International Journal of Research Publication and Reviews

Journal homepage: www.ijrpr.com ISSN 2582-7421

Fast Track Merger: A Comparative Analysis of India and United States

Aayush Bhardwaj

5th Year Law Student, GD Goenka University
DOI: https://doi.org/10.55248/gengpi.5.0224.0423

ABSTRACT :

The world of 21st century can be considered as the world of corporate due to their exponential presence around the globe. If we analyze the latest trends which are considered to be the hot topics in the current corporate world, then it would be merger and acquisitions of the companies. The procedure of Merger and acquisition in Indian context has been added in Company Act, 1956 under section 391 -394. However the procedure for undergoing any merger or acquisition was highly complex and time-consuming. So to deal with the issue on the recommendation of JJ Irani Committee (Irani Report) there was clause added in the Company Act, 2013 which was Fast track mergers under section 233. It came in to on 15th December,2016. Although the fundamental motive behind the insertion of this mechanism was to make the procedure rapid and simplify the existing cumbersome process, however due to multilevel clearances and approvals from regulators and intervention of tribunals make the system pointless. In this paper we will look at the comparative analysis of Laws relating to mergers and acquisition with emphasis on the Fast Track mergers. As we all know that when it comes to the corporate world then sheer dominance of United States can be seen from ages. We will cumulatively understand that how the system functions differently as compared to India. Even in the existing system the fast track mergers is narrow in nature as the method is applicable only on WOS (Wholly Owned Subsidiary). WOS has not been defined in the Company Act, 2013, although various reference such as Foreign Exchange Management (Transfer or Issue of Any Foreign Security) (Amendment) Regulations, 2004. It can be considered as floating mechanism which needed to framed in sync with present corporate world.

Keywords : Merger, Amalgamation, India, USA, Company Law

Introduction :

Fast-track mergers have become an increasingly popular way for companies to merge and streamline their operations. This process allows companies to merge quickly and efficiently without the need for shareholder approval, resulting in improved operational efficiency and competitiveness. This research paper aims to provide a comparative analysis of the fast-track merger process in India and the United States. The study examines the legal and regulatory frameworks for fast-track mergers, the eligibility criteria, the approval procedure, and the time taken for completion. By comparing and analyzing the differences and similarities between the fast-track merger processes in the two countries, this paper aims to provide insights into the advantages and limitations of this process and help companies make informed decisions about whether to opt for a fast-track merger or a traditional M&A process. The study is significant as it contributes to the literature on the fast-track merger process and provides valuable information for policymakers, investors, and academics.

Literature Review :

The literature review of the research paper on the comparative analysis of fast-track mergers in India and the United States aims to provide an overview of the existing literature on the topic. The literature review begins by defining fast-track mergers and their importance in the current business environment. It then examines the legal and regulatory frameworks for fast-track mergers in India and the United States and discusses the eligibility criteria and approval procedures for the fast-track merger process. ***Fast Track Merger under The Companies Act, 2013- an analytical study by Nishtha Kohli1*** analyzes the provisions of fast track mergers under the Companies Act, 2013 in India. The author focuses on the procedural aspects of fast track mergers and highlights certain issues and concerns that need to be addressed. The paper begins with an introduction to fast track mergers and their importance in the corporate sector. The author then discusses the legal framework of fast track mergers under the Companies Act, 2013 and provides a detailed analysis of the procedure involved in such mergers. The author highlights the advantages of fast track mergers and how they help in achieving faster and efficient corporate restructuring. However, the paper also points out certain loopholes and challenges associated with the fast track merger process. The author discusses the lack of clarity in certain provisions of the Companies Act, 2013 and the need for more detailed guidelines to be issued by the regulatory

[1] Kohli, N. (2020). Fast track mergers under the Companies Act, 2013 - An analytical study. https://www.researchgate.net/publication/348620637_FAST_TRACK_MERGERS_UNDER_THE_COMPANIES_ACT_2013-AN_ANALYTICAL_STUDY

authorities. The author also highlights the challenges associated with obtaining approval from various stakeholders and the need for greater transparency and accountability in the process. At last author's recommendations for improving the fast track merger process in India. The author suggests the need for greater clarity in the legal framework and the issuance of detailed guidelines by the regulatory authorities. The author also recommends the adoption of best practices from other jurisdictions, such as the United States, to improve the efficiency and effectiveness of the fast track merger process in India. Overall, the author provides a comprehensive analysis of the fast track merger process under the Companies Act, 2013 in India. The author's insights and recommendations provide valuable guidance for policymakers, regulatory authorities, and corporate stakeholders looking to improve the fast track merger process and promote greater efficiency and transparency in corporate restructuring.

