take effect notwithstanding anything to the contrary contained in any other law.
7. Where the Reserve Bank directs a dissolution of the amalgamated banking company, it shall transmit a copy of the order directing such dissolution to the Registrar before whom the banking company has been registered and on receipt of such order the Registrar shall strike off the name of the company.
8. An order under sub-section (4) whether made before or after the commencement of section 19 of the Banking Laws (Miscellaneous Provisions) Act, 1963 shall be conclusive evidence that all the requirements of this section relating to amalgamation have been complied with, and a copy of the said order certified in writing by an officer of the Reserve Bank to be a true copy of such order and a copy of the scheme certified in the like manner to be a true copy thereof shall, in all legal proceedings (whether in appeal or otherwise and whether instituted before or after the commencement of the said section 19), be admitted as evidence to the same extent as the original order and the original scheme.
9. Nothing in the foregoing provisions of this section shall affect the power of the Central Government to provide for the amalgamation of two or more banking companies under section 396 of the Companies Act, 1956, [corresponding to Section 237 of the Companies Act, 2013], Provided that no such power shall be exercised by the Central Government except after consultation with the Reserve Bank.

APPROVALS FROM INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY (IRDA)

Section 36 of the Insurance Act, 1938 deals with the sanction of amalgamation and transfer by Authority. When any application under sub-section (3) of section 35 is made to the Authority, the Authority shall cause, a notice of the application to be given to the holders of any kind of policy of insurer concerned along with statement of the nature

and terms of the amalgamation or transfer, as the case may be, to be published in such manner and for such period as it may direct, and, after hearing the directors and considering the objections of the policyholders and any other persons whom it considers entitled to be heard, may approve the arrangement, and shall make such consequential orders as are necessary to give effect to the arrangement.

SECTION 37 OF THE INSURANCE ACT, 1938 DEALS WITH THE STATEMENTS REQUIRED AFTER AMALGAMATION AND TRANSFER

Where an amalgamation takes place between any two or more insurers, or where any business of an insurer is transferred, whether in accordance with a scheme confirmed by the Authority or otherwise, the insurer carrying on the amalgamated business or the person to whom the business is transferred, as the case may be, shall, within three months from the date of the completion of the amalgamation or transfer, furnish in duplicate to the Authority-

a) a certified copy of the scheme, agreement or deed under which the amalgamation or transfer has been effected, and

b) a declaration signed by every party concerned or in the case of a company by the chairman and the principal officer that to the best of their belief every payment made or to be made to any person whatsoever on account of the amalgamation or transfer is therein fully set forth and that no other payments beyond those set forth have been made or are to be made either in money, policies, bonds, valuable securities or other property by or with the knowledge of any parties to the amalgamation or transfer, and

c) where the amalgamation or transfer has not been made in accordance with a scheme approved by the Authority under Section 36:

   I. balance-sheet in respect of the insurance business of each of the insurers concerned in such amalgamation or transfer, prepared in the Form set forth in Part II of the First Schedule and in accordance with the regulations contained in Part I of that Schedule, and

   II. certified copies of any other reports on which the scheme of amalgamation or transfer was founded

SECTION 37A OF THE INSURANCE ACT, 1938 DEALS WITH THE POWER OF THE AUTHORITY TO PREPARE SCHEME OF AMALGAMATION

1. If the Authority is satisfied that-

   I. in the public interest; or

   II. in the interests of the policy-holders; or

   III. in order to secure the proper management of an insurer; or

   IV. in the interests of insurance business of the country as a whole.

   it is necessary so to do, it may prepare a scheme for the amalgamation of that insurer with any other insurer (hereinafter referred to in this section as the transferee insurer): Provided that no such scheme shall be prepared unless the other insurer has given his written consent to the proposal for such amalgamation

2. The scheme aforesaid may contain provisions for all or any of the following matters, namely:

   a) the constitution, name and registered office, the capital, assets, powers, rights, interests, authorities and privileges, and the liabilities, duties and obligations of the transferee insurer;

   b) the transfer to the transferee insurer the business, properties, assets and liabilities of the insurer on such terms and conditions as may be specified in the scheme;

   c) any change in the Board of Directors, or the appointment of a new Board of directors of the transferee-insurer and the authority by whom, the manner in which, and the other terms and conditions on which such change or appointment shall be made, and in the case of appointment of a new Board of Director or of any director, the period for which such appointment shall be made;

   d) the alteration of the memorandum and articles of association of the transferee insurer for the purpose of altering the capital thereof or for such other purposes as may be necessary to give effect to the amalgamation;

   e) subject to the provisions of the scheme, the continuation by or against the transferee insurer, of any actions or proceedings pending against the insurer;

   f) the reduction of the interest or rights which the shareholders, policy holders and other creditors have in or against the insurer before the amalgamation to such extent as the Authority considers necessary in the public interest or in the interests of the shareholders, policy-holders and other creditors or for the maintenance of the business of the insurer;

   g) the payment in cash or otherwise to policy-holders, and other creditors in full satisfaction of their claim, -

I. in respect of their interest or rights in or against the insurer before the amalgamation; or
II. where their interest or rights aforesaid in or against the insurer has or have been reduced under clause (f), in respect of such interest or rights as so reduced.

h) the allotment to the shareholders of the insurer for shares held by them therein before the amalgamation Whether their interest in such shares has been reduced under clause (f) or not] of shares in the transferee insurer and where any shareholders claim payment in cash and not allotment of shares, or where it is not possible to allot shares to any sharp holders the payment in cash to those shareholders in full satisfaction of their claim—
I. in respect of their interest in shares in the insurer before the amalgamation; or
II. where such interest has been reduced under clause (f) in respect of their interest in shares as so reduced;

i) the continuance of their services of all the employees of the insurer (excepting such of them as not being workmen within the meaning of the Industrial Disputes Act, 1947, are specifically mentioned in the scheme) in the transferee insurer at the same remuneration and on the same terms and conditions of service, which they were getting or, as the case may be, which they were being governed, immediately before the date of the amalgamation

j) However, the scheme shall contain a provision that the transferee insurer shall pay or grant not later than the expiry of the period of three years, from the date of the amalgamation, to the said employees the same remuneration and the same terms and conditions of service as are applicable to the other employees of corresponding rank on status of the transferee insurer subject to the qualifications and experience of the said employees being the same as or equivalent to those of such other employees of the transferee insurer.

k) However, if in any case any doubt or difference arises as to whether the qualification and experience of any of the said employees are the same as or are equivalent to the qualifications and experience of the other employees of corresponding rank or status of the transferee insurer, the doubt or difference shall be referred to the Authority whose decision thereon shall be final.

l) notwithstanding anything contained in clause (i), where any of the employee, of the insurer not being workmen within the meaning of the Industrial Disputes Act, 1947, are specifically mentioned in the scheme under clause (i) or where any employees of the insurer have by notice in writing given to the insurer or, as the case may be, the transferee insurer at any time before the expiry of one month next following the date on which the scheme is sanctioned by the Central Government, intimated their intention of not becoming employees of the transferee insurer, the payment to such employees of compensation, if any, to which they are entitled under the Industrial Disputes Act, 1947, and such pension, gratuity, provident fund, or other retirement benefits ordinarily admissible to them under the rules or authorizations of the insurer immediately before the date of the amalgamation;

m) any other terms and conditions for the amalgamation of the insurer;

n) such incidental, consequential and supplemental matters as are necessary to secure that the amalgamation shall be fully and effectively carried out.

