VOLUME 20 ISSN 2456-9704

CROSS BORDER MERGERS AND ACQUISITIONS

By Lavanya Panwar and Anshita Kohli
From School of Law, Manipal University Jaipur

ABSTRACT

This research paper places major focus on the cross-border mergers and acquisitions. It is an attempt by authors to acknowledge and deeply analyze the handful of laws governing the Indian legal aspect of cross border mergers and acquisitions. It places pertinence on different laws governing such transactions along with the impact and importance of the same on such transactions. It also covers the amendments introduced in past few years to ease the carrying out of such transactions. The research paper gives a brief description about the terms and the basic difference between them. It further delves into the evolution of such transactions in India in accordance with the proposed changes in laws governing it. It also gives a brief description of benefits incurred by the execution of such transactions. The paper also attempts to point out certain loopholes in the laws and endows suggestions for the same. It provides reader clarity on the topic and covers all the aspects relating to cross-border mergers and acquisitions.

INTRODUCTION

The last two decades have experienced numerous emerging trends in corporate world, one such trend is *"Cross-Border Mergers and Acquisition."* According to the statistics *"in 2008, M&A activity reached $707 billion, almost a tenfold increase from $77 billion in 1991–1996."*[1] These transactions account majority in growth of FDI in any country. The Outward Foreign Direct Investment (hereinafter referred as "*OFDI*") has played major role in economic development worldwide and has also served as a boon for the development of Industrial sector resulting in enhancing the economic development in various countries.

With the intent to comprehend the subject mentioned above in detail it is quintessential to discuss the terms "Merger and Acquisition" (hereinafter mentioned as "M&A") in detail. Though the terms "Mergers" and "Acquisitions" may seem akin to each other but complying to the corporate interpretation in the contemporary times, the terms can be vastly distinguished. The term "*Merger*" can be defined as incorporation of two entities with the object to form a third new entity. In the process of merger, the assets and liabilities dissolve in order to incorporate it in the newly merged entity, thereby forming a separate legal entity by incorporation and dissolution of the two merging companies. In addition to this, the meaning of the term *"Acquisition"* can be construed as overtaking or purchase of an entity by other entity. Acquisition is also known as "take over" and "buyout."[2] In the process of acquisition, the company acquiring the shares or assets of the concerned company maintains its existence in the market.

[1]Douglas H. Brooks and Juthathip Jongwanich, Cross-Border Mergers and Acquisitions and Financial Development: Evidence from Emerging Asia, ADB Economics Working Paper Series

[2]Kanwardeep Singh Panjrath, Navpreet Panjra, Mergers and Acquisitions in India, Jus Scriptum [2007] 78 CLA (Mag.) 16.

In mergers the consent of both the parties is a pre-requisite and is a mutual decision to shape the transaction of merger and mostly the companies are of equal status whereas, in Acquisition the consent of the acquired company is not necessarily essential for the completion of transaction of Acquisition and in general, the acquiring company is larger than the company being acquired. Further, the term "Cross Border Mergers and Acquisition" can be defined as transactions of M&A entered by the companies registered in two different countries. Parties generally merge with each other just for the benefit of them. Some great Merger and Acquisition examples are Disney and Pixar, Exxon and Mobile, Comcast and Time Warner Cable, Dell and EMC, Microsoft and Skype.

EVOLUTION OF CROSS BORDER MERGER AND ACQUISITIONS

The process of evolution of Cross-Border M&As can be traced to two significant events in Indian history, *viz.* –

A. <u>Introduction of LPG policies in 1991 in India.</u>

The transactions of Cross-Border M&As in the country initiated with the introduction of LPG policies in 1991. The legal regime during the pre-liberalization period depicts that the Indian Government was very reluctant towards the concept of overseas trading and as a result of this, there were strict laws relating to licensing and "red tape" regulations persisted in the country, which was also termed as *"License Raj."* These regulations, which effectively isolated India's business community from the world, have been described as an inward-looking set of policies calling for centralized planning, complex industrial licensing requirements, bank nationalization, substantial public ownership of heavy industry, tight restrictions on the operations of foreign companies, high tariff barriers, tight restriction of imports and exports, and high bureaucratic control.[3] Though this system proved to be beneficial to the domestic traders in sustaining their businesses, as they were shielded under the garb of these policies from the outside competition, but it resulted in huge depreciation in the growth of Indian economy, which almost led the country to the condition of bankruptcy. This situation led to dismantling of the License Raj system and to the introduction of a new policy.

After the liberalization policy came into effect the process gained momentum by initiation of Multinational Companies who began to expand their businesses and enter the Indian markets. Consequently, the Multinational Companies entering, found that India has a high base of consumers and can result in huge profits for them. They found that resorting into mergers, acquisitions and similar strategies is an easy way of entry into Indian market without much cost of time and money.[4] While the reforms begun in 1991 were critical in familiarizing Indian firms with M&A transactions and promoted an influx on inbound M&A, it was not until early 2000s when outbound M&A transactions took off as a result of a transformation of the overseas investment laws.[5] Thus, The Indian economy saw a growth in Private Sector investments as

[3]Afra Afsharipour, Rising Multinationals: Law and the Evolution of Outbound Acquisitions by Indian Companies, University of California, Davis, Vol. 44:1029

[4]Beena Saraswathy, Cross-Border Mergers and Acquisitions in India: Extent, Nature and Structure, Working Paper 434 (July, 2010)

[5]See *id*. at 3.

a result the foreign exchange reserves increased from $1.2 billion in 1991 to $313 billion by June 2014.[6]

B. **Amendments in Company Law relating to mergers and acquisitions introduced by J.J. Irani committee and Companies Act, 2013**.

