"CROSS BORDER MERGER"

DETAILED ANALYSIS OF *"COMPANIES ACT, 2013"* and *"Foreign Exchange Management (Cross Border Merger) Regulation, 2018"*

Abbreviation:

CA 2013	-	Companies Act, 2013 (which includes erstwhile Companies Act, 1956)
FDI	-	Foreign Direct Investment
FEMA	-	Foreign Exchange Management Act, 1999
MCA	-	Ministry of Corporate Affairs
Merger Rules	-	Companies (Compromises, Arrangements and Amalgamations) Rules, 2016
NCLT	-	National Company Law Tribunal
ROC	-	Registrar of Companies
SEBI	-	Securities Exchange Board of India

PREFACE:

Ministry of Corporate Affairs dated April 13, 2017 issued a notification vide its Notification No [F. No. 1/37/2013-CL.V][1] notifying the effective date for the Section 234 of CA 2013. Sections 234 and 469 empowers Central Government to make the rules, in consultation with Reserve Bank of India in connection with merger and amalgamation of two companies across the border. Exercising the said power, Ministry of Corporate Affairs dated April 13, 2017 issued a notification vide its Notification No. [F. No. 1/37/2013 CL.V][2] amending the existing rules "Companies (Compromises, Arrangements and Amalgations) Rules, 2016", with insertion of Rule 25A.

In addition to the abovementioned action by MCA, RBI further streamlined the procedure for the Cross-Border Mergers, by notifying Foreign Exchange Management (Cross Border Merger) Regulations, 2018 vide its Notification dated March 20, 2018 vide its Notification no FEMA. 389 /2018-RB[3].

In exercise of the powers conferred on Central Government by section 469, MCA issued a notification vide its Notification No [F. No. 1/30/2013/CL-V(i)][4] dated July 21, 2016 notifying the National Company Law Tribunal Rules, 2016 which also lead to the transfer of all the pending proceedings under Companies Act, 1956 which included proceedings of arbitration, compromise, arrangements, etc. from the jurisdiction of respective State High Courts to the Bench of National Company Law Tribunal. Ministry of Corporate Affairs vide its Notification No. [F. No. 16/61/2016-Legal][5] dated December 7, 2016 issues order for transfer of all abovementioned proceeding, depending upon its pendency before the jurisdiction of High Court to NCLT Bench.

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[1]Notification No [F. No. 1/37/2013-CL.V]: http://www.mca.gov.in/Ministry/pdf/section234Notification_14042017.pdf

[2]Notification No. [F. No. 1/37/2013 CL.V]: http://www.mca.gov.in/Ministry/pdf/CompaniesCompromises_14042017.pdf

[3]Notification No FEMA. 389 /2018-RB: http://egazette.nic.in/WriteReadData/2018/184059.pdf

[4]Notification No [F. No. 1/30/2013/CL-V(i)] http://164.100.158.181/orders/Rules_NCLT_latest.pdf

[5]Notification No [F. No. 16/61/2016-Legal] : http://www.mca.gov.in/Ministry/pdf/CompaniesROD_08122016.pdf

WHAT DEFINES "CROSS BORDER MERGER"?

"Cross Border Merger" concept as such is nowhere defined, neither Companies Act, 2013 (including erstwhile Companies Act, 1956) nor in Foreign Exchange Management Act, 1999. However, the concept of the Cross Border Merger comes from the Section 234 of Companies Act, 2013 which gives clarity on the merger or amalgation of the Companies registered under Companies Act, 2013 and companies incorporated in the jurisdiction of such countries as may be notified from time to time by Central Government.

Merger is an arrangement / agreement between two or more existing companies, in order to pursue its expansion plan so as to enhance its existing business, or to enter into new business segment, a new opportunity for branding its goodwill and tighten the stakeholders' interest in the business.

Once the Tribunal pass an order for merger, all the assets and liabilities of the transferor company get transferred to the transferee company.

LEGAL PROVISIONS:

Companies Act, 2013 (including erstwhile Companies Act, 1956) – CA 2013
Companies (Compromises, Arrangements and Amalgamation) Rules, 2016
Foreign Exchange Management Act, 1999 – FEMA
Foreign Exchange Management (Cross Border Merger) Regulations, 2018

Chapter I – Provisions for Cross-Border Merger as per Companies Act, 2013 and rules made thereunder

Section 234. Merger or amalgation 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.*

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."