3. (a) A copy of the scheme prepared by the Authority shall be sent in draft to the insurer and also to the transferee insurer and any other insurer concerned in the amalgamation, for suggestions and objections, if any, within such period as the Authority may specify for this purpose.

(b) The Authority may make such modifications, if any, in the draft scheme as he may consider necessary in the light of suggestions and objections received from the insurer and also from the transferee insurer, and any other insurer concerned in the amalgamation and from any shareholder, policyholder or other creditor of each of those insurers and the transferee insurer.

4. The scheme shall thereafter be placed before the Central Government for its sanction and the Central Government may sanction the scheme without any modification or with such modifications as it may consider necessary, and the scheme as sanctioned by the Central Government shall come into force on such date as the Central Government may notify in this behalf in the Official Gazette: Provided that different dates may be specified for different provisions of the scheme.

a) Every policy holder or shareholder or member of each of the insurers, before amalgamation, shall have the same interest in, or rights against the insurer resulting from amalgamation as he had in the company of which he was originally a policyholder or shareholder or member: Provided that where the interests or rights of any shareholder or member are less than his interest in, or rights against, the original insurer, he shall be entitled

to compensation, which shall be assessed by the Authority in such manner as may be specified by the regulations.

b) The compensation so assessed shall be paid to the shareholder or member by the insurance company resulting from such amalgamation.

c) Any member or shareholder aggrieved by the assessment of compensation made by the Authority under sub-section (4A) may within thirty days from the publication of such assessment prefer an appeal to the Securities Appellate Tribunal.

5. The sanction accorded by the Central Government under sub-section (4) shall be conclusive evidence that all the requirements of this section relating to amalgamation have been complied with and a copy of the sanctioned scheme certified in writing by an officer of the Central Government to be a true copy thereof, shall, in all legal proceedings (whether in appeal or otherwise) be admitted as evidence to the same extent as the original scheme.
6. The Authority may, in like-manner, add to, amend or vary any scheme made under this section.
7. On and from the date of the coming into operation of the scheme or any provision thereof; the scheme or such provision shall be binding on the insurer or, as the case may be, on the transferee insurer and any other insurer concerned in the amalgamation and also on all the shareholders, policy-holders and other creditors and employees of each of those insurers and of the transferee insurer, and on any other person having any right or liability in relation to any of those insurers or the transferee insurer.
8. On and from such date as may be specified by the Central Government in this behalf, their properties and assets of the insurer shall, by virtue of and to the extent provided in the scheme, stand transferred to, and vest in, and the liabilities of the insurer shall, by virtue of and to the extent provided in the scheme, stand transferred to and become the liabilities of, the transferee insurer.
9. If any difficulty arises in giving effect to the provisions of the scheme the Central Government may by order do anything not inconsistent with such provisions which appears to it necessary or expedient for the purpose of removing the difficulty.
10. Copies of every scheme made under this section and of every order made under sub-section (9) shall be laid before each House of Parliament, as soon as may be, after the scheme has been sanctioned by the Central Government or, as the case may be, the order has been made.
11. Nothing in this section shall be deemed to prevent the amalgamation with an insurer by a single scheme of several insurers.
12. The provisions of this section and of any scheme made under it shall have effect notwithstanding anything to the contrary contained in any other provisions of this Act or in any other law or any agreement, award or other instrument for the time being in force.
13. The provisions of section 37 shall not apply to an amalgamation given effect to under provisions of this section.

APPROVALS FROM TELECOM REGULATORY AUTHORITY OF INDIA (TRAI)

The Department of Telecommunications, Govt. of India vide its circular No. 20-281/2010-AS-I (Volume-VII) dated 20th February, 2014 issued 'Guidelines for Transfer/ Merger of various categories of Telecommunication service licenses / authorisation under Unified Licence (UL) on compromise, arrangements and amalgamation of the companies'.

Production Linked Incentive (PLI) scheme for Promoting Telecom & Networking Products Manufacturing in India

With the objective to boost domestic manufacturing, investments and export in the telecom and networking products Department of Telecommunications (DoT) notified the "Production Linked Incentive (PLI) Scheme" on 24th February 2021.The PLI Scheme will be implemented within the overall financial limits of Rs. 12,195 Crores only (Rupees Twelve Thousand One Hundred and Ninety-Five Crore only) for implementation of the Scheme over a period of 5 years. For MSME category, financial allocation will be Rs. 1000 Crores. Small Industries Development Bank of India (SIDBI) has been appointed as the Project Management Agency (PMA) for the PLI scheme. The scheme will be effective from 1st April, 2021. Investment made by successful applicants in India from 1st April, 2021 onwards and up to Financial Year (FY) 2024-2025 shall be eligible, subject to qualifying incremental annual thresholds. The support under the Scheme shall be provided for a period of five (5) years, i.e. from FY 2021-22 to FY 2025-26.