With the objective to uncomplicate the previously existing cumbersome process and stringent laws in India regarding M&As, J.J. Irani committee came into existence. The Irani report does not introduce any significant change in the core concepts and rules envisaged in Companies law, but it did introduce certain improvements in the previous system.[7] The changes in the process are listed below:

i. It endowed statutory recognition to contractual mergers which earlier were not recognised by law. This will facilitate the shareholders and parties with the option to rectify clauses.
ii. The committee in its report has reflected its intentions regarding cross-border M&A also. Indian companies are permitted for cross-border M&A by way of both contractual based and court-based M&A. The Indian companies are now permitted to enter into both inbound and outbound transactions relating to cross-border M&As.
iii. The restriction envisaged under Section 390(a) of Companies Act, 1956 has been removed, which required court's intervention for winding up of a company merged with another.[8]
iv. Along with this the Companies Act, 2013 has put forward certain restriction, *viz.* the foreign company should be located in a country that has been notified by the central government; and India's federal bank or the Reserve Bank of India (hereinafter mentioned as *"RBI"*) prior approval is quintessential for the transaction to be completed.[9]
v. With the introduction of Section 234 of Companies Act, 2013 the Payment of cash, or issuance of Indian Depository Receipts, or a combination of both can be used to discharge the consideration to shareholders of the amalgamating company in the transaction of cross-border M&As.[10]

REASONS FOR CROSS BORDER MERGER AND ACQUISITION

There are always various reasons to enter into transactions related to cross border M&As as it helps in building a strong financial base, cut down taxes, expansion etc. The major reasons for undertaking such transactions in India are mentioned hereinafter:

1. **Globalisation of Markets in the Economy-** Globalisation led to the free flow of FDI in the country. Since India is and was a developing country at that time, the MNC's invested and established their businesses and found it a great source of profit as the consumer base in India is strong and

[6]Puja Mehra, Liberalization, (July, 2, 2020, 3:30 PM) https://www.thehindu.com/business/budget/liberalisation-199192/article6186027.ece

[7]Bobby Kurian, Dr. K. S. Gupta, Cross border Merger and Acquisition: The evolving Indian landscape, International Journal of Business and Management Invention, ISSN (Online): 2319 – 8028, ISSN (Print): 2319 – 801X, Volume 6 Issue 8.

[8]Report on Company Law, Jamshed J. Irani Committee Report

[9]Companies Act, 2013, Section 234.

[10] Rohit Lalwani and Vanita Bhatnagar, Cross Border Mergers – Revolutionary Development Insight under Companies Bill, 2012, Jus Scriptum

resources are cheaper as compared to other countries.

2. **Market Pressure-** The country saw a huge increase in its GDP due to increase in transaction of cross-border M&As. It increased from 105 USD Billion to 125 USD Billion in the period of 1999-2003[11]. The survival of the Indian companies was getting difficult and hence they were forced to enter into the cross-border M&As to sustain in the market.
3. **Growth-** Every company's primary objective is to maximize its profits. For profit maximisation, business needs to diversify in various fields and should run beyond borders. The most effective, efficient and economical method to expand business beyond borders is through M&As with an existing company in the domestic country.[12] It helps the company to develop new consumer base, earn more profits, which is the basic goal of every business.
4. **Gaining Monopoly or Market Share-** One of the major reasons which proves to be of great importance while transacting such deals is the fact that when a company acquires or merges with a company in India or vice versa, that Indian company is financially weak but regardless of the financial status the company has a certain market share to offer to the acquiring company or the merging company, which in long run is very helpful.[13]
5. **Gaining Access to Assets-** Apart from the above-mentioned reasons, gaining access to the assets of the acquired company or merging company is also one of the factors that motivated the businessmen to enter into such transactions.[14]

LEGAL PROCEDURES FOR M&A UNDER VARIOUS LAWS

In order to accomplish a cross border merger and acquisition in India, several provisions enshrined in different laws in domain of corporate and commercial laws recognised in India are to be complied with. They are as follows:

1. COMPANIES ACT, 2013

Section 230 to 234 of the Companies Act, 2013 endows the requisites to be fulfilled by a company for accomplishment of an inbound or outbound merger.

A. Rules envisaged under Section 234 of Companies Act, 2013

Ministry of Corporate Affairs (hereinafter referred as "*MCA*") has enabled cross border mergers vide "*Notification No. S.O. 1182(E) dated 13.04.2017*"[15] which came into force on 13th of April, 2017, thereby bringing Section 234 into play. With this notification coming into force, the cross-border M&As have been enabled in India.[16] Section 234 of the Companies Act, 2013 put forward,

[11] Source: India Brand Equity Foundation (IBEF)

[12] V.K. Bhalla, Financial Management and policy, Anmol Publication Pvt. Ltd, New Delhi, 1998 Page No. 1144.

[13] Piyush Singh and Daphne Menezes, Cross Border Mergers and Takeovers: A Recent Trend, (July, 2, 2020 8:30 PM) http://www.legalserviceindia.com/article/l80-Mergers-&-Takeovers.html.

