Regulatory Approvals of Scheme

Lesson 9

KEY CONCEPTS

■ Competition Commission of India ■ Reserve Bank of India ■ Foreign Exchange ■ Cross Boarder Merger

Learning Objectives

To understand:

- Regulatory Approval of Merger or amalgamation
- Regulatory approvals from RD / ROC/ OL
- Approval under Competition Act
- Approval from SEBI / Stock Exchange(s)
- Regulatory approvals from RBI
- Approvals from IRDA/ TRAI

Lesson Outline

- Introduction
- Regulatory approvals from Competition Commission of India (CCI), Income Tax Authorities, Stock Exchange, SEBI
- Regulatory approvals from RBI, RD, ROC and Official Liquidator
- Approvals from Sector Regulators such as IRDA, TRAI, etc.
- Lesson Round-Up
- Test Yourself
- List of Further Readings

REGULATORY FRAMEWORK

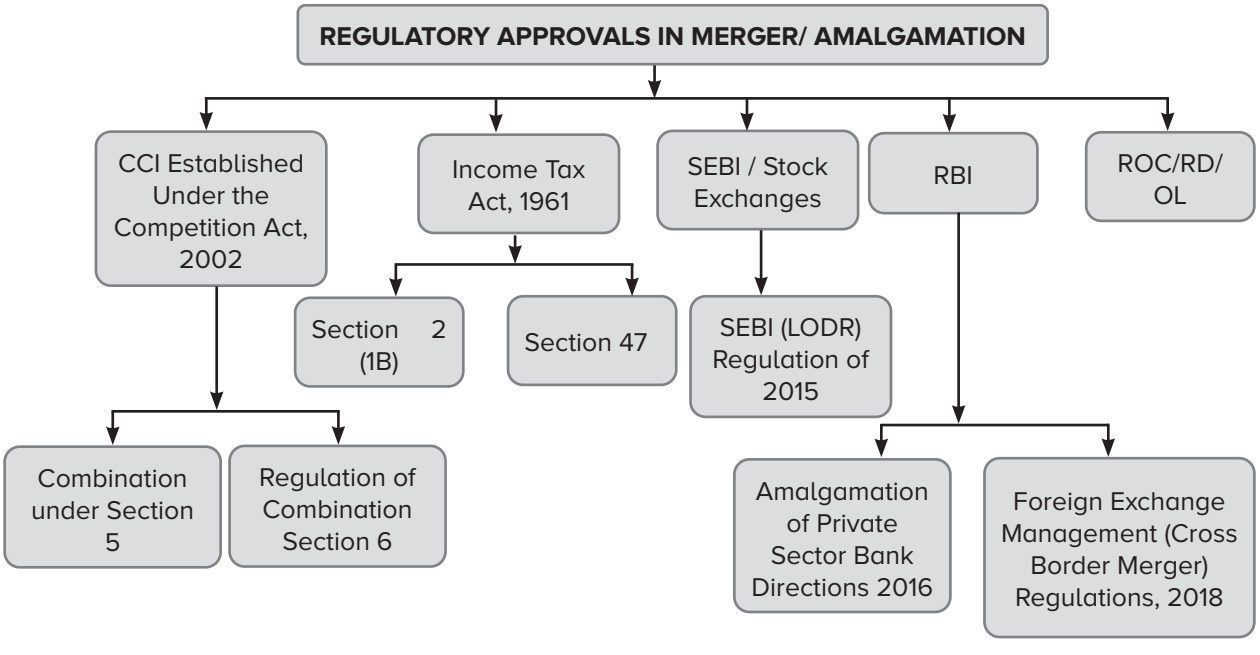
- The Companies Act, 2013
- The Competition Act, 2002
- The Income Tax Act, 1961
- The Banking Regulation Act, 1949
- The Foreign Exchange Management (Cross Border Merger) Regulations 2018

INTRODUCTION

The Companies Act, 2013 requires that notice of the Merger be sent along with such other documents as the Scheme and valuation report, not only to shareholders and creditors, but also to various regulators like the Ministry of Corporate Affairs, the Reserve Bank of India (in cases, where non-resident investors are involved), SEBI and Stock Exchanges (for listed companies), Competition Commission of India (in cases where the prescribed fiscal thresholds are being crossed and the proposed merger could have an adverse effect on competition), Income Tax authorities and any other relevant industry regulators or authorities which are likely to be affected by the merger. This ensures compliance of the Scheme with any and all other regulatory and statutory requirements that need to be followed by the merging entities. The Companies Act 2013 also prescribes a 30-day period for the regulators to make representations, failing which the right would cease to exist.

