Chapter 1

AN INTRODUCTION OF CORPORATE EXPANSION STRATEGY – MERGER AND ACQUISTION

The pioneer aspiration of every country in the world is to upbringing standard of living of every citizen. In order to achieve the same countries policies are keep on changing with the demand arisen due to time. In the post-Independence time India followed conservatism approach. The policies were made with lots of regulation to prevent anything like before independence. In 1991, India had gone under major economic reforms. These changes are designed to stabilize growth and to make structural reforms in Indian economy. A well-known 'The LPG' reform (Namely Liberalization, Privatization, and Globalization) has affected the functioning and governance of Indian corporate sector. With this India is set to fly around the globe. Corporate Enterprises started to revise their strategy with survival and growth plan in the dynamic and highly competitive environment. The corporate restructuring became a normal phenomenal business scenario. The Merger and Acquisitions and Internal Restructuring became most commonly used and attractive restructuring strategies.

The merger and acquisition is not a new concept for the Indian economy. In 90's corporate entities have done mergers and acquisition in order to prove their superiority in the respective business sector. The purpose of merger and acquisition is changing with the time. In most of the cases it has been used as corporate expansion strategy in order to achieve purposes like core competency, Market share, Global competition etc. But in recent times the merger and acquisition has been used as defensive strategy to survive in the market competitiveness. *For Example,* merger of Idea - Vodafone (India) is the mother of the all mergers in the telecom sector. The purpose of this strategy is to survive against strong market penetration made by Jio (Reliance). The merger and acquisition is long term business strategy. The entire chapter is divided into two parts; first part is conceptual theories and tactics and second part is legal framework applicable to Merger and Acquisition.

Part A: Conceptual Theories and tactics

1.1 - Corporate Restructuring

Corporate restructuring is a tool to meet challenges which makes business ease of going. This process is consisting portfolio and asset restructuring, Internal restructuring, Divestment, Merger and acquisition, Financial restructuring. Corporate entities redesign their business with a view to better management of their portfolio which yields enough to improve competitiveness and shareholder's value. The impact of economic reforms of India leads to large competition, Imports, diversification, economy of scale etc. Indian entities are required to think immediately about restructuring in order to make Indian industry globally competent and paying good amount to shareholders. Companies are trying to consolidate themselves in areas of core business and divest business where they do not have financial and competitive advantage. There are four types of corporate restructuring.

- **Financial Restructuring**: It includes change in Capital base and Raising finance for new project. It is in order to get back on track from financial distress without going into liquidation. Buy back, Alteration or Reduction in Share capital, Long term debt funds are techniques of financial restructuring.
- **Market Restructuring**: It is related to company's core competency to be used in its product market segment.
- **Technological Restructuring**: It is developing of new technology that change the way of operation of entire industry. Market and Technological Restructurings affects the employees and leads to new training program for them. Companies also improve the efficiency and make alliance with company which has advanced technology. Joint Venture, Strategic Alliance, Franchise are techniques of Market and Technological Restructuring.
- **Organizational Restructuring**: It deals with the alteration of internal structure of the organization. The procedure for improving capacity of Personnel of all three level namely corporate level, Business level and function level is implemented. So they respond to changes more rationally and adopt the same.

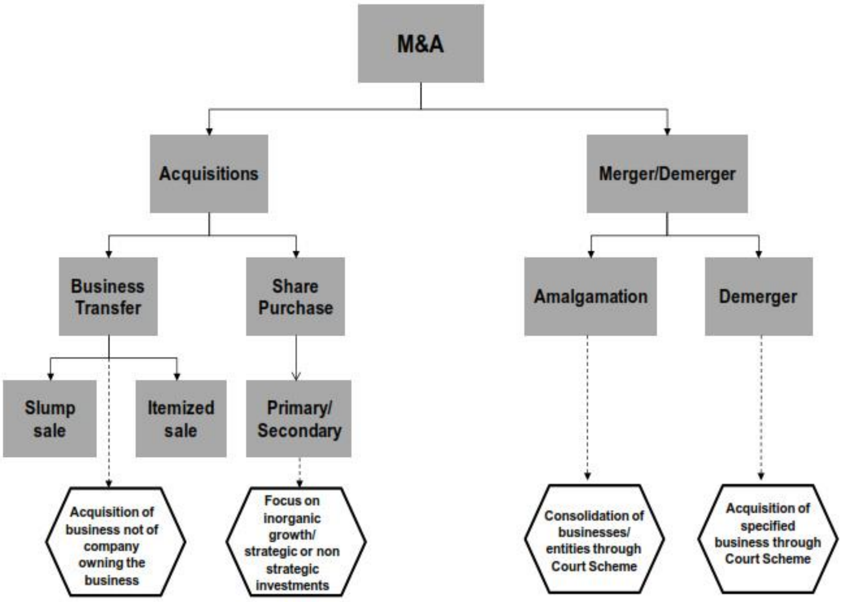
The Merger and Acquisition is a key option of corporate restructuring.

