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***DOI:*** *https://doij.org/10.10000/IJLMH.111526*

# INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

**[ISSN 2581-5369]**

**Volume 4 | Issue 4**

**2021**

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# A Case Study on Transnational Mergers and Amalgamation

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## ABSTRACT

*"Transnational enterprises which means those enterprises which own or control production or severe facility outside the country which they are based" . Therefore, transactions in forms of mergers and amalgamation, that create or assist such Transnational Enterprises, can be understood as Transnational Mergers and Amalgamation. There is no particular law that deals with such transactions, as due to the international presence of the same it becomes really difficult to create a pre estimated legislature regulating the same on a national level. In the paper the researcher shall explore the legal framework surrounding such transactions. And furthermore, explore the concept in hand with the help of various recorded transactions, case studies, namely; Bharti Airtel, Ranbaxy and Jet Airways.*

*Though we have made tremendous evolution for governing transnational mergers, there is still room for improvement. This improvement will not be as significant of an improvement that the 2013 Companies Act was over the Companies Act 1956, or further it might not be as impact full as the Competition Act 2002 following the Raghavan Committee. However, there are still some needed changes. Such are the changes suggested by the researcher in entirety of this paper.*

***Keywords:*** *Transnational, Companies Act, Raghavan Committee.*

## I. INTRODUCTION

*"Transnational enterprises which means those enterprises which own or control production or severe facility outside the country which they are based"*[3]. Therefore, transactions in forms of mergers and amalgamation, that create or assist such Transnational Enterprises, can be understood as Transnational Mergers and Amalgamation. There is no particular law that deals with such transactions, as due to the international presence of the same it becomes really difficult to create a pre estimated legislature regulating the same on a national level. Hence,

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[3] Impact of Multinational Corporations on Development and on International Relations, 25 (United Nations, 1974).

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there are various international regulations for the concept in hand which at times tend to differ for developed nations in contrast with the developing nation.

### (A) Define Mergers and Amalgamations

It is essential to primary establish the definition of the concept of Mergers and Amalgamations. Although the said concept is neither defined in the Companies Act or the Competition Act. The definition can still be established from the following;

*"In the strictest sense, a merger is a combination of two or more entities where each merging entity has an equal stake in the new enterprise and each merging entity has a very clearly defined role in the new entity."*[4]

Therefore, on the basis of the above, it can be stated that the concept of merger and amalgamation is that whereby a company combines with either one or multiple other companies, for a superior profit in the business. However, in some case Mergers can also be performed in a strategic manner, which is to be in a more dominant position in the market as compared to the competitor.

### (B) Define Transnational Merger and Amalgamation

Those merger operations whose economic effects are felt in the territory of more than one country can be classified as Transnational Merger and Amalgamation. It is important to note that impact of such transactions shall be faced by minimum two countries, can extend to more.

## II. LEGAL FRAMEWORK IN INDIA

### (A) Procedural History - The Companies Act, 1956

Section 390 to Section 396A under Chapter V of the Companies Act 1956, dealt with transnational mergers to an extent. However, as far as all the statues were concerned, there were furthermore regulations from other various act which exist till date. The basic set of legislation governing such manner of transactions deal with these areas (to name a few);

i. Approvals from authorities in charge,
ii. Legal filling requirements,
iii. Payment of stamp,
iv. Stock Exchange fillings.

#### 1. Section 394 of the Companies Act 1956.

The biggest restriction that the prior version of company law presented was the fixed

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[4] Mergers & Acquisitions For Dummies, (Wiley Publishing, Inc, 2011).

circumstance that the transferee company of the merger shall be belong to India, i.e., it shall be incorporated in India.

