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A CRITICAL STUDY ON CROSS-BORDER COMBINATION IN BALANCING ECONOMIC GROWTH AND COMPETITION IN INDIA

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ABSTRACT

Combination includes Merger, Acquisition and Amalgamation. And cross-border Combination refers to Merger, Acquisition and Amalgamation in and out of the territory of India by a foreign entity or an Indian Company acquiring company outside the territory of India. After Globalisation in the year of 1991, Cross Border Combination plays a crucial role in economic development of the Country. It encourages Foreign Direct Investment, transfer of Technology, innovation, transfer of resources and creation of employment opportunities and in other hand it had negative impact in host country competitors. When a dominant player in the relevant market mergers with the foreign entity in it possible to AAEC in competition by price fixing, restricting new competitors to enter the market, abusing its dominant position, market allocation and even entering into Anti-competative agreement. It is very important for developing country like India to have proper regulatory mechanism and it do have many authorities. For a merger to establish in India, if it exceeds certain threshold limit it is important to get approved from Reserve Bank of India, National Company Law Tribunal and Competition Commission of India. This study critically examines the impact of cross-border combinations on India's economic growth and its competition framework. Simultaneously, it assesses the regulatory challenges faced by Indian authorities, especially the Competition Commission of India, in scrutinizing and approving such combinations to ensure they do not hinder competitive market dynamics.

The study further analyses the effectiveness of current legal and policy frameworks i.e. Effects Doctrine in India governing cross-border combinations under the Competition Act, 2002. It evaluates whether these frameworks are adequate to balance economic growth aspirations with the need to maintain a level competition field in the market.

KEYWORDS: Merger, Effects Doctrine, economy, Competition, Cross Border Combination

INTRODUCTION

In the era of liberalisation, privatisation and Globalisation and after introduction of new economic policy, cross border mergers become a strategic tool for the Indian companies for its international expansion of business resources. In ordinary parlance merger means fusion of one thing into another. It is a combination of two or more entities to form a new institution. Merger by absorption is when the resultant entity is a new company altogether and merger by substitution is when one company mergers into another and loses its previous identity. A cross-border merger is a merger between companies in different jurisdictions. It entails governance of legal framework of different countries Historically the regulatory framework of India restricted the outbound mergers limiting the ability of Indian firms to merge with or into foreign entities. However, the companies Act, 2013 alongside with Companies (compromises, Arrangement and Amalgamation) Rules, 2016 and Reserve Bank of India Foreign Exchange Management (Cross-

Merger) Regulations, 2018 promoted cross border mergers to promote economic development of the country, increase the value of Indian companies in global market and increase the revenue of in and out of the country. In the other hand, the Competition Act, 2002 have collectively refines and restricts the Indian approach to Cross-Border mergers having Appreciable adverse effect on the Competition (AAEC), enabling outbound transactions under specific conditions. Similarly, Recent amendments in 2023 introduced significant changes to the Indian merger control regime. One of the key changes is the introduction of a "deal value threshold" which mandates that transactions exceeding INR 2,000 crore (approximately USD 240 million) must be reported to the CCI, provided the target company has substantial business operations in India. This change aims to capture significant deals in the digital and new-age markets, where companies might have high valuations despite low tangible assets or turnover. The contribution of cross-border combinations to economic growth is neither linear nor uniformly positive. While they can inject much needed capital and managerial expertise into underperforming sectors, they may also lead to the erosion of local industries, job losses due to restructuring, and the dominance of foreign multinational corporations over key sectors of national interest. Additionally, the repatriation of profits and aggressive tax structuring by MNCs may diminish the long-term economic benefits for host nations.

ROLE OF CROSS BORDER COMBINATION IN PROMOTING ECONOMIC GROWTH

Economic progress is now closely connected to global networks and collaborations rather than being limited to national borders in today's globalized world. Trade and/or friendly ties between governments may lead to regional cross-border coordination and collaboration. Cross-border partnerships are crucial in determining the structure of the global economy, from governments promoting international trade agreements to multinational firms forging strategic alliances. Through these partnerships, resources, information, and experience may be shared across national boundaries and beyond physical barriers, opening up new opportunities and pathways for progress. Through cross-border collaborations, players may access new markets, develop more efficiently, and reach economies of scale that would be impossible via unilateral efforts by exploiting the comparative advantages of various areas and economies. India underwent a radical change with the economic liberalization of 1991, which allowed international investment and integrated the country into the world economy. India's stringent policies before to 1991 had discouraged cross-border mergers and foreign investment. However, new laws and rules brought about by the reforms decreased government interference, removed obstacles to foreign direct investment (FDI), and promoted the growth of private industry.

2.1. ECONOMICS AND CROSS BORDER COMBINATION

2.1.1. NEO CLASSICAL THEORY:

Neoclassical economists emphasize the importance of capital accumulation, technological progress, and efficient resource allocation in driving economic growth. While neoclassical growth theory tends to focus on factors such as investment, savings, and productivity, it also recognizes the role of partnerships in fostering innovation and knowledge diffusion. Partnerships allow firms to pool resources, share risks, and collaborate on research and development (R&D) activities, thereby stimulating technological innovation and productivity gains. In Neoclassical Growth Theory, partnerships serve as instrumental mechanisms for fostering innovation and knowledge diffusion within an economy. Neoclassical economists primarily focus on factors such as capital accumulation, technological progress, and efficient resource

allocation as drivers of economic growth[116]. Hence, cross-border partnerships for economic development embody the principles of Neoclassical Growth Theory by providing a mechanism through which firms can overcome barriers to innovation and capitalize on economies of scale and scope at an international level. By fostering collaboration and knowledge sharing across borders, these partnerships stimulate technological progress, enhance productivity, and drive long-term economic growth not only within individual countries but also on a global scale.

