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CROSS-BORDER MERGERS AND ACQUISITIONS UNDER FEMA, THE COMPANIES ACT, AND SEBI REGULATIONS: A CRITICAL ANALYSIS OF INDIA'S REGULATORY ARCHITECTURE

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Abstract

Cross-border mergers and acquisitions ("M&A") have emerged as a central vehicle for Indian companies to integrate with global value chains and for foreign investors to consolidate their presence in the Indian market. The legal architecture governing such transactions in India is tri-layered, resting on the Companies Act, 2013, which supplies the corporate law mechanics for schemes of merger and amalgamation; the Foreign Exchange Management Act, 1999, together with the Foreign Exchange Management (Cross Border Merger) Regulations, 2018, which regulate the capital account and exchange control dimensions; and the regulations framed by the Securities and Exchange Board of India, which govern disclosure, valuation, and shareholder protection where listed entities are involved. This paper undertakes a doctrinal examination of this framework, tracing its historical evolution from the restrictive regime under the Companies Act, 1956, to the liberalised inbound-and-outbound merger regime introduced by Section 234 of the Companies Act, 2013 and Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. It examines the procedural interplay between the National Company Law Tribunal, the Reserve Bank of India, and SEBI, analyses key compliance obligations such as valuation, pricing guidelines, and the deemed-approval route under Regulation 9 of the 2018 Regulations, and evaluates judicial and regulatory precedent. The paper concludes that while India has made significant strides toward a facilitative cross-border merger regime, structural frictions—particularly in taxation, sectoral restrictions, and coordination among regulators—continue to limit its efficacy, and recommends targeted reforms.

Keywords: *C*ross-Border Mergers, FEMA, Companies Act 2013, SEBI, Section 234, Rule 25A, Outbound Merger, Inbound Merger, NCLT.

I. Introduction

Mergers and acquisitions that transcend national boundaries occupy a distinctive place in corporate law because they sit at the intersection of three otherwise autonomous regulatory domains: corporate governance, exchange control, and securities regulation. A cross-border merger, in the Indian context, refers to any merger, amalgamation, or arrangement between an Indian company and a foreign company, resulting in either an *inbound merger* (where the resultant company is Indian) or an *outbound merger* (where the resultant company is foreign).[1] For decades, Indian law effectively foreclosed the possibility of an Indian company merging into a foreign entity. The Companies Act, 1956 defined a "transferee company" to mean only a company incorporated in India, thereby permitting foreign companies to merge into Indian companies but not the converse.[2] This asymmetry was widely criticised as inconsistent with India's stated policy of economic liberalisation and as a competitive disadvantage for Indian companies seeking to redomicile assets, access foreign capital markets, or restructure global operations.

The enactment of the Companies Act, 2013 marked a watershed moment. Section 234 of the Act, read with Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, for the first time expressly permitted mergers of Indian companies with foreign companies incorporated in jurisdictions notified by the Central Government, and vice versa.[3] However, Section 234 could not operate in isolation: because cross-border mergers necessarily involve the issuance, transfer, or acquisition of securities by persons resident outside India, and often the creation of overseas assets, liabilities, and branch structures, a corresponding exchange control framework was indispensable. This gap was filled only in March 2018, when the Reserve Bank of India ("RBI") notified the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 (the "2018 Regulations") under Section 6(3) read with Section 47 of the Foreign Exchange Management Act, 1999 ("FEMA").[4] Where the merging entities

[1]Foreign Exchange Management (Cross Border Merger) Regulations, 2018, Notification No. FEMA.389/2018-RB, reg. 2(iv)–(v) (India).
[2]Companies Act, 1956, No. 1, Acts of Parliament, 1956, § 394 (India) (repealed); see also Cross-Border Merger Framework in India: Limited Efficacy?, S&R Assocs. (2023).
[3]Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 234 (India); Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, r. 25A (India).
[4]Foreign Exchange Management (Cross Border Merger) Regulations, 2018, Notification No. FEMA.389/2018-RB (India); Foreign Exchange Management Act, 1999, No. 42, Acts of Parliament, 1999, §§ 6(3), 47 (India).

include a company listed on a recognised stock exchange, a third stratum of regulation is superimposed: the disclosure, valuation, and minority-protection requirements administered by the Securities and Exchange Board of India ("SEBI") under the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("LODR Regulations"), the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("Takeover Code"), and, where applicable, the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018.