[14] Suhita Mukhopadhyay, Cross-Border Mergers, Acquisitions, and Valuation, (July, 3, 2020, 10:00 AM) http://www.lawyersclubindia.com/articles/Cross-Border-Mergers-Acquisitions-and-Valuation-3583.asp

[15] Ministry of Corporate Affairs, (July, 3, 2020, 12:00 PM) http://www.mca.gov.in/Ministry/pdf/section234notification_14042017.pdf

[16] CS Deepali Agarwal, Analysis of Section 234 of Companies Act, 2013 notified on 13.04.2017, (July, 3, 2020, 5:00 PM) https://taxguru.in/company-law/section-234-companies-act-2013-notified-13042017.html?amp

below-mentioned conditions for completion of cross-border M&As:

i. *Mutatis Mutandis* Application of provisions of Companies Act, 2013 –

Provisions contained Section 230 to 232 shall apply *mutatis mutandis* in every transaction concerning cross-border M&As unless otherwise provided by any law in force. Further, the provisions ascribe that such transactions are only mandated with companies incorporated under jurisdiction of companies notified by Central Government.

ii. Power to make Rules in regard with cross-border mergers –

The Central Government is envisaged with the power to make rules regarding cross-border merger and amalgamations but this power to make rules is subject to consultation with RBI.

iii. Prior Approval by the RBI –

A foreign company is mandated to obtain prior approval from RBI in order to merge with a company registered under Companies Act, 2013 or vice versa. *On the merits of an approval requirement from RBI in case of cross-border merger, from a regulatory perspective, the rationale could be that since a cross-border transaction has the potential to alter the asset/liability profile of a country, such transaction should be regulated.*[17]

B. Rules envisaged under Section 230 to Section 232 of Companies Act, 2013

Apart from Section 234 of Companies Act, 2013, there are certain general principles enshrined under Section 230 to 232 of Companies Act, 2013, which govern transactions related to merger and amalgamation. Mandatory provisions regarding such transactions are as follows:

i. Memorandum of Association (hereinafter referred as MoA) –

The company willing to enter into such transaction shall be authorized by the MoA of the company. Only after complying with the provisions of MoA, the company can initiate with the draft scheme of merger and amalgamation under the provisions of Companies Act, 2013.

ii. Application to National Company Law Tribunal (NCLT)–

With prior approval from the board of directors and RBI as mentioned above, the Indian company undergoing cross-border merger shall also present an application with NCLT in form NCLT-1, which seeks to call upon a meeting of creditors with the object to approve the said merger or amalgamation.[18] Also, the copy of all the required documents shall be attached with the application.

iii. Notice –

After obtaining the approval from NCLT to call a meeting in this regard, the company shall endow notice to creditors and members of the company. The notice shall contain documents necessary for the meeting *viz.* the scheme, details of companies merging, result of merging etc. it shall also be published in newspaper, official websites of company, stock exchanges and SEBI. Notices shall also be submitted to statutory authorities such as

[17]Provision enabling cross-border mergers notified: India further integrates into the stream of globalization, (July, 4, 2020, 11:00 PM) http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/newsid/3938/html/1.html?no_cache=1

[18]Merger and Amalgamation of Indian Companies with Foreign Companies, Corporate Law Connect, (July, 4, 2020 12:24 PM) http://ssrana.in/Admin/UploadDocument/IP%20Updates/Merger-and-Amalgamation-of-Indian-Companies-with-Foreign-Companies.html

Central Government, Registrar of Companies, income tax authorities and all other authorities as are required by tribunal.

iv. Meeting –

When all these requisites are met by the company then the members shall vote within 30 days of receipt of such notice, in the meeting. The results of such notice shall be filed with the tribunal within 3 days.

Based on the approval by the members a petition shall be filed by the company to the tribunal within 7 days. Tribunal after satisfying the compliance of procedure envisaged under above-mentioned provisions shall pass the order for sanctioning of such scheme and make necessary provisions related to it. Such order of the tribunal shall be filed with Registrar of Companies within 30 days by company.[19]

C. Companies (Compromises, Arrangements and Amalgamations) Amendment Rules 2017.

Rule 25A of the above-mentioned Rules specifically deals with *"Merger or Amalgamation of a foreign company with a Company and vice versa"* which articulates that the concerned companies shall comply with the provisions mentioned in Section 232 to 234 of Companies Act, 2013, obtain RBI's approval and shall also comply with these rules in order to complete the transaction. Indian companies can merge with those foreign companies which are mentioned in Annexure B.

Along with the Application submitted to RBI, the transferee company is also responsible for endowing a valuation of merger by the professional of recognized professional body and it shall also be in compliance with the Internationally Accepted Accounting and valuing principles.[20] A further declaration shall be made and attached with the application made to the RBI for further approval. After obtaining all such approvals the companies shall file an application before NCLT according to the abovementioned provisions of Companies Act, 2013.[21]

2. Foreign Exchange Management Act (FEMA)

With the intention to bridge the gap between Indian and foreign companies for the purpose of mergers and amalgamations, RBI has notified Foreign Exchange Management (Cross Border Merger) Regulations (hereinafter referred as "Regulations"). These regulations have covered both inbound and outbound mergers, which have been mentioned below:

A. Inbound Merger

When the company resulting out of transactions is Indian company and all the assets and liabilities will be transferred to the Indian company by the merging foreign company then following guidelines should be followed according to the said Regulations –

[19] Companies Act, 2013.

