CROSS BORDER MERGERS

The Reserve Bank of India ("**RBI**") has notified the Foreign Exchange Management (Cross Border Merger) Regulations on 20 March 2018 ("**Regulations**") under the Foreign Exchange Management Act, 1999 ("**FEMA**"). The Regulations allow cross-border mergers and amalgamations that could boost foreign direct investment into the country. These Regulations define cross border merger to mean any merger, amalgamation and arrangement between an Indian company and foreign company in accordance with Companies (Compromises, Arrangement and Amalgamation) Rules, 2016 ("**Companies Rules**") notified under the Companies Act, 2013 ("**Companies Act**").

The Regulations also define *Inbound* and *Outbound* Merger and set out the following guidelines for the same:

Inbound Merger

- Inbound Merger means a cross border merger where the **resultant company** is an **Indian company**.
- The resultant company may issue or transfer any security to a person resident outside India in accordance with pricing guidelines, entry routes, sectoral caps, attendant conditions, and reporting requirements under FEMA, etc., subject to certain conditions.
- The 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 company.
- The guarantees/outstanding borrowings of the foreign company from overseas sources which become the borrowing of the resultant company shall conform with the external commercial borrowing norms or trade credit norms within 2 years, provided that (a) no remittance for repayment of such liability is made from India within the said period of 2 years; and (b) conditions with respect to end use supply shall not be applicable.
- The resultant company may acquire and hold an asset outside India that it is permitted to acquire in compliance with the provisions of FEMA, rules and regulations made thereunder.
- If the resultant company is not permitted to acquire or hold an asset outside India, the resultant company shall sell such an asset or security within a period of 2 years from the date of sanction of the scheme by the National Company Law Tribunal ("**NCLT**") and the sale proceeds can be repatriated to India via banking channels. Such sale proceeds can also be used to settle any liability, if such liability is not permitted to be held by the resultant company.
- The resultant company can open a bank account in foreign currency in the overseas jurisdiction for a period of 2 years from the date of sanction of scheme by NCLT.

Outbound Merger

- Outbound Merger means a cross border merger where the **resultant company** is a **foreign company**.
- A person resident in India may acquire or hold securities of the resultant company in accordance with the Foreign Exchange Management (Transfer or issue of any Foreign Securities) Regulations, 2004.
- 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 (i.e. a scheme to facilitate resident individuals to remit funds abroad for permitted current or capital account transactions or combination of both).
- An office in India of the Indian Company, pursuant to the sanction of the scheme, may be deemed to be a branch office in India of the resultant company in accordance with 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.
- The guarantees/ borrowings of the Indian Company that become the liabilities of the resultant company shall be repaid as per the scheme sanctioned by the NCLT in terms of the Companies Rules, provided that (a) the resultant company shall not acquire any liability payable towards a lender in India in Rupees which is not in conformity with FEMA or its rules and regulations, and (b) the no-objection certificate to this effect should be obtained from the lenders in India of the Indian company.
- The resultant company may acquire and hold any asset in India that a foreign company is permitted to acquire under the provisions of FEMA, its rules and regulations made thereunder.
- If the asset or security in India is not permitted to be acquired or held by the resultant company; the resultant company can sell such asset or security within a period of 2 years from the date of sanction of the scheme by the NCLT and the sale proceeds can be repatriated outside India via banking channels. Such sale proceeds can be used towards repayment of Indian liabilities.
- The resultant company may open a Special Non-Resident Rupee Account in accordance with relevant regulations and for the purposes mentioned therein. This account will run for 2 years from the date of sanction of scheme by NCLT.

Other Provisions

- The valuation of the companies involved shall be done in accordance with Rule 25A of the Companies Rules.
- All transactions under the Regulations shall have deemed approval of RBI as required under the Companies Rules.
- There are various other miscellaneous provisions such as (i) compensation paid by the resultant company to a holder of a security to be in accordance to the scheme sanctioned by the NCLT; (ii) completion of regulatory actions with respect to non-compliance, contravention etc., prior to the merger; (iii) resultant company/ companies involved in the cross border merger should furnish reports to RBI in consultation with the Government of India.

ALMT ANALYSIS

The Regulations may play an important role in the Indian economy as these Regulations would help Indian companies and foreign companies gain market accessibility to large amount of capital both abroad and in India respectively. It would facilitate mergers between companies which may in turn help in covering a broad sector of markets.

However, in our view, there may be certain drawbacks such as (i) a prior approval that may be required for certain sectors; (ii) lack of clarity on whether a foreign company and Indian company can demerge after completion of cross border merger since Section 234 of the Companies Act is also silent on the same; and (iii) Section 234 of the Companies Act is restricted by Rule 25A of the Companies Rules and makes it mandatory for the transferee company to file an application before the NCLT without affording the benefit of fast track merger. Further, the Regulations will allow Indian companies to merge their

foreign businesses with their domestic companies and the combined synergies of both the companies, now merged into one, will articulate into a power house catering to masses all across the world.

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