Merger and Acquisition Guidelines 2014 by the Department of Telecommunications, Govt. of India

Government of India

Ministry of Communications and Information Technology Department of Telecommunications

Subject: Merger and Acquisition Guidelines 2014 by the Department of Telecommunications, Govt. of India Government of India-Ministry of Communications and Information Technology Department of Telecommunications:

1. National Telecom Policy-2012 envisages one of the strategy for the telecom sector to put in place simplified Merger & Acquisition regime in telecom service sector while ensuring adequate competition. This sector has been further liberalised by allowing 100% FDI. Further, it has been decided in principle to allow trading of spectrum. The Companies Act, of 1956 has also been amended by Companies Act of 2013 and the amendments have been made in reference to compromise / arrangements and amalgamations of companies. SEBI has also prescribed procedure for IPO.
2. The Scheme of compromise, arrangements and amalgamation of companies is governed by the various provisions of the Companies Act, 2013 as amended from time to time. Such scheme is to be approved by National Company Law Tribunal to be constituted under the provisions of Companies Act, 2013. Consequently, the various licences granted under section 4 of the Indian Telegraph Act, 1885 to such companies need to be transferred to the resultant entity (ies). It is also noted that such schemes may comprise of merger by formation or merger by absorption or arrangements or amalgamation etc. of company (ies) and thereafter merging/transferring such licences / authorisation subject to the condition that the resultant entity being eligible to acquire such licence /authorisation in terms of extant guidelines issued from time to time.
3. Earlier department has issued Guidelines for intra service area Merger of Cellular Mobile Telephone Service (CMTS) / Unified Access Services (UAS) Licences vide Office Memo No. 20-232/2004-BS-III dated 22nd April, 2008. Taking into consideration the TRAI's Recommendations dated 11.05.2010 and 03.11.2011 and National Telecom Policy 2012, in supersession of these guidelines, it has been further decided that Transfer / Merger of various categories of Telecom Services Licences/ authorisation under UL shall be permitted as per the guidelines mentioned below for proper conduct of Telegraphs and Telecommunication services, thereby serving the public interest in general interest in particular:-
   a) The licensor shall be notified for any proposal for compromise arrangements and amalgamation of companies as filed before the Tribunal or the Company Judge. Further, representation / objection, if any, by the Licensor on such scheme has to be made and informed to all concerned within 30 days of receipt of such notice.
   b) A time period of one year will be allowed for transfer/ merger of various licences in different service areas in such cases subsequent to the appropriate approval of such scheme by the Tribunal /Company Judge.
   c) If a licensee participates in an auction and is consequently subject to a lock-in condition, then if such a licensee propose to merger/ compromise/ arrange/amalgamate into another licensee as the provisions of applicable Companies Act, the lock-in period would apply in respect of new shares which would be issued in respect of the resultants company (transferee Company). The substantial Equity/ Cross Holding clause shall not be applicable during this period of one year unless extended otherwise. This period can be extended by the Licensor by recording reasons in writing.
   d) The merger of licensee/ authorisation shall be for respective service category. As access service license/ authorisation allows provision of internet services, the merger of ISP license/ authorisation shall also be permitted.
   e) Consequent to transfer of assets/ licences/ authorisation held by transferor (acquired) company to the transferee (acquiring) company, the licences / authorisation of transferor (acquired) company will be subsumed in the re sultant entity. Consequently, the date of validity of various licences / authorisation shall be as per licenses/ authorisation and will be equal to the higher of the two period on the date of merger subject to prorate payments, if any, for the extended period of the licence / authorisation for that service. However, the validity period of the spectrum shall remain unchanged subsequent to such transfer of asset/ licences/authorisation held by the transferor (acquired) company.
   f) For any additional service orany licence area/ service area, Unified Licence with respective authorisation is to be obtained.
   g) Taking into consideration the spectrum cap of 50% in a band for access services, transfer/ merger of licences consequent to compromise, arrangements or amalgamation of companies shall be allowed where market share for access services area of the resultant entity is upto 50%. In case the merger or acquisition or amalgamation proposals results in market share in any service area(s) exceeding 50%, the resultant entity should reduce its market share to the limit of 50% within a period of one year from the date of approval of merger or acquisition or amalgamation by the competent authority. If the resultant entity fails to reduce its

market share to the limit of 50% within the specified period of one year, then suitable action shall be initiated by the licensor.

h) For determining the aforesaid market share, market share of both subscriber base and Adjusted Gross Revenue (AGR) of licensee in the relevant market shall be considered. The entire access market will be relevant market for determining the market share which will included wire line as well as wireless subscribers. Exchange Data Records (EDR) shall be used in the calculation of wire line subscribers and Visitor Location Register (VLR) data of equivalent, in the calculation of wireless subscribers for the purpose of computing market share based on subscriber base. The reference date for taking into account EDR/ VLR data of equivalent shall be 31st December or 30th June of each year depending on the date of application. The duly audited AGR shall be the basis of computing revenue based market share for operators in the relevant market. The date for duly audited AGR would be 31st March of the preceding year.

i) If a transferor (acquired) company holds a part of spectrum, which (4.4 MHz/2.5 MHz) has been assigned against the entry fee paid, the transferee (acquiring) company (i.e. resultant merged entity), at the time of merger, shall pay to the Government, the differential between the entry fee and the market determined price of spectrum from the date of approval of such arrangements by the National Company Law Tribunal / Company Judge on a pro-rate basis for the remaining period of the license(s). No separate charge shall be levied for spectrum acquired through auctions conducted from year2010 onwards. Since auction determined price of the spect rum is valid for a period of one year, thereafter, PLR at State Bank of India rates shall be added to the last auction determined price to arrive at market determined price after a period of one year. In the event of judicial intervention in respect of the spectrum holding beyond 4.4 MHz in GSM band / 2.5. MHz in CDMA band before merger in respect of transferee (i.e. acquiring entity) company, a bank guarantee for an amount equal to the demand raised by the department for one time spectrum charge shall be submitted pending final outcome of the court case.

j) The Spectrum Usage Charge (SUC) as prescribed by the Government from time to time, on the total spectrum holding of the resultant entity shall also be payable.

k) Consequent upon the implementation of scheme of compromises, arrangements or amalgamations and merger of licenses in a service area there upon, the total spectrum held by the Resultant entity shall not exceed 25% of the total spectrum assigned for access services and 50% of the spectrum assigned in a given band, by way of auction or otherwise, in the concerned service area. The bands will be as counted for such cap in respective NIAs for auction of spectrum. In respect of 800 MHz band, the ceiling will be 10 MHz. Moreover, the relevant conditions pertaining to auction of that spectrum shall apply. In case of future auctions, the relevant conditions prescribed for such auction shall be applicable. However, in case transferor and transferee company had been allocated one block of 3G spectrum through the auction conducted for 3G/ BWA spectrum in 2010, the resultant entity shall also be allowed to retain two blocks of 3G spectrum in respective service areas as a result of compromise, arrangements and amalgamation of the companies and Transfer / Merger of various categories of Telecommunication service licences / authorisation under Unified License (UL), being within 50% of spectrum band cap.

l) If, as a result of merger, the total spectrum held by the relevant entity is beyond the limits prescribed, the excess spectrum must be surrendered within one year of the permission being granted. The applicable Spectrum Usage Charges on the total spectrum holding of the resultant entity shall be levied for such period. If the spectrum beyond prescribed limit is not surrendered by the merged entity within one year, then, separate action in such cases, under the respective licenses/ statutory provisions, may be taken by the Government for non surrender of the excess spectrum. However, no refund or set off of money paid and / or payable for excess spectrum will be made.

