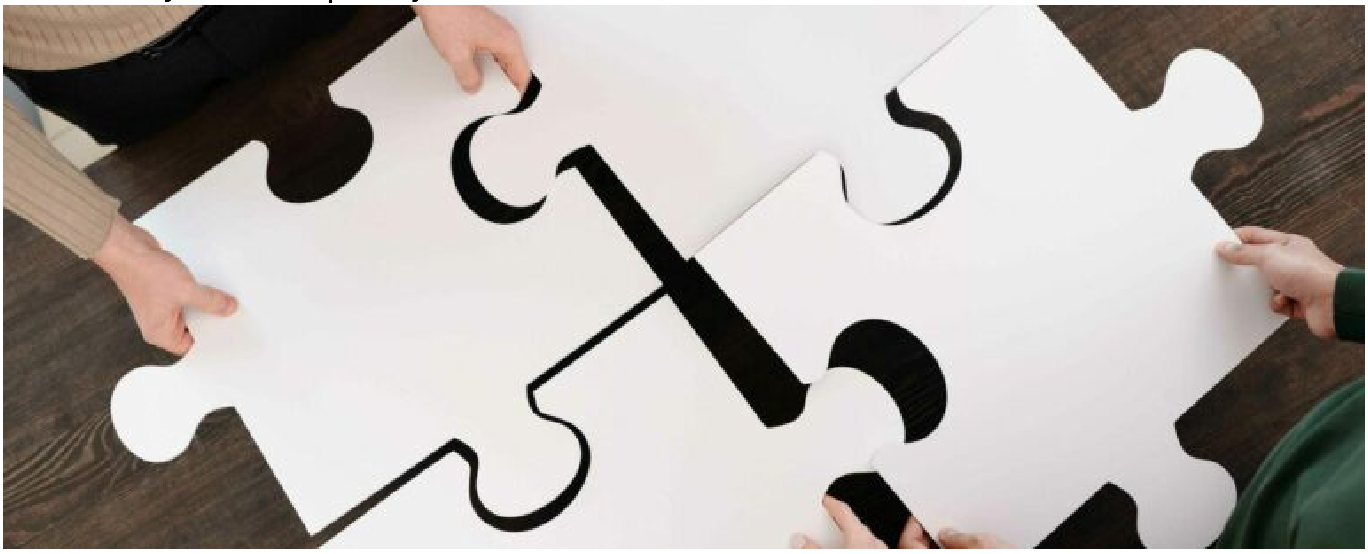
The Rise Of Cross-Border M&As & Merger Control

written by KSANDK | July 7, 2022



Cross Border M&A

The previous few decades have seen corporates around the world seek competitive advantage over each other, primarily due to the accelerated expansion of commercial markets around the world. Due to the difficulties of growing in an increasingly compact global market, businesses have sought to follow their increasingly international clientele across geographical borders. As a result, cross-border mergers and related acquisition activity have similarly expanded at unprecedented rates due to globalization for several reasons, such as deregulations, privatization, and corporate restructuring. Cross-border mergers and acquisitions are thus becoming routine in the global business environment. As per the statistics, cross-border deals totalling more than $2.1 trillion were made in 2021, an increase of 69% from the previous year. [1]

The phrases 'cross-border M&As' or 'overseas merger and acquisition' describes a deal involving two or more businesses based in different nations. [2] Such a deal creates a new legal entity by combining the activities and assets of the merging entities. Consequently, a former business receives the assets and operations of a local company, and the former business joins the latter as an affiliate.

Merger Control: Legislative Context In India

The 'merger control' methodology is used to assess the mergers and acquisitions by relevant competition legislation. [3] Merger control is essential to keep a check on entities to prevent them from making the market volatile with the influence they have. The Competition Act of 2002 is legislation that governs mergers and acquisitions (as well as merger control) in India for this very purpose. [4]

The act specifies certain thresholds under which parties are allowed to collaborate. Adding a clause to Section 5, the new Competition Amendment Bill of 2020 enables the Competition Commission of India (CCI) and the Central Government to specify new thresholds for merger notice. The CCI will be able to set sector-specific thresholds thanks to this threshold, which can be issued in the public interest.

