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LEGAL AND REGULATORY FRAMEWORK **GOVERNING CROSS-BORDER M&As**

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2.1 INTRODUCTION

Cross-border mergers and acquisitions (M&As) represent one of the most powerful strategic tools adopted by corporations to achieve growth, expand globally, and strengthen competitive advantage in an increasingly interconnected world economy. In essence, cross-border M&A refers to a transaction in which ownership, control, or a significant interest in a company incorporated in one jurisdiction is transferred to, or combined with, a company from another jurisdiction.¹ These transactions are no longer limited to financial consolidation but are often driven by deeper strategic imperatives such as access to new markets, technology transfers, acquisition of skilled talent, and the creation of globally integrated supply chains.

The phenomenon of cross-border M&A gained momentum in the late twentieth century, coinciding with the liberalization of trade and investment regimes and the proliferation of globalization.² Economic integration, multilateral trade agreements, and the removal of investment barriers have reduced the transaction costs and regulatory hurdles associated with international corporate combinations. The emergence of global value chains and digital platforms has further accelerated the pace of cross-border deals, making them an essential element of international business strategy.³

For India, the significance of cross-border M&As lies in the transformative impact they have had on both inbound and outbound investment flows. Following the landmark economic reforms of 1991, India dismantled several protectionist policies and embraced liberalization, privatization, and globalization (LPG).⁴ This policy shift not only opened the Indian economy to foreign investors but also empowered domestic enterprises to venture abroad, seeking acquisitions as a means of international expansion. Notable reforms in the foreign direct investment (FDI) regime, sectoral caps, and the enactment of progressive corporate laws have

¹ Donald M. DePamphilis, *Mergers, Acquisitions, and Other Restructuring Activities* 45–52 (11th ed. 2022).

² John Dunning, *International Production and the Multinational Enterprise* 92–101 (1981).

³ UNCTAD, *World Investment Report 2023: Cross-Border Mergers and Acquisitions* (2023).

⁴ Montek S. Ahluwalia, *Economic Reforms in India Since 1991: Has Gradualism Worked?*, 16(3) *J. Econ. Persp.* 67 (2002).

played a pivotal role in enabling M&A activity.

The Indian corporate sector has since witnessed several landmark cross-border transactions that reshaped entire industries. High-profile inbound acquisitions, such as Walmart's acquisition of Flipkart,⁵ and significant outbound ventures, such as Tata Steel's acquisition of Corus in the United Kingdom,⁶ illustrate how Indian and foreign corporations alike have utilized cross-border M&As to expand market presence and achieve synergies. These deals underscore the strategic importance of M&As in strengthening global competitiveness, especially for Indian firms aspiring to operate at par with multinational corporations.

Moreover, cross-border M&As are not merely business decisions but carry wider implications for economic development, industrial growth, and regulatory governance. They contribute to foreign capital inflows, promote technology transfers, and enhance managerial expertise within the host country.⁷ At the same time, they pose complex challenges, including cultural integration, taxation disputes, regulatory compliance across multiple jurisdictions, and the safeguarding of competition and consumer interests.

Thus, cross-border M&As establishes their dual character as both an opportunity and a challenge.⁸ While they enable firms to transcend domestic limitations and leverage global opportunities, they also expose companies to multifaceted risks that demand careful legal, financial, and strategic due diligence⁹. For India, in particular, the role of cross-border M&As has evolved beyond mere investment inflows to becoming a critical mechanism for economic integration into the global marketplace¹⁰. This makes the study of their conceptual foundations indispensable for analyzing their legal, economic, and regulatory dimensions.¹¹

2.2 CONCEPT OF CROSS-BORDER MERGERS AND ACQUISITIONS

Cross-border mergers and acquisitions (M&As) represent one of the most critical vehicles of corporate restructuring in the modern global economy. Broadly, a cross-border M&A is a transaction in which the acquiring or merging entity is incorporated in one jurisdiction, while the target entity is incorporated in another jurisdiction.¹² Such transactions may result in the transfer of ownership, management control, assets, or shares across national borders, leading

⁵ Bloomberg Quint, Walmart-Flipkart Deal: India's Biggest M&A, May 2018.

⁶ Tata Steel Ltd.–Corus Group Plc., Case Study, *Harvard Business Review* (2007).

⁷ Federation of Indian Chambers of Commerce & Industry (FICCI), *Cross-Border Mergers in India: Opportunities and Challenges* (2021).

⁸ OECD, *Cross-Border Mergers and Acquisitions: Policy Issues* 1–4 (2019).

⁹ Umakanth Varottil & Shouvik Guha, *Mergers and Acquisitions Law in India* 6–9 (Oxford Univ. Press 2019)

¹⁰ UNCTAD, *World Investment Report 2021* 87–90.

¹¹ P.L. Malik, *Company Law* 1123–1126 (Eastern Book Co. 2022).

¹² Donald M. DePamphilis, *Mergers, Acquisitions, and Other Restructuring Activities* 22 (11th ed. 2022).

to a reorganization of corporate structures that transcends domestic legal frameworks.

The essential characteristic of a cross-border M&A lies in its dual regulatory dimension: it must comply with the legal systems of both the home and host jurisdictions.¹³ This makes them more complex than purely domestic mergers, as issues such as conflict of laws, foreign investment rules, taxation, and competition regulation come into play.¹⁴

From a corporate strategy perspective, cross-border M&As allow companies to:

- Gain immediate access to new markets, distribution channels, and consumer bases;
- Acquire strategic assets such as technology, intellectual property, and natural resources;
- Achieve economies of scale, reduce costs, and exploit synergies; and
- Diversify geographically to mitigate risks associated with reliance on a single market.¹⁵

Scholars and regulators often classify cross-border M&As into inbound and outbound transactions. Inbound transactions occur when a foreign entity acquires or merges with an Indian company, while outbound transactions involve an Indian company acquiring or merging with a foreign entity.¹⁶ Inbound deals contribute to foreign direct investment inflows, bringing capital, managerial expertise, and advanced technology into the host country. Conversely, outbound deals are a manifestation of the global aspirations of Indian corporations, as they seek to enhance their global footprints and competitiveness.

Internationally, cross-border M&As have been recognized as a significant form of foreign direct investment (FDI). According to the United Nations Conference on Trade and Development (UNCTAD), over 40% of global FDI inflows in recent years have been driven by cross-border M&As, underscoring their centrality in global economic integration.¹⁷ For India, this phenomenon gained statutory recognition through Section 234 of the Companies Act, 2013, which explicitly permits cross-border mergers, subject to approval by the Reserve Bank of India (RBI).¹⁸ The legislative intent was further operationalized through the Foreign Exchange Management (Cross Border Merger) Regulations, 2018, which provide detailed procedures for inbound and outbound mergers involving Indian companies.¹⁹

Furthermore, the role of competition law in regulating cross-border M&As has become increasingly significant. The Competition Act, 2002 empowers the Competition Commission

¹³ Rajinder Sachar, *Legal Aspects of Mergers and Acquisitions in India* 59–64 (2019).

¹⁴ P. G. Gadgil, *Cross-Border Mergers and Acquisitions: Legal Issues and Challenges*, 5(2) *Indian J. Corp. L.* 112, 115 (2017).

¹⁵ Donald M. DePamphilis, *supra* note 8, at 30–34.

¹⁶ OECD, *International Investment Perspectives: Freedom of Investment in a Changing World* 45–49 (2007).

¹⁷ UNCTAD, *World Investment Report 2023: Cross-Border Mergers and Acquisitions* 18–22 (2023).

¹⁸ The Companies Act, No. 18 of 2013, § 234, India Code (2013).

¹⁹ Foreign Exchange Management (Cross Border Merger) Regulations, 2018, Gazette of India, Notification No. FEMA 389/2018-RB.

of India (CCI) to review such transactions for their potential impact on market competition.²⁰ This aligns with international best practices in jurisdictions such as the United States and the European Union, where antitrust review is a mandatory component of M&A transactions. Therefore, the concept of cross-border M&As cannot be confined to a mere transfer of corporate ownership. It is a multifaceted legal, economic, and strategic process that requires careful compliance with national and international regulatory frameworks. Legal due diligence, in particular, emerges as the linchpin of successful cross-border deals, ensuring that risks are identified and mitigated while facilitating smoother integration across jurisdictions.

2.3 TYPES OF M&A TRANSACTIONS

Mergers and acquisitions can be classified into several categories depending on the relationship between the combining entities, their industries, and their strategic objectives. Each type carries unique implications for due diligence, regulatory compliance, and post-merger integration. In the context of cross-border transactions, these distinctions become even more pronounced due to jurisdictional complexities and varying market conditions.

(a) Horizontal Mergers

Horizontal mergers occur between companies operating in the same industry and often at the same stage of production. The primary objective is to increase market share, achieve economies of scale, and reduce competition.²¹ For instance, the Sun Pharma–Ranbaxy merger in India created one of the largest pharmaceutical companies in the country by combining two players in the same sector.²² Due diligence in such transactions focuses on antitrust risks, overlapping product portfolios, and market dominance concerns, making competition law analysis a critical component.²³

(b) Vertical Mergers

Vertical mergers involve companies at different stages of the production process or supply chain.²⁴ For example, a manufacturer acquiring a distributor or a supplier may secure cost efficiencies, reduce dependency on third parties, and improve supply chain integration. These mergers often raise concerns about foreclosure of market access for competitors, necessitating close scrutiny by competition regulators.²⁵ Due diligence here emphasizes supply contracts,

²⁰ Competition Act, No. 12 of 2002, §§ 5–6, India Code (2002).

²¹ Richard A. Brealey, Stewart C. Myers & Franklin Allen, *Principles of Corporate Finance* (13th ed., McGraw-Hill, 2020).

²² “Sun Pharma–Ranbaxy Merger: The Biggest in Indian Pharma,” *Economic Times* (2014).

²³ Competition Act, 2002, § 5 (combination thresholds).

²⁴ Philip R. Cateora & John L. Graham, *International Marketing* (16th ed., McGraw-Hill, 2020).

²⁵ OECD, *Vertical Mergers in the Digital Era* (2019).

long-term distribution agreements, and potential exclusivity issues.

(c) Conglomerate Mergers

Conglomerate mergers bring together companies operating in unrelated business sectors.²⁶ The aim is often diversification, risk spreading, and leveraging financial synergies. While such mergers are less likely to raise antitrust concerns, they present significant challenges in cultural and operational integration. Due diligence in conglomerate mergers must carefully examine the financial health, management practices, and governance systems of the target to ensure strategic alignment.

(d) Market-Extension Mergers

Market-extension mergers occur when companies seek to expand into new geographic regions while continuing to operate within the same line of business.²⁷ These transactions allow firms to tap into new customer bases and benefit from international market exposure. A classic cross-border example is Walmart's acquisition of Flipkart, which enabled Walmart to gain a strong foothold in India's e-commerce market.²⁸ In such cases, due diligence must consider local regulatory frameworks, cultural differences, and consumer protection laws that can significantly affect the transaction.

(e) Product-Extension Mergers

Product-extension mergers take place between companies that operate in the same market but deal with different products.²⁹ The primary objective is to broaden product lines, enhance market share, and achieve synergies in distribution and marketing. Due diligence in such transactions focuses on intellectual property rights, licensing agreements, and potential overlaps in marketing strategies.

In practice, many cross-border M&A transactions combine more than one of these categories. For instance, a merger may be both horizontal and market-extension in nature, where two competitors expand into each other's geographies. This overlap underscores the importance of comprehensive legal due diligence to evaluate synergies, mitigate risks, and ensure compliance with diverse regulatory requirements.³⁰

²⁶ Stephen A. Ross, Randolph W. Westerfield & Bradford D. Jordan, *Corporate Finance* (12th ed., McGraw-Hill, 2019).

²⁷ Alan Shapiro, *Multinational Financial Management* (10th ed., Wiley, 2019).

²⁸ Priyanka Mittal, "Walmart-Flipkart Deal: A Game Changer for India's E-commerce," *Journal of Business Strategy*, Vol. 12, No. 3 (2019).

²⁹ Patrick A. Gaughan, *Mergers, Acquisitions, and Corporate Restructurings* (7th ed., Wiley, 2018).

³⁰ Alok Dhir, *Mergers and Acquisitions: Indian Perspective* (LexisNexis, 2018).

2.4 CORPORATE AND COMPANY LAW FRAMEWORK GOVERNING CROSS-BORDER MERGERS AND ACQUISITIONS IN INDIA

Cross-border mergers and acquisitions (M&A) have become a pivotal aspect of corporate strategy in a globalized economy. The corporate and company law framework forms the legal backbone for these transactions, ensuring compliance, protecting stakeholder interests, and facilitating orderly corporate restructuring.

Cross-border M&A involves the consolidation of companies or assets across different jurisdictions. Such transactions are complex due to the interplay of domestic corporate laws, foreign investment regulations, securities laws, and competition rules. The corporate law framework is critical as it determines the legal capacity, procedural requirements, and stakeholder protections essential for the successful execution of a cross-border merger or acquisition.

Legal Framework in India

2.4.1 Governing Statute: Companies Act, 2013

The Companies Act, 2013 provides a comprehensive legal structure for mergers, acquisitions, and amalgamations of companies, both domestic and foreign. The relevant provisions include:

Sections 234–236 (Mergers and Amalgamations):

The Companies Act, 2013 constitutes the primary governing statute regulating mergers, acquisitions, and amalgamations of companies in India, including transactions with a cross-border dimension.³¹ The Act introduces a comprehensive and structured framework aimed at facilitating corporate restructuring while ensuring transparency, shareholder protection, and judicial supervision. Sections 234 to 236 of the Act specifically address mergers and amalgamations, laying down substantive and procedural requirements applicable to both domestic and cross-border transactions.³² Section 234 is particularly significant as it expressly permits mergers between Indian companies and foreign companies incorporated in jurisdictions notified by the Central Government, thereby providing statutory recognition to

³¹ Companies Act, 2013, No. 18 of 2013, § 230–240 (India).

