Analysing the Regulatory Framework for Mergers and Acquisitions and its Impact on Market Competition

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Abstract

Mergers and acquisitions are increasingly utilized by businesses in India as a means of achieving economies of scale (Economies of scale are the cost advantages that a company can achieve by increasing its level of production or output) and growth. However, the implementation of these strategies is subject to a complex legal framework that includes various laws. While India's merger and acquisition (M&A) activity was mainly stable between 2015 and 2019, India saw a boom in deal values in 2022, when strategic M&A [1]deal volume and value in India reached all-time highs while dealmaking declined in the rest of the world. [2]The purpose of the paper is to evaluate, summarise, and debate key regulations related to M&A in India and to offer useful policy guidelines involved in merger and acquisition deals. The paper also gives a succinct description of the legal aspects of M&A, including the regulatory framework, the key legal requirements, the procedures to be followed, and the consequences of non-compliance. The other portion of the paper demonstrates how an M&A transaction has a negative impact on market competition.

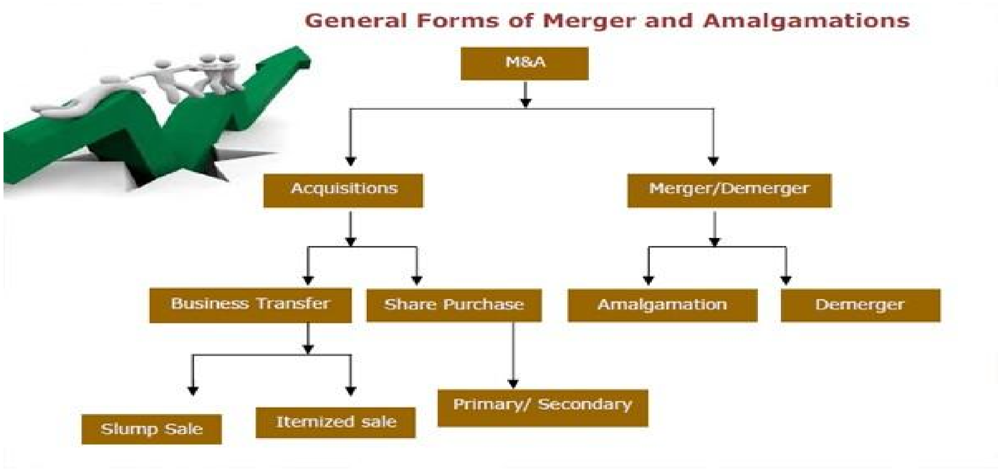
Introduction

Mergers and acquisitions (M&A) have become increasingly prevalent as a strategic approach employed by companies to expand their operations and bolster their market presence. In India, enterprises are increasingly turning to mergers and acquisitions as a means to extend their reach and attain economies of scale.[3] A comprehensive knowledge of the legal system and the accompanying regulatory framework is imperative for the successful execution of M&A transactions. Moreover, M&A framework is a part of combinations (business transactions that involve the consolidation or integration of two or more enterprises) which includes a range of activities like mergers, amalgamations, acquisitions, joint ventures, and other similar arrangements. However in this paper we will generally be focusing on our particular topic which is mergers and acquisitions and will analyse the challenges and issues encountered by various organisations during its process. Additionally, this paper endeavours to examine the extent and applicability of some of the legal regulations governing such transactions.

[1] *Keywords: Mergers and Acquisitions (M&A)*

[2] *M&A Boom in 2022*

[3] *Economies of Scale: Economies of scale are the cost advantages that a company can achieve by increasing its level of production or output*



As a concept, a merger refers to the combination of two or more entities into one, the desired effect being not just the accumulation of assets and liabilities of the distinct entities but the organisation of such entities into one business. Legally, a merger entails the consolidation of two businesses into a single organisation with a new ownership and management structure (ostensibly with members of each firm). For example, Exxon Corp. and Mobil Corp. completed their merger in November 1999[4] following approval from the Federal Trade Commission (FTC). Prior to the merger, Exxon and Mobil were the top two oil producers in the sector. The combined company underwent a significant restructuring as a result of the merger, which included selling more than 2,400 petrol outlets around the country. The joint company is still listed on the New York Stock Exchange under the name Exxon Mobil Corporation. In India, the term merger is not defined under the Companies Act, 2013 or the Income-tax Act, 1961. The Income-tax Act's Section 2 (1B)[5] defines the term "amalgamation" in regard to companies as the combination of two or more companies to establish a single entity or the merging of one company with another company.

Types of mergers:

1. ***Horizontal Mergers:*** This type of merger, also known as "horizontal integration," occurs between organisations engaged in rival businesses that are at the same stage of the industrial process. The other benefits of this form of merger are economies of scale[6] and economies of scope. (It refers to the cost savings and efficiencies gained by integrating two or more enterprises that can produce a broader range of products or services more efficiently than they

[4] *Merger b/w EXXON and MOBIL*
[5] *Definition of Amalgamation as per Income Tax Act*
[6] *Economies of Scale: Economies of scale are the cost advantages that a company can achieve by increasing its level of production or output*

could individually). Both Vodafone and Idea were telecom service providers in India. The merger was completed on August 21, 2018, and the new entity was named Vodafone Idea Limited. With a market share of more than 40%, Vodafone and Idea combined to become India's largest telecom operator. The deconsolidation of Vodafone India will reduce the net debt of the Vodafone Group by around INR 552 billion[7] (US$8.2 billion) and the leverage of the Vodafone Group by about 0.3x Net Debt/EBITDA once the transaction closes. The deal is anticipated to improve Vodafone's cash flow starting in the first full year after completion.

2. ***Vertical Mergers:*** A vertical merger is the combination of two organisations that are in different phases of the same production or industrial process. The merger leads to lower transaction costs and better synchronisation of demand and supply. Reliance, which is a telecommunications carrier, merged with Flag Telecom, which is a provider of international wholesale network transport and communications services. The merger was completed on January 13, 2004. Additionally, Flag Telecom had a proven track record of offering global data services. As a result, Reliance was able to provide a greater selection of foreign data services to its clients, including voice over IP (VoIP) and video conferencing.