SCOPE OF THIS SECTION

Unlike merger between two Indian companies, cross border mergers are subject to the prior approval from the RBI. Sub-section (2) makes it very clear about the requirement of prior approval from RBI in either case of merger, either foreign company merging into an Indian Company or vice versa. Therefore, the sectoral cap of the business as defined in the FDI Policy (which is subject to undergo amendment from time to time) is immaterial, even if the business of the existing Indian company is under approval route. This section gives an equal opportunity to RBI for its involvement in framing the rules and regulations to monitor and ensure the cross-border mergers.

This section gave the merger and amalgation an international extension, with an additional authority to Central Government to make or amend the rule for successful implementation of this concept of the cross-border mergers in consultation with RBI.

Rule 25A. Merger or amalgamation of a foreign company with a Company and vice versa:

"(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 sub-rule (2), as the case may be.

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."

SCOPE OF THIS RULE

In sequence with Section 234, Rule 25A makes an applicant to comply with the Sections 230 to 232 for making an application to the Tribunal, for merger or amalgation. Irrespective of the jurisdiction of the country where the Companies are incorporated, in India or in some other country, both the companies, i.e. transferor and transferee companies are required to comply with the Rule 25A. Further, Rule 25A is a restrictive rule, whereby any amendment to be made by Central Government, shall be made only in consultant with RBI, since the foreign entities are involved and the prior approval of RBI is required by the foreign entity to merge their business with Indian Company.

It will be obligation of the transferee company to obtain valuation report from the valuer who the member of a recognized professional body. Such valuation should be in accordance with principles on accounting and valuation accepted at international level. Hence, if the transferee is foreign company, in that case, valuation report to be obtained from the foreign professional within jurisdiction of the foreign company.

COMPARISON BETWEEN SUB-RULE (1) and (2)

Sub-clause (2) is restrictive clause whereby Indian companies may merge with the foreign companies incorporated in any of the jurisdictions as specified in Annexure B [as attached with the sub-rule (3)], subject to the prior approval of RBI and in compliance with Section 230 to 232. However, foreign companies may merge with the company irrespective of its jurisdiction of incorporation, subject to the prior approval of RBI and in compliance with Section 230 to 232.

Application to be filed with NCLT as per Section 230 to 232:

Earlier discussion on Section 234 and Rule 25A was self-explanatory about the application to be made by the filed by the applicant in line with the provision of Sections 230 to 232. Detailed procedure is stated in these sections for an applicant to comply with.

SUMMARISED PROCEDURE OF THE CROSS-BORDER MERGER

Sr. No.	Legal Provision	Particulars	Forms
1	Rl 25 A (i) and (ii)	Prior approval from RBI	
2	**Provision for making an application to Tribunal**		
	Rl 25A (3)	Applicant to make an application referring section 230 to 232	
	Rl 3	Application under Sec 230 to be filed	Form NCLT – 1
		Notice of Admission	Form NCLT – 2
		An Affidavit	Form NCLT – 6
		Copy of Scheme	
		Fees	
3	**Hearing before the Tribunal**		
	Section 230(1) r/w Rl 5	On hearing the applicant, Tribunal may call for the meeting of the creditors and members	
4	**Proceeding of the meeting**		
	Section 230(3) r/w Rl 6	Notice of the meeting to be sent individually	Form CAA 2
	Section 230(3) r/w Rl 7	Advertisement of the notice of the meeting	Form CAA 2
	Section 230(3) r/w Rl 8	Notice to the Statutory Authorities	Form CAA 3
	Rl 9 & 10	Company to arrange for the voting facilities and for proxy	
	Rl 12	Affidavit to be submit to Tribunal before 7 days	
	Rl 13 & 14	Results and Report of the Voting	Form CAA 4
	Rl 15	Petition to Tribunal for sanctioning the scheme	Form CAA 5
	Rl 17 & 20	Order of Tribunal	Form CAA 6

DETAILED STEPWISE EXPLANATION OF THE CROSS-BORDER MERGER IN LINE WITH THE ACT AND RULES ARE EXPLAINED BELOW

1. Prior approval from RBI:

Before applying the scheme of merger, Company may obtain the prior approval of Reserve Bank of India. In case if the Foreign Company is planning to merge with Indian Company, Foreign Company will be required to obtain prior approval from Reserve Bank of India and in case of an Indian Company to merge with Foreign Company, Indian Company will be required to obtain prior approval from Reserve Bank of India.