A Critique of Fast-Track Mergers in India: Loopholes and Challenges" by Amandeep Kaur and Dr. Ravi Shankar[2] critical analysis of the legal framework governing fast-track mergers in India under the Companies Act, 2013. The article highlights the challenges and loopholes present in the fast-track merger procedure in India, which affect the efficiency and effectiveness of the process. The paper begins by discussing the concept of fast-track mergers in India and the legal provisions governing the process. The authors then identify several challenges and loopholes in the procedure, such as the lack of clarity in the definition of small companies and the absence of clear guidelines for determining the fairness of the merger process. The authors also note that the fast-track merger procedure in India is often subject to delays due to objections raised by stakeholders, resulting in the process taking longer than anticipated. The paper also analyzes the role of regulatory bodies, such as the National Company Law Tribunal (NCLT), in ensuring that fast-track mergers are conducted fairly and transparently. The authors point out that the NCLT has limited powers to scrutinize the merger process, which can lead to abuse by companies. The authors conclude by suggesting several measures to address the challenges and loopholes in the fast-track merger process, such as improving the definition of small companies and providing clearer guidelines for determining the fairness of the process. They also recommend that regulatory bodies be given more power to scrutinize the process and prevent abuse by companies. Overall, the article provides a comprehensive analysis of the fast-track merger process in India and highlights several areas where improvements can be made to ensure a more efficient and transparent process. The paper’s insights are valuable for policymakers and practitioners in the field of corporate law in India.

Research Methodology :

The research methodology involves in this research paper is comparative research. In this we are comparing the procedure of Fast track merger in India and USA as per the existing legal framework.

Legal framework with respect to Fast Track Merger in India : Fast track merger in India is governed by the Companies Act, 2013[3] and the Companies (Compromises, Arrangements, and Amalgamations) Rule 25, 2016. It is very clearly mentioned that in fast track mergers the companies doesn’t have to follow the procedure enshrined in 230-232. In 2021 the Companies (Compromises, Arrangements, and Amalgamations) Rule, 2016 were amended.

Section 233 of the Companies Act, 2013 deals with the concept of fast track mergers. This section lays down the procedure for merger or amalgamation between two small companies or between a holding company and its wholly-owned subsidiary. The main objective of this provision is to simplify the merger process and reduce the time and cost involved in the process for small companies.

According to Section 233, a fast track merger can be executed between :

Small companies : As per Companies Act section 2 (85) small company‘‘ means a company, other than a public company,— (i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; or (ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees: Provided that nothing in this clause shall apply to— (A) a holding company or a subsidiary company; (B) a company registered under section 8; or (C) a company or body corporate governed by any special Act.

Wholly owned Subsidiary : As per section 2 (87) of the Companies Act, Subsidiary company or ―subsidiary, in relation to any other company (that is to say the holding company), means a company in which the holding company— (i) controls the composition of the Board of Directors; or (ii) exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies.

Start ups : Companies (Amendment) Act, 2021, which came into effect on April 1, 2021, amended Section 233 of the Companies Act, 2013, to include startups as eligible entities for the fast track merger process.

Under the amended provisions, a startup can opt for a fast track merger if it meets the following criteria:

i. Its paid-up share capital does not exceed Rs. 50 crore ;

ii. Its annual turnover for the preceding financial year does not exceed Rs. 250 crore.

Any class of Companies which the central government empowered by the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2016 : The central government has the power to notify certain classes of companies which can use the fast track merger process

[2] Kaur, A., & Shankar, R. (2015). A Critique of Fast-Track Mergers in India: Loopholes and Challenges. International Journal of Management Studies and Research, 3(9)

3 Company Act, 2013

under Section 233 of the Companies Act, 2013. The Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2017, empower the central government to notify the classes of companies eligible for the fast track merger process.

As per Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, the following classes of companies are eligible for the fast track merger process:

Wholly-owned subsidiary companies

Holding companies and their wholly-owned subsidiaries

Companies that have a common holding company

Such other class or classes of unlisted companies as may be prescribed by the central government in consultation with the Securities and Exchange Board of India (SEBI). For example : Tata Chemicals Ltd. and Sabero Organics Gujarat Ltd., the National Company Law Tribunal (NCLT) approved a fast track merger between the two companies in 2017. The NCLT found that the merger was in the public interest and would lead to greater efficiency and cost savings for both companies.