3. [8]***Conglomerate Mergers:*** It is a merger between two organisations from unrelated industries. Utilising financial resources, increasing debt capacity, increasing the value of outstanding shares through higher leverage and earnings per share, and decreasing the average cost of capital are the main drivers of conglomerate mergers. The merger between Berkshire Hathaway, an investment company, and Precision Castparts, a manufacturer of aerospace components, was completed in 2007. Precision Castparts is a leading supplier of aerospace components to Boeing, Airbus, and other major aircraft manufacturers. Berkshire Hathaway could benefit from Precision Castparts' knowledge and experience in this industry. Berkshire Hathaway has a diversified portfolio of enterprises across several areas. This network may lead to chances for collaboration, knowledge sharing, and company development for Precision Castparts.
[9]

4. ***Con-generic Mergers:*** A congeneric merger is a particular kind of merger in which two companies are in the same or related industries but do not offer the same products. Congeneric mergers can benefit from synergies between the companies' similar distribution networks. Entities looking to extend their product ranges or improve market share frequently turn to this form of merger. The merger between Mahindra & Mahindra, an automotive and farm

[7] *Illustration of Vodafone and Idea*

[8] *Illustration of Reliance and Flag Telecom*

[9] *Illustration of Berkshire Hathaway and Precision Castparts*

equipment company, and Mahindra Satyam, an information technology company. The merger was completed in 2013 and aided Mahindra & Mahindra in increasing their scale and market share, diversifying product lines, and gaining access to new markets and technology.
[10]

5. *Cash Mergers:* The shareholders of one corporation receive cash rather than shares in the combined entity in a "cash merger," also known as a "cash-out merger." This is effectively an exit for the cashed-out shareholders. The merger of Bharti Infratel and Indus Towers, where Vodafone Idea Ltd. (VIL) has received about ₹3,760 crore in cash for its 11.15% holding in Indus.

6. [11]*Triangular Mergers:* This is a tripartite arrangement where the target merges with an acquirer subsidiary. A triangle merger can be forward (when the target merges into the subsidiary and the subsidiary survives) or reverse (when the subsidiary merges into the target and the target survives), depending on which entity remains after such a merger. The merger between Tata Consultancy Services (TCS) and CMC Limited (CMC) in 2009 is an example of a reverse triangular merger. In this case, CMC was the surviving entity.
[12]

In the context of an acquisition, the emergence of a new entity does not emerge. Instead, the smaller company is typically assimilated and ultimately dissolves, with its assets integrated into the larger company. An acquisition transpires when one company assumes full control over the operational management of another. Companies may engage in acquisitions with the aim of procuring their supplier, enhancing economies of scale and leading to a reduction in per unit production costs as output scales up. Such strategic maneuvers are often pursued to augment market share, streamline expenditures, and venture into uncharted product lines. When a business is acquired on a going-concern basis, it is referred to as a 'slump sale' under the Income Tax Act, 1961. For example, On June 15, 2018, AT&T Inc. completed its acquisition of Time Warner Inc. Within three years of the transaction's closing, the $42.5[13] billion acquisition is anticipated to result in cost savings for the combined business of $1.5 billion and revenue synergies of $1 billion.

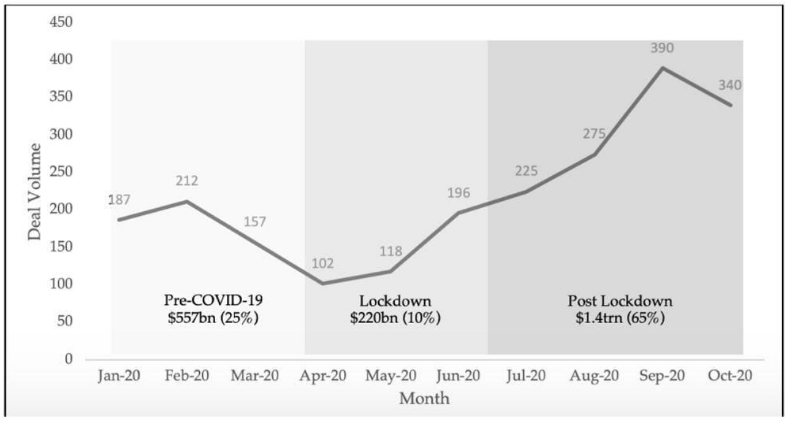
[10] *Illustration of M&M and Mahindra Satyam*

[11] *Illustration of Bharti Infratel and Indus Towers*

[12] *Illustration of TCS and CMC*

[13] *Acquisition of Time Warner by AT&T*

Figure 1. Deal Volume: Breakdown by Phases (Source: Data collected from Deloitte).



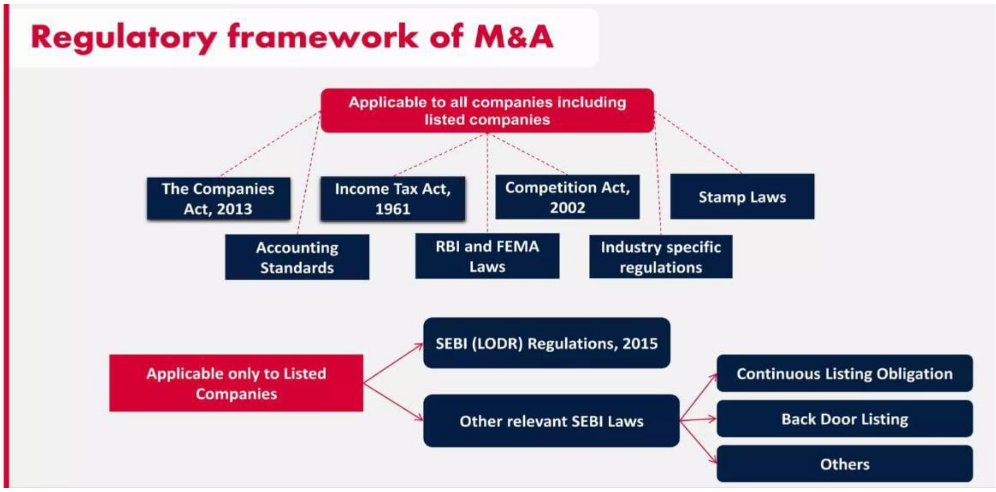
[14]

The disruptions brought about by the COVID-19 pandemic have further accelerated the adoption of acquisition strategies in India, where businesses are utilising this tactic to ensure swifter growth rates. From Figure 1, it is evident that with the declaration of a global pandemic by the World Health Organization, there was a sharp and significant drop of almost 50% in M&A transactions by mid-February 2020. This abrupt decline was brought on by an unstable business climate marked by orders for stay-at-home work, competition for new government regulations, and hazy COVID-19 viral estimates. In the following months, the slow easing of lockdown measures, as well as vaccine announcements, gave momentum to M&A proceedings. As a result, during those historically rare times, the sum of all announced trades from January 2020 to October 2020 was USD 2.2 trillion.

