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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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ENSURING SHAREHOLDER APPROVAL: LEGAL PROCEDURES AND REQUIREMENTS IN INDIAN M&A TRANSACTIONS UNDER THE COMPANIES ACT, 2013 & OTHER REGULATIONS & STAGES OF MERGER & ACQUISITION TRANSACTIONS

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Businesses in modern-day economies are comprehensively different from their counterparts in earlier times. Modern-day economies are characterized by an extremely dynamic, rapidly evolving and vibrant environment under which business models are put to trial on a regular basis. The increasing adaptation and proliferation of technology is further challenging the way in which established businesses operate. Under this backdrop coupled with a wave of globalization, the landscape of mergers & acquisitions **('M&A')** has gained significant importance in recent times. An enabling framework under corporate and tax laws goes a long way in enhancing the effectiveness of a functional M&A regime in the economy. Mature economies invariably boast of a supportive and contemporaneous framework under its corporate and tax laws that act as a catalyst in facilitating inorganic growth in the economy.

A loosely referred term, M&A, as usually understood and also commonly used under this research paper includes the other forms of effectuating a transaction including demerger, amalgamation, spin-off, reverse merger, business transfer, etc. Under this backdrop let us discuss the broad regulatory framework surrounding the M&A regime in India in relation to corporate entities.

Section 230 to 240 of the Companies Act, 2013 cover the statutory provisions governing M&As including arrangements involving companies, their members and creditors. All sections other than section 234 have been notified effective from December 15, 2016 with section 234 being notified on April 13, 2017. Apart from the substantive provisions mentioned in Section 230-240, guidance on procedural aspects is covered in Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 **('CAA Rules')**. The provisions relating to section 230 to 240 are different from erstwhile section 391 to 394 of the Companies Act, 1956 **('1956-Act')** on account of various aspects.

a. **Mandate of the National Company Law Tribunal (‘NCLT’):** After a long legal encounter over constitutional validity of certain provisions, the NCLT saw light of the day in 2016. Delay in setting- up of NCLT and the surrounding infrastructure resulted in a delay in implementation of section 230- 240 of the Companies Act, 2013. In a marked departure from the 1956-Act, the body for adjudging on M&A matters involving an arrangement shifted from respective High Courts to a more specialized judicial body aka NCLT. NCLT being a focussed body for corporate law matters brings alongside the desired focus and the right understanding in dealing with complex corporate law matters. There are currently 11 benches of the NCLT including the principal bench being in Delhi. Appeals against the orders of the NCLT lie with the National Company Law Appellate Tribunal **(‘NCLAT’)** at Delhi.

b. **Introduction of Fast-Track merger process:** The entire process of effectuating a M&A involving an arrangement passes through various levels of filings, approvals, compliances and processes. A lot of these steps are extraneous when the companies involved in the M&A are extremely small companies or parent-subsidiary company. Accordingly, a fast-track merger process also commonly known as “House-Merger” is conceptualised in Companies Act, 2013. We discuss the process of a fast-track merger in latter part of this article.

c. **Two-way cross-border amalgamations:** The 1956-Act much like a one-way street allowed foreign companies to merge into Indian companies but did not specifically provide for the other way round. Companies Act, 2013 allows merger of Indian companies also into foreign companies subject to checks and balances as laid down. Section 234 deals with such schemes of mergers and amalgamations between companies registered under this Companies Act, 2013 and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government. Further, the Companies Act, 2013 also requires prior approval of the Reserve Bank of India for effectuating such schemes. The Reserve Bank of India has issued draft rules in this matter which inter alia prescribes conditions for in-bound and outbound schemes. Further, Annexure – B of CAA Rule 25A also prescribes the jurisdictions in which the foreign company(ies) is incorporated, with which cross-border mergers can be undertaken.

d. **Quantified threshold for objecting to the scheme:** The Companies Act, 2013 prescribes a threshold beyond which a stakeholder can object to the scheme of arrangement. A proposed scheme can be objected only by shareholders having not less than 10% shareholding or creditors whose debt is not less than 5% of total outstanding debt as per the last audited financial statement or the provisional financial statements which is not older than six months 1956.Act did not have any threshold.

e. **Certification from statutory auditors:** The Companies Act, 2013 prescribes that no arrangement shall be sanctioned by the NCLT unless a certificate by the company's auditor has been filed with the NCLT to the effect that the accounting treatment, if any, proposed in the scheme of arrangement is in conformity with the accounting standards prescribed under section 133 of the Companies Act, 2013. Such a requirement has hitherto been applicable in case of listed companies only.

f. **Procedural ease:** Companies Act, 2013 proposes certain smaller process eases to facilitate a smoother approval. These include flexibility of e-voting, electronic submission of documents with NCLT, exit offer to dissenting shareholders under section 235, obligation to purchase of minority shareholders share under section 236, etc.