In the case of **Andhra Bank Housing Finance Ltd. v. Andhra Bank**, it was held that "*a body corporate which can be considered as a 'holding company' under Section 4(5) of the 1956 Act, will fall within the expression 'company within the meaning of this act' and thus it can be considered as a 'transferee company' under section 394(4) (b) of the Act. Therefore, accordingly, an Indian subsidiary of a foreign holding company which is a body corporate under section 2(7) will be considered as a 'transferee company' under Section 394(4) (b) of the Act.*"[5]

Although the section in, 394 was never clear in its interpretation, but at its best the section failed to cover all the facets of the active members of a transnational merger. Which can be seen with the help of the case of Bombay Gas Co Pvt Ltd, where it was held that; "*An Indian company cannot integrate with a foreign company as a foreign company cannot be a transferee company under the Indian law.*"[6]

**2. Jurisdiction of the High Court**

One of the primary objectives of the Companies Act is to safeguard the interest of the shareholders and the creditors of a company among the various other parties. The similar stand was of the court in the case of **Re Savoy Hotel Ltd**, as it was held that; "*court's jurisdiction is supervisory in nature, as it cannot approve a merger which is not approved by the creditors and shareholders of the company.*"[7] The similar opinion was further extended in the case of **Kiloskar Electric Co Ltd.**[8]

Lastly in the case of **Mafatlal Industries**[9], the apex court of India presented the court with guidelines that are to be followed by the court in the cases of such mergers. The premise of these guidelines was; "*the scheme of merger and the decision should be just and fair*."

**(B) The Existent Policy – Companies Act, 2013**

"*This restrictive policy was faced with a lot of criticism as it not only hindered economic growth but also showed a protectionist approach of the legislation towards the Indian companies.*"[10]

Majority of the changes which the Nation observed between the Companies Act 1956 and that

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[5] Andhra Bank Housing Finance Ltd. v. Andhra Bank, 2003 (3) ALD 654.
[6] Bombay Gas Co Pvt Ltd v Central Government (1997) 89 Comp Cas 195 (Bom).
[7] Re Savoy Hotel Ltd., (1981) All ER 646 (Ch. D), para 38.
[8] Re Kiloskar Electric Co. Ltd, [2003] 116 Comp Cas 413 (Kar).
[9] Miheer H. Mafattal v. Mafatlal Industries Ltd, (1997) 1 SCC 579.
[10] Ajay Kumar Sharma, Cross border Mergers Provisions under the Companies Act, 2013: Analysis and Implications. Available at: http://www.indialawjournal.com/volume7/issue1/article2.html

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of 2013 was influenced by "*Committee under the Chairmanship of Dr. J.J. Irani.*"[11] This conference included aspects like acceptance if IDR (which is discussed ahead), and most importantly, provided permission for Indian firms to merge with foreign companies in an 'inbound' as well as an 'outbound' manner.

**1. Interpretation of Section 234 of the Companies Act, 2013**

While section 230 to 240 all deal with various aspects of mergers and amalgamations, it is section 234 that specifically deals transnational mergers. Section 234 (2) can be broken down into two significant aspects;

**i. Approval from RBI**

A foreign company under the Companies Act 2013, will require an approval from RBI to merger with an Indian company which is registered under the Companies Act 2013, it is to be noted that similar is the case in vice-versa scenarios.

*"Even under the current FEM (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, the transferee company has to just file a report to the Reserve Bank within 30 days from the date of approval of merger."*[12]

Therefore, approval from RBI is the procedure that is generally followed by the companies. However, '*subject to any other law for time being in force*' is the phrase that protects this aspect of the provision from ambiguity, as this allows for FEMA (Transfer or Issue of Security by a Person Resident outside India) to '*override*' the condition if need be.

**ii. Consideration**

The payment that is to be recorded as compensation to the Shareholders of the merging corporation may be executed in any form be it receipts or cash, unless the agreement specified a particular method for the same.

This regulation permits the use of Indian Depository Receipts (IDR), which has however received a decent amount of drawback from the foreign initiatives, as they express issues with taxation and lack of clarity. The bulk of the blame is with the execution of the 'The Companies (Issue of Indian Depository Receipts) Rules, 2004' which has single handedly made the entire process of the same cumbersome.