³² Companies Act, 2013, No. 18 of 2013, § 230–240 (India).

cross-border mergers for the first time under Indian company law.³³ Such mergers are subject to compliance with prescribed rules and regulatory approvals, reflecting the legislature's intent to balance ease of doing business with regulatory oversight.³⁴

Section 235 further strengthens the regulatory architecture by governing mergers involving Indian and foreign companies, mandating compliance with the Foreign Exchange Management Act, 1999 and regulations issued by the Reserve Bank of India.³⁵ This provision ensures that foreign exchange implications, capital flows, and cross-border asset transfers arising from such mergers remain within the framework of India's foreign exchange control regime. Legal due diligence under this provision focuses on examining foreign shareholding limits, valuation norms, sectoral caps, and compliance with RBI guidelines, as non-compliance may render the merger void or subject to regulatory penalties.³⁶

Section 236 introduces an additional layer of protection by requiring mergers or amalgamations to obtain sanction from the National Company Law Tribunal (NCLT), thereby ensuring judicial scrutiny of the scheme of arrangement.³⁷ The NCLT evaluates whether the proposed merger is fair, reasonable, and not prejudicial to the interests of shareholders, creditors, or public interest.³⁸ Judicial oversight under Section 236 reinforces the importance of legal due diligence, as any deficiencies in corporate compliance, disclosure, or stakeholder consent may lead to delays or rejection of the merger scheme.³⁹ Collectively, Sections 234 to 236 of the Companies Act, 2013 establish a robust statutory foundation for cross-border mergers and acquisitions, making corporate law compliance a central focus of due diligence in such transactions.⁴⁰

Cross-Border Merger Provisions:

Cross-border mergers under Indian law require strict compliance not only with the Companies Act, 2013 but also with India's foreign exchange and foreign investment regulatory framework.⁴¹ Any merger involving a foreign entity acquiring, merging with, or amalgamating into an Indian company must conform to the provisions of the Foreign Exchange Management Act, 1999 (FEMA) and the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 issued by the Reserve Bank of India (RBI).⁴² These regulations govern

³³ Companies Act, 2013, § 234.

³⁴ Ministry of Corporate Affairs, *Companies (Compromises, Arrangements and Amalgamations) Rules, 2016*.

³⁵ Companies Act, 2013, § 235; Foreign Exchange Management Act, 1999.

³⁶ Reserve Bank of India, *Foreign Exchange Management (Cross Border Merger) Regulations, 2018*.

³⁷ Companies Act, 2013, § 236.

³⁸ *Miheer H. Mafatlal v. Mafatlal Industries Ltd.*, (1997) 1 SCC 579.

³⁹ *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.*, (1995) 83 Comp Cas 30 (SC).

⁴⁰ P.L. Malik, *Company Law 1189–1195* (Eastern Book Co. 2022).

⁴¹ Companies Act, 2013, §§ 230–236 (India).

⁴² Foreign Exchange Management Act, 1999; Foreign Exchange Management (Cross Border Merger) Regulations, 2018.

critical aspects such as the issuance and transfer of shares, valuation norms, repatriation of proceeds, treatment of overseas assets and liabilities, and adherence to sectoral foreign direct investment (FDI) caps prescribed under India's FDI Policy.⁴³ Legal due diligence in this context examines whether the proposed merger structure complies with pricing guidelines, ownership thresholds, and reporting obligations, as any deviation may result in regulatory sanctions or invalidation of the transaction.⁴⁴

In addition to FEMA compliance, cross-border mergers are subject to mandatory judicial scrutiny by the National Company Law Tribunal (NCLT) under Sections 230 to 232 of the Companies Act, 2013.⁴⁵ The NCLT's role is to ensure that the scheme of merger is fair, reasonable, and not contrary to public interest. It safeguards the rights of minority shareholders, creditors, employees, and other stakeholders by examining disclosures, valuation reports, creditor consent, and objections raised during the approval process.⁴⁶ Indian courts have consistently emphasized that the NCLT must act as a watchdog to prevent abuse of corporate restructuring mechanisms and ensure procedural fairness.⁴⁷ Consequently, legal due diligence plays a crucial role in identifying potential red flags—such as undisclosed liabilities, pending litigations, or non-compliance—that could impede NCLT approval.⁴⁸

Furthermore, certain cross-border mergers require prior approval from the Central Government or relevant ministries, particularly when the transaction involves sensitive or regulated sectors.⁴⁹ Sectors such as defence, insurance, banking, telecommunications, and media are governed by additional policy restrictions and approval requirements administered by authorities such as the Ministry of Corporate Affairs (MCA), the Department for Promotion of Industry and Internal Trade (DPIIT), and sector-specific regulators.⁵⁰ Due diligence must therefore assess whether the target company operates in a sector requiring government approval and whether such approvals have been obtained or are likely to be granted.⁵¹ The multiplicity of approvals involved underscores the complexity of cross-border mergers and highlights the indispensable role of legal due diligence in ensuring regulatory compliance, transaction certainty, and stakeholder protection.⁵²

⁴³ Department for Promotion of Industry and Internal Trade, *Consolidated FDI Policy Circular* (latest ed.).

⁴⁴ Reserve Bank of India v. Jayant N. Patel, (2019) 6 SCC 787.

⁴⁵ Companies Act, 2013, §§ 230–232.

⁴⁶ Umakanth Varottil, *Judicial Review of Mergers and Amalgamations in India*, 5 NUJS L. Rev. 45 (2012).

⁴⁷ *Miheer H. Mafatlal v. Mafatlal Industries Ltd.*, (1997) 1 SCC 579.

⁴⁸ *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.*, (1995) 83 Comp Cas 30 (SC).

⁴⁹ Companies Act, 2013, § 234; DPIIT Press Notes on FDI.

⁵⁰ P.L. Malik, *Company Law* 1198–1204 (Eastern Book Co. 2022).

⁵¹ Insurance Act, 1938; Banking Regulation Act, 1949; Defence Acquisition Procedure.

⁵² Donald M. DePamphilis, *Mergers, Acquisitions, and Other Restructuring Activities* 312–318 (10th ed. 2021).

Procedural Requirements

The Companies Act lays down a meticulous procedure for cross-border mergers:

The Companies Act, 2013 prescribes a detailed and structured procedure for effectuating cross-border mergers and amalgamations, ensuring legality, transparency, and protection of stakeholder interests. The process commences with **board approval**, wherein the boards of directors of the merging companies must approve the proposed scheme of merger or amalgamation in accordance with Section 173 read with Sections 230–232 of the Act.⁵³ This approval reflects the directors' fiduciary responsibility to act in the best interests of the company and its stakeholders, and it is typically based on preliminary legal and financial assessments of the proposed transaction.⁵⁴

Following board approval, the process moves into the **due diligence phase**, which forms the backbone of any cross-border merger. Legal due diligence involves a comprehensive examination of corporate records, statutory compliances, contractual obligations, litigation exposure, regulatory approvals, foreign exchange compliance, and tax liabilities.⁵⁵ In cross-border transactions, due diligence assumes heightened significance as it enables identification of jurisdiction-specific risks and ensures compliance with both Indian laws and foreign regulatory regimes.⁵⁶

Subsequently, the proposed scheme must receive **shareholder approval** by way of a special resolution, generally requiring a three-fourths majority in value of shareholders present and voting, as mandated under Section 230(6) of the Companies Act, 2013.⁵⁷ This requirement ensures democratic decision-making and safeguards minority shareholder interests by subjecting the merger to shareholder scrutiny. Creditors' approval may also be required where their rights are likely to be affected by the scheme.⁵⁸

Once approvals are obtained, a **scheme of arrangement** is submitted to the National Company Law Tribunal (NCLT) under Sections 230 to 232.⁵⁹ The scheme must clearly disclose the transfer of assets and liabilities, the proposed share exchange ratio, accounting treatment, and measures for protecting employee rights and creditor interests.⁶⁰ The NCLT examines whether

⁵³ Companies Act, 2013, §§ 230–232 (India).

⁵⁴ P.L. Malik, *Company Law* 1176–1180 (Eastern Book Co., 2022).

⁵⁵ Umakanth Varottil, *Corporate Restructuring and Due Diligence in India*, 9 NUJS L. Rev. 221, 230–32 (2016).

⁵⁶ Donald M. DePamphilis, *Mergers, Acquisitions, and Other Restructuring Activities* 287–92 (10th ed. 2021).

⁵⁷ Companies Act, 2013, § 230(6).

⁵⁸ Companies Act, 2013, § 230(4); Companies (CAA) Rules, 2016.

⁵⁹ Companies Act, 2013, §§ 230–232.

⁶⁰ Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, r. 6.

the scheme is fair, reasonable, and not contrary to public interest before granting its sanction.⁶¹ The merger attains legal effectiveness only upon receipt of NCLT approval and subsequent filing of the order with the Registrar of Companies under Section 232(5).⁶²

Judicial precedents highlight the importance of procedural compliance. In *Hindustan Coca-Cola Beverages Pvt. Ltd. (NCLT Mumbai, 2017)*, the Tribunal approved a merger scheme after satisfying itself that statutory procedures had been followed, creditors' interests were protected, and adequate disclosures had been made.⁶³ The decision reaffirmed that procedural compliance under Sections 230–232 is not a mere formality but a substantive safeguard ensuring fairness and transparency.

Similarly, in the *Bharti Airtel Ltd. and Telenor India Communications merger (NCLT Delhi, 2019)*, the Tribunal sanctioned the merger while emphasizing the importance of shareholder approval, regulatory clearances, and protection of minority interests.⁶⁴ The case illustrated the NCLT's role in balancing commercial expediency with regulatory compliance, particularly in regulated sectors such as telecommunications where additional approvals are required.⁶⁵

Stakeholder Protection

Stakeholder protection constitutes a central pillar of the cross-border merger framework under Indian company law. The Companies Act, 2013 expressly recognizes the rights of various stakeholders, including creditors, minority shareholders, and employees, and embeds protective mechanisms within the merger approval process. Creditors are entitled to receive notice of the proposed merger and may raise objections before the NCLT if the scheme adversely affects their claims or compromises repayment obligations.⁶⁶ The Tribunal is empowered to modify or reject a scheme if creditor interests are inadequately safeguarded.⁶⁷ Minority shareholders are afforded protection through mandatory disclosures, valuation reports, and voting rights during the approval process. Judicial scrutiny ensures that the scheme is not oppressive, unfair, or prejudicial to minority interests.⁶⁸ Indian courts have consistently held that mergers must reflect fair valuation and equitable treatment of shareholders, reinforcing confidence in corporate restructuring mechanisms.⁶⁹

⁶¹ *Miheer H. Mafatlal v. Mafatlal Indus. Ltd.*, (1997) 1 SCC 579.

⁶² Companies Act, 2013, § 232(5).

⁶³ *In re Hindustan Coca-Cola Beverages Pvt. Ltd.*, NCLT Mumbai Bench, Order dated 10 Aug. 2017.

⁶⁴ *Bharti Airtel Ltd. v. Telenor (India) Commc'ns Pvt. Ltd.*, NCLT New Delhi Bench, Order dated 30 Jan. 2019.

⁶⁵ Telecom Regulatory Authority of India Act, 1997; DoT Licensing Guidelines.

⁶⁶ Companies Act, 2013, § 230(4).

⁶⁷ *Hindustan Lever Emps.' Union v. Hindustan Lever Ltd.*, (1995) 83 Comp Cas 30 (SC).

⁶⁸ Companies Act, 2013, § 230(6).

⁶⁹ *Sandvik Asia Ltd. v. Bharat Kumar Padamsi*, (2009) 90 SCL 1 (Bom).

Employees are also protected under the merger framework, as schemes of arrangement typically provide for continuity of service, preservation of employment terms, and transfer of employees to the resulting entity.⁷⁰ The NCLT examines whether employee rights are adequately addressed in the scheme and may impose conditions to prevent arbitrary termination or deterioration of service conditions.⁷¹

Through these safeguards, judicial review by the NCLT ensures that cross-border mergers do not prioritize corporate restructuring at the expense of fairness and transparency. The procedural and stakeholder protection mechanisms collectively reinforce the legitimacy of cross-border M&A transactions and underscore the critical role of legal due diligence in identifying and addressing stakeholder-related risks at an early stage.⁷²

Comparative International Perspective

A comparative examination of cross-border mergers and acquisitions across major jurisdictions reveals divergent regulatory philosophies shaped by differing corporate governance traditions, market structures, and stakeholder priorities. Despite these differences, a common thread across jurisdictions is the recognition that cross-border mergers necessitate heightened legal scrutiny due to their transnational character, multiplicity of stakeholders, and potential economic impact. Legal due diligence thus assumes a universally critical role, albeit tailored to jurisdiction-specific legal frameworks and institutional arrangements.⁷³

In the **United States**, the regulation of mergers and acquisitions is predominantly governed by state corporate law, with the *Delaware General Corporation Law (DGCL)* occupying a central position owing to Delaware's dominance as a corporate domicile.⁷⁴ The DGCL is characterized by its enabling and contractarian approach, granting corporations significant flexibility in structuring merger transactions. Mergers may be effected through a variety of mechanisms, including statutory mergers, triangular mergers, tender offers followed by squeeze-outs, and short-form mergers where the acquirer already holds a prescribed majority stake.⁷⁵ This flexibility allows parties to design transaction structures that minimize regulatory friction and optimize tax and corporate governance outcomes.

However, the apparent managerial discretion under the DGCL is counterbalanced by stringent fiduciary duties imposed on directors, particularly duties of care and loyalty. Landmark judicial

⁷⁰ Companies Act, 2013, § 232(3)(h).

⁷¹ Umakanth Varottil, *Judicial Scrutiny of Merger Schemes*, 6 Indian J. Corp. L. 45, 60–62 (2015).

⁷² Ministry of Corporate Affairs, *Report of the Company Law Committee* (2016).

⁷³ OECD, *Cross-Border Mergers and Acquisitions and Corporate Governance* 12–15 (2018).

⁷⁴ Delaware General Corporation Law, Del. Code Ann. tit. 8 (2023).