[20] Vikrant Rana and Akshay Gupta, India: Merger And Amalgamation Of Indian Companies With Foreign Companies, (July, 4, 2020, 6:45 PM) http://www.mondaq.com/india/x/592890/Corporate+Commercial+Law/Merger+And+Amalgamation+Of+Indian+Companies+With+Foreign+Companies

[21] Companies (Compromise, Arrangements and Amalgamations) Amendments Rules, 2017, SEBI, Rule 25A.

i. Issue or Transfer of Securities:

In compliance with Regulation 4 if the resultant Indian company issues or transfers any security in favour of any person who is resident outside India then the Indian company should comply with all the conditions related to it in the pricing guidelines, entry routes, sectoral caps, attendant conditions and reporting requirements for foreign investment as laid down in Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017.[22]

ii. Merger of Joint Venture or Wholly Owned Subsidiary:

In the instance of merger of a joint venture (hereinafter referred as JV) or wholly owned subsidiary (hereinafter referred as "WOS") of an Indian company with its parent Indian company then such transaction of transfer of shares shall be governed by Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 (ODI Regulations).[23]

iii. Offices of foreign companies to become branch/office of the Indian company:

When a foreign company merges with Indian company then all its branches/offices situated outside India shall become the branch/office of the resultant Indian company.

iv. Stipulations regarding assets outside India of foreign company:

If the foreign company merges with any Indian company then such resultant Indian company shall acquire assets of such foreign company in accordance with the provisions of FEMA, 1999. Further, if such transaction is barred by FEMA then the resultant company shall sell all the assets within 2 years of date of order of sanction by NCLT for the said merger. Also, the sale proceeds obtained by such sale shall be repaid to India in the earliest possible opportunity by banking channels.

- Mergers surrounding inbound mergers of the existing group companies

i. Merger of a foreign domiciled holding company:

Loans: RBI permits Indian companies to take over the guarantees and outstanding borrowings of foreign companies which shall conform to the external commercial borrowing (hereinafter referred as ECB) norms within the transition period. If these loans have been obtained from a local vendor or a non-recognised financial body under the definition of 'recognised lender' or the Indian entity does not fall within the ambit of 'recognised borrower' as per the ECB Regulations then such borrowings though permitted under the hands of grandfathers Indian entity have to be repaid within the transition period of two years.

If the criteria of 'eligible borrower' or 'recognised lender' is satisfied but the minimum maturity period of such borrowing is not in alignment with the ECB guidelines, then in this case the Indian party may have to renegotiate the minimum maturity period prior to the merger or repay the ECB within a period of two years.

[22]Atul Pandey, Abhishek Sanyal, Indruj Raj and Hirak Mukhopadhyay, India: FEMA Cross Border Merger Regulations Issued By RBI, (July, 5, 2020, 11:23 PM) http://www.mondaq.com/india/x/689316/Corporate+Commercial+Law/FEMA+Cross+Border+Merger+Regulations+Issued+By+RBI

[23]Rishabh Shroff & Manu Varghese , India finally notifies Cross Border Merger Regulations, India Corporate law, (July, 5, 2020, 3:12 PM) https://corporate.cyrilamarchandblogs.com/2018/04/india-finally-notifies-cross-border-merger-regulations/

ii. Mergers of operating overseas WOS/JV:

a Manufacturing Companies: The office of the company shall be deemed to be a branch office of the Indian company. Similarly, if an overseas manufacturing company has factories or warehouses is proposed to be merged with an Indian company, such factories or warehouses shall be deemed to become branch offices of Indian companies. If the manufacturing activities intend to continue, then these branch offices shall be deemed to have permanent establishment implications. Moreover, these branch offices which have ongoing commercial liabilities, employer's contract, vendor and customer contracts, etc. would on-go post-merger.

b Trading and Service sector companies: In many situations the WOS/JV in this sector will shut down but when such companies do remain operational then such regulations shall remain in force:

- Transfer of employees to the Indian company: The employees of the previous company will shift on the payroll of the Indian company and accordingly Indian company will be responsible for salaries, allowances and provident-fund contributions. Furthermore, in the case of those foreign employees who have participated in ESOP of the Indian holding company will continue to hold the same post-merger.

2. Determination of ODI thresh-hold step down subsidiaries: WOS/JV having downstream investment in step down subsidiary, the Indian company is required to revaluate the prescribe threshold of 400% of the net worth, as such entities will become direct subsidiaries of the Indian company.

3. Consideration towards to JV Partner under share swap: The JV partner of the overseas company shall receive shares of the Indian company on the account of such merger. The FDI regulations regards this transaction as a share swap transaction which would fall under automatic route subject to certain conditions. This practice in more evident in trading sector, e.g. software companies having overseas JVs which may collapse with Indian companies.

B. Outbound Merger

An outbound merger is the one in which an Indian company undergoes the transaction of merger with a foreign company and all the assets, liabilities and employees of the Indian company are then transferred to the resultant foreign company. Regulation 5 articulates the requirement for a deemed approval from RBI[24] along with the below-mentioned regulations in regards with outbound merger in different circumstances:

i. Acquisition of securities of foreign company: In compliance with Regulation 5 of Foreign Exchange Management (Transfer or Issue of Foreign Security) Regulations, 2004 which articulates that a person resident in India is permitted by the said regulations, to acquire securities shares issued by the foreign company.[25] Further, the securities secured shall be in compliance with the threshold prescribed under Liberalised Remittance Scheme.[26]

[24]Ketan Dalal, Cross Border Mergers – The Outbound Stitch, (July, 6, 2020, 7:45 PM) http://www.lawstreetindia.com/experts/column?sid=250

[25]Master Direction- Liberalised Remittance Scheme (LRS), Reserve Bank of India, RBI/FED/2017-18/3 FED Master Direction No. 7/2015-16, (July, 6, 2020, 8:12 PM) https://rbi.org.in/Scripts/NotificationUser.aspx?Id=10192&Mode =0

