CROSS BORDER MERGER & ACQUISITION: TRENDS AND CHALLENGES

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ABSTRACT

International corporate growth is mostly driven by cross-border mergers and acquisitions (CBMAs), which allow companies to grow, improve synergies, and diversify risk. These deals, however, present difficult strategic, financial, and legal issues. This study looks at the Companies Act 2013, the FEMA (Cross Border Merger) Regulations 2018, the SEBI Takeover Code, and the RBI Guidelines about India's legal environment for CBMAs. These laws guarantee adherence to foreign currency rules, shareholder rights, tax laws, and competition standards. CBMAs are classified as inbound mergers, where a foreign company merges with an Indian entity, and outbound mergers, where an Indian company merges with a foreign entity. The study explores key challenges such as taxation, regulatory complexity, cultural integration, geopolitical risks, and due diligence. India's tax framework includes transfer pricing regulations, double taxation treaties, and anti-avoidance rules like GAAR. Global M&A choices are increasingly influenced by strategic considerations like sustainability, digitization, and ESG compliance. Despite these obstacles, CBMAs have benefited from government programs like Made in India, PLI schemes, and increased FDI. Case studies and recent legislative developments demonstrate how legal and strategic factors are always changing. This study emphasizes how crucial financial prudence, legal compliance, and strategic due diligence are to successful cross-border deals. It offers information on new trends influencing CBMAs, guaranteeing sustained company expansion in a changing global environment.

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INTRODUCTION

When a company is absorbed taken over or acquired by any other company or entity is called a merger or acquisition. But when the same transaction takes place between companies of two different countries it is referred to as Cross Border Merger or Acquisition. The company getting acquired or the company that is acquiring can be a private company a government company or even a Private Sector Undertaking. In a cross-border merger, the assets and liabilities of both companies are combined and formulate a new company (A+ B = C) whereas in a cross-border acquisition, the control and authority get transferred to the acquiring company either by purchasing the assets and liabilities or by taking the major shareholding of the company. (A+B= A/B). The merger of an Indian Company with a foreign company is majorly governed by the provisions of the Companies Act, 2013 FEMA (Cross border merger) Regulation, 2018 in India. There are 2 ways in which a cross-border merger takes place i.e. inbound Merger and Outbound merger.

INBOUND MERGER

An inbound merger happens when the resultant company is an Indian Company. It will be called an inbound merger when it fulfils the following conditions:

1. The transfer between a foreign company and an Indian company should be according to the provisions related to sectoral caps, pricing guidelines, and other requirements of Foreign Exchange laws of India and the provision of Foreign Exchange Management (Overseas Investment) Regulations, 2022 and Foreign Exchange Management (Overseas Investment) Rules, 2022 when a foreign company is a Joint Venture or Subsidiary of other Indian company.

2. All the borrowing of foreign companies becomes borrowings of the Resultant Company within 2 years as per Foreign Exchange Management Act, 1999 (FEMA) rules and regulations.

3. The resultant Indian company can acquire, transfer, or hold the assets of the Foreign Company outside India according to FEMA Rules and Regulations but if the Resultant

Company is not allowed to hold or acquire assets outside India then it must sell it within 2 years from the sanctioning of scheme from NCLT.

4. From the date of sanction of the scheme the Resultant Company can open a bank account in a foreign country for a maximum of 2 years and can use it for cross-border transactions of the company only.

5. When a foreign company has an office outside India then that office will now be treated as a branch of the Resultant Indian Company.

OUTBOUND MERGER

Outbound Merger happens when the resultant Company is a Foreign Company. The following conditions need to be fulfilled by the companies for an Outbound Merger:

1. Any Indian person having a shareholding in the transferor Indian company can hold the securities of the Resultant Company as per the provisions of Foreign Exchange Management (Overseas Investment) Regulations, 2022, and Foreign Exchange Management (Overseas Investment) Rules, 2022.

2. All the borrowing of the Indian transferor Company will be transferred to the Resultant Company and shall be repaid as per the scheme mentioned under the Companies Rule.

3. The resultant Foreign Company can acquire, transfer, or hold the assets of the Indian Company in India according to FEMA Rules and Regulations but if the Resultant Company is not allowed to hold or acquire assets in India then it must sell it within 2 years from the sanctioning of scheme.

4. The Resulting company can open a special account in India for a maximum of 2 years as per provisions of Foreign Exchange Management (Deposit) Regulations, 2016 only for cross-border transactions.

5. When an Indian company has an office in India then that office will now be treated as a branch of the Resultant Foreign Company.