This paper analyses the tri-partite framework—Companies Act, FEMA, and SEBI regulations—that together govern cross-border M&A in India. Part II traces the historical evolution of the regime. Part III examines the corporate law mechanics under Section 230 to 234 of the Companies Act and Rule 25A. Part IV analyses the FEMA and 2018 Regulations framework, including valuation, pricing, and post-merger compliance obligations. Part V examines the SEBI overlay applicable to listed company mergers. Part VI surveys procedural interplay and select regulatory and judicial precedent. Part VII identifies persistent challenges, and Part VIII offers recommendations.

II. Historical Evolution of the Cross-Border Merger Regime

Prior to 2013, Indian company law permitted only inbound mergers—that is, the merger of a foreign company into an Indian company—subject to prior approval of the High Court exercising company jurisdiction.[5] Outbound mergers, whereby an Indian company would merge into a foreign entity and cease to exist as a domestic company, had no statutory basis and were considered impermissible. This created significant friction for Indian promoters seeking to reorganise multinational group structures, redomicile holding companies, or achieve tax and listing efficiencies through schemes recognised in other jurisdictions.

The J.J. Irani Committee on Company Law, whose recommendations substantially shaped the Companies Act, 2013, recognised this lacuna and recommended that Indian law be amended to permit both inbound and outbound cross-border mergers, subject to appropriate safeguards. Parliament acted on this recommendation through Section 234 of the 2013 Act. Nevertheless, Section 234 remained dormant for several years: it was notified only on April 13, 2017, simultaneously with Rule 25A, and even then could not be operationalised in the absence of

[5]Companies Act, 1956, No. 1, Acts of Parliament, 1956, §§ 391–394 (India) (repealed).

RBI regulations governing the foreign exchange dimension of such transactions.[6] The RBI had, in April 2016, placed draft guidelines for public comment, but it was not until March 20, 2018 that the 2018 Regulations were finally notified, thereby completing the regulatory architecture and enabling the first tranche of cross-border mergers to be implemented under the new regime.[7]

III. The Companies Act, 2013 Framework: Sections 230–234 and Rule 25A

A. The General Scheme Mechanism under Sections 230–232

Every merger or amalgamation involving an Indian company, whether domestic or cross-border, must be affected as a "scheme of compromise, arrangement, or amalgamation" sanctioned by the National Company Law Tribunal ("NCLT") under Sections 230 to 232 of the Companies Act, 2013.[8] The procedure requires the applicant company to convene meetings of shareholders and creditors (or seek dispensation thereof), obtain approval by the requisite majority, and secure sanction of the scheme by the NCLT after considering objections from regulatory authorities, including the Registrar of Companies, the Regional Director of the Ministry of Corporate Affairs, and, where applicable, sectoral regulators such as SEBI and the RBI. Section 232 further provides for the automatic vesting of assets, liabilities, and legal proceedings of the transferor company in the transferee company upon sanction of the scheme, without the need for separate conveyance.[9]

Section 234 extends this general framework to cross-border transactions by providing that "a foreign company, may with the prior approval of the Reserve Bank of India, merge into a company registered under this Act or vice versa," and that the terms of any such scheme "may, subject to the rules made under this section, provide for payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts."[10] Two features of Section 234 merit emphasis. First, it confines eligible foreign companies to those incorporated in jurisdictions specified by the Central Government—currently, Annexure B to Rule 25A lists jurisdictions whose securities market

[6]See Lakshmikumaran & Sridharan, Cross-Border Mergers: Analysis of FEMA Provisions (2018) (noting that Rule 25A required prior RBI approval for cross-border mergers, but the absence of implementing regulations meant such mergers could not, in practice, proceed).
[7]Foreign Exchange Management (Cross Border Merger) Regulations, 2018, Notification No. FEMA.389/2018-RB (India).
[8]Companies Act, 2013, No. 18, Acts of Parliament, 2013, §§ 230–232 (India).
[9]Id. § 232(3).
[10]Companies Act, 2013, No. 18, Acts of Parliament, 2013, § 234(2) (India).

regulator and central bank are signatories to the International Organization of Securities Commissions' Multilateral Memorandum of Understanding or a bilateral memorandum with SEBI, and are not identified in the Financial Action Task Force's public statement of jurisdictions with strategic deficiencies.[11] Second, it makes RBI approval a jurisdictional precondition, not merely a procedural formality, thereby embedding exchange control clearance into the corporate approval chain.

B. Rule 25A: Valuation, Deemed Approval, and Conditions

Rule 25A operationalises Section 234 in granular detail. It requires that the transferor foreign company obtain approval from the applicable NCLT bench, and mandates that valuation of both merging companies be conducted by valuers who are members of a recognised professional body in the jurisdiction of the merging company and who apply internationally accepted principles of valuation.[12] Significantly, Rule 25A(3) provides that a transaction under the rule which otherwise complies with the RBI's specified conditions shall be “deemed to have the prior approval of the Reserve Bank,” thereby introducing a facilitative deemed-approval mechanism where the transaction falls squarely within pre-notified parameters, dispensing with case-by-case RBI clearance.[13] Where the proposed transaction does not meet the specified conditions, the companies must apply to the RBI for approval prior to filing the scheme application with the NCLT. Rule 25A also mandates that the transferee company in an outbound merger, and the resultant company generally, ensure compliance with accounting standards prescribed under Section 133 of the Act, and file confirmation of compliance with the Registrar of Companies.[14]

IV. The FEMA Overlay: The 2018 Cross Border Merger Regulations

A. Deemed Approval and Compliance Conditions

The 2018 Regulations give substantive content to the “conditions specified” referenced in Rule 25A. Regulation 9 of the 2018 Regulations provides that any transaction on account of a cross-border merger undertaken in accordance with the Regulations “shall be deemed to have prior approval of the Reserve Bank,” thereby operationalising the deemed-approval concept.[15] This

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[11] Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, r. 25A(5) & annex. B (India).
[12] Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, r. 25A(2)–(3) (India).
[13] Id. r. 25A(3).
[14] Id. r. 25A(4), (11).
[15] Foreign Exchange Management (Cross Border Merger) Regulations, 2018, Notification No. FEMA.389/2018-RB, reg. 9 (India).

deemed-approval route substantially reduces transaction timelines and regulatory uncertainty, since companies structuring an inbound or outbound merger in compliance with the substantive conditions of the 2018 Regulations need not seek a separate, discretionary RBI no-objection prior to approaching the NCLT.

B. Inbound Mergers

In an inbound merger, where the resultant company is Indian, Regulation 4 permits the resultant company to issue or transfer securities to persons resident outside India in accordance with the pricing guidelines, entry routes, sectoral caps, and attendant conditions applicable under the foreign direct investment regime, then governed by the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2017, and now by the Foreign Exchange Management (Non-Debt Instruments) Rules, 2019.[16] Any office of the foreign transferor company outside India is deemed, upon the merger becoming effective, to be a branch or office of the resultant Indian company outside India, and is required to conform to the Foreign Exchange Management (Foreign Currency Account by a Person Resident in India) Regulations, 2015.[17] Guarantees and outstanding overseas borrowings of the erstwhile foreign company that vest in the resultant Indian company must, within a period of two years, conform to the External Commercial Borrowings framework, failing which the resultant company would be required to repay such borrowings or otherwise regularise them.[18]