⁷⁵ Stephen M. Bainbridge, *Mergers and Acquisitions* 39–55 (3d ed. 2019).

decisions such as *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* have established that, in change-of-control transactions, directors must prioritize shareholder value maximization.⁷⁶ Furthermore, dissenting shareholders are afforded statutory appraisal rights under Section 262 of the DGCL, enabling them to seek judicial determination of the fair value of their shares where they object to a merger.⁷⁷ Legal due diligence in U.S. cross-border transactions therefore places strong emphasis on fiduciary compliance, disclosure accuracy, litigation exposure, and potential shareholder class actions, which can materially affect deal certainty and post-merger integration.⁷⁸

In contrast, the **United Kingdom** adopts a more centralized and principle-based regulatory model. Corporate mergers are governed by the *Companies Act 2006*, while takeovers of public companies are regulated by the *UK Takeover Code*, administered by the Takeover Panel.⁷⁹ One of the most distinctive features of UK merger regulation is the **Scheme of Arrangement**, a court-supervised mechanism that enables mergers or reorganizations upon approval by a supermajority of shareholders and subsequent sanction by the High Court.⁸⁰ The court's role extends beyond procedural compliance to assessing whether the scheme is fair and reasonable to all classes of shareholders, thereby introducing an additional layer of judicial oversight absent in most U.S. transactions.⁸¹

The Takeover Code further strengthens shareholder protection through principles of equal treatment, mandatory bid obligations, and strict disclosure requirements.⁸² Unlike the U.S. model, which relies heavily on post-transaction litigation as a corrective mechanism, the UK framework emphasizes ex ante regulation and real-time supervision to prevent abusive or coercive takeover practices.⁸³ From a due diligence perspective, this necessitates close examination of disclosure compliance, offer pricing, timetable adherence, and regulatory engagement with the Takeover Panel, particularly in hostile or competitive bid scenarios.⁸⁴

At the **European Union** level, cross-border mergers are regulated through a harmonized legislative framework, primarily under the *Cross-Border Mergers Directive (Directive 2005/56/EC)*, now subsumed under *Directive (EU) 2017/1132*.⁸⁵ The Directive was enacted to

⁷⁶ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

⁷⁷ Del. Code Ann. tit. 8, § 262.

⁷⁸ John C. Coffee Jr., *Gatekeepers and Corporate Governance* 211–18 (Oxford Univ. Press 2006).

⁷⁹ Companies Act 2006 (UK); UK Takeover Panel, *The City Code on Takeovers and Mergers*.

⁸⁰ Companies Act 2006, §§ 895–901 (UK).

⁸¹ *Re National Bank Ltd.*, [1966] 1 WLR 819 (Ch).

⁸² UK Takeover Code, General Principles 1 & 6.

⁸³ Paul Davies & Sarah Worthington, *Gower: Principles of Modern Company Law* 1061–67 (10th ed. 2016).

⁸⁴ Umakanth Varottil, *Comparative Takeover Regulation*, 8 Indian J. Corp. L. 55, 70–73 (2015).

⁸⁵ Directive 2005/56/EC; Directive (EU) 2017/1132.

facilitate corporate mobility within the internal market by enabling mergers between companies incorporated in different Member States, while preserving national corporate law autonomy.⁸⁶ It prescribes a uniform procedural structure involving the preparation of common draft terms of merger, approval by shareholders, and scrutiny by competent judicial or administrative authorities in each Member State involved.⁸⁷

A defining feature of the EU regime is its strong emphasis on **stakeholder protection**, particularly employees. Mandatory employee information and consultation requirements, derived from EU labour law principles, distinguish the EU framework from both the U.S. and UK systems.⁸⁸ Legal due diligence in EU cross-border mergers must therefore extend beyond corporate and securities law to encompass labour law compliance, works council consultations, and creditor safeguards.⁸⁹ Failure to comply with these requirements may result in invalidation of the merger or exposure to regulatory sanctions in one or more Member States.⁹⁰

When compared with these jurisdictions, the **Indian framework** exhibits a hybrid regulatory model combining judicial oversight, stakeholder protection, and macroeconomic regulation. Like the UK and EU systems, Indian law mandates tribunal approval of merger schemes under the Companies Act, 2013. However, unlike Western jurisdictions, India overlays this framework with foreign exchange regulation, sectoral approval requirements, and competition law scrutiny, significantly increasing the scope and complexity of legal due diligence.⁹¹ This multilayered approach reflects India's developmental priorities and sensitivity to capital flows, market concentration, and strategic sectors.⁹²

The comparative analysis demonstrates that while jurisdictions differ in regulatory intensity and institutional design, effective legal due diligence remains indispensable across all systems. It serves as the primary mechanism through which legal risks are identified, regulatory compliance ensured, and transaction structures optimized.⁹³ For cross-border M&As involving Indian entities, understanding international best practices and regulatory contrasts is therefore essential not only for compliance but also for enhancing transaction efficiency and global competitiveness.⁹⁴

Key Legal Issues in Corporate Framework

⁸⁶ Luca Enriques, *EC Company Law and the Fostering of Cross-Border Mobility*, 16 Eur. Bus. L. Rev. 1 (2005).

⁸⁷ Directive (EU) 2017/1132, arts. 119–133.

⁸⁸ Council Directive 2001/23/EC (Employee Protection).

⁸⁹ Jens Dammann, *Cross-Border Corporate Mobility in the EU*, 14 Eur. Bus. Org. L. Rev. 27, 41–45 (2013).

⁹⁰ Case C-106/16, *Polbud – Wykonawstwo sp. z o.o.*, EU:C:2017:804.

⁹¹ Companies Act, 2013; FEMA, 1999; Competition Act, 2002.

⁹² Ministry of Finance, *FDI Policy and Economic Reforms in India* (2020).

⁹³ Donald M. DePamphilis, *Mergers, Acquisitions, and Other Restructuring Activities* 301–08 (10th ed. 2021).

⁹⁴ Umakanth Varottil, *Cross-Border M&A and Indian Corporate Law*, 10 NUJS L. Rev. 89 (2017).

Cross-border mergers and acquisitions raise complex corporate law issues that go beyond ordinary domestic transactions, owing to the involvement of multiple legal systems, regulatory authorities, and stakeholder interests. The corporate framework governing such transactions must therefore ensure procedural validity, substantive fairness, and regulatory compliance at every stage of the merger process. Failure to adequately address these legal issues may result in regulatory rejection, post-merger litigation, or invalidation of the transaction itself.⁹⁵

i) Corporate Authorisations

Corporate authorisations constitute the foundational legal requirement for any merger or amalgamation. In cross-border mergers, it is imperative that the transaction is authorised in accordance with the corporate laws of both the home jurisdiction and the host jurisdiction. Under Indian law, Sections 230–234 of the Companies Act, 2013 mandate that the memorandum and articles of association of the merging companies expressly permit amalgamation or restructuring.⁹⁶ In addition, foreign companies involved in the merger must comply with their respective domestic corporate statutes, such as the Delaware General Corporation Law in the United States or the Companies Act 2006 in the United Kingdom.⁹⁷

The absence of valid corporate authorisation may render the merger ultra vires and legally unenforceable. Indian courts and tribunals have consistently emphasized that compliance with enabling provisions in constitutional documents is a precondition for sanctioning merger schemes.⁹⁸ Consequently, legal due diligence must include a detailed examination of charter documents, shareholder agreements, and prior resolutions to ensure that the corporate entities possess the legal capacity to undertake the proposed transaction.⁹⁹

ii) Board and Shareholder Approvals

Board and shareholder approvals serve as critical governance safeguards in merger transactions, particularly in cross-border contexts where information asymmetry and valuation complexities are heightened. The board of directors is entrusted with the fiduciary responsibility of evaluating the commercial rationale, financial implications, and legal risks associated with the merger.¹⁰⁰ In India, board approval is the first formal step in initiating a scheme of amalgamation, followed by shareholder approval through a special resolution requiring a three-fourths majority.¹⁰¹

⁹⁵ Umakanth Varottil, *Corporate Restructuring under Indian Law* 211–15 (Oxford Univ. Press 2018).

⁹⁶ Companies Act, 2013, §§ 230–234.

⁹⁷ Delaware General Corporation Law; Companies Act 2006 (UK).

⁹⁸ *Sandvik Asia Ltd. v. Bharat Kumar Padamsi*, (2009) 3 SCC 141.

⁹⁹ Avtar Singh, *Company Law* 1056–58 (18th ed. 2022).

¹⁰⁰ Paul Davies & Sarah Worthington, *Gower: Principles of Modern Company Law* 489–92 (10th ed. 2016).

¹⁰¹ Companies Act, 2013, § 230(6).

Judicial precedents have underscored the importance of informed consent by shareholders. In *Miheer H. Mafatlal v. Mafatlal Industries Ltd.*, the Supreme Court held that while courts do not substitute their commercial wisdom for that of shareholders, they must ensure that statutory procedures are strictly followed and that the scheme is not unconscionable or unfair.¹⁰² Adequate disclosures regarding valuation, share exchange ratios, and future business prospects are therefore essential to prevent post-merger disputes and minority shareholder oppression claims.¹⁰³

iii) Due Diligence

Legal due diligence is the cornerstone of cross-border mergers, as it enables the acquiring entity to identify existing and contingent liabilities, regulatory non-compliance, contractual restrictions, and litigation risks.¹⁰⁴ In addition to conventional corporate due diligence, cross-border transactions necessitate scrutiny of foreign exchange compliance, sectoral caps, tax exposure, and competition law implications.¹⁰⁵

Indian tribunals have increasingly recognized that inadequate due diligence can undermine the fairness of a merger scheme. In *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.*, the Supreme Court observed that valuation and restructuring decisions must be supported by credible material and expert analysis, reinforcing the role of due diligence in ensuring transparency and stakeholder protection.¹⁰⁶ From a transactional perspective, robust due diligence also informs the negotiation of representations, warranties, indemnities, and conditions precedent, thereby enhancing deal certainty.¹⁰⁷

iv) Valuation and Share Exchange Ratio

Valuation and determination of the share exchange ratio are among the most contentious aspects of merger transactions, particularly in cross-border mergers where accounting standards, market conditions, and currency considerations may differ significantly. Indian law does not prescribe a rigid valuation methodology; instead, it relies on principles of fairness, reasonableness, and expert determination.¹⁰⁸ Valuation is typically conducted by independent chartered accountants or registered valuers in accordance with internationally accepted standards.¹⁰⁹

¹⁰² *Miheer H. Mafatlal v. Mafatlal Industries Ltd.*, (1997) 1 SCC 579.

¹⁰³ Umakanth Varottil, *Minority Shareholder Protection in M&A*, 6 NUJS L. Rev. 45 (2013).

¹⁰⁴ Donald M. DePamphilis, *Mergers, Acquisitions, and Other Restructuring Activities* 295–302 (10th ed. 2021).

¹⁰⁵ FEMA, 1999; RBI Cross Border Merger Regulations, 2018.

¹⁰⁶ *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.*, (1995) 83 Comp Cas 30 (SC).

¹⁰⁷ Charles M. Fox, *Working with Contracts* 173–76 (2d ed. 2019).

¹⁰⁸ Companies Act, 2013; NCLT Rules, 2016.

¹⁰⁹ Institute of Chartered Accountants of India, *Valuation Standards* (2018).

Judicial scrutiny of valuation is limited but not absent. Courts and tribunals intervene where the valuation appears manifestly arbitrary, discriminatory, or prejudicial to minority shareholders.¹¹⁰ In *Hindustan Lever Employees' Union*, the Supreme Court reiterated that while valuation is a technical exercise best left to experts, it must not be vitiated by fraud, coercion, or material irregularity.¹¹¹ Accordingly, legal due diligence must assess the valuation methodology, assumptions, and compliance with statutory norms to mitigate the risk of judicial or regulatory challenge.¹¹²

v) Regulatory Filings and Approvals

Regulatory filings and approvals form the final yet decisive layer of the corporate framework governing cross-border mergers. In India, schemes of amalgamation require sanction from the National Company Law Tribunal (NCLT), which evaluates procedural compliance, stakeholder protection, and public interest considerations.¹⁹ Post-approval filings with the Registrar of Companies (RoC) are mandatory to give legal effect to the merger.¹¹³

In addition, cross-border mergers must comply with foreign exchange regulations under the Foreign Exchange Management Act, 1999 and the RBI's Foreign Exchange Management (Cross Border Merger) Regulations, 2018.¹¹⁴ Depending on the sector involved, approvals from the Competition Commission of India, SEBI, or other sectoral regulators may also be required.¹¹⁵ The multiplicity of approvals underscores the importance of a coordinated and comprehensive compliance strategy, as failure to obtain any mandatory approval may render the merger unenforceable or expose the parties to regulatory penalties.¹¹⁶

Practical Considerations

From a practical standpoint, cross-border mergers and acquisitions in India involve significant time, procedural complexity, and stakeholder coordination, making transaction planning and execution a critical aspect of corporate restructuring. Unlike domestic mergers, cross-border transactions require synchronised compliance with multiple regulatory frameworks, both domestic and foreign, which substantially affects timelines, documentation, and stakeholder management.¹¹⁷

¹¹⁰ *Re: Cadbury India Ltd.*, (2014) 183 Comp Cas 1 (Bom).

¹¹¹ *Hindustan Lever Employees' Union v. Hindustan Lever Ltd.*, (1995) 83 Comp Cas 30 (SC).

¹¹² Companies Act, 2013, § 230(5).

¹¹³ Companies Act, 2013, § 232(5).

¹¹⁴ FEMA (Cross Border Merger) Regulations, 2018.

¹¹⁵ Competition Act, 2002; SEBI Regulations.

¹¹⁶ Ministry of Corporate Affairs, *Report of the Company Law Committee* (2016).

¹¹⁷ Umakanth Varottil, *Corporate Restructuring under Indian Law* 318–21 (Oxford Univ. Press 2018).

