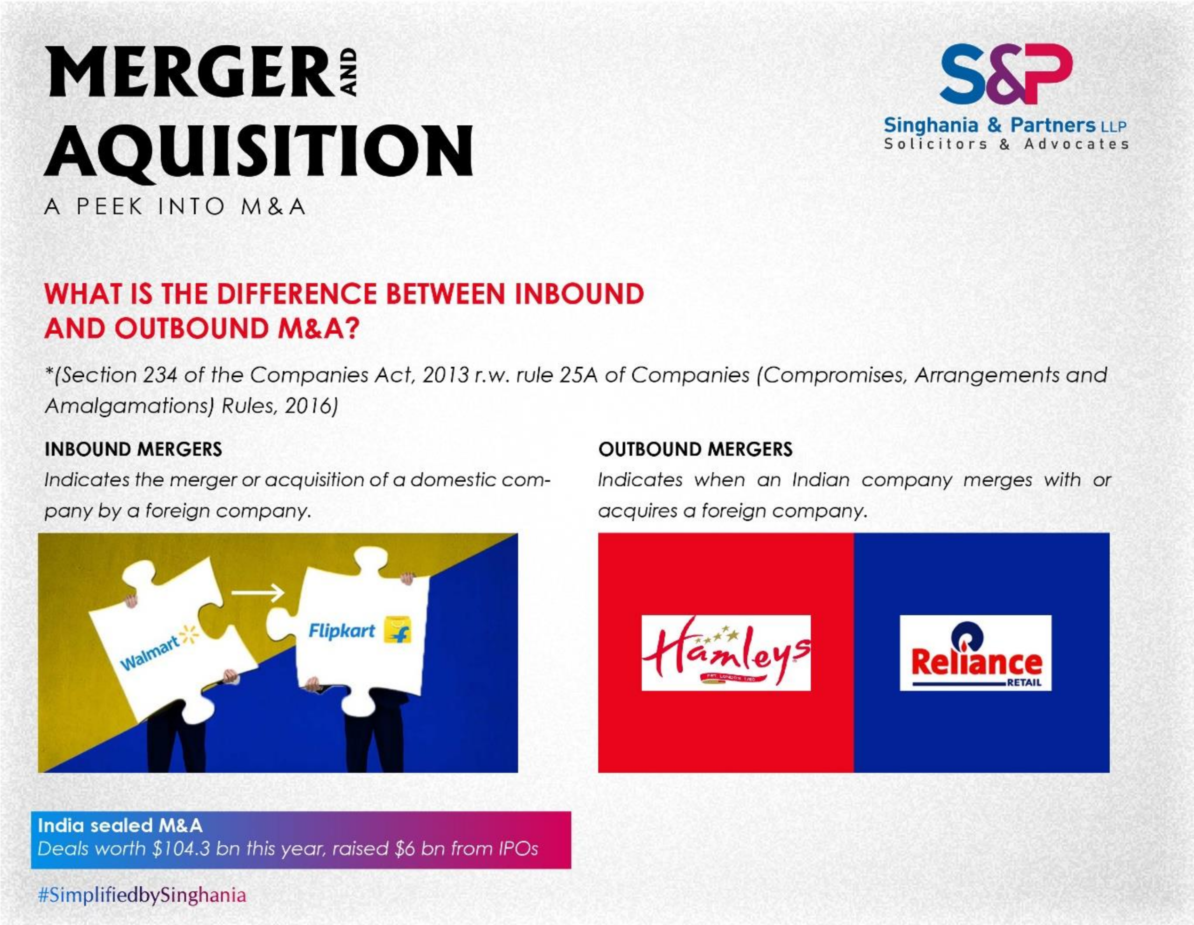
Inbound and Outbound Mergers



A merger that happens between two companies across borders is called a cross-border merger. With economies getting globalised, the concept of cross-border mergers is increasing significantly. It allows the expansion of companies globally. If India is to be placed on the global commercial map, a solid legal framework for cross-border mergers is required. This is the rationale behind the introduction of *Section 234 of the Companies Act, 2013*. The need for a cross-border merger stems from the desire for economic growth and scale economies.

Section 234 of the Companies Act, 2013 which was brought into effect from 13th April 2017, provides for the legal framework and hence, operationalising the concept of cross-border mergers.

Cross-border mergers is governed by the following laws in India:

1. The Companies Act 2013;
2. Competition Act 2002;
3. SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011;
4. Transfer of Property Act 1882;
5. Indian Stamp Act 1899;
6. Insolvency and Bankruptcy Code 2016;
7. Income Tax Act 1961;
8. The Department of Industrial Policy and Promotion (DIPP);
9. IFRS 3 Business Combinations;
10. Foreign Exchange Management (Cross Border Merger) Regulations, 2018;
11. Foreign Exchange Management Act, 1999 (FEMA).

There are two types of cross-border mergers mentioned in the Companies Rules, 2016 under the Companies Act, 2013:

1. **Inbound Mergers:** An inbound merger happens when a foreign company merges with the Indian Company resulting in an Indian company being formed. In simple words, when a foreign company merges with or acquires an Indian company, it is called an inbound merger. In this case, the resultant company is an Indian company.

   Eg. Acquisition of a 77% stake in Flipkart by Walmart.

   Another example could be Acquisition of Ranbaxy by Diachi.

2. **Outbound Mergers:** An outbound merger is one where an Indian company merges with a foreign company resulting in a foreign company being formed. In simple words, when an Indian company or domestic company merges with or acquires any foreign company, it is called an outbound merger. In this case, the resultant company is a foreign company.

Eg. Acquisition of Jaguar and Land Rover by Tata Motors in 2011, Acquisition of Hamleys by Reliance Group, and Acquisition of Corus by Tata Steels are some examples of Outbound Mergers.

There was no provision of Outbound mergers prior to the implementation of the Companies Act, 2013. The Reserve Bank of India (RBI) issued the Foreign Exchange Management (Cross Border Merger) Regulations 2018 to regulate cross-border mergers.

Implication of Foreign Exchange Management (Cross Border Merger) Regulations 2018: Until March 2018, it was not possible for an Indian company to merge with a foreign company. Indian companies could only merge with an Indian company under the merger framework sanctioned under corporate law at that time. In March 2018, RBI finally notified the Foreign Exchange Management (Cross-Border Merger) Regulations, 2018 which allowed an Indian enterprise that wishes to merge with foreign firms to do so with the RBI's prior clearance.

Section 234 of Companies Act, 2013:

"Merger or amalgamation of a company with foreign company. —
(1) The provisions of this Chapter unless otherwise provided under any other law for the time being in force, shall apply mutatis mutandis to schemes of mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government: Provided that the Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this section.

(2) Subject to the provisions of any other law for the time being in force, 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 the terms and conditions of the scheme of merger may provide, among other things, for the 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, as the case may be, as per the scheme to be drawn up for the purpose.

Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016: Merger or amalgamation of a foreign company with a Company and vice versa.
(1) A foreign company incorporated outside India may merge with an Indian company after obtaining

prior approval of the Reserve Bank of India and after complying with the provisions of sections 230 to 232 of the Act and these rules.

(2) (a) A company may merge with a foreign company incorporated in any of the jurisdictions specified in Annexure B after obtaining prior approval from the Reserve Bank of India and after complying with provisions of sections 230 to 232 of the Act and these rules.

(b) The transferee company shall ensure that valuation is conducted by valuers who are members of a recognised professional body in the jurisdiction of the transferee company and further that such valuation is in accordance with internationally accepted principles on accounting and valuation. A declaration to this effect shall be attached with the application made to the Reserve Bank of India for obtaining its approval under clause (a) of this sub-rule.

(3) The concerned company shall file an application before the Tribunal as per provisions of section 230 to section 232 of the Act and these rules after obtaining approvals specified in sub-rule (1) and sub-rule (2), as the case may be.

The existing legal framework for M&A in India is favourable to attract foreign investment. At the same time, this allows Indian companies to have global market access which in turn would increase India's global economic presence. The current legal framework of cross-border mergers is still at a nascent stage, however, the government is taking sufficient steps to provide a smooth enabling environment for the same.