m) All demands, if any, relating to the licences of merging entities, will have to be cleared by either of the two licensees before issue of the permission for merger/ transfer of licenses/ authorisation. This shall be as per demand raised by the Government / licensor based on the returns filed by the company notwithstanding any pending legal cases or disputes. An undertaking shall be submitted by the resultant entity to the effect that any demand raised for pre-merger period or transferor or transferee company shall be paid. However, the demand except for one time spectrum charges of transferor and transferee company, stayed by the Court of Law shall be subject to outcome of decision of such litigation. The one time spectrum charge shall be payable as per provisions in para 3(i) above of these guidelines.

n) If consequent to transfer / merger of licenses in a service area, the Resultant entity becomes a 'Significant Market Power' (SMP), then the extant rules & regulations applicable to SMPs would also apply to the Resultant entity. SMP in respect of access services is as defined in TRAI's 'The Telecommunications Interconnect (Reference Interconnect Offer) Regulations, 2002 (2 of 2002)' as amended from time to time.

4. The dispute resolution shall lie with Telecom Dispute Settlement and Appellate Tribunal as per TRAI Act, 1997 as amended from time to time.

5. LICENSOR reserves the right to modify these guidelines or incorporate new guidelines considered necessary in the interest of national security, public interest and for proper conduct of telegraphs.

LESSON 10 - FAST TRACK MERGERS

INTRODUCTION

Companies Act, 1956 did not provide a simple procedure for mergers and amalgamations of certain type of companies. It prescribed a cumbersome and time-consuming process for all companies irrespective of their size, net worth and turnover. The legal provisions pertaining to merger process were stipulated in sections 391-394 of the Companies Act, 1956. This procedure was perceived to be very confusing, complex and time- taking by all stakeholders involved in the process. The process involved, *inter alia*, drafting a merger scheme, taking judicial approval for the scheme, getting Board and shareholders authorisation, etc. It defeated the very purpose for which mergers were entered into and proved to be a deterrent for companies looking for collaborations, rather than a facilitator.

Small companies with fewer resources were also subject to same complex procedure. This was proving to be an obstacle in the way of their growth and expansion. Having the same procedure for merger for all companies was proving to be counter-productive. The complexities of the earlier regime gave rise to the need for a simplified procedure and a more efficient legal regime for merger process. This need was embedded in the following benefits which a fast track merger offered under Section 233 of the Companies Act, 2013:

- Simplified procedure for merger
- No judicial approval required
- Separate procedures for certain type of companies would enable them to expand without any roadblocks
- Form filings required also significantly reduced
- No requirement to apply to the National Company Law Tribunal
- No requirement to get a special audit conducted for the transferor company
- No requirement to issue public advertisements announcing the merger
- Less cost intensive and less time consuming

The Companies Act, 2013 replaced the earlier tedious process with a new concept called the `fast track mergers'. Fast track mergers have dispensed with Tribunal approval for mergers. However, it is to be noted that this process is applicable only to merger between small companies and holding and subsidiary companies.

Legal Regime behind Fast Track Mergers

Section 233 of the Companies Act, 2013 along with Rule 25 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 lay down the entire legal framework of fast track mergers.

MERGER OR AMALGAMATION OF CERTAIN COMPANIES – SECTION 233

1. Notwithstanding the provisions of section 230 and section 232, a scheme of merger or amalgamation may be entered into between two or more small companies or between a holding company and its wholly-owned subsidiary company or such other class or classes of companies as may be prescribed, subject to the following, namely: —
   a) a notice of the proposed scheme inviting objections or suggestions, if any, from the Registrar and Official Liquidators where registered office of the respective companies are situated or persons affected by the scheme within **thirty days** is issued by the transferor company or companies and the transferee company;
   b) the objections and suggestions received are considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least ninety per cent. of the total number of shares;
   c) each of the companies involved in the merger files a declaration of solvency, in the prescribed form, with the Registrar of the place where the registered office of the company is situated; and
   d) the scheme is approved by majority representing nine-tenths in value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of twenty- one days along with the scheme to its creditors for the purpose or otherwise approved in writing.
2. The transferee company shall file a copy of the scheme so approved in the manner as may be prescribed, with the Central Government, Registrar and the Official Liquidator where the registered office of the company is situated.
3. On the receipt of the scheme, if the Registrar or the Official Liquidator has no objections or suggestions to the scheme, the Central Government shall register the same and issue a confirmation thereof to the companies.
4. If the Registrar or Official Liquidator has any objections or suggestions, he may communicate the same in writing to the Central Government within a period of **thirty days**: Provided that if no such communication is made, it shall be presumed that he has no objection to the scheme.
5. If the Central Government after receiving the objections or suggestions or for any reason is of the opinion that such a scheme is not in public interest or in the interest of the creditors, it may file an application before the

Tribunal within a period of **sixty days** of the receipt of the scheme under subsection (2) stating its objections and requesting that the Tribunal may consider the scheme under section 232.

6. On receipt of an application from the Central Government or from any person, if the Tribunal, for reasons to be recorded in writing, is of the opinion that the scheme should be considered as per the procedure laid down in section 232, the Tribunal may direct accordingly or it may confirm the scheme by passing such order as it deems fit: Provided that if the Central Government does not have any objection to the scheme or it does not file any application under this section before the Tribunal, it shall be deemed that it has no objection to the scheme.
7. A copy of the order under sub-section (6) confirming the scheme shall be communicated to the Registrar having jurisdiction over the transferee company and the persons concerned and the Registrar shall register the scheme and issue a confirmation thereof to the companies and such confirmation shall be communicated to the Registrars where transferor company or companies were situated.
8. The registration of the scheme under sub-section (3) or sub-section (7) shall be deemed to have the effect of dissolution of the transferor company without process of winding-up.
9. The registration of the scheme shall have the following effects, namely: —
   a) transfer of property or liabilities of the transferor company to the transferee company so that the property becomes the property of the transferee company and the liabilities become the liabilities of the transferee company
   b) the charges, if any, on the property of the transferor company shall be applicable and enforceable as if the charges were on the property of the transferee company;
   c) legal proceedings by or against the transferor company pending before any court of law shall be continued by or against the transferee company; and (d) where the scheme provides for purchase of shares held by the dissenting shareholders or settlement of debt due to dissenting creditors, such amount, to the extent it is unpaid, shall become the liability of the transferee company.
10. A transferee company shall not on merger or amalgamation, hold any shares in its own name or in the name of any trust either on its behalf or on behalf of any of its subsidiary or associate company and all such shares shall be cancelled or extinguished on the merger or amalgamation.
11. The transferee company shall file an application with the Registrar along with the scheme registered, indicating the revised authorised capital and pay the prescribed fees due on revised capital: Provided that the fee, if any, paid by the transferor company on its authorised capital prior to its merger or amalgamation with the transferee company shall be set-off against the fees payable by the transferee company on its authorised capital enhanced by the merger or amalgamation.
12. The provisions of this section shall mutatis mutandis apply to a company or companies specified in subsection (1) in respect of a scheme of compromise or arrangement referred to in section 230 or division or transfer of a company referred to clause (b) of subsection (1) of section 232.
13. The Central Government may provide for the merger or amalgamation of companies in such manner as may be prescribed.
14. A company covered under this section may use the provisions of section 232 for the approval of any scheme for merger or amalgamation"