Legal Framework

The Companies Act serves as the primary guideline for mergers, acquisitions, and combinations. A successful merger/acquisition requires consent from a number of parties, including the shareholders, the board of directors, and regulatory agencies like the National Company Law Tribunal (NCLT), the Securities and Exchange Board of India (SEBI), and the Competition Commission of India (CCI). Overall, the legal framework in India for mergers, acquisitions, and combinations is well established and regulates these transactions thoroughly. It is bound by several laws, which are discussed below.

[14] *Regulatory Framework of Mergers and Acquisitions (Image source)*



Regulatory framework of M&A

Applicable to all companies including listed companies

The Companies Act, 2013

Income Tax Act, 1961

Competition Act, 2002

Stamp Laws

Accounting Standards

RBI and FEMA Laws

Industry specific regulations

Applicable only to Listed Companies

SEBI (LODR) Regulations, 2015

Other relevant SEBI Laws

Continuous Listing Obligation

Back Door Listing

Others

[15]

1. Company Laws:

a) ***Companies Act, 2013:*** The Companies Act, 2013, provides a comprehensive legal framework for mergers and acquisitions in India. The provisions relating to M&A, including agreements that include firms, their members, and creditors, are covered under Sections 230 to 240 of the Act. It describes the steps and prerequisites for businesses looking to merge, combine, or acquire one another. The National Company Law Tribunal (NCLT) must approve the transaction and the interests of shareholders, employees and creditors must be safeguarded, and valuation and accounting standards must be followed, among other requirements. The Act intends to promote business restructuring while defending stakeholders' rights. Some of the key provisions of the Act are:

1. The Act protects minority shareholders by requiring permission for specific types of schemes from a majority representing three-fourths in value of shareholders present and voting.
2. The Act requires the appointment of an impartial valuer to determine the scheme's assets' and shares' fair market value. It also offers advice on how reserves, surpluses, and capital sufficiency should be handled after a merger.

[15] *Regulatory Framework of Mergers and Acquisitions (Image source)*

3. The Act guarantees the protection of employees' interests. It mandates that the business disclose how the plan would affect the employees and, when appropriate, take steps to protect them.

Illustration: A good example is the 2018[16] merger of Vodafone India and Idea Cellular. Both companies' shareholders authorised the merger, but it also needed the Competition Commission of India's (CCI) authorization. In this case, the merger was put to a vote by the minority shareholders of both Vodafone India and Idea Cellular, who approved it on the condition that the combined company sell off part of its assets.

b) ***Cross-Border Merges:*** With the Reserve Bank of India's (RBI) prior approval, mergers between Indian and international corporations are permitted under Section 234 of the Companies Act 2013. Any organisation that was incorporated outside of India, regardless of whether it has a physical location in India, is referred to as a foreign corporation. The following prerequisites need to be met for a cross-border merger:

1. The foreign corporation must be incorporated in an authorised jurisdiction that satisfies specific requirements.
2. The transferee business must make sure a recognised professional body completes the valuation in its jurisdiction and complies with generally acknowledged international standards of value and accounting.
3. The mergers must be undertaken in accordance with the Companies Act 2013 procedure.

Illustration: In 2021, the Indian IT company Wipro acquired the US-based IT company Capgemini's subsidiary, Appirio. The acquisition was worth $800 million [17]and was approved by the Competition Commission of India (CCI). In this instance, Wipro needed the RBI's approval before it could purchase Appirio. The RBI granted approval for the transaction subject to Wipro maintaining Appirio's current staff and refraining from making any layoffs. Other requirements, such as Wipro's obligation to make a specified financial investment in Appirio's operations, were also imposed by the RBI.

[16] *Illustration of Vodafone and Idea*

[17] *Illustration of Wipro and Appirio*

c) ***Indian Contract Act, 1872:*** The Indian Contract Act, 1872, provides forth the general guidelines for the formation, enforcement, and validity of contracts, as well as the repercussions of contract breaches. The Indian Contract Act, 1872, applies to M&A[18] transactions in the following ways:

1. It outlines the necessary conditions for a contract to be enforceable, including an offer and acceptance, consideration, capacity, freely given consent, a lawful purpose, and an agreement that has not been declared void.
2. It outlines the standards for contract interpretation, including the parties' intentions, the significance of words and expressions, the impact of errors, fraud, deception, coercion, undue influence, etc.
3. It details the remedies for contract breach, including monetary losses, restraining orders, specific performance, and rescission.

Illustration: The British company Corus was purchased by the Indian corporation Tata Steel in 2021. One of the largest cross-border purchases in Indian history, the deal was valued at $12 billion. An acquisition is described as "the purchase of the assets of one company by another" in Section 2(j) of the Indian Contract Act. According to Section 33 of the Indian Contract Act, a contract between the target company and the acquiring company can be used to accomplish an acquisition. The boards of directors of both firms signed the acquisition deals in the cases of Tata Steel and Corus. The terms and circumstances of the acquisition, including the purchase price, the assets, and the liabilities that were being bought, were outlined in the contract of acquisition.

