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# Cross border Merger and Acquisition: The evolving Indian landscape

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***Abstract:*** *The paper provides with an overview of the cross-border mergers and acquisitions in India and the role of policy and economic structure in cross border deals. The paper analyzes cross border M&A details available from year 2010 and Policies related to cross border deals in INDIA. The Indian context for cross border M& As are explored in details to know how restrictive are our investment policies that may have impact on the M&A deals happening in our country. Indian laws applicable to overseas direct investment and foreign direct investment are explored and been summed up. The paper also signifies current bottlenecks in the system for inflow and outflow of the capital and discusses various transactional issues compulsory when performing an acquisition*

***Keywords:*** *Acquisitions, Mergers, Cross border, FDI, Greenfield Investment, Brownfield Investment*

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## I. INTRODUCTION

Indian M&A Activity has seen an exponential growth and touched a new peak in the year 2016. The year recorded a total of 1,195 announced transactions worth $69.75 billion, which was almost double compared to 2015, where 1,306 M&A deals worth $36.68 billion were recorded. Reforms and policy changes by government and its agencies along with the global interest in tapping abundant talent available in India are the driving force behind the improved buoyancy in India's economic growth prospects.

Merger and acquisition ("M&A") activity in India is booming. In particular, the percentage of cross-border transactions has risen significantly. Flow of FDI's are greatly encouraged with enactment of new laws and tweaking of existing policies. In the IT sector phenomenal growth of cross-border transactions is recorded. Foreign online firms are focusing on companies in the digital space to gain access to skilled talent and a burgeoning market. Foreign Direct Investment commonly known as FDI, Greenfield Investment and brownfield investment are the topics that flashes in one's mind in any discussion about cross border deals.

FDI: FDI refer to an investment made by an individual or a company based in one country forms a business operation or acquire business assets based in another country. This can be by way of ownership or partnership or by equity purchases. FDI is major source of external finance. The rapid rise of china in almost all the industrial sectors can be credited to the flow of FDIs. In India, FDIs are heavily welcomed to steer it into a major player in the industry. Many wealthier countries are performing an offshore transaction to India thereby increasing inbound M&A activity and improving India's economic stature.

Greenfield Investment: Investopedia.com explains green field investment as a form of FDI in which the parent company starts fresh operations from a foreign country (from the ground up). This may include construction of new premises, distribution points, warehouses, offices etc. Examples are firms like Coca Cola, Toyota etc. These investment starts from a bare ground and everything is then assembled or constructed as per the detailed design. By greenfield investment involved parties get greater control and perform based on a long term strategy. Since one gets chance to work from the beginning they can well get experienced on the nuances of the existing system in the new country. However, there are negative side effects also for greenfield approach - it cost more, barrier to entry will become difficult to overcome, and policies may create challenges in the initial phases.

Brownfield Investment: Brownfield approach of investment involves lease/purchase of existing facility rather than starting one from the scratch. The key advantage of this approach is the ease of availing existing licenses and government approvals. Considering less tweaking to the existing structure, without any major upgrades the company can continue its production. However, if design/architecture/production line need to be remodeled then, it may pose challenges especially if the location is on a congested spot or the infrastructure is reaching its expiry.

Considering inbound-outbound M&As happening in India, one can see that the transaction has risen significantly. Earnst and Young in its whitepaper on India specific' Transactions 2017 ' reports that on the cross-border front, the deal value recorded an increase of 127% y-o-y, reaching US$31.1 billion in 2016 [Figure 1]. There were four mega deals during this period which contributed for the quantum leap. E&Y reports that total inbound deal value of US$21.4 billion materialized 2016 alone is about 130% more compared to the previous year and its amplifies India's sustained attractiveness among foreign firms. The E&Y report stresses the significance of IT Sector since this sector reported maximum deal count in 2016. [Figure 2]

In the Technology sector of companies are acquiring start-ups which offer niche technologies. The firm hunters also looking for skills and talent that work for these entities in order to augment the existing products/software suites. Startup companies in Social, mobile, analytics and cloud – knows in short form as SMAC Players – are majorly targeted as they can give superb rate of return. Social Media startup with disruptive ideas are quickly acquired by major players like Facebook and Google. Deal makers also eyes consolidation, in the e-commerce space major players are hunting for Indian e-tailing shops in order to get a wider audience for their products and to kill the competition. Another set of Online players increasingly concentrated on acquisitions of e-payment tools as India is gearing up for a Cashless Economy. An example of such a deal is South Africa's Naspers purchase of payments technology player, Citrus Pay for US$130 million! India's demonetization drive offered another chance for dela makers to concentrate on digitization of financial services using Mobile applications (Apps). BHIM app introduced by government and subsequent application supporting the digital transactions like mobile wallets, paved way for more M&As in this segment. Revolutionary reforms including Demonetization & GST provided opportunities for M&As in related fields.

**Institutional Policies Governing Cross Border Deals.**

Firms and Strategists often complain about India's long and drawn out process for cross border M&As as highly cumbersome, problematic and tiring. Multiple government institutions like Courts, RBI, ROC (Registrar of Companies), Stock Exchange are parties to this problem. The procedure remains complicated as laws for each type of deals are different and require lengthy approval process.

**The Irani Report:**

To uncomplicated the complex policies on M&As government setup 'Dr J J Irani Committee' and the report later known as 'Irani Report' which recommended quite a lot reforms primarily aimed to clear the air on M&As and make the process friendlier and less cumbersome. The report observed the delays that can take anywhere from six to more than a year to get final approvals. Irani report in any way replace or reduce the core concepts and rules envisaged in Companies Act. However, the report recommended key improvements to the existing system which impact the way mergers and acquisitions were done earlier. Some of the most critical ones are listed below.