REGULATORY FRAMEWORK IN INDIA

The major acts and regulations of India that control and regulate Cross Border mergers are as follows:

1. Companies Act, 2013 and Companies (Compromises, Arrangements, and Amalgamations) Rules: Companies Act, 2013 provides section 234 under chapter XV which provides regulation for the Merger and Amalgamation of a Company with a Foreign Company[1], which provides procedures for merging with countries outside India, along with Rule 25A of Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016 (Companies Merger Rules) allows mergers between Indian companies and foreign companies incorporated in certain jurisdictions outside India.

2. Foreign Exchange Management Act, 1999 (FEMA) and Foreign Exchange Management (Cross Border Merger) Regulations 2018: In exercise of the powers conferred by sub-section (3) of section (6) read with section 47 of the Foreign Exchange Management Act, 1999 (42 of 1999), the Reserve Bank makes the regulations Foreign Exchange Management (Cross border merger) Regulation, 2018 relating to merger, amalgamation, and arrangement between Indian companies and foreign companies.[2] It provides guidelines and all the requirements to be followed by the companies merging across borders and addresses all the issues that may arise in a cross-border merger.

3. SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011: In India, SEBI regulates the security market and acquisitions. It also provides mandatory disclosure, open offer Requirements, minority shareholders rights relating to acquisition, and cross-border acquisition of shares.

4. Reserve Bank of India: Some cross-border mergers require prior approval from RBI to ensure compliance with FEMA Regulations for smooth transfer of shares capital and borrowings. RBI checks that such transfer is not affecting adversely the financial stability of India. Other than the above-mentioned acts and rules, there are certain other regulation and acts also which plays some role in cross-border mergers and transactions such as the Competition Act, 2002, Insolvency and Bankruptcy Code, 2016, Income Tax Act, 1961 and approval by the Competition Commission of India (CCI) which is an authority which ensures there is no monopoly or anti-competition in the market due to a Cross Border Merger.

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[1] Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).

[2] Reserve Bank of India, Master Direction - Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017, (June 7, 2017), available at https://www.rbi.org.in.

PROCEDURE OF CROSS-BORDER MERGER & ACQUISITIONS

1. Due Diligence: Due diligence is the key to success in the complex world of cross-border mergers and acquisitions; it is a complex symphony of legal examination, financial forensics, and cultural awareness. To avoid the deal sinking into a pit of unanticipated liabilities, it necessitates a diligent investigation of regulatory complexities, tax implications, and geopolitical undercurrents. The conclusion is that prudent due diligence is essential to a long-term corporate merger and not just a formality.

2. Valuation: A complex ballet of asset evaluation, risk reduction, and synergistic potential replaces simple math in cross-border mergers and acquisitions, where valuation is an alchemical fusion of financial knowledge, market forecasting, and strategic vision. It requires an astute analysis of underlying value, taking into account exchange rate swings, jurisdictional tax complexities, and macroeconomic upheavals that could turn a profitable transaction into a financial nightmare. Valuation is essentially the lodestar that leads business organizations through the perilous waters of global consolidation rather than being a pointless numerical exercise.

3. Financing and Taxation: In the high-stakes game of cross-border M&A financing, acquirers use loan, equity, or hybrid instruments to negotiate complex financial, legal, and geopolitical issues. While equity financing raises money but runs the danger of dilution, leveraged buyouts drive transactions with borrowed capital, and hybrid structures combine the two for flexibility. Each acquisition is a master class in financial strategy and corporate daring, with layers of intrigue added by currency swings, legal obstacles, and shareholder interests.

4. Shareholder's approval: In cross-border M&A, shareholder approval is an essential hurdle that guarantees investor interests are protected. The type of deal will determine whether a simple majority or supermajority is needed. Although the board provides disclosures, assessments, and suggestions, the process may be interrupted by rival bidders or activist investors. In this high-stakes situation, shareholder approval has the power to make or break a deal.

5. Regulatory approvals: The final obstacle in cross-border mergers and acquisitions (CBMA), where transactions are subject to close examination by several different jurisdictions, is regulatory approval. Financial watchdogs make sure that sector-specific regulations are followed, competition authorities review antitrust concerns, and foreign investment regulators consider the implications for national security.

TRENDS SHAPING CROSS BORDER MERGER & ACQUISITION

1. Growth in Strategic M&A Activity: The Merger & Acquisition in India has increased from 37.46 billion dollars in 2024 to 44.86 billion dollars in 2025[3] Which shows a good growth rate. But as far as Cross Border is concerned, there is was a general increase from 472 in 1985 to 8500 in 2023[4]. India remains a big open opportunity for other countries and big companies for Foreign Direct Investment (FDI), who especially want to enter or diversify their business in Asian countries.

