

## ***FAST TRACK MERGER- A Novel Concepts***

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Merger is a restructuring tool available to Indian conglomerates aiming to expand and diversify their businesses for various reasons whether it is to gain competitive advantage, reduce costs or unlock values. In commercial parlance, merger essentially means an arrangement whereby one or more existing companies merge their identity into another existing company or form a distinct new entity.

The Companies Act, 2013 introduce the novel concepts fast track merger for Small Companies and Holding and its wholly owned subsidiary Companies. This is the first significant change to merger and amalgamations regime in the last six decades, with the previous Companies Act having been in place since 1956. There are pragmatic reforms for Merger and Acquisitions under Companies Act, 2013, which could make merger, acquisitions and restructuring easier for companies.

There was a long felt need to simplify and fast track the procedure for mergers of holding-subsidiary or companies where interest of third parties is not involved. The act clarifies that this fast track process shall apply not just to mergers but also to all types of compromise & arrangements involving these companies.

Even the Companies have the option to follow the normal route of merger process if the desire.

### **Benefits:**

Cross Border merger are expected to increase internal restructuring and Cross Border restructuring. Exit opportunity to the dissenting shareholders is expected to reduce litigation & frivolous complaint and representation of Income Tax Department, Sectoral

- No need of approval of NCLT.
- Approval of members holding 90% of share capital of members present in the meeting
- Approval of 9/10<sup>th</sup> of value of Creditors present in Meeting.
- Power of Central Government lying with the Regional Director.

Regulators would safeguard their interest, though at the cost of prolonged process.

Provisions of section 230 to 232 of the Act for Merger & Amalgamation is very time cumbersome activity, as it includes clearance from many regulatory bodies and all type of companies has to go through such route. Under the fast track process Central government has the power to approve such scheme and there is no need to approach to NCLT.

### Sections Involved

Section 233- Merger or Amalgamation of certain companies. This section comes into force w.e.f. 15<sup>th</sup> December, 2016.

### Rule Involved

Rule 25 Companies (Compromises, Arrangements and Amalgamations) Rules, 2016

### Notification Involved:

<sup>1</sup>Notification No. S.O. 3677(E), Dated 7<sup>th</sup> December, 2016 (section become effective)

<sup>2</sup>Notification No. S.O. 4090(E), Dated 19<sup>th</sup> December, 2016 (<sup>3</sup>Delegation of Power)

### Forms involved:

CAA.9- Notice of the scheme inviting objections or suggestions

CAA.10 - Declaration of solvency

CAA.11 Notice of approval of the scheme of merger

CAA.12 Confirmation order of scheme of merger or amalgamation between

INC.28 Notice of Order of the Court or any other competent authority

GNL-1 Filing of Application with ROC

**Non Ostensive Clause:** Section 233 start with non ostensive clause “<sup>4</sup>Notwithstanding the provisions of section 230 and section 232”. Meaning of notwithstanding is ‘in spite of what has just been said’. It demonstrate that in spite of whatever said in section 230 and 232 below given class of Companies can avail the option of fast track merger (merger by Central

Government (RD) without NCLT.

<sup>1</sup> [http://www.mca.gov.in/Ministry/pdf/commencementnotif\\_o8122016.pdf](http://www.mca.gov.in/Ministry/pdf/commencementnotif_o8122016.pdf)

<sup>2</sup> [http://www.mca.gov.in/Ministry/pdf/Notification\\_PowerRD\\_20122016.pdf](http://www.mca.gov.in/Ministry/pdf/Notification_PowerRD_20122016.pdf)

<sup>3</sup> Power of Central Government u/s 233(2-6) transferred to Regional Director

<sup>4</sup> English meaning in spite of what has just been said

Between whom the Compromise & <sup>5</sup>Arrangement can propose: Section 233(1)

As in some overseas jurisdictions, the 2013 Act has introduced the new concept of fast-track mergers and demergers. These provide the option of a simplified and fast-track merge process, which can be used for the following and is an option for companies:

- Merger of Two or More Small Companies or
- Merger between a holding company and its wholly-owned subsidiary Company or
- Such other class or classes of companies as may be prescribed;

To whom Scheme for Fast Track Merger will submit: Section 230(2)

Companies shall file application with following below motioned authorities in whose jurisdiction registered office of the Company is situated.

- Central Government (Powers are delegated to Regional Director)
- Registrar and
- The Official Liquidator

***FIRST STEP- Filing of Notice of Proposed Scheme***

- i. **Issue of Notice of Proposed Scheme:** A notice in **form CAA-9** of the proposed <sup>6</sup>scheme inviting objections or suggestions, if any, shall be sent to followings:
- Registrar of Companies, where registered office of the respective companies are situated
  - Official Liquidators, where registered office of the respective companies are situated
  - Persons affected by the scheme

**Time period for Objections/ Suggestion:**

Above mentioned all persons send their objections/ suggestions to Company within 30 (Thirty) days of the issue of notice to them, by the transferor company or companies and the transferee company.

