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ANALYSING CROSS-BORDER MERGERS & ACQUISITIONS IN INDIA- Aniket Raina¹**ABSTRACT**

In India, Merger & Acquisition (M&A) activity has risen substantially as a response to the ever-changing global market and corporate measures to expand to even greater horizons, acquire foreign investment and amass a wider customer base. The law of the jungle is in full effect here and the Indian industry's propensity towards establishing itself as a respected global player has led companies to transcend beyond the borders of their host nation and march onwards towards the uncharted territory, namely foreign markets with massive corporate competition seeking newer consumers and greater profits. Mittal Steel Company's merger with Arcelor and Walmart's 77% acquisition of Flipkart are some of the more notable merger and acquisition-related events of the past years. However, cross-border M&A does not exist not without its own sets of conflicts. For instance, the difference in business practices between the prospecting companies, the laws of both nations, communications, possible creation of a cornered market, etc. are some of several concerns that lead to a downcast in any possible M&A-related ventures. This article briefly provides an overview of cross-border M&A activity while laying forth a note on specific Indian laws and regulations and theroadblocks associated with the same and has been concluded by discussing future outlooks for such activities.

INTRODUCTION

Cross-Border Mergers & Acquisitions can be defined as when a company in India merges or acquires another company situated in another nation. These are of two types², namely, inbound mergers and outbound mergers. Inbound Mergers refer to mergers wherein a foreign company merges or acquires a company in India and a resulting Indian company is formed

¹ Student at Amity Law School, Noida

²Singhania & Partners LLP, *Inbound and Outbound Mergers*, SINGHANIA & PARTNERS LLP (Nov. 14, 2022), <https://singhania.in/blog/inbound-and-outbound-mergers> (last visited July 30, 2023).

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whereas when an Indian firm merges or acquires a foreign company and a new foreign company is created, this is referred to as an Outbound Merger. Given the scope of such amalgamations and the potential rifts they could levy on markets, the Indian laws bearing relevance in these transactions are quite expansive and commonly include (but are not limited to) stamp laws, foreign exchange regulations, competition laws, etc.

M&A deals in India had crossed over USD 160 billion in 2022 alone with strategic M&A increasing over 126% in value compared to 2021 owing to stronger demand therein providing a suitable environment for growth. Moreover, Biocon's acquisition of the biosimilar operations of American global pharmaceutical corporation Viatris Inc., a deal valued at USD 3 billion was rated as part of the Top 5 M&A transactions in 2022, according to a report by Deloitte.³

A popular reason why such mergers or acquisitions exist is due to the rapid increase in globalization and looming market pressure which may or so often incentivize companies to reshape their influence in the market and their business structure. The resulting inward or outward investment acts as a vehicle for expansion in operations and the exchange in technology allows for wider efficiency, significantly driving profits upwards and rendering higher dividends. Moreover, cross-border M&A acts as an opportunity for the amalgamating companies to consolidate their costs and resources, make use of the newly acquired brand IP, and act as a single unit in the fulfilment of a common goal. It can also be unequivocally stated that the corporate restructuring that arises out of such cross-border M&A leads to the formation of jobs, thereby aiding the local economy.

CURRENT SCENARIO:

Under the Companies Act, 2013, the Reserve Bank of India (RBI) must first approve any merger or amalgamation with a foreign company. Moreover, the terms and conditions of the merger scheme may, among other things, call for the payment of consideration to the shareholders of the merging company in cash, in depository receipts, or partially in cash and partially in depository receipts, as the case may be, in accordance with the plan that will be developed.⁴ Further, the term "foreign company" had been so devised to include any-body

³Deloitte India, *India M&A Trends 2023* / Deloitte India, DELOITTE INDIA (2023), <https://www2.deloitte.com/in/en/pages/finance/articles/India-MnA-Trends-2023.html> (last visited July 30, 2023).

⁴ The Companies Act, 2013, § 234, No. 18, Acts of Parliament, 2013 (India).

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corporate whose business is incorporated outside of India. This gives effect to both inbound and outbound mergers simultaneously.

Additionally, Regulation 2(iii) of the Foreign Exchange Management (Cross Border Regulations), 2018⁵ defines a "cross border merger" as one that is carried out in accordance with the Companies (Compromises, Arrangements and Amalgamation) Rules, 2016, between an Indian and foreign company. However, the foreign company must be incorporated in any of the jurisdictions as per Annexure B specified in Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2016⁶. These provisions have led to streamlining, recognition, and bolstering of cross-border M&A-related procedural measures. Moreover, Section 25A of the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2016⁷ allows M&A between foreign and Indian companies provided if conditions vested in Section 230 to 232 of the Companies Act, 2013 which involves filing an application before the National Company Law Tribunal (NCLT).