Representation by other professionals: Since Chartered Accountants, Company Secretaries and Cost Accountants can also appear (besides Advocates) before NCLT, they will be able to take up M&A cases before NCLT which earlier they could not as earlier respective High Courts were handling schemes of arrangement.

Process for effectuating a M&A through a scheme of arrangement (NCLT route) under section 232 of Companies Act, 2013

Mergers and Acquisitions

A business may grow over time as the utility of its products and services is recognized. It may also grow through an inorganic process, symbolized by an instantaneous expansion in work force, customers, infrastructure resources and thereby an overall increase in the revenues and profits of the entity. Mergers and acquisitions are manifestations of an inorganic growth process. While mergers can be defined to mean unification of two players into a single entity,

acquisitions are situations where one player buys out the other to combine the bought entity with itself. It may be in form of a purchase, where one business buys another or a management buyout, where the management buys the business from its owners. Further, de-mergers, i.e., division of a single entity into two or more entities also require being recognized and treated on par with mergers and acquisitions regime as recommended below, and accordingly references below to mergers and acquisitions also is intended to cover de-mergers (with the law & Rules as framed duly catering to the same).

Mergers and acquisitions are used as instruments of momentous growth and are increasingly getting accepted by Indian businesses as critical tool of business strategy. They are widely used in a wide array of fields such as information technology, telecommunications, and business process outsourcing as well as in traditional business to gain strength, expand the customer base, cut competition or enter into a new market or product segment. Mergers and acquisitions may be undertaken to access the market through an established brand, to get a market share, to eliminate competition, to reduce tax liabilities or to acquire competence or to set off accumulated losses of one entity against the profits of other entity.

The process of mergers and acquisitions in India is court driven, long drawn and hence problematic. The process may be initiated through common agreements between the two parties, but that is not sufficient to provide a legal cover to it. The sanction of the High Court is required for bringing it into effect. The Companies Act, 1956 consolidates provisions relating to mergers and acquisitions and other related issues of compromises, arrangements and reconstructions, however other provisions of the Companies Act get attracted at different times and in each case of merger and acquisition and the procedure remains far from simple. The Central Government has a role to play in this process and it acts through an Official Liquidator (OL) or the Regional Director of the Ministry of Company Affairs. The entire process has to be to the satisfaction of the Court. This sometimes results in delays.

Needless to say, in the context of increasing competitiveness in the market, speed is of the essence, especially in an expanding and vibrant economy like ours. A sign of corporate readiness, skill and stratagem is the ability to do such mergers and acquisitions with ‘digital’ speed. E-governance could provide a helpful tool in achieving the objective of speed with provisions for online registration, approvals etc.

The Committee was of the view that contractual mergers may be given statutory recognition in the Company Law in India as is the practice in many other countries. Such mergers and acquisitions through contract form (i.e. without court intervention), could be made subject to subsequent approval of shareholders by ordinary majority. This would eliminate obstructions to mergers and acquisitions, ex-post facto protection and ability to rectify would be available. There has been a steady increase in cross-border mergers with the increase in global trade. Such mergers and acquisitions can bring long-term benefits when they are accompanied by policies to facilitate competition and improved corporate governance.

The Committee went into several aspects of the provisions in the existing law constituting a separate code in themselves and regulating a very important aspect of restructuring and consolidation of business in response to the economic environment. An effort was made to identify the areas of concern under the present law and to recommend means of addressing them. At present, in case of a proposed scheme for amalgamation of company which is being dissolved without winding up, the law requires a report from the Official Liquidator (OL) or Registrar of Companies (ROC) that the affairs of company have not been conducted in a manner prejudicial to the interest of its members or to public interest. The Act also requires that no order for dissolution of any transferor company shall be made by the Court unless the OL makes a report to the Court that the affairs of the company have not been conducted in a manner prejudicial to the interest of its members or to public interest. The Committee felt that the above two requirements under the present law can be covered by issuing notices to ROC and OL respectively; who may file before the Court, information that may have a bearing on the proposed merger. There is no requirement of a separate information in response to the notice to be filed for the purpose. Filing of such report may be time-bound, beyond which it may be presumed that ROC/OL concerned have no comments to offer.

