Fast Track Mergers in India: Feasibility and Key Legal Challenges

Consolidation of business by way of a merger is a widely accepted mechanism for corporate restructuring.

However, the National Company Law Tribunal ("**NCLT**") route in India is cumbersome from a time and cost perspective. Given the length of time between the announcement of a merger and the fact that merger terms (including the share exchange ratio) need to be announced on the date the merger is first announced, there is a real risk that such a transaction may not remain viable on the originally announced terms by the time the relevant regulatory approvals are in place. A time period of about nine to twelve months is fairly typical for a merger process under the NCLT route, although in many cases it has taken much longer.

In 2005, the J.J. Irani Committee recommended legal recognition of contractual mergers in India – mergers that can be implemented without court intervention. This recommendation was codified in the Companies Act, 2013 (the "**Act**") by inclusion of a mechanism for fast-track mergers ("**Fast Track Mergers**") of prescribed companies. This mechanism became effective in 2016.

The process for Fast Track Mergers is more time and cost efficient and does not require public advertisement of the proposed merger scheme. However, the availability of the Fast Track Merger route has been limited to certain specific categories of companies. In addition, certain procedural requirements for Fast Track Mergers (such as a higher threshold for creditors approval in comparison to the court-approval route) make this a more difficult process.

This note analyzes recent amendments aimed at strengthening and broadening the Fast Track Merger framework and attempts to identify key procedural challenges and suggestions that may be considered to increase the efficacy of the Fast Track Merger route.

It is noteworthy that in her Budget speech on February 1, 2025, the Finance Minister stated that "*Requirements and procedures for speedy approval of company mergers will be rationalized. The scope for fast-track mergers will also be widened and the process made simpler.*"

PROCESS

Fast Track Mergers are governed by Section 233 of the Act read with Rule 25 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 ("**Merger Rules**"). The Fast Track Merger route is available in the following situations:

- a merger between two or more small companies;
- a merger between a holding company and its wholly-owned subsidiary ("**WOS**");
- a merger between two or more start-up companies; and
- a merger of a start-up company with a small company.

In summary, the process prescribed for Fast Track Mergers requires the parties to the merger scheme to:

- send notice of the proposed merger scheme to the concerned registrar of companies ("**RoC**") and official liquidators ("**OL**") and consider their objections and suggestions in a general meeting;
- file a declaration of solvency with the RoC; and
- seek approval of: (a) shareholders in a general meeting holding at least 90% of the total number of shares ("**Shareholder Threshold**"); and (b) majority of creditors in a meeting representing at least 90% in value ("**Creditor Threshold**").

After the proposed merger scheme is approved by the shareholders and creditors in accordance with the Shareholder Threshold and the Creditor Threshold, it is filed with the regional director ("**RD**"), the RoC and the OL.

The RD, after considering any objections or suggestions of the RoC and/or the OL to the merger scheme, may either (a) register the merger scheme and issue a confirmation to the parties to the merger scheme; or (b) if it is of the opinion that the merger scheme is not in public interest or in the interests of the creditors, file an application before the NCLT to assess whether the proposed merger scheme should be considered under the NCLT route and not the Fast Track Merger route.

RECENT AMENDMENTS

Timelines

Recognizing potential lags in response time from the relevant regulatory authorities, the (Indian) Ministry of Corporate Affairs ("**MCA**") notified changes to Rule 25 of the Merger Rules in 2023 to introduce the following timelines for confirmation of the proposed merger scheme under the Fast Track Merger route:

- 45-day timeline if no objections or suggestions are received from the RoC and OL and the RD is of the opinion that the merger scheme is in public interest or in the interest of creditors;
- 60-day timeline if objections or suggestions are received from the RoC and OL, however, the RD is of the opinion that such objections or suggestions are not sustainable and that the merger scheme is in public interest or in the interest of creditors;
- 60-day timeline for the RD to file an application before the NCLT to consider the scheme under court-approval route if the RD is of the opinion that the merger scheme is not in public interest or in the interest of creditors; and
- 60-day deemed approval timeline if the above timelines are not adhered with.

Recommendation

In relation to the timelines set out in (i) and (ii) above, the authors submit that instead of the word "or", the word "and" should have been used in Rule 25. The RD should be required to conclude that the merger scheme is in public interest and in the interest of creditors to issue an order of confirmation. If the RD concludes that the merger scheme is not in public interest or in the interest of creditors, then the RD should refer the matter to the NCLT.

Fast Track Merger route and cross border mergers

Cross border mergers between Indian and foreign companies are permitted in India under the NCLT route and are governed by Section 234 of the Act read with Rule 25A of the Merger Rules.