1.2 - Merger and Acquisition

The transactions of merger and acquisition consolidate two entities in terms of ownership, business unit or resources. The aspect of strategic management of merger and acquisition allows entities to expand, divest and change the nature of business or competitive position in order to achieve growth. The center approach of merger and acquisition is to create more value together compared to compete individually. The reasons for merger and acquisition are as follows:

- ✓ To get benefit of maximum production which result into reduce cost per unit that arises from increased total output of product known as economies of scale.
- ✓ Exploring technological advancement, buying small companies with unique technology will benefit the bigger company.
- ✓ Avail tax benefit which is implicit rather than explicit motive.
- ✓ Establish dominance, a combination of giants result into potential monopoly in the market.
- ✓ Avail competitive advantage in terms of defensive strategy and attacking strategy both.
- ✓ To achieve rapid growth by making presence widely.
- ✓ To improve profitability, Growth rate, Market value of stock etc.
- ✓ Additional customer base and market.
- ✓ Minimize the internal risk and dependency on single product or market.

1.2.1 - Types of Merger and Acquisition.



(Figure 1.1- Source: ICSI Study Material for Professionals)

Merger and Acquisition includes number of transactions such as Merger, Acquisition, Amalgamation, Consolidation, Tender offer, Purchase of Asset and Management buy-out.

- **Merger**

The term merger and amalgamation has not defined in any statute. In General, merger and amalgamation are known as single terminology and used interchangeably. However a thin line of difference exists.

“Merger’ means combination of two or more entities, whereby the identity of one or more entities is lost resulting in single entity”. [1]

“Amalgamation’ means two or more entities combine and losses their identity to create new entity with separate legal entity”. [1]

A merger of two entities can be done either by way of amalgamation or absorption or by formation of new company. The Board of Directors of both the companies approves the combination along with shareholder’s approval.

Ex. An acquisition of eBay India by Flipkart
A merger of Vodafone and Idea etc

- ***Horizontal Merger***

"A merger between two or more companies, selling similar products, in similar market, having direct competition with each other, decreases competition in the market". [1] The main aim of horizontal merger is to get advantage of economies of scale with optimum production capacity, reduce competition, achieving near monopoly and control over a market.

Ex. Facebook's acquired Instagram in 2012 for US$1 billion. Both the companies Facebook and Instagram operated in the same industry and were in similar production stages in terms of their photo-sharing services. Facebook, for strengthening its position in the social media and social sharing space, saw the acquisition of Instagram as an opportunity to grow its market share, increase its product line, and reduce competition and access potential new markets.

- ***Vertical Merger***

"A Merger between two or more companies, operating in same industry but at different stage of production process is known as vertical merger". [1] In other words, a merger between two or more companies where one buys or sells something from or to the other. It can be either Forward Vertical Merger or Backward vertical merger depending upon stage of production process.

- ***Conglomerate Merger***

"A merger between two companies having no common business areas is known as conglomerate merger". [1] The aim of conglomerate merger is to achieve big size and diversified line of business. *For Example* cement manufacturing acquires watch manufacturing unit.

- ***Congeneric Merger***

"A merger between two or more companies, which are related to each other in terms of customer groups, functions or technology, is known as congeneric merger". [1] *For Example*, a merger between computer system manufacturer and UPS manufacturer.

- ***Cash Merger***

"A certain part of the purchase consideration is paid in Cash to the certain shareholders of the target company in proportion of their holdings, is known as cash merger". [1]

- ***Downstream Merger***

"A parent company is merged with subsidiary company is known as downstream merger". [1]

- ***Upstream Merger***

"A subsidiary company is merged with parent company having potential holdings in subsidiary, is known as upstream merger". [1]

- **Acquisition**

One entity takes control over the stock of another entity, equity interest or assets. It is known as the purchase of controlling interest in the share capital of another existing company. Even after take over and change in the management, companies retain their separate legal entity. *For Example*, Flipkart acquired Myntra for US$ 300million. Both the companies are having their separate entity and doing business. In case of acquisition of entity against the will and forced acquisition is called takeover.

Difference between Merger and Acquisition

Merger	**Acquisition**
One or more individual entities combine resources to create new joint organization.	A purchase of one entity by another entity. Usually small one by large. Exception Tata – Corus.
Old Entity ceases to exist and new entity emerges.	A new entity does not emerge.
Combination of two entities with new structure of ownership and management.	Takeover of all management decisions
If takeover is friendly called merger.	If takeover is hostile called acquisition.

The distinction between merger and acquisition is less clear because from the economic and commercial point of view, in both the cases transaction will result into consolidation of all asset and liabilities under the one entity. In other words, "the real difference is lies in how the nature of purchase is considered and communicated to, and received by the acquiree company's Board of Directors, employees and shareholders". [2] A stock swap occurs with swap ratio in order to discharge purchase consideration partly or fully, when shareholders' ownership of the acquiree company's shares are exchanged for shares of the acquiring company as part of a merger or acquisition. During a stock swap, each company's shares value must be calculated accurately in order to determine a fair swap ratio. *For Example*, A merger of Sun pharma and Taro gets demerged after 3 years of merger because complