

CORPORATE RESTRUCTURING - Meaning and Mode Restructuring through takeovers and mergers and amalgamation

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- Infosys to acquire Loadstone Holding AG, a leading global management consultancy firm for an aggregate enterprise value of CHF 330 million in cash - acquisition to ramp up consulting and system integration business, minimal client overlap and expansion in new geographic area, bring innovations...
- NEA backed Nova Specialty Surgery acquires Excel Hospitals, a reputed multi- speciality hospital in Kanpur – to boost expansion plan nationally and globally
- Retail giant Future Ventures acquires Express Retail Services Private Limited for Rs. 61.35 Cr - acquisition to provide Future Venture significant presence in Delhi and NCR region alongwith leveraging its operational and administrative infrastructure

- NIIT Technologies acquires Sabre's Philippines Development Centre - acquisition to enhance global delivery capability of NIIT Technologies Limited
- Lenovo group Limited worlds largest PC maker to buy consumer electronics maker Digibras to expand Brazil computer market share and add mobile products including phones and tablets
- Tata Global beverages buys stake in US company (beverage and bottled water company) - in line with strategic vision to become leader in 'Good for you' beverage segment

M & As

- Pantaloon Retail India Limited (LC) and Future Value Retail Limited (UC and WOS) – to transfer format brands and product brands to Future Value Retail
- Godrej Household Products Limited (UC and WOS) with Godrej Consumer Products Limited (LC) – Horizontal Merger – Both engaged in same line of business
- HTMT Telecom Private Limited (engaged in telecom infra) with Hinduja Ventures Limited (engaged in media and communication, real estate and treasury)- Conglomerate amalgamation
- Reliance Industries Limited – Vertical integration

- Meaning and mode
- Mergers and Amalgamation
- Takeover

Corporate Restructuring

Meaning – not defined

- To rearrange, rebuild, restructure, reorganize, change
- Comprehensive process

Kinds of Corporate Restructuring

- Financial Restructuring – re-organisation of capital, buy-back, CDR, acquisitions, mergers, joint ventures and strategic alliances
- Technological restructuring – alliances for technical expertise
- Market Restructuring – product / market segments
- Organizational Restructuring – internal structures and procedures

OBJECTIVES

- Growth
- Diversification
- Optimum utilization of capacities
- Improved competencies
- Synergistic operational advantages
- Cost reduction
- Consolidation and economies of scale
- Financial restructuring / support
- Revival of weak or sick company
- Tax benefits
- Widen market presence
- Advantages of brand equity / goodwill / IP
- Horizontal / vertical integration

Tools / Modes of Corporate Restructuring

- Re-organisation of capital - buy-back, reduction, capitalisation of reserves
- Compromise / Arrangement
- Merger / Amalgamation
- Demerger
- Acquisition / Takeover
- Disinvestment
- Slump sale
- Strategic Alliance
- Joint Venture

MERGERS AND AMALGAMATION

Merger and Amalgamation

- Not defined in Companies Act, 1956
- Defined under section 2(1B) of I.T. Act, 1961

“Amalgamation”, means the merger of one or more companies with another company or the merger of two or more companies to form one company, in such a manner that, it results in :

–transfer of all properties and liabilities of amalgamating companies to the amalgamated company; and

–shareholders holding not less than $3/4^{\text{th}}$ in value of the shares of the amalgamating companies would become the shareholders of the amalgamated company

Merger and Amalgamation (Contd...)

- By absorption – where transferor company merges into the transferee company and the transferor company stands dissolved without winding up
- By formation – where two or more companies merge and a new company is formed

Types of Merger

- Cogeneratedic - within the same industries and taking place at the same level of economic activity
 - Horizontal merger
 - Vertical merger
- Conglomerate – between unrelated businesses
- Reverse Merger
- Sick company – through BIFR
- Banking company under Banking Regulation Act
- Insurance company under IRDA

Reverse Merger

- Merger of a healthy company with a financially weak company
- Transferee company's loss and unabsorbed depreciation can be set-off against the profits of transferor company as also carried forward

Cross Border Mergers

- Merger of Indian company with a company incorporated outside India and vice-versa

M & A (Sec 391)

Single window clearance

- Alteration of objects clause
- Increase in authorised capital, borrowing and investment limits
- Financial restructuring
- Writing off accumulated losses
- Reclassification of capital / reserves / debt
- Cancellation / Reduction of capital
- Transfer of property subject to charge
- Creation, satisfaction of charge without further documentation

Tools for Feasibility Study

- Internal valuation
- Due diligence – technical and legal
- Review internal policies for compatibility
- Valuation Report
- Fairness opinion

Applicable Regulations

- The Companies Act, 1956 – Secs 391 to 394
- The Companies (Court) Rules, 1959
- Depositories Act, 1996
- Competition Act, 2002
- Combination Regulations, 2011
- SAST 2011 where it is not exempt
- Listing Agreement
- FEMA
- Accounting Standards of ICAI – AS-14
- The Income Tax Act, 1961
- Stamp Act

Regulatory / Statutory Authorities

- Competition Commission of India
- Stock Exchange(s)
- Registrar of Companies
- Regional Director
- Official Liquidator
- High Court(s)
- RBI
- Depositories

Approvals / NOCs Required

- Competition Commission of India
- Board of Directors
- Stock Exchange
- Shareholders – Equity and others
- Creditors – Secured and Unsecured
- Regional Director / Registrar of Companies
- Official Liquidator
- High Court

Preliminary Aspects

- Understand management program for implementation of the merger / amalgamation
- Check applicable laws, procedures and processes
- Prepare detailed checklist of activities involved

Preliminary Aspects (Contd...)

- Check – Memorandum and Articles of Association of the transferor and transferee company to ensure that:
 - The objects clause of **both** contain enabling clauses to undertake merger / amalgamation
 - The objects clause of the transferee company enables undertaking the business of the **transferor company(ies)**
 - Nature and size of the authorised capital of the **transferee company** is sufficient to enable further issue of shares, if required

Preliminary Aspects (Contd...)

- Ensure that
 - The transferee company has sufficient borrowing and investment limits to absorb the liabilities and investments of the transferor company(ies)
 - All disclosures, compliances, statutory records and regulatory filings by the companies are in order
- Check for common directorships, common creditors and common shareholders (FIIs / FIs / Banks) having large shareholdings
- Ascertain assets and liabilities of transferor company(ies)

Preliminary Aspects (Contd...)

- Check whether
 - Immovable property have clear title
 - Assets are subject to lien / mortgage
- Ascertain various class(es) of creditors from whom approval would be required
- Obtain NOCs from creditors, if required
- Partly paid-up shares of transferor company(ies) to be made fully paid or treated separately in the Scheme
- Obtain details of pending legal proceedings in respect of the company and its directors

Preliminary Aspects (Contd...)

- Check accounting years of both the transferor and transferee companies and date of last AGM held – apply for extension of time to hold next AGM, if necessary
- Check cost audit requirements, if applicable
 - Cost audit reports cannot be filed until audited accounts are available
 - Seek approval of Central Government for transfer of Cost Auditors from transferor company(ies) to transferee company

Preliminary Aspects (Contd...)

- Ensure compliance with
 - Listing Agreement – 24(f), (g), (h), (i)
 - SAST 2011, where applicable
 - Competition Act
- Appointment of advocates / solicitors / counsels / valuers / merchant bankers (fairness opinion)
- Date of last audited financial statements
- Financial statements not more than 6 months old / else unaudited financial statements required

Valuation

- Experts – independent valuers
- Share exchange ratio – considering assets and liabilities, debt restructuring, effect of material litigations, if any

Common Methods of Valuation

- Net Asset Value (NAV)
- Profit Earning Capacity Value (PECV)
- Market Value (MV)

Fair value

- Final valuation based on best reasonable judgement; price at which there is a willing buyer and willing seller

Court Convened Meetings

- Strategise the meetings – Jurisdiction of Courts / Court vacation / holidays & procedures
- Convene and hold separate meetings for different classes of members / creditors
- Obtain written consents wherever possible and seek dispensation of meetings
- Plan for printing and mailing the notice for meetings – minimum 25 days before the date of the meeting or as directed by court
- Organise for the publication of notice in newspapers
- Strategise for ensuring majority to be present in person or proxy and voting in favour of the proposal – number and value both are important

Court Convened Meetings (Contd...)