[19]

d) ***Special Relief Act, 1963:*** The Specific Relief Act, 1963, provides recourse to the aggrieved party to seek injunctions to prevent contract violations as well as specific performance of contracts. The Specific Relief Act and the Contract Act's applicable provisions are applied to the dispute by civil and commercial courts as well as arbitral tribunals. In relation to mergers and acquisitions, the Special Relief Act, 1963, may be relevant in the following situations:

1. The court may award such relief if the contract is legitimate and enforceable in accordance with the act's requirements and one party to a contract for the sale

[18] *Keywords: Mergers and Acquisitions (M&A)*

[19] *Illustration of Tata Steel and Corus*

or acquisition of shares or assets of a company requests particular performance of the contract from the other party.

2. The court may grant such relief if it is convinced that the contract is voidable at the option of the aggrieved party when a party to a contract for the merger or amalgamation of two or more companies seeks to rescind or cancel the contract on the grounds of fraud, misrepresentation, error, undue influence, coercion, or any other valid reason.

Illustration: In 2018, the Competition Commission of India (CCI) issued a directive to halt Reliance Retail Limited's (RRL) acquisition of Future Retail Limited (FRL). According to the CCI, the transaction would have significantly lessened competition in the retail industry. In the Delhi High Court, FRL contested the CCI's choice. The High Court ordered FRL to carry on with the merger with RRL while staying the CCI's order. The Specific Relief Act of 1963, however, was also ruled to apply to the merger by the High Court, and FRL would be obligated to pay RRL damages if the merger was later determined to be unlawful.

[20]

2. *Merger Control law:*

a) ***Competition Act, 2002:*** The Competition Act, 2002, which was recently updated in 2023 to streamline procedures and improve competition enforcement, serves as the primary regulatory framework for merger control in India. Section 4[21] of the Act addresses abuse of a dominant position, while Section 3 addresses anti-competitive agreements. Additionally, combinations that have caused or are likely to cause an appreciable adverse effect on competition (AAEC) in India are governed by the Competition Commission of India (CCI) (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011 (Combination Regulations).

The Competition Commission of India (CCI) has changed the reporting requirements for businesses preparing to complete an M&A transaction in India. Form II has been amended for this purpose. The merging parties, the nature of the combination, its effect on competition, market shares etc. are all covered in detail in Form II. In order to determine whether the proposed combination is likely to have a

[20] *Illustration of FRL and RRL*

[21] *Mergers and Acquisitions as prescribed by Competition Act, 2002*

noticeably negative impact on competition in India, the CCI evaluates this information.It should be emphasised that Form II is necessary in circumstances where a thorough investigation is required to determine how the combination will likely affect competition in India. Form-I, which requests fundamental information on mergers and more general questions like particulars of the parties Involved, details of assets and liabilities, regulatory approvals, nature and purpose of the Combination etc. is filed in cases of less substantial transactions. Companies are required to report the extent of "complimentary linkages" between them and their effects on the market, according to new regulations that went into effect on May 1, 2022. The entities might also be required to give information about their market's size, market share of parties, rivals, customers, and suppliers over the last five years.

Illustration: In 2020, the Indian company Reliance Industries Limited (RIL) acquired the Indian company Future Retail Limited (FRL). The acquisition was valued at $3.4 billion. The boards of directors of both organisations, as well as the FRL shareholders, authorised the transaction. The transaction was rejected by the Competition Commission of India (CCI), which found that it would probably have a negative effect on competition in the Indian retail market. In 2022, the Supreme Court upheld the CCI's judgement. As a result, RIL was unable to complete the acquisition of FRL. Any combination that substantially lessens competition in India is forbidden by Section 5 of the Competition Act.
[22]

3. ***Securities Laws:***

a) ***SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Takeover Code):*** It consists of a set of rules made by the Securities and Exchange Board of India (SEBI) to ensure fairness when one person or company wants to buy a significant amount of shares in a listed company. It is a set of guidelines to make sure that when someone is trying to take over a company, they do it in a way that is transparent and fair to all the shareholders. Some of the important guidelines are as follows :

1. When a person or corporation buys a particular percentage of a company's shares (such as 25% or more), they must make an open offer to buy shares from

[22] *Illustration of RIL and FRL*

the company's existing shareholders at a defined price. This assures that all shareholders can sell their shares if they so desire.

2. Anyone who acquires shares in a company, resulting in a change in control or ownership, is required to disclose their intentions about the company. This could contain plans for management changes, corporate strategy, or any other major choices that could have an impact on the company and its shareholders.

Illustration: In 2013, Unilever PLC, the global consumer goods giant, made an open offer to acquire an additional 22.5%[23] stake in Hindustan Unilever Limited, a leading fast-moving consumer goods company in India. Unilever PLC's holding in HUL would have risen to 75% as a result, as this transaction would have materially affected HUL's control and ownership structure, it was subject to the SEBI Takeover Code. Unilever PLC was required to follow the rules, which included making an open offer to HUL's existing shareholders at a price specified by the guidelines.

b) ***SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (Listing Regulations):*** The listing regulations offer a thorough framework for controlling different categories of listed securities (Listed securities refer to financial instruments, such as stocks or bonds, that are officially listed and traded on a regulated exchange). In accordance with these regulations, SEBI[24] has established requirements that a listed company must adhere to while submitting an application to the National Company Law Tribunal (NCLT) for approval of merger, amalgamation, or reconstruction projects. Some of the requirements are:

1. The listed firm is responsible for ensuring that any mergers, amalgamations, or reconstructions are fully compliant with all applicable listing laws.
2. The company should seek approval from its shareholders for the proposed merger, amalgamation, or restructuring project through the adoption of a special resolution.
3. The shareholders and stock exchanges must be promptly and transparently informed of all material facts like the valuation of assets and liabilities, terms of the transaction, and regulatory approvals etc. relating to the proposed transaction.

[23] *Illustration of HUL and Unilever PLC*

[24] *Keywords: Securities and Exchange Board of India (SEBI)*

Illustration: In 2022, the Indian company Mindtree Ltd. merged with Larsen & Toubro Infotech Ltd. (LTI) through a scheme of arrangement. Companies that are listed are required by Section 13 of the Listing Regulations to report any information that could have a material impact on the company or its securities. This also contains details on mergers and acquisitions. In compliance with the Listing Regulations, the stock exchanges were informed of the combination of Mindtree and LTI. Details of the merger, including its terms and conditions, an assessment of the assets and liabilities of the merging companies, and the management structure of the new company, were included in the disclosure.