2. Provision for making an application to Tribunal:

Application by the Concerned Company: After obtaining prior approval from RBI, concerned company is required to refer Rule 25A (3) of the Merger Rules, to make an application under Section 230 to 232 of the Act before NCLT.

Application under Section 230 to 232: Referring Rule 3 of Merger Rules, an applicant to submit an application for merger, amalgamation, compromise, arrangement, etc. in Form NCLT – 1. Additional documents to be attached with the Form NCLT – 1:

- Notice of admission in Form NCLT – 2
- An Affidavit in Form NCLT – 6
- Copy of Scheme of merger, along with the disclosure to be made as per Section 230(2)

3. Hearing before NCLT:

On hearing before the NCLT Bench, unless the Bench thinks deem fit for any reason to dismiss the application, may call for the meeting of the Creditors and members. NCLT may also fix the time and venue of the meeting, appoint a Chairperson and scrutinizer, fix the quorum of the meeting, to place the system of voting and proxy, etc.

4. Stepwise procedure of NCLT:

NOTICE OF MEETING

Pursuant to order of NCLT for convening the meeting of creditors or members, notice of such meeting shall be sent to each of the creditors or members in Form CAA 2. Notice shall be sent by the Chairperson or any other person as specified by the NCLT by hand delivery, speed post, courier, registered post, email or any other mode, at least one month before the meeting.

ADVERTISEMENT OF THE NOTICE OF MEEETING

Advertisement of the notice of meeting shall be published in English and vernacular language newspaper in Form CAA 2, having its wide circulation at the place where the Registered office of the company is located. Further, the copy of such advertisement shall be place on the website of the

Company, if any. For listed companies, such advertisement shall be submitted to SEBI and stock exchange for hosting it on the website of SEBI and exchanges.

NOTICE TO THE STATUTORY AUTHORITIES

Notice in Form CAA 3 to be submitted to all the statutory authorities, after the said notice has been sent to the members or creditors along with the copy of scheme and explanatory statement. Notice of the meeting shall be sent to the authorities in the following cases:

- **In all cases:** Central Government, Registrar of Companies, Income Tax authorities
- **Based on applicability:** Reserve Bank of India, SEBI, Competition Commission of India
- **Based on direction by NCLT:** other sectoral authorities, if required

VOTING AND PROXIES

Recipient of the notice of such meeting, who are eligible to cast their vote in the meeting, either in person or through proxy or postal ballot for the adoption of the scheme. An individual can vote through proxy, provided that proxy form in the prescribed format is filed with the Company at its Registered Office, at least 48 hours before the meeting.

Where the member or creditor is body corporate, then the representative shall be authorized to attend and vote on behalf of the corporate body in the Board meeting and the Board Resolution certified by the Director, Manager or Company Secretary shall be submitted at the office of the Company at least 48 hours before the meeting. **Minors are not eligible to act as proxy.**

AFFIDAVIT BY CHAIRPERSON

The Chairperson of the meeting shall file an affidavit to NCLT not less than seven days before the date of meeting. This affidavit shall contain the information about the compliance to be done towards the direction issued by NCLT for conducting the meeting of creditors or members. In case of default in filing an affidavit with NCLT, Chairperson shall make an application to the Tribunal along with the original order, for the Tribunal to make the necessary order as it may think deem fit.

RESULTS AND REPORT OF THE MEETING

Detailed report with the information of the creditors present during the meeting and the quantum of the voting, in person, through proxy or by electronic modes shall be provided along with votes in favor or against the adoption of the scheme shall be produced in Form CAA 4.

The Chairperson appointed by NCLT shall submit the report to Tribunal, within timeframe as mentioned in the order, or within three days from the conclusion of the meeting if such timeframe is not directed by NCLT.

PETITION FOR CONFORMING THE SCHEME

On approval from members or creditors by three-fourth members in value, with or without modification, Company to present the petition before the bench of NCLT within 7 days after the report submitted by chairperson to NCLT in Form CAA 5.

