CROSS-BORDER MERGERS AND ACQUISITIONS: CAN THEY BE SUSTAINABLE IN THE LONG RUN?

Jalak Jain*

ABSTRACT

Merger and acquisition, a business technique used by many investors in order to increase their global reach, is not just limited to domestic boundaries. Very frequently, we see in newsflashes that two companies of the same industry but not necessarily in the same country merge with one another to take benefits like capitalizing from economies of scale, sharing each other's technology, corporate restructuring, and other factors. When companies originating from two different countries, join hands to amalgamate and enter into a merger, it is known as cross-border merger and acquisition. In the era of 1990s, the deals of cross-border M&A alone witnessed a jump of over 200% in the Asia-Pacific region. Nevertheless, cross-mergers and acquisitions come with their own sets of advantages and setbacks like layoffs, cultural barriers, and regulatory compliance, to name a few. This article aims to dive deep into the effects of cross-border M&A, analysing case studies of successful and unsuccessful M&A deals, pre and post-merger performance and determining whether cross-border mergers and acquisitions shall see the rise of the sun in the coming years or not.

Keywords: Merger, Acquisition, Cross-border merger, NCLT, FEMA.

WHAT IS THE MEANING OF MERGERS AND ACQUISITIONS?

Merger and Acquisitions (M&A) can simply be understood as the amalgamation of two registered entities and the acquirement of one entity by another. When two independent organisations come together to combine forces and form a new, united organization that is when a merger takes place. Whereas, an acquisition is a result of a takeover of one company by another in order to expand its reach or gain market share. Small businesses, medium-sized businesses, and huge corporations are all adopting M&A as a modern business strategy to help them adapt to changing market conditions and capitalise on them. Some famous mergers and acquisitions that took place in India are

- Future Group - Heritage Foods

*BA LLB, FIFTH YEAR, FACULTY OF LAW, GLS UNIVERSITY, AHMEDABAD.

- Vodafone - Idea
- Flipkart - Myntra
- Tata Motors - Jaguar
- Aditya Birla Group - Jaypee Cements

Aforesaid are some examples of domestic businesses which joined hands to either form a new entity altogether or get saved by the horror and shame of having to declare insolvency or bankruptcy. Interestingly, M&A is not just a subject of national interest. The growing trend of globalisation has enabled cross-border mergers and acquisitions whereby an Indian enterprise can take over an international business vis-a-vis. Because it has made it simple for enterprises to expand into nations where it would have been difficult to establish a foundation due to market and logistical requirements, they are becoming a recurring pattern in business and economic cycles.[1] But wait exactly is it or what rules are being applied to the same and what is the future of such deals, you ask?

'Cross-border merger' is defined in FEMA Regulations as any merger, amalgamation or arrangement between an Indian company and foreign company in accordance with Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 notified under the Companies Act, 2013.[2]

Challenging as it may sound, cross-border mergers and acquisitions are quite successful if done lawfully and by addressing all the nuances and mechanisms to deal with the same. In India, the laws that are applicable to cross-border mergers and acquisitions are

- The Companies Act, 2013 (Substantial Acquisition of Shares and Takeovers) Regulations 2011
- Competition Act, 2002
- Transfer of Property Act, 1882
- Insolvency and Bankruptcy Code, 2016
- Income Tax Act, 1961
- The Department of Industrial Policy and Promotion (DIPP)

[1] Cross-border Mergers and Acquisitions (SM II_HANDOUT 08)<https://www.lkouniv.ac.in/site/writereaddata/siteContent/202003291621085882smitasingh_cross_border_m_a.pdf> accessed 21 June 2023

[2] Foreign Exchange Management (Cross-border Merger) Regulations, 2018 <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11235&Mode=0> accessed 21 June 2023

- IFRS 3 Business Combinations
- Foreign Exchange Management (Cross-border Merger) Regulations, 2018 and
- Foreign Exchange Management Act, 1999 (FEMA)[3]

WHY FIRMS ARE CROSSING BORDERS?