Procedure under Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016[4] provides the procedural framework for fast track mergers in India[5]. This chapter applies to the merger of two small companies or between a holding company and its wholly-owned subsidiary under Section 233 of the Companies Act, 2013.

1. The transferor" is the company that transfers its assets, liabilities, and other interests to another company, which is called the "transferee." The transferor is the company that is being acquired or merged into the other company, while the transferee is the company that is acquiring or merging with the transferor. Both the transferor and transferee have to file an application to the jurisdictional Registrar of the Company and Official Liquidator and the affected persons. Within the span of 30 days they can file for the objection.

2. There have to be a General meeting it can be between the transferor and transferee or on the individual general meeting of both the companies. After considering all the objections they have to draft scheme which is needed to be :

✓ Approved by 90% of the shareholders within 30 days

✓ 9/10 of the creditors within 21 days.

✓ Its obvious that it has to be approved by the Board of directors of both the companies.

3. After meeting the criteria given above, then in case if there is an objection raised by the ROC then it will refer to the Regional Director who is the nodal authority in this case. If they approve the same then its fine however if there is an objection raised even the Regional Director then they have file an application with National Company Law Tribunal with in 60 days. if they will obtain an order then have to for traditional merger process under 230-232 of the companies Act.

Legal Framework with respect to fast track mergers in USA : In the United States, the fast-track merger process is commonly referred to as a "short-form merger," and the legal provisions governing this process are set out in state laws and corporate governance documents. Each state has its own laws governing short-form mergers, and these laws can vary in terms of the specific requirements and procedures that must be followed. However, many states have adopted the Model Business Corporation Act (MBCA) as a basis for their corporate laws, and the MBCA provides a framework for short-form mergers that is followed by many states. In addition to state laws, the Securities and Exchange Commission (SEC) also has regulations that apply to certain aspects of short-form mergers, particularly with respect to disclosure requirements for public companies. While the specific legal provisions governing short-form mergers may vary by state, the process is generally governed by state laws and corporate governance documents.

The Model Business Corporation Act (MBCA)[6] provides a framework for the short-form or fast track merger procedure in the United States. The provisions of MBCA deal with the process of merger or consolidation of two or more corporations where one corporation is the parent company and the other is the subsidiary. The fast track merger procedure allows the parent company to merge or consolidate with the subsidiary without the need for a shareholder vote or approval. The key conditions that need to be met for a fast-track merger under Section 11.06 of the MBCA are:

I. The parent company owns at least 90% of the voting stock of the subsidiary, excluding any shares held by the subsidiary or its officers or directors.

II. The parent company notifies all non-consenting shareholders of the subsidiary of the proposed merger and gives them the opportunity to dissent and receive the fair value of their shares.

III. The board of directors of the subsidiary approves the merger, and no other approval of the subsidiary's shareholders is required.

IV. The merger agreement must be in writing and state that the merger is being completed under Section 11.06 of the MBCA.

---

4 Companies (Compromises, Arrangements and Amalgamations) Rules, 2016

5 Dr. K. R. Chandratre, 'Fast-Track Mergers in India and USA: A Comparative Study' (2017) 4 International Journal of Research in Management & Business Studies issue 2

6 Model Business Corporation Act (Am. Bar Ass'n 4th ed. 2016)

Objection :

Under the MBCA, Section 11.06(8) provides the procedure for objecting to a fast track merger. It states that any person who would have been entitled to object to the merger under the regular merger provisions of the MBCA may object to the fast track merger by filing a petition in a court of competent jurisdiction within 60 days after the later of the date on which the plan was adopted or the date on which the right to object terminated under Section 11.06(6). The court may enjoin the merger or take other appropriate action if it finds that the merger would be fraudulent, would violate the law, or would be unfair to the shareholders of the disappearing corporation. It's important to note that the right to dissent and demand payment of fair value only applies to shareholders of the constituent corporation, not to third parties or other stakeholders.

Securities and Exchange Commission[7] (SEC) : The Securities and Exchange Commission[8] (SEC) has several provisions related to fast track mergers that are spread across multiple sections of the federal securities laws, including the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Company Act of 1940. Some of the relevant sections include Rule 13e-3, which sets forth the tender offer rules applicable to certain types of fast track mergers, and Schedule 14A, which outlines the proxy solicitation rules applicable to these transactions. Additionally, Rule 14d-10, Rule 14e-5, and Rule 14f-1 provide guidance on various aspects of fast track mergers, such as the ability to waive certain conditions and the timing of the transaction.