The law should provide for a single forum which would approve the scheme of mergers and acquisition in an effective time bound manner. The law should also provide for mandatory intimation to regulators in respect of specified class of companies. The concept of 'deemed approval' should be provided for in cases where the regulators do not intimate/inform their comments within a specified time period to the Court/Tribunal before which the scheme of merger/amalgamation is submitted for approval.

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Valuation Of Shares

The Committee while discussing this aspect in detail, also took into account the Shroff Committee Report on "Valuation of Corporate Assets and Shares" during the course of its deliberation on the subject and took the view that valuation of the shares of companies involved in schemes of mergers should be made mandatory in respect of such companies. It was also recommended that such valuation should be carried out by independent registered valuers rather than by Court appointed valuers. The law should lay out the exception, if any, to the mandatory valuation requirements. The law should also recognize valuation of incorporeal property. Valuation standards may also be developed on the lines of 'International Valuation Standards' issued by the International Valuation Standards Committee. The valuation should be transparent so that the aggrieved person may get an opportunity to challenge the same before Court/Tribunal. Benchmarking of valuation techniques and Peer Review Mechanism for Valuers should also be provided for. Where an Audit Committee is mandatory for a company, the task of appointing the valuer should be entrusted to the Audit Committee. The Audit Committee should also have the duty to verify whether the valuer has an advisory mandate and had past association with the company management. The Audit Committee should verify the independence of the valuer for the purposes of an independent valuation. In the case of companies not required to have Audit Committee, this task should be carried out by the Board.

Registration of merger and acquisition

The Committee discussed with concern, the differential stamp duty regime prevalent in different States, which inhibits merger and acquisition activity. It has been a question for consideration whether an order of a court sanctioning a compromise/arrangement under Sections 391-394 of the Companies Act, 1956 would be stampable as a "conveyance" at the rates applicable to such entry in the various state Stamp Acts. Certain states like Maharashtra, Gujarat, Karnataka and Rajasthan sought to address this problem by amending their stamp legislations to make an order of the High Court under Sections 391-394 stampable. However, majority of the states in India have not adopted this stand, resulting in a confusion on the issue. This confusion is more acutely present in the case of mergers of companies that have registered offices in different states. However, as this subject falls within the domain of the States under the Constitution, the States will have to take initiative in this regard. It would be appropriate for the Central Government to facilitate a dialogue in this regard.

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The Concept Paper on Company Law (2004) contemplates that an order of the scheme of merger will be effective only if a certified copy of the order of the Court is filed with the Registrar and duly registered. The Committee felt that it should be enough if the company complies with the filing requirement with the Registrar of Companies as is presently provided, to make the scheme effective.

The Committee also felt that a separate electronic registry should be constituted for filing schemes under Sections 391/394 of the Companies Act. Instead of filing the schemes with the Registration Offices wherever the properties of the company are located, filing the scheme with the electronic registry should be considered sufficient compliance. This however, could raise jurisdictional issues vis-à-vis Stamp Duties applicable which may be resolved by an appropriate Constitutional amendment to enable a uniform, reasonably priced Stamp Duty regime across the country. Further, there must also be a provision in the Company Law for compulsory registration with the electronic registry of all property of a company above a certain value. This will simplify the mutation procedure subsequent to scheme of arrangement between two or more companies. The Committee took the view that enabling uniformity and overall reduction of Stamp Duties applicable in pursuance of mergers, demergers, amalgamations or schemes of reconstruction, takeover would be desirable as competition requires cost reduction and Indian firms need to be competitive in restructuring exercise in the global context.

