Mergers and Acquisitions – Strategies and Execution

Corporate Restructuring is concerned with arranging the business activities of the Corporate as a whole so as to achieve certain pre-determined objectives at corporate level, such as enhancement of shareholders value, deployment of surplus cash from one business to finance profitable growth in another, exploiting inter-dependence among present or prospective businesses, risk reduction, development of core-competencies, to obtain tax advantages by merging a loss-making company with a profit-making company etc. One of the most popular way of Corporate Restructuring is Mergers/Acquisition and Amalgamation.

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INTRODUCTION

A business may grow over time as the utility of its products and services is recognized, but it is a long-drawn process. 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. Corporate Restructuring is such tool, it's a comprehensive process by which a company can consolidate its business operations and strengthen its position for achieving its short-term and long-term corporate objectives.

Corporate Restructuring is concerned with arranging the business activities of the Corporate as a whole so as to achieve certain pre-determined objectives at corporate level, such as enhancement of shareholders value, deployment of surplus cash from one business to finance profitable growth in another, exploiting inter-dependence among present or prospective businesses, risk reduction, development of core-competencies, to obtain tax advantages by merging a loss-making company with a profit-making company etc. One of the most popular way of Corporate Restructuring is Mergers/Acquisition and Amalgamation. Different types of Strategic Corporate Restructuring are as follows:

MERGERS/ACQUISITIONS AND AMALGAMATION:

Mergers and Acquisitions (M&A) is a critical strategy for growth in the new economy. M&A are transactions in which the ownership of companies, other business organizations or operating units are transferred or combined. As an aspect of strategic management, M&A

allow enterprises to grow, shrink and change the nature of the business or competitive position. It refers to the consolidation of two companies. The reasoning behind M&A is that two separate companies together create more value compared to being on an individual stand. With the objective of wealth maximization, companies keep evaluating different opportunities through the route of merger or acquisition. Section 232 of the Companies Act, 2013 ('the Act') deals with the mergers and amalgamation of companies and Section 234 of the Act which deals merger or amalgamation of a company with a foreign company.

DIFFERENCE BETWEEN MERGER AND ACQUISITION

In a merger, two companies form a single entity together, and this single company replaces the two previous ones, whereas, In an acquisition, one company buys another, and the buyer company retains its identity.

M&As: THE GLOBAL TRENDS

The first half of 2023 saw a robust M&A market with total deal value reaching an astounding $2.3 trillion globally, a 15% increase from the same period in 2022. A total of 8,934 deals were announced globally during this period, representing a 12% increase over 2022.

Sector Specific Trends:

- In 2023, technology, healthcare, and financial services have continued to be the leading sectors in M&A activities.
- The technology sector maintained its dominance, accounting for approximately 28% of the total deal volume, reflecting the ongoing digital transformation and increased technology adoption across various industries. There has been a 20% increase in tech M&A deals compared to 2022, with Artificial Intelligence and Cybersecurity companies leading the charge.
- The healthcare sector, accounting for 22% of the total deals, continued to see growth. The drive for consolidation, advancements in biotechnology and the increased demand for telehealth services post-pandemic were the key drivers for this uptick.
- Meanwhile, financial services accounted for 18% of the total deal volume. Fintech continues to be a hotbed of activity, reflecting the sector's rapid digital transformation.

Geographic Trends:

North America continues to dominate global M&A activity, accounting for 40% of the total deal value, driven by the US's robust economic recovery. However, the Asia-Pacific region has also shown significant growth, with China and India leading the charge, accounting for 30% of the global deal value, a 5% increase from the previous year.

M&A Structure Trends:

The year 2023 saw a rise in stock-for-stock transactions, given the elevated equity valuations. There has been a 25% increase in such deals compared to 2022, indicating that businesses are using their appreciated stock as a currency for acquisitions.

Private Equity (PE) buyouts continued their upward trajectory, accounting for 27% of the total M&A deal value, a 7% increase from 2022. This was largely driven by the significant amount of dry powder available with PE firms and their eagerness to invest in high-growth sectors like technology and healthcare.