2.1.2. ENDOGENOUS GROWTH THEORY- (Romar and Lucas)

Unlike neoclassical growth theory, endogenous growth theory emphasizes the role of innovation, human capital, and knowledge spillovers in driving long-term economic growth. Partnerships play a central role in this framework by facilitating the creation and dissemination of knowledge through collaborative R&D activities, technology transfer, and learning-by doing processes. Endogenous Growth Theory, developed primarily by economists Paul Romer and Robert Lucas in the 1980s, explains long-term economic growth as a result of internal factors within the economy, rather than relying on external forces or diminishing returns to capital as suggested in classical (exogenous) growth models. It emphasizes the role of human capital, innovation, knowledge spillovers, and technological progress as the main drivers of sustainable growth. Unlike exogenous models, where technological advancement is treated as an external and unexplained factor, endogenous growth theory incorporates it within the economic system. According to this theory, investments in education, research and development (R&D), and innovation-friendly policies can lead to increasing returns and sustained productivity improvements. One of the central tenets of this theory is that knowledge and ideas are non-rival and partially excludable, meaning they can be shared without being depleted, leading to positive spillover effects across industries and countries. The theory also argues that government policy, such as subsidies for R&D or education, can significantly influence the rate of innovation and thus the overall growth rate[117].

In the context of globalization and cross-border mergers, endogenous growth theory is particularly relevant. Foreign direct investment (FDI) and mergers bring new technologies, skills, and managerial practices that can be absorbed by domestic firms, enhancing innovation and productivity. Therefore, cross-border combinations, if well-regulated, can serve as channels for transmitting growth-enhancing knowledge and innovation across borders, supporting long-term economic development[118].

2.1.3. INTERNATIONALISATION THEORY:

Internalization Theory, developed by Peter Buckley and Mark Casson in 1976, provides a foundational framework for understanding why firms expand internationally through foreign direct investment (FDI) and often choose to internalize operations rather than rely on external market transactions such as licensing or exporting. The core idea is that firms internalize operations to minimize transaction costs and protect proprietary advantages, such as technology, managerial expertise, and brand value. In international markets, these transaction costs are often high due to uncertainty, weak legal systems, enforcement issues, or information asymmetry. Therefore, instead of licensing technology to a foreign firm which may lead to imitation or misuse the firm prefers to establish a subsidiary or acquire a local firm to retain full control. This theory helps explain the preference for cross-border mergers and acquisitions (M&As), where internalization allows firms to enter new markets while protecting their intangible assets. It also ensures better coordination, quality control, and alignment of

[116] https://cleartax.in/glossary/neoclassical-economics
[117] https://egyankosh.ac.in/bitstream/123456789/83221/1/Unit-6.pdf
[118] Charles I. Jones, Paul Romer: Ideas, Nonrivalry, and Endogenous Growth, The Scandinavian Journal on Economics, Scand. J. of Economics 121(3), 859–883, 2019

strategic goals across borders. In the context of economic growth, internalization through cross-border M&As enables technology transfer, capital inflow, and skill development in host countries. It facilitates the diffusion of innovation and managerial practices, contributing to increased productivity and competitiveness of domestic industries[119]. Internalization Theory also complements the Eclectic Paradigm (OLI Model), where internalization is one of the three key motives for FDI. Ultimately, this theory underscores why multinational enterprises choose to grow globally by acquiring or establishing operations in foreign countries, rather than dealing with external agents.

2.2. CHALLENGES IN CROSS BORDER COMBINATION:

The OECD (2012) identifies the following challenges: The lack of a competition culture due to the historical dominance of the state in the economy and, consequently, an underdeveloped private sector. This lack of a competition culture affects the enforcement of competition laws and leads to a distorted view of the competition process. Competition authorities often lack the necessary resources and trained personnel in law and economics to perform their regulatory functions due to budgetary constraints. In this context, merger control is not a priority, and efforts are focused primarily on tackling cartels and abuse of dominant positions, inadequate or non-existent legal framework for merger control, often consisting only of basic provisions that are insufficient for effective control over cross-border mergers;

Legal and Regulatory Compliance: One of the most significant challenges in cross-border M&As is compliance with the complex laws and regulations across multiple jurisdictions, as each country has its own set of corporate laws, securities regulations, competition rules, tax obligations, and foreign investment policies, making the legal landscape especially challenging to navigate[120].

Conflicting Jurisdictions

In the case of cross-border mergers, it is crucial to address the legal requirements of all the jurisdictions involved. For example, if a company in India is merging with a U.S.based company, both countries regulatory frameworks must be taken into account. India's Companies Act, 2013, and the Foreign Exchange Management Act (FEMA) lay down specific procedures for cross-border mergers, particularly for the foreign exchange implications and approval from the Reserve Bank of India (RBI).The Foreign Exchange Management (Cross-Border Merger) Regulations, 2018 also stipulate detailed procedures that both the Indian transferee company and the foreign transferor company must adhere to for a smooth merger. However, navigating these procedures can be complex as the processes and approval requirements vary from country to country.

Foreign Investment Policies

In many countries, certain industries may be considered "strategic" or "sensitive," and foreign acquisitions of companies in these sectors are subject to more stringent scrutiny. For instance, China's Foreign Investment Law requires that foreign investments be scrutinized to ensure they don't harm national security or result in the loss of control over sensitive industries. In such cases, companies involved in cross-border M&As must seek appropriate approvals from various government agencies to ensure compliance with national security regulations.

Given the complexity of compliance across different legal systems, failure to address legal requirements adequately can result in delays, penalties, or even deal cancellations. Legal advisors must be vigilant in understanding the

[119] Isaac Otchere & Erin Oldford, Cross-border acquisitions and host country competitiveness, https://www.efmaefm.org/0efmameetings/EFMA%20ANNUAL%20MEETINGS/2018-Milan/papers/EFMA2018_0012_fullpaper.pdf , visited 10th May 2025, 2.16 PM

[120] Rohitkumar Ramesh Ohal, Legal and Regulatory Framework Governing Cross-Border Mergers and Acquisitions in India: Challenges and Reforms, International Journal of Research Publication and Reviews, Vol (6), Issue 5, May (2025), Page – 805-807

regulatory landscape and ensure that all approvals are obtained before proceeding with the transaction[121].

Tax Implications and Structuring

Tax implications are another major concern in cross-border M&As. Each country has its own tax code, and companies must carefully assess the tax implications of the deal from both the seller and buyer's perspectives. Cross-border deals are often subject to double taxation, which can significantly impact the value of the transaction.

Double Taxation Risk

When a company in one country acquires or merges with a company in another jurisdiction, it may face the risk of being taxed in both countries. This can occur when the transaction involves the transfer of assets, stock, or shares between entities located in different tax jurisdictions. Double tax treaties (DTTs) are usually put in place between countries to mitigate this risk, but in some cases, the provisions of DTTs may not fully eliminate the burden.

For example, in India, the taxation of capital gains arising from the transfer of shares is subject to the Income Tax Act. Similarly, the U.S. has its own tax rules that govern cross-border M&As, and these regulations must be carefully understood to avoid unforeseen tax liabilities.

Tax structures of cross-border M&As must also consider repatriation of funds. In some countries, repatriating funds from subsidiaries or merged entities can attract high taxes. Legal and tax advisors must carefully structure the deal to minimize tax liabilities through tax-efficient vehicles or strategies, such as using a third jurisdiction that offers favourable tax rates or tax treaties.

Due Diligence

Due diligence is critical in any M&A, but it is even more crucial in cross-border transactions. Cross-border due diligence involves not only reviewing financial statements, contracts, and assets but also assessing the legal and regulatory risks in the target company's home country. Companies must ensure that the target company is compliant with local regulations and that no hidden liabilities or legal issues could surface after the deal.

The complexity of due diligence in cross-border M&As arises from the need to evaluate the target company's operations in multiple jurisdictions. This includes analysing tax records, reviewing intellectual property (IP) rights, and ensuring that the company's environmental and labour practices comply with local regulations.

Political and Economic Risks

Cross-border M&As are also subject to political and economic risks that can affect the stability of the deal. Changes in government policy, tax laws, or foreign investment regulations can drastically impact the value of the merger. Political instability or economic downturns in one of the countries involved can create additional hurdles and risks.

Companies should consider purchasing political risk insurance to mitigate these risks. Additionally, they must continuously monitor the political and economic climate in the target market to ensure the long-term success of the merger.

REGULATORY FRAMEWORK

3.1. UNDER COMPANIES ACT, 2013:

The term Combination includes merger, acquisitions and amalgamation. The term Merger has not been defined under the Companies Act, 2013 or Income Tax Act, 1961 but as a concept 'merger" is a combination of two or more entities into one with the accumulation of their assets and liabilities and coming together of the entities into one business. And Acquisition is the process of procurement of one company by the other. The two companies involved are

[121] Avaantika Kakkar and Vijay Pratap Singh Chauhan, Evolving Character of the Indian Merger Control Regime, Competition Commission of India Journal on Competition Law and Policy, Vol. 3, December 2022, pp. 1-19

acquirer or buyer which is the bigger fish in the sea and the acquired company or seller also called the target company. The Buyer company can acquire this by buying of shares or assets of the target company depending on the way the deal is structured. And cross-border merger is defined as combination of business of two or more companies incorporated in two or more countries. Companies of different jurisdiction basically go through this process in order to enhance their growth and elevate their standard to compete in international market[122]. The 1956 Act basically approved only inbound mergers but after introduction of 2013 Act, even outbound merger got recognised[123].

Application under Section 230 of the Act, has to be made to the Tribunal by either of the party to tribunal and on such application, Tribunal may call the meeting of members or creditors or both, for the purpose of obtaining approval of the proposed scheme through voting by such members or creditors or both and entertaining the objections which may be raised by them. The notice for such meeting along with the creditors and members, if required shall also be sent to the Central Government of India, Income Tax Authority, Reserve Bank of India (RBI), Security and Exchange Board of India (SEBI), Competition Commission of India (CCI), the Registrar, respective Stock Exchanges, the Official Liquidator. Each of them on receiving such notice shall be allowed to raise objections to such proposed scheme within thirty days. The merger would become binding, if three-fourth of the creditors in their debt value or members in their shares value, as the case may be, vote in favour of such Cross Border Merger or if the scheme is otherwise approved by the Tribunal. In the significant development[124], the ministry of corporate affairs made changes in section 234 of the Act, it inter alia provides that, with the prior approval of the Reserve Bank of India (RBI), a foreign company may merge into an Indian company and vice versa and that the terms and conditions of the scheme of merger may provide, among other things, for payment of consideration to the shareholders of the merging company in cash, or in depository receipts, or partly in cash and partly in depository receipts. The amendment to the Merger Rules further prescribes that such cross-border mergers and amalgamations must adhere to the requirements under the Companies Act and that the valuation (in case of an outbound merger) be conducted by valuers who are members of a recognised professional body in the country of the transferee company and as per internationally accepted accounting standards and valuation.

While the MCA has now permitted cross-border mergers, there are certain aspects that would require evaluation for successful implementation of cross-border mergers, including feasibility of tax neutrality in all the relevant countries and evaluation of impact under other tax provisions such as general anti-avoidance rules etc. The Amendment also prescribes that the concerned company shall make application to NCLT and procedure under section 230 to 232 shall be followed [125]even for cross border compromises.

3.2. UNDER SEBI REGULATION:

The Securities and Exchange Board of India (SEBI) (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, which place a strong emphasis on protecting investor interests, frequently referred to as the Takeover Regulations, govern the acquisition of stock and management of publicly traded companies. These regulations ensure that shareholders are given the opportunity to withdraw their capital on reasonable terms when large shareholders or acquirers meet predefined conditions. One of the most crucial provisions states that anytime an acquisition obtains 25% or more of the voting

[122] Section 234, Companies Act, 2013
[123] Diksha Jain , Mergers & Acquisitions under the Companies Act, 2013: A Critical Analysis, Mergers-Acquisitions-under-the-Companies-Act-2013-A-Critical-Analysis-Sept18.pdf, visited 10th May, 2025 at 1.05 PM
[124] Rule 29A, Compromises, Arrangement and Amalgamation Amendment Rules, 2016
[125] Sabeeh Khan, India and Cross-Border Merger and Acquisition, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5048260

rights or more than 5% more throughout a fiscal year, an open offer has to be made.

The regulations also increased the bar for starting an open offer from 15% to 25% and mandated that individuals or groups wishing to acquire more than 25% of voting rights make a public statement. The Takeover Regulations, which address a range of acquisition strategies such negotiated, open market, and bail-out takeovers, offer both general and specific exclusions as well as penalties for non-compliance in order to guarantee transparency and fair treatment of shareholders. Moreover, SEBI also guarantees that the terms of the cross-border merger, in case it takes place, are fair to all shareholders, despite the numbers of shares they seem to hold. SEBI's approval is required to ensure that the merger does not result in unfair treatment or exploitation of shareholders. India's corporate takeover scene was revolutionized by the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. By guaranteeing that their interests are not jeopardized in the event of an acquisition by the acquirer, these restrictions protect the interests of listed firms' shareholders[126]. Since it is a fundamental component of the concept, which is referred to as corporate governance, it also gives priority to the interests of minority shareholders.

3.3. FOREIGN EXCHANGE MANAGEMENT ACT, 1999:

In terms of FEMA Merger Regulations, a 'Cross-border merger' is defined to mean 'any merger, amalgamation or arrangement between Indian company or companies and foreign company or companies in accordance with Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 notified under the Companies Act, 2013'. Any transaction pertaining to a cross-border merger (including inbound and outbound mergers) is subject to the FEMA Merger Regulations and shall be considered to have received the RBI's prior clearance, as mandated by the aforementioned Rule 25A. Therefore, no additional application needs to be submitted to the RBI for approval if all of the requirements outlined in the FEMA Merger Regulations are met. The Companies Act's requirement that cross-border mergers obtain the RBI's prior clearance has been loosened with the inclusion of this deeming approval clause in the FEMA Merger Regulations.

The key provisions related to cross border merger under FEMA Regulation related to inbound mergers are:

- Issue or Transfer of assets when the foreign company mergers with the Indian Company: Any issue or transfer of security by the resultant Indian company to a person resident outside India should comply with the pricing guidelines, entry routes, sectoral caps, attendant conditions and reporting requirements for foreign investment laid down in the FEMA Inbound Investment Regulations i.e. Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017.
- Merger of Joint venture wholly or partly owned subsidiary with Indian Parent Company.
- Overseas offices of foreign Company to become branch/office of Indian of Indian Company.
- Guarantees or outstanding borrowing from overseas sources obtained by the merging foreign Company will become borrowing of resultant company
- The resultant Indian company may acquire and hold any asset outside India which an Indian company is permitted under the relevant provisions of FEMA. Such assets can be transferred by the resultant Indian company for undertaking a transaction permitted under FEMA.
- The resultant Indian company is permitted to open a foreign currency bank account in the overseas jurisdiction for a maximum period of two years from the date of sanction of the cross-border merger by the NCLT

[126] Sidharath Kumar Pathak, Role of SEBI, Cross-Border merger, Take over code, Indian Journal of Integrated Research in Law, Vol II, ISSN-2583-0538, p.1-7

for undertaking the transactions incidental to cross border merger[127].