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.

In this chapter, we shall discuss the various regulatory requirements which are needed for the smooth merger and amalgamation etc.



REGULATORY APPROVALS FROM COMPETITION COMMISSION OF INDIA (CCI), INCOME TAX AUTHORITIES, STOCK EXCHANGE, SEBI

Approval under Competition Act, 2002

Combination (Section 5 of Competition Act, 2002)

The Competition Act, 2002 is the principal legislation that regulates combinations (acquisitions, mergers, amalgamations and de-mergers) in India. Sections 5 and 6 of the Competition Act, which deal with the regulation of combinations, have been in force since 1st June 2011. Prior to this date there was no statutory obligation to notify to any antitrust authority before completing merger and amalgamations.

Section 5 of the Act prescribes the jurisdictional thresholds limits (based on asset and turnover of combining companies) for transactions that must be notified to CCI prior to implementation of merger and acquisition.

Meaning of Combination for the purpose of Competition Act, 2002

Any acquisition, merger or amalgamation that meets the following jurisdictional thresholds limits, as provided in Section 5 of the Competition Act, 2002, is a "combination" for the purpose of the Act.

The thresholds relate to the assets and turnover of the parties to the combination, i.e., target enterprise and acquirer (or acquirer group) / merging parties (or the group to which merged entity would belong).

Mandatory or voluntary

If the jurisdictional thresholds are met and exemptions are unavailable, it is mandatory to notify the Competition Commission of India (CCI) of the combination. Approval of CCI is must. CCI will consider whether proposed Combination is having any appreciable adverse impact on competition in India or not.

Regulatory Authority for Notifying Combinations

The Competition Commission of India (CCI) is the statutory authority responsible for reviewing combinations and assessing whether or not they cause or are likely to cause an appreciable adverse effect on competition within the relevant market(s) in India. CCI approval is required for combinations where the parties involved exceed the assets/turnover thresholds set out in section 5 of the Competition Act.

Triggering events

Any one of the following events requires approval of CCI:

1. The acquisition of
   - shares,
   - voting rights,
   - assets, or
   - control in one or more enterprises, or
2. A merger or amalgamation of enterprises,that meets the thresholds constitutes a combination and must be pre-notified to Competition Commission of India (CCI), and the approval of the Competition Commission of India (CCI) is required before the transaction can be completed.

Types of Notifiable Transactions

Section 5 of the Competition Act, 2002 covers three broad categories of combinations:

1. The acquisition by one or more persons of control, shares, voting rights or assets of one or more enterprises, where the parties, or the group to which the target will belong post-acquisition, meet the specified assets/ turnover thresholds.

2. The acquisition by a person of control over an enterprise where the person concerned already has direct and indirect control over another enterprise with which it compete, where the parties, or the group to which the target will belong post-acquisition, meet the specified assets/turnover thresholds.

3. Mergers or amalgamations, where the enterprise remaining, or enterprise created, or the group to which the enterprise will belong after the merger/amalgamation, meets the specified assets/turnover thresholds.

Time Period for CCI for giving Approval

The Combination Regulations provide that the CCI will "endeavour" to pass an order or issue directions within a period of 150 days from the date of notification. Section 6 deals with the Regulation of Combinations:

(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, referred to in clause (d) of section 5, 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 referred to in clause (d) of section 5 or acquiring of control referred to in clause (b) of that section.

It may be noted that "other document" means any document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets or if the acquisition is without the consent of the enterprise being acquired, any document executed by the acquiring enterprise, by whatever name called, conveying a decision to acquire control, shares or voting rights or where a public announcement has been made in accordance with the provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 made under the Securities and Exchange Board of India Act, 1992 for acquisition of shares, voting rights or control such public document

(2A) No combination shall come into effect until ***one hundred and fifty*** dayshave 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.

(3) 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.

(4) 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.

(5) Upon filing of a notice under sub-section (4) and acknowledgement thereof by the Commission, the proposed combination shall be deemed to have been approved by the Commission under sub-section (1) of section 31 and no other approval shall be required under sub-section (2) or sub-section (2A).

(6) 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.

(7) 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).

(8) 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.

(9) 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.