[26]Reserve Bank of India sets new rules for cross border mergers and amalgamation, The Indian Lawyer, (July, 6, 2020, 10:58 PM) http://www.theindianlawyer.in/blog/2018/03/30/reserve-bank-india-sets-new-rules-cross-border-merger-amalgamation/

ii. Status of office outside India:
In accordance with Regulation 5(3) of the Cross-Border Regulations, the branch/office in India before the Scheme of Merger or amalgamation shall be considered to be the branch office (hereinafter referred as BO)/ liaison office (hereinafter referred as LO) of the resultant foreign company pursuant to the transaction of outbound merger. Such offices should further require complying with the provisions of 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 (including restrictions on activities applicable to a branch office).[27] All the transactions undertaken by BO/LO shall be in accordance with the Regulations of FEMA.

iii. Guarantees or liabilities of the foreign company:
All the guarantees or liabilities of the Indian company merging with the resultant foreign company shall become the liabilities of the resultant company and should also be repaid as per the scheme sanctioned by NCLT.[28] The repayment shall also be in compliance with FEMA. The lenders of the Indian Company shall also issue a no-objection certificate. The repayment shall further be governed by Companies (Compromise, Arrangement or Amalgamation) Rules, 2016 pursuant to the outbound merger.

iv. Sale of Assets and Securities:
The resultant company shall sell off the assets and securities, which they are not capable of acquiring or hiring, within the time period of two years (also known as transition period), from the sanction of Scheme of such merger. The sale proceeds can also be used for repayment of borrowings of Indian liabilities within the transitional period.

v. Maintaining special non-resident rupee account:
In accordance with the FEMA (Deposit) Regulations, 2016, the resultant company is permitted to open a special non-resident rupee account for two years for the purpose of facilitating transactions relating to outbound merger.[29]

Through the detailed provisions mentioned above the inbound and outbound mergers are dealt in the country. This ensures accountability of the transaction between the parties to the system and further creates a mechanism for the entire transaction to take place with ease.

3. COMPETITION ACT, 2002

The Competition Act, 2002 came into force on 13th January 2003 with the object to regulate the market forces and protect the interests of consumers.[30] It also emphasised on shifting focus from restricting monopolies to regulating them and further ensuring freedom of trade envisaged in the Constitution of India. While witnessing a dynamic market and huge influx of M&As in the country there was felt a need to regulate them so as to ensure that no appreciable adverse effect on competition (hereinafter referred as AAEC) is caused due to such transactions. As a result, the Competition Commission (Combination) Regulations, 2011 (hereinafter referred as Regulations,

[27] *Id 24*

[28] M. Govindarajan, **Foreign Exchange Management (Cross Border Merger) Regulations, 2018, (July, 6, 2020, 11:48 PM)** https://www.taxmanagementindia.com/visitor/detail_article.asp?ArticleID=7956&kw=FOREIGN-EXCHANGE-MANAGEMENT-CROSS-BORDER-MERGER-REGULATIONS-2018

[29] *Id 25*

[30] The Competition Act, 2002,

2011) were introduced as the sixth amendment to the Act.[31] This brought about major changes in the procedure of M&As taking place in the country and ensured greater clarity in such transactions.

These amendments introduced certain thresholds for a combination to take place in India. The transactions which come under the purview of provided thresholds shall be required to be examined by the CCI (hereinafter referred as Commission). The thresholds serve the purpose of identifying potentially harmful mergers and bringing them under the scrutiny of the Commission. Therefore, threshold must be designed in such a way that potential anti-competitive combinations would be under scrutiny without overburdening the commission with such combinations which would not affect competition.[32] This has also led to the introduction of *de minimis exemption* which has been a relief to the corporate world as it ensures that M&As of small enterprises do not require the approval of Commission.[33]

A. Section 5 of the Competition Act, 2002 –

The term combination includes all M&As whether occurring in India or outside India. Section 5 of the Competition Act, 2002 deals with three kinds of combination and the tables hereinafter depict the thresholds which triggers the examination by the Commission of a transaction related to M&A.

a. Section 5(a) of the Competition Act, 2002 deals with acquisitions through control, shares, voting rights or assets and its thresholds in case of cross-border acquisitions are as follows:

Individual	Assets	Transaction in India or outside India
		More than USD 1 Billion with at least more than Rs. 1,000 crores in India
	OR Turnover	More than USD 3 Billion with at least more than Rs. 3,000 crores in India.
Groups	Assets	More than USD 4 Billion with

[31]Bharat Budholia, Aishwarya Gopalakrishnan & Aishwarya Gupta, Sixth set of Amendments to the Combination regulation, (July, 7, 2020, 10: 47 PM) https://competition.cyrilamarchandblogs.com/2018/10/sixth-amendments-combination-regulations-competition-law/#more-2138

[32]Cross-Border Merger Control: Challenges For Developing And Emerging Economies, Competition Law and Policy OECD, DAF/COMP/GF(2011)13, (July, 7, 2020, 2:43 PM) https://www.oecd.org/competition/mergers/50114086.pdf

[33]Merger Control Exemptions Expanded- Better Late Than Never!, Nishith Desai Associates, (July, 10, 2020, 1:12 PM) http://www.nishithdesai.com/information/news-storage/news-details/article/merger-control-exemptions-expanded-better-late-than-never.html

		at least more than Rs. 1,000 crores in India.
	OR Turnover	More than USD 12 Billion with at least more than Rs. 3,000 crores in India.