2. Globalization and Market Expansion, the Government of India's Make in India policy and Production Linked Incentive (PLI) initiative has attracted various foreign businesses and MNCs to merge with or acquire the Indian companies involved in manufacturing business. On the other hand, Indian companies also want to enter the global market, so cross-border M&A is a favourable option for both parties.

3. Digitalization and innovation in technology are at a rapid pace which has increased cross-border mergers as companies want to acquire or get merged with other companies that have new technologies and R&D capabilities to stay at the top of the competition.

4. ESG & Sustainability: ESG stands for Environmental, Social, and Governance. In cross-border mergers & acquisitions, ESG plays a crucial factor. ESG has become a way of improving the business value and minimizing the risk but these ESG standards impose some restrictions on profitability by increasing expenses. ESG helps in selecting the Target Company, negotiations, and pre-merger plans and post-merger plans for M&A as a company wants to acquire the target company with good ESG credentials and more stability as they align their strategies and plan with sustainable and social impact prioritizing long-term financial success. MNCs and big giants face the problem of maintaining the viability of cross-border mergers by following global standards which are changing day to day by balancing the advantages of ESG compliance with its consequences.

[3] Inst. for Mergers, Acquisitions & All., Global M&A Report 2023, IMAA (2023) https://imaa-institute.org/global-ma-report-2023

5. Due Diligence Considerations and Complexities: Due Diligence is essential for examining the risk factor involved by evaluating the danger that may arise during the transaction. This includes detailed sound information on the business, working, transaction, nature, and object of the target business. Before entering into a cross-border M&A, a DD process must be followed to know the goals and expectations of the company from that transaction which may be affected by the laws and regulations of different countries. Not performing an extensive Due Diligence could affect the business permanently and can influence its workings. Due Diligence also helps in Tax assessment and finding out the synergy benefits arising from that transaction.

CHALLENGES

Legal and Regulatory Challenges: The phenomenon of Cross Border Mergers and Acquisition, emblematic of Globalization is fraught with a labyrinthine array of Legal intricacies that demand careful navigation. These mergers wherein corporate entities across the sovereign frontier to expand their commercial destinies are beset by regulatory, jurisdictional, taxation, and compliance requirements. Legal challenges emerge as different countries have different sets of rules and regulatory frameworks including antitrust laws, Intellectual Property Laws, Privacy laws, and Dispute Resolution which need to be complied with by both companies entering into M&A. However, a major issue faced by the companies is the complexity relating to Tax considerations.

2. Taxation Aspect: A complex web of statutory demands, court rulings, and the ongoing struggle between revenue augmentation and taxpayer facilitation make up India's tax system. Businesses must manage intricate requirements such as transfer pricing laws, double taxation avoidance agreements (DTAAs), and the stringent General Anti-Avoidance Rule (GAAR) monitoring while engaging in cross-border transactions. India wants to establish an investor-friendly tax system, but there are still obstacles because regulatory objectives frequently conflict with convoluted processes and ambiguous enforcement.

The taxation complexities inherent in cross-border mergers unfurl as a veritable Gordian knot of fiscal jurisprudence wherein the merging of different countries' tax systems creates a confusing mix of conflicting rules and regulations. This compound procedure of combining businesses overseas is entwined in a web of tax treaties, withholding taxes, capital gains rules, and the risk of profit being shifted. Making it difficult for what otherwise could have been a smooth corporate integration.

3. Vodafone-Hutchison Acquisition: In 2007, Vodafone International Holdings acquired a 67% stake in Hutchison Essar, an Indian telecom company, through a transaction involving offshore entities. The Indian tax authorities later demanded capital gains tax from Vodafone, leading to prolonged litigation. The dispute centred on whether India had jurisdiction to tax a transaction between two non-Indian entities involving assets in India.[4]

4. Regulatory Aspect: Cross-border mergers are a symphony of economic synergy in the big theatre of global trade, but they often encounter the daunting ramparts of regulatory obstacles. This procedure is a complex diplomatic tango because of the juxtaposition of many legal systems, protectionist inclinations, and nationalistic economic agendas. Using the sword of competition law, regulators examine transactions to make sure they don't turn into monopolistic giants. The threat of market domination encourages invasive actions from organizations like the EU Commission, the US FTC, and India's CCI

5. Walmart- Flipkart & the Regulatory Wrangle: Technically not a merger, it faced scrutiny under multiple legal and regulatory frameworks, exposing India’s fragmented regulatory architecture. FDI Policy: Walmart’s acquisition of Flipkart triggered Press Note 2 (2018) restrictions on e-commerce entities with foreign investments, leading to policy uncertainty.[5] Competition Law: The deal sailed through CCI approval, but opposition from traders’ bodies (e.g., CAIT).