Merger of a listed company into an unlisted company and vice-versa

The Committee examined issues relating to the merger of listed company with an unlisted company and vice-versa. It was felt that the Act needs to provide specifically that de-listing through a scheme of merger under section 391-394 of the Companies Act is possible by merging a listed company with an unlisted company. However, such a process should enable a safety net or a clear exit option for the public shareholders of the listed company. Similarly, if substantial assets are moved out of a listed company in the case of de-merger, a safety net/exit option needs to be provided to the public shareholders and the residual company needs to be de-listed (in case more than 90% of the public shareholders exercise such option). The law should enable companies to purchase the stake of minority shareholders in order to prevent exploitation of such shareholders where a promoter has bought back more than 90% of the equity. Such purchase should, however, on the basis of a fair offer. Appropriate valuation rules for this purpose should be prescribed, or, the last known price prior to delisting, could be made

the benchmark for such acquisitions.

Approval of the Scheme

The existing Law requires that a scheme for merger and/ or any arrangement should be approved by a majority in number representing also 3/4th in value of shareholders/creditors present and voting. The requirement of majority in number does not serve any useful purpose considering that value is simultaneously being considered as a criterion. Besides, international practice recognizes value as the determining factor and does not appear to impose such additional conditions. The Committee is, therefore, of the view that this requirement, in Indian law, may also be modified to provide only for approval by 3/4th in value of shareholders and creditors, present and voting.

Under the present scheme of Act, the manner of holding of the meetings of the creditors and shareholders as also dispensing with the same is left to the discretion of the courts. However, different courts follow different procedures. The Committee feels that there is a need for uniformity in this regard and recommends that rules may be formulated under the Act to cover this aspect, including dispensing of the requirement to hold such meetings.

Minority Interest

The Committee examined the view that quite frequently shareholders/creditors with insignificant stake raise objections to schemes of merger/acquisition and the process of dealing with such objection becomes vexatious. After a detailed discussion, the Committee recommended that while protection of minority interest should be recognized under the law, only shareholders/creditors having significant stake at a level to be prescribed under law should have the right to object to any scheme of mergers. The philosophy behind such a move would be to streamline the procedure of articulation of the minority interest while restricting obstructionist attitude on the part of any section of minority.

Merger of class of Companies

The Committee reviewed the international models of mergers and amalgamations. In the case of mergers within a group, the Act may prescribe a short form of amalgamation. Conceptually a scheme of amalgamation or merger between holding company and subsidiary company stands on a different footing from amalgamation and merger between two independent

companies. So also merger between two private limited companies should be viewed differently as compared to the merger of two public limited companies. The amended new Act should provide for less regulation in respect of mergers among associate companies/two private limited companies where no public interest is involved. The concept of contractual merger should also be thought of as an alternative to the form of merger available under the Act as on date.

Cross Border Mergers

A forward looking law on mergers and amalgamations needs to also recognize that an Indian company ought to be permitted with a foreign company to merger. Both contract based mergers between an Indian company and a foreign company and court based mergers between such entities where the foreign company is the transferee, needs to be recognized in Indian Law. The Committee recognizes that this would require some pioneering work between various jurisdictions in which such mergers and acquisitions are being executed/created.

The Indian shareholders should be permitted to receive Indian Depository Receipts (IDR) in lieu of Indian shares especially in listed companies or foreign securities in lieu of Indian shares so that they become members of the foreign company or holders of security with a trading right in India (especially in listed companies). Further, in such cases, the shell of such company should be allowed to be dissolved without winding up with court intervention. The present Act does not permit this form of merger in view of the specific definition of company under section 390(a) of the Companies Act. The Committee noted that apart from amendments to the Companies Act, suitable changes may be necessary in the Income Tax Act, Foreign Exchange Management Act and provisions relating to IDR to enable merger of an Indian Company with foreign entity. The Committee therefore recommended adoption of international best practices and a coordinated approach while bringing amendments to the code of merger in the Companies Act.

Disclosure Requirements

As the shareholders need to have complete information in the case of a scheme of merger/acquisition, especially in the case of promoter initiated mergers, the Act/Rules should list out the disclosure requirements in the explanatory statements to be sent to the shareholders in respect of the scheme filed before the Courts/Tribunals. In the case of Companies required

to appoint independent directors, the Act should mandate the Committee of independent directors as a monitoring body to ensure adequacy of disclosures.