b. Section 5(b) of the Competition Act, 2002 deals with acquisitions of an enterprise's control where the acquirer already has direct or indirect control of another engaged in identical business and the thresholds for the same in cross border acquisitions are as follows:

Individual	Assets	Transaction in India or outside India
		More than USD 500 Million with at least more than Rs. 500 crores in India.
	Or Turnover	More than USD 1500 Million with at least more than Rs. 1500 crores in India.
Group	Assets	More than USD 2 Billion with at least more than Rs. 500 crores in India.
	Or turnover	More than USD 6 Billion with at least more than Rs. 1500 crores in India.

c. Section 5(c) deals with mergers or amalgamation between or among enterprises and the thresholds for the same are mentioned below:

Individual	Assets	Transaction in India or outside India
		More than USD 500 Million with at least more than Rs. 500 crores in India.
	Or Turnover	More than USD 1500 Million with at least more than

VOLUME 20 ISSN 2456-9704

		Rs. 1500 crores in India.
Group	Assets	More than USD 2 Billion with at least more than Rs. 500 crores in India.
	Or turnover	More than USD 6 Billion with at least more than Rs. 1500 crores in India.

B. Section 6 of the Competition Act, 2002 –

Section 6(1) of the Competition Act states that all such combination which causes or likely to cause an AAEC in the relevant market of India shall be prohibited and any such combination shall be considered void. Further, Section 6(2) prescribes that a notice shall be sent to the commission regarding details of proposed combination within 30 days of (a) approval of board of director in case of mergers or (b) execution of agreement or other document in case of acquisition through control. Further Section 6(2A) clarifies that all such combination shall come into effect after completion of 210 days from the date of notice sent to the Commission or after the Commission has passed an order under section 31 of the Act, whichever is earlier. After receiving the notice regarding the proposed combination, the Commission shall deal with it in accordance to Section 29, 30 and 31 of the Competition Act, 2002.

C. Investigation and Examination of Proposed Combination under section 6

When a combination triggers the thresholds mentioned in Section 5 of the Act then Section 29 comes into play. According to Section 29(1) of the Act, if the Commission believes prima facie that a combination causes or is likely to cause AAEC then a notice is issued to the parties which directs them to show cause within 30 working days of receipt of notice, the reasons for not conducting investigation relating to such combination. After the responses of the parties have been received, a report shall be called by the Director General (DG) which shall be submitted to the Commission in the time prescribed. After receiving the report from DG or responses from parties, whichever is earlier, the Commission within 7 working days shall direct the parties to publish the details of the combination to the public within 10 working days of such direction. Any person who is affected by the proposed combination should file his written objections within 15 days of such publication. Within another fifteen working days the parties shall furnish all the additional details required by the parties and from 45 days from the expiry of said 15 days the Commission shall proceed with the case.

Further in accordance with Section 31 of the Act if the Commission is opined that the proposed combination does not cause AAEC then the said combination shall be approved but if the Commission believes that it causes or is likely to cause AAEC then the said combination shall not take effect. When the Commission believes that AAEC can be obliterated through modification in the said combination then such appropriate modifications may be proposed. The parties, if accept the proposal of modification then it shall be modified in the specified time and if

parties fail to do so then the combination will be said to have AAEC. Parties also have the right to submit amendment to the modification proposed by the Commission. Further Section 31(11) also specifies that the Commission shall pass an order within 210 days from the date of notice to the Commission, failing to do so the combination shall be deemed to be approved by the Commission.

D. Extra Territorial jurisdiction of the Commission under Section 32

The Commission holds extraterritorial jurisdiction which provides the Commission with the power to hold inquiries of combinations not only taking place in India, but also of combinations where the parties may not be situated in India but there can be a potential AAEC in the relevant market in India.[34] Section 32 precisely covers all the kinds of cross border combinations that generally occurs and hence, endows power to the Commission to intervene in such transactions.

E. Green Route Channel

The green route channel is introduced through "Procedure in regard to the transaction of business relating to combinations Regulations, 2011" which is applicable to certain transactions. According to this amendment the parties to a combination can simply file a notification under the green route mechanism in the format prescribed in the Regulations. However, there is not much clarity on cross border M&As but if a foreign company intends to own a small share in the Indian company then the green route channel can be used subject to the conditions mentioned in the Regulations in this behalf.[35]

All these provisions give detailed and complete procedure for the transactions relating to cross-border combinations.

4. SEBI (Substantial Acquisition Of Shares And Take-Overs) Regulations, 2011

These Regulations were introduced in September 2011 to regulate the acquisition of shares and voting rights in a public listed company in India. These regulations apply to direct and indirect acquisition of shares and voting rights in target company. These regulations define "Acquisition" as "direct or indirect acquiring or agreeing to acquire shares or voting rights in, or control over, a target company"[36] and the person acquiring such a control over the company whether acting alone or in concert is defined as an "acquirer". A target company as defined under these regulations is a public listed company.

Trigger for Open Offer

According to the amended provisions of the Code any person acquiring 15% of the shares of the target company shall put up an open offer for acquiring 20% shares in the Company. These new amendments indicate that shareholders having 25% shares, or more will get a representation in the board of directors for voting and special issue.

Voluntary Offer

An acquirer having control over the shares or the voting rights of the target company entitling them to 25% or more but less than the permissible non-public shareholdings

[34] Ajay Kr. Sharma, Cross Border Merger Control by the Competition Commission of India: Law and Practice, Freilaw, Page No. 11-20, ISSN: 1865-0015.