The key provisions related to cross border merger under FEMA Regulation related to outbound mergers are:

❖ Acquisition of securities of foreign company by the residents: A person resident in India may acquire or hold securities of the resultant foreign company, in accordance with the FEMA Outbound Investment Regulations. If a resident individual acquires securities of a foreign company, the fair market value of such securities should be within the limit prescribed under the Liberalised Remittance Scheme i.e. USD 250,000 per financial year[128].

❖ Indian offices of Indian company to become branch/office of the Foreign Company: An office in India of the merging Indian company, pursuant to the scheme of merger, shall be deemed to be the branch office in India of the resultant foreign company and shall be required to comply with the provisions of the 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 permissible activities applicable to a branch office).

❖ Guarantees or outstanding borrowings of the Indian Company to be assumed by Foreign Company: Any guarantees and outstanding borrowings of the Indian company, which become the liability of the resultant foreign company pursuant to the outbound merger, shall be repaid in terms of the scheme of merger sanctioned by the NCLT. Any assumption of liability in Rupees by a foreign company towards an Indian lender must comply with the provisions of FEMA and a no-objection certificate would be required from the Indian lender.

❖ Assets in India of merging Indian Company: In case the resultant foreign company is not permitted to acquire or hold the asset/security in India, the resultant foreign company shall sell such asset/security within a period of two years from the date of sanction of the merger scheme by NCLT and the sale proceeds would need to be repatriated outside India immediately through banking channels. Repayments of Indian liabilities from the sale proceeds of such assets/ securities shall be permissible within the said period of two years.

❖ Opening of bank account by Foreign Company in India: The resultant foreign company shall open a Special Non-Resident Rupee Account (SNRR Account) in accordance with the Foreign Exchange Management (Deposit) Regulations, 2016 for undertaking the transactions contemplated under the FEMA Merger Regulations. The bank account shall run for a maximum period of two years from the date of sanction of the merger scheme by NCLT.

Pitfalls in FEMA Act[129]:

❖ Demergers are not covered

❖ The facility for fast-track mergers provided under Section 233 of the Companies Act, as applicable to domestic transactions, is not available for cross border mergers. Under Section 233 of the Companies Act, a fast-track process has been provided for mergers between two or more small companies, or between holding companies and their wholly-owned subsidiaries, whereby a relatively easier and shorter process for mergers may be followed without applying to the NCLT[130].

❖ Under the FEMA Merger Regulations, the explanation to the definition of the term 'foreign company' states that the foreign company should be incorporated in the specified jurisdiction as contained in the relevant Companies Merger Rules. The term 'foreign company' under the FEMA Merger Regulations is used with reference to both inbound and outbound mergers, thereby resulting in the applicability of the requirement of specified

[127] C A Divya Ashta, Cross Border Merger- A Summary of Recent Development, https://ibclaw.in/wp-content/uploads/2019/09/Cross-Border-Mergers-%E2%80%93-A-Summary-of-Recent-Developments-Jun18.pdf

[128] Swathi Gopireddy, Cross-Border Mergers in the Realm of FEMA Regulations: Transcending Global Boundaries, International Journal of Law Management & Humanities, Vol. 7, p. 1030

[129] ibid

[130] FEMA Cross Border Merger Regulations issued by RBI, https://www.khaitanco.com/thought-leadership/FEMA-cross-border-merger-regulations-issued-by-RBI , 4th April, 2018.

jurisdictions to both inbound and outbound mergers. This is in conflict with the provisions laid down under Rule 25A of the Companies Merger Rules where the requirement for specified jurisdictions is restricted only to the outbound mergers. Accordingly, the Company Merger Rules and FEMA Merger Regulations would need to be appropriately aligned.

❖ Adequacy of prescribed time: The timeframe to sell assets not permitted to be held or acquired under FEMA has been increased from 180 days (under the Draft FEMA Merger Regulations) to 2 years (under the FEMA Merger Regulations) from the date of sanction of the scheme. However, whether such increased timeframe would be sufficient for sale of foreign assets in light of compliance under tax and regulatory laws of the foreign jurisdiction is yet to be seen based on future experience with cross border merger transactions.

❖ Deemed approval: While the FEMA Merger Regulations specify that Cross Border Mergers which meet the provisions mentioned therein shall have deemed RBI approval, such regulations at the same time prescribe that the regulatory actions connected with non-compliance or contravention of FEMA would need to be completed prior to the merger.

❖ Merger of Foreign LLP with Indian Company and Vice-Versa: Under the Companies Merger Rules and the FEMA Merger Regulations, a foreign company is defined to include a body corporate incorporated outside India whether having a place of business in India or not. Further, under Section 2(d) of the Limited Liability Partnership (LLP) Act, 2008 a body corporate is defined to include an LLP incorporated outside India. Accordingly, the implications of a merger of a foreign LLP with an Indian Company under an inbound merger and vice versa under an outbound merger would need to be examined carefully keeping in mind the FEMA Inbound Investment Regulations and FEMA Outbound Investment Regulations.

The role of Foreign Direct Investment (FDI) is viewed positively by some countries, where foreign companies are considered a key factor for economic development. In contrast, some countries impose strict controls on FDI participation in certain sectors of the economy. However, there is a general consensus that merger controls do not affect the attraction of foreign capital.

3.4. UNDER COMPETITION ACT, 2002:

The Competition Act, 2002, is the primary legislation governing competition law in India. It aims to promote and sustain competition in markets, protect the interests of consumers, and ensure freedom of trade carried out by individuals and entities. The Act prohibits anti-competitive agreements, abuse of dominance, and regulates mergers and acquisitions to prevent any adverse effect on competition. The Competition Act, 2002, defines a "combination" as the acquisition of control, shares, voting rights, assets, or mergers or amalgamations[131]. The Competition Commission of India (CCI) is the regulatory body responsible for reviewing combinations and determining whether they would cause an Appreciable Adverse Effect on Competition (AAEC) in the relevant market. In the case of cross-border mergers, the CCI has issued a set of regulations called the "Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011".

These regulations apply to all combinations that have an impact on the Indian market, even if the parties involved are located outside India. Under these regulations, any combination that exceeds certain financial thresholds must be notified to the CCI for approval. The thresholds are based on the assets and turnover of the companies involved in the combination. If the combination does not exceed the thresholds, it is not required to be notified to the CCI.

[131] Regulation Of Combinations Under the Competition Act, 2002: An Analysis, Gurpreet Kaur, International Journal of Novel Research and Development, Volume 9, e313-e320, (2024)

The CCI has 210 days to review the combination and determine whether it would cause an AAEC in the relevant market. During this period, the parties involved in the combination are not allowed to consummate the transaction. If the CCI finds that the combination would cause an AAEC, it may prohibit the combination or require the parties to modify the combination to address the competition concerns. It is worth noting that the CCI has approved several cross-border mergers in the past, including the merger of Vodafone India with Idea Cellular in 2018. The CCI has also approved the acquisition of Flipkart by Walmart, subject to certain conditions, in 2018. In conclusion, India has made provisions for cross-border mergers through the Companies Act, 2013, and the Competition Act, 2002. The Competition Act regulates mergers and acquisitions to prevent any adverse effect on competition, and the CCI is the regulatory body responsible for reviewing combinations. Cross-border mergers that have an impact on the Indian market must be notified to the CCI for approval, and the CCI has 210 days to review the combination and determine whether it would cause an AAEC. While the CCI has approved several cross-border mergers in the past, it remains to be seen how these regulations will be enforced in the future.

After enforcement of merger control in India, the CCI has approved 859 merger applications till March 2022 as per their Annual Reports by using analytical tools. By removal of filing timeline, the merger control regime was aligned with international best practices. The CCI introduced 'Green Channel' keeping in view the needs of the market and the best practices in others jurisdiction. Green Channel allows automatic system of approval for combinations and reduces the burden on parties to transactions which have no effect on competition and needs notification only for technical reasons.[132]The amendment brought threshold limits for filing notice, reduced the time limit for review of combination from 210 to 150 days and the word 'control' included the ability to exercise material influence in any manner whatsoever over the manag ement of affairs.

3.5. THE COMPETITION AMENDMENT ACT, 2023:

Threshold limit for filing notice

Enterprise	**India**	**Asset: More than rupees 2000 crores**	**Or**	**Turnover more than rupees 6000 crores**
Enterprise	**Worldwide with India**	**More than US $ 1 Billion with at least more than Rupees 1000 crore in India**	**Or**	**More than US $ 3 million with at least more than rupees 3000 crore in India**
Group	**India**	**More than Rupees 8000 crores**	**Or**	**More than rupees 24000 crore**

[132] Dr Mayank Tiwari, Dr. Rajat Solanki Merger Control Regime in India, visited 12th May, 2025, https://www.icsi.edu/media/webmodules/CSJ/August/14.pdf

Group	Worldwide with India	More than US $ 4 billion or with at least more than Rupees 1000 crore in India	Or	More than US $12 Billion with at least more than Rupees 3000 crore in India

JURISDICTIONAL ISSUES:

The first issue what if the regulating authority under Companies Act which basically promotes merger in turn boost the economy approves the combination and CCI, basically merger control authority rejects the same. Which decision will prevail over the other?. In India, cross-border combinations (like mergers or acquisitions involving foreign entities) must receive approval from multiple regulatory bodies, primarily: Firstly, from NCLT (National Company Law Tribunal) - for approval under the Companies Act, especially for schemes of arrangement. Secondly from RBI (Reserve Bank of India) for compliance with FEMA (Foreign Exchange Management Act) and foreign investment regulations. Thirdly from (Competition Commission of India) for approval under the Competition Act, 2002, particularly with regard to whether the combination causes an Appreciable Adverse Effect on Competition (AAEC) in the relevant market in India. And the order of the CCI will prevail since, The Competition Act, 2002 is a special legislation dealing specifically with competition concerns. If a combination leads to AAEC in the Indian market, then under Section 5 and Section 6 of the Act, CCI has exclusive jurisdiction to prohibit or modify such combinations. This position is based on the doctrine of "generalia specialibus non derogant" a

- In the case of Reliance Industries Limited / Bharti AXA Life Insurance Case[133], The CCI rejected a combination even though other regulatory approvals were obtained. It stated that "clearance from other regulators does not preclude the CCI from evaluating the combination independently under the Competition Act".