Corporate Debt Restructuring

The Reserve Bank of India has specific tools for fast track debt restructuring known as the CDR Mechanism (Corporate Debt Restructuring Mechanism). It is often seen that sometimes even though 75% of the secured creditors consent to the debt restructuring and make significant sacrifices, minority secured creditors or unsecured creditors put a spoke through the wheel. As a result, such schemes that would otherwise enable the return of the corporate to viable operation, get delayed or scuttled.

As in the case of contractual mergers or schemes of arrangement, the Committee recommends that if the petitioning creditors or petitioning company is prima facie able to prove that 75% of the secured creditors who have consented to the CDR Mechanism have made sacrifices to restructure the company then, notwithstanding the minority dissent, such a scheme should be sanctioned on filing.

Appropriate remedies for misstatement and the ability to revoke such an order with punishment for any misstatement would be an adequate safeguard for false misstatement. The unsecured creditors are subsequent in the queue and without the consent of the secured creditors and their debt restructuring, they would have no hope to receive their dues. However, to safeguard their interests and to ensure the continuity of the company's functioning, the scheme must satisfy a minimum liquidity test and should have provisions for a security pool either made available by the secured creditor as cash availability or by the promoter to progress the scheme of restructuring. Such schemes must contain safeguards against fraudulent preference and must have a creditors' responsibility statement, similar to a directors' responsibility statement, appended to it. Withdrawal from the security pool provided for by the liquidity test could be regulated by the Court/ National Company Law Tribunal.

The Committee recommended that the need to file a separate scheme for reduction of capital simultaneously the scheme for merger and acquisition should be avoided. The provisions relating to obtaining consent from unsecured creditors should be done away with. To ensure continuity of the existence of transferee company/resulting company, the Committee felt the

need to mandate requirement of a satisfactory liquidity test and prescribed debt equity norms. The creditors consent may be necessary only in case of companies not meeting the liquidity test.

Amalgamation in public interest

Existing Section 396 empowers Central Government to order amalgamation of two or more companies in public interest. It has been suggested that these provisions should be reviewed. It is felt that amalgamation should be allowed only through a process overseen by the Courts/Tribunals. Therefore, instead of existing provisions of Section 396, provision should be made to empower Central Government to approach the Court/Tribunal for approval for amalgamation of two or more companies.

Fees on Increased Authorized Share Capital

At any point of time the transferor company and the transferee company, both companies would have paid fees of their respective authorized share capital at the rates specified in Schedule X of the Companies Act, 1956. Upon dissolution of the transferor company into the transferee company, the fees paid by the transferor company go waste and the transferee company gets no set off for the same.

In order to facilitate and encourage merger and acquisition activities, it is recommended that the fees paid by the transferor company on the authorized share capital should be available as a set off to the transferee company upon the sanction of the scheme of amalgamation by the High Court. This principle should apply both in respect of merger and demerger cases.

Introduction of Non Obstante Clause in Section 394(2)

Section 394(2) of the Companies Act, 1956 provides for vesting of assets and liabilities of the transferor company in the transferee company upon the sanction of the scheme of amalgamation by the High Court. Since the section does not contain a non-obstante clause, it creates immense practical difficulties in actual transfer of the various properties/assets of the transferor company into the transferee company.

It was noted that the Sick Industrial Companies (Special Provisions) Act, 1985 and Section 32 thereof had clear provisions in the nature of a non-obstante declaratory order whilst sanctioning

a scheme of restructuring. The Sick Industrial Companies Act has been subsumed in the company law and the principles therein, therefore, are eminently capable of being modified and applied in the new company law to be made.

It is therefore recommended that a non-obstante provision be introduced in the relevant provisions of the law to ensure that the assets and liabilities of the transferor company absolutely vest in the transferee company notwithstanding anything to the contrary in any other law for the time being in force. This would ensure that the transferee company is not subjected to cumbersome formalities for the transfer of assets and liabilities in its own name.

Regulatory Framework

The legal framework governing mergers, acquisitions, and combinations in India is primarily governed by the Companies Act, 2013, along with the rules made thereunder (hereinafter the "Companies Act"). There are two types of combinations: mergers and amalgamations, and demergers. The former involves a combination of two or more companies into one, while the latter involves the transfer of one or more undertakings of a company to another or multiple companies.