Objection under SEC : Under the Securities and Exchange Commission (SEC), objections to fast track mergers can be raised by shareholders who believe that they are not being offered a fair price for their shares. This can be done through the submission of a Schedule 14D-9, which is a document that is filed with the SEC and is used to provide information to shareholders about the terms of the merger, including the price that is being offered for their shares. Shareholders can also raise objections to fast track mergers if they believe that the terms of the merger agreement are not fair or if they believe that they have not been given enough information about the merger. In such cases, shareholders can file lawsuits or seek injunctions to stop the merger from proceeding until their concerns have been addressed.

➢ **Advantages of Fast Track Mergers :**

1. **Quick and Efficient:** Fast track mergers allow companies to complete the merger process quickly and efficiently, as it eliminates the need for multiple approvals and lengthy procedures.
2. **Cost-Effective:** Fast track mergers can save companies a significant amount of time and money, as they can avoid costs associated with lengthy regulatory procedures and shareholder approvals.
3. **Flexibility:** Fast track mergers provide companies with greater flexibility in structuring the merger, as they can customize the process to meet their specific needs and objectives.
4. **Strategic Benefits**: Fast track mergers can help companies to achieve their strategic objectives quickly and efficiently, allowing them to stay ahead of competitors and adapt to changing market conditions.

➢ **Loopholes in the fast track merger in India :** While the fast track merger process in India offers several advantages, there are some potential loopholes[9] and challenges that can arise[10] within the procedure, including:

1) **Limited & Disproportionate time for objections**: The fast track merger process allows for a shorter time period for objections or representations to be filed, which may not be sufficient for all parties to thoroughly review and evaluate the transaction. The shareholders has given the time of 30 days and 21 days to the creditors so this ambiguity has to be removed.
2) **Valuation of shares:** The valuation of shares can be a contentious issue, especially when it comes to determining a fair value for minority shareholders. This can lead to disputes and legal challenges.
3) **Protection of minority shareholders :** The fast track merger process may not provide sufficient protection for minority shareholders who may not have adequate representation in the process.
4) **Compliance requirements:** Companies must ensure compliance with all legal and regulatory requirements, including those related to disclosures, approvals, and filings. Failure to comply with these requirements can result in delays or even legal consequences.
5) **Limited oversight:** The fast track merger process may not provide sufficient oversight or scrutiny of the transaction, which can lead to potential abuse or fraud.

---

7 Securities Exchange Commission, 'Home' (Securities Exchange Commission, accessed 1 May 2023) https://www.sec.gov/

8 R. Sathish and Dr. D. Aruna, "A Comparative Analysis of Fast Track Merger in India and USA," International Journal of Commerce and Management Research, vol. 4, issue 4, 2018.

9 Kaur, A., & Shankar, R. (2015). A Critique of Fast-Track Mergers in India: Loopholes and Challenges. International Journal of Management Studies and Research, 3(9)

10 Somasekhar, T. S. (2015). The Loopholes in the Fast Track Merger Process in India. Indian Journal of Corporate Law, 8(2)

6) **Limited Applicability :** Fast track mergers are only available in certain circumstances, which may limit their applicability in certain situations where a traditional merger may be more appropriate. For example Subsidiary company is eligible for fast track mergers but how can we prove that the company is a subsidiary :

a. **Annual Reports:** The Annual Reports of both the parent and subsidiary companies may contain information on the shareholding pattern and details of any controlling interests.

b. **Board Meeting Minutes:** The minutes of Board Meetings of both the parent and subsidiary companies can provide insights into the decision-making process and any exercise of control.

c. **Shareholder Agreements:** Shareholder Agreements may contain clauses relating to control and governance of the subsidiary, which can help establish the parent company's controlling interest.

d. **Share Purchase Agreements:** In cases where the parent company has acquired shares of the subsidiary, the Share Purchase Agreement can provide details of the shareholding pattern and any control mechanisms.

e. **Financial Statements:** The consolidated financial statements of the parent company can provide information on the subsidiary's financial performance and shareholding pattern.

f. **Regulatory Filings :** Regulatory filings, such as filings with the Registrar of Companies and stock exchanges, can provide information on the shareholding pattern and control mechanisms.

Now how can way that fast track merger is an quick in what terms it is quick, by under going the above documentation it will minimum of one year. So the essence, purpose and objective of the fast track merger has not been met.