If the above two factors are satisfied then a company incorporated in India as well as vice-versa

[11] Ministry of Corporate Affairs, Presentation of the Report of the Expert Committee on Company Law by Dr. J.J. Irani, Chairman of the Expert Committee. Press Note 03/2005.
[12] FEMA (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000.Regulation 7.

are eligible for merger or amalgamation.

It is however, the clause of the said provision that has been more progressive in its application. Section 234(1), states that the government of India may formulate further specific rules for transactions of these nature. Thereby, this provision has been a gateway to further introduce more changes if needed, and therefore it keeps the laws regulation the same updated. The biggest instance of the same can been seen in the Companies Rules, 2016.

"*All proceedings under the Act, including proceedings relating to arbitration, compromise, arrangements and reconstruction, other than proceedings relating to winding up on the date of coming into force of these rules shall stand transferred to the Benches of the Tribunal exercising respective territorial jurisdiction.*"[13]

It was made explicitly clear as per the above rule that in the cases, in the above-described circumstances shall stand transferable to the National Company Law Tribunal. However, as per Section 234 predominantly any cases dealing with mergers or amalgamations that further had a foreign player into the equation, were subject to be transferred to High Court. Which created further doubt that following rule, would such matters be transferred to the NCLT or the High Court.

**2. Jurisdiction of the Court**

The primary factor of determining the jurisdiction of the court in mergers is to evaluate whether the transferee has any form of operations in India, be it in form of subsidiaries or branch office.

In **Re Bank of Muscat**, "*the court was faced with a question as to which court would have jurisdiction to sanction a merger in cases where the principal office and the place of ROC is different. Bank of Muscat which was a foreign corporation, had its branch office in Bangalore*"[14] The Karnataka High Court was of the opinion that such a case would fall under their jurisdiction, since the branch office was registered under the Companies Act.

In **Re Moschip Semiconductor Technology Ltd.**, "*the High Court of Andhra Pradesh was faced with a question as to whether Indian courts have jurisdiction to sanction amalgamation. A California based company wished to integrate with an Indian company whose registered office was at Hyderabad. The petition for amalgamation was filed by the transferee company and the transferor company was not joined as a party in the petition. The court considered whether the law applicable to the California based company permitted merger with a foreign*

[13] Rule 3, Companies (Transfer of Pending Proceedings) Rules, 2016.
[14] Re Bank of Muscat, 60 CLA 325 (Kar).

*company, and observed that the law of California permitted such mergers.*"[15]

However, following the 2016 Rules, the complete jurisdiction lies in the hands of the National Law Company Tribunal (NCLT).

**(C) The SEBI Regulations, 2011**

There are various regulations of the SEBI, that govern or in the least assist governing mergers or amalgamation involving foreign corporations. The best instance of the same can be observed from SEBI Listing Agreement.

Whereby it is explicitly stated that;

"*The Company agrees that, while filing for approval any draft Scheme of amalgamation / merger / reconstruction, etc. with the stock exchange under this subclause.*"[16]

Abiding this provision, all such transactions require the participating members to send a framework of their merging strategy or the terms to the SEBI.

The basic principle behind allotting SEBI to play a role in such transnational mergers is that in scenarios where the Indian transferee issues shares of a local subsidiary to the foreign transferer, then the foreign company with these allotted shares are to adhere to the guidelines of SEBI, specifically the "Disclosure and Investment Protection Guidelines, 2000", and further the "SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009". This way the firms are not only allotted the freedom to deal in shares when closing an agreement of merger, but also facilitates the government or specifically SEBI in governance of such transferred share capital.

**(D) Foreign Exchange Laws (Foreign Exchange Management Act, 1999 & FDI Policy)**

"FEMA is the parent legislation which governs foreign exchange transactions and the Department of Investment Policy and Promotion, (DIPP) and the Reserve Bank of India (RBI) from time to time formulates regulations such as press notes and circulars for the same."[17]

FEMA under further regulations, namely 5(1) and 5(2) provide for foreign investments in shares and stock market, which plays a vital role in mergers as expanded upon prior.