CASE STUDY ANALYSIS OF RECENT MERGERS

The Most Popular and Major Mergers and Acquisitions of 2022-2023 have been:

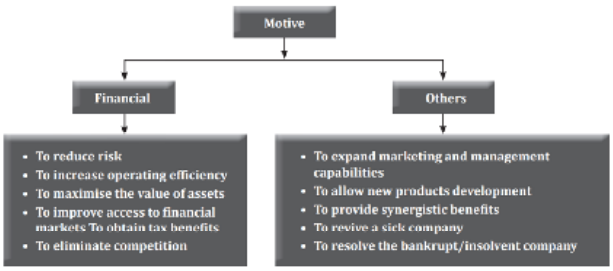
1. **Merger between Tata Group and Air India**: Tata Group acquired Air India for a value of $2.4 billion or Indian Rupees 18,000 crore, wherein INR 2,700 crore was paid upfront and INR 15,300 of debt was taken up by Tata Sons. Further, Tata Group also announced a merger between Air India and Vistara, whereby Singapore Airlines (the owner of 49% of Vistara equity) will get ownership of 25.1% of the combined merged entity.

2. **HDFC Limited – HDFC BANK Merger** – HDFC Bank and HDFC Ltd merged to create a financial services conglomerate. The merger became effective by July 01, 2023. The merger ratio is 25 HDFC shares for 42 HDFC Bank shares. The merger created a banking behemoth with a market capitalisation of Rs 14 lakh crore.
3. **Zomato – Blinkit merger** – Zomato and Blinkit have reached an agreement for a merger. The all-stock deal values Blinkit between $700 million and $750 million. Blinkit, formerly known as Grofers, has recently revamped itself to focus on an instant grocery delivery portal.

ARTICLE

SWOT ANALYSIS: THE PROS AND CONS OF JOINING HANDS AND RESOURCES

Advantages/ Pros for Mergers & Acquisitions:



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

- **M&A is the fastest way to achieve growth:**

  There is no other form of corporate activity that can grow your company's top line as fast as a merger or acquisition.

- **Becoming bigger:**

  Many companies use M&A to grow in size and leapfrog their rivals. While it can take years or decades to double the size of a company through organic growth, this can be achieved much more rapidly through mergers or acquisitions.

- **Pre-empted competition**:

  This is a very powerful motivation for mergers and acquisitions, and is the primary reason why M&A activity occurs in distinct cycles. It eliminates competition.

- **Domination**:

  Companies also engage in M&A to dominate their sector. However, since a combination of two behemoths would result in a potential monopoly, such a transaction would have to face regulatory authorities.

- **Tax benefits:**

  Companies also use M&A for tax purposes, although this may be an implicit rather than an explicit motive.

- **Economies of scale:**

  Mergers also translate into improved economies of scale which refers to reduced costs per unit that arise from increased total output of a product.

- **Acquiring new technology:**

  To stay competitive, companies need to stay on top of technological developments and their business applications. By buying a smaller company with unique technologies, a large company can maintain or develop a competitive edge.

- **Improved market reach and industry visibility:**

  Companies buy other companies to reach new markets and grow revenues and earnings. A merger may expand two companies' marketing and distribution, giving them new sales opportunities. A merger can also improve a company's standing in the investment community: bigger firms often have an easier time raising capital than smaller ones.

- **Ultimate obtainment of Synergies:**

  Consolidation of business operations thus resulting in significant impetus to growth.

Disadvantages/ Cons for Mergers & Acquisitions

- **M&A can very easily be conducted for the wrong reasons:**

  Because of all the pros that have just been outlined, it can be simple to think of M&A as a quick win. That's one thing that it almost certainly never is. A merger or acquisition is the largest project that any company will take on, so it's not to be taken lightly.

- **M&A can distract from the daily management of a business:**

  As much as M&A can add value for a business, the main value creation that goes on in any business should be its day-to-day operations. Thus, pulling managers away from the operations of the company can be a major distraction from their performing their day-to-day tasks.

  This defeats the purpose of what M&A is for, so a good plan has to be put in place before any deal to ensure that the correct time is allocated for each manager's participation in the process.

- **M&A can destroy value as well as create it:**

  More than one company has had value destroyed because of mismanagement at some part of the M&A process. Unfortunately, if managers don't keep their eye on the ball, this can even happen when two companies appear to be a near-perfect match.

  Without the proper care at every stage of the deal - be that origination, negotiations, due diligence, deal closing, or integration - value can be destroyed without good planning and implementation.

- **M&A valuations are an inexact science:**

  More than one book on M&A has called it's a combination of 'science and art'. Another way of saying this is, even the most analytical of us can get M&A horribly wrong.

Amazon's acquisition of Whole Foods, to take one example, was seen in many quarters as a deal that would generate significant value for both companies, giving Amazon a high-end distribution chain for its grocery fulfilment efforts, and giving Whole Foods access to the world's most potent e-commerce engine.

But the deal hasn't been a roaring success, proving that even if everything is in place for a deal to be a success, it doesn't mean for sure that it will be.

- **M&A due diligence is a complex and time-consuming task:**

  There is a correlation between thorough due diligence and deal success. The most successful deals were almost always those in which the M&A lifecycle management platform was used more, by more participants, for a longer period of time.

M&A: THE STRATEGIC BENEFITS:

- In order to reduce competition.
- For the purpose of gaining a larger market share.
- For the purpose of creating a strong brand name.
- For the purpose of reducing tax liabilities.
- For Risk diversification.
- For balancing the losses of one organisation against the profit of another.

M&A: THE INITIAL HICCUPS AND THEIR RECOURSES

Merger and amalgamation are complex business transactions that involve combining two or more companies into a single entity. While these processes can have several benefits, they often come with various challenges and initial hiccups. Some of the common initial hiccups that may arise in case of a merger and amalgamation include:

1) **Cultural Integration**: Different companies often have distinct organizational cultures, work practices, and values. Merging these cultures can lead to conflicts and resistance among employees, affecting overall productivity and morale.

2) **Workforce Redundancy**: Mergers and amalgamations may result in duplicate job roles or overlapping functions, leading to potential job redundancies. Deciding which employees to retain and how to manage workforce reductions can be a difficult and sensitive process.

3) **Legal and Regulatory Challenges**: Mergers and amalgamations must comply with various legal and regulatory requirements at the local, national, and international levels. Navigating through these complexities can be time-consuming and expensive.

4) **Financial and Accounting Issues**: Combining financial statements, accounting practices, and tax

structures of two companies can be challenging. Discrepancies or differences in financial reporting may emerge, requiring adjustments and careful scrutiny.

5) **Technology Integration:** Integrating different IT systems and technologies is often a daunting task. Incompatible systems may lead to disruptions in operations and data migration problems.

6) **Customer Concerns**: Customers of both merging companies may feel uncertain about the changes, leading to questions about service quality, pricing, or product availability.

7) **Supplier and Vendor Management**: Managing relationships with suppliers and vendors may become complicated due to changes in contracts, payment terms, or preferred suppliers.

8) **Synergy Realization:** The expected synergies, such as cost savings or increased market share, may not materialize as quickly or as significantly as anticipated.

9) **Branding and Identity**: Deciding on the branding and identity of the newly merged entity can be challenging, as it needs to reflect the combined values and strengths of both companies.

10) **Communication Challenges**: Inadequate or unclear communication to employees, customers, and other stakeholders about the merger and its implications can lead to misunderstandings and resistance.

11) **Management and Leadership Changes**: Leadership roles may be restructured or merged, causing uncertainty and resistance among executives and managers.

To address these initial hiccups effectively, companies need meticulous planning, open communication, and a clear vision for the future of the merged entity. Engaging experienced consultants and professionals can also help streamline the process and ensure a smoother transition.

RECOURSES FOR INITIAL HICCUPS IN M&A

Initial hiccups in mergers and amalgamations can be challenging to handle, but there are various resources and strategies that companies can employ to address them effectively. Let's look at some common hiccups and their possible remedies:

1) **Cultural Integration**:

- HR and organizational development experts can help facilitate workshops and activities to promote cross-cultural understanding and integration.
- Encourage open communication and feedback channels to address concerns and conflicts promptly.

2) **Workforce Redundancy**:

- HR teams can conduct a thorough assessment of the workforce to identify overlapping roles and develop a fair and transparent redundancy plan.
- Offer retraining and reassignment options for affected employees where possible.

3) **Legal and Regulatory Challenges**:

- Legal advisors and experts can assist in navigating complex legal and regulatory requirements, ensuring compliance and minimizing potential risks.
- Seek pre-approval from relevant regulatory authorities to avoid delays and uncertainty.

4) **Financial and Accounting Issues**:

- Financial consultants and auditors can assist in reconciling financial statements, identifying discrepancies, and ensuring accurate reporting.
- Develop a comprehensive financial integration plan and allocate sufficient time and resources for its execution.

5) **Technology Integration:**

- IT specialists can conduct a thorough assessment of existing IT systems and devise a plan for integrating and upgrading technology.
- Implement temporary workarounds or parallel systems during the integration process to minimize disruptions.

6) **Customer Concerns**:

- Implement a proactive communication strategy to keep customers informed about the merger, its benefits, and any changes in services or products.
- Address customer feedback and concerns promptly to build confidence and trust.

7) **Supplier and Vendor Management**:

- Engage in open communication with suppliers and vendors to discuss contract modifications and any potential changes in the business relationship.
- Explore opportunities for renegotiation to align terms with the new entity's requirements.

8) **Synergy Realization**:

- Set clear goals and expectations for synergy realization and monitor progress regularly.
- Allocate resources strategically to prioritize and achieve synergy targets.

9) **Branding and Identity**:

- Work with marketing and branding experts to develop a cohesive brand strategy that reflects the combined entity's values and vision.
- Involve key stakeholders in the decision-making process to build buy-in for the new brand identity.

10) **Communication Challenges**:

- Establish a dedicated communication team to handle internal and external communications related to the merger.
- Use multiple communication channels, such as town hall meetings, emails, and intranet updates, to keep stakeholders informed.

11) **Management and Leadership Changes**:

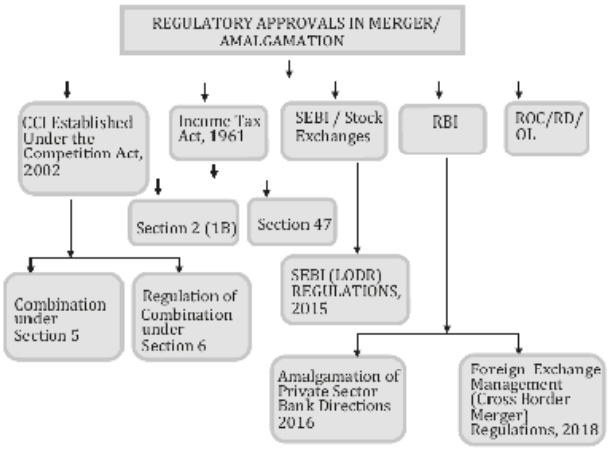
- Provide leadership training and support to help leaders adapt to their new roles and responsibilities.
- Foster a culture of collaboration and inclusivity to encourage smooth leadership transitions.

Overall, successful merger and amalgamation require a combination of effective planning, open communication, and the use of specialized expertise. By leveraging appropriate resources, companies can navigate through the initial hiccups and set a strong foundation for the merged entity's future success.

M&A: THE LEGAL ANGLE:

The legal framework applicable to Mergers and Amalgamation is primarily governed by the Companies Act, 2013, along with rules made thereunder. Other acts applicable are SEBI (LODR) Regulations, 2015 in case of listed entity, Competition Act, 2002, Income Tax Act, 1961, Indian Stamp Act, 1899, FEMA (in case of merger of companies having foreign capital), Prior approval of

RBI in case of cross-border merger and any other sectoral-regulatory approval as maybe applicable.



THE IMPACT ON BOARDS AND SUCCESSION PLANNING

"There is nothing obliging a board to buy or sell if a proposed transaction is not in the best interests of the company and its owners. To that end, the board must carefully weigh an M&A opportunity as part of its corporate oversight."