RELEVANT PROVISIONS FOR MERGER & AMALGAMATION

- Under Companies Act, 2013, the provisions of section 230 provide the additional disclosure if the proposed scheme involves; Reduction of Share Capital or the scheme is of Corporate Debt restructuring; consented by not less than 75% in value of secured creditors, every notice of meeting about scheme to disclose valuation report explaining effect on various shareholders.
- Further, no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the Accounting Standards prescribed under section 133 of the Companies Act, 2013.
- Apart from this, dealing with the Arrangements; notice of meeting to consider compromise or arrangement to be given to Central Government, Income Tax Authorities, Reserve Bank of India, Securities Exchange
- Board of India, Registrar of Companies, respective Stock Exchange, Official Liquidator, Competition Commission of India and other Authorities likely to be affected by the same. So, these Authorities can voice their concern within 30 days of receipt of notice, failing which it will be presumed that they have no objection to the scheme.

RULE 25 OF THE COMPANIES (COMPROMISES, ARRANGEMENTS AND AMALGAMATIONS) RULES, 2016:

Sr No.	Particulars	Form
1	The **notice** of the proposed scheme to invite objections or suggestions from the Registrar and Official Liquidator or persons affected by the scheme The notice of the meeting to the members and creditors shall be accompanied by – (a) a statement disclosing the details of the compromise or arrangement; (b) the declaration of solvency in Form No. CAA.10; (c) a copy of the scheme	CAA 9
2	The **declaration of solvency** shall be filed by each of the companies along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014, before convening the meeting of members and creditors for approval of the scheme.	CAA.10
3	The transferee company shall, within seven days after the conclusion of the meeting of members or class of members or creditors or class of creditors, **file a copy of the scheme as agreed to by the members and creditors, along with a report of the result of each of the meetings with the Central Government,** along with the fees as provided under the Companies (Registration Offices and Fees) Rules, 2014. Copy of the scheme shall also be filed, along with Form No. CAA. 11 with – (i) the Registrar of Companies in Form No. GNL-1 along with fees provided under the Companies (Registration Offices and Fees) Rules, 2014; and (ii) the Official Liquidator through hand delivery or by registered post or speed post.	CAA.11
4	Where no objection or suggestion is received to the scheme from the Registrar of Companies and Official Liquidator or where the objection or suggestion of Registrar and Official Liquidator is deemed to be not sustainable and the Central Government is of the opinion that the scheme is in the public interest or in the interest of creditors, the Central Government shall issue a **confirmation order** of such scheme of merger or amalgamation	CAA.12.
7	Where objections or suggestions are received from the Registrar of Companies or Official Liquidator and the Central Government is of the opinion, whether on the basis of such objections or otherwise, that the scheme is not in the public interest or in the interest of creditors, it may file an **application before the Tribunal** within sixty days of the receipt of the scheme stating its objections or opinion and requesting that Tribunal may consider the scheme under section 232 of the Act.	CAA.13
8	**The confirmation order of the scheme** issued by the Central Government or Tribunal under sub-section (7) of section 233 of the Act, shall be filed, within thirty days of the receipt of the order of confirmation along with the fees as provided under Companies (Registration Offices and Fees) Rules, 2014 with the Registrar of Companies having jurisdiction over the transferee and transferor companies respectively.	INC-28
9	For the purpose of this rule, it is clarified that with respect to schemes of arrangement or compromise falling within the purview of section 233 of the Act, the concerned companies may, at their discretion, opt to undertake such schemes under sections 230 to 232 of the Act, including where the condition prescribed in clause (d) of sub-section (1) of section 233 of the Act has not been met.	

As per Rule 25(1)(1A) of the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2021 : A scheme of merger or amalgamation under section 233 of the Act may be entered into between any of the following class of companies, namely:-

i. two or more start-up companies; or

ii. one or more start-up company with one or more small company.

Explanation.- For the purposes of this sub-rule, "start-up company" means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognized as such in accordance with notification number G.S.R. 127 (E), dated the 19th February, 2019 issued by the Department for Promotion of Industry and Internal Trade.

SMALL COMPANY

The Companies Act, 2013 introduced the concept of small company. Such small companies form the backbone of an economy and encourage entrepreneurship and, therefore, lesser stringent legal procedures pertaining to mergers and acquisitions would act as an incentive encouraging more people to start such businesses.

"Small Company" under section 2(85) of the Companies Act, 2013 is defined as:

"Small company'' means a company, other than a public company, -

I. **paid-up share capital** of which **does not exceed Fifty Lakh rupees** or such higher amount as may be prescribed which shall not be more than ten crore rupees; and

II. **turnover** of which as per profit and loss account for the immediately preceding financial year **does not exceed Two crore rupees** or such higher amount as may be prescribed which shall not be more than one hundred crore rupees:

Provided that nothing in this clause shall apply to,

a) a holding company or a subsidiary company;

b) a company registered under section 8; or

c) a company or body corporate governed by any special Act;

There are various advantages of being a small company. Some of these are:

- **Filing Annual Return**

  The annual return of a small company can be signed by either its company secretary or its director, whereas an annual return of a private limited company other than a small company has to be necessarily signed by both the company secretary and the director.

- **Board Meeting**

  Small companies are required to conduct only 2 board meetings in a year whereas private limited companies have to conduct four board meetings in a year.

- **Cash Flow Statement**

  A small company is not required to prepare a cash flow statement as a part of its financial statement unlike other private limited companies.

- **Rotation of Auditors**

  A small company is not required to rotate its auditors unlike other private limited companies who are required to rotate their auditors every 5 or 10 years.