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<sup>5</sup> *Explanation*.—For the purposes of this sub-section, arrangement includes a re-organization of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods

<sup>6</sup> Scheme approved by Board of Directors



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- ii. **Declaration of Solvency:** Each of the companies involved in the merger files a declaration of solvency, in **form CAA-10** with the Registrar of the place where the registered office of the company is situated.
- iii. **Approval from Shareholders in General Meeting:** The Companies will hold Meeting of shareholders in following manner:
- The objections and suggestions received are considered by the companies in their respective general meetings
  - The scheme should be approved by members present in the meeting, holding at least 90% of <sup>7</sup>total number of shares in the General Meeting.

**Notice of General Meeting:** The notice of the meeting to the members shall be accompanied by –

- <sup>8</sup>A statement disclosing the details of the compromise or arrangement, as far as applicable.
- The declaration of solvency made in pursuance of clause (c) of sub-section (1) of section 233 of the Act in **Form No. CAA.10**
- A copy of the Scheme.

- iv. **Approval from Creditors in their Meeting:** The Companies will hold Meeting of Creditors. The scheme should be approved by creditors or class of creditors present in the meeting, representing at least 9/10 of value of creditors.

**Notice of Creditors Meeting:** The notice of the meeting shall be convene by giving at least 21 days notice to the members and notice shall be accompanied by –

- A statement disclosing the details of the compromise or arrangement, as far as applicable.
- The declaration of solvency made in pursuance of clause (c) of sub-section (1) of section 233 of the Act in **Form No. CAA.10**;
- A copy of the Scheme.

#### **Dispensation from the Meeting**

If 90% in value of creditors agree by way of affidavit then meeting of creditors can be dispensed.

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<sup>7</sup> For calculating the 90% members present in the meeting will consider.

<sup>8</sup> Referred to in sub-section (3) of section 230 of the Act read with sub-rule (3) of rule 6 hereof

## ***SECOND STEP- Filing of Scheme with Central Government (RD)/ ROC/ OL***

The transferee company shall within 7 days of after the conclusion of the meeting of members or class of members or creditors or class of creditors shall Section 233(2) and Rule 25(4)

- A copy of the *Scheme* so approved by the members and creditors along with
- A report of the result of each of the meetings in **Form No. CAA.11** to the Central Government (RD).

### **Filing to whom:**

- Central Government (RD)- through hand delivery or by registered post or speed post
- Registrar of Companies (ROC) - in **Form No. GNL-1**
- Official Liquidator (OL)- through hand delivery or by registered post or speed post

## ***THIRD STEP- Registration of Scheme***

<sup>9</sup>On the receipt of the scheme, If the Registrar or Official Liquidator has any objections or suggestions, he may communicate the same in writing to the Central Government (RD) within a period of 30 days. Section 233(4).

### **Issue of Order:**

- Where no objection or suggestion is received to the scheme from the Registrar of Companies and Official Liquidator or
- where the objection or suggestion of Registrar and Official Liquidator is deemed to be not sustainable and

The Central Government is of the opinion that the scheme is in the public interest or in the interest of creditors, the Central Government shall issue a confirmation order of such scheme of merger or amalgamation in **Form No. CAA.12**.

## ***FOURTH STEP- Filing of Order***

### **Registrar of Companies:**

The confirmation order of the scheme issued by the Central Government shall be filed, within 30 days of the receipt of the order of confirmation, in **Form INC-28** with the

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<sup>9</sup> if no such communication is made, it shall be presumed that he has no objection to the scheme.

Registrar of Companies having jurisdiction over the transferee and transferor companies respectively. Section 233(7) and Rule 25(7).

**Person Concerned:**

The confirmation order of the scheme issued by the Central Government shall be filed, within 30 days of the receipt of the order of confirmation, concerned person. Section 233(7)

***FIFTH STEP- Confirmation by ROC***

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The Registrar shall register the scheme and issue a confirmation thereof to the companies and such confirmation shall be communicated to the Registrars where Transferor Company or companies were situated.

***SIXTH STEP- Miscellaneous- Effect of Registration of Scheme***

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**Dissolution of transferor Companies:** The registration of the scheme transferor Companies shall be deemed to have the effect of dissolution without process of winding-up.

**Other Effects:** Section 233(9)

- i. **Transfer of Property or Liabilities:** Transfer of property or liabilities of the transferor company to the transferee company so that the property becomes the property of the transferee company and the liabilities become the liabilities of the transferee company.]
- ii. **Charge:** the charges, if any, on the property of the transferor company shall be applicable and enforceable as if the charges were on the property of the transferee company.
- iii. **Legal Proceeding:** legal proceedings by or against the transferor company pending before any court of law shall be continued by or against the transferee company.
- iv. **Another important Liability:** where the scheme provides for purchase of shares held by the dissenting shareholders or settlement of debt due to dissenting creditors, such amount, to the extent it is unpaid, shall become the liability of the transferee company

### ***SEVENTH STEP- Transferee Company Compliances***

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**Important Condition for Transferee Companies:** Section 233(10) A Transferee company shall not on merger or amalgamation, hold any shares in its own name or in the name of any trust either on its behalf or on behalf of any of its subsidiary or associate company and all such shares shall be cancelled or extinguished on the merger or amalgamation.

