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Cross-Border Mergers in the Realm of FEMA Regulations: Transcending Global Boundaries

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ABSTRACT

Cross-border mergers are the amalgamation of two businesses with distinct physical headquarters to create a single organization. The primary goals of mergers are to increase shareholder value, lower operating costs, expand the market, and maximize profits. Inbound and outbound cross-border mergers are subject to different regulatory restrictions under the Companies Act of 2013 and FEMA regulations. Inbound mergers: Compliance with FEMA's stance on foreign security issuance and borrowing is necessary for foreign businesses merging into Indian companies. Indian entities are permitted to purchase foreign securities under the Liberalized Remittance Scheme, even in the presence of asset and liability management intervals.The RBI's regulatory control ensures that they adhere to FDI caps, borrowing guidelines, and valuation standards. Merger procedures have been made simpler by the Companies Act of 2013, in addition to SEBI, the Competition Act, and the Income Tax Act. Companies must conduct thorough due diligence and comprehend the operational, legal, and financial responsibilities that contribute to integration and success after a merger.Market diversification, operational effectiveness, technology adoption, and enhanced financial performance are some further advantages of cross-border mergers. Certain hazards are increased by institutional complexity brought about by cultural settings, legal protections, and regulatory frameworks. Strong governance procedures and efficient management can reduce these risks and guarantee market leadership and value creation.International valuation standards, NCLT permission, and legal framework adherence are necessary for cross-border mergers in India in order to ensure transparency and conformity with international norms. The process is facilitated and India's entry into the global economy is encouraged by the adoption of the RBI's considered approval approach and specific compliance schedules. In the end, cross-border acquisitions are a strategic instrument for expansion that permits businesses to take advantage of synergies, negotiate regulatory differences, and gain a competitive advantage in global markets.

***Keywords**: Mergers, cross- border, FEMA, FDI.*

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I. INTRODUCTION

A cross-border merger can be defined as the union of two enterprises that are headquartered in separate nations to merge into a third company[2] A merger of two enterprises, often of similar stature so that the shareholders of the two standalone companies jointly demonstrate the new business's shares[3]. The primary objective of mergers is to increase shareholder value, reduce expenditures on operations, enter new markets, consolidate equivalent product lines, and boost sales and profits, which should be in return profitable to the shareholders.[4] The notion of "merger "refers to five distinct groups of enterprise combinations: product development, vertical, market extension, horizontal and conglomerate mergers. The economic function, the goal of the commercial transaction, and the relationship between the merging companies all impact the phrase that describes the merger[5]. They are prompted by a range of factors, including excess capacity increased competition in traditional industries and new market opportunities in high-technology sectors.[6] Cross-border mergers can yield dividends in terms of company performance and profits as well as benefits for home and host countries when successful industrial restructuring leads to greater efficiency without undue market concentration.[7]Any merger or agreement between an Indian company and a foreign company in compliance with Companies Rules notified under the CA 2013 is referred to as a cross-border merger under the Merger Regulations, This could take the shape of an outbound or an inbound merger.[8] In an inbound merger, FEMA regulations govern foreign security issuance, asset holdings, borrowing conformity and account management with specific conditions for compliance and timelines, including a two-year adjustment period. In an outbound merger, Indian residents can acquire foreign securities under FEMA regulations, manage liabilities, hold permissible assets and open

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[2] taxguru_in and kohli, J. (2020) *Cross border merger – meaning, types, procedure & main rules & regulation*, *TaxGuru*. Available at: https://taxguru.in/company-law/cross-border-merger-meaning-types-procedure-main-rules-regulation.html#google_vignette (Accessed: 14 September 2024).

[3] *Types of mergers* (2023) *Corporate Finance Institute*. Available at: https://corporatefinanceinstitute.com/resources/valuation/types-of-mergers/ (Accessed: 14 September 2024).