[35] Jubair Bhati and Mayank Sen, Roadblocks to CCI's Green Channel, IndiaCorpLaw, (July, 10, 2020, 4:12 PM) https://indiacorplaw.in/2019/10/roadblocks-ccis-green-channel.html

[36] SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997, Regulation 2(b).

shall have power to make a public announcement (PA) for an open offer to acquire shares. This offer is subject to certain conditions, which are mentioned below:

- 10% should be the minimum offer size of the total shares in the target company.
- The maximum permissible non-public shareholdings limits shall not be exceeded by the acquirer or the persons acting in concert (hereinafter referred as PAC) in aggregate once the open offer is complete.
- The acquirer or the PAC can only make voluntary offer in the target company once the period of 52 weeks has lapsed since they have last acquired shares of the target company without attracting the obligations of an open offer.
- No shares shall be acquired by the acquirer or PAC during the voluntary offer period other than under open offer.
- Only after a period of 6 months has passed since the completion of the open offer can the acquirer or the PAC, acquire more shares of the target company. However, they can acquire more shares pursuant to another voluntary offer or making a competing offer upon another making the offer or bonus issue or stock splits.

Minimum open offer size

Trigger for open offer	Minimum open offer size	Other conditions/observations
Direct acquisition Indirect acquisition	It shall be 26% of the total shares of the target company, commencing from 10th working day from the closure of the tendering period.	Once the offer period is complete and the shareholding of the acquirer or the PAC is exceeding the non-public shareholding limits: It needs to be brought in the permissible limits in the period of 1 year. It shall not be permitted to make a voluntary delisting offer under the SEBI Delisting Regulations for a period of 12 months form the date of completion of offer period.
Voluntary Open Offer	It shall be 10% of the total shares of the target company. This shall not exceed the permissible non-public shareholding.	

Process of Open Offer

- The acquirer shall make a PA of the open offer through a registered merchant worker under the SEBI. The merchant banker shall be appointed as the manager of the open offer. The PA of the open offer shall be sent to all the stock exchanges where the shares of the target company have been listed.
- Furthermore, within one working day the copies of the PA shall be sent to the board of the target company and to the registered office of the target company.
- The acquirer or the PAC shall make a detailed PA by publishing the open offer in the newspaper within five days from the date of the PA. In case it is an indirect open offer, the publication shall be made in the newspapers not later than the five days once the primary acquisition of shares and voting rights in or over the control of the target company are complete.
- According to Regulations 14 the following provisions have to be adhered to for the publication of a detailed public announcement and public announcement:

i. According to Provision 1 of the Regulation the PA shall be made to the stock exchanges on which the shares of the target company are listed, and these stock exchanges shall disseminate this information to the public. This shall be done on the same day on which the open offer is made.

ii. According to Provision 2 of the Regulations the same public announcement shall be sent to the directors of the Target Company and to the registered office of the target company. This shall be done on the same working day on which the open offer was made.

iii. According to Provision 3 of the Regulations the acquirer or the PAC shall send a detailed public statement (DPS) from the date of the PA. DPS shall be published in the newspapers of Hindi language, English language, regional national language which circulates in the area of the registered office of the target company, regional national language which circulates in the area of stock exchange where the maximum volume of trading has taken place in the past 60 days.

iv. According to Provision 4 of the Regulations, the acquirer or the PAC shall send the DPS to the board, stock exchange and the registered office of the target company.

- Once the PA and the DPS is complete the acquirer or the PAC shall send a draft Letter of Offer shall be sent to SEBI and once approved it shall be sent to the shareholders of the target company.
- Two working days prior to the date of DPS, an escrow account has to be created.
- Competing offer can be made after completion of fifteen days from the date of the DPS published by the acquirer who made the PA.
- Until the expiry offer period is passed, the acquirer shall not complete the acquisition of shares or voting rights in or control over the target company. The exceptions to this are:

i. When an open offer is made on the preferential shares, the completion period shall be 15 days from the date of passing of special resolution.

ii. When the acquirer makes a 100% payment of the consideration that is payable under the offer letter in the escrow account then the parties of such agreement can from the passing of 21 days of the DPS, shall act upon the agreement and the acquirer may take the complete the acquisition of the shares or the voting rights in, or control over the target company[37]

[37]STA Law Firm, Substantial Acquisition Of Shares And Take-Over (SEBI) Regulations 2011 Overview, Mondaq, (July, 10, 2020, 9:34 PM) https://www.mondaq.com/india/shareholders/754950/

Upon receiving the DPS the Board of the target companies shall appoint a body of independent directors who shall make recommendations regarding the open offer and the same recommendations shall be published in the newspaper.

Any merger or amalgamation will come under the scrutiny of the same regulations.

5.

6. **APPLICATION OF INCOME TAX ACT, 1961 (HEREINAFTER REFERRED AS ACT)**

One of the major reasons behind bringing into effect a merger and acquisition deal is to achieve tax benefits endowed by the Indian tax regime. Subject to certain conditions, mergers are provided with a favourable treatment. The Act has defined amalgamation as a merger of one or more companies to form a new company such that the assets and liabilities of merging companies become the assets and liabilities of resulting company and shareholding of at least three-quarters of the shares in the amalgamating company becoming shareholding of amalgamated company.[38] Some of the significant tax provisions governing cross-border M&As are discussed hereinafter -

A. PLACE OF EFFECTIVE MANAGEMENT (POEM)

If a foreign company has a place of effective management in India then, it is considered to be a resident of India and shall be taxed at 40% of its global income. Central Board of Direct Taxes (hereinafter referred to as '**CBDT**') has specified that any overseas Indian holding companies and subsidiaries deriving passive income may be exposed to domestic tax net due to place of effective management.