ORDER OF TRIBUNAL

Once a Tribunal bench is satisfied with all the parameters, will sanction the order of merger, with or without modification of the scheme, as it may deem think fit. The copy of such order passed by the NCLT shall be filed with the Registrar of Companies within 30 days from the date of receipt of certified order copy or any other dates as may be fixed by the NCLT Bench.

Chapter II – Provisions for Cross-Border Merger as per Foreign Exchange Management Act, 1999 and Rules & Regulations framed thereunder

Reserve Bank of India, in exercise of the powers conferred under FEMA, issued Regulations for merger, amalgamation and arrangement between foreign and Indian companies, "Foreign Exchange Management (Cross Border Merger) Regulations, 2018". All the pending Cross Border merger pending before the NCLT shall be governed by these Regulation going forward along with the compliance of CA 2013.

These Regulation are in connection with the other various other FEMA regulations and guidelines, to ensure the compliance pertaining to the procedure of inbound and outbound cross border mergers of two or more companies.

FOREIGN EXCHANGE MANAGEMENT (CROSS BORDER MERGER) REGULATIONS, 2018:

Rl 4. Inbound merger:

"(1) the resultant company may issue or transfer any security and/or a foreign security, as the case may be, to a person resident outside India in accordance with the pricing guidelines, entry routes, sectoral caps, attendant conditions and reporting requirements for foreign investment as laid down in Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017."

Resultant Company may issue / transfer any security to a person resident outside India in a manner as it is specified under Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017. In reference with the said regulation, prior approval from Government shall be obtained if the business sector is covered under automatic route.

(i) "where the foreign company is a joint venture (JV)/ wholly owned subsidiary (WOS) of the Indian company, it shall comply with the conditions prescribed for transfer of shares of such JV/ WOS by the Indian party as laid down in Foreign Exchange Management (Transfer or issue of any foreign security) Regulations, 2004;
(ii) where the inbound merger of the JV/WOS results into acquisition of the Step down subsidiary of JV/ WOS of the Indian party by the resultant company, then such acquisition should be in compliance with Regulation 6 and 7 of Foreign Exchange Management (Transfer or issue of any foreign security) Regulations, 2004."

KEY POINTS OF RL. 4

- Any office outside India of JV / WOS will be considered as Branch office of the resultant company under the scheme of merger.
- Any outstanding borrowings or guarantees from overseas sources shall be confirmed within two years to the External Commercial Borrowing or Trade credit norms or other foreign borrowing norms
- In case where the security or assets are not permitted to be acquired or held by Indian resultant company, then such security or assets to be sold out within two years from the sanction of merger scheme by NCLT and the sale proceeds to be repatriated immediately to India through banking channels only.

- Any liability which is not permitted to be carried out by Indian resultant company, shall be extinguished within two years
- Bank account with foreign currency in the overseas jurisdiction can be opened for the period of two years from the date of sanction of merger scheme by NCLT.

Rl 5. Outbound merger:

KEY POINTS OF RL. 5

- Indian Company having its office in India will be treated as Branch office in India of the foreign resultant company.
- Outstanding borrowings of the Indian Company shall be repaid as per the scheme sanctioned by the NCLT.
- Resultant company will not be liable to repaid any outstanding which are not in conformity of the Act, Rules or Regulations. Further NOC should be obtained from Indian lenders.
- Where scheme does not permit the resultant company to hold or acquire assets or security of Indian company, then the resultant company shall sell the same within two years from the date of sanction of scheme by NCLT. Repayment of liabilities from such sale proceeds are permissible for two years.
- Foreign Resultant Company are allowed to open and run Special Non-Resident Rupee Account for the period of two years from the date of sanction of the Scheme by NCLT.

Other relevant points:

- All the entities involved in the cross-border merger are required to comply with any regulatory action by the Government department on account of non-compliance, contravention, and violation, of any provision of Act, Rules or Regulations before going for merger.
- If RBI prescribe to furnish any reports pursuant to the scheme of merger, the said reports shall be furnished within due dates
- Transition involved pursuant to the cross-border merger shall be deemed to have prior approval from RBI.
- Compliance Certificate from MD / WTD and Company Secretary, if any, to be filed with the application to the NCLT, ensuring the compliance of this Regulation.

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