STEPS INVOLVED IN FAST TRACK MERGERS

The following steps need to be followed in a fast track merger:

Step	Particulars
1	First of all, both the companies need to check their Articles of Association (AoA) and assess if they have the requisite authority under them to enter into a merger. If no, then the AoA need to be amended before such merger can take place.
2	Convene the Board Meeting and prepare a draft scheme of merger or amalgamation.
3	Prepare a financial statement of assets and liabilities and get an auditor's report prepared.
4	Get the draft scheme approved in the Board Meeting.
5	Both the companies need to send a notice to the Registrar of Companies (RoC) and Official Liquidator (OL) of their respective regions inviting suggestions/objections to the scheme, if any within 30 days of issuing the notice.
6	Such notice to the RoC should be in Form CAA 9 and have the following attachments: • Copy of the scheme • Shareholding pattern of the transferee pre and post-merger • Last 3 years audited financial statements • Memorandum and Articles of Association • Board Resolution • Valuation Report
7	Both the companies are required to file a declaration of solvency with their respective ROCs. This declaration of solvency shall be accompanied by the following: • Board Resolution • Statement of Assets and Liabilities

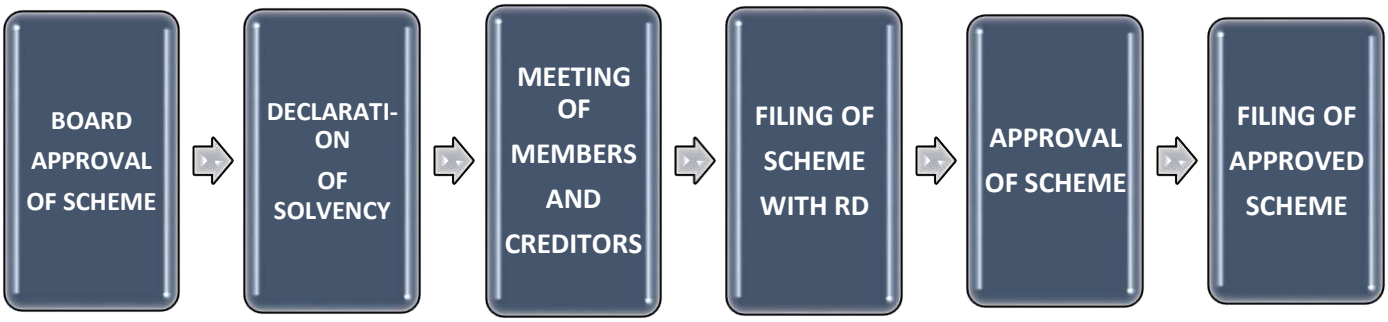
	• Auditors Report
8	Sending notice of shareholders' meeting and creditors' meeting.
9	Conducting the shareholders' meeting and getting the scheme approved.
10	Conducting creditors' meeting and getting the scheme approved.
11	Filing of the results of each meeting with the Regional Director and the Official Liquidator by the transferee company.
12	Objections/Suggestions to be sent to the Regional Director by the RoC / Official Liquidator.
13	Regional director may file an application with the Tribunal if he is of the opinion that the scheme is against public interest.
14	The Tribunal can approve or disapprove the scheme.
15	If approved it shall be filed with the RoC of the transferee company and the transferor company respectively.

POST-MERGER EFFECT

The following consequences shall result out of the merger:

- The transferor company shall stand dissolved on the registration of the scheme. No winding-up shall be required for the same.
- All the assets and liabilities of the transferor company shall be transferred to the transferee company.
- Any charge on the transferor's property shall stand transferred to the transferee.
- Payment of social security benefits of employees will now be the responsibility of the transferee company.

THE FOLLOWING FLOWCHART WOULD HELP UNDERSTAND THE PROCEDURE OF FAST TRACK MERGER BETTER:



PRACTICAL INSIGHTS

Knowing and learning the basic theoretic concepts around fast track mergers is important. However, one also must know how to use this theory in practice. Whenever asked to render a legal opinion on fast track mergers or if your firm is entering into one, keep in mind the following practical steps:

a) Assess whether the merger is beneficial before entering into one.
b) Conduct due diligence on the firm sought to be merged with.
c) Remember both the companies need to be small companies for FTM to apply.
d) Have a prescribed timeline and a strategy in place in order to avoid undue delay.
e) Think of all the possible objections you may receive from ROC and already keep solutions ready so as to save time.

LESSON 11 - CROSS BORDER MERGERS

INTRODUCTION

A company in one country can be acquired by an entity (another company) from other countries. In the event of the merger or acquisition by foreign investors referred to as cross-border merger and acquisitions will result in the transfer of control and authority in operating the merged or acquired company. Assets and liabilities of the two companies from two different countries are combined into a new legal entity in terms of the merger, while in terms of acquisition, there is a transformation process of assets and liabilities of local company to foreign company (foreign investor), and automatically, the local company will be affiliated. Since the cross border M&As involve two countries, according to the applicable legal terminology, the state where the origin of the companies that make an acquisition (the acquiring company) in other countries refer to as the Home Country, while countries where the target company is situated refers to as the Host Country

TYPES OF MERGERS

The most popular types of mergers are horizontal, vertical, market extension or marketing/technology related concentric, product extension, conglomerate, congeneric and reverse. Recently, the concept of inbound and outbound mergers was also introduced in the Companies Act, 2013 as part of Section 234 of the Act.

1. INBOUND MERGER

An Inbound merger is one where a foreign company merges with an Indian company resulting in an Indian company being formed. Following are the key regulations which need to be followed during an inbound merger:

a) **Transfer of Securities:** Typically, the resultant company of the cross-border merger can transfer any security including a foreign security to a person resident outside India in accordance with the provisions of Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instrument) Regulations, 2019. However, where the foreign company is a joint venture/ wholly owned subsidiary of an Indian company, such foreign company is required to comply with the provisions of Foreign Exchange Management (Overseas Investment) Rules & Regulations, 2022.

b) **Branch/Office outside India:** An office/branch outside India of the foreign company shall be deemed to be the resultant company's office outside India for in accordance with the Foreign Exchange Management. In case of transfer of securities both Buyer as well as Target can use the service of a Tripartite whose job is to have Securities in the Books and doing all back-office operations (including valuation of the Securities).

c) **Borrowings:** The borrowings of the transferor company would become the borrowings of the resulting company. The Merger Regulations has provided a period of 2 years to comply with the requirements under the External Commercial Borrowings (ECB) regime. The end use restrictions are not applicable here. Cross Border Mergers require hedging of External Commercial Borrowings (ECB) as well. An External Commercial Borrowings (ECB) is an arrangement between Indian Buyer and Foreign Bank whereby Foreign Bank is funding to Indian Corporate via Foreign Currency Loan having specific amount, tenor. FEMA does permit hedging of loan taken from outside Bank in Indian Books.

d) **Transfer of Assets:** Assets acquired by the resulting company can be transferred in accordance with the Companies Act, 2013 or any regulations framed thereunder for this purpose. If any asset is not permitted to be acquired, the same shall be sold within two years from the date when the National Company Law Tribunal (NCLT) had given sanction. The proceeds of such sale shall be repatriated to India.

e) **Opening of overseas bank accounts for resultant company:** The resultant company is allowed to open a bank account in foreign currency in the overseas jurisdiction for a maximum period of 2 years in order to carry out transactions pertinent to the cross-border merger.

