

**CROSS BORDER MERGERS– A PRECIS OF RECENT DEVELOPMENT**

PRIYANKA BHATTACHARYYA

AMITY LAW SCHOOL, KOLKATA

**ABSTRACT**

*India is one of the fastest developing major economies in the world. Recently due to the changing trends and continuous developments taking place in terms of globalization, technology and the changes taking place in the regulatory regime governing cross border mergers has contributed immensely to increasing the competition and has broader the scope for mergers and acquisitions operations. Substantially the Cross-border deals are more complex than domestic deals as the number of parameters to think about and anticipate at pre-deal and post-deal level in a Merger deal is huge and it is a complex process indeed. The 1990s were the golden era for cross-border Mergers in the Asia Pacific, with a roughly 200 percent increase in the number of such transactions<sup>1</sup>. This region was preferred for cross-border M&A because most countries in the region were liberalizing their markets and policies, which gave those deals a much-needed boost.*

**INTRODUCTION**

The economic liberalization in India in 1991<sup>2</sup> has shifted the economy towards a market-oriented economy and has also led to expanding the rule of foreign investment procedures. Cross-border mergers have seen remarkable expansion over centuries<sup>3</sup>, due to a desire to avoid tariffs and nontariff obstacles emerging due to the international trade and taxes; to get new financing alternatives; to acquire technology; to spread R&D<sup>4</sup> costs across a larger base. Several factors

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<sup>1</sup> Jyoti Kohli, *Cross Border Merger – Meaning, Types, Procedure & Main Rules & Regulation*, Tax guru, <https://taxguru.in/company-law/cross-border-merger-meaning-types-procedure-main-rules-regulation.html> (2020)

<sup>2</sup> Patrick A Gaughan, *Mergers, Acquisitions, and Corporate Restructurings*, (2017)

<sup>3</sup> Shruthi Shenoy, *Cross Border Mergers – Key Regulatory Aspects To Consider*, Mondaq, <https://www.mondaq.com/india/maprivate-equity/695282/cross-border-mergers-key-regulatory-aspects-to-consider>, (2018).

<sup>4</sup> Michael A Hitt & Vincenzo Pisano, *The Cross-Border Merger and Acquisition Strategy: A Research Perspective*, *Research gate*, Vol. 1 Iss: 2, *The Journal of the Iberoamerican Academy of Management*, (pp. 133 –144),(2003).

put in place to moderate this growth include Protecting critical sectors; limiting managing interest rates and regulating repatriation of earnings and dividends, basically, the financial and economic (macro and micro) roots, which influence their magnitude and direction of the stock and bond prices of the foreign nation, are key cause variables influencing cross-border mergers and acquisitions. A successful merger involves the due diligence and research to be done so that the proper merger is done with the targeted company in the foreign market and that should also meet with the profile of the buying company or acquiring company which leads to an effectively integrated merger.

## **NOTION OF CROSS BORDER MERGERS**

The consequence of a cross-border merger is the transfer of power and control over to the merged company. Basically, the assets and liabilities of two companies from two different countries are combined into a single legal entity in a merger. The cross-border merger in the Indian perspective involves an Indian corporation combining with a foreign corporation or vice versa and the companies involved therein may be Private, Public, or State-owned entities<sup>5</sup>. Simply the term "cross-border mergers" refers to a merger involving international owners. The trend in the significant rise of cross-border mergers has accelerated globalization and furthermore. India is steadily improving its ease of doing business rankings and is increasingly becoming a preferred business destination due to the increasing economical development that has given rise to an increase in the Cross- Border merger globally. The cross-border merger is mentioned under section 394 of the Companies Act, 1956<sup>6</sup> that permits the merger of a foreign company with an Indian company and not vice versa. This specific section has been criticized by the Hon'ble Judiciary because of its conservative and outdated approach of viewing business with foreign entities with scepticism. The Cross-border mergers are governed following Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016 notified under the Companies Act, 2013<sup>7</sup>.

Majorly the Cross-border Mergers is of two types of Inbound Merger and Outbound Merger. Inbound Mergers these cross-border mergers are in which the resulting company is an Indian

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<sup>5</sup> Sakshar Law Associates, *Cross Border Merger in India*, Lexology, <https://www.lexology.com/library/detail.aspx?g=b86301e2-1b3e-43a0-a5cb-faaaea459d80> (2021).