NOTICE COMBINATION TO THE CCI

Even if thresholds under Section 5(a) to (c) of the Act are not met and breaching the Section 5(d) of the Act, that is Deal Value Transaction (DVT) and meeting the Substantial Business Operations (SBO) in India makes the transaction a combination in terms of Section 5 of the Act, and a notice for the combination is required to be filed.

If transaction value is unclear and cannot be established with reasonable certainty, the value of the transaction may be considered as exceeding the amount specified in Section 5(d) of the Act i.e., may be considered to exceed INR 2,000 crore.

Parties intending to file a notice with CCI can approach it for an informal pre-filing consultation in case of any doubts/queries. The advice provided by the officers of the Commission during PFC is neither binding on the Commission or the person seeking pre-filing consultation. Notifying parties have the discretion to file a notice either using ***Form I or Form II,*** as set out in Schedule I of the Combinations Regulations 2024. However, in the following cases, a notice should preferably be given in Form II:

(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 fifteen percent (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 twenty-five per cent (25%) in the relevant market.

In cases where the parties to the combination have filed a notice in Form I and the Commission requires information in Form II to form its *prima facie* opinion as to whether the combination is likely to cause or has caused an ***Appreciable Adverse Effect on Competition (AAEC)*** within the relevant market, the Commission shall direct the parties to the combination to file a notice in Form II. However, the fee already paid while giving

notice in Form I shall be adjusted against the fee payable for giving notice in Form II if such notice is given within a period of forty-five days from the date of communication of the decision of the Commission.

The merger control regime in India is *ex-ante*. All combinations above a certain financial threshold/value of transaction are mandatorily required to be notified to the Commission, if not exempt, and the combination cannot be consummated until approved by the Commission. Section 6(2) of the Act places the obligation on the parties to give notice to the Commission disclosing the details of the proposed combination.

Approval under Income Tax Act, 1961

The Income Tax Act, 1961 contemplates and recognizes the following types of merger and acquisition activities:

- Merger/Amalgamation;
- Demerger or spin-off;
- Slump sale/asset sale; and
- Transfer of shares/Share Sale.

Merger has not been defined under the Income Tax Act, 1961 but has been covered under the term 'amalgamation' as defined in section 2(1B) of the Act. To encourage restructuring, merger and demerger, it has been given a special treatment in the Income-Tax Act, 1961 since the beginning. The Finance Act, 1999 clarified many issues relating to business reorganizations thereby facilitating and making business restructuring tax neutral.

Every scheme involving restructuring is required to be submitted to jurisdictional assessing officer and no-objection is required from income-tax department before a scheme is approved by NCLT.

Certain provisions of Income Tax Act, 1961 applicable to mergers/demergers are as under:

Meaning of Amalgamation [Section 2(1B)]

"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.

Section 45 of the Income Tax Act, 1961 levies tax on capital gains arising on the transfer of a capital asset. Section 2(47) of the Act defines the term 'transfer' in relation to a capital asset. If a merger or any other kind of restructuring results in a transfer of a capital asset by a resident or a capital asset that is situated in India to a non-resident, it would lead to a taxable event.

Section 47 of the Act sets out certain transfers that are exempt from the provisions of Section 45 (the charging provision for tax on capital gains) and such transfers are exempt from tax on capital gains. The relevant exemptions are mentioned in Lesson 8 of this Study Material.

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.

Securities and Exchange Board of India (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, as per sub-regulation (1) of regulation 37, 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 sub-regulation (5) of regulation 37.

REGULATORY APPROVALS FROM RBI, REGIONAL DIRECTOR (RD), ROC, OFFICIAL LIQUIDATOR

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 as is referred to in sub-section (1) 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.

6A. 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.

6B. 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.

6C. 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.

7. 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.

Regulatory approvals from RD / ROC/ OL

Section 233 deals with the merger or amalgamation of certain companies. It provides as under:

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 Liquidator 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[3] 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 sub-section (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 sub-section (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 sub-section (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.

Foreign Exchange Management (Cross Border Merger) Regulations 2018

Section 234 of the Companies Act, 2013 deals with the merger or amalgamation of company with foreign company. Sub-section (1) provides that 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 Companies Act, 2013 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.

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 Companies Act, 2013 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.

Explanation.—For the purposes of sub-section (2), the expression "foreign company" means any company or body corporate incorporated outside India whether having a place of business in India or not.