Sections 5, 6, 20, 29 and 31 of the Competition Act, 2002 (which have been in effect since June 2011) specifically address merger control. The Ministry of Corporate Affairs (MCA) of the Indian government and the Competition

Commission of India (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011, both regulate merger control (Combination Regulations) as well.[5]

Merger Control Vis-À-Vis Cross-Border M&As

Some mergers may reduce the competitiveness of the market, which would negatively affect the entire business ecosystem. This might occur if the merger creates a monopolistic firm that abuses its position by imposing entry obstacles, setting discriminatory prices, and reducing output. These negative consequences can exceed the alleged advantages of a merger.

With that in mind, a crucial clause regarding cross-border mergers was added to the act in the 2007 amendment. It states that no combination may be completed until two hundred and ten days have passed since the notice was given to the CCI or until the Commission has issued orders under Section 31 approving, rejecting, or changing the terms of the proposed combination. Further, Section 32 of the Act gives the CCI extra-territorial power to review a combination between parties outside of India and impose orders against it if it has a noticeable negative impact on the competitiveness in India.

Noteworthy Implications Of Recent Amendments

The recent amendments to the Competition Act have brought up several ways in which cross-border M&A have been impacted. Some of them are:

Fiscal threshold restriction: Due to fiscal threshold restrictions, a lot of cross-border transactions – particularly those in capital-intensive industries like petrochemicals or national banks which do not necessarily affect competition in India – would need to be approved by CCI if one of the parties (domestic, international or in aggregate) is big enough to go over a certain monetary threshold. This requirement necessitates an inspection from CCI’s end by bringing regular transactions under the purview of its control even if they hold comparatively lesser influence, which is not ideal. Such thresholds could be unfriendly to foreign businesses and could indirectly discourage them from investing in Indian sectors.

Jurisdictional issues in cross-border transactions: The possible contradiction between different nations' competition laws is a crucial topic of concern about cross-border mergers. The potential for contradictory rulings by two different competition authorities over the same merger transaction is a significant issue associated with the plurality of countries. It is because other countries have different guiding principles for competition authorities when determining the impact of any combination. For instance, Section 32 gives the CCI the jurisdiction to look into and make decisions in situations where transactions that take place outside of India still impact competition in India and gives the body jurisdiction over a corporate entity if the consequences are negative. However, the act falls short of explaining the process of implementing such orders and how they would align with the legislation of the country from which the corporate entity originates.

Merger review: Merger review is an ex-ante activity, as opposed to typical situations of abuse of dominance or anti-competitive agreements, which call for an ex-post investigation. It determines if a grouping of cross-border merging parties would ultimately result in the development of a monopoly in India, the CCI must employ the ‘rule of reason’ approach. The investigation is somewhat speculative since it anticipates a future series of potential events.

Timelines: The Competition Act mandates a waiting time of 210 days before the effective date of any combination. Compared to other foreign authorities, the CCI has a prolonged review period. It may be necessary for the merging companies to postpone making crucial business decisions if the CCI takes such a long time to approve a planned merger. Overseas investors accustomed to the shorter review period in their home nations may consider this a barrier to their business plans and look for alternative options in other countries.

Remarks

The presence of cross-border mergers indicates a healthy economy. Its significance may be determined by the fact that they account for almost 70% of all mergers globally. The expanding trend of inorganic development through mergers and acquisitions amongst Indian corporates is attributed to a strong Indian economy, progressive government policies, and newly discovered business dynamism.

However, regulations surrounding merger control are still a recent development in India, having been developed in 2011. The CCI has had to oversee complex mergers in that time, and while it has progressed in terms of smoothening procedures and speeding up the process of approvals or disapprovals. With that in mind, striking a clean balance between restriction and authorization is essential.

The 2007 Amendment to the Competition Act of 2002 aimed to fix several problems with the act but only partially succeeded, leaving many other issues that still need to be handled. The government of India recently established a Competition Law Review Committee to examine and offer further amendments to the Competition Act. It is expected that the government will act on the committee's suggested reforms, which is good news if India is expected to develop further as a strong global participant in the merger and acquisition market.

1. https://www.igi-global.com/dictionary/cross-border-mergers-and-acquisitions-ma/54237
2. https://www.concurrences.com/en/dictionary/Merger-control-procedure
3. https://www.mca.gov.in/Ministry/actsbills/pdf/The_competition_Act_2002.pdf
4. https://uk.practicallaw.thomsonreuters.com/0-501-2861?transitionType=Default&contextData=(sc.Default)&firstPage=true