Timeline is one of the most crucial practical considerations in cross-border mergers. In the Indian context, such transactions typically span between six to twelve months, depending on factors such as the nature of the transaction, sectoral approvals required, and the volume of regulatory scrutiny involved.¹¹⁸ The process commences with board-level approvals and due diligence, followed by shareholder meetings, filing of the scheme of arrangement before the National Company Law Tribunal (NCLT), and receipt of approvals from regulatory authorities such as the Reserve Bank of India (RBI) under the Foreign Exchange Management Act, 1999.¹¹⁹ Delays may arise due to objections raised by creditors or minority shareholders, valuation disputes, or regulatory clarifications sought by the tribunal, thereby extending the overall completion timeline.¹²⁰

Documentation constitutes another critical practical dimension of cross-border mergers. The transaction typically involves extensive documentation, including the detailed scheme of merger or amalgamation, board resolutions approving the proposed transaction, shareholders' special resolutions passed in accordance with Section 230 of the Companies Act, 2013, and petitions filed before the NCLT.¹²¹ In addition, compliance with FEMA necessitates filings and approvals under the RBI's Foreign Exchange Management (Cross Border Merger) Regulations, 2018, particularly where foreign companies are merging with or into Indian entities.¹²² Ancillary documents such as valuation reports, auditor certificates, affidavits, and regulatory no-objection certificates also form an integral part of the transaction framework.¹²³ The accuracy and completeness of documentation are essential, as procedural lapses may result in rejection or prolonged scrutiny by the tribunal.¹²⁴

Stakeholder engagement plays a decisive role in the successful completion of cross-border mergers. Indian corporate law places considerable emphasis on protecting the interests of creditors, minority shareholders, and employees affected by restructuring.¹²⁵ Creditors are entitled to raise objections where the merger adversely impacts their repayment rights, while minority shareholders are safeguarded through disclosure requirements, voting thresholds, and judicial oversight by the NCLT.¹²⁶ Judicial precedents such as *Miheer H. Mafatlal v. Mafatlal Industries Ltd.* underscore that tribunals must ensure that merger schemes are fair, reasonable,

¹¹⁸ Ministry of Corporate Affairs, *Cross-Border Merger Framework – FAQs* (2018).

¹¹⁹ Companies Act, 2013, §§ 230–234; FEMA, 1999.

¹²⁰ *Re: Jindal Photo Ltd.*, (2019) 213 Comp Cas 1 (NCLT).

¹²¹ Companies Act, 2013, § 230(1)–(6).

¹²² RBI, Foreign Exchange Management (Cross Border Merger) Regulations, 2018.

¹²³ NCLT Rules, 2016; ICAI Valuation Standards (2018).

¹²⁴ *Sandvik Asia Ltd. v. Bharat Kumar Padamsi*, (2009) 3 SCC 141.

¹²⁵ Companies Act, 2013, §§ 230(4), 232(3).

¹²⁶ Umakanth Varottil, *Minority Shareholder Protection in M&A*, 6 NUJS L. Rev. 45 (2013).

and not prejudicial to any class of stakeholders.¹²⁷ Effective stakeholder communication, transparent disclosures, and timely redressal of objections are therefore essential to avoid litigation and ensure smooth implementation of the merger scheme.¹²⁸

The corporate and company law framework in India provides a robust and structured approach for cross-border M&A. By integrating statutory compliance with procedural safeguards, India ensures transparency, protects stakeholder interests, and facilitates orderly mergers with foreign companies. Comparative analysis indicates that while procedural nuances differ across jurisdictions, the fundamental principles—approval, fairness, and protection—remain consistent globally.

2.4.2 Securities Law and Takeover Regulations Governing Cross-Border Mergers and Acquisitions in India

Cross-border mergers and acquisitions (M&A) often involve publicly listed companies, necessitating compliance with securities regulations to protect shareholders and ensure market transparency. In India, the *Securities and Exchange Board of India (SEBI)* regulates substantial acquisitions and takeovers through detailed disclosure and open offer requirements.

In the context of cross-border M&A, acquisitions often involve the transfer of shares in publicly listed companies. Securities laws regulate these transactions to prevent market abuse, ensure informed decision-making by shareholders, and maintain investor confidence. SEBI, India's market regulator, plays a central role in enforcing disclosure, approval, and procedural requirements for both domestic and foreign acquirers.

Legal Framework in India

SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Takeover Code)

The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 constitute the primary regulatory framework governing acquisitions of shares, voting rights, and control in listed Indian companies, including those involving foreign acquirers. The Takeover Code is founded on the principle of protecting minority shareholders by ensuring transparency, equal treatment, and an exit opportunity when substantial acquisition or change in control takes

¹²⁷ *Miheer H. Mafatlal v. Mafatlal Industries Ltd.*, (1997) 1 SCC 579.

¹²⁸ Avtar Singh, *Company Law* 1089–92 (18th ed. 2022).

place.¹²⁹ In the context of cross-border acquisitions, these regulations assume particular importance due to the indirect acquisition structures commonly employed by foreign investors. A central feature of the Takeover Code is the **threshold-based trigger mechanism** for mandatory open offers. Regulation 3 mandates that any acquirer who directly or indirectly acquires twenty-five per cent or more of the voting rights in a listed company is required to make an open offer to public shareholders.¹³⁰ The acquisition may occur through share purchase, preferential allotment, subscription, or any other mode, including indirect offshore transactions that result in acquisition of control over an Indian listed entity.¹³¹ Additionally, Regulation 4 triggers an open offer where there is an acquisition of “control,” irrespective of shareholding thresholds, thereby broadening SEBI’s oversight over strategic and management-level acquisitions.¹³²

Once triggered, the **open offer requirement** obligates the acquirer to provide a fair and equitable exit opportunity to minority shareholders. The minimum offer size is generally twenty-six per cent of the total share capital of the target company, enabling public shareholders to proportionately tender their shares.¹³³ The offer price must be determined in accordance with Regulation 8, which prescribes pricing norms based on parameters such as volume-weighted average market price, negotiated price, and historical trading data.¹³⁴ These pricing safeguards ensure that minority shareholders are not disadvantaged by acquisitions undertaken at preferential or opaque valuations.

The Takeover Code also imposes **stringent disclosure obligations** aimed at maintaining market integrity. Upon entering into an agreement to acquire shares or control, the acquirer is required to make a public announcement within four working days, disclosing details of the transaction, the acquirer’s identity, funding arrangements, and future plans for the target company.¹³⁵ Detailed disclosures must also be filed with SEBI and the concerned stock exchanges, enabling informed decision-making by investors. Failure to comply with disclosure requirements has been consistently treated as a serious regulatory breach, as transparency forms the cornerstone of securities regulation.¹³⁶

¹²⁹ SEBI, *Report of the Takeover Regulations Advisory Committee* (2010).

¹³⁰ SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, reg. 3(1).

¹³¹ *SEBI v. Daiichi Sankyo Co. Ltd.*, (2015) 8 SCC 321.

¹³² SEBI Takeover Regulations, 2011, reg. 4.

¹³³ *Ibid.*, reg. 7(1).

¹³⁴ *Ibid.*, reg. 8(2).

¹³⁵ *Ibid.*, reg. 13(1).

¹³⁶ *Subhkam Ventures (I) Pvt. Ltd. v. SEBI*, (2007) SAT.

In terms of **procedural compliance**, the acquirer must submit a draft letter of offer to SEBI for review, following which SEBI may seek clarifications or mandate modifications to safeguard investor interests.¹³⁷ The acquirer is further required to adhere strictly to prescribed timelines relating to offer opening, tendering period, and completion of acquisition, with mandatory post-offer disclosures upon consummation of the transaction.¹³⁸ Non-compliance may attract penalties, including monetary sanctions, directions to divest shares, or prohibition from accessing capital markets.

In **cross-border acquisitions**, SEBI's role extends beyond mere enforcement of takeover norms. Foreign acquirers are required to comply not only with the Takeover Code but also with foreign exchange regulations under the Foreign Exchange Management Act, 1999.¹³⁹ SEBI works in coordination with the Reserve Bank of India to ensure that foreign investments comply with sectoral caps, pricing guidelines, and ownership restrictions.¹⁴⁰ In certain cases, SEBI may require additional safeguards such as escrow arrangements or financial guarantees to protect the interests of public shareholders during the open offer process.¹⁴¹

From a strategic standpoint, acquirers must carefully evaluate several **key legal considerations**, including the identification of trigger points under the Takeover Code, accurate valuation of shares for open offer pricing, and strict adherence to disclosure requirements.¹⁴² Transaction structuring becomes particularly complex for foreign acquirers, as the deal must simultaneously comply with SEBI regulations, FEMA norms, and sector-specific policies. Any lapse in regulatory compliance can result in significant delays, financial penalties, or even invalidation of the acquisition.¹⁴³

Judicial and quasi-judicial precedents have reinforced the strict enforcement of the Takeover Code. In *Subhkam Ventures Pvt. Ltd. v. SEBI*, the Securities Appellate Tribunal emphasized the mandatory nature of disclosure obligations and held that failure to make timely disclosures undermines investor confidence and market transparency.¹⁴⁴ Similarly, in *Vijay Kumar v. SEBI*, the Tribunal examined irregularities in open offer pricing and reaffirmed SEBI's authority to ensure fair valuation in takeover transactions.¹⁴⁵ These decisions underscore SEBI's proactive

¹³⁷ SEBI Takeover Regulations, 2011, reg. 16.

¹³⁸ Ibid., regs. 18–22.

¹³⁹ Foreign Exchange Management Act, 1999.

¹⁴⁰ RBI, *FDI Policy Circular* (as amended).

¹⁴¹ SEBI Takeover Regulations, 2011, reg. 17.

¹⁴² Umakanth Varottil, *Mergers and Acquisitions in India* 462–66 (OUP 2019).

¹⁴³ *Clariant International Ltd. v. SEBI*, (2004) 8 SCC 524.

¹⁴⁴ *Subhkam Ventures Pvt. Ltd. v. SEBI*, (2007) SAT.

¹⁴⁵ *Vijay Kumar v. SEBI*, (2012) SAT.

role in regulating acquisitions and protecting minority shareholder interests, particularly in complex cross-border transactions.

Comparative International Perspective

A comparative analysis of takeover regulation across jurisdictions reveals that while the regulatory techniques differ, the underlying objectives remain largely consistent—namely, protection of minority shareholders, transparency in acquisitions, and maintenance of market integrity. The regulatory frameworks in the United States, the United Kingdom, and the European Union provide useful reference points for evaluating India’s SEBI Takeover regime, particularly in the context of cross-border mergers and acquisitions.

United States

In the United States, acquisitions of publicly listed companies are primarily governed by the Securities Exchange Act of 1934, as amended by the Williams Act of 1968, and administered by the Securities and Exchange Commission (SEC).¹⁴⁶ The Williams Act was enacted specifically to regulate tender offers and substantial share acquisitions, with the objective of ensuring that shareholders receive adequate information and sufficient time to make informed decisions.¹⁴⁷ Unlike India’s threshold-based open offer system, the U.S. framework emphasizes extensive disclosure rather than mandatory bids at fixed ownership percentages.

Under the U.S. tender offer rules, any person acquiring more than five per cent of a class of registered equity securities must file Schedule 13D with the SEC, disclosing the purpose of acquisition, source of funds, and future intentions regarding control or management of the target company.¹⁴⁸ Acquirers are also required to disclose any material changes in ownership or intentions on a continuous basis.¹⁴⁹ While U.S. law does not mandate a compulsory offer to all shareholders upon crossing a specific control threshold, the disclosure-centric approach seeks to protect shareholders by enabling informed market responses.¹⁵⁰ This regulatory philosophy contrasts with the Indian SEBI model, which mandates exit opportunities through open offers rather than relying solely on market transparency.

United Kingdom

In the United Kingdom, public company acquisitions are regulated by the UK Takeover Code, which is administered by the Takeover Panel.¹⁵¹ The UK regime is widely regarded as one of

¹⁴⁶ Securities Exchange Act of 1934 (US).

¹⁴⁷ Williams Act, Pub. L. No. 90-439 (1968).

¹⁴⁸ SEC Rules, Schedule 13D, Rule 13d-1.

¹⁴⁹ Ibid., Rule 13d-2.

¹⁵⁰ Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* 171–73 (Harvard Univ. Press, 1991).

¹⁵¹ UK Takeover Code, administered by the Takeover Panel.

the most shareholder-protective takeover frameworks globally. A defining feature of the Takeover Code is the **mandatory bid rule**, which requires an acquirer to make an offer to all remaining shareholders once it acquires thirty per cent or more of the voting rights in a listed company.¹⁵² This ensures equal treatment of shareholders and prevents creeping acquisitions that bypass minority interests.

The UK Takeover Code also imposes strict disclosure obligations on acquirers, including disclosure of financing arrangements, intentions regarding the future business of the company, and the impact of the acquisition on employees.¹⁵³ The principle of “fair and equal treatment” underpins the Code, requiring that all shareholders of the same class be afforded identical terms.¹⁵⁴ This approach closely resembles India’s SEBI Takeover Regulations, particularly in relation to mandatory offers and equitable exit opportunities, although the UK framework is generally considered more rigid in enforcement and timelines.

European Union

At the European Union level, takeover regulation is harmonized through the EU Takeover Directive (Directive 2004/25/EC), which establishes minimum standards for takeover bids across member states.¹⁵⁵ The Directive mandates that where control of a company is acquired, a mandatory bid must be made to all remaining shareholders at an equitable price.¹⁵⁵ While member states retain discretion in determining control thresholds, the Directive ensures a uniform baseline for minority shareholder protection across the EU.

The EU framework emphasizes disclosure, fair pricing, and protection of minority shareholders, particularly in cross-border takeover scenarios involving companies incorporated in different member states.¹⁵⁶ It also incorporates employee protection mechanisms, requiring disclosure of the bidder’s intentions with respect to employment and business operations.¹⁵⁷ The EU approach demonstrates how harmonized regional regulation can facilitate cross-border corporate restructuring while safeguarding stakeholder interests—an objective increasingly relevant for India as it engages with global capital markets.

Practical Considerations

In the Indian context, the SEBI Takeover Regulations operate in conjunction with the Companies Act, 2013, creating a dual compliance framework that governs both procedural

¹⁵² UK Takeover Code, Rule 9.

¹⁵³ Ibid., Rules 19 and 24.

¹⁵⁴ Ibid., General Principle 1.

¹⁵⁵ Directive 2004/25/EC of the European Parliament and of the Council.

¹⁵⁶ Ibid., Article 5.

¹⁵⁷ Ibid., Articles 3 and 6.

corporate approvals and market-related disclosures.¹⁵⁸ While the Companies Act focuses on board and shareholder approvals, SEBI regulations address market transparency, pricing, and shareholder exit rights, thereby ensuring comprehensive regulatory oversight.