C. Outbound Mergers

The converse situation—an outbound merger in which the resultant company is foreign—is addressed by Regulation 7, which permits a person resident in India to acquire or hold securities of the resultant foreign company in accordance with the Foreign Exchange Management (Transfer or Issue of Any Foreign Security) Regulations, 2004 ("TIFS Regulations").[19] An office of the Indian transferor company in India is deemed to be a branch office of the resultant foreign company, and is required to conform to the Foreign Exchange Management (Establishment in India of a Branch Office or a Liaison Office or a Project Office or Any Other Place of Business) Regulations, 2016. Any Indian assets or liabilities may, subject to specified

[16]Id. reg. 4; see also Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 (India) (which, with effect from October 17, 2019, superseded the erstwhile FEMA 20-R and now governs pricing, sectoral caps, and entry routes for equity investment by non-residents).
[17]Foreign Exchange Management (Cross Border Merger) Regulations, 2018, Notification No. FEMA.389/2018-RB, reg. 5 (India).
[18]Id. reg. 5(3).
[19]Id. reg. 7; see also Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 (India).

conditions, be transferred to or held by a Special Non-Resident Rupee Account maintained by the resultant foreign company, and existing borrowings of the Indian transferor company must conform to the External Commercial Borrowings framework or be repaid.[20] Outbound mergers raise a distinct and often decisive tax friction: the tax-neutrality exemptions available for domestic amalgamations under Sections 2(1B) and 47 of the Income-tax Act, 1961 are, on a plain reading, available only where the resultant company is an Indian company, meaning that an outbound merger may trigger capital gains liability for the Indian transferor company and its shareholders notwithstanding the corporate law and exchange control clearances obtained.[21]

D. Valuation and Reporting

Valuation of the merging companies must be undertaken in accordance with Rule 25A of the Companies Merger Rules, and, for outbound mergers specifically, must additionally be certified by a valuer who is a member of a recognised professional body in the relevant foreign jurisdiction and follow internationally accepted accounting and valuation standards.[22] The resultant company is required to file the requisite reports with the RBI within the specified timelines, including confirmation from the managing director, whole-time director, or company secretary that the merger has been effected in compliance with the 2018 Regulations.[23]

V. The SEBI Overlay for Listed Company Mergers

A. LODR Regulations and the Requirement of a No-Objection Certificate

Where a listed Indian company is a party to a scheme of merger, amalgamation, or arrangement—cross-border or otherwise—Regulation 37 of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 requires the company to obtain a no-objection or observation letter from the stock exchange(s) on which its securities are listed prior to filing the scheme with the NCLT.[24] The exchanges, in turn, forward the scheme to SEBI for its comments, in accordance with SEBI's Master Circular on Schemes of Arrangement, which prescribes detailed disclosure requirements, including a valuation report, a fairness opinion

[20]Foreign Exchange Management (Cross Border Merger) Regulations, 2018, Notification No. FEMA.389/2018-RB, regs. 6, 8 (India).
[21]Income-tax Act, 1961, No. 43, Acts of Parliament, 1961, §§ 2(1B), 47(vi) (India); see S&R Assocs., supra note 2.
[22]Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, r. 25A(3)(b) (India).
[23]Foreign Exchange Management (Cross Border Merger) Regulations, 2018, Notification No. FEMA.389/2018-RB, reg. 10 (India).
[24]SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, reg. 37 (India).

from an independent merchant banker, and a certificate confirming compliance with applicable accounting standards. SEBI's observations, though not binding in the way a statutory approval is, carry significant practical weight because the NCLT will ordinarily require the scheme to address any concerns raised by SEBI or the stock exchanges before granting sanction.[25]

B. Valuation, Pricing, and Minority Protection

SEBI's regulatory concern in cross-border schemes is chiefly the protection of public shareholders, who may be structurally disadvantaged relative to promoters or foreign counterparties in negotiating exchange ratios. Accordingly, SEBI requires an independent valuation and, where the resultant entity is unlisted or foreign, specific safeguards to ensure that public shareholders are not unfairly diluted or denied an exit. Where the scheme involves the delisting of the Indian listed entity as a consequence of an outbound merger, the process must additionally comply with the SEBI (Delisting of Equity Shares) Regulations, 2021, including the reverse book-building mechanism for price discovery, unless the delisting is specifically exempted as a consequence of a scheme sanctioned under Sections 230–232 read with Rule 25A.[26]