2. OUTBOUND MERGERS

An outbound merger is one where an Indian company merges with a foreign company resulting in a foreign company being formed. The following are the major rules governing an outbound merger:

a) **Issue of Securities:** The securities issued by a foreign company to the Indian entity, may be issued to both,persons resident in and outside India. For the securities being issued to persons resident in India, the acquisition should be compliant with the ODI Regulations. Securities in the resultant company may be acquired provided that the fair market value of such securities is within the limits prescribed under the Liberalized Remittance Scheme.

b) Branch Office: An office of the Indian company in India may be treated as the branch office of the resultant company in India in accordance with the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016.

c) Other changes:

a) The borrowings of the resulting company shall be repaid in accordance with the sanctioned scheme.

b) Assets which cannot be acquired or held by the resultant company should be sold within a period of two years from the date of the sanction of the scheme.

c) The resulting foreign company can now open a Special Non-Resident Rupee Account in terms of the FEMA (Deposit) Regulations, 2016 for a period of two years to facilitate the outbound merger.

SECTION 234 OF COMPANIES ACT, 2013

Merger or amalgamation of company with foreign company. —

1. The provisions of this Chapter unless otherwise provided under any other law for the time being in force, shall apply mutatis mutandis to schemes of mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government: Provided that the Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this section.
2. Subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the Reserve Bank of India, merge into a company registered under this Act or vice versa and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may be, as per the scheme to be drawn up for the purpose.

Companies Act, 1956 also dealt with cross border mergers. Sections 391-394 of the Companies Act, 1956 laid down provisions with respect to cross border mergers. However, under the Companies Act, 1956, only inbound mergers were permitted. Section 234 of the Companies Act, 2013 which was notified in December, 2017 has made provisions for both inbound and outbound mergers. It enables the Central government in consultation with the RBI to make rules pertaining to cross border mergers.

In pursuance of the same, the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 (Merger Regulations 2018) have been notified and are effective from March 20, 2018, placed at Annexure A. Mergers which follow the Merger Regulations are deemed to be automatically approved by the RBI and do not require a separate approval. The Merger Regulations are a comprehensive set of rules which deal holistically with cross border mergers.

RULE 25A OF THE COMPANIES (COMPROMISES, ARRANGEMENTS AND AMALGAMATIONS) RULES, 2016

1. A foreign company incorporated outside India may merge with an Indian company after obtaining prior approval of Reserve Bank of India and after complying with the provisions of sections 230 to 232 of the Act and these rules.
2. (a) A company may merge with a foreign company incorporated in any of the jurisdictions specified in Annexure B after obtaining prior approval of the Reserve Bank of India and after complying with provisions of sections 230 to 232 of the Act and these rules.

   (b) The transferee company shall ensure that valuation is conducted by valuers who are members of a recognised professional body in the jurisdiction of the transferee company and further that such valuation is in accordance with internationally accepted principles on accounting and valuation. A declaration to this effect shall be attached with the application made to Reserve Bank of India for obtaining its approval under clause (a) of this sub-rule.
3. The concerned company shall file an application before the Tribunal as per provisions of section 230 to section 232 of the Act and these rules after obtaining approvals specified in sub-rule (1) and subrule (2), as the case may be.
4. Notwithstanding anything contained in sub-rule (3), in case of a compromise or an arrangement or merger or demerger between an Indian company and a company or body corporate which has been incorporated in a country which shares land border with India, a declaration in Form No. CAA-16 shall be required at the stage of submission of application under section 230 of the Act.
5. Additionally, the following would also need to be fulfilled:
   - Merger of an Indian company is permitted only with a foreign company, which is incorporated in specified jurisdictions.

- Burden is on the foreign company to ensure valuation is done by a valuer, who is a member of a recognized professional body in its jurisdiction and in accordance with internationally accepted principles on accounting and valuation;

JURISDICTIONS SPECIFIED IN CLAUSE (A) OF SUB-RULE (2) OF RULE 25A [ANNEXURE-B]

i. Whose securities market regulator is a signatory to International Organization of Securities Commission's Multilateral Memorandum of Understanding (Appendix A Signatories) or a signatory to bilateral Memorandum of Understanding with SEBI, or
ii. Whose central bank is a member of Bank for International Settlements (BIS), and
iii. A jurisdiction, which is not identified in the public statement of Financial Action Task Force (FATF) as:
   a) a jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or
   b) a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the Financial Action Task Force to address the deficiencies.

DRIVERS AND RETURNS OF CROSS BORDER MERGERS

The following are the benefits of entering into a cross border merger:

a) **Diversification:** A merger often leads to product diversification, whereas a cross border in addition to offering diversification of products also leads to geographical diversification. This is extremely important for companies which want to make their global presence felt.
b) **Achieving cost effectiveness:** When a company seeks to enter new markets, it takes some resources and money to build capacity. Having an existing infrastructure and resources in the new market helps in achieving cost effectiveness.
c) **Technological advancement:** Mergers enable both the parties to use each other's intellectual properties hence enhancing technical know-how.
d) **Distribution:** Cross border mergers help in creating a large distribution network transcending boundary.

However, with bouquets come brickbats, hence with the benefits also come risks associated with cross border mergers. **Some of the risks posed by cross border mergers are:**

a) Despite Double Tax Avoidance Agreements, the tax implications in the host countries may prove to be complex and tedious. This may increase costs as a local professional is required to be hired.
b) **Regulatory landscape:** The laws and regulations in the host country would be different and may be difficult to comply. An unusable regulatory landscape may pose risks to a cross border merger.
c) **Political scenario:** It is essential to assess the political situation of the country before one enters into a merger with an entity belonging to that country. Unstable politics may lead to difficulties in carrying out business.