[25]

c) ***SEBI (Prohibition of Insider Trading) Regulations, 2015 (Insider Trading Regulations):*** These regulations control insider trading and the flow of information about the target. It states that companies must take steps to prevent insider trading, even in the context of mergers and acquisitions.

Illustration: In 2021, the Indian company Hindustan Unilever Limited (HUL) acquired the Indian company Brooke Bond Lipton India Limited (BBLIL). The merger was valued at $2.8 billion. [26]Both firms' boards of directors as well as their respective shareholders authorised the merger. The Securities and Exchange Board of India (SEBI) did, however, issue a show-cause notice to HUL, stating that the business had broken the insider trading rules by buying and selling BBLIL shares while in possession of unreleased price-sensitive information (UPSI) on the merger. HUL refuted the accusations and insisted that it had not broken any rules or laws. SEBI, however, charged HUL with insider trading and fined the company Rs. 5 crore (about $670,000).

d) ***SEBI (Delisting of Equity Shares) Regulations, 2009:*** These regulations apply when a potential acquisition could result in the delisting of a listed firm. The key requirements of the delisting process are that:

1. The acquirer must make an offer to acquire all of the shares of the target company.
2. The offer must be made at a fair price.

[25] *Illustration of LTI and Mindtree*

[26] *Illustration of HUL and BBLIL*

3. The offer must be open for a minimum of 21 days.
4. The offer must be approved by the shareholders of the target company.

Illustration: According to SEBI[27] regulations, the delisting procedure for the combination of Mindtree and LTI was completed. A fair price was proposed by the buyer, Larsen & Toubro Infotech Ltd., to purchase all of the shares of Mindtree Ltd. The offer was accepted by Mindtree Ltd. shareholders and was available for at least 21 days. Mindtree Ltd. was removed from the Bombay Stock Exchange and the National Stock Exchange of India as a consequence of the delisting procedure. [28]

4. Tax and Duties:

a) ***Income Tax Act, 1961:*** The Income Tax Act of 1961 in India governs the taxation of income earned by individuals, companies, and other entities. When it comes to mergers and acquisitions (M&A), several provisions within the Income Tax Act are relevant. Some of them include:

1. The term "amalgamation," which is widely used in the context of mergers and acquisitions, is defined in Section 2(1B). The merger of one or more corporations with another firm or the combination of two or more companies to form a new entity is referred to as amalgamation.
2. This section offers a list of transactions that are not considered transfers and are so exempt from capital gains tax (A type of tax imposed on the profit or "gain" made from the sale of certain types of assets, known as capital assets. These assets typically include real estate, stocks, bonds, precious metals, and other investments). Section 47(vi) exempts the transfer of capital assets in a scheme of amalgamation.
3. The Section 49(1) section establishes the method for calculating the cost of acquisition of capital assets received by the amalgamated company after the amalgamation.

Illustration: In 2014, IDFC Limited decided to merge its banking business with IDFC Bank. The merger was structured as an amalgamation, where IDFC Bank absorbed the banking business of IDFC Limited. As part of the amalgamation,

[27] *Keywords: Securities and Exchange Board of India (SEBI)*

[28] *Illustration of LTI and Mindtree*

various capital assets, such as banking infrastructure, IT systems, and other related assets, were transferred from IDFC Limited to IDFC Bank. Section 47(vi) was applicable in this case, which exempted the transfer of these capital assets[29] from capital gains tax[30]. The assets were transferred at their book values, as recorded in the books of IDFC Limited.

b) ***Indian Stamp Act, 1899:*** The instrument or document affecting the transfer is always subject to payment of stamp duty whenever there is a conveyance or transfer of any movable or immovable property. It will be applicable to the following:

1. National Company Law Tribunal (NCLT) order for merger or demerger, depending on state-specific stamp laws
2. Stamp duty on share purchase agreements
3. Stamp duty on a shareholder agreement or joint venture agreement

Illustration: In 2020, the Tata Group acquired Air India from the Indian government. According to the Act's terms, the acquisition was subject to the payment of stamp duty. The amount of stamp duty due was determined at a rate of 0.5% [31]of the asset value of Air India. The total amount of stamp duty due was around 250 crore[32] (US$32 million).

5. *Exchange Control Laws:*

a) ***Foreign Exchange Management Act, 1999:*** The Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 (FI Regulations) and the Industrial Policy and Procedure published by the Secretariat for Industrial Assistance (SIA) govern foreign investments in partial and full acquisitions of Indian companies. The Foreign Exchange Management (Cross-Border Merger) Regulations, 2018[33] (Merger Regulations), which were also released by the RBI [34]on March 20, 2018, stated that any transaction related to a cross-border merger

[29] *Capital Assets: These assets typically include real estate, stocks, bonds, precious metals, and other investments.*

[30] *Capital Gains Tax: A type of tax imposed on the profit or "gain" made from the sale of certain types of capital assets.*

[31] *M&A as per Indian Stamp Act, 1899*

[32] *Illustration of TATA and AIR INDIA*

[33] *M&A as per FEMA, 1999*

[34] *Keywords: Reserve Bank of India (RBI), Foreign Exchange Management Act (FEMA)*

that is carried out in line with the FEMA Regulations shall be regarded as having received RBI approval.

Illustration: In 2020, the Indian company Tata Steel acquired the UK company Corus Group. The purchase entailed a cross-border money transfer, therefore it was governed by FEMA's rules. The Reserve Bank of India (RBI) obliged Tata Steel to pay 75% of the purchase price in foreign currency. This means that Tata Steel had to pay a major chunk of the purchase price in a currency other than Indian rupees. This is a frequent practise in international business transactions to guarantee that organisations have sufficient foreign currency reserves to fulfil such transactions. Another requirement set forth by the RBI required Tata Steel to invest the foreign currency in India for a minimum of three years. This was done to prevent the use of the foreign currency for speculative purposes.

a) ***Foreign Direct Investment Policy:*** The relevance of FDI in a country's economic development has finally been acknowledged as the Foreign Direct Investment (FDI) system in India has liberalised over time. Direct foreign corporate investment is permitted in India as a joint venture or as a totally owned subsidiary. Any expected funding by a foreign corporation in an existing company can be accomplished by either expanding the equity or purchasing the existing equity in an international joint venture.