[4] Hargrave, M. (no date) *Merger: Definition, how it works with types and examples*, *Investopedia*. Available at: https://www.investopedia.com/terms/m/merger.asp (Accessed: 14 September 2024).

[5] *5 types of company mergers* (2018) *Minority Business Development Agency*. Available at: https://archive.mbda.gov/news/blog/2012/04/5-types-company-mergers.html#:~:text=There%20are%20five%20commonly%2Dreferred,merger%20and%20product%20extension%20merge (Accessed: 14 September 2024).

[6] Kang, N. and S. Johansson, "Cross-Border Mergers and Acquisitions: Their Role in Industrial Globalisation"" *OECD Science, Technology and Industry Working Papers, No. 2000/01, OECD Publishing,* (2000).

[7] Kang, N. and S. Johansson, "Cross-Border Mergers and Acquisitions: Their Role in Industrial Globalisation"" *OECD Science, Technology and Industry Working Papers, No. 2000/01, OECD Publishing,* (2000).

[8] *India: Cross-Border Merger Framework* (no date) *DLA Piper*. Available at: https://www.dlapiper.com/en/insights/publications/crossroads-icr-insights/2022/india-cross-border-merger-compliance (Accessed: 14 September 2024).

accounts for transactions, adhering to specific compliance timelines and conditions.[9]

The Foreign Exchange Regulation Act (FERA) was enacted as an interim measure to control the flow of foreign cash into India following its independence. Later on, the "Foreign Exchange Management Act"(FEMA) was the new name for this legislation. It currently functions under the Indian central government, exerting broad authority to supervise foreign exchange operations.[10] "The Foreign Exchange Management Act (FEMA)" is essential to maintain a nation's foreign exchange market and manage foreign exchange transactions, FEMA analyses the objectives, key provisions, economic impact and suggestions for improvement and criticisms of the foreign exchange[11] Under Section 5 of FEMA, Indian residents can freely buy or sell foreign exchange for current account transactions, except for those prohibited by the government, such as lottery remittances, gambling and specific export commissions[12] Rule 25A of the companies (compromises, Arrangement or Amalgamation) Rules, 2016 must be followed when valuing both the Indian and foreign companies. Cross-border merger transactions compliant with these regulations are considered pre-approved by the Reserve Bank Under Rule 25A. A certificate from the managing director or company secretary must confirm compliance when applying NCLT.[13] The companies intending to undertake cross-border mergers must address prior regulatory issues and ensure the valuations are done by a qualified professional in compliance with international standards. A declaration may be required in the RBI approval process.[14] A complete legal structure supports mergers and acquisitions in India, enumerated under the Companies Act, 2013, constituting basic governance in a company. Acquisition of shares would be regulated by SEBI regulations, 2011, Besides, Competition Act, 2002, Insolvency and Bankruptcy Code, 2016, as well as the Income Tax Act, 1961 also plays a role in conducting M&A transactions. In addition, the Department for Promotion of Industry and Internal Trade(DPIIT) controls foreign investment and Transfer of Property Act 1882, Indian Stamp Act, 1899 and International Financial Reporting Standards (IFRS) along with FEMA influence the entire M&A process.[15]

Section 234 of the Companies Act 2013 would apply between companies incorporated in India

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[9] Government of India, "Foreign Exchange Management (Cross Border Merger) Regulations" (Reserve Bank of India, 2018)

[10] G.Santhoshi Kumari and Dr.M.S.V.Prasad (eds.), *Currency Risk Management* 20-35 (Vernon Press, Visakhapatnam, India, 2019).

[11] Mohit Kumar, "Study of Foreign Exchange Management Act" 10 *Universal Research Reports* 183-187 (2023).

[12] Government of India, "Liberalized Remittance Scheme" (Reserve Bank of India, 2023)

[13] Government of India, "Foreign Exchange Management (Cross Border Merger) Regulations" (Reserve Bank of India, 2018)

[14] Sidharrth Shankar, "India: Cross-Border Merger Framework" *DLA Piper*(2022).

