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Regulatory Alert
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RBI notifies provisions relating to cross border mergers, amalgamations and arrangements

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Background

- The Ministry of Corporate Affairs (MCA) had on 13 April 2017 notified Section 234 of the Companies Act 2013 (Companies Act) and a new Rule 25A in Companies (Compromises, Arrangements and Amalgamations) Rules 2016 (Companies Merger Rules) which *inter alia* provided for the process and provisions facilitating mergers and amalgamations between an Indian company and a foreign company i.e.
  - Merger of a foreign company with an Indian company;
  - Merger of an Indian company with a foreign company incorporated in any of the prescribed jurisdictions
- The Companies Merger Rules prescribed for obtaining prior approval of the Reserve Bank of India (RBI) for cross border mergers.
- On 26 April 2017, RBI had released the draft of Foreign Exchange Management (Cross Border Merger) Regulations, 2017 seeking comments from stakeholders.
- RBI has on 20 March 2018 notified the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 (the Regulations) dealing with merger, amalgamation or arrangement between Indian companies and foreign companies which are to be read with section 234 of the Companies Act and the corresponding Companies Merger Rules.

Definitions

The Regulations which are effective from 20 March 2018 provide for certain definitions that *inter alia* include the following:

- 'Cross border merger' means any merger, amalgamation or arrangement between an Indian company and a foreign company in accordance with Companies (Compromises, Arrangements and Amalgamations) Rules 2016 notified under the Companies Act 2013.
- 'Foreign company' means any company or body corporate incorporated outside India whether having a place of business in India or not.
  Note: For the purposes of outbound mergers, the foreign company should be incorporated in a jurisdiction specified in Annexure B to Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 (reproduced at Annexure 1)*;*
- 'Indian company' means a company incorporated under the Companies Act or under any previous company law.
- 'Resultant company' means an Indian company or a foreign company which takes over the assets and liabilities of the companies involved in the cross border merger.

Inbound Merger

'Inbound merger' means a cross border merger where the resultant company is an Indian company.

- Resultant Indian company may issue / transfer any security and / or foreign security, as the case may be, to a person resident outside India in accordance with pricing guidelines, entry routes, sectoral caps and reporting requirements for FDI as specified in Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017.
  - In case 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 specified in Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 (FEMA ODI Regulations).
  - In case 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 Indian company, then such acquisition should be in compliance with Regulation 6 and 7 of the ODI Regulations for e.g.: such foreign entity should not be engaged in real estate business or banking business, the financial commitment post such acquisition should not exceed 400% of the net worth of the Indian party.
- An office outside India of the foreign company, pursuant to the sanction of the scheme of cross border merger, shall be deemed to be the branch/office outside India, of the resultant Indian company, in accordance with the Foreign Exchange Management (Foreign Currency Account by a person resident in India) Regulations, 2015.
- The guarantees or outstanding borrowings of the foreign company from overseas sources shall become the borrowing of the resultant company or any borrowing from overseas sources and the books of resultant company shall conform, within a period of 2 years, to the External Commercial Borrowing (ECB) norms, as laid down under Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 or Foreign Exchange Management (Borrowing or Lending in Rupees) Regulations, 2000 or Foreign Exchange Management (Guarantee) Regulations, 2000, as applicable, subject to following:
  - Resultant company cannot make any remittance for repayment of such liability within such period of 2 years; and
  - Conditions with respect to end use shall not be applicable in such a case.
- The resultant company may acquire/ hold/ transfer any asset outside India that an Indian company is permitted to acquire/ hold/ transfer in accordance with the provisions of FEMA.
- Where the asset or security outside India is not permitted to be acquired or held by the resultant company, the resultant company shall sell such asset or security within a period of 2 years from the date of sanction of the scheme by NCLT and the sale proceeds shall be repatriated to India immediately through banking channels.
- Where any liability outside India is not permitted to be held by the resultant company, the same may be extinguished from the sale proceeds of such overseas assets within the period of 2 years.

- The resultant company may open a bank account in foreign currency in the overseas jurisdiction for the purpose of putting through transactions incidental to the cross border merger for a maximum period of 2 years from the date of sanction of the scheme by NCLT.

Outbound Merger

'Outbound merger' means a cross border merger where the resultant company is a foreign company.