The process for mergers, acquisitions, and combinations is primarily set out in the Companies Act. It requires obtaining approval from various parties, including the board of directors, shareholders, and regulatory authorities like the National Company Law Tribunal (NCLT), the Securities and Exchange Board of India (SEBI), and the Competition Commission of India (CCI). In addition, the Companies Act outlines the rights of shareholders, creditors, and employees of the companies involved in the combination. Overall, the legal framework in India for mergers, acquisitions, and combinations is well established and regulates these transactions thoroughly.

A. Companies Act The Companies Act is the primary legislation in India that governs the incorporation, management, and operation of companies. It provides a legal framework for mergers, acquisitions, and combinations in India, which are often used as a strategy for corporate growth or restructuring. Under the Companies Act, a merger is defined as the amalgamation of two or more companies into one new or existing company, while an acquisition is defined as the purchase of one company by another company. A combination is

a term that includes both mergers and acquisitions. The Companies Act sets out the procedures for mergers and acquisitions, including the approval of shareholders and regulatory authorities, the valuation of shares, and the treatment of minority shareholders.

Approval of Shareholders: Before a merger or acquisition can take place, the proposal must be approved by the shareholders of each company involved. The Companies Act requires that at least 75% of the shareholders present and voting must approve the proposal.

Approval of Regulatory Authorities: The Act also requires approval from various regulatory authorities, including the National Company Law Tribunal (NCLT), the Competition Commission of India (CCI), and the Securities and Exchange Board of India (SEBI). The NCLT and CCI evaluate the impact of the proposed merger or acquisition on competition and ensure that the rights of minority shareholders are protected.

Valuation of Shares: The Companies Act also sets out rules for the valuation of shares, which is necessary for determining the share exchange ratio between the companies involved in the merger or acquisition. The valuation must be done by an independent valuer appointed by the company's board of directors.

Treatment of Minority Shareholders: The Companies Act also provides protection for minority shareholders. The Companies Act requires that the shares of minority shareholders be treated on par with the shares of the majority shareholders. Minority shareholders have the right to object to the merger or acquisition and can ask for the fair value of their shares to be determined by an independent valuer.

In summary, the Companies Act provides a comprehensive legal framework for mergers, acquisitions, and combinations in India, which includes procedures for shareholder and regulatory approval, valuation of shares, and protection of minority shareholders' rights.

Competition Act, 2002

The Competition Act, 2002 (hereinafter the "Competition Act") is an important legislation in India that regulates competition in the market by preventing anti-competitive agreements, abuse of dominance, and mergers and acquisitions that may have an adverse impact on competition in the market. Following are some of the important and noteworthy functions of

the Competition Act:

Prohibition of Anti-Competitive Agreements: The Competition Act prohibits agreements that have an appreciable adverse effect on competition in the market. Such agreements may include agreements between competitors to fix prices, limit production, or share markets, among others. The Competition Act also prohibits vertical agreements between enterprises that may cause an adverse effect on competition in the relevant market.

Abuse of Dominant Position**:** The Competition Act prohibits an enterprise from abusing its dominant position in the market. This may include actions such as imposing unfair conditions on customers or suppliers, refusing to deal with certain customers or suppliers, or charging excessive prices, among others.

Regulation of Mergers and Acquisitions: The Competition Act regulates mergers, acquisitions, and combinations that may have an adverse impact on competition in the market. The CCI is responsible for evaluating whether a proposed merger or acquisition may have an adverse impact on competition in the market. The CCI may approve the merger or acquisition subject to certain conditions, or it may prohibit the merger or acquisition if it determines that it would have an appreciable adverse effect on competition in the market.

The Competition Act aims to promote and sustain competition in the market, protect consumer interests, and ensure freedom of trade in India. The Competition Act also provides for penalties and other consequences for non-compliance with its provisions

SEBI Regulations

The Securities and Exchange Board of India (SEBI) is the primary regulatory body for the securities market in India. Its objective is to protect the interests of investors in securities and to promote the development of the securities market in India. One of the ways SEBI achieves this is by regulating the process of M&A in the Indian securities market.

SEBI regulations require companies to disclose information about M&A transactions to the stock exchanges and to their shareholders. This is to ensure that all relevant information is made available to investors so that they can make informed decisions about their investments. The information that must be disclosed includes the terms and conditions of the proposed

merger or acquisition, the valuation of the companies involved, and any potential risks or benefits associated with the transaction.