The corporate sector across the continents has now more than ever realised the need to upgrade and grow its business operations to remain in the ever-increasing economic competition globally. To remain in the race, businesses must partake by adapting to the changing trends of development. A prudent and yet more economical way to go beyond their geographical horizons in order to expand business operations is to participate in cross-border mergers and acquisitions. Many reasons serve the purpose of cross-border M&A like gaining greater market share, broadening the portfolio to reduce business entering new markets and geographies, and capitalising on economies of scale and many other reasons.[4]

For the third consecutive time, India has made a significant jump in improving its ranking in the 'World Bank's Ease of Doing Business Ranking 2020' from 142nd in 2014 to 63rd in 2019.[5]These rankings are arrived at after careful analysis of various indications, such as obtaining loans, obtaining building permits, launching a business, etc. India placed a high priority on a few factors, including

- Reporting measures,
- Business incorporation,
- Insolvency resolution,
- Cross-border trade, and

[3]Singhania & Partners LLP, 'India: Inbound and Outbound Mergers' (21 November 2022) <https://www.mondaq.com/india/corporate-and-company-law/1252516/inbound-and-outbound-mergers> accessed 21 June

[4]Kanika & Nancy, 'Cross-border Mergers and Acquisitions by Indian Firms-An Analysis of Pre and Post Merger Performance' (ISSN 2278-5612) <https://www.researchgate.net/publication/331083029_Cross_Border_Mergers_and_Acquisitions_by_Indian_firms-_An_Analysis_of_Pre_and_Post_Merger_performance/fulltext/5c64d122a6fdccb608c11829/Cross-Border-Mergers-and-Acquisitions-by-Indian-firms-An-Analysis-of-Pre-and-Post-Merger-performance.pdf> accessed 22 June 2023

[5]Ease of Dong Business <https://www.makeinindia.com/eodb#:~:text=India%20jumps%2079%20positions%20from,of%20Doing%20Business%20Ranking%202020%27.&text=To%20further%20enhance%20the%20ease,legal%20provisions%20have%20been%20decriminalized.> accessed 22 June 2023

- Obtaining building permits[6]

In order to boost cross-border mergers and acquisitions, the Made in India effort received increased attention, and restrictions on foreign direct investment were relaxed. India, a developing country, has a big population of skilled young people. Multinational corporations predominantly view this as an opportunity and seek to establish their enterprises through mergers or the acquisition of already-existing entities."Starting a business [in India] is less costly thanks to abolished filing fees for the SPICe company incorporation form, electronic memorandum of association and articles of association," the World Bank said.[7]

INBOUND AND OUTBOUND CROSS-BORDER MERGERS AND ACQUISITIONS

There are two types of mergers and acquisitions laid down under the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016:

Inbound Cross-Border Mergers and Acquisitions: When a foreign business partners with an Indian business or fully acquires an Indian business, inbound M&A occurs. An Indian firm and a foreign corporation having a stake in the new corporation is the corollary company produced by such a merger or acquisition and it shall function in India only.

Examples: Flipkart, an Indian company was acquired by Walmart and Walmart bought a 77% stake in the company. The resultant company, however, functions in India. This is an inbound cross-border merger.[8]

Another example of an inward merger and acquisition is Daiichi's June 2008 acquisition of Ranbaxy, a multinational pharmaceutical business based in India. However, the arrangement went sour six months into the business, and it was abandoned as a result.

Outbound Cross-Border Merger and Acquisitions: When a resident of India or an Indian-incorporated company holds or acquires securities in a foreign company in accordance with

---

[6]Press Information Bureau, 'India Improves Rank by 23 Position in Ease of Doing Business' (2018)<https://pib.gov.in/newsite/PrintRelease.aspx?relid=184513> accessed 22 June 2023
[7]'Ease of Doing Business: What policies have helped India march forward in World Bank's Ranking?' *Business Today* (24 October 2019)<https://www.businesstoday.in/latest/economy-politics/story/ease-of-doing-business-what-policies-have-helped-india-march-forward-236024-2019-10-24> accessed 23 June 2023
[8]Peerzada Abrar, 'Walmart buys 77% stake in Flipkart' *The Hindu* (09 May 2018) <https://www.thehindu.com/business/Industry/walmart-buys-major-stake-in-flipkart/article61837730.ece> accessed 23 June 2023

the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004, and the resulting company is a foreign entity, this is known as outbound M&A.[9]

Examples: Tata Motors acquired Jaguar and Land Rover in 2011. Tata Motors, an Indian automotive manufacturing company went ahead to acquire Jaguar and Land Rover (JLR) from the Ford Motor Company. Subsequent to the acquisition, the JLR became part of the Tata Motors Group.[10]