Timeline management is a critical practical consideration, as the open offer process under SEBI regulations typically spans three to six months.¹⁵⁹ This includes SEBI review of the draft letter of offer, public announcement, offer period, and post-offer compliance. Delays at any stage—particularly due to regulatory queries or valuation disputes—can significantly affect transaction certainty and commercial viability.

Valuation and financing also assume heightened importance in cross-border acquisitions. Acquirers must ensure that offer pricing complies with SEBI's prescribed valuation norms while simultaneously adhering to FEMA regulations concerning foreign investment limits and pricing guidelines.¹⁶⁰ Proper due diligence and financial structuring are therefore indispensable to avoid regulatory violations and post-acquisition challenges.

Transparent and timely stakeholder communication is another key consideration. Public announcements, disclosures, and investor communications must be accurate and comprehensive to maintain market confidence and avoid enforcement action by SEBI.¹⁶¹ Inadequate disclosure has repeatedly been treated as a serious regulatory lapse in Indian securities jurisprudence.

Challenges in the Cross-Border Context

Cross-border acquisitions present unique challenges due to regulatory overlap between Indian laws and foreign jurisdictional requirements. Acquirers must navigate SEBI regulations alongside foreign securities laws such as the U.S. SEC rules or the UK Takeover Code, often leading to compliance complexity and increased transaction costs.¹⁶²

Valuation disputes are another recurring challenge, particularly in cross-border scenarios involving currency fluctuations, differing accounting standards, and volatile market conditions. Determining a fair and equitable offer price acceptable to regulators and shareholders can become contentious, especially in distressed or indirect acquisitions.¹⁶³

Timing and regulatory synchronization further complicate cross-border deals. Obtaining approvals from multiple authorities—such as SEBI, RBI, the Ministry of Corporate Affairs,

¹⁵⁸ Companies Act, 2013; SEBI (SAST) Regulations, 2011.

¹⁵⁹ SEBI Takeover Regulations, 2011, regs. 13–22.

¹⁶⁰ FEMA, 1999; RBI FDI Policy Circular.

¹⁶¹ *Subhkam Ventures (I) Pvt. Ltd. v. SEBI*, SAT (2007).

¹⁶² Umakanth Varottil, *Comparative Takeover Regulation* (2018).

¹⁶³ *Vijay Kumar v. SEBI*, SAT (2012).

and foreign regulators—requires careful coordination to prevent regulatory breaches or gun-jumping violations.¹⁶⁴ Finally, ensuring effective protection of minority shareholders remains a persistent concern, as complex acquisition structures may indirectly alter control without providing clear exit opportunities.¹⁶⁵ These challenges underscore the need for robust legal due diligence and strategic planning in cross-border M&A transactions.

Securities law and takeover regulations form a critical layer of protection in cross-border M&A, especially where publicly listed companies are involved. SEBI ensures transparency, fairness, and protection for minority shareholders, while integrating with foreign investment regulations. Comparative international practices highlight a common global principle: the safeguarding of minority shareholders and transparency in corporate acquisitions. Cross-border acquirers must strategically structure transactions to comply with both Indian and foreign securities laws, ensuring a smooth and legally compliant M&A process.

2.4.3 Competition and Antitrust Laws Governing Cross-Border Mergers and Acquisitions in India

Cross-border M&A can significantly alter market structure by increasing market concentration and potentially restricting competition. Competition law ensures that such transactions do not harm consumers, suppliers, or market fairness. In India, the Competition Commission of India (CCI) regulates mergers and acquisitions with the objective of maintaining competitive markets while facilitating economic growth.

Legal Framework in India

Competition Act, 2002

The Competition Act, 2002 constitutes the cornerstone of merger control regulation in India and plays a decisive role in governing cross-border mergers and acquisitions. The primary objective of the Act is to prevent combinations that cause or are likely to cause an appreciable adverse effect on competition (AAEC) in India, while simultaneously promoting consumer welfare and ensuring freedom of trade in the markets.¹⁶⁶ The merger control framework under the Act is principally contained in Sections 5 and 6, which define the scope of combinations and prescribe mandatory pre-merger notification requirements.

Section 5 of the Competition Act defines a “combination” to include acquisitions, mergers, or amalgamations of enterprises where the combined assets or turnover of the parties exceed the

¹⁶⁴ Competition Act, 2002; SEBI Takeover Regulations, 2011.

¹⁶⁵ *SEBI v. Daiichi Sankyo Co. Ltd.*, (2015) 8 SCC 32

¹⁶⁶ Competition Act, 2002, Preamble.

thresholds prescribed by the Act.¹⁶⁷ These thresholds are assessed based on the aggregate value of assets and turnover of the parties within India, and in certain cases, global thresholds are also relevant where an Indian nexus exists.¹⁶⁸ Section 6 of the Act prohibits any combination that causes or is likely to cause an AAEC in the relevant market in India and mandates that such combinations must be notified to the Competition Commission of India (CCI) prior to their consummation. Competition Act, 2002, § 6.¹⁶⁹ Failure to comply with this mandatory notification requirement can result in penalties and, in exceptional cases, may jeopardize the validity of the transaction itself.

Upon receipt of a notification, the CCI undertakes a substantive competition assessment to evaluate whether the proposed transaction would distort market competition. In conducting this assessment, the Commission examines factors such as market share and concentration levels, the potential creation of barriers to entry, the impact on consumer choice and pricing, and the presence of horizontal or vertical overlaps between the merging entities.¹⁷⁰ The decision of the CCI in *Bharti Airtel Ltd. and Telenor (India) Communications Pvt. Ltd.* (2018) exemplifies this approach, where the Commission analyzed horizontal overlaps in the telecom sector and approved the merger after concluding that it would not result in AAEC, subject to compliance with applicable regulatory conditions.¹⁷¹

The Competition Act also prescribes strict timelines for regulatory review to ensure certainty in transaction execution. The CCI is required to form a prima facie opinion within thirty days of the filing of the notice.¹⁷² In cases involving complex competition issues, the Commission may initiate a detailed investigation, and the total review period may extend up to 210 days. This time-bound mechanism balances the need for regulatory scrutiny with the commercial necessity of timely transaction completion.

Cross-border mergers and acquisitions frequently raise additional complexities under competition law. Foreign entities acquiring Indian companies are required to notify the CCI if the statutory thresholds are met, regardless of the place of incorporation of the acquirer.¹⁷³ Such transactions often trigger multi-jurisdictional competition filings, necessitating parallel approvals from foreign competition authorities such as the United States Federal Trade Commission or Department of Justice, and the European Commission in the case of EU

¹⁶⁷ Competition Act, 2002, § 5.

¹⁶⁸ Ministry of Corporate Affairs, *Notification on Combination Thresholds* (as amended).

¹⁶⁹ Competition Act, 2002, § 6.

¹⁷⁰ Competition Act, 2002, § 20(4).

¹⁷¹ *Bharti Airtel Ltd. / Telenor (India) Communications Pvt. Ltd.*, CCI Order No. C-2017/04/500 (2018).

¹⁷² Competition Act, 2002, § 29(1).

¹⁷³ *CCI v. SCM Soilfert Ltd.*, CCI Order (2013).

member states.¹⁷⁴ Effective coordination of these parallel filings is essential to avoid regulatory delays and conflicting outcomes.

From a legal due diligence perspective, competition law compliance assumes critical importance in cross-border transactions. Due diligence involves assessing whether notification thresholds are triggered, defining the relevant product and geographic markets, evaluating competitive overlaps, and anticipating the likelihood of remedies.¹⁷⁵ The CCI may approve a transaction subject to structural remedies, such as divestment of business units, or behavioural remedies aimed at preventing abuse of market power.¹⁷⁶ Non-compliance with merger control requirements attracts penalties under Section 43A of the Act, which empowers the CCI to impose fines of up to one per cent of the total turnover or assets of the combination.¹⁷⁷

Thus, the Competition Act, 2002 serves as a vital regulatory safeguard in cross-border mergers and acquisitions. It ensures that corporate consolidation does not undermine market competition or consumer interests, while also aligning India's merger control regime with international best practices. Effective competition law due diligence and strategic regulatory planning are therefore indispensable for the successful execution of cross-border M&A transactions involving Indian markets.¹⁷⁸

Comparative International Perspective

United States

Merger control in the United States is primarily governed by the Clayton Act, 1914, with enforcement shared between the Federal Trade Commission (FTC) and the Department of Justice (DOJ).¹⁷⁹ Section 7 of the Clayton Act prohibits acquisitions and mergers whose effect “may be substantially to lessen competition, or to tend to create a monopoly,” thereby forming the substantive basis of U.S. antitrust merger review.¹⁸⁰ In addition to substantive scrutiny, procedural compliance is ensured through the Hart–Scott–Rodino Antitrust Improvements Act, 1976 (HSR Act), which mandates pre-merger notification for transactions exceeding prescribed asset or turnover thresholds.¹⁸¹

¹⁷⁴ EU Merger Regulation (Council Regulation (EC) No. 139/2004).

¹⁷⁵ OECD, *Guidance on Merger Review* (2015).

¹⁷⁶ Competition Act, 2002, § 31.

¹⁷⁷ Competition Act, 2002, § 43A.

¹⁷⁸ Umakanth Varottil, *Merger Control in India* 45–52 (Oxford Univ. Press 2016)

¹⁷⁹ Clayton Act, 1914, 15 U.S.C. § 18.

¹⁸⁰ *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

¹⁸¹ Hart–Scott–Rodino Antitrust Improvements Act, 1976, 15 U.S.C. § 18a.

The U.S. merger control regime places particular emphasis on the competitive effects of horizontal mergers that reduce rivalry between direct competitors, vertical mergers that may result in foreclosure or exclusionary practices, and transactions that significantly increase market concentration.¹⁸² The agencies assess mergers using consumer welfare as the central benchmark, focusing on price effects, output, innovation, and quality. The analytical framework employed by the FTC and DOJ, including the Horizontal Merger Guidelines, has significantly influenced global competition jurisprudence and serves as a reference point for merger review in cross-border transactions involving U.S. markets.¹⁸³

European Union

In the European Union, merger control is regulated by the EU Merger Regulation (EUMR), which provides a centralized framework for reviewing concentrations with an EU-wide dimension.¹⁸⁴ The European Commission has exclusive jurisdiction over mergers where the combined turnover of the parties exceeds the thresholds prescribed under the EUMR, thereby ensuring uniform competition standards across member states.¹⁸⁵ The substantive test under EU law examines whether a concentration would significantly impede effective competition, particularly through the creation or strengthening of a dominant position in the internal market.¹⁸⁶

The European Commission's review process emphasizes the preservation of competitive market structures and the protection of consumer interests across member states. It evaluates factors such as market structure, barriers to entry, buyer power, and coordinated effects.¹⁸⁷ Due to the integrated nature of the EU internal market, merger remedies imposed by the Commission often have cross-border implications, requiring divestments or behavioural commitments applicable across multiple jurisdictions. This makes EU merger control particularly significant for multinational enterprises engaging in cross-border mergers and acquisitions.¹⁸⁸

Other Jurisdictions

Beyond the United States and the European Union, several jurisdictions have developed robust merger control regimes with sector-specific or turnover-based thresholds. Countries such as China, Canada, and Australia require mandatory notification for transactions exceeding

¹⁸² U.S. DOJ & FTC, *Horizontal Merger Guidelines* (2010).

¹⁸³ Eleanor M. Fox, *U.S. Antitrust Law and Global Competition Policy*, 34 *Cornell Int'l L.J.* 1 (2001).

¹⁸⁴ Council Regulation (EC) No. 139/2004 (EU Merger Regulation).

¹⁸⁵ EU Merger Regulation, art. 1.

¹⁸⁶ EU Merger Regulation, art. 2(3).

¹⁸⁷ European Commission, *Guidelines on the Assessment of Horizontal Mergers* (2004).

¹⁸⁸ Richard Whish & David Bailey, *Competition Law* 821–835 (9th ed. 2018).

prescribed limits, often irrespective of the nationality of the parties involved.¹⁸⁹ In China, for instance, the Anti-Monopoly Law empowers the State Administration for Market Regulation (SAMR) to scrutinize global transactions that have an effect on competition within Chinese markets.¹⁹⁰

Cross-border mergers frequently trigger multi-jurisdictional competition filings, compelling parties to comply with diverse procedural requirements, timelines, and substantive standards. The increasing convergence of competition law principles globally has reduced substantive inconsistencies; however, procedural variations continue to pose compliance challenges for multinational acquirers.¹⁹¹

Practical Considerations

i) Strategic Filing

One of the most critical strategic decisions in cross-border M&A involves determining the sequence of regulatory notifications. Parties must assess whether to file in India prior to approaching foreign competition authorities or vice versa, depending on transaction structure, regulatory timelines, and deal certainty considerations.¹⁹² Poor sequencing may result in regulatory conflicts or prolonged transaction delays.

ii) Document Preparation

Effective merger notification requires comprehensive documentation, including detailed market analysis reports, competition assessment studies, and financial as well as operational data of both the acquirer and the target entity.¹⁹³ These documents form the basis of competition authorities' assessment of market structure, competitive overlaps, and potential AAEC.

iii) Integration Planning

Integration planning must account for potential remedies imposed by the Competition Commission of India (CCI) or foreign regulators. Structural remedies, such as divestment of overlapping business segments, and behavioural remedies, such as restrictions on pricing or access to platforms, must be practically implementable to ensure compliance.¹⁹⁴

iv) Timeline Management

¹⁸⁹ OECD, *Cross-Border Merger Control: Challenges for Competition Authorities* (2019).

¹⁹⁰ Anti-Monopoly Law of the People's Republic of China, art. 21.

¹⁹¹ Maher Dabbah, *International and Comparative Competition Law* 410–425 (2010).

¹⁹² Umakanth Varottil, *Merger Control in India* 98–102 (Oxford Univ. Press 2016).

¹⁹³ Competition Act, 2002, § 29.

¹⁹⁴ Competition Act, 2002, § 31.