Illustration: In 2018, the Chinese company Tencent Holdings acquired a 9.9% stake in the Indian e-commerce company Flipkart for $1.4 billion.[35] The Foreign Investment Promotion Board (FIPB) of the Indian government had to approve this acquisition. The acquisition was finally approved by the FIPB, but not without a number of restrictions being placed on Tencent, including that it invest an extra $1 billion in Flipkart over the following three years.

6. *Penal Laws:*

a) ***Indian Penal Code, 1860:*** When there are claims of fraud and cheating in M&A conflicts, the Indian Penal Code, 1860 (IPC), is frequently cited.

[35] *Illustration of Tencent and Flipkart*

Illustration: In 2018, the Securities and Exchange Board of India (SEBI) filed a case against several individuals for insider trading in relation to the merger of Cairn India and Vedanta Resources. The SEBI alleged that the individuals had traded in Cairn India shares while in possession of confidential information about the merger. The individuals were charged under Section 409 [36]of the IPC, which deals with criminal breach of trust.

b) ***Code of Criminal Procedure, 1973:*** The investigation, prosecution, and trial of criminal cases in India are governed by the Code of Criminal Procedure, 1973 (CrPC). Criminal offences that may be committed in connection with a merger or acquisition can be looked into and prosecuted using the CrPC. Fraud, insider trading, and market manipulation are examples of such offences.

Illustration: The National Stock Exchange (NSE) promoters were the subject of a prosecution brought by Securities and Exchange Board of India (SEBI) under the CrPC in 2020. The NSE promoters were accused of insider trading by the SEBI in connection with a merger with another company. The SEBI inquiry is still ongoing. [37]

c) ***Prevention of Money Laundering Act, 2002:*** Under this Act, the ED[38] looks into cases involving money laundering. The superior criminal courts or the supreme court, as applicable, would hear appeals and challenges to rulings or orders of the criminal courts. The Appellate Tribunal under the PMLA is where appeals against the ED's decision are heard. The highest court of appeals is the Supreme Court.

Illustration: In 2017, the Indian company Mindtree Ltd. was acquired by Larsen & Toubro Infotech Ltd. (LTI) for $1.9 billion.[39] The Financial Intelligence Unit (FIU), a division of the Indian government tasked with upholding the PMLA, had to approve the acquisition. To make sure the purchase wasn't being used to launder money, the FIU looked into it. The promoters of Mindtree and LTI were among the parties to the acquisition whose backgrounds the FIU also investigated. The acquisition was finally allowed by the FIU, but not before attaching a number of requirements to LTI,

[36] *Illustration of Cairn India and Vedanta Resources*

[37] *Illustration of NSE and SEBI*

[38] *Keywords: Enforcement Directorate (ED), Prevention of Money Laundering Act (PMLA), Mergers and Acquisitions (M&A), Prevention of Money Laundering Act (PMLA)*

[39] *Illustration of LTI and Mindtree*

including the need for LTI to keep track of all transactions associated with the acquisition and to report any suspicious transactions to the FIU.

7. ***Insolvency Laws:***

   a) ***Insolvency and Bankruptcy Code, 2016:*** The code has gained popularity as a means of acquiring businesses in India. The IBC establishes the framework for insolvency resolution of insolvent enterprises, which includes, in the initial stage, an effort to sell the business as a going concern and, in the event of failure, the liquidation of the insolvent company's assets.

   Illustration: One of the first significant disputes settled under the IBC was Tata Steel's purchase of Bhushan Steel in 2018. A steel company named Bhushan Steel had missed payments on its debts. The NCLT accepted the case after the lenders to Bhushan Steel filed a petition for insolvency under the IBC. For Bhushan Steel, several businesses, including Tata Steel, submitted proposals. The NCLT accepted Tata Steel's proposal since it was the highest. Tata Steel paid 35,200 crore[40] (US$4.7 billion) to acquire Bhushan Steel.

8. ***Sector-Specific legislation:***

The Banking Regulation Act of 1949, the Insurance Act of 1938, the Mines and Minerals (Development and Regulation) Act of 1957, the Drugs and Cosmetics Act of 1940, and the Telecom Regulatory Authority of India Act of 1997 are just a few examples of sector-specific laws that apply to transactions involving Indian companies engaged in the relevant sector. For highly regulated industries like insurance and banking, the Insurance Regulatory and Development Authority of India (IRDAI) and the Reserve Bank of India (RBI), respectively, set rules for companies engaged in those industries. Companies may also be required to obtain prior approval for the acquisition of shares or assets of businesses engaged in such areas.

Illustration: In 2021, the Reserve Bank of India (RBI) approved the merger of Lakshmi Vilas Bank (LVB) with DBS Bank India Limited. The merger was subject to certain conditions, including the divestment of certain assets by LVB. The RBI must approve any merger of two banking companies under Section 44A [41]of the Banking Regulation Act. If the RBI is certain

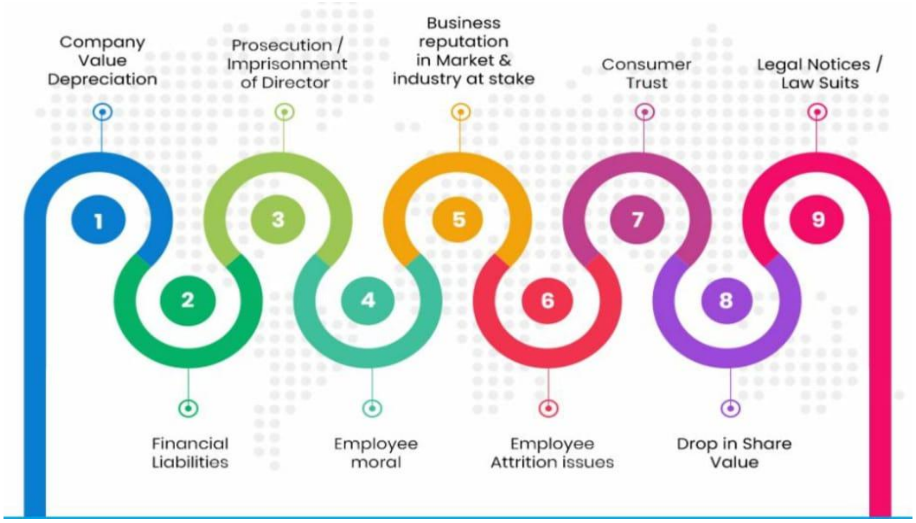
[40] *Illustration of Bhushan Steel and Tata Steel*

[41] *Illustration of Lakshmi Vilas Bank and DBS Bank*

that the merger is in the public interest and won't negatively impact depositor interests or the stability of the banking system, it can authorise it.