Other outbound cross-border mergers include the acquisition of Hamleys by Reliance Group and the acquisition of Corus by Tata Steels.[11] The Foreign Exchange Management (Cross-border Merger) Regulations, 2018, contain provisions governing cross-border mergers or acquisitions of Indian companies by foreign companies and their reciprocal relationships. These clauses were added to the legislation in order to allow Indian corporations to merge with overseas corporations. Prior to this, there were no rules governing cross-border mergers and acquisitions, therefore an Indian company could only merge with other Indian enterprises. To make an alliance or acquire an international company, the Indian company must take prior approval of the Reserve Bank of India and comply with the provisions given under Section 234 of the Companies Act, 2013 and Rule 25A of the Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016.

PRE AND POST-MERGER PERFORMANCE

Cross-border mergers and acquisitions are getting more and more ubiquitous. Its expansion and popularity are due to an array of factors. Many people select the M&A route in order to remain competitive and capitalise on the changing market trends by reducing costs through synergies. Others, however, view M&A as an exit strategy that will allow them to liquidate their business at the highest price while also protecting their reputation and good name. What is the actual difference that cross-border mergers and acquisitions generate in businesses upon their successful implementation? The most important factor to take into account is whether cross-border mergers and acquisitions produce a return commensurate with the risk taken. The case study that follows shows the impact of cross-border M&A before and after.

[9]Notification, 'Foreign Exchange Management (Cross-border Merger) Regulations, 2018 (20 March 2018) <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11235&Mode=0> accessed 23 June 2023
[10]Singhania & Partners LLP, 'Inbound and Outbound Mergers' (14 November 2022) <https://singhania.in/blog/inbound-and-outbound-mergers#:~:text=In%20this%20case%2C%20the%20resultant%20company%20is%20a%20foreign%20company,some%20examples%20of%20Outbound%20Mergers.> accessed 24 June 2023
[11]*Ibid*

Jet-Etihad deal (2019): Jet Airlines Ltd., an Indian airline company gave away its 24% stake to Etihad Airways, a national airline of the United Arab Emirates (UAE) by merging, in 2019. In this deal, Jet Airways joined hands with Etihad Airlines to enhance its services and cover a substantial portion of its debt with the help of an overall infusion of cash. The deal generated a total cash inflow of $750 million, allowing Jet to reduce its debt from $2.1 billion to $1.5 billion.*"Strategic investment under the FDI policy of the Government of India will deliver wide-ranging revenue growth and cost synergy opportunities for both airlines"*.[12]

The successful merger brought India's metro airports more passengers, more flights, and more money. It also gave them direct access to a worldwide network and improved consumer advantages and efficiency, among other things.

Daimler-Chrysler Merger: Chrysler Corporation was one of the biggest automobile manufacturers in the US. Daimler-Benz is another world-class automotive company based in Germany. The two major competitors in the automotive sector planned to merge in 1998 in order to control the whole US and European markets, expand their global presence, and create the largest monopoly in the production of high-end luxury vehicles. The post-merger integration, however, did not go as expected because Daimler-Benz was never interested in a merger and was instead watching for an opportunity to acquire Chrysler Corporation.[13]

Cross-border mergers and acquisitions are frequently chosen for their ability to increase capital, create jobs, and transfer technology. This is due to the fact that cross-border M&A boosts capital many times over when two businesses join forces or acquire one another because not only money but also assets and technological expertise will be brought in. Cross-border M&A has many financial benefits, but it also has drawbacks that can occur if the deal is not properly closed. Due diligence, political and cultural concerns, legal and tax considerations, as well as tax and accounting considerations, are some of the issues and challenges that surround cross-border mergers and acquisitions.

[12]AneesPhadnis, 'All you need to know about Jet-Etihad deal' *Business Standard* (20 November 2013) <https://www.business-standard.com/article/companies/all-you-need-to-know-about-jet-etihad-deal-113112000302_1.html> accessed 24 June 2023

[13]Tarek ALDAOUD, 'M&A Towards a Global Reach Strategy: Cross-Border M&A Success and Failure: The Case of Daimler-Chrysler Merger' (2015)<https://repositorio-aberto.up.pt/bitstream/10216/80042/2/36304.pdf> accessed 24 June 2023

ARE CROSS-BORDER MERGERS AND ACQUISITIONS GAINING MOMENTUM?