Taxation Issues: Flipkart’s investors (Soft Bank, Tiger Global) faced capital gains tax liabilities, demonstrating the unpredictability of India’s tax regime.[6]

Strategic Issues: Mergers present strategic challenges that go beyond simple financial calculations and turn into a high-stakes chess game in which businesses must coordinate a symphony of operational integration, cultural fusion, and regulatory compliance. The attraction of synergies must be balanced against the dangers of misalignment in this delicate interplay between vision and pragmatism, where the convergence of leadership ideologies can either

[4] Vodafone Group Plc & CK Hutchison Group Telecom Holdings Ltd., Merger of Vodafone UK & Three UK to Create One of Europe's Leading 5G Networks, VODAFONE (June 14, 2023), https://www.vodafone.com/news/corporate-and-financial/merger-vodafone-uk-three-uk-europe-leading-5g-networks

[5] Walmart Inc., Walmart and Flipkart Announce Completion of Walmart Investment in Flipkart, India’s Leading Marketplace E-Commerce Platform, WALMART CORPORATE (Aug. 18, 2018), https://corporate.walmart.com/news/2018/08/18/walmart-and-flipkart-announce-completion-of-walmart-investment-in-flipkart-indias-leading-marketplace-ecommerce-platform

[6] Flipkart, Walmart Completes Flipkart Investment, FLIPKART STORIES (Aug. 18, 2018), https://stories.flipkart.com/walmart-flipkart-investment-complete

spark growth or cause strife. Companies have to deal with the demands of market positioning, the need to rebalance competitive dynamics, and the constant threat of geopolitical volatility in addition to their balance sheets. Because a poorly thought-out merger is more than just a failed transaction it is an existential disaster that has the potential to tear apart the very fabric of corporate ambition the interaction of regulatory scrutiny, shareholder expectations, and worker absorption necessitates nothing less than strategic dexterity.

GE-Honeywell Merger-2001: General Electric's proposed acquisition of Honeywell was approved by U.S. antitrust authorities but blocked by the European Commission. The EU's concerns over competition issues. The differing decisions by U.S. and EU regulatory authorities in the GE-Honeywell merger case highlight the challenges arising from a lack of harmonization in international competition laws.[7]

Geopolitical Risk: To avoid their strategic goals being derailed by the whims of world politics, corporate actors must not only conduct financial due diligence but also understand the volatile calculus of international relations. Geopolitical risk in mergers is not merely an incidental concern; rather, it is a powerful determinant of deal viability. Growing economic nationalism is prompting regulators to examine foreign investments more closely. They prevent or alter mergers and acquisitions through national security reviews, FDI restrictions, and antitrust legislation. Encouraged by the rise of economic nationalism, regulatory watchdogs are scrutinizing foreign investments more closely and using national security assessment procedures, antitrust laws, and limits on foreign direct investment (FDI) to block or alter planned deals. The ensuing maze of compliance, negotiations, and geopolitical brinkmanship makes the completion of a merger a master class in diplomatic acuity rather than just a legal or financial issue.

CONCLUSION

The combination of capital, entrepreneurship, and ambition across sovereign borders is exemplified by cross-border mergers and acquisitions, which propel economic integration despite tax obstacles, geopolitical dangers, and regulatory complexity. India’s regulatory structure, which includes the Companies Act, FEMA, SEBI, and RBI directives, encourages both inward and outbound mergers by striking a balance between international investment and

[7] Charles A. James, The GE/Honeywell Decision: The U.S. Dep't of Justice Perspective on Global Antitrust Enforcement, U.S. DEP’T OF JUST., ANTITRUST DIV. (July 18, 2001), https://www.justice.gov/atr/speech/ge-honeywell-us-decision

domestic interests. Despite obstacles including cultural differences and economic nationalism, globalization, digitization, and ESG requirements guarantee their continued relevance. With programs like PLI and Make in India, India is ready for more international trade. In the end, these endeavours' success depends on strategic vision, legal knowledge, and sound financial judgment, solidifying their influence on the direction of international trade.