Consequences of Non- Compliance

The Companies Act and the Competition Act govern mergers, acquisitions, and combinations in India. Non-compliance with the laws governing such transactions may result in a number of negative outcomes for the organisations, some of which are stated below:


Company Value Depreciation
1
Financial Liabilities
2
Prosecution / Imprisonment of Director
3
Employee moral
4
Business reputation in Market & industry at stake
5
Employee Attrition issues
6
Consumer Trust
7
Drop in Share Value
8
Legal Notices / Law Suits
9

[42]

1. ***Imposition of Penalties:*** The competition authorities have the authority to impose fines for noncompliance with the law. For violations of the Competition Act, CCI [43]has the authority to impose fines of up to 1% of the company's total turnover or assets, whichever is greater.

2. ***Rejection of the merger/acquisition:*** The regulatory authorities may reject the merger or acquisition if the legal requirements are not followed. For instance, the CCI can reject a merger or acquisition if it finds that the transaction is likely to have a negative impact on competition.

3. ***Legal Action:*** Legal action against the concerned businesses is another possibility if the legal standards are not followed. The Companies Act allows for legal action against the business and its officers for failing to adhere to the requirements of the Act.

[42] *Consequences of Non Compliance (Image source)*

[43] *Keywords: Competition Commission of India (CCI)*

4. ***Damage to reputation:*** The reputations of the relevant companies may be harmed by failure to comply with the law. It may have a negative effect on their brand's reputation and consumer loyalty.

5. ***Delay in the transaction:*** The transaction could be delayed if the legal formalities are not followed. This may result in higher expenses and uncertainties for the companies involved.

Illustration: In addition to issuing a cease-and-desist order, the CCI claimed to have fined Google INR 1,337.76[44] crore for abusing its dominant position in a number of areas within the Android mobile device ecosystem. The ruling highlights the far broader global power of big tech firms outside of China, such as Apple and Facebook's parent company, Meta. For instance, customers of Meta's instant messaging service WhatsApp are looking for alternatives after the company announced revisions to its privacy policies. India is one of the platform's largest markets. Regarding smart TVs and its in-app payment system, the CCI is still investigating Google.

Impact on Market Competition

The impact of mergers and acquisitions on market competition can vary depending on the specific circumstances of the deal. However, in general, mergers and acquisitions can both have a negative effect on market competition.

1. ***Less Competition:*** Mergers and acquisitions can reduce competition by consolidating the market. When two businesses combine, they practically become one. This implies that the market has one less rival now. For instance, if two of a country's three biggest airlines merge, only two major airlines will remain in the market. The remaining airlines will have more market strength as a result, which could result in higher prices for consumers.

2. ***Entry Barriers:*** M&A[45] can increase barriers to entry for new competitors, preventing them from entering the market and reducing competitive dynamics. This may increase the company's market dominance and make it more difficult for rivals to compete with them. For instance, if two of a country's top three banks merge, they could use their combined financial power to make it more challenging for new banks to enter the market.

[44] *Illustration of Google*

[45] *Keywords: Mergers and Acquisitions (M&A)*

3. ***Collusion:*** Acquisitions and mergers may make it simpler for businesses to collude. When businesses collaborate to fix prices or limit output, this is called collusion. This can lead to higher prices for consumers. For example, if two of the three major car manufacturers in a country merge, they may be able to agree to fix prices for cars. This would allow them to charge higher prices for cars than they would be able to if they were competing against each other.

4. ***Increased market concentration:*** Market concentration is a measurement of the number of businesses operating in a given market and the proportion of the market they each control. Increased market concentration may result from mergers and acquisitions. Therefore, there will be fewer firms competing for a larger market share. As a result of the remaining businesses having more market sway, consumers may also see increased costs.

Illustration: The prime example is the merger of AOL and Time Warner in 2001. AOL was a prominent internet service provider, and Time Warner was a sizable media conglomerate with holdings in publishing, cinema, and television. One of the greatest media corporations in the world, AOL Time Warner, has a market valuation of over $300 billion.[46] There were worries that the combination would lessen competition in the media business. A corporation with a dominating position in each of these markets would have resulted from the merger. These concerns were justified. AOL Time Warner raised the cost of its goods and services in the years after the merger. The company also laid off thousands of employees.

It is important to note that not all mergers and acquisitions will reduce competition. A number of variables, including the size of the merged companies, the level of market rivalry prior to the merger, and the regulatory environment, will affect how a merger or acquisition will affect competition.

Issues and Challenges in M&A

In India, mergers and acquisitions (M&A)[47] take place under a regulatory and facilitating legal framework. A number of legal concerns in India can make it difficult for smooth execution of merger and acquisition (M&A) transactions. There are a number of loopholes in this framework that could pose difficulties and lead to potential pitfalls:

1. ***Unclear Provisions:*** The definitions of "merger" and "acquisition" lack clarity and specificity in the legal framework. In the Indian context, the term "merger" is not explicitly defined in either

[46] *Illustration of AOL and Time Warner*

[47] *Keywords: Mergers and Acquisitions (M&A)*

the Companies Act, 2013 or the Income-tax Act, 1961. In accordance with Section 2(c) of the Competition Act, 2002, the term "dominant position" necessitates a precise definition. These definitions often lack precision and can be subject to varied interpretations by different individuals. Consequently, these regulations incorporate phrases from disparate sources without furnishing a clear or meaningful definition or interpretation. In the realm of legal statutes, any legislative, regulatory, or behavioural framework that employs terminology without offering a precise and meaningful definition is typically regarded as legally questionable.