Cross-border mergers and acquisitions are gaining speed as a result of the FDI policy's liberalisation and simplification and India's rise to prominence as a top location for foreign investment. Cross-border mergers and acquisitions are encouraged by governments since they greatly stimulate the economy and, when done carefully, provide a solid foundation for business growth and survival. But in order to prevent future inconsistencies, the following must be carefully established when a cross-border M&A is likely to occur.

- Proper Management
- Business Policies
- Cultural Integration
- Taxation
- General Business Conditions in the Country [14]

FUTURE OF CROSS-BORDER MERGERS AND ACQUISITION: SUSTAINABLE OR NOT?

Since they became more and more popular over the past 20 years, cross-border mergers and acquisitions have been a contentious subject. With benefits come a package of unknown outcomes that, frequently, lead to the collapse of such mergers or acquisitions.As a result, if the merger fails, the merging companies stand to lose a lot. This brings up the issue of whether or not to engage in cross-border mergers and acquisitions. Cross-border merger and acquisition negotiations can fall through for an acting number of reasons, including

- Present Indian company law and merger regulations for cross-border mergers and acquisitions and talk about mergers and acquisitions with foreign companies. However, they remain silent on the concept of cross-border demergers, the concept of compromise and arrangement in order to restructure the deal, and such.[15]
- In order to sanction any cross-border merger in India, it requires the approval of various authorities and the final approval is given by the National Company Law Tribunal (NCLT). The NCLT has final jurisdiction over a large number of matters

[14]Cross-border Mergers and Acquisitions (SM II_HANDOUT 08) <https://www.lkouniv.ac.in/site/writereaddata/siteContent/202003291621085882smitasingh_cross_border_m_a.pdf> accessed 25 June 2023

[15]Rödl& Partner, 'M&A Evolution in India: Cross-border Mergers – A Perspective' (01 August 2022) <https://www.roedl.com/insights/india-ma-cross-border-mergers-evolution> accessed 25 June 2023

relating to oppression and mismanagement, voluntary liquidation, etc. While handling all these matters, the merger approvals take a back seat often resulting in delays or continuous hauls. Moreover, the fast-track facility as provided under Section 233 of the Companies Act which enables domestic firms to use the fast-track process to merge/amalgamate, is not available for cross-border mergers.[16]

- The existing tax laws of our country provide for tax exemptions in case of inbound mergers and demergers. However, in the case of outbound mergers, no relaxations in any merger or demerger are provided which negatively affects the investors planning to merge/amalgamate with a foreign firm. In such cases, the potential investors take a step back before going ahead with the merger or acquisition since it comes with the additional costs of paying taxes.[17]
- The Foreign Exchange Management Act specifies the range of activities that the resulting firm, following a merger or acquisition, is permitted to carry out, including the export and import of goods, acting as a buying and selling agent, developing software, etc. Such a merger shall not be sanctioned if the other operations even if legally carried out by the resulting firm, do not come under the FEMA list of activities.[18]
- The FEMA cross-border merger laws outline the definition of a "foreign company," which applies to both inbound and outbound mergers and refers to a corporation that should be incorporated under a specified jurisdiction. This concept, however, conflicts with "Rule 25A of Companies Merger Rules" rules, which restricts the requirement of specified jurisdiction to outbound jurisdictions only. Not only are the rules governing the cross-border M&A not aligned, but it even makes it more difficult for the companies to comply with the same.

CONCLUSION

Towards the end, it is evident that cross-border mergers and acquisitions hold huge potential and can prove to be invaluable for companies to increase their share price by giving them a competitive edge over other players in the same industry in the long run. However, the regulatory compliances given under cross-border mergers and acquisitions still require some

[16]*Ibid*
[17]*Ibid*
[18]CA. DivyaAshta, 'Cross-border Mergers – A Summary of Recent Developments' (June 2018) <https://ibclaw.in/wp-content/uploads/2019/09/Cross-Border-Mergers-–-A-Summary-of-Recent-Developments-Jun18.pdf> accessed 25 June 2023

reforms to make compliance more hassle-free by streamlining the whole process. Another suggestion is to include cross-border M&A deals under Section 233 of the Companies Act so that the approval for sanctions can be granted on a fast-track basis. If the tax and regulatory authorities properly handle these irregularities, it might lead to a considerable increase in cross-border M&A and would create an enabling environment for both; investors and the government.