- The board has an important role to play in setting strategy, monitoring corporate performance and management, overseeing risk management, counselling the CEO on the most difficult challenges facing the business, championing good governance and offering constructive criticism on the company's operations. Many of these tasks are applicable to M&A where the board must offer oversight and governance. Though deals are typically proposed by the senior executive team, the boards of both the acquirer and target must decide whether a potential transaction can proceed beyond an initial exploratory phase.
- The board's involvement in any deal should begin well before it appears imminent and last until well after completion. For this beginning-to-end cycle to be successful, the board must adopt a holistic approach, undertaking a strategy review, risk assessment, due diligence of all varieties, deal approval and post-deal integration.
- The board should also ask management a series of questions as part of its oversight of corporate strategy, to ensure that the directors agree with how management believe M&A fits into the company's overall strategy.
- Board members must be clear on the drivers and logic of the deal, within the framework of the company's business plans and growth strategy and they must also be comfortable that the due diligence process will highlight and properly mitigate any issues that might arise.
- The board must clearly communicate its expectations about management's obligations to inform and involve the board in the M&A process.

What is succession planning?

A solid succession planning definition would be that it's the set of measures that you put in place ahead of selling your business to ensure the continuity of the company's success in the future.

"There is nothing obliging a board to buy or sell if a proposed transaction is not in the best interests of the company and its owners. To that end, the board must carefully weigh an M&A opportunity as part of its corporate oversight."

After your exit, the success of your business will have to endure without your leadership – otherwise, how can it be expected to command a good price on the M&A market? Buyers won't spend top-dollar on a business that is overly reliant on your position as CEO. The business needs to have a strategy in place that will maintain its performance after your departure – that's the purpose of succession planning.

Why is succession planning important?

The purpose of succession planning is to hand over control of your business in a way that not only ensures its continued commercial success, but provides assurances over the continuity of your business to potential buyers, helping your company command a higher price at exit.

Areas to be approached for developing an effective succession plan:

1. **Defining the role** – what are the responsibilities of your current role, and what qualities will a person need to be able to take on the role?
2. **Gauging interest** – is there a genuine appetite among your middle management team to take a step up?
3. **Assessing talent and identifying potential** – if there is interest, do the candidates at your disposal have the skills, experience and drive to take on your business? Or will you have to look beyond the walls of your company?
4. **Alternative successors** – even if you have suitable candidates within your family or your middle management team, are there other viable fits outside of your business?
5. **Developing your business through your succession plan** – once you have a vision for your succession in mind, is your business model tailored to make the transition as smooth as possible?

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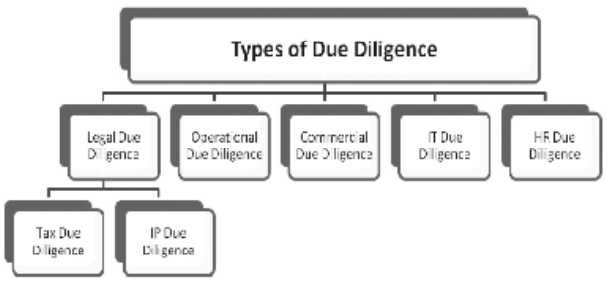
M&A: THE PROCEDURAL SIDE

Some of steps involved in merger are mentioned in detail below:

i. Due Diligence



A due diligence is an investigation or audit of a potential investment. It seeks to confirm all material facts in regard to a sale. It is a way of preventing unnecessary harm/hassles to either party involved in a transaction. It first came into use as a result of the US Securities Act, 1933.

ii. Obtain NOC from Stock Exchange

The procedure commences with an application to stock exchange for NOC and then an application for seeking directions of the Tribunal for convening, holding and conducting meetings of creditors or class of creditors, members or class of members, as the case may be, to the stage of the Tribunal's order sanctioning the scheme of compromise or arrangement is contained in Sections 230 to 240 of the Companies Act, 2013 and rules 3-29 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

iii. Memorandum to authorise amalgamation

a. MoA under object clause of company should authorise power of amalgamation.

b. If not, then company should hold General Meeting to alter object clause by passing SR.