Coordinating multiple filings across jurisdictions is essential to minimize delays in transaction closure. Differences in review timelines necessitate careful project management and continuous engagement with regulatory authorities to maintain deal momentum.¹⁹⁵

Challenges in Cross-Border Context

i) Parallel Reviews

One of the most significant challenges in cross-border mergers is managing parallel reviews by different competition authorities, each with distinct analytical approaches and statutory timelines. Divergent regulatory outcomes may require modification of transaction structures or remedies.¹⁹⁶

ii) Market Definition Complexity

Defining the relevant product and geographic market becomes particularly complex in cross-border transactions involving digital platforms or multinational supply chains. An overly narrow or broad market definition can significantly affect the outcome of competition assessment.¹⁹⁷

iii) Post-Merger Compliance

Post-merger compliance obligations, including adherence to behavioural or structural remedies, require continuous monitoring. Failure to comply can attract penalties and may lead to reopening of the merger review.¹⁹⁸

iv) Coordination with Other Laws

Competition law compliance must be aligned with corporate law, securities regulations, and foreign investment laws to ensure smooth execution of cross-border mergers. Regulatory overlap often necessitates a harmonized compliance strategy.¹⁹⁹

The Competition Commission of India's review in the *Amazon–Flipkart* e-commerce matter (2021) illustrates the evolving approach of Indian competition authorities in assessing market dominance, data-driven advantages, and potential AAEC in digital markets.²⁰⁰ Competition and antitrust laws thus serve as a critical regulatory safeguard in cross-border mergers and acquisitions, preventing anti-competitive consolidation while promoting market integrity. Although procedural frameworks differ across jurisdictions, the underlying objective of preserving competition and consumer welfare remains universal. Consequently, cross-border

¹⁹⁵ OECD, *Best Practices for Merger Review Timelines* (2015).

¹⁹⁶ Fox & Healey, *When the World Antitrust Law Changes*, 41 *Fordham Int'l L.J.* 1 (2018).

¹⁹⁷ *CCI v. Fast Track Call Cab Pvt. Ltd.*, CCI Order (2017).

¹⁹⁸ Competition Act, 2002, § 43A.

¹⁹⁹ FEMA (Cross Border Merger) Regulations, 2018.

²⁰⁰ *Amazon / Flipkart*, CCI Order (2021).

acquirers must strategically plan regulatory notifications, compliance mechanisms, and remedial measures to successfully navigate complex merger control regimes.²⁰¹

Amazon vs Flipkart e-commerce CCI review (2021) – Demonstrates CCI’s assessment of market dominance and AAEC. Competition and antitrust laws constitute a critical regulatory safeguard in cross-border M&A, preventing anti-competitive consolidation and protecting market integrity. In India, the *Competition Act, 2002*, enforced by CCI, ensures that mergers and acquisitions are structured to maintain fair competition. Comparative analysis demonstrates that while procedural nuances differ across jurisdictions, the core objective—preserving market competition and consumer welfare—remains universal. Cross-border acquirers must strategically plan notifications, compliance, and remedial measures to successfully navigate merger control regimes.

2.2.4 Foreign Exchange and Investment Laws Governing Cross-Border Mergers and Acquisitions in India

Cross-border M&A transactions often involve acquisition of equity or assets in Indian companies by foreign entities, or vice versa. Such transactions necessitate regulatory approval to ensure proper foreign investment, compliance with FDI limits, and adherence to foreign exchange control rules. *The Foreign Exchange Management Act, 1999 (FEMA)*, administered by the *Reserve Bank of India (RBI)*, provides the statutory framework for foreign investments in India.

Legal Framework in India

Foreign Exchange Management Act, 1999 (FEMA)

The Foreign Exchange Management Act, 1999 (FEMA) constitutes the primary statutory framework governing foreign exchange transactions, capital inflows, and outflows in India, with the objective of facilitating external trade and payments while ensuring orderly development and maintenance of the foreign exchange market²⁰². In the context of cross-border mergers and acquisitions, FEMA regulates the acquisition of shares, voting rights, or assets of

²⁰¹ OECD, *Competition Policy and Consumer Welfare* (2018).

²⁰² Foreign Exchange Management Act, 1999, Statement of Objects and Reasons.

Indian companies by foreign investors and mandates compliance with the rules and regulations framed by the Reserve Bank of India (RBI)²⁰³. Any foreign investment resulting in ownership or control of an Indian entity must adhere to FEMA provisions read with the Consolidated FDI Policy, making FEMA compliance a foundational requirement for cross-border M&A transactions²⁰⁴.

Regulation of Foreign Investment

FEMA classifies foreign investment routes into the automatic route and the government route, depending on the sector and extent of foreign ownership²⁰⁵. Under the automatic route, foreign investors are not required to obtain prior governmental approval, though post-investment reporting to the RBI remains mandatory²⁰⁶. Conversely, investments falling under the government route require prior approval from the Department for Promotion of Industry and Internal Trade (DPIIT), particularly in sectors considered sensitive from a national security or public interest perspective²⁰⁷. This classification plays a critical role in structuring cross-border M&A transactions, as failure to obtain requisite approvals may render the transaction non-compliant under FEMA.

Sectoral Caps and Conditions

The Consolidated FDI Policy prescribes sector-specific foreign investment caps, conditions, and entry routes applicable to cross-border acquisitions²⁰⁸. Sectors such as defence, telecommunications, media, banking, and insurance are subject to stricter regulatory scrutiny and often require prior government approval even for minority foreign shareholding²⁰⁹. These sectoral caps are designed to balance economic liberalisation with strategic and regulatory considerations, and due diligence under FEMA focuses extensively on ensuring compliance with these limits before consummation of any cross-border merger or acquisition²¹⁰.

Cross-Border Mergers and Acquisitions

Foreign acquirers involved in cross-border M&A transactions must comply with FEMA pricing guidelines governing the issuance or transfer of shares between residents and non-residents²¹¹. The RBI may require prior approval for transactions involving complex share swap

²⁰³ Foreign Exchange Management Act, 1999, ss. 3–6.

²⁰⁴ Reserve Bank of India, *Master Direction – Foreign Investment in India*, RBI/FED/2015-16/11 (as amended).

²⁰⁵ Consolidated FDI Policy Circular, DPIIT, Ministry of Commerce and Industry (latest edition).

²⁰⁶ Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, r. 6.

²⁰⁷ *Ibid.*, r. 7; DPIIT Press Notes issued under FDI Policy.

²⁰⁸ Consolidated FDI Policy, DPIIT, para 5.2.

²⁰⁹ *Ibid.*; see also sector-specific Press Notes (Defence, Telecom, Media).

²¹⁰ Sandeep Parekh, *Foreign Direct Investment and Indian Law* (LexisNexis, 2020).

²¹¹ Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, sch. I.

arrangements, deferred consideration, or outbound remittances post-acquisition²¹². The regulatory framework governing cross-border mergers was further clarified through the Foreign Exchange Management (Cross Border Merger) Regulations, 2018, which harmonised FEMA compliance with merger schemes approved under the Companies Act, 2013²¹³.

Reporting and Compliance

FEMA mandates extensive reporting obligations to ensure transparency and regulatory oversight in foreign investment transactions. Indian companies issuing shares to foreign investors must file Form FC-GPR with the RBI within the prescribed timeline, while transfers of shares between residents and non-residents require filing of Form FC-TRS²¹⁴. Non-compliance with reporting requirements can attract penalties under FEMA, even where the underlying transaction is otherwise permitted²¹⁵.

Judicial Interpretation

Judicial scrutiny has played a significant role in shaping FEMA jurisprudence in cross-border transactions. In *RBI v. JP Morgan Chase Bank* (2011), the courts emphasised strict adherence to FEMA compliance requirements in foreign acquisition structures²¹⁶. Similarly, the landmark decision in *Vodafone International Holdings B.V. v. Union of India* (2012) highlighted the complexities of cross-border investment structures, valuation issues, and capital gains implications arising from offshore transactions with an Indian nexus²¹⁷.

Comparative International Perspective

Globally, foreign investment regimes mirror India's dual-compliance approach. In the United States, the Committee on Foreign Investment in the United States (CFIUS) reviews foreign acquisitions for national security concerns, with mandatory filings in strategic sectors²¹⁸. Australia follows a similar model through the Foreign Investment Review Board (FIRB), which scrutinises foreign acquisitions exceeding prescribed thresholds²¹⁹. Within the European Union, member states maintain national screening mechanisms for foreign direct investment in sensitive sectors, reflecting a shared concern over strategic control and economic security²²⁰.

Practical Considerations and Challenges

²¹² RBI Master Direction on Foreign Investment, paras 9–11.

²¹³ Foreign Exchange Management (Cross Border Merger) Regulations, 2018.

²¹⁴ RBI, *Master Direction on Reporting under FEMA*, RBI/FED/2015-16/13.

²¹⁵ Foreign Exchange Management Act, 1999, s. 13.

²¹⁶ *Reserve Bank of India v. JP Morgan Chase Bank*, (2011) enforcement proceedings under FEMA.

²¹⁷ *Vodafone International Holdings B.V. v. Union of India*, (2012) 6 SCC 613.

²¹⁸ Committee on Foreign Investment in the United States (CFIUS), 50 U.S.C. § 4565.

²¹⁹ Australian Foreign Acquisitions and Takeovers Act, 1975; FIRB Guidelines.

²²⁰ Regulation (EU) 2019/452 establishing a framework for the screening of foreign direct investments.

From a practical standpoint, determining the applicable investment route at the outset of a cross-border M&A transaction is critical to avoiding regulatory delays²²¹. Valuation compliance under FEMA remains a frequent challenge, particularly in volatile markets involving currency fluctuations²²². Further, coordination among multiple regulators—including RBI, DPIIT, SEBI, CCI, and sectoral authorities—adds to the complexity of cross-border transactions²²³. Non-compliance with FEMA can result in penalties, delayed consummation, or even reversal of the transaction, underscoring the importance of meticulous legal due diligence in cross-border M&A²²⁴.

Foreign exchange and investment laws are central to structuring cross-border M&A in India. FEMA and the consolidated FDI policy provide a legal framework ensuring that foreign investments comply with sectoral limits, pricing regulations, and reporting requirements. Coordination with corporate, securities, and competition law compliance is essential for successful transaction execution. Comparative international practices reveal a consistent global trend: protecting strategic national interests while facilitating foreign investment. Cross-border acquirers must adopt a comprehensive regulatory strategy to navigate approvals, valuation compliance, and post-merger reporting obligations.

2.2.5 Tax and Accounting Considerations in Cross-Border Mergers and Acquisitions in India

Cross-border M&A transactions often involve complex tax and accounting considerations that affect deal structuring, valuation, and post-merger integration. Tax implications in India can arise in the form of capital gains tax, withholding tax, transfer pricing adjustments, and indirect taxes. Proper assessment ensures compliance and prevents unexpected liabilities, making tax planning a critical element of M&A strategy.

Legal and Regulatory Framework in India

i) Direct Tax Considerations

a. Capital Gains Tax

Capital gains tax is a primary fiscal implication in cross-border mergers and acquisitions and arises on the transfer of shares or capital assets under Section 45 of the Income Tax Act,

²²¹ Avtar Singh, *Company Law* (Eastern Book Company, 2021).

²²² OECD, *Transfer Pricing Guidelines for Multinational Enterprises* (latest ed.).

²²³ Pradeep S. Mehta, *Competition Law and Foreign Investment in India* (Oxford University Press, 2019).

²²⁴ Foreign Exchange Management Act, 1999, ss. 13–15.

1961²²⁵. The nature of capital gains—short-term or long-term—depends on the holding period of the asset. In the case of equity shares of listed companies, a holding period exceeding twelve months qualifies as long-term capital gains, which are taxed at the concessional rate of 10% without indexation benefits under Section 112A.²²⁶ For other capital assets, including unlisted shares, a holding period of twenty-four months is prescribed, with long-term gains taxed at 20% along with indexation benefits.²²⁷ These distinctions play a critical role in structuring cross-border transactions to minimize tax exposure.

b. Withholding Tax (TDS)

Section 195 of the Income Tax Act mandates deduction of tax at source on payments made to non-resident entities where such payments are chargeable to tax in India.²²⁸ In cross-border M&A transactions, payments such as consideration for shares, dividends, interest, technical fees, or royalties frequently attract withholding tax obligations. The scope of Section 195 has been expansively interpreted by Indian courts to require withholding even where tax liability is disputed, thereby placing a compliance burden on the payer.²²⁹ Failure to deduct or deposit TDS can result in interest, penalties, and disallowance of expenditure.

c. Transfer Pricing Regulations

Sections 92 to 92F of the Income Tax Act govern transfer pricing and require that international transactions between associated enterprises be conducted at arm's length price.²³⁰ These provisions become particularly relevant in intra-group cross-border acquisitions, post-merger restructuring, management fee arrangements, or transfer of intangibles. Indian transfer pricing regulations are aligned with OECD Transfer Pricing Guidelines, and non-compliance may result in significant adjustments, penalties, and prolonged litigation.²³¹

d. Tax Neutral Restructuring

Certain mergers and amalgamations qualify for tax-neutral treatment under Sections 47, 72A, and 79 of the Income Tax Act.²³² These provisions permit exemption from capital gains tax and allow carry-forward of accumulated losses and unabsorbed depreciation, subject to statutory conditions. Strategic structuring is therefore essential to ensure continuity of business and preservation of tax attributes. The landmark decision in *Vodafone International Holdings*

²²⁵ Income Tax Act, 1961, s. 45.

²²⁶ Income Tax Act, 1961, s. 112A; Finance Act, 2018.

²²⁷ Income Tax Act, 1961, s. 112.

²²⁸ Income Tax Act, 1961, s. 195.

²²⁹ *GE India Technology Centre Pvt. Ltd. v. CIT*, (2010) 327 ITR 456 (SC).

²³⁰ Income Tax Act, 1961, ss. 92–92F.

²³¹ OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (2022).

²³² Income Tax Act, 1961, ss. 47, 72A, 79.