SEBI also specifies the procedures for obtaining approval from the stock exchanges for mergers and acquisitions. The companies involved in the M&A transaction must submit a draft scheme of the merger or acquisition to the stock exchanges for approval. The scheme must include details about the companies involved, the share exchange ratio, and the benefits and risks of the transaction. The stock exchanges will then review the scheme and provide their approval if they find that it is in compliance with SEBI regulations.

In addition to the above, SEBI also requires companies to obtain approval from their shareholders for M&A transactions. The companies must hold a general meeting of their shareholders to obtain approval for the transaction. Shareholders must be provided with all relevant information about the transaction and must be given the opportunity to ask questions and express their views. Overall, SEBI regulations aim to ensure that M&A transactions in the Indian securities market are conducted in a fair and transparent manner, with all relevant information made available to investors and with the approval of the stock exchanges and shareholders.

Procedure for Mergers, Acquisitions, and Combinations

Mergers, acquisitions, and combinations are complex business transactions that require careful planning, execution, and evaluation.

Here's a general overview of the procedures involved:

1. Pre-transaction planning: Before the transaction, both companies should conduct a thorough analysis of their own strengths and weaknesses, as well as those of their potential partner. They should also identify areas of overlap and determine the strategic fit of the transaction.
2. Valuation: Both companies should determine the fair value of their assets and liabilities to establish a fair exchange ratio or price. This process typically involves hiring a third-party appraiser to provide an objective valuation.
3. Due diligence: The acquiring company should conduct a comprehensive review of the target company's financial statements, contracts, legal documents, and operational procedures to identify any potential risks or liabilities.

4. Negotiation: Once the due diligence process is complete, both companies should enter into negotiations to establish the terms of the transaction, including the exchange ratio or price, the structure of the transaction, and any contingencies or conditions.
5. Documentation: Once the terms have been agreed upon, both companies should prepare and execute legal documents, such as a merger agreement, acquisition agreement, or purchase agreement.
6. Regulatory approvals: Depending on the nature of the transaction and the industries involved, both companies may need to obtain regulatory approvals from board of directors, shareholders and various other stakeholders including regulatory agencies and government agencies.
7. Integration: After the transaction is complete, the companies should begin the process of integrating their operations, systems, and cultures to realize the benefits of the transaction.
8. Post-transaction evaluation: Finally, both companies should evaluate the success of the transaction and identify any areas for improvement or further integration. This evaluation process should continue over time to ensure the ongoing success of the combined entity. Overall, the procedures involved in mergers, acquisitions, and combinations can be complex and time-consuming, and it's important to have experienced professionals to guide the process.

Stages Of M&A

Assessment and preliminary review

Whenever a purchaser is yet to be found, it is standard practice for an M&A transaction process to commence by means of an information memorandum. The Information Memorandum is generally drawn up by the vendor and published with a view to gauge market interest and ultimately sell the company/ group of companies/ their business or part thereof for maximum value. An Information Memorandum usually contains enough information to provide the potential purchaser with sufficient detail to understand whether it would like to pursue the acquisition of the target company/ business, without divulging any confidential or sensitive business information of the said target. Should a purchaser be interested in acquiring the target company or its business, the interested purchaser or purchasers, if more than one, would generally enter into a Non-Disclosure Agreement (NDA) which is aimed at securing the confidentiality of the target company and the sensitive data concerning its business.

2. Negotiation and letter of intent

Whenever there is more than one potential purchaser involved, this second phase is usually preceded by the due diligence exercise which is outlined below. However, if there is only one potential purchaser in the fray, before or simultaneously with the commencement of the due diligence exercise, it is common for the parties to start considering certain matters which should precede the contractual phase of the sale. Such matters, include the following:

- competition/antitrust law implications, and whether such transaction necessitates pre-clearance from the Office for Competition;
- employment law considerations;
- licensing matters; and
- fiscal implications, amongst others.

It is also common for the potential purchaser and vendor to outline the proposed terms and conditions underlying such acquisition in a letter of intent, which in most cases is (or for the most part is) not legally binding.