<sup>6</sup> THE COMPANIES ACT, 1956, NO. 4 Acts of Parliament, 1956 (India)

<sup>7</sup> 7th Edition, Avtar Singh, *Company Law*, (2021).

company. It simply implies that a foreign corporation combines with an Indian corporation, resulting in the formation of an Indian Company. As an illustration, The TOI (Times of India) Group had acquired over the UK-based Virgin Radio. It was the take over of the first British media outlet by an Indian company and the cross-border deal was for Rs.445 crores. It was when the first time when the British media outlet was taken over by an Indian Company. The Indian Company announced plans to re-branding Virgin Radio and hence it can be stated as a cross-border deal where the foreign investors combined with the Indian investors resulting in the formation of an Indian Corporation. Another overseas cross-border deal of Mahindra & Mahindra taking over 90% of stake in Schonewiss, a leading company in the forging sector in Germany. In 2007, Tata Steel has acquired Corus, a European steelmaker, for \$12.02 billion, making it the world's fifth-largest steel manufacturer. In 2006, Another biggest Inbound merger of Arcelor and Mittal group. The multinational steel manufacturing corporation merged to form ArcelorMittal. Subsequently, it was a takeover and a merger of Arcelor for \$38.3 billion by Mittal Steel (an Indian-owned company). It has resulted in one of the most hostile takeovers and mergers. A recent acquisition deal that occurred in 2019 was of the OYO group acquiring the Leisure Group (a vacation rental company that manages homes, holiday parks, and apartments in Europe) for \$ 369.5 million<sup>8</sup>.

Outbound Merger in which the resulting company formed out of the merger is a foreign company. Basically, in this an Indian Company merged with a foreign company ensued in the formation of a foreign company. As an illustration in the year 2018, the largest outbound deal took place involving an Indian company and a foreign Company as a result of which 77% of Flipkart's share was acquired by Walmart for \$16 billion<sup>9</sup>.

## **REGULATION TO BE ADHERED WITH DURING CROSS BORDER MERGER**

- **Regulation needed to be followed during an Inbound Mergers:**

**Issuance of Securities:** The Securities issued by a foreign corporation to an Indian company may be issued to both persons resident in India and person resident outside India. In case the

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<sup>8</sup> Amit Raja Naik, 2019 *In Review: Top 10 High-Profile Start-up Acquisitions in India*, Inc42 Staff, <https://inc42.com/features/2019-in-review-top-10-high-profile-startup-acquisitions-in-india/> (2019).

<sup>9</sup> P. Bala Bhaskaran and Nasheman Bandoowala, *Walmart's Acquisition of Flipkart: Emerging Paradigm of the Digital Era*, *journals.sagepub.com*, <https://journals.sagepub.com/doi/pdf/10.1177/2277977919881404> (2020)

person is the resident of India, then the acquisition should be in compliance with Regulation 6 and 7 of the ODI Regulations. Wherein the person residing outside India, then the issuing of securities must be in accordance with the pricing rules, sectoral caps and other relevant guidelines set out in the Cross-Border Regulation. In case of the foreign entity the joint venture, must follow the rules set out in the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004.

**Branch/Office outside India:** In compliance with the Foreign Exchange Management (Foreign Currency Accounts by an Individual Residing in India) Regulations, 2015, a foreign company's office/branch outside India shall be considered as the resulting company's office outside India.

**Vesting of Assets & Liabilities:** If there are any borrowings or guarantees of the transferor's corporation would become the resulting company's borrowings or guarantees. Hence to comply with the external commercial borrowing compliance, a two-year timeframe has been issued.

Any asset obtained by the resulting corporation may be transferred in any capacity authorised by the Act or regulation. If such an asset is not allowed to be acquired, the resulting company must sell it within two years from the date of sanction of order by the National Company Law Tribunal (the NCLT) and the sale proceeds must be deported to India via banking channels. In case where the resultant corporation is not entitled to hold any liabilities outside of India, the liability may be extinguished from the sale proceeds of those overseas assets within two years.

The resultant Corporation can open a bank account in the foreign country's jurisdiction to oversee transactions related to the merger for the duration of two years after the NCLT approves the Scheme of Sanction.

**Valuation:** The valuation shall be prepared in compliance with Rule 25A of the Companies (Compromises, Arrangements, and Amalgamations) Rules 2016, that is, by Registered Valuers who are the members of recognised professional bodies in the transferee company's prescribed jurisdictions, and such valuation are done in accordance with widely agreed accounting and valuation standards.

- **Provisions needed to be followed in Outbound Mergers:**

**Issuance of Securities:** The issue of securities by the foreign corporation to the shareholders of both the entities which include both Indian residents and non-Indian residents. Wherein if in case a share is being to the person resident in India, then the acquisition will be subject to the ODI Regulations issued by RBI.