[15] Mayank Garg, "Navigating-Cross-Border-Mergers-And-Acquisitions-In-India" *Legal Mantra* (2023).

and foreign companies incorporated in any jurisdiction subject to an order notified by the Central Government or otherwise provided for in such provisions. A foreign company merger can be accepted with an Indian Company, accepting consideration either in cash or in depository receipts or a combination of both, subject to the RBI approval.[16]

A prospective buyer's comprehensive assessment of a company, known as "due diligence," undertakes principally to determine its assets and liabilities and assess its commercial potential. Commercial due diligence would be the first step in a "classical" due diligence process, which would then move on to operational due diligence and legal review, accounting compliance review and financial due diligence.[17] Due diligence must confirm the validity of securities, tax compliance and asset title, as breaches can only be addressed post-transaction through representations in the purchase agreement. It also requires scrutiny of liabilities, contingent liabilities and various compliance issues, including environmental and contractual obligations.[18] The due diligence phase of any acquisition is a critical milestone that can determine success or failure, serving as an essential precursor to post-merger integration (PMI) planning activities.[19] When it comes to the case of "SFC (Securities and Future Commission) vs. CITIC Limited (2016)" the fundamental problem in this instance, is losses in foreign exchange contracts resulting from CITIC Limited's failure to perform due diligence before initiating Cross-border transactions.

According to the court of Hong Kong, the directors had a duty to disclose all relevant risks associated with the merger and acquisition deals and to undertake due diligence. Established the need to take into account the level of operational and financial due diligence, including foreign exchange, that businesses should perform before entering into cross-border agreements.[20]

II. BENEFITS AND RISKS OF CROSS-BORDER MERGERS

(A) Risks

According to Gubbi, 2015; Oetzel & Oh, 2019; and Zhou et al., 2016, cross-border mergers and acquisitions entangle risks because of the much intertwined institutional complications that result from various influences such as differences in political, economic, regulatory, and

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[16] Merger or Amalgamation of Company with Foreign Company (Companies Act 2013), s. Section 234

[17] Liviu Warter and Iulian Warter, "Cultural Due Diligence as Competitive Advantage in Cross- Border Mergers and Acquisitions" 65 *Research Gate*60-71 (2015).

[18] Arthur H. Rosenbloom, *Due Diligence for Global Deal Making* 1-11 (Bloomberg Press, New York, 2002).

[19] Leticia Krüger Grigull, "Due Diligence, a Comprehensive Tool for a Positive Cross-Border M&A" *Hamburg University of Applied Sciences*(2017).

[20] Securities and Futures Commission, "SFC Commences Proceedings Against CITIC, its Former Chairman and Executive Directors" (2014)

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cultural contexts. These risks increase the costs of transactions and this makes the firms use awareness, protection, and assessment practices in a bid to optimize investment decisions (Barna & Nachescu, 2014). Firms with a history of international experience build up resilience and a stronger risk orientation because of factors from the financial (among them, payment and valuation) and non-market ones (such as sociological and political) considerations (Dai et al., 2017; Zakaria et al., 2017). Excellent management will dampen the risks of overpayment as risks critical in the acquisition valuation (Rappaport & Sirower, 1999).

cross-border mergers and acquisitions Accounting standards and disclosure requirements vary differently to impede the process of due diligence in cross-border acquisitions. Differences in legal protections for minority shareholders and enforceability of contracts further hinder valuation of future cash flows. In weak-institutional countries, majority owners may expropriate minority shareholders, making investor protection a concern for acquirers (Djankov et al., 2003, 2008).[21]

(B) Benefits

In the case of cross-border mergers, the integration of two companies allows for market growth in terms of expansion to new regions, use of local entities to make entry easier into the market, and diversification to stabilize economic fluctuations. This also enables the business to adopt new technologies, ideas and practices that help stay competitive with innovation-driven growth.[22]