c. The above same process for transferor company, apart from that some other part such as increase authorised share capital of company, power to issue shares.

iv. Convening a Board Meeting of the Board of Directors of the company.

i. Board Meeting is to be convened and held to consider and approve in principle, amalgamation and appoint the registered valuer for valuation of shares to determine the share exchange ratio.

ii. After finalisation of scheme, another Board Meeting is to be held to approve the scheme.

iii. Notice to CCI, IRDA if applicable

Preparation of Valuation Report

Simultaneously, Registered Valuers are requested to prepare a Valuation Report and the swap ratio for consideration by the Boards of both the transferor and transferee companies.

v. Preparation of scheme of amalgamation or merger

All the companies, which are desirous of effecting amalgamation or merger, must interact through their company's auditors, legal advisors and Practicing Company Secretary who should report the result of their interaction to the respective Board of Directors. The Boards of the involved companies should discuss and determine details of the proposed scheme of amalgamation or merger and prepare a draft of the scheme of amalgamation or merger. The drafts of the scheme finally prepared by the Boards of both the companies should be exchanged and discussed in their respective Board Meetings. After such meetings a final draft scheme will emerge. The scheme must define the "effective date" from which it shall take effect subject to the approval of the Tribunal.

vi. Application to Tribunal seeking direction to hold meetings

Pursuant to Rule 3 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, Application made to NCLT for an order directing convening of Meeting of creditors or member or any class of them.

vii. Obtaining order of the Tribunal for holding class meeting

On receiving application, NCLT the Tribunal may order meeting(s) of the members/creditors to be called, held and conducted in such manner as the court directs. Once the ordered meetings are duly convened, held and conducted and the scheme is approved by the prescribed majority in value of the members/creditors, *the Tribunal is bound to sanction the scheme.*

Note: The Tribunal looks into the fairness of the scheme before ordering a meeting because it would be no use putting before the meeting, a scheme containing illegal proposals which are not capable of being implemented. At that stage, the Tribunal may refuse to pass order for the convening of the meeting.

viii. Draft Notice:

a. Explanatory statement under Section 230 of the Companies Act, 2013 and form of proxy are required to be filed and settled by the concerned Tribunal before they can be printed and dispatched to the shareholders.

i. Generally, this meeting is called by company under section 230 but creditor or a member or a class of creditors or a class of members may make application to tribunal to hold meeting under section 230(1).

b. After obtaining the Tribunal's order containing directions to hold meeting(s) of members/creditors,

the company should make arrangement for the issue of notice(s) under form CAA-2 of the meeting(s).

i. The notice should be in Form No. CAA- 2 of the said Rules and must be sent by the person authorised by the Tribunal in this behalf.

ii. *Generally, the Tribunal directs that the notice of meeting of the creditors and members or any class of them be given through newspaper advertisements also.* In such case, such notices are required to be given in the prescribed Form and published once in an English newspaper and once in the regional language of the State in which the registered office of the company is situated

iii. Tribunal also appoints Scrutinizer for holding voting through postal ballot and e-voting.

ix. Convening of General Meeting

a. At the General Meeting convened by the Tribunal, resolution will be passed approving the scheme of amalgamation with such modification as may be proposed and agreed to at the meeting.

i. The Extraordinary General Meeting of the Company for the purpose of amendment of Object Clause, consequent change in Articles and issue of shares can be convened on the same day either before or after conclusion of the meeting convened by the Tribunal for the purpose of approving the amalgamation.

ii. Following points of difference relating to the holding and conducting of the meeting convened by the Tribunal may be noted:

1. Proxies are counted for the purpose of quorum;

2. Proxies are allowed to speak;

3. The vote must be put on poll or by voting through electronic means.

iii. The minutes of the meeting should be finalized in consultation with the Chairman of the meeting and should be signed by him once it is finalised and approved. Copies of such minutes are required to be furnished to the Stock Exchange in terms of the listing requirements.

x. Reporting of the Results

a. The chairman of the meeting will submit a report of the meeting indicating the results to the concerned Tribunal in Form No.CAA-4 of the said Rules within the time fixed by the Tribunal, or where no time has been fixed, within three days after the conclusion of the meeting.