"*A registered Foreign Institutional Investor (FII) is allowed to purchase shares or convertible debentures of an Indian company under the Portfolio Investment Scheme.*"[18]

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[15] Re Moschip Semiconductor Technology Ltd., (2004) 59 CLA 354.
[16] SEBI Listing Agreement, Clause 24(f).
[17] Executive Programme Economic, Business and Commercial Laws, The Institute of Company Secretaries of India, 2019.
[18] FEM (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000. Regulation 5(2).

It is also important to get an approval of RBI before any such foreign investments, specially in cases of 'inbound' form of transnational mergers. Therefore, as has been observed now, even though there is an '*subject to any other law for time being in force'* which acted as freeway from RBI approval under section 234, can further be countered here. As even though concluded prior in the paper that the provision of approval from RBI can be exempted, following FEMA (Transfer or Issue of Security by a Person Resident outside India) to '*override*' the condition if need be. However, the important word is condition, as in the case of particularly shares, it is essential for any form of 'inbound' transaction to take place, the RBI needs to be informed about the same. The above is further signified from the point of view of the companies by regulation 16;

"*Indian parties, without the permission of RBI are not entitled to sell share or security held in a Joint Venture or Wholly Owned Subsidiary outside India, to any person.*"[19]

Therefore, following regulation 5(2) the RBI requirement under section 234 of Companies Act is further solidified.

# III. Case studies

## (A) Bharati Airtel Limited and MTN

### 1. Background

Bharati Airtel Limited and MTN, were individually huge in their respective countries, and therefore wanted to merge to expand their market. For the same they got into to negotiation talks in 2008, but that led nowhere. However, they met again for negotiation in 2009.

### 2. Regulations

The biggest reason of dispute became '*Dual Listing*', as now this matter had exceeded the negotiations between two corporations, it rather became a brawl of regulations. "*Dual listing is a feature under which the companies would continue to be listed at their respective stock exchange.*"[20] Dual Listing in itself led to violation / direct implications of FEMA and SEBI Regulations.

### 3. Analysis

Violation of Foreign Exchange Management Act, 1999

MCN was a South African based company, and this merger would provide it an access to the

[19] FEM (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000. Regulation 16.

[20] Dual Listing. Available at: http://www.investopedia.com/terms/d/duallisting.asp (Last visited on April 19, 2021).

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Indian market; specifically, the Indian listed shares. Therefore, this transaction if executed would be violative of the very principle of the said act, as it would not only open the gates to '*full capital account convertibility'* but moreover this would allow a foreign company to invest in India.

Implications of the SEBI (Substantial Acquisition of Shares and Takeover) Regulation, 1997:

Following the amendment of the said act, which resulted in; "*ADRs/GDRs with voting rights at par with domestic shares and thus, a company would be required to make an open offer under the regulation.*"[21] The implication of such an amendment would be grave, as now it would be required that MTN make "an open offer to buy an additional stake of 20% in Bharti."[22]

In conclusion, this merger had the potential to be a huge game changer in its respective filed, and additional would be a heavy 'outbound' investment from India. But the South African official were keen on executing 'dual listing' and to counter it a strict denial of the same was presented by the Indian authorities. One of the most renowned reason for the denial by the Indian authorities was that they were of the opinion that SEBI would lose its authority to an extent in the market. It was also reported that 'dual listing' would further lead to change in regulations of bankruptcy and taxes if agreed by India. Therefore, this merger wasn't completed.

### (B) Ranbaxy Laboratories and Daichii Sankyo Company Ltd

#### 1. Background

Daichii Sankyo Company Ltd was a giant in the market of pharmaceuticals, and it was a Japan based company. Ranbaxy Laboratories was also working in a similar field, and had been based in India. In late 2008, Daichii Sankyo Company Ltd was on a mission to make Ranbaxy its subsidiary to expand their operations to India.