#### **Authorized Capital:**

The transferee company shall file an <sup>10</sup> application with the Registrar along with the scheme registered, indicating the revised authorized capital and pay the prescribed fees due on revised capital.

#### **Note on Fee:**

The fee, if any, paid by the transferor company on its authorized capital prior to its merger or amalgamation with the transferee company shall be set-off against the fees payable by the transferee company on its authorized capital enhanced by the merger or amalgamation.

#### **CONCLUSION:**

The thirty days time limit imposed on the regulators will, hopefully, ensure that they respond in a time bound manner. The exact time frame that the entire merger process would involve will be known once it is tested. It would be fair to say that the 2013 Act seeks to streamline and make M&A more smooth and transparent. The new provisions should make it easier for corporations proposing mergers as it seems to have a good system of checks & balances to prevent abuse of these provisions.

### **OTHER CIRCUMSTANCES IN FAST TRACK MERGER:**

We have already understood the process of Fast Track merger as discussed above. Below we would try to give clarity on the provision of fast track merger in the situation Registrar of Companies (ROC) or Official Liquidator (OL) raise any objections or suggestions and send the same to Central Government within a period of 30 days, as per provisions of Sub Section 4 of Section 233 of Companies Act, 2013.

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<sup>10</sup> In form SH-7 for increase in authorized capital.



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### ***Filing of Scheme with Central Government (RD)/ ROC/ OL***

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As mentioned in sub section 2 once the scheme is approved by the Shareholders and Creditors The transferee company shall within 7 days of after the conclusion of the meeting of members or class of members or creditors or class of creditors shall Section 233(2) and Rule 25(4)

- A copy of the *Scheme* so approved by the members and creditors along with
- A report of the result of each of the meetings in **Form No. CAA.11** to the Central Government (RD).

#### **Filing to whom:**

- Central Government (RD)- through hand delivery or by registered post or speed post
- Registrar of Companies (ROC) - in **Form No. GNL-1**
- Official Liquidator (OL)- through hand delivery or by registered post or speed post

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### ***Objections/ Suggestions by ROC/ OL***

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If the Registrar or Official Liquidator has any objections or suggestions, he may communicate the same in writing to the Central Government within a period of 30 (thirty) days. Section 233(4) and Rule 25(5)

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### ***Judgment of Central Government (RD)***

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If the Central Government (RD) after receiving the objections or suggestions or for any reason is of the opinion that such a scheme is not in public interest or in the interest of the creditors, it may file an application before the Tribunal within a period of 60 (sixty) days of the receipt of the scheme under sub-section (2) stating its objections in **Form No. CAA. 13**

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### ***Decision of Tribunal (NCLT)***

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On receipt of an application from the Central Government, if the Tribunal, for reasons to be recorded in writing, is of the opinion that the scheme should be considered as per the procedure laid down in section 232, the Tribunal may direct accordingly or it may confirm the scheme by passing such order as it deems fit.



### **CONCLUSION:**

Once its directed by the tribunal to file the application as per procedure given in section 232 then the Companies involved in M&A will file the applications and follow the lengthy process of Merger and Amalgamation.

### ***Calendar of process of Fast Track Merger***

S. No.	Particular of Activity	Purpose of Activity	Time Period
A.	Convey of Board Meeting	To Approve the Scheme	All Companies
B.	Filing of Notice of Proposed Scheme along with copy of Scheme	To ROC/ OL/ Concerned Person in form No. CAA-9	All Companies
C.	Declaration of Solvency	In form CAA.10 after issue of notice	All Companies
D.	Convey of General Meeting	The scheme should be approved by members present in the meeting, holding at least 90% of 11 total number of shares in the General Meeting	All Companies
E.	Convey of Creditors Meeting	The scheme should be approved by creditors or class of creditors present in the meeting, representing at least 9/10 of value of creditors	All Companies
F.	File a copy of Scheme and report of the result of each of the meetings	In Form No. CAA.11 and Form No.CAA.9(i.e. notice) with Within 7 days after the conclusion of the meeting of members or class of members or creditors.	Transferee Company
G.	Registration of Scheme	Where no objection or suggestion is received to the scheme from the Registrar of Companies and Official Liquidator.	Issue of Order by RD

<sup>11</sup> For calculating the 90% members present in the meeting will consider.

		The Central Government (RD) is of the opinion that the scheme is in the public interest or in the interest of creditors, the Central Government shall issue a confirmation order of such scheme of merger or amalgamation in <b>Form No. CAA.12</b>	
H.	Filing of Order with ROC	The confirmation order of the scheme issued by the Central Government shall be filed, within 30 days of the receipt of the order of confirmation, in Form INC-28 with the Registrar of Companies having jurisdiction over the transferee and transferor companies respectively	All Companies
I.	Confirmation by ROC	The Registrar shall register the scheme and issue a confirmation thereof to the companies and such confirmation shall be communicated to the Registrars where Transferor Company or companies were situated	By ROC

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