i. The number of creditors or class of creditors or the number of members or class of members, as the case may be, who were present at the meeting;

ii. The number of creditors or class of creditors or the number of members or class of members, as the case may be, who voted at the meeting either in person or by proxy;

iii. Their individual values; and

iv. The way they voted.

xi. Petition to Tribunal for confirmation of scheme

a. A petition must be made to the Tribunal for confirmation of the scheme of compromise or arrangement. The petition must be made by the company.

i. The petition is required to be made in Form No. CAA-5.

ii. On hearing the petition the Tribunal shall fix the date of hearing and shall direct that a notice of the hearing shall be published in the same newspapers in which the notice of the meeting was advertised.

xii. Obtaining order of the Tribunal sanctioning the scheme

a. An order of the Tribunal on summons for directions should be obtained which will be in Form No. CAA. 6.

xiii. Filing of copy of NCLT order with ROC

a. Certified copy of the order passed by the Tribunal required to be filed with INC-28 as prescribed in the Companies Act, 2013 within a period of 30 days of the receipt of the order.

xiv. Other Important points:

a. Section 2393 provides that the books and papers of a company which has been amalgamated with, or whose shares have been acquired by, another company shall not be disposed of without the prior permission of the Central Government and before granting such permission, that Government may appoint a person to examine the books and papers or any of them for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with the promotion or formation, or the management of the affairs, of the transferor company or its amalgamation or the acquisition of its shares.

b. In case of Banking company different procedure will be applicable as prescribed by RBI.

M&A: THE TRIGGER POINTS FOR COMPETITION LAW

Fair Competition for Greater Good

Following statutory provisions apply to mergers, amalgamations and acquisitions from competition law perspective:

- The Competition Act, 2002
- The Competition Commission of India (Procedure in regard to the

transaction of business relating to combinations) Regulations, 2011

- The Competition Commission of India (General) Regulations, 2009
- Notifications issued by Competition Commission of India from time to time.

CCI Approval:

Section 5 provides the financial thresholds and all combinations exceeding these financial thresholds are required to be mandatorily approved by the Commission.

Combination means…

Combinations as envisaged under section 5(a), 5(b) and 5(c) were explained by the Supreme Court in *Competition Commission of India v. Thomas Cook (India) Ltd. & Anr. (Civil Appeal No.13578 of 2015)* in the following manner:

- Under section 5(a), a combination is formed if the acquisition by one person or enterprise of control, shares, voting rights or assets of another person or enterprise subject to certain threshold requirement that is minimum asset valuation or turn over within or outside India.
- Under Section 5(b) of the Act the combination is formed if the acquisition of control by a person over enterprise when such person has already acquired direct or indirect control over another enterprise engaged in the production, distribution or payment of a similar or identical or substitutable good provided that the exigencies provided in section 5(b) in terms of asset or turnover are met.
- Under section 5(c) merger and amalgamation are also within the ambit of combination. The enterprise remaining after merger or amalgamation subject to a minimum threshold requirement in terms of assets or turnover is covered within the purview of section 5(c).

Threshold:

Under section 5:

Section 5 is applicable when the combined assets of the parties or the group to which the target entity would belong after the acquisition.

THRESHOLDS FOR FILING NOTICE				
		Assets		Turnover
Enterprise Level	India	> ₹2000 crore	OR	> ₹6000 crore
	Worldwide with India leg	> US$ 1 bn With at least Rs.1000 crore in India		> US$ 3 bn With at least Rs.3000 crore in India
OR				
Group Level	India	> Rs.8000 crore	OR	> Rs.24000 crore
	Worldwide with India leg	> US$ 4 bn With at least Rs.1000 crore in India		> US$ 12 bn With at least Rs.3000 crore in India

***De Minimis* Exemption**:

THRESHOLDS FOR AVAILING OF *DE MINIMIS* EXEMPTION				
		Assets		Turnover
Target Enterprise	In India	< ₹350 crore	OR	< ₹1000 crore

According to Notification No.S.O.988(E) dated March 27, 2017, all forms of combinations involving assets of not more than Rs.350 crore in India or turnover of not more than Rs.1,000 crore in India, are exempt from Section 5 of the Act for a period of 5 years.