2. ***Inefficiencies in the Regulatory Process:*** Mergers and acquisitions (M&A) transactions typically necessitate approvals from various regulatory authorities, such as the Competition Commission of India (CCI), the Reserve Bank of India (RBI), and the Securities and Exchange Board of India (SEBI). Delays in obtaining these approvals can extend the timeline for closing M&A deals. Securing regulatory licences can be a complex and bureaucratic process, potentially leading to disruptions and uncertainty in business operations.

3. ***Cross-Border Challenges:*** Navigating several legal systems and regulatory frameworks during cross-border M&A can be challenging and give rise to jurisdictional disputes. Cross-border mergers often entail intricate tax implications that vary based on the countries involved, making it challenging to assess the financial ramifications of the deal accurately. M&A transactions are subject to the jurisdictional laws and regulations of each country involved, introducing complexities in manoeuvring through the process and ensuring compliance with all relevant legal requirements.

4. ***Delays in Approvals:*** The duration required to conclude a merger can significantly fluctuate, contingent upon the particular circumstances. As a general guideline, the timeframe may range from six months to multiple years. Notably, as per Section 59 of the Competition Act, 2002, the Competition Commission of India (CCI) employs a two-stage review process, which can extend up to 90 days for completion. If deemed necessary, the CCI possesses the authority to prolong the review period by an additional 30 days. Such extensions have the potential to impede mergers and acquisitions, posing challenges for companies striving to compete effectively in the global marketplace.

5. ***Tax Implications for Spin-Offs:*** The tax implications stemming from spin-offs[48] can have significant ramifications for both the parent company and its shareholders. In certain instances, shareholders may incur taxation even when they do not receive any form of cash or equivalent consideration in return for their shares in the spin-off. For instance, in 2015, Dell Inc. conducted a spin-off of its VMware division, where Dell shareholders received one VMware share for every ten Dell shares[49] they held. Despite the absence of monetary compensation or any other form of remuneration in exchange for their shares, shareholders were subject to taxation in connection with the spin-off. This tax treatment arose because, from a tax perspective, the spin-off was considered akin to an asset sale or exchange.

Policy Suggestions

Mergers and acquisitions (M&A) can be done in a fair and efficient manner while also preserving competition and defending the interests of diverse stakeholders with the help of policy recommendations for the legal framework of M&A. Here are some ideas for policies to take into account:

1. ***Clear Guidelines:*** The government and decision-makers should take immediate action to rewrite and clarify the provisions that were left out of various statutes. A high-level investor protection committee must exist in order to accomplish this, and it must be made up of knowledgeable and experienced individuals from the RBI, SEBI, CCI[50], Registrar of Companies, and other relevant departments. In order to improve policymaking and ensure effective legal enforcement, the committee must enlist senior academic experts from the fields of economics, finance, strategy, and law, as well as emeritus policymakers from industrialised economies.

2. ***Tax Credit:*** Both regulatory agencies and economic policymakers agree that permitting a tax credit in international transactions will enable MNCs to increase their investment in the same sector as well as in other promising industries in the host country. For example, Hohler (2013) suggested that the government should create a policy where "foreign tax payments can be credited against domestic taxes". Cross-listing allows local businesses and foreign MNCs better access to global financial markets, resulting in less expensive external finance.

[48] *Spin Offs: When a business divides one of its divisions into a brand-new independent firm*

[49] *Spin off of DELL Inc.*

[50] *Keywords: Reserve Bank of India (RBI), Securities and Exchange Board of India (SEBI), Competition Commission of India (CCI), Multinational Companies (MNC'S), Mergers and Acquisitions (M&A)*

3. *Use of Mediation and Arbitration:* Mediation and arbitration are alternative dispute resolution (ADR) methods that can be used to resolve disputes between businesses and regulators. ADR techniques can assist organisations in resolving conflicts more swiftly and effectively while also preserving the dispute's confidentiality. ADR procedures can assist regulators in lessening courtroom burdens and encouraging collaboration between firms and regulators.

4. *Review Timeframes and Efficiency:* The suggested idea is to speed up the approval process and set realistic deadlines for regulatory reviews. By doing this, it would be possible to avoid pointless delays and hasten the completion of M&A deals. Technology can be used by the merger's parties to speed up the evaluation procedure. The use of data analytics to spot possible competition issues, video conferencing to assist meetings with regulators, and electronic signatures to speed up the clearance process are a few examples.

5. *Provisions for Spin-Offs:* The CCI and the Registrar of Companies could create new laws and guidelines to govern spin-offs. The criteria for selecting which divisions should be spun off, the method for doing so, the rights of shareholders in both the parent business and the spun-off firm, and the effect of spin-offs on competition could all be covered by these rules and regulations. These laws and regulations would be designed to make sure that spin-offs are carried out fairly and openly and do not hurt competition. Few analysts believe that "spin-offs could pave the way for the next merger wave."

Conclusion

It should be noted that mergers and acquisitions are a typical business strategy utilised to accomplish growth and increase market share, but they can also be difficult tasks that demand careful preparation, execution, and integration. Mergers and acquisitions success strongly depends on a number of variables, including strategic fit, cultural fit, communication, and leadership. As a result, businesses should carefully weigh the advantages and drawbacks of each merger or acquisition before moving forward. They can create substantial expenses and obstacles if they are not handled well, despite the fact that they can also create considerable opportunities for growth and competitive advantage. Ultimately, the ability of the organisations involved to collaborate towards a common objective and generate value for their shareholders will determine whether mergers and acquisitions are successful. Furthermore, India has a complicated legal system that governs mergers, acquisitions, and combinations. As a result, it is crucial for parties participating in such transactions to have legal counsel and make sure they are abiding by all applicable rules and regulations. By doing this, the parties can protect themselves from the negative effects of non-compliance and guarantee a smooth and effective transaction.

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