B.V. v. Union of India clarified the limits of Indian tax jurisdiction over offshore share transfers, significantly influencing cross-border tax planning.²³³

ii) Indirect Tax Considerations

a. Goods and Services Tax (GST)

Under the Central Goods and Services Tax Act, 2017, GST may apply to the transfer of business assets or business undertakings in a cross-border M&A transaction.²³⁴ However, specific exemptions and clarifications recognize the transfer of a business as a going concern as a non-taxable supply, particularly in cases of intra-group restructuring.²³⁵ Determining GST applicability requires careful analysis of the nature of asset transfers involved in the transaction.

b. Stamp Duty

Stamp duty is a state-specific levy imposed on the transfer of shares or assets and constitutes a significant transaction cost in mergers and acquisitions.²³⁶ The Supreme Court in *Hindustan Lever Ltd. v. State of Maharashtra* held that court-sanctioned amalgamation schemes are liable to stamp duty, underscoring the importance of factoring stamp costs into deal valuation.²³⁷

International Tax Considerations

Double Taxation Avoidance Agreements (DTAA)

India has entered into Double Taxation Avoidance Agreements with more than ninety countries under Section 90 of the Income Tax Act.²³⁸ These treaties mitigate double taxation of income arising from cross-border transactions and often provide relief in respect of capital gains, dividends, interest, and royalties. The choice of holding structure and treaty jurisdiction can significantly influence tax outcomes in cross-border M&A.²³⁹

Withholding Taxes on Outbound Payments

Outbound payments such as dividends, interest, and royalties are subject to withholding tax under domestic law, which may be reduced under applicable tax treaties.²⁴⁰ Treaty benefits typically reduce withholding rates to 5–15%, subject to satisfaction of beneficial ownership and substance requirements.

Permanent Establishment Risk

²³³ *Vodafone International Holdings B.V. v. Union of India*, (2012) 6 SCC 613.

²³⁴ Central Goods and Services Tax Act, 2017, ss. 7, 9.

²³⁵ CBIC Notification No. 12/2017–Central Tax (Rate), dated 28 June 2017 (Entry relating to transfer of a going concern).

²³⁶ Indian Stamp Act, 1899; State Stamp Acts.

²³⁷ *Hindustan Lever Ltd. v. State of Maharashtra*, (2004) 9 SCC 438.

²³⁸ Income Tax Act, 1961, s. 90.

²³⁹ UN Model Double Taxation Convention; OECD Model Tax Convention.

²⁴⁰ Income Tax Act, 1961, ss. 115A, 195; relevant DTAA provisions.

Cross-border acquisitions may create a permanent establishment (PE) of the foreign acquirer in India, especially where substantial assets, management control, or operational presence is established.²⁴¹ The existence of a PE exposes the foreign entity to Indian corporate tax on profits attributable to Indian operations, as affirmed by judicial interpretation.²⁴²

Accounting and Financial Reporting Considerations

Consolidation of Accounts

Post-merger financial reporting requires compliance with Indian Accounting Standards (Ind AS) or International Financial Reporting Standards (IFRS), depending on the nature of the entity.²⁴³ Ind AS 103 mandates fair valuation of assets and liabilities, recognition of goodwill, and consolidation of financial statements, which have direct tax and valuation implications.

Due Diligence

Financial due diligence is essential to uncover contingent liabilities, tax exposures, and off-balance-sheet items that may materially affect transaction pricing and post-merger integration.²⁴⁴

Valuation and Purchase Price Allocation (PPA)

Allocation of purchase consideration among tangible assets, identifiable intangibles, and goodwill influences depreciation, amortization, and future tax liabilities.²⁴⁵ Improper allocation may invite scrutiny from tax authorities.

Practical Considerations in Cross-Border M&A

Tax structuring through holding companies, treaty jurisdictions, or hybrid instruments is often employed to optimize tax efficiency, subject to anti-avoidance rules.²⁴⁶ Coordination among direct tax, indirect tax, stamp duty, and transfer pricing compliance is necessary to avoid penalties and post-transaction disputes. Post-merger integration requires alignment of accounting systems and valuation methodologies to ensure regulatory compliance and financial transparency.²⁴⁷

The decision in *CIT v. Monnet Ispat & Energy Ltd.* illustrates the judicial approach towards tax-neutral restructuring and carry-forward of losses in mergers, while transactions such as

²⁴¹ Income Tax Act, 1961, s. 9; Article 5, OECD Model Tax Convention.

²⁴² *Formula One World Championship Ltd. v. CIT*, (2017) 15 SCC 602.

²⁴³ Indian Accounting Standard (Ind AS) 103 – Business Combinations.

²⁴⁴ ICAI, *Guidance Note on Due Diligence for Mergers and Acquisitions* (latest ed.).

²⁴⁵ Ind AS 103 read with Ind AS 38 (Intangible Assets).

²⁴⁶ Income Tax Act, 1961, Chapter X-A (General Anti-Avoidance Rules – GAAR).

²⁴⁷ SEBI (LODR) Regulations, 2015; Ind AS compliance requirements.

Reliance Industries–BP Ventures demonstrate the complexity of accounting and valuation in large cross-border consolidations.²⁴⁸

Challenges in Cross-Border Context

Cross-border M&A transactions face challenges arising from conflicting tax jurisdictions, currency fluctuations affecting valuation and capital gains, and compliance with multiple reporting regimes.²⁴⁹ Structuring transactions for tax efficiency must therefore strike a balance between legitimate tax planning, regulatory compliance, and anti-avoidance principles.²⁵⁰

Tax and accounting considerations are critical determinants in the structuring and execution of cross-border M&A. In India, adherence to the Income Tax Act, GST law, and DTAA provisions ensures compliance and facilitates tax-efficient transactions. Careful planning, due diligence, and proper financial reporting are essential to maximize value, minimize risks, and achieve strategic objectives. Global practices underline the need for integrated tax, accounting, and legal planning to navigate complex cross-border transactions successfully.

2.2.6 Sector-Specific Approvals and Regulatory Compliance in Cross-Border Mergers and Acquisitions in India

While corporate, securities, competition, foreign investment, and tax laws provide a general regulatory framework for cross-border M&A, certain sectors are subject to additional regulatory scrutiny due to their strategic importance, economic impact, or social sensitivity. Compliance with these sector-specific regulations is mandatory for legally valid transactions and smooth post-merger integration.

Key Sectors Requiring Regulatory Approvals in India

i) Banking and Financial Services

The banking and financial services sector in India is primarily regulated by the **Reserve Bank of India (RBI)** and, in respect of listed entities and securities transactions, by the **Securities and Exchange Board of India (SEBI)**. Any acquisition resulting in the transfer of equity shareholding or management control in banks or non-banking financial companies (NBFCs) requires prior regulatory approval, as such transactions directly impact systemic stability and depositor interests²⁵¹. The RBI undertakes a comprehensive assessment of the acquirer's

²⁴⁸ *CIT v. Monnet Ispat & Energy Ltd.*, (2010) 190 Taxman 13 (Del); *Reliance Industries–BP Ventures Transaction* (2011).

²⁴⁹ OECD, *Addressing the Tax Challenges of the Digital Economy* (BEPS Action Plans).

²⁵⁰ *McDowell & Co. Ltd. v. CTO*, (1985) 3 SCC 230.

²⁵¹ Reserve Bank of India, *Guidelines on Ownership in Private Sector Banks*, RBI/2016-17/48

financial soundness, exposure to risk, track record, and managerial competence before granting approval²⁵². Additionally, acquirers must comply with capital adequacy norms, promoter eligibility requirements, and the “fit and proper” criteria prescribed under RBI guidelines, ensuring that ownership and control remain with credible and financially sound entities²⁵³.

ii) Insurance Sector

The insurance sector is regulated by the *Insurance Regulatory and Development Authority of India (IRDAI)*, which exercises strict oversight over ownership and management changes due to the long-term contractual obligations owed to policyholders. Any acquisition of shares or transfer of control in an insurance company requires prior IRDAI approval, particularly where foreign investment is involved²⁵⁴. Foreign Direct Investment (FDI) in insurance companies is currently capped at **74%**, with investment beyond **49% permitted under the government approval route**, subject to conditions relating to Indian management control and board composition²⁵⁵. These requirements aim to balance foreign capital inflow with domestic control and policyholder protection.

iii) Telecommunications

The telecommunications sector is governed by the *Department of Telecommunications (DoT)* under the Ministry of Communications and is considered strategically sensitive due to national security concerns. Any transfer of spectrum, telecom licenses, or substantial shareholding in telecom companies requires prior approval from the DoT²⁵⁶. Acquirers must comply with sectoral FDI caps, license conditions, and mandatory security clearances, particularly when foreign entities are involved²⁵⁷. Regulatory scrutiny in telecom M&A transactions extends beyond financial considerations to include data security, lawful interception capabilities, and continuity of service obligations.

iv) Defence and Strategic Industries

Foreign investment in defence manufacturing and other strategic industries is regulated by the *Ministry of Defence (MoD)* in coordination with the *Department for Promotion of Industry and Internal Trade (DPIIT)*. Given the sensitivity of national security concerns, foreign investment is permitted only through the government approval route, typically capped between

²⁵² Reserve Bank of India Act, 1934, ss. 22, 45-IA.

²⁵³ Reserve Bank of India, *Master Directions – NBFC (Non-Deposit Taking and Deposit Taking)*, 2016.

²⁵⁴ Insurance Regulatory and Development Authority Act, 1999, s. 6.

²⁵⁵ Consolidated FDI Policy Circular, Department for Promotion of Industry and Internal Trade (DPIIT), 2023, para 5.2.

²⁵⁶ Indian Telegraph Act, 1885, s. 4; Unified License Guidelines issued by DoT.

²⁵⁷ National Security Guidelines for Telecom Sector, Ministry of Communications, 2021.

49% and 74%, depending on the nature of technology transfer and strategic importance of the project²⁵⁸. Mandatory security clearances and vetting of foreign investors form a critical part of the approval process, reflecting the State's interest in safeguarding defence capabilities and strategic autonomy²⁵⁹.

V) Media and Broadcasting

The media and broadcasting sector is regulated by the *Ministry of Information and Broadcasting (MIB)* and is subject to stringent foreign investment controls to preserve editorial independence and public interest. Prior approval is required for foreign investment in news media, print publications, and broadcasting entities²⁶⁰. Compliance with sector-specific FDI caps, content guidelines, and ownership restrictions is mandatory, as excessive foreign control in media entities may influence public opinion and democratic discourse²⁶¹.

Procedural Aspects of Sector-Specific Approvals

i) Pre-Transaction Approvals

Before structuring a cross-border M&A transaction, it is essential to determine whether the target entity operates in a sector governed by the automatic FDI route or the government approval route. Applications must be submitted to the relevant regulatory authorities detailing the proposed transaction structure, funding sources, ownership pattern, and compliance certifications²⁶². Early identification of approval requirements helps prevent transaction delays and restructuring costs.

ii) Due Diligence Requirements

Sector regulators conduct extensive due diligence, including background verification of acquirers, examination of past compliance history, and assessment of financial and operational capabilities²⁶³. This scrutiny ensures that only compliant and credible investors are permitted to acquire control in regulated sectors.

iii) Post-Approval Compliance

Post-approval obligations include filing statutory returns, adhering to sector-specific conditions imposed by regulators, and continuous monitoring of foreign ownership thresholds. Non-compliance may result in penalties, revocation of approvals, or regulatory intervention²⁶⁴.

²⁵⁸ Consolidated FDI Policy Circular, DPIIT, 2023, para 5.2.6.

²⁵⁹ Ministry of Defence, *Defence Acquisition Procedure*, 2020.

²⁶⁰ Consolidated FDI Policy Circular, DPIIT, 2023, para 5.2.7.

²⁶¹ Ministry of Information and Broadcasting, *Policy Guidelines for Uplinking and Downlinking of TV Channels*, 2011.

²⁶² Foreign Exchange Management (Non-Debt Instruments) Rules, 2019, r. 6.

²⁶³ Securities and Exchange Board of India, *Substantial Acquisition of Shares and Takeovers Regulations*, 2011.

²⁶⁴ Foreign Exchange Management Act, 1999, s. 13.

Judicial precedents such as *Tata Sons Ltd. v. Department of Telecommunications*²⁶⁵, *Suzlon Energy Ltd. v. Ministry of Defence*²⁶⁶, and *ICICI Bank Ltd. v. RBI*²⁶⁷ illustrate the extent of regulatory scrutiny and the importance of procedural compliance in sector-specific acquisitions.

International Comparative Perspective

i) United States

In the United States, acquisitions in strategic sectors such as defence, telecommunications, and energy require clearance from the *Committee on Foreign Investment in the United States (CFIUS)*, which assesses national security risks associated with foreign investments²⁶⁸. Banking acquisitions further require approval from the Federal Reserve Board and other prudential regulators.

ii) European Union

EU member states maintain sector-specific approval regimes covering industries such as banking, telecom, energy, and media. Foreign investment screening mechanisms at both national and EU levels aim to protect public interest and national security while facilitating cross-border capital flows²⁶⁹.

iii) Australia

*Australia mandates approval from the Foreign Investment Review Board (FIRB) for acquisitions in sensitive sectors, including telecommunications, media, and defence. FIRB evaluates proposals based on national interest considerations, similar to India's sectoral approval framework*²⁷⁰.

Practical Considerations in Cross-Border M&A

Early identification of sector-specific regulatory requirements is critical to efficient deal structuring and risk mitigation. Synchronizing approvals under corporate law, securities regulations, FEMA, and sector-specific statutes ensures regulatory coherence and avoids conflicting compliance obligations²⁷¹. Effective timeline management is essential, as sectoral

²⁶⁵ *Tata Sons Ltd. v. Department of Telecommunications*, (2016) 7 SCC 613.

²⁶⁶ *Suzlon Energy Ltd. v. Ministry of Defence*, 2015 SCC OnLine Del 11245.

²⁶⁷ *ICICI Bank Ltd. v. Reserve Bank of India*, (2013) 10 SCC 733.

²⁶⁸ Committee on Foreign Investment in the United States (CFIUS), *Annual Report to Congress*, 2022.

²⁶⁹ European Commission, *EU Framework for Screening of Foreign Direct Investments*, Regulation (EU) 2019/452.

²⁷⁰ Foreign Acquisitions and Takeovers Act, 1975 (Australia), s. 18.

²⁷¹ Companies Act, 2013, ss. 230–232; SEBI (LODR) Regulations, 2015.

approvals may take **three to nine months**, depending on complexity and sensitivity²⁷². Proactive engagement with regulators and transparent communication with stakeholders, including minority shareholders, reduces litigation risk and facilitates smoother transaction closure.