Under section 6:

Section 6 of the Competition Act, 2002 prohibits any person or enterprise from entering into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and if such a combination is formed, it shall be *void*. Section 6 read as under:

Regulation of combinations

- 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.
- 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, within thirty days of—
  - approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;
  - execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section.
- The provisions of this section shall not apply to share subscription or financing facility or any acquisition, by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement.

  Section 54(a) of the Act provides Exemption to Banking Sector and Oil and Gas Sector.

M&A: ROLE OF GOVERNANCE PROFESSIONALS

We can understand that how different regulators and professionals ensure the governance and their responsibilities in case of M&A Transactions. With the growing economy, the corporates would grow at much larger pace and would also take the benefits of corporate restructuring techniques permitted in law. With all this, law makers and regulators will ensure to have a better governed economy and governance level will keep on rising. In future many new sectors will get evolved and more sectoral regulators would get involved in M&A Transactions approvals, as each sectoral regulator will need to ensure the interest of its stakeholders, hence,

> Governance is no longer the luxury of Compliance, it's an expectation of the regulator and the stakeholders of the Company.

governance level in M&A Transactions will keep on rising in coming future. Although governance is important in M&A Transactions, but timing of completion of M&A Transactions is also very important. Members would have approved the scheme based on valuation derived as on a particular date. In today's dynamic world, there are innumerable factors which can affect the valuation within a short span of time. If the entire process of M&A takes 7-8 months or even a year or more, then the whole rationale of undertaking the M&A Transaction may get defeated and the valuation, which would have been the basis of the scheme, may not remain relevant at all. As due diligence is wholesome exercise that require specialized knowledge, expertise & experience to complete the task in time bound & effective manner. The role of governance professionals is much crucial in the following pre-requisite arenas for Merger and Amalgamation.

Prerequisites of Merger and Acquisition:

1) **Due Diligence**: It refers to the investigating effort made to gather all relevant facts and information that can influence a decision to enter into a transaction or not. Exercising due diligence is not a privilege but an unsaid duty of every party to the transaction. For instance, while purchasing a food item, a buyer must act with due diligence by checking the expiry date, the price, the packaging condition, etc. before paying for the product. It is not the duty of the seller to ask every buyer every time to check the necessary details. M&A due diligence helps to avoid legal hassles due to insufficient knowledge of important information.

2) **Business Valuation:** Business valuation or assessment is the first step of merger and acquisition. This step includes examination and evaluation of both the present and future market value of the target company. A thorough research is done on the history of the company with regards to capital gains, organizational structure, market share, distribution channel, corporate culture, specific business strengths, and credibility in the market. There are many other aspects that should be considered to ensure if a proposed company is right or not for a successful merger.

3) **Planning Exit**: When a company decides to sell its operations, it has to undergo the stage of exit planning. The company has to take firm decision as to when and how to make the exit in an organized and profitable manner. In the process the management has to evaluate all financial and other business issues like taking a decision of full sale or partial sale along with evaluating on various options of reinvestments.

4) **Structuring Business Deal**: After finalizing the merger and the exit plans, the new entity or the take-over company or target company has to take initiatives for marketing and creating innovative strategies to enhance business and its credibility. The entire phase emphasize on structuring of the business deal.

5) **Stage of Integration**: This stage includes both the company coming together with their own parameters. It includes the entire process of preparing the document, signing the agreement, and negotiating the deal. It also defines the parameters of the future relationship between the two.

CONCLUSION

As we navigate through 2023, it's evident that M&A activity continues to play a critical role in shaping the global business landscape. The dynamic and resilient nature of M&A activity is highlighted by the trends we've seen this year. With the continual advancement in technology, ongoing economic recovery, and abundance of capital available for investments, it seems likely that M&A activity will continue to flourish in the foreseeable future. Corporations and investors should stay agile and attentive to the changing trends and opportunities within the M&A landscape. Rapid strategic change is a necessity for most companies in these days of globalization, hyper competition, and accelerated technological change.

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