3. Due diligence

It is common practice at this stage, for a due diligence exercise on the target company or target business to be carried out. In most cases where there is one potential purchaser, the due diligence exercise is carried out by advisors engaged by the said purchaser, in which case it would be referred to as a buyer due diligence. A vendor may also decide to carry out a due diligence exercise itself for a number of reasons. Principally, a vendor due diligence may facilitate a sale (in which case the potential purchaser may decide to rely on such due diligence and secure its position by warranties and indemnities) or spot any potential issues which might hinder the sale, effect the price/ negotiations or have an impact on the warranties that it can provide to the purchaser.

A due diligence may cover legal, fiscal as well as financial areas and the main aim of such exercise is to identify the key risks that may arise from the potential transaction, determine fair pricing and increase bargaining power. From a legal standpoint, the due diligence exercise itself may span over a number of issues in order to thoroughly examine the target or its business, such as: corporate matters, contractual and commercial obligations, employment, data protection, intellectual property, insurance, regulatory and compliance matters.

4. Negotiations and closing

Once the due diligence exercise is finalised, the prospective purchaser will typically go over and consider the findings and their materiality to the transaction together with its advisors. Should the purchaser be still interested in proceeding with the acquisition, the parties would typically engage in negotiating the details of their transaction, and all terms and conditions thereto. This may also involve negotiating the final price or agreeing on a mechanism that would determine the sale price and the details of the warranties, the indemnities and any limitations which will then be included in Share Purchase Agreement (SPA) or an Assets Purchase Agreement (APA), depending on whether the transaction will involve the acquisition of shares or of the business.

5. Post-closure integration/implementation

It is common for the SPA/ APA to include clauses that come into effect post-closing, such as further obligations that are to be undertaken by the parties, finalising the transfer of additional assets; obtaining consents, issuing notifications, affecting a price adjustment mechanism or entering into other ancillary contracts. Besides implementing such post-closing matters, the parties may consider undergoing a post-closing integration exercise in order to bring the two companies or businesses together with the aim of maximising synergies to ensure the success of the deal.

Consequences of Non-Compliance

In India, mergers, acquisitions, and combinations are governed by the Companies Act and Competition Act. Non-compliance with the legal requirements for such transactions can lead to various consequences, including:

1. Imposition of penalties: Non-compliance with the legal requirements can result in penalties being imposed by the competition authorities. The CCI has the power to impose a penalty of up to 1% of the total turnover or assets of the company, whichever is higher, for non-compliance with the provisions of the Competition Act.
2. Rejection of the merger/acquisition: Noncompliance with the legal requirements may lead to the rejection of the merger or acquisition by the regulatory authorities. For instance, the CCI can reject a merger or acquisition if it finds that the transaction is likely to have an adverse effect on competition in the relevant market.

3. Legal action: Non-compliance with the legal requirements can also result in legal action being taken against the companies involved. The Companies Act provides for legal action against the company and its officers for non-compliance with the provisions of the Companies Act.
4. Damage to reputation: Non-compliance with the legal requirements can lead to damage to the reputation of the companies involved. This can have a negative impact on their brand image and customer loyalty
5. Delay in the transaction: Non-compliance with the legal requirements can result in a delay in the completion of the transaction. This can lead to increased costs and uncertainty for the companies involved. In summary, non-compliance with the legal requirements for mergers, acquisitions, and combinations in India can have significant consequences for the companies involved. It is important for companies to comply with the provisions of the Companies Act, Competition Act, 2002 and other statutes to ensure a smooth and successful transaction.

Conclusion

In conclusion, mergers and acquisitions are a common strategy used by companies to achieve growth and expand their market share. However, they can also be complex and challenging endeavours that require careful planning, execution, and integration. Success in mergers and acquisitions relies heavily on various factors such as strategic fit, cultural alignment, communication, and leadership. As such, companies should carefully evaluate the potential benefits and risks before embarking on any merger or acquisition. While they can offer significant opportunities for growth and competitive advantage, they can also result in significant costs and challenges if not managed effectively. Ultimately, the success of mergers and acquisitions will depend on the ability of the companies involved to work together towards a common goal and create value for their stakeholders.

Further, mergers, acquisitions, and combinations are subject to a complex legal framework in India. Therefore, it is essential for parties involved in such transactions to seek legal advice and ensure compliance with the relevant laws and regulations. By doing so, the parties can avoid the consequences of non-compliance and ensure a smooth and successful transaction.