B. INBOUND MERGERS

The tax neutral status has always been enjoyed by the merging companies and its shareholders in an inbound merger. However, in accordance with Section 42(vi) and 42(vii) of the Act, the shareholders of the merging companies may enjoy this benefit subject to the condition prescribed i.e. all the assets and liabilities and continuity of holding minimum 75% of the shareholding.

In case of an overseas merging company, there is no tax liability applicable on it if there are no assets situated in India. Akin to this, the shareholders of the merging company are also exempted from capital gain implication arising due to transfer of shares. Contrary to this, if the shareholders are Indian residents and the shares derive their value from assets situated in India then the shareholders will be required to fulfil tax requisites arising therefrom under the head capital gains.[39]

C. OUTBOUND MERGERS

The Indian tax regime fails to take into account the transactions related to outbound merger and resultantly, the tax neutrality benefits generally available to inbound mergers are not available to outbound mergers. However, any transaction involving transfer of capital assets will attract capital gains tax in the hands of the foreign company and shareholders receiving shares of resultant foreign company.

D. CARRY FORWARD

Generally, the amalgamated companies attain the privilege of setting off depreciation and carry forward of unabsorbed/accumulated

substantial-acquisition-of-shares-and-take-over-sebi-regulations-2011-overview.

SEBI Takeover Code- Detailed Analysis, Taxguru, (July, 11, 2020, 5:12 PM) https://taxguru.in/sebi/sebi-takeover-code.html

[38] Income Tax Act, 1961, Section 2(1B)

[39] Prerna Mehndiratta, Cross Border Mergers – Tax Aspects, (July, 12, 2020, 12:19 PM) https://taxguru.in/income-tax/crossborder-mergers-tax-aspects.html

losses against its acquired profits. However, this privilege cannot be exercised by public companies where shareholders holding 51% voting rights on the last date of the year in which set off took place and shareholders carrying 51% voting rights on the last date of the year in which losses was incurred. Notably, carry forward of losses is applicable only to the specified sectors prescribed under the IT Act or notified by authorities.[40]

E. General Anti Avoidance Rules (GAAR)

The GAAR provisions provides the authority to tax authorities to scrutinize arrangements and on accountability of sufficient reasons to believe that such arrangement would result in lack of commercial substance, denial of tax benefit under the Act or tax treaty, the authorities may invalidate them as 'impermissible avoidance agreement' (hereinafter referred as IAA). This provision is applicable when the said arrangement exceeds Rs. 30 million, irrespective of their residential or legal status.

7. Role of IBC in Cross Border Mergers And Acquisition

It has been highly believed that the transactions and deals regarding M&As have substantively increased since the introduction of Insolvency and bankruptcy Code, 2016 (hereinafter referred as IBC). Thomson Reuters data depicts that deals relating of M&As were worth $99.7 billion between January and September, which surpasses the existing records.[41] According to the data provided by Kroll and Merger Market, since IBC came in effect the M&A deals in distressed asset have increased up to sales worth around $14.3 billion.[42]

The IBC provides the healthy companies a clear idea about the businesses which are on the verge of insolvency or already under the insolvency resolution and which can be easily acquired by the healthy firms.[43] The acquiring companies also benefit from such deals as the management of the company which is under corporate insolvency resolution process (hereinafter referred as CIRP), is already under pressure from the banks due to defaults and this leads to corporate assets being offered by such companies at a very low rate. This acts as a fair deal for both the parties and facilitates to the idea of ease of doing business.

Conclusion

The concept of M&As is still in its nascent stages and the laws are constantly evolving in consonance with the global trends. These laws grail to make Indian companies more competitive in the global market. However, there are certain laws which hinder the business and shall be amended to ease transactions and benefit of Indian companies. Some of these laws are mentioned henceforth:

[40] Rajesh Begur and Avik Karmakar, India: Taxation Aspects In Cross Border Mergers, (July, 12, 2020, 4:42 PM) https://www.mondaq.com/india/corporate-and-company-law/540748/taxation-aspects-in-cross-border-mergers

[41] M. Sriram, M&As poised to cross $100 billion-mark in 2018, (July, 13, 2020, 9:23 PM) https://www.livemint.com/Companies/IuQ7k4nI4GKgNdHGXAL2WN/MAs-poised-to-cross-100-billionmark-in-2018.html

[42] M&A Critique, IBC Triggers M&A deals for distressed assets, (July, 16, 2020, 4:00 PM) https://mnacritique.mergersindia.com/insolvency-bankruptcy-code-drives-mergers-acquisitions/

[43] *Id 47*

The Income Tax Act exempts a company from taxes if the transferee company is an Indian company however, in case of outbound mergers, it would not be a taxable transaction. The law requires to maintain uniformity and promulgate a regime governing outbound mergers with the aim to obliterate ambiguities surrounding such transactions.

The regulatory provisions related to outbound mergers in India shall be in sync with the regulatory provisions of the foreign countries. Any conflict between the laws of the two countries will cause hindrance in the merger of the foreign company.

Present cross-border regime in India is an inception to bring Indian companies on the global standing in the world but it still has a long way to go. The amendments shall be intended to expunge the regulatory difficulties for the smooth transactions in future. The laws should focus on minimising differences in regulatory framework amongst various jurisdictions. In furtherance with the persisting loopholes, this research paper objects to throw light on the detailed regulatory framework governing the transactions relating to cross-border M&As in India and the issues girdling it.

*****