- Proxy is treated as person present and voting
- Ensure proxies and resolutions appointing authorised representatives are deposited at least 48 hours before the meetings
- Voting is only by poll
- Attendance slips, proxies and poll papers should be discreetly identifiable
- Arrange for adequate number of poll boxes and place them in convenient locations at the meeting venue

Court Convened Meetings (Contd...)

- Prepare handbook for Chairman to facilitate conduct of proceedings
- Review of objections, if received, and provide necessary information to the Chairman to facilitate smooth conduct of the meetings
- Keep available supporting case laws for any objections, received or anticipated
- Resolution proposing any amendment to the scheme as to ratios or important matters- need not be accepted
- Keep inspection file available
- Determine persons who can be and are willing to be scrutineers and ensure they are present in the meeting

Contents of Scheme

- Details of transferor and transferee companies
- Appointed date and effective date
- Rationale for the scheme of amalgamation
- Effect on the undertakings, business, contracts, legal proceedings, assets, liabilities and employees of the transferor companies
- Share exchange ratio
- Procedure and terms of the issue of new shares, fractional entitlements, cancellation of the existing shares
- Restructuring of liabilities

Contents of Scheme (Contd...)

- Accounting treatment
- Dissolution of transferor company(ies)
- Provision for modification of the scheme if directed by the regulatory authorities
- Pre-conditions subject to which the scheme would operate viz., approval of requisite majority, sanction of High Court, filing with RoC
- Liability to bear costs, charges and expenses of the merger
- Details of properties and liabilities transferred

Explanatory Statement

Should provide –

- Salient features of the scheme
- Common directors and directors' shareholdings, if any
- Interest of directors, trustees, etc.
- Pre and post amalgamation – capital structure and shareholding pattern

Accounting Aspects - AS – 14

- Amalgamation in the nature of merger or nature of purchase
- **Pooling of interests method**
 - Assets and liabilities of transferor company recorded at their existing carrying amounts
 - Effect of change in accounting policies, if required, to be reported
 - Difference in share capital adjusted in reserves
- **Purchase method**
 - Assets and liabilities of the transferor company are accounted either at existing carrying amounts or on the basis of their fair values at the date of amalgamation
 - Excess of assets over liabilities accounted as capital reserve
 - Excess of liabilities over assets accounted as goodwill³²

Tax Implications

- Tax implications on the sale or exchange of shares in amalgamation in the hands of the shareholders
- Holding Period of the shares of the transferor company is considered for capital gains
- Carry forward of losses of companies
- Transfer of assets pursuant to a scheme of amalgamation as per section 2(1B) of the Income Tax Act, 1961 exempt from capital gains tax under section 47(vi)

GDR Holders

- If transferor company has issued GDRs –
 - Check
 - if transferee company has issued GDRs
 - SEC Rule 12g3-2(b) exemption valid
 - New shares to be issued by transferee company in the share exchange ratio to the custodian
 - Overseas depository will issue GDRs
- If transferee company has not issued GDRs
 - Follow procedure for fresh issue of GDRs

OR

 - Scheme should provide for cancellation of GDRs of transferor company and pay out on the underlying shares at the market price prevailing as on the effective date

M & A exempt under SAST 2011

- Scheme of M&A involving target company as transferor or transferee company pursuant to order of a court or competent authority
- Scheme of M&A indirectly involving target company as transferor or transferee company pursuant to order of a court or competent authority, subject to:
 - Consideration in cash or cash equivalent not less than 25% under the scheme; and
 - After implementation, at least 33% of voting rights in combined entity continues with the same persons directly or indirectly