**Branch/Office outside India:** In compliance with Foreign Exchange Management (Establishment in India of a branch office or a liaison office or a project office or any other place of business) Regulations, 2016, a foreign company's office/branch outside India shall be considered as the resulting company's office outside India.

**Vesting of Assets & Liabilities:** The guarantees or borrowings of the resulting corporation must be repaid according to the NCLT-approved scheme. Furthermore, they should not take on any liability that is not in accordance with the Act or the legislation. The Indian company's lenders should issue a no objection certificate to this effect.

Any asset acquired can be transferred in any manner permitted by the Act or the regulations enacted thereunder. If in any case the resulting corporation is unable to hold or acquire it, then it should be sold within two years from the date of the NCLT's sanction of the scheme and the sale proceeds must be subsequently repatriated outside India through banking channels. It would be possible to repay subsequent debts from the sale proceeds of such properties or securities within two years.

**Opening a Bank Account:** The resulting foreign entity is permitted to open a Special Non-Resident Rupee Account (SNRR Account) with the FEMA (Deposit) Regulations, 2016 for the purpose of managing transactions relating to the merger.

**Valuation:** The valuation shall be prepared in compliance with Rule 25A of the Companies (Compromises, Arrangements, and Amalgamations) Rules 2016, that is, by Registered Valuers who are the members of recognised professional bodies in the transferee company's prescribed jurisdictions, and such valuation are done in accordance with widely agreed accounting and valuation standards.

**Other Compliances:** The resultant corporation and/or the firms involved in the cross-border merger would be expected to submit reports as recommended by the RBI from time to time in consultation with the Government of India, It is important to note that at the time of the merger of a foreign company with an Indian company, the NCLT will consider the validity of the merger in accordance with the laws and Regulation of the country in which the foreign transferor body corporate was incorporated and if any transaction occurs involving the cross-border merger it shall be operated in accordance with Cross-Border Merger regulations and with the prior approval of RBI

### **FACTORS TO BE CONSIDERED IN CROSS- BORDER MERGERS**

Business reports suggest that cross-border mergers only occur when there are adequate opportunities so that both the companies foreign as well as domestic companies can gain benefit out of such deal otherwise the cross-border deal turns out to be grim. Many domestic firms undergo cross-border M&A to embellish their ability in the emerging financial markets and the foreign companies must conduct due diligence before pursuing a deal with a domestic company so that the risk factor such as the political risk, social risk, economic risk, and general risk associated with the merger is minimised and so that the foreign companies can gain maximum profit and so that the firms can evaluate their potential partners for a merger<sup>10</sup>. Apart from the risk factor, numerous other reasons encourage the companies to pursue cross-border mergers: The globalization and the consequent surge of cross-border Merger activity of financial markets; Due to the market pressures and increasing international competition; Due to the technological advancements new market opportunities created which leads to the foreign companies merging with the domestic companies; For achieving objective and for growing profitability; To increase the production scale of the company; The Geographic diversification, resulting in the exploration of resources in other nations; It would also benefit in Tax planning.

### **CHALLENGES WITH CROSS BORDER MERGERS**

The cross-border mergers are similar to the domestic merger, but it has a thin line of difference which make the domestic mergers different from the cross-border merger is the huge involvement of international nature in it. There are many issues and challenges relating to the

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<sup>10</sup> Scott Whitaker and Andrew Scola, *Key considerations for cross-border M&A planning*, *Financial Management*, <https://www.fm-magazine.com/issues/2019/feb/cross-border-mergers-acquisitions-planning.html> , (2019).

cross-border mergers<sup>11</sup>: The political concerns of the countries in which businesses are formed are a critical consideration to consider in cross-border mergers; The cultural obstacles is a threat to the success of cross border merger; The legal consequences when a firm is merged they must investigate into various legal and regulatory challenges that they would certainly encounter. ; The Tax-related matters are generally complex in nature specifically when it comes to structuring the transactions. International Financial Reporting Standards (IFRS) must be implemented globally to make the process easier; The Due diligence is significant element of the cross-border merger process as due diligence is a challenge that can affect the terms and conditions of the merger and could also influence the deal.