The MCA amended the Merger Rules to enable inbound merger between a transferor foreign holding company into its Indian WOS under the Fast Track Merger route ("**Inbound Merger**") with effect from September 17, 2024 by introducing Rule 25A(5). This

amendment is evidently intended to facilitate "reverse flipping" (which refers to relocation of ownership and assets into India) through the Fast Track Merger route; examples of "reverse flipping" being initiated or completed (not under the Fast Track Merger route) include PhonePe, Groww, Pepperfry and Zepto.

In relation to cross border mergers, the Reserve Bank of India ("**RBI**") has earlier notified the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 ("**RBI Merger Regulations**") to regulate exchange control matters relating to cross border mergers. Cross border mergers undertaken in compliance with the RBI Merger Regulations are deemed to have RBI approval.

Unless otherwise clarified, we assume that if an Inbound Merger under the Fast Track Merger route is undertaken in compliance with the RBI Merger Regulations, it will not require prior RBI approval.

In relation to an Inbound Merger, if the foreign parent is incorporated in a country sharing land border with India or its beneficial owners are situated in or are citizens of such a country, such Inbound Merger will require prior government approval.

Recommendation

Rule 25A(5)(iii) of the Merger Rules by using the word "shall" suggests that a merger of a foreign holding company into its Indian WOS can only be through the Fast Track Merger route. The authors submit that this runs counter to the legislative mandate under Section 233 (which provides an alternative route for mergers subject to certain conditions and not an exclusive route) and was perhaps not intended. The authors submit that the word "shall" in Rule 25(A)(5)(iii) should be replaced with "may".

CERTAIN KEY CONSIDERATIONS

Intragroup restructuring

In the context of intragroup restructuring, the Fast Track Merger route is available for a merger between parent and its WOS. However, the Fast Track Merger route is not expressly available if a step-down WOS were to merge with its ultimate parent ("**Step-Down Merger**") or if two WOS of a common parent were to merge with each other ("**Affiliate WOS Merger**").

In this regard, it is relevant that under Indian securities law, a merger involving a listed company requires such listed company to file the draft merger scheme with the stock exchanges for obtaining their no-objection letter. However, a merger of a WOS with its holding company is exempt from this requirement. The Securities and Exchange Board of

India (India's securities market regulator) ("**SEBI**") analysed this exemption in an informal guidance in the context of a merger of a WOS and a stepdown WOS into the holding company. The SEBI concluded that the exemption will extend to such a case.

Recommendation

The MCA should consider broadening the scope of the Fast Track Merger route to include Step-Down Mergers and Affiliate WOS mergers.

Shareholder and Creditor Approval Thresholds

A significant challenge for corporates assessing the Fast Track Merger route is compliance with the Creditor Threshold which requires approval by a majority of creditors representing at least 90% in value.

The Shareholder Threshold (90% of the total number of shares) poses a similar challenge.

Recommendation

Given the limited applicability of the Fast Track Merger route to situations which are unlikely to involve any matters of public interest, the MCA should consider aligning the Creditor and Shareholder Thresholds for the Fast Track Merger route with the thresholds that apply in a NCLT process, i.e., majority of persons representing 3/4th in value of creditors/shareholders, present and voting at a meeting.

The existing Creditor and Shareholder Thresholds for Fast Track Mergers may continue to apply as a standard to dispense with meetings altogether if the requisite creditors and/or shareholders provide their affirmation by way of affidavit – this will enable a faster process if the higher standards are met.

CONCLUSION

The Fast Track Merger route has emerged as a strategic tool to expedite corporate restructuring in India. As India's business environment continues to evolve, Fast Track Mergers will likely play an increasingly significant role in enabling companies to adapt quickly to market dynamics and streamline operations.

The NCLTs have also generally adopted a pro-Fast Track Merger approach while assessing procedural requirements (such as threshold for shareholders' approval) and scope of RD's review of FTM scheme (such as solvency of transferor company).

The regulatory framework, particularly through the recent amendments providing fixed statutory timelines and permitting Inbound Mergers has further eased the process and broadened the scope of Fast Track Mergers.

However, the MCA should consider broadening the scope of entities eligible to undertake Fast Track Mergers and reducing the prescribed thresholds for shareholders' and creditors approval for better adoption of the Fast Track Merger process resulting in ease of corporate restructuring and reduced burden on NCLTs.

In addition, on account of a series of (piecemeal) amendments to the Merger Rules over a period of time, certain inconsistencies have crept in. These need to be reviewed and rectified through a comprehensive review of the Act, the Merger Rules and the RBI Merger Regulations.

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