C. Takeover Code and ICDR Implications

A cross-border merger that results in a change of control of a listed Indian company, or in the acquisition of shares or voting rights beyond the threshold prescribed under Regulation 3 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, would ordinarily trigger an open offer obligation, unless the transaction falls within an exemption—most relevantly, Regulation 10(1)(d), which exempts acquisitions pursuant to a scheme of arrangement sanctioned by the NCLT, provided the scheme itself is not colourably designed to circumvent the Takeover Code's open offer requirement.[27] Where new securities are issued by the resultant listed company as consideration to shareholders of the merging foreign company, the pricing and lock-in requirements under the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 may also be engaged, depending on the mode of consideration.

VI. Procedural Interplay and Regulatory Precedent

[25]SEBI, Master Circular for Schemes of Arrangement by Listed Entities (2023).
[26]SEBI (Delisting of Equity Shares) Regulations, 2021, reg. 3(2), 37 (India).
[27]SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, regs. 3, 10(1)(d) (India).

In practice, a cross-border merger involving a listed Indian company proceeds through a sequenced, multi-regulatory approval chain: (i) approval of the scheme by the boards of the merging companies; (ii) filing of the scheme with the stock exchanges and SEBI for observations, where a listed entity is involved; (iii) determining whether the transaction falls within the deemed-approval parameters of the 2018 Regulations, and if not, obtaining specific RBI approval; (iv) convening of shareholder and creditor meetings as directed by the NCLT; and (v) final sanction of the scheme by the NCLT, followed by filing of the sanctioned order with the Registrar of Companies and, for outbound mergers, filing of post-merger compliance reports with the RBI.[28] Indian NCLT benches have sanctioned a number of cross-border schemes since 2018, involving both inbound restructurings—where overseas group entities have merged into Indian operating companies to consolidate regional business—and, more sparingly, outbound restructurings, reflecting the continuing tax and procedural frictions associated with the latter.

Judicial engagement with the cross-border dimension of Indian corporate and tax law more broadly is illuminated by the Supreme Court's decision in *Vodafone International Holdings B.V. v. Union of India*, which, although concerned with an offshore share transfer rather than a Section 234 merger, remains the leading authority on the tax characterisation of cross-border corporate restructurings involving Indian assets and underscores the continuing sensitivity of Indian authorities to structures perceived as designed to avoid Indian tax exposure—a sensitivity that persists in the design of the outbound merger tax regime.[29] More directly on point, the NCLT's approach in sanctioning schemes under Section 234 has generally required strict demonstration of compliance with Rule 25A's valuation and jurisdictional requirements, and tribunals have shown willingness to seek clarificatory affidavits from the Regional Director where cross-border elements of a scheme are not fully particularised at the first hearing.

VII. Challenges and Structural Limitations

A. Tax Neutrality Gap for Outbound Mergers

The single most significant impediment to outbound cross-border mergers remains the absence of tax neutrality under the Income-tax Act, 1961. Because the statutory definition of “amalgamation” for tax purposes requires the resultant company to be an Indian company, an

[28]See generally Companies Act, 2013, §§ 230–234 (India); Foreign Exchange Management (Cross Border Merger) Regulations, 2018 (India).
[29]Vodafone Int'l Holdings B.V. v. Union of India, (2012) 6 S.C.C. 613 (India).

outbound merger falls outside the scope of the capital-gains exemption available to domestic amalgamations, exposing the Indian transferor company and its shareholders to tax on the transfer of assets and shares respectively. This asymmetry means that, notwithstanding the corporate and exchange-control liberalisation introduced by Section 234 and the 2018 Regulations, outbound mergers remain commercially unattractive for many Indian corporate groups, and the number of outbound schemes sanctioned since 2018 remains modest relative to inbound schemes.