- And in Zee Entertainment and Sony Merger[134], it was held that decision of Competition Commission of India is independent of decision of SEBI and NCLT.

ANALYSIS:

So, having many procedural requirements for establishment it leads to decline in foreign investment and inbound mergers in one hand and in other hand it is essential to have both Merger regulating authority and Merger control authority. Even without competition the cross-border contributes to the economy but it will lead to decline in other competitors in the market and low-level sectorial entrepreneurs which in turn affects the economy. Economy runs like a cycle it should get balanced by RBI, NCLT and CCI.

IMPACT OF EFFECTS DOCTRINE IN CROSS BORDER COMBINATION

"Any Acts taking place outside India but having an effect on Competition in India, can be investigated by the CCI[135]". This principle is called as effects doctrine. This doctrine ensures that any anti-competitive practice occurring outside India having AAEC shall not be escaped from liability on the ground of extra-territoriality. Historically, the primarily legislation framed in this regard is MRTP Act, 1969. However, the power is limited in nature and does not operate extra territorially. This limitation was recognised in the case of Haridas Exports v. All India Float Glass Association[136], wherein the SC underlined that the MRTP commission does not have extra territorial jurisdiction to investigate and penalize the export and import cartel affecting the Indian Market.

[133] Combination Reg. No. C-2019/07/676
[134] Combination Registration No. C-2022/04/923
[135] Section 32, Competition Act, 2002
[136] (2002) 6 SCC 6

However, this limitation got overcome by the Raghavan Committee suggesting introducing an independent body to deal with effects doctrine. Further the applicability of this doctrine arises when there is "direct, substantial and reasonably foreseeable effect in the economy of India". It has been notified in the Competition Commission of India (General) Regulations 2009, that the extra territorial Jurisdiction can be enforced by the provisions of Competition Act, 2002 and CPC, 1908. And the important loophole in Section 5 and 6 of 2002, Act is the AAEC is not properly defined in connection with Cross-border Combination.

4.1. ENFORCEMENT OF CCI ORDER:

The Act under section 32 grants the commission with the power to pass order it deems fit in regards to any anti-competitive practices outside India. The CCI has been granted power to pass two types of order:

Firstly, as per the amendment Act, 2007, if the CCI finds that there exists no contravention of provisions of the Act, it shall pass an order by either approving such agreement or combination. Secondly, the commission, if it finds there exists any practice that causes AAEC in the Indian market, shall direct by order to discontinue such practice which distorts competition. The commission shall further impose penalties for anti-competitive practices on such parties under Sec 27, 31 of the Act[137].

International Cooperation: Memorandum of Understandings (MoUs) by CCI:

In order to accomplish its goals, which include eradicating practices that lead to AAEC in India, promoting fair competition, and safeguarding consumer interests, Section 18 of the act also requires CCI to enter into agreements or understandings with foreign authorities or competition regulators. In order to maintain and advance competitiveness, this involves signing any bilateral or multilateral agreements with foreign authorities. This makes it possible for the commission to work with international law enforcement. This provision's main goals are to improve cross-border collaboration and successfully counteract MNC anti-competitive behaviours that have an impact on the national economy. In 2011, CCI signed its first Memorandums of Understanding (MoUs) with the Federal Trade Commission of the United States and the Federal Anti-Monopoly Service (FAS) of Russia. 37 The most recent MOUs that CCI entered covers 2022 between CCI and the Mauritius Competition Commission, 2023 between CCI and the Egyptian Competition Authority, etc.

4.2. CASE STUDIES:

i.Jet - Etihad Deal[138]:

Jet Airways made a proposal to the Etihad airways that it wishes to sell its 24% stake to it. When notice was sent to competition commission, it conducted investigation. The majority ruled under section 31 of the competition act and approved the deal whereas the minority judgement held that there would be appreciable adverse effect. The majority and minority opinions differed over what the relevant market is. While the majority used the Origin and Destination pair approach and covered the network effect stating that the nine cities that are overlapping for both the companies are on what the approach will be applied. The minority on the other hand, determined it to be the international air passengers to and from India. Among other agreements, the commercial cooperation agreement that the parties entered into had a no code-sharing clause. The majority was of the opinion that it might not prove to be anti-competitive due to the other major airlines competition with them. The minority ruled it to have an appreciable adverse effect on the competition. As it can be deduced from the current scenario that the deal was a win-win for both the parties and it did not prove to anticompetitive in nature.