- The person resident in India may acquire or hold securities of the resultant company in accordance with FEMA ODI Regulations.
- A resident individual may acquire securities outside India provided that the fair market value of such securities is within the limits prescribed under the Liberalized Remittance Scheme laid down in the Act or rules or regulations framed thereunder.
- An office in India of the Indian company, pursuant to sanction of the scheme of cross border merger, may be deemed to be a branch office in India of the resultant company in accordance with the Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016 and the resultant foreign company may undertake any transaction as permissible for a branch office in India under the aforesaid Regulations.
- The guarantees or outstanding borrowings of the Indian company which become the liabilities of the resultant company shall be repaid as per the scheme sanctioned by the NCLT and shall be subject to the following conditions:
  - The resultant company shall not acquire any liability payable towards a lender in India in rupees which is not in conformity with FEMA.
  - A no-objection certificate to this effect should be obtained from the lenders in India of the Indian company.
- The resultant foreign company may acquire and hold any asset in India that a foreign company is permitted to acquire under the provisions of FEMA. Such asset can be transferred in any manner for undertaking a transaction permissible under the FEMA.
- Where the asset/ or security is not permitted to be acquired/ held by the resultant company under FEMA, the resultant company shall sell such asset or security within a period of 2 years from the date of sanction of the scheme of the cross border merger by NCLT, and repatriate the sale proceeds outside India immediately. Repayment of Indian liabilities from sale proceeds of such assets or securities within the period of 2 years shall be permissible.
- The resultant company may open a Special Non-Resident Rupee Account (SNRR Account) in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016 for a maximum period of 2 years from the date of sanction of the scheme by NCLT.

Deemed approval

- Company Merger Rules prescribed for obtaining prior approval of RBI for cross border mergers. The Regulations have now brought in the provisions of deemed approval i.e. any transaction on account of a cross border merger undertaken in accordance with the Regulations shall be deemed to have prior approval of the RBI.

Other compliances

- Valuation of the Indian company and the foreign company to be conducted by valuers who are members of a recognized professional body and further to be ensured that such valuation is in accordance with internationally accepted principles on accounting and valuation.
- The resultant company and/or the companies involved in the cross border merger shall be required to furnish reports as may be prescribed by RBI.
- A certificate from the Managing Director/Whole Time Director and Company Secretary, if available, of the company (ies) concerned ensuring compliance to these Regulations shall be furnished along with the application to be made to the NCLT for approval of the scheme.
- Regulatory actions, if any, with respect to non-compliance, contravention under FEMA shall be completed prior to merger by the companies involved in cross border merger.
- Compensation by the resultant company, to a holder of a security of the Indian company or the foreign company, as the case may be, may be paid, in accordance with the scheme sanctioned by the NCLT.

Conclusion

The Regulations laying down the framework under FEMA, would facilitate cross border merger. Inclusion of the deemed prior approval of RBI on fulfilment of conditions of the Regulations would expedite the process for all cross border mergers and would facilitate the government initiative of ease of doing business in India.

The Regulations need to be read with the provisions of the Companies Act and the Rules made thereunder.

The cross-border merger / amalgamation will also require compliance with applicable overseas laws. Examination of income tax and indirect tax laws implications of cross border merger will be a necessity before taking a final decision.

Source: FEMA Notification 389/2018 – RB dated 20 March 2018

Annexure 1

Annexure B

Jurisdictions referred to in clause (a) of sub-rule (2) of rule 25A

Jurisdictions –

(i) whose securities market regulator is a signatory to International Organization of Securities Commission's Multilateral Memorandum of Understanding (Appendix A Signatories) or a signatory to bilateral Memorandum of Understanding with SEBI, or

(ii) whose central bank is a member of Bank for International Settlements (BIS), and

(iii) a jurisdiction, which is not identified in the public statement of Financial Action Task Force (FATF) as:

(a) a jurisdiction having a strategic Anti-Money Laundering or Combating the Financing of Terrorism deficiencies to which counter measures apply; or

(b) a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the Financial Action Task Force to address the deficiencies.

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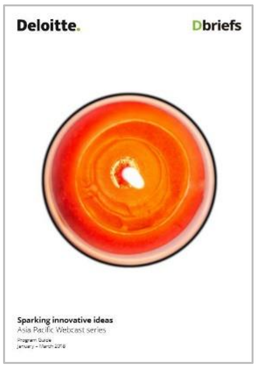

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