B. Restricted Jurisdictional Scope

Rule 25A confines eligible foreign jurisdictions to those satisfying the securities-regulator and FATF criteria in Annexure B, which, while designed to guard against use of the cross-border merger route for money laundering or regulatory arbitrage, has the effect of excluding several jurisdictions that are otherwise significant destinations for outbound Indian investment, thereby narrowing the practical utility of the regime for certain corporate structures.

C. Multiplicity of Regulators and Timeline Uncertainty

Even with the deemed-approval mechanism under Regulation 9 of the 2018 Regulations, a cross-border merger involving a listed company must still satisfy the sequential and largely non-fungible requirements of the NCLT, SEBI, the stock exchanges, the RBI, and the Registrar of Companies, each operating on independent timelines and with differing documentation standards. Divergent expectations across these regulators—particularly around valuation methodology, disclosure of promoter shareholding changes, and treatment of dissenting shareholders—introduce timeline uncertainty that undermines the objective of the deemed-approval framework.

D. Sectoral and Foreign Direct Investment Constraints

Because inbound mergers necessarily involve the issuance or transfer of securities to non-residents, they remain subject to the sectoral caps, entry-route conditions, and pricing guidelines applicable under the foreign direct investment regime. Where the underlying Indian company operates in a sector subject to government-route approval or sectoral caps—such as defence, insurance, or multi-brand retail—the cross-border merger route does not dispense with those substantive restrictions, and the transaction must additionally secure sectoral regulatory clearance, layering further complexity onto an already multi-regulator process.

VIII. Recommendations

First, Parliament should consider amending the definition of “amalgamation” under Section 2(1B) of the Income-tax Act, 1961 to extend tax-neutral treatment, subject to appropriate anti-abuse safeguards, to outbound mergers where the resultant foreign company satisfies specified conditions of bona fide business purpose and continuity of shareholding, thereby aligning the tax regime with the corporate and exchange-control liberalisation already achieved.

Second, the Central Government should periodically review and expand Annexure B to Rule 25A to reflect a broader and more dynamic set of eligible jurisdictions, consistent with evolving FATF assessments, so that the regime does not become a de facto bottleneck for commercially legitimate restructurings involving jurisdictions of genuine business relevance to Indian groups.

Third, SEBI, the RBI, and the Ministry of Corporate Affairs should consider institutionalising a joint or coordinated review mechanism—akin to a single-window clearance—for cross-border schemes involving listed entities, to reduce the sequential dependency between stock exchange observations, RBI clearance, and NCLT sanction, and thereby improve the predictability of transaction timelines.

Fourth, greater regulatory guidance is warranted on the interaction between Rule 25A valuation requirements and SEBI's independent valuation and fairness-opinion requirements, to avoid duplicative or inconsistent valuation exercises for the same transaction.

IX. Conclusion

The introduction of Section 234 of the Companies Act, 2013 and the subsequent notification of the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 represent a considered and overdue liberalisation of India's cross-border merger regime, correcting a longstanding asymmetry that had confined Indian companies to inbound restructurings alone. The tri-layered framework of corporate, exchange-control, and securities regulation examined in this paper reflects a deliberate regulatory design intended to balance facilitation of legitimate cross-border restructuring against concerns of capital flight, tax avoidance, and erosion of minority shareholder protections. Nevertheless, the persistence of a tax-neutrality gap for outbound mergers, a restrictive jurisdictional list, and the absence of a genuinely integrated multi-regulatory clearance process continue to constrain the practical uptake of the outbound merger route in particular. As Indian corporate groups increasingly pursue global consolidation, holding-company re-domiciliation, and cross-border listing strategies, the coherence and efficiency of this regulatory architecture will remain a significant determinant of India's attractiveness as a base for outward corporate expansion, and targeted legislative and regulatory reform along the lines identified in this paper would meaningfully enhance its efficacy.