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[137] Tahira Mehreen, Ramya R, The Long Arm of Indian Competition Law: Examining the Extraterritorial Scope of the Competition Commission of India and the effects Doctrine, IJARIIE, VOL-11, Issue-2 -ISSN(O)-2395-4396 (2025)

[138] Combination Reg. No. C-2013/05/122

ii.Walmart-Flipkart Deal[139]:

The competition commission gave its approval to Walmart's sixteen-billion dollars acquisition of Flipkart. Since the total assets and turnover from the transaction surpassed the threshold, approval was necessary. Since many small online shops opposed the merger, the impact of the proposed combination on competition was evaluated. Both its general effects on the retail industry and the economy as a whole were evaluated. The focus was on identifying the relevant market, and since Walmart's market share in India was small, the transaction was not thought to have any negative effects on the competition. In cases where the notice has been filed after the expiration of the 30 days period the CCI has imposed heavy penalties. In case of Johnson, Ethicon and Google the delay was of 43 days in filing of the notice and the Commission imposed on the ma fine of Rs. 5 lakhs. In cases where the notice itself is not being filed when there is a need to the CCI has gone to the extent of imposing a fine of Rs. 5 crores. Such a scenario was witnessed in the case of Piramal and Shriram.

iii.Bharti-MTN Deal:

The proposed merger of MTN Group, a major South African telecommunications firm, and Bharti Airtel, a prominent Indian telecommunications company, is known as the "Bharti-MTN deal". The proposed agreement, which started talks in May 2008, sought to establish the third-largest telecom provider in the world by number of subscribers. However, because of its intricate structure, which involved cross-border transactions and various jurisdictions, the purchase encountered a number of legal and regulatory obstacles. The proposed deal structure, which called for MTN to acquire a 36% share in Bharti and Bharti to acquire a 49% holding in MTN, was the primary source of disagreement. The regulatory environment in South Africa and India was one of the major obstacles that the parties had to overcome.

The Indian government had strict foreign investment regulations in the telecommunications sector, while the South African government had rules requiring the majority ownership of local companies in strategic industries. Additionally, there were concerns about the implications of the deal for competition in the telecommunications sector, especially in African countries, where both companies had a significant presence.

The proposed merger raised antitrust concerns, and there were fears that it could lead to a monopolistic market. The negotiations between Bharti Airtel and MTN lasted for several months, with the parties making several attempts to reach a deal. However, the negotiations eventually broke down in September 2009 due to disagreements over the structure of the deal and the regulatory hurdles. In conclusion, the Bharti-MTN deal was a significant proposed merger in the telecommunications industry that faced several legal and regulatory challenges. Despite the parties' efforts to reach an agreement, the deal ultimately fell through, highlighting the importance of regulatory compliance and the complexities of the cross-border transactions[140].

National competition rules now cover cross-border company operations due to the growing globalization of business and the widespread acceptance of the "effects doctrine". Subject matter jurisdiction and enforcement jurisdiction are the two main categories into which the principles of extraterritorial jurisdiction can be divided. The territorial and nationality principles are adequate to carry out a significant number of violations of competition statutes for the purposes of subject matter jurisdiction. On the other hand, the Act's provisions might not be given the full power of the enforcement jurisdiction if bilateral or multilateral agreements are not entered into. Therefore, in accordance

[139] Combination Registration No. C-2018/05/571

[140] Ambarish Bharadwaj Sivashankaran, Cross Border Mergers and Competition Law, International Journal for Multidisciplinary Research (IJFMR), Volume 5, Issue 3, May-June 2023, E-ISSN: 2582-2160

with Section 18 of the Act, the CCI must make an effort to sign bilateral or multilateral agreements with other competition agencies[141].

iv.Mylan Agila[142]:

Mylan Incorporation is a US based corporation which was to acquire Agila, an Indian company, which was a wholly owned subsidiary of SAL (Strides Acrolab Ltd.). Both were in the business of Pharmaceuticals. Competition commission approved the deal by order under section 31 of the Competition Act. Both the acquirer and merging company had a very less market in India and there was no question of anti-competitive practices. The commission did focus on the non- compete clause in their deal but found nothing objectionable.

CONCLUSION

Cross-border combinations (CBCs), such as mergers and acquisitions across national borders, have emerged as significant drivers of economic globalization. They facilitate access to new markets, transfer of technology, capital inflows, and operational efficiencies that collectively contribute to economic growth. However, the benefits of CBCs are not uniformly distributed, and the unchecked expansion of multinational firms through these combinations can result in excessive market concentration, reduced competition, and negative consequences for consumers, small businesses, and economic sovereignty.

Effects doctrine plays crucial role in protecting the domestic market from anti-competitive practices, prevent market distortion and support sovereign but it has loopholes in enforcement mechanism in outside Indian territory. Firstly, foreign entities have no physical presence in India, evidence and data must be retrieved from the abroad and foreign Governments or companies refuse cooperation. For example, if two foreign companies enter into a price-fixing agreement overseas that affects Indian imports, the CCI may investigate, but cannot compel foreign firms or individuals to appear, submit documents, or pay penalties without international legal cooperation. Similarly, certain foreign combinations that could harm Indian markets fall below the notification thresholds (especially in digital markets where asset and turnover are low, but market power is high). Even if CCI issues orders or penalties under Section 32, there's no clear path to enforce those orders internationally, unless the foreign firm has assets or operations in India. Strengthening Institutional Capacity in Developing Economies Emerging markets should invest in building strong, independent competition authorities with adequate legal, economic, and technical expertise to assess the implications of cross-border combinations effectively. This includes training, access to global databases, and adopting modern digital tools for market analysis.

Ultimately, the success of cross-border combinations should not be measured solely by economic growth indicators but also by their long-term effects on market structure, consumer welfare, and innovation. A balanced and well-regulated approach is essential to ensuring that CBCs contribute to inclusive and sustainable global economic development.

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