## **LAWS GOVERNING CROSS-BORDER MERGERS IN INDIA**

The Companies Act provide provision for under section 234 and Rule 25A of the Companies Merger Rules read with Section 230 to 232 of the Companies Act. Previously to the enactment of the Companies Act Rule 2013 the Indian Corporation were prohibited from cross border mergers. Later with the notification in 2017 this amendment lifted the restriction and made Outbound mergers became a possible. Section 6 of the Competition Act 2002 put certain criteria which are ought to be followed by the merging companies such as the merger should meet the threshold limit, it should qualify to the combination rule laid down in the section 5 of the Act after getting qualified with the said provisions CCI must be provided a notice and then with in 30 days the approval of the proposed plan of the cross-border merger by the directors of the companies involved. Then in furtherance to the cross-border merger the documents are prepared. After the documentation, the law further the provides provision for the waiting period of 210 days from the very day of such notice given to CCI, section 29 and 30 deals with the purpose of holding an investigation to check the appreciable adverse effect on the competition that could arise due to this merger. After the investigation is done if the Competition Commission of India under section 31 of the act is satisfied that the answer is not negative for the question of appreciable adverse effect then shall proceed towards approving the scheme, but in case if the merger scheme leads to adverse effect on the competition, then the scheme is disapproved by CCI only under certain exception it is allowed only if there is a scope for modification can be

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<sup>11</sup> Neetika Ahuja and Vineet Aneja, *Challenges In Cross-Border Mergers*, *Lexology*, <https://www.lexology.com/library/detail.aspx?g=7448ce05-88ba-4d67-9c1d-84a47af484e4> (2020)

made. Other than Companies rule & Competition Act there are other provisions which govern the cross-border merger in India the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011; Foreign exchange Management Act; Transfer of Property Act 1882; Indian Stamp Act 1899; Insolvency and Bankruptcy Code 2016; The Department of Industrial Policy and Promotion (DIPP); Income Tax Act 1961.

## **POST-MERGER PERFORMANCE EVALUATION**

Across border merger can be assessed by comparing the published merger performance of the merged entities<sup>12</sup>:

1. **Return generated from the company:** The first parameter by which a company can be assessed is its return that is being generated by the entity basically the pre-merger performance has to be assessed and if the return of the company is appreciable higher then the merger is deemed to be successful.
2. **Cash flow and operational efficiency:** if the merger leads to the increase in the cash flow an expansion of the institution with its operational efficiencies, then it can be said that the merger is successful because with the operational efficiency the cash flow is also increased.
3. **Stock market response:** whenever a merger takes place it is important to be noted that stock market reacts well to the Cross Border merger announcement, the merger seems to be a good decision.

## **COVID: 19 AND IT IMPACTS ON THE CROSS- BORDER MERGERS**

When COVID-19 ravaged the globe in the early months of 2020, it hugely impacted the global economy, technology, globalization and led to uncertainty<sup>13</sup>. Generally, the economic impact massively affects the merger and acquisitions procedures which can be domestic as well as international in nature the COVID-19 will inevitably raise complication and would have a devastating effect on the globalization and economy of the country.

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<sup>12</sup> Kashayap Legal partner & Associate, *EVALUATION OF CORPORATE PERFORMANCE POST M&A*, kpalegal, <https://www.kpalegal.com/evaluation-of-corporate-performance-post-merger-acquisition> (2019)

<sup>13</sup> Philip Watkins and Tom Braiden, *The impact of COVID-19 on domestic and cross-border M&A*, financier worldwide <https://www.financierworldwide.com/the-impact-of-covid-19-on-domestic-and-cross-border-ma#>. YLO62KgzbIU (2020)



However, M&A activity has not come to a complete standstill. Now due to the effect of Covid 19 some bridge buyers are well positioned to take the advantage of the lower value target in this sector which is in the virtue of crisis. the COVID-19 has made some factors in the cross-border merger really difficult and challenging which is impacting the merger and acquisition internationally.

Due diligence: the due diligence procedure which is stated to be one of the important parameters in cross border merger has become extremely challenging during this current crisis as because of the ongoing lockdown and restrictions in different countries globally the companies can hardly maintain their focus on the due diligence procedure while merger which can latter lead to failure & unsuccessful merger.

Transaction documentation: during this current crisis it has become very difficult for the companies merging to properly maintain their documentations and agreement. The crisis is also becoming is creating a huge difficulty in completing after transactional obligations and documentations.

## CONCLUSION

It can be concluded that as the corporate sector in India is rapidly moving in the direction of a degree wherein globalisation and its concepts are supposed to be established with the help of states through their favourable legislation. however, due to difference in the technology, social difference, economical difference, political situation and law governing the cross-border mergers are different which makes it nearly impossible to obtain the maximum perfect level in single effort. The cross-border merger is a bit complex then the domestic merger, because of the international character the cross-border mergers involve complexity in itself. However, with the enactment of the Companies Act 2013, the extent of which was furthermore enlarged with the inclusion of Rule 25A to the Companies (compromise, association, and amalgamation guidelines) 2017 in recognition of outward merger and also with enactment of the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 the cross-border mergers have been simplified.