Section 32 of the Competition Act, 2002⁸ clarifies that any abuse of a dominant position arising out of an act outside of India but having an effect in India is subject to an inquiry of such abuse of position. Thus, in any scenario of a negative effect arising out of a cross-border merger that could affect fair competition or harm consumer interests, the Commission accordingly intervenes.

However, an exemption to the Commission's intervention, as per the notice of the Ministry of Corporate Affairs (MCA) which was extended till 2027, intervention under the provisions of the Competition Act, 2002 shall be exempted so long as the acquiree does not have more than INR 350 crore in assets in India or the turnover in India should not exceed INR 1,000 crore.⁹

CHALLENGES:

⁵Foreign Exchange Management (Cross Border Merger) Regulations, 2018, Gazette of India, pt. II sec. 3 (Mar. 20, 2018).

⁶Companies (Compromises, Arrangements and Amalgamations) Rules, 2017, Gazette of India, pt. II sec. 3 (Apr. 13, 2017).

⁷*Ibid* 5

⁸ The Competition Act, 2002, § 32, No. 12, Acts of Parliament, 2002 (India).

⁹Avaantika Kakkar et al., *Update on Indian Merger Control Regime: The Small Target Exemption and Pitfalls Around Jurisdictional Thresholds for Merger Filings Before the CCI*, COMPETITION LAW (Mar. 30, 2022), https://competition.cyrilamarchandblogs.com/2022/03/update-on-indian-merger-control-regime-the-small-target-exemption-and-pitfalls-around-jurisdictional-thresholds-for-merger-filings-before-the-cci/#_ftn2 (last visited July 30, 2023).

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Some of the challenges faced in cross-border M&A transactions are as follows¹⁰:

1) Political rifts: Political sentiment tends to be the guiding force behind laws that regulate free competition and accordingly, M&A-related activities between the nations of both parties. If it is deemed that the merger or amalgamation could potentially lead to a politically volatile scenario impacting grave matters such as employment or the domestic market, such activities may be blocked.

2) Business Structure & Culture: In the event of a cross-border M&A, the lapse in time zones combined with differences in work hours, tax filing periods, accounting standards, etc. can be rather cumbersome and confusing to adapt. In addition, differences in culture can lead to miscommunication and lengthier talks, therein delaying the transaction.

3) Due Diligence: While it is a preliminary duty of the acquirer company to conduct due diligence and investigate the past dealings of the potential acquiree along with evaluation of business performance, operating costs, etc., the such duty can transform into a tough task if the investigation is not effective in uncovering any underlying hazard in the acquiree's business operations. This can lead to devastating results in terms of loss in performance, profits and an erosion in company goodwill and reputation.

4) Tax Codes: Varying tax laws between companies belonging to different nations can pose a severe risk as there might exist conflicts between tax regimes (which update periodically) in terms of a lack of relaxed tax incentives or difficulty arising out of harmonizing tax filings of both the Indian and foreign company while giving cognizance to a myriad of underlying regulations that work in tandem with tax laws.

CONCLUSION AND REMARKS:

India's M&A sector is expected to remain resilient in 2023 even in the presence of increasing interest rates and inflation leading to higher pressure on company margins. Strategic M&A activities stand to remain buoyant given increased domestic demand and that outbound activities are capable of undergoing further growth if they can show resiliency to increased inflation levels and possesses strong cashflows.¹¹ However, cross-border M&A are high-risk,

¹⁰Brigitta Naunton, *Cross-Border Mergers & Acquisitions: What Are the Legal Issues?*, HARPER JAMES (Oct. 14, 2022), <https://harperjames.co.uk/article/cross-border-mergers-and-acquisitions/> (last visited July 30, 2023).

¹¹*Ibid* 2

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high-reward activities whose benefits stem from the performance and sentiment of the surrounding markets. In case of any volatility, this would reduce business confidence for large-scale expansion and would resort to damage control mode to preserve their resources.

The cross-border M&A laws in India are inclusive of several legislations which can be overbearing for foreign companies to go over and work in tandem with. India is on the right trajectory towards greatly improving its M&A industry but it needs more time and more importantly, additional provisions that streamline existing provisions for foreign companies which would in turn lead to greater participation between market players (domestic & abroad) and subsequently creating positive benefits throughout all spheres of the market.



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