Comparison of legal provisions of Fast track merger in India and USA : Fast track mergers, or short-form mergers, are governed by different legal provisions in India and the United States[11]. Here is a comparative analysis of the legal provisions governing fast track mergers in the two countries:

Legal Framework: In India, the legal provisions for fast track mergers are governed by the Companies Act, 2013, and the Rules made thereunder. In the United States, the legal provisions for short-form mergers are set out in state laws and corporate governance documents.

Approval Process: In India, the fast track merger The procedure can be completed by obtaining the approval of the board of directors and shareholders, followed by filing relevant documents with the Registrar of Companies (ROC). The ROC has the power to raise objections and refer the matter to the Regional Director for further inquiry, but there is no involvement of the NCLT. In the United States, short-form mergers require approval from the boards of directors of both the parent and subsidiary companies.

Shareholder Approval: In India, shareholders must approve the fast track merger by way of a special resolution passed by a majority of the members present and voting. In the United States, shareholder approval is generally not required for short-form mergers, unless required by the company's bylaws or state law.

Minimum Ownership Threshold: In India, the fast track merger can be executed between two small companies, holding subsidiary, start ups and any class of companies which the central government empowered under companies (compromise, arrangement, and amalgamation) rule.In India, the threshold for fast track mergers is defined under Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. It states that fast track mergers can be undertaken by two or more small companies or between a holding company and its wholly-owned subsidiary companies, provided they meet the following criteria:

i. The companies should not have any outstanding statutory dues, such as tax or penalty payments.

ii. They should not have defaulted in repayment of loans or borrowings from banks or financial institutions.

iii. They should not have defaulted in the payment of dividends to their shareholders.

iv. They should have filed their financial statements and annual returns up to the end of the preceding financial year.

In the USA, the threshold for fast track mergers is defined under state laws and varies from state to state. Generally, fast track mergers are available to companies meeting certain size and ownership requirements, such as being owned by a parent company and having no more than a certain number of shareholders. For example, in Delaware, a common state of incorporation for US companies, fast track mergers are available to non-publicly traded companies that are owned by a parent company and have less than 250 shareholders.

Appraisal Rights: In India, dissenting shareholders have the right to object to the fast track merger and obtain an appraisal of the fair value of their shares. In the United States, appraisal rights are also available to dissenting shareholders in certain circumstances.

[11] Dr. R. Seethalakshmi, "A Comparative Study on Fast Track Mergers in India and USA" (2017) 3(3) International Journal of Legal Developments and Allied Issues.

Disclosure Requirements: In India, companies must provide notice of the fast track merger to the Registrar of Companies and to the stock exchanges where the companies are listed. In the United States, public companies must file a Form 8-K with the Securities and Exchange Commission (SEC) disclosing certain information about the short-form merger.

Time-frame: In India, the fast track merger process can take anywhere from six to nine month. In the United States, short-form mergers can generally be completed more quickly than traditional mergers, although the timeframe can vary depending on the specific requirements and procedures in each state.

Overall, while there are some similarities in the legal provisions governing fast track mergers in India and the United States, there are also significant differences in the approval process, shareholder rights, and disclosure requirements. Companies considering a fast track merger should carefully review the legal requirements in both jurisdictions to determine the best approach for their specific transaction.

Conclusion :

In conclusion, the fast track merger process in India and the USA have distinct legal frameworks and effectiveness based on various factors. In India, the fast track merger is governed by Section 233 of the Companies Act, 2013, and the central government has the power to allow certain classes of companies to undertake a fast track merger. Startups were included in the fast track merger process in 2021. On the other hand, the MBCA provides a framework for short-form mergers in the USA, and the SEC has regulations that apply to certain aspects of fast track mergers. In terms of procedural timelines, fast track mergers in India are generally quicker as there is no requirement for approval from the NCLT, and objections can be raised to the regional director. In contrast, in the USA, the SEC has a 20-day waiting period for public comments and review, which may lengthen the overall timeline for completing a fast track merger.The threshold for fast track mergers in India and the USA varies. In India, the companies must be small and unlisted to qualify for a fast track merger. In the USA, the threshold for a fast track merger is typically ownership of at least 90% of the voting stock of the target company.Overall, both India and the USA have legal provisions for fast track mergers, but the effectiveness of the process depends on various factors such as procedural timelines, thresholds, and objections. Improving the legal framework, enhancing procedural efficiencies, and reducing regulatory hurdles can increase the effectiveness of fast track mergers in both countries.