Competition Act and Combination Regulations

Exemption - Schedule I(8A)

- Merger or Amalgamation involving holding company and subsidiary wholly owned by enterprises belonging to the same group
- Merger or Amalgamation of subsidiaries wholly owned by enterprises belonging to the same group

FEMA Compliance

- For shares issued to NRIs, FIIs, GDR holders file Form FCGPR with RBI within 30 days of allotment

Process

- Board approval
- CCI approval, if applicable
- Stock exchange- NOC
- Application to High Court seeking directions for meetings
- Meetings of shareholders / creditors to seek approval
- File Chairman's report to Court within 7 days of the meeting
- File Petition with Court
- Issue public notice of hearing not less than 10 days of the date of hearing
- Follow up for NOC from RD / ROC / OL
- Hearing of the petition by the Court
- File form 21 along with certified copy of order within 14 days of the order

Important Concepts

- **Appointed Date** : The date on which the assets, properties, liabilities, etc. of the transferor company vests and is transferred to the transferee company
- **Effective Date** : The date on which all the legal formalities are completed, usually the date of filing of the Court Order with RoC
- High court order - Instrument subject to stamp duty
- Ensure compliance of sections 166, 210 and 211 of the Companies Act, 1956 in case of delay of sanction
- Change of name - section 21 to be complied

Important Concepts (Contd...)

- Dispensation of meetings – subject to written consent
- **Voting: By poll**
 - Approval of majority in number representing in value of members / creditors present and voting either in person or proxies
 - Person who is member / creditor on the date of meeting should be reckoned (also value)
- Proxy and representations to be lodged at least 48 hours before the meeting
- Proxy counted for the purpose of quorum

Post Effective Date

- Fix record date
- Allotment of shares / dealing with fractional entitlement
- Complete formalities for listing
- Report to RBI (Form FCGPR)
- File return of allotment with RoC
- If transferee company is not a listed company steps should be taken for listing the shares

Post Court Sanction

- Arrange for
 - Adjudication of stamp duty payable – keep available information of all immovable properties of transferor company(ies) in the State where the registered office of the transferee company is situated
 - Annex copy of the Court Order to every copy of the Memorandum of association of the company
 - Ensure smooth transfer of records and documents of the transferor company(ies) – need to be preserved

Post Court Sanction (Contd...)

- Ensure that all vouchers, invoices, letterheads, receipts, etc., of transferor company(ies) bear the name and the registered office address of the transferee company
- Take steps for integrating PF, gratuity, pension funds of the transferor company(ies) with that of the transferee company
- Arrange for endorsement of all licenses, quotas, etc., of transferor company(ies) in favour of the transferee company

Important points arising out of judgements

- Amalgamation of WOS with holding company – no requirement for holding company to file petition where there is no effect on the rights of members or creditors of transferee company as between themselves or does not involve re-organisation of share capital of the transferee company
- Joint application / petition can be made by two or more companies
- The transferee company should be in existence on the effective date, i.e. the date on which the actual transfer takes place and not the appointed date.
- Court will not question the valuation or the expertise of valuers as long as the scheme is duly approved

Important points arising out of judgements (Cont...)

- Locus of objector only in the respective courts
- No locus for a third person – neither member / creditor
- Forum for objection is only the High court after petition is filed
- Scheme once sanctioned binds the minority
- Sanction of a scheme cannot be stayed due to pendency of investigations u/s 235 of the Companies Act. Investigations may be allowed simultaneously
- On increase in authorised share capital after the sanction of scheme u/s 391, the transferee company is not required to pay registration fee u/s 94 and 97 of the Companies Act

Provisions for M & A in Companies Bill

- Authority to NCLT
- Valuation report by registered valuer
- Persons who can object - to hold not less than 10% shareholding or 5% outstanding debt as per latest audited FS
- Notice along with all the accompanying documents should also be sent to various authorities (CG, CCI, RBI, SEBI, IT, etc.)
- The authorities to make representation within one month from the date of receipt of such notice, else deemed to be approved
- Auditor's certificate to be filed with Tribunal that the scheme is in conformity with AS
- Tribunal may dispense meeting of creditors if at least 90% in value agree and confirm by an affidavit

Provisions for M & A in Companies Bill (contd...)