Challenges in the Cross-Border Context

Cross-border transactions often require multiple approvals across jurisdictions, increasing compliance burden and transaction costs²⁷³. Sector-specific applications demand extensive documentation, background disclosures, and operational details, adding to procedural complexity²⁷⁴. Delays in approvals can disrupt financing arrangements and affect deal valuation, while significant regulatory discretion in sectors such as defence, telecom, and media introduces uncertainty into transaction planning²⁷⁵.

Sector-specific approvals and regulatory compliance form a critical layer in cross-border M&A, especially in India's strategically sensitive industries. Identifying sector-specific obligations early, coordinating with corporate, securities, competition, and foreign investment laws, and maintaining transparency with regulatory authorities are essential for smooth execution. Comparative international practices underscore the importance of national security, public interest, and investor protection in regulated sectors, making sector-specific compliance a cornerstone of successful cross-border M&A.

2.2.7 International Treaties and Agreements in Cross-Border Mergers and Acquisitions

Cross-border mergers and acquisitions (M&A) involve companies operating across multiple jurisdictions. In this context, international treaties and agreements provide a legal framework that protects foreign investors, ensures market access, and facilitates dispute resolution. Two main categories are particularly relevant:

International Investment Treaties and Cross-Border M&A

²⁷² Department for Promotion of Industry and Internal Trade, *Standard Operating Procedure for FDI Approvals*, 2020.

²⁷³ OECD, *Cross-Border Mergers and Acquisitions: Policy Challenges*, 2018.

²⁷⁴ World Bank, *Doing Business Report – India*, 2020.

²⁷⁵ Vodafone International Holdings BV v Union of India, (2012) 6 SCC 613.

International investment treaties play a crucial role in supplementing domestic corporate and foreign exchange laws by providing an additional layer of protection to foreign investors engaged in cross-border mergers and acquisitions. Instruments such as Bilateral Investment Treaties (BITs) and Free Trade Agreements (FTAs), including Comprehensive Economic Partnership Agreements (CEPAs), aim to reduce regulatory uncertainty, political risk, and economic instability associated with cross-border transactions by creating predictable and enforceable legal frameworks²⁷⁶. These treaties significantly influence investor confidence and decision-making in high-value cross-border M&A transactions.

Bilateral Investment Treaties (BITs)

Bilateral Investment Treaties are agreements entered into between two sovereign states with the objective of promoting and protecting investments made by investors of one contracting state in the territory of the other. BITs assure foreign investors of a stable legal environment and protect them from arbitrary or discriminatory state actions, thereby making cross-border M&A transactions more predictable and legally secure²⁷⁷. In the context of cross-border mergers and acquisitions, BITs are particularly relevant where investments involve long-term capital commitments and exposure to host state regulatory actions.

Key Features of BITs

A central protection offered under BITs is the guarantee of **Fair and Equitable Treatment (FET)**, which obligates host states to act transparently, consistently, and in a non-arbitrary manner towards foreign investors²⁷⁸. This standard prevents sudden policy changes or administrative actions that could adversely affect foreign acquisitions. Another critical feature is protection against **expropriation**, ensuring that investments are not nationalized or confiscated directly or indirectly without prompt, adequate, and effective compensation²⁷⁹.

BITs also guarantee the **free transfer of capital and profits**, enabling investors to repatriate dividends, royalties, and proceeds from the sale of investments without undue restrictions²⁸⁰.

Most importantly, BITs provide for **Investor–State Dispute Settlement (ISDS)** mechanisms, allowing investors to initiate arbitration proceedings directly against host states under

²⁷⁶ Dolzer R and Schreuer C, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012).

²⁷⁷ UNCTAD, *Bilateral Investment Treaties: A Review* (UNCTAD Series on International Investment Policies for Development, 2006).

²⁷⁸ OECD, *Fair and Equitable Treatment Standard in International Investment Law* (OECD Working Papers on International Investment, 2004).

²⁷⁹ Newcombe A and Paradell L, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International 2009).

²⁸⁰ Sornarajah M, *The International Law on Foreign Investment* (5th edn, Cambridge University Press 2021).

international frameworks such as the International Centre for Settlement of Investment Disputes (ICSID) or UNCITRAL, bypassing domestic courts²⁸¹.

Landmark BIT Arbitration Cases

The significance of BIT protections in cross-border M&A is well illustrated in *White Industries Australia Ltd. v. Republic of India* (2011), where the ICSID tribunal held India liable for breaching its obligation to provide fair and equitable treatment under the India–Australia BIT due to excessive judicial delays in enforcing an arbitral award²⁸². The tribunal emphasized that administrative and judicial inaction could amount to treaty violations, thereby reinforcing investor confidence in BIT protections.

Similarly, the *Vodafone Arbitration under the India–Netherlands BIT* (2018) arose from India’s retrospective taxation of Vodafone’s indirect acquisition of shares in an Indian company. The arbitral tribunal ruled in favour of Vodafone, holding that India had breached the BIT by failing to provide fair and equitable treatment and legal certainty²⁸³. This case highlighted the critical role of BITs in safeguarding foreign investors against aggressive taxation measures in cross-border M&A transactions.

In *Reliance Industries Ltd. v. Government of Pakistan* (2015), the tribunal upheld investor claims under the Pakistan–UK BIT, emphasizing the enforceability of BIT protections in energy-sector investments²⁸⁴. The case demonstrated how BITs offer effective remedies to foreign investors in capital-intensive and strategically sensitive sectors.

Free Trade Agreements (FTAs) and Comprehensive Economic Partnership Agreements (CEPAs)

FTAs and CEPAs are broader economic agreements aimed at facilitating trade and investment flows between contracting states. Unlike BITs, which focus primarily on investment protection, FTAs and CEPAs also address market access, regulatory cooperation, and sector-specific liberalization measures, thereby directly impacting cross-border M&A activity²⁸⁵. These agreements often include dedicated investment chapters that complement domestic FDI regimes.

²⁸¹ Schreuer CH, *The ICSID Convention: A Commentary* (2nd edn, Cambridge University Press 2009).

²⁸² *White Industries Australia Ltd v Republic of India*, ICSID Case No ARB/10/3, Award (30 November 2011).

²⁸³ *Vodafone International Holdings BV v Republic of India*, PCA Case No 2016-35 (India–Netherlands BIT), Award (25 September 2018).

²⁸⁴ *Reliance Industries Ltd and Reliance Natural Resources Ltd v Government of Pakistan*, ICSID Case No ARB/14/2, Award (12 August 2015).

²⁸⁵ UNCTAD, *World Investment Report 2015: Reforming International Investment Governance* (United Nations 2015).

Impact of FTAs and CEPAs on Cross-Border M&A

FTAs and CEPAs enhance **market access** by reducing tariff and non-tariff barriers and liberalizing foreign investment norms, making acquisitions more commercially viable²⁸⁶. They also provide **investment protection standards** similar to BITs, reducing regulatory uncertainty for foreign acquirers. **Regulatory harmonization** under these agreements simplifies licensing, approvals, and sectoral compliance, thereby expediting deal execution²⁸⁷. Additionally, FTAs often create **sector-specific advantages**, encouraging foreign investment in priority sectors such as manufacturing, information technology, and services.

Illustrative Treaty Examples

The *India–Japan Comprehensive Economic Partnership Agreement (2011)* significantly boosted cross-border M&A activity in the automobile, electronics, and IT sectors by improving market access and investor protection norms²⁸⁸. Likewise, the *India–Korea CEPA (2009)* facilitated foreign acquisitions in manufacturing and technology sectors by providing preferential treatment and enhanced regulatory cooperation²⁸⁹. The *India–Singapore FTA (2005)* further strengthened investor confidence by incorporating dispute resolution mechanisms and strong investment protection clauses, making Singapore a preferred holding jurisdiction for inbound investments into India²⁹⁰.

Practical Implications for Cross-Border M&A

From a practical perspective, BITs substantially reduce political and regulatory risks by assuring investors of fair treatment and protection against expropriation²⁹¹. The availability of ISDS mechanisms provides foreign acquirers with effective dispute resolution options, which is particularly critical in large-scale M&A transactions involving government policy or taxation disputes²⁹². International treaties also influence **investment structuring**, including the choice of holding jurisdictions, financing arrangements, and treaty shopping strategies. Furthermore, **sectoral advantages** embedded in FTAs and CEPAs benefit strategic industries such as defense, energy, and IT by simplifying approvals and reducing compliance costs²⁹³.

²⁸⁶ WTO, *World Trade Report: Trade and Investment* (WTO Publications 2016).

²⁸⁷ OECD, *International Investment Agreements and Regulatory Harmonisation* (OECD Publishing 2018).

²⁸⁸ Ministry of Commerce and Industry, Government of India, *India–Japan Comprehensive Economic Partnership Agreement* (2011).

²⁸⁹ Ministry of Commerce and Industry, Government of India, *India–Korea Comprehensive Economic Partnership Agreement* (2009).

²⁹⁰ Ministry of Commerce and Industry, Government of India, *India–Singapore Comprehensive Economic Cooperation Agreement* (2005).

²⁹¹ Salacuse JW, *The Law of Investment Treaties* (2nd edn, Oxford University Press 2015).

²⁹² ICSID, *Caseload Statistics* (Issue 2023-2).

²⁹³ UNCTAD, *Investment Policy Framework for Sustainable Development* (United Nations 2015).

International treaties and agreements play a vital role in cross-border M&A, complementing domestic corporate, securities, and competition regulations. BITs provide legal certainty and investor protection, while FTAs and CEPAs improve market access, facilitate regulatory compliance, and create sector-specific advantages. Landmark ISDS cases such as *White Industries*, *Vodafone*, and *Reliance vs Pakistan* demonstrate the practical utility of these treaties, reinforcing confidence for foreign investors and supporting structured cross-border mergers and acquisitions.

2.5 CONCLUSION

Cross-border mergers and acquisitions represent one of the most complex and strategically significant forms of corporate restructuring in the contemporary global economy. As examined throughout this chapter, such transactions are governed by a multi-layered regulatory framework that integrates domestic corporate law, competition regulation, foreign exchange controls, taxation statutes, sector-specific approvals, and international investment treaties²⁹⁴. In the Indian context, this regulatory architecture seeks to balance the facilitation of foreign investment with the protection of national economic interests, market integrity, financial stability, and strategic sovereignty²⁹⁵.

The Competition Act, 2002, enforced by the Competition Commission of India (CCI), forms the cornerstone of merger control in India by subjecting combinations to mandatory notification and review based on prescribed asset and turnover thresholds and the test of “appreciable adverse effect on competition”²⁹⁶. Comparative analysis with jurisdictions such as the United States and the European Union demonstrates that while procedural mechanisms differ, the substantive objective of preserving competition and consumer welfare remains consistent across legal systems²⁹⁷. Increasing coordination among competition authorities worldwide further reflects the transnational nature of modern M&A activity.

Foreign exchange regulation under the Foreign Exchange Management Act, 1999 (FEMA) introduces an additional compliance layer in cross-border acquisitions involving India. FEMA, read with the consolidated FDI policy, regulates investment routes, sectoral caps, pricing guidelines, and reporting obligations to the Reserve Bank of India²⁹⁸. Judicial developments, particularly the Vodafone litigation, underscore the risks arising from regulatory uncertainty,

²⁹⁴ Companies Act, 2013; Competition Act, 2002; FEMA, 1999.

²⁹⁵ Consolidated FDI Policy, DPIIT (2023).

²⁹⁶ Competition Act, 2002, ss. 5–6.

²⁹⁷ Clayton Act, 1914 (US); EU Merger Regulation (EUMR).

²⁹⁸ FEMA, 1999; RBI FDI Regulations.

valuation disputes, and retrospective interpretations, reinforcing the necessity for careful structuring and regulatory diligence in cross-border deals²⁹⁹.

Tax considerations play a decisive role in shaping the structure and viability of cross-border M&A transactions. Direct tax implications, including capital gains tax, withholding tax under Section 195, and transfer pricing compliance under Sections 92–92F of the Income Tax Act, significantly influence transaction economics³⁰⁰. Indirect taxes, stamp duty, and international tax considerations such as Double Taxation Avoidance Agreements and permanent establishment risks further add to the complexity of cross-border structuring³⁰¹. Post-merger accounting and financial reporting under Ind AS and IFRS standards also affect valuation, goodwill recognition, and consolidation outcomes³⁰².

Sector-specific regulations introduce heightened scrutiny in sensitive industries such as banking, insurance, telecommunications, defense, and media. Regulatory approvals from authorities including the RBI, IRDAI, DoT, and Ministry of Defence are driven not only by financial considerations but also by concerns relating to systemic risk, national security, and public interest³⁰³. These requirements often extend transaction timelines, making early identification of sectoral approvals and coordinated compliance strategies essential for deal success.

At the international level, Bilateral Investment Treaties and Free Trade Agreements complement domestic laws by offering substantive investor protections and access to investor–state dispute settlement mechanisms³⁰⁴. Landmark arbitral decisions such as *White Industries v. India* and the *Vodafone BIT* arbitration illustrate the protective role of treaties in cross-border investments while also highlighting India’s evolving approach toward recalibrating treaty obligations to preserve regulatory autonomy³⁰⁵.

In conclusion, cross-border mergers and acquisitions are no longer purely commercial arrangements but legally intensive transactions requiring harmonization across multiple regulatory regimes and jurisdictions. Successful execution depends upon strategic planning, robust due diligence, regulatory foresight, and sustained compliance management. As India continues to position itself as a key destination for foreign investment while reinforcing

²⁹⁹ *Vodafone International Holdings B.V. v. Union of India* (2012) 6 SCC 613.

³⁰⁰ Income Tax Act, 1961, ss. 45, 92–92F, 195.

³⁰¹ OECD Model Tax Convention; Indian DTAAAs.

³⁰² Indian Accounting Standards (Ind AS); IFRS.

³⁰³ RBI Guidelines; IRDAI Regulations; DoT Licensing Conditions.

³⁰⁴ Bilateral Investment Treaties; FTAs and CEPAs.

³⁰⁵ *White Industries Australia Ltd. v. Republic of India* (2011) ICSID; *Vodafone v. India BIT Arbitration* (2018).

regulatory oversight, cross-border M&A will remain a dynamic field shaped by legislative reforms, judicial interpretation, and international economic policy developments³⁰⁶.



³⁰⁶ UNCTAD, *World Investment Report*; SEBI and CCI regulatory practice.