Further Rule 25A was added by the Companies (Compromise, Arrangements & Amalgamation) Amendment Rules 2017.

The said rule deals with the merger or amalgamation of a foreign company with a Company and *vice versa* and provides as under:

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 Companies Act, 2013 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 Companies Act, 2013 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 sub-rule (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) Where the transferor foreign company incorporated outside India being a holding company and the transferee Indian company being a wholly owned subsidiary company incorporated in India, enter into merger or amalgamation, –

(i) both the companies shall obtain the prior approval of the Reserve Bank of India;

(ii) the transferee Indian company shall comply with the provisions of section 233;

(iii) the application shall be made by the transferee Indian company to the Central Government under section 233 of the Act and provisions of rule 25 shall apply to such application; and

(iv) the declaration referred to in sub-rule (4) shall be made at the stage of making application under section 233 of the Act.

Explanation 1. For the purposes of this rule the term "company" means a company as defined in clause (20) of section 2 of the Act and the term "foreign company" means a company or body corporate incorporated outside India whether having a place of business in India or not:

Explanation 2. For the purposes of this rule, it is clarified that no amendment shall be made in this rule without consultation of the Reserve Bank of India."

RBI's Guidelines: As mentioned in the proviso to section 234 that Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations, the RBI *vide* its Press Release dated 20th March, 2018 placed on its website the regulations on cross border merger transactions pursuant to the Rules notified by Ministry of Corporate Affairs through Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2017 on April 13, 2017.

Provisions under the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016

Merger or Amalgamation of certain companies (Rule 25)

1. The notice of the proposed scheme, under clause (*a*) of sub-section (1) of section 233 of the Act, to invite objections or suggestions from the Registrar and Official Liquidator or persons affected by the scheme shall be in Form No. CAA.9.

   (1A) 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, 2013or 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.

2. For the purposes of clause (c) of sub-section (1) of section 233 of the Act the declaration of solvency shall be filed by each of the companies involved in the scheme of merger or amalgamation in Form No. CAA.10 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.

3. For the purposes of clause (b) and (d) of sub-section (1) of section 233 of the Act, the notice of the meeting to the members and creditors shall be accompanied by –

   (a) a statement, as far as applicable, referred to in sub-section (3) of section 230ofthe Act read with sub- rule (3) of rule 6 hereof;

   (b) the declaration of solvency made in pursuance of clause (c) of sub-section (1) of section 233 of the Act in Form No. CAA.10;

   (c) a copy of the scheme.

4. (*a*) For the purposes of sub-section (2) of section 233 of the Act, 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 in Form No. CAA.11 with the Central Government, along with the fees as provided under the Companies (Registration Offices and Fees) Rules, 2014.

   (b) 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.

5. Where no objection or suggestion is received within a period of thirty days of receipt of copy of scheme under sub-section (2) of section 233, from the Registrar of Companies and Official Liquidator by the Central Government and the Central Government is of the opinion that the scheme is in the public interest or in the interest of creditors, it may, within a period of fifteen days after the expiry of said thirty days, issue a confirmation order of such scheme of merger or amalgamation in Form No. CAA.12.

   Provided that if the Central Government does not issue the confirmation order within a period of sixty days of the receipt of the scheme under sub-section (2) of section 233, it shall be deemed that it has no objection to the scheme and a confirmation order shall be issued accordingly.

(6) Where objections or suggestions are received within a period of thirty days of receipt of copy of scheme under sub-section (2) of section 233 from the Registrar of Companies or Official Liquidator or both by the Central Government and –

   (a) such objections or suggestions of Registrar of Companies or Official Liquidator, are not sustainable and the Central Government is of the opinion that the scheme is in the public interest or in the interest of creditors, it may within a period of thirty days after expiry of thirty days referred to above, issue a confirmation order of such scheme of merger or amalgamation in Form No. CAA.12.

   (b) 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 within sixty days of the receipt of the scheme file an application before the Tribunal in Form No. CAA.13 stating the

objections or opinion and requesting that Tribunal may consider the scheme under section 232 of the Act:

Provided that if the Central Government does not issue a confirmation order under clause (a) or does not file any application under clause (b) within a period of sixty days of the receipt of the scheme under subsection (2) of section 233 of the Act, it shall be deemed that it has no objection to the scheme and a confirmation order shall be issued accordingly.