- The transferee company shall not hold any shares in its own name or in the name of any trust whether on its behalf or on behalf of any of its subsidiaries or associate companies and any such shares shall be cancelled or extinguished
- Where the transferor is a listed company and the transferee is an unlisted company –
 - the transferee company shall continue to be an unlisted company until it becomes a listed company
 - exit opportunity to shareholders of transferor company and to be paid at a pre-determined price formula or after valuation
 - Such price to be not less than that specified by SEBI regulations

Provisions for M & A in Companies Bill (contd...)

- Until completion of the scheme, every year statement certified by a CA / CS / Cost Accountant in practice, indicating whether the scheme is being complied with in accordance with the order of the Tribunal or not, shall be filed with RoC
- Specific provisions for M&A of small companies; holding and WOS
- Provisions for cross border mergers

TAKEOVER

Mode

- Transfer of shares or voting rights
- Transfer of interest in business
- Transfer of control

Unlisted Company

- Approvals
 - By Board- sec 292 and 372A (unanimous consent)
 - Shareholders' approval - sec 372A if not within limits
 - Creditors, wherever applicable
- SPA, change of directors, transfer of shares, transfer of assets and liabilities, consideration

Listed company

Applicable laws

- SAST 2011
- Competition Act and Combination regulation
- Companies Act, 1956 – 292, 372A
- FEMA
- Depositories
- Insider trading regulations

Mode

- Direct
- Indirect

Thresholds

- 25% of shares or voting rights
- 25% - 75%, 5% in a financial year
- Only gross acquisitions to be considered – no netting off
- Individual acquisitions will also trigger irrespective of no change in group holding

Illustration : Individual holding 23%, group holding 64%

Creeping allowed 5% for the group, however individual cannot cross 25%,

also applicable to inter-se transfer for the individual

Control

- Direct or Indirect acquisition of control with or without acquiring shares will trigger open offer
- No exemption for change in control, as was available in SAST 1997
- Check whether acquisition is exempted under Reg. 10 else make open offer
- If exempt, make necessary disclosures for acquisition of shares or voting rights – 4 days prior to acquisition, 4 days after acquisition and 21 days report

Process and documents

- Due diligence and Strategy
- Appoint merchant banker
- Determine – offer size and pricing as per norms
- In case of conditional offer set out minimum level of acceptance
- Public announcement
- Open escrow account and deposit required amounts
- Detailed Public Statement and letter of offer
- File letter of offer with SEBI
- Minimum open offer size- 26%
- Terms of offer to be in line with the regulations
- Seek and release opinion of independent directors – 2 working days prior to the tendering period
- Comply all requirements of SAST 2011

Obligations of acquirer & PACs

- Obtain all statutory approvals including CCI, if applicable
- Not to acquire or sell any shares of TC during the period between 3 working days prior to commencement of tendering period and until expiry of the tendering period
- Not to sell shares of TC during offer period
- May acquire shares of TC during offer period excluding as given above, but if price is higher than the offer price, the offer price will stand revised

Competition Act and Combination Regulations

- An acquisition leading to holding of 25% or more of total shares or voting rights of a company, directly or indirectly **check:**
 - thresholds under Competition Act
 - whether acquisition results in acquisition of control
- Creeping acquisition between 25% to 50% - **control**
- Acquisition of shares or voting rights by an acquirer already having 50% or more shares or voting rights – **joint control to sole control would require CCI approval**
- Acquisition of control or shares or voting rights by one person or enterprise of another person or enterprise within the same group (exempt under Comb Reg)
- **If applicable approval of CCI is a primary requirement** 56

Provisions of Companies Bill

- Provisions for takeover of unlisted companies provided elaborately
- Exit opportunity to be provided to minority shareholders
- Valuation by registered valuer
- Listed companies to be governed by SAST 2011

THANK YOU!