#### 2. Regulations

The regulations that either violated or had direct impact on the said transaction were SEBI Regulations and FEMA Regulations. Further there was a huge role played by RBI and FIPB in the same.

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[21] Amendments in SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (Press Note300/2009) Available at: http://www.sebi.gov.in/press/2009/2009300.html

[22] Bharti-MTN merger deal called off with South Africa rejecting the structure. TIMES OF INDIA (Sep 30, 2009).

**3. Analysis**

Implications of the SEBI (Substantial Acquisition of Shares and Takeover) Regulation, 1997:

Following the regulations 10 and 12 of the said act, it was established that Daichii Sankyo was "*required to make an open offer to acquire 15 % or more of the voting right.*"[23] Following the all the additional requirements, "*the stake of Daichii Sankyo in Ranbaxy rose to approximately 63% by way of acquiring the stake of promoters, open offer and preferential allotment.*"[24] Ultimately Daichii did end up abiding by all the formalities, but sure ended up spending extra revenue and time.

The Authorities; RBI and FIPB

There were two notable complications arising with respect to the stated authorities and the FEMA Regulations. Originally as per the 2000 regulations of FEMA, Daichii would be subjected to receiving an approval from RBI. However, following a 2004 circular, there was no need of RBI approval. This circular was executed; "*with a view to facilitate foreign investment in India.*"[25] Furthermore until 2011, hundred percent of FDI was allowed with respect to the pharmaceutical industry. Therefore, no approval was required by the RBI and FIPB.

In conclusion, because of the sector of the deal being pharmaceutical, and the time of the Indian Demographic being modern enough to encourage foreign investments, this transaction was successfully completed. Although Daichii had to face its share of complexities due to the SEBI regulations, it sure did benefit from not seeking approval from RBI at the time.

**(C) Jet Airways and Etihad Airway**

**1. Background**

In Mid-2013, the private airlines corporations namely Jet and Etihad reached out to each other to negotiate towards a merger. Etihad Airways entered the negotiation with the intention of purchasing a percentage of equity shares of Jet Airways.

**2. Regulations**

The regulations that either violated or had direct impact on the said transaction were SEBI Regulations. Further there was a huge role played by RBI, FDI and CCI in the same.

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[23] SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. Regulation 10 & 12.

[24] Letter of Offer by Daichii Sankyo to SEBI. Available at: http://www.sebi.gov.in/takeover/ranbaxylof.pdf

[25] Reserve Bank of India, Foreign Exchange Department, RBI/2004-05/207 / Circular No. 16, (Oct 4, 2004) Available at: https://rbidocs.rbi.org.in/rdocs/notification/PDFs/57144.pdf

### 3. Analysis

Until 2012, the FDI's upper limit for domestic airlines was initially capped at 49 percent, however for NRI's the cap was further increased to 100 percent However, any investment of such nature "*required an approval from the government*"[26] The basic principle behind the same was to avoid the transfer of ownership from a company. Therefore, they settled with an agreed 24 percent of equity ownership for Etihad.

Since the transaction in hand, is fairly recent as compares to the other cases analyzed, it is important to note that Jet Airways for this transaction to go through had to apply for, and receive permission for the same from FIPB and CCEA, which they were successful with. Furthermore, in regards to the SEBI regulations Etihad didn't need to "*make any public offer under the Takeover Code as the threshold for open offer obligation was not exceeded.*"[27] This result is the exact opposite of that in the case of Airtel as explored in the first case study. However, that is due to Etihad being within the provided threshold.

In conclusion, this transaction did follow through, and was executed. It also further made its own share of history as this was the first case in which a foreign airline had invested in a domestic one.