VALUATION OF CROSS BORDER FIRM

In cross border acquisitions, there can be factors important for considerations which are not considered at all in domestic acquisitions. Valuation is one such factor which changes with countries due to changes in exchange rate, stock market transactions and other macroeconomic developments. Once identification has been completed, the process of valuing the target begins. A variety of valuation techniques are widely used in global business today each with its relative merits. In addition to the fundamental methodologies of Discounted Cash Flow (DCF) and multiples (earnings and cash flow), there are also a variety of industry-specific measures that focus on the most significant elements of value in business lines.

We shall discuss a few valuation methods below:

- The DCF (Discounted Cash Flow) approach to valuation calculates the value of the enterprise as the present value of all future free cash flows less the cash flows due to creditors and minority shareholders.
- The P/E ratio is an indication of what the market is willing to pay for a currency unit of earnings. It is also an indication of how secure the markets perception is about the future earnings of the firm and its riskiness.
- The market-to-book ratio (M/B) is a method of valuing a firm on the basis of what the market believes the firm is worth over and above its capital, its original capital investment, and subsequent retained earnings. Like the P/E Ratio, the magnitude of the M/B ratio as compared with its major competitors, reflects the market's perception of the quality of the firm's earnings, management, and general strategic opportunities.

The completion of a variety of alternative valuations for the target firm aids not only in gaining a more complete picture of what price must be paid to complete the transaction, but also in determining whether the price is attractive.

TAXATION OF MERGERS AND ACQUISITIONS IN INDIA

- There can be different methods of asset acquisition. Irrespective of the method, the tax losses are not generally transferred to the buyer thereby remaining operating in the domain of the seller.
- When the undertaking is acquired via slump sale where the particular picking up of assets by the buyer is not possible, some of the tax benefits/ deductions of the undertaking are made available to the buyer. If the transfer is made for inadequate consideration and the tax proceedings are going on against the transferor then the authorities have the power to claim the amount from the transferee on the completion of the proceedings, if the consideration for the transfer is found to be inadequate. No GST is applicable to a slump sale, i.e., wherein all the assets, rights, property and liabilities are transferred to the transferee. On the other hand, in a situation where particular assets are bought, the GST rate pertaining to the asset is applicable.
- When the acquisition is via sale of shares, Securities Transition Tax (STT) is payable by both the buyer and when the shares are sold through a recognized stock exchange, STT is imposed on purchases and sales of equity shares listed on a recognized stock exchange in India at 0.1 percent based on the purchase or sale price.
- Where a foreign company transfers shares of a foreign company to another company and the value of the shares is derived substantially from assets situated in India, then capital gains derived on the transfer are subject to income tax in India.
- Further, payment for such shares is subject to Indian Withholding Tax (WHT). Shares of a foreign company are deemed to derive their value substantially from assets in India if such Indian assets are valued at a minimum of INR100 million and constitute at least 50 percent of the value of all the assets owned by such foreign company. A tax neutral status is provided where the resultant company is Indian (inbound merger) given that the transfer occurs through a slump sale and shareholders continue holding three-fourths of the shares.
- If the foreign company is the parent company and the subsidiary is in India then the merger of the foreign company with another foreign company makes the newly created company, the owner of the Indian company provided that 25% of the shareholders of the amalgamating company remain the shareholders of the amalgamated company as well. Such a situation warrants for tax exemptions

REGULATORY ASPECT

We have seen the regulatory framework around cross border mergers in the sections above. Let us now see how other key legislations regulate cross border mergers:

- The Foreign Exchange Management (Non-Debt Instrument) Regulations, 2019 and Foreign Exchange Management (Overseas Investment) Regulations, 2022 are extremely important pieces of legislation for allowing foreign investment in India and hence prove to be pertinent to cross border mergers as well.
- In addition to this, the Reserve Bank of India (the RBI) has notified Foreign Exchange Management (Cross-Border Merger) Regulations, 2018 (the Cross-Border Regulation) under the Foreign Exchange Management Act, 1999. These Regulations specifically deal with cross border mergers and contain provisions pertaining to mergers, demergers, amalgamations and arrangements between Indian companies and foreign companies. These regulations also discuss the concepts of inbound and outbound investments.
- If the foreign company is a JV/WOS then it is required to adhere to the conditions mentioned in (Overseas Investment) Rules & Regulations, 2022. Further, if the inbound merger of the JV/WOS leads to the acquisition of a subsidiary of the JV/WOS, then it is required to comply with the ODI Regulations, specifically regulations 6 and 7. If in an outbound merger, shares are being acquired by a person resident in India, then such acquisition becomes subject to the ODI Regulations as prescribed by the RBI.
- **FDI Regulations:** Cross border mergers essentially lead to inflow of foreign direct investment in the country and hence would be required to comply with the same. Foreign Direct Investment or FDI as it is called in common parlance is an investment by an entity or person who is resident outside India in the capital of an Indian company. An Indian company for the purposes of FDI would be a company incorporated in India under the applicable Companies Act. FDI can only be made through equity shares (shares which entitle its holder to vote), fully, compulsorily and mandatorily convertible debentures (instruments issued against loans) and fully, compulsorily and mandatorily convertible preference shares (shares which do not give voting rights). The two routes through

which foreign investors may enter the country are government approval and automatic route. In a cross-border merger, the companies would have to comply with the FDI regulations as there would be inflow of foreign cash in the economy.

- **Takeover Code:** These come into picture, if the merger is happening with a listed company in India. If voting rights or control over the company is acquired then these regulations get triggered.

CROSS BORDER MERGERS – EARNOUTS:

Cross Borders Mergers are subject to earnouts. An earnout is a contingent consideration whereby Buyer of the Target would decide an amount which is to be paid provided certain contingent considerations to happen. Cross Border Mergers specially covering Information Technology (IT), Technological Mergers, Banking Mergers are subject to Contingent Considerations. Earnouts are divided into 3 types:

- Cash Earnouts
- Equity Earnouts
- Stock Compensation Earnouts.

Cross Borders Mergers – Carveouts: A Carve out is a Potential divestiture of a Business unit in which a parent company sells minority interest of a Child Company to outside Investors. A Carveout allows a company to capitalize on a Business segment that many not be part of its core operations.

POST-MERGER PERFORMANCE EVALUATION

Cross border mergers can be truly assessed only by evaluating the post-merger performance of the merged entities. The following parameters may be used to assess the post-merger performance:

- **Returns:** A comparative analysis of the returns being generated by the entity pre and post-merger should be carried out. If the merged entity is earning significantly higher returns than the merger is deemed successful.
- **Cash flow and operational efficiency:** If post-merger the cash flow significantly increases and this increased cash flow is put to use to obtain operational efficiency, this too shows that the newly created entity is performing well.
- **Stock market reaction:** If the stock market reaction to the announcement of merger is positive then the merger appears to be a positive step.