1. An all-party forum (including all stakeholders) to settle and negotiate on the transaction, its ways and means and to elicit a final decision with 2 days
2. Introduction of independent evaluators for assessment than court appointed appraisers
3.A uniform code for all stamp duties than paying different duties on different states
4.Clarity on Shareholder exit mechanism in case of company acquisition or merger
5.An unambiguous de-listing process
6.Clarity of the right to Object for any stake sales. Especially in the percentage of ownership mandatory to have the right to object to any scheme of merger.
7.Company dissolvent procedures. Currently the approval required form court for winding up any business
8.Developing an electronic registry in all the registration offices and interlinking them in order to capture location details of all the company assets

**Warranties/Damage Claims during M&A deals:**

There are situations when parties involved in M&As entitled to claim the damages (for example untruthful disclosure, breach of warranty etc). Generally, there will be caps applied. During due diligence every warranty aspects and its disclosure are required to be addressed. However, for breach of any warranties indemnified party can claim based on the set provisions of

1. Aggregate cap which define the maximum liability (cap 50%-100%) which may include scrapping the deal and claiming the full damage
2.De Minimis define the minimum amount a party can claim (cap .5%-1%)
3.Indemnification basket – A range which need to be met for the indemnified party to claim the loss (cap 1%-2%).

The liability clauses are important for the acquiring party as it won't be interested in acquiring the seller's problems. Hence due diligence before signing the deal is quite important since India have multiple laws which need to be considered while arriving at the liability clauses.

**Latest Notification on cross border M&As by Government of India:**

It is important to note the new notification on cross border deals from ministry of corporate affairs shows the intent of the government to put India on the global M&A hub. Four months back in 13th April '17 ministry notified sec 234 of Companies Act, 2013. The new Amendment rules of 2017 is specifically focuses on the merger aspects of foreign company with an Indian firm. Earlier rules prevented Indian company merging with foreign company (Sec 394, Company Act 1956) thereby making it impossible for merging of an Indian company to a foreign company. However certain tax provisions on merger with foreign company (which is taxable) need more clarity. The amendments of course, are welcome, however as reported by SKP Group – a leading Indian firm working with M&A deals – the amendment does not provide detailed provisions for merger or amalgamation from an implementation perspective.

Under the title' New Dawn for India's Cross Border Merger Regime' famed group on M&A - 'Cyril Amarchand Mangaldas' – states the need vigor among deal makers for India specific M&As after the amendments were passed. It highlights the old issue of merge with a foreign company within the court sanctioned merger framework set out under Indian corporate law and its final change in April 2017, when the company law provisions that govern cross border mergers were brought into force. The Reserve Bank of India (RBI) recent issuance of draft regulations for deemed approval from the RBI for cross border mergers was very much welcomed. Now, companies in India desirous of merging with a foreign company may do so in specified jurisdictions – those eligible jurisdictions are: (a) those whose securities market regulator is a signatory to the Multilateral MoUs of the International Organization of Securities Commission (IOSC) or to the Bilateral MoU with the SEBI; oror (b) jurisdictions whose central bank is a member of the Bank of International Settlements; and jurisdictions not identified in the public statement of the Financial Action Task Force (FATF) for deficiencies relating to anti-money laundering or combating terrorism financing or jurisdictions without an action plan developed with the FATF to address the deficiencies. US, China, Mauritius, Cyprus etc. are countries that fall under the eligible jurisdiction. For any Inbound/outbound transactions – Indian foreign exchange regulations should be applied for receiving the 'deemed' approval from RBI.

## II. FIGURES AND TABLES


**Figure: 1**

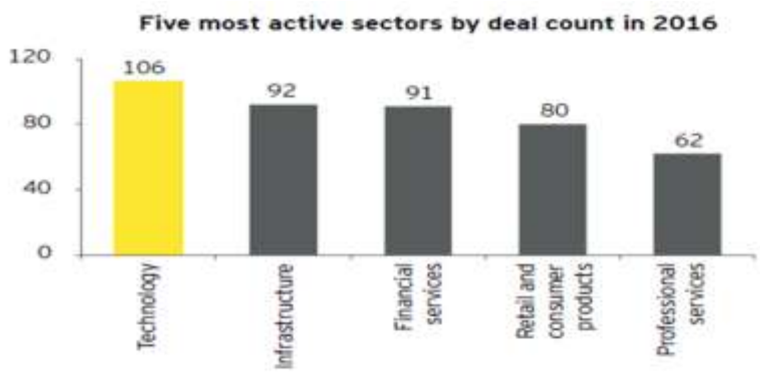


**Figure: 2**

## III. CONCLUSION

M&A activities are speeding up considering India's consistent track record of growth fueled by large scale domestic consumption and attractive middle class consumers. There is a need to ensure the regulatory framework is well suited to attract more investments from M&As and prosper the booming economy to much higher levels. India's tax system is undergoing significant changes. Positive changes and much needed provisions were added to tax laws and framework. Tax administration's efforts to broaden the tax base, increase the tax revenues and combat the tax evasion must be continued. However, the taxation policies need to be fair and practical. A more fine-tuned laws to address concerns like ambiguous points, more interpretative terms, fast tracking approval procedures and speedy resolution of disputes – will make India a global player in M&A market.

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