## IV. Suggestions & conclusion

Transnational Mergers and Amalgamations has its own fair share of a rich history in terms of the legislations surrounding it. It's a concept which has undergone quite an evolution, and the primary reason for the same has been globalization. It is very evident how our legislation deferred in handling the same prior to India opening the gates for the rest of the world. The best instance of the same can be seen how the Companies Act 1956 dealt with the same, in contrast with the Companies Act 2013 which has been reflected upon in the paper in hand. It is not only the legislation, but the authorities summoned by these legislations namely the SEBI and RBI have to act as constant regulators. In case of most form of FDI, a prior approval from the RBI is required. While following the Irani Committee, the latest act that being the 2013 Companies Act, has allowed for FDI both in an inbound as well as an outbound manner has been permitted. It is however, the stringent procedure specially in inward situations that seems to discourage a negotiation at times.

Therefore, though we have made tremendous evolution for governing transnational mergers,

[26] Ministry of Commerce & Industry Department of Industrial Policy & Promotion, Press Note No.6 (Sept 20, 2012) Available at: http://dipp.nic.in/english/acts_rules/Press_Notes/pn6_2012.pdf
[27] SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. Regulation 3(1).

there is still room for improvement. This improvement will not be as significant of an improvement that the 2013 Companies Act was over the Companies Act 1956, or further it might not be as impact full as the Competition Act 2002 following the Raghavan Committee. However, there are still some needed changes. The researcher is of the opinion that the next change to the existent legislations would be revolutionary. Even though there is no need of any ground breaking new revelations, even an upgrade to the existing procedure to simplify the same would be greatly appreciated by all the member parties. After researching on the subject in hand, the following are the few suggestions that the researcher has towards the same;

**(A) IDR (Indian Depository Receipts)**

IDR has often been criticized for on a global stage. This is the case because it is often observed that such a method of consideration is quite complex and complicated to execute. It is also further noted that RBI and SEBI, to enforce their authority have created a decent number of restrictions on the insurance of the same. It is also quite peculiar that the instrument was launched in 2000, but wasn't used a single time until the 2010s. Therefore, ***the researcher would suggest either scraping, replacing or modifying the current instrument of IDR.***

**(B) Freedom from the Authorities**

The researcher understands that is a highly controversial point, but in his humble opinion that authorities namely RBI and SEBI are very stern with their regulations, and at times to stern. The researcher understands the it is highly important to have a control over the same, but at this stage that we stand it is a situation of over control. For almost every legal step in the process of transnational merger, the RBI and the SEBI have to approve, which at times can be unfair and be a drawback in attracting foreign investors. The best instance of the same can be noted from the case study of Bharati Airtel. The merger of Airtel was set to be historical, with it being the biggest foreign investment made from India at the time, and the same was declined as it involved a factor of SEBI losing a negligible amount of control over the stock capital. Therefore, ***the researcher would suggest ease in terms of the authoritative control at every stage of the transaction, and further would urge the authorities to be flexible to the option adjusting as per the circumstances.***

**(C) Logical Thresholds**

This last suggestion is more towards the Foreign Direct Investment (FDI). The threshold set by the government differs in terms of the field of investment, which is understandable as there exist priorities. However, if the government on one hand limits the threshold for airways at 49 percent but on the other hand for pharmaceuticals keep it at 100 percent, it results in an

understandable yet unfair situation. It is further important to note that existence of thresholds is to avoid transfer of owners or majority of ownership being in hands of a foreign investors. However, the purpose is completely defeated when priorities exist. Therefore, ***the researcher suggests that authorities in charge take a more logical approach towards setting the threshold, and further committing to one aspect only rather than diverse and contradicting their stand.***

### (D) Ease of Merger Process

While it is understandable why the entire process of merger and amalgamation is highly complex, specially when transactions become transnational in nature. However, at the same time if there was an ease to the process of any form, be it reducing the powers of the authorities, or be it formulating a separate statue that deals with mergers at such scale. Any form of ease at this point would be appreciated. While it is understandable due to the transaction being at an international stage, it would be impossible to have an effortless system, but at the least the present complexities can be reduced. Therefore, ***the researcher suggests that the entire process of Mergers and Amalgamation be made unchallenging or undemanding at least. Doing so would be in the best interest of both the investors as well as the economy***.

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