7. The confirmation order of the scheme issued by the Central Government or Tribunal under sub-section of section 233 of the Act, shall be filed within thirty days of the receipt of the order of confirmation in Form INC-28 along with the fees as provided under Companies (Registration Official and Fees) Rules, 2014 with the Registrar of Companies having jurisdiction over the transferee and transferor companies respectively.

8. 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

APPROVALS FROM SECTOR REGULATORS SUCH AS IRDA, TRAI, ETC.

When arrangement, amalgamation or merger involves companies being regulated by a sectoral regulator like IRDA, TRAI, RBI, etc. then approval of such Regulators is also required in addition to compliance with Companies Act, 2013. Further these Regulators have issued detailed guidelines to be complied with while amalgamation/ merger between such companies.

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:

Provided that 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:

Provided further that 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.

(j) 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;

(k) any other terms and conditions for the amalgamation of the insurer;

(l) 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.

4A. Everypolicyholder orshareholderor memberof each of theinsurers, before amalgamation, shallhave 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.

4B. The compensation so assessed shall be paid to the shareholder or member by the insurance company resulting from such amalgamation.

4C. 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 (whetherin 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'. The details of these guidelines are mentioned in *Annexure*.

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 1 st 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.

Annexure

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

Sanchar Bhawan, 20 Ashok road, New Delhi (AS-I Division)
No. 20-281/2010-AS-I(Volume –VII) 20th February, 2014

Subject: Guidelines for Transfer / Merger of various categories of Telecommunication service licenses / authorisation under Unified Licence (UL) on compromises, arrangements and amalgamation of the companies.

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 ROUND-UP

- Merger or amalgamation of companies involves various issues and compliance not even of the Companies Act, 2013, but from the Regulators also depending upon the nature of business of the company and sector under which it is operating. These may include SEBI, RBI, CCI, Stock Exchanges, IRDAI, TRAI, etc.
- Section 5 of the Competition Act 2002 deals with the Combination and section 6 with the Regulation of combinations. The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 prescribes the procedure and relevant forms for taking approvals in case of such combinations.
- To encourage restructuring, merger and demerger, it has been given a special treatment in the Income-Tax Act, 1961 since the beginning. The Finance Act, 1999 clarified many issues relating to Business Reorganizations thereby facilitating and making business restructuring tax neutral. Section 47 of the Income Tax Act, 1961 deals with the transactions which are not regarded as transfer.
- The unlisted companies are to follow the provisions of the Companies Act, 2013. Whereas a listed company has to comply with the guidelines contained in the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 in addition to the Companies Act, 2013.
- Regulatory approval of the RBI is required for the merger /amalgamation of the Banking companies. The Master Direction on amalgamation of Private Sector Banks, Directions, 2016 issued by the RBI vide its Circular No. RBI/DBR/2015-16/22 Master Direction DBR. PSBD. No. 96/16.13.100/2015- 16, dated April 21, 2016 provides the detailed issues relating to the amalgamation of Private Sector Banks. The provisions of these Directions shall apply to all private sector banks licensed to operate in India by the RBI and to the Non-Banking Financial Companies (NBFC) registered with the RBI. The principles underlying these Directions would be applicable, as appropriate, to public sector banks.
- Similarly the merger and amalgamation of the insurance companies requires the regulatory approvals from the IRDA and the telecom companies require approval from TRAI.

TEST YOURSELF

(These are meant for recapitulation only. Answers to these questions are not to be submitted for evaluation)

1. In the matter of merger/ takeover of the listed companies, they are required to comply with the provisions of the Companies Act as well as of SEBI Regulations. List out relevant provisions of the Companies Act and the SEBI Regulations in this respect.
2. Mention the merger and acquisition cases in which approval from the CCI is required. Discuss the relevant provisions of the Competition Act, 2002.
3. Describe in detail the regulatory requirements in case of merger/ takeover of insurance companies.
4. Write down the procedure to be followed in brief for the amalgamation of private sector banks.
5. The Department of Telecommunications and TRAI has issued detailed guidelines relating to the merger/ takeover of Telecom companies. Discuss the same in brief.

LIST OF FURTHER READINGS

- Hand book on Mergers and Amalgamation and Takeovers- ICSI Publication
- Mergers/ Amalgamation, Takeovers, Joint ventures, LLP and Corporate Restructure: Snow White Publication
- www.rbi.org
- www.cci.gov.in
- www.irdai.gov.in
- www.trai.gov.in
- www.mca.gov.in
- www.nclt.gov.in