Research has identified five basic motives behind cross-border mergers : value creation, efficiency improvement, market leadership, strategic and marketing objectives, and synergistic gains. Overall findings suggest that the acquiring firms expect to realize better cost and financial efficiency, stakeholder benefits, and employee welfare after the acquisition. Naturally, value creation is one of the important drivers of enhanced financial performance after a merger.[23]

Cross-border mergers are often driven by the potential for added value through regulatory and governance differences between countries. Firms may benefit by accessing favorable regulatory environments or lower labor costs, transferring some operations to regions with less stringent labor laws. Improved corporate governance in a firm's home country also enhances the quality of valuation) and non-market ones (such as sociological and political) considerations (Dai et

[21] Tomas Mantecon, "Mitigating Risks in Cross-Border Acquisitions" 33 *Journal of Banking & Finance* 640-651 (2009).
[22] Stephenson Fournier, "The Benefits and Risks of Cross-Border Mergers and Acquisitions" (2024)
[23] Nam-Hoon Kang and Sara Johansson, "Cross-Border Mergers and Acquisitions Their Role in Industrial Globalisation" 1-40 (2000).

al., 2017; Zakaria et al., 2017). Excellent management will dampen the risks of overpayment as risks critical in the acquisition valuation (Rappaport & Sirower, 1999).

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III. Case law

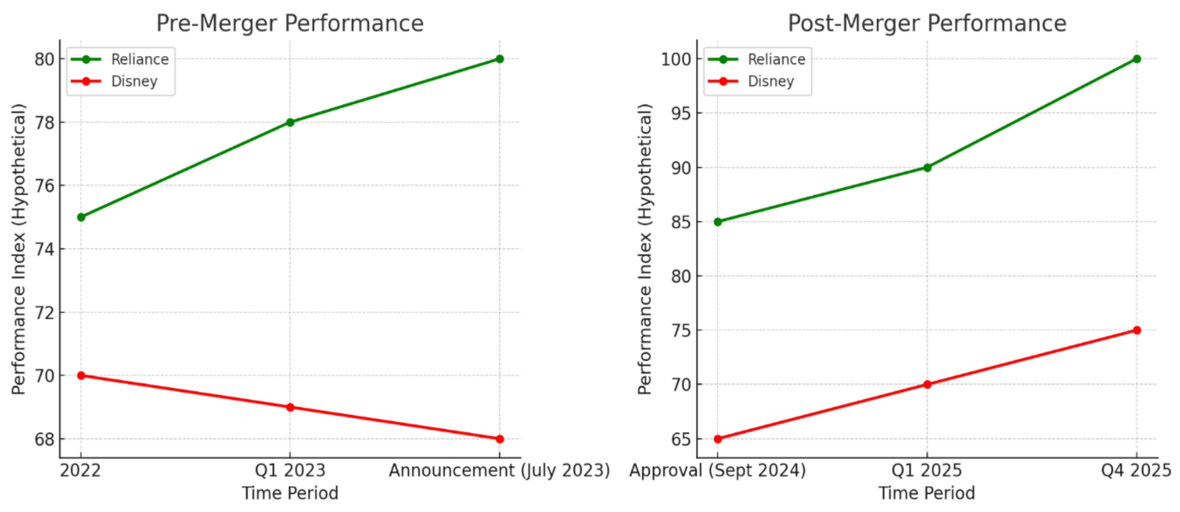
In 2024, one of the most prominent cross-border mergers featuring India was Reliance-Disney, in which Viacom18 Media Pvt. Ltd. acquired a Reliance Industries entity that owned Disney Star India Pvt. Ltd. At $8.5 billion, it is regarded as one of the biggest acquisitions of Q1 2024[25]. The merger has regulatory authorization from the National Company Law Tribunal (NCLT) and the Competition Commission of India (CCI) and is anticipated to be finalized by Q3 2025[26]

Pre-merger context- Viacom18, which operates several TV channels and OTT platforms in India, was considered as a way for Reliance to expand its media presence. Disney's problems in the Indian market were minimal. This was therefore a calculated divergence as part of Disney's commitment to refocus its business strategies broadly.

Post- Merger context -By acquiring substantial sports and entertainment assets from Disney Star in India, this merger has significantly expanded Viacom18's portfolio. Consequently, this further solidifies Reliance's dominance as an influential force in the Indian media market. Particularly in developing economies like India, the Indian media panorama is gradually turning into a part of the larger consolidation of the global media company. To enhance their competitive edge, local businesses are investing in assets from overseas nations.[27]

The graphs below show that with consistent growth both before and after the merger, Reliance benefits significantly from it, whilst Disney shows indications of a recovery.

[24] Tomas Mantecon, "Mitigating Risks in Cross-Border Acquisitions" 33 *Scopus Journal* (2008).
[25] Business Standard, "Reliance Eyes Completing Merger with Disney's India Business in Q3" (2024)
[26] Ching-Chiu Hsu, Jeong-Yang Parl, *et.al.*, "Resilience and Risks of Cross-Border Mergers and Acquisitions" 27 *Multinational Business Review*(2019).
[27] Dheeraj Budaraju, "Disney-Reliance: A Match Made in Media Heaven or Hell" (2024)



IV. Inbound and outbound mergers

Cross-border mergers are permitted in jurisdictions that the Central Government has notified under Section 234. It requires prior approval from the Reserve Bank of India (henceforth referred to as the "RBI") and allows mergers to occur both inbound and outbound. It specifies that the merger's consideration must be either cash or depository receipts, or a combination of both.[28]

The Companies Act of 1956 only allowed inbound mergers and did not allow outbound cross-border mergers. This was changed in the 2013 Companies Act to allow for outbound cross-border mergers under Section 234 to support and encourage India's rapidly expanding economy and growing international investment. To regulate such transactions, RBI guidelines were implemented in 2018 after this was formally notified in 2017. These regulations permit such cross-border mergers to occur with the RBI's presumed consent.[29]

According to Regulation 4, in the event of an inbound merger

a) The Foreign Exchange Management Act (henceforth, "FEMA") (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000, govern the issuance and transfer of security by a non-resident in the event of an inbound merger

b) Any foreign company's borrowing that is converted to an Indian company's borrowing must adhere to the Trade Credit, External Commercial Borrowing, or other foreign borrowing standards.

c) In accordance with the current Act and its rules, the resulting Indian corporation is

[28] Soundaraya Lahari Vedula, "Cross Border Mergers: The Indian Perspective" *SSRN Journal* 1-14 (2018).
[29] J, "Outbound Mergers - a Distant Dream? - Analysing the New Cross-Border Merger Framework Under the Companies Act, 2013" *SSRN Journal*1-14 (2019).

allowed to hold or transfer assets.

d) Any asset that is not allowed to be held in this manner must be sold within 180 days of the merger plan's approval date.[30]

According to Regulation 5, in the event of an outbound merger

a) An Indian resident may purchase or hold securities in line with the liberalized Remittance scheme or the FEMA (Transfer of Issue of Security by a Person Resident Outside India) Regulations,2000, depending on the circumstances

b) The resulting foreign business must pay back the outstanding loans in accordance with the plan approved by the National Company Law Tribunal (NCLT)

c) The resulting foreign company is allowed to transfer or hold assets that are permitted for foreign business to hold under the current Act and its rules and regulations.

d) Any asset that cannot be held in this manner must be sold within 180 days of the sanction date.[31]

Regulation 7 outlines the valuation rules, while Regulation 8 applies the RBI's considered approval principle after all requirements are met.[32]

V. Foreign Direct Investment Law in Compliance with FEMA Norms

According to the 2017 regulations, any borrowing by a foreign company that becomes a borrowing by the resulting Indian company in the event of an inbound merger must comply with the Foreign Exchange Management (Guarantee) Regulations, 2000 or the Foreign Exchange Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000, as appropriate.[33]Only approved dealers are allowed to borrow foreign currency due to strict inspections imposed by ECB regulations. The use of funds is subject to limitations. Additionally, RBI permission is required in the event that the loan is repaid.[34]Companies may not be able to fully comply with these strict standards in the event of a cross-border merger.

[30]Regulation 4, Foreign Exchange management (Cross Border Merger) Regulations, 2017,Reserve Bank of India Section 47 of the Foreign Exchange Management Act, 1999 (November 2024) available at https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11235&Mode=0

[31]Regulation 5, Foreign Exchange management (Cross Border Merger) Regulations, 2017,Reserve Bank of India Section 47 of the Foreign Exchange Management Act, 1999 (November 2024) available at https://www.rbi.org.in/scripts/NotificationUser.aspx?Id=11235&Mode=0

[32] Regulation 7&8, Foreign Exchange Management (Cross Border Merger) Regulations, 2017, Reserve bank of India, section 47 of Foreign Exchange Management Act, 1999, (November 17, 2024) available at https://rbidocs.rbi.org.in/rdocs/Content/PDFs/CBMD08484A86A9AE4780A2D825C5D85184B3.PDF

[33] Government of India, "Department for Promotion of Industry and Internal Trade" (Ministry of Commerce and Industry, 2020)

[34] Government of India, "ECB Policy – New Framework" (India Tax& Regulatory Services, 2015)

Investments by a foreign portfolio investor (FPI) and its investor group must not exceed 10% of the fully diluted paid-up equity capital, according to Schedule II of the FEMA Rules. The FPI may sell off excess holdings or reclassify them as FDI if the limit is exceeded.

According to operational framework for reclassification of foreign portfolio investment by Foreign Portfolio Investment to Foreign Direct Investment (FDI) By RBI it states that the following approvals/concurrence must be obtained to classify as an FDI

a) In order to comply with FDI requirements, such as entry routes, sectoral caps, price criteria, and investment restrictions under Schedule I of the FEMA Rules, government approvals—especially those of neighboring countries—must be sought.

b) The Indian investee company should agree to reclassify as an FDI, ensuring that it complies with sectoral caps, FDI restrictions, and all the necessary government approvals stipulated under the applicable regulations.[35]

VI. Conclusion

Cross-border acquisitions are transforming initiatives that let companies open up new markets, integrate globally, and take advantage of operational synergies. The Companies Act, FEMA, RBI rules, and worldwide valuation standards are among the stringent regulatory requirements imposed by legal and statutory frameworks on these transactions. These cross-border mergers offer numerous advantages, such market diversity, cost effectiveness, and innovation-driven growth, just like any other merger. However, they also carry a high risk because of institutional complexity, legal differences, and cultural barriers.

Inbound and outbound merger acquisitions have a dual structure, which highlights the need for meticulous preparation and a strict timeframe for asset management, liabilities settlement, and compliance. Naturally, this results in to due diligence, which plays a significant role in evaluating the operational, legal, and financial aspects in order to minimize risks and maximize post-merger integration.

India has become a major player in the global M&A scene by bringing its local laws into line with international standards. In addition to facilitating industry restructuring, cross-border mergers boost shareholder value, promote innovation, and increase economic efficiency. But for such transactions to succeed, they require sound governance, efficient risk management, and the foresight to navigate a complex regulatory environment.

[35] Government of India, "Operational Framework for Reclassification of Foreign Portfolio Investment to Foreign Direct Investment (FDI)" (Reserve Bank of India, 2024)

Finally, cross-border mergers are a very effective way to achieve strategic company objectives and promote global economic expansion. Consequently, businesses, legislators, and other pertinent stakeholders ought to concentrate their efforts on creating robust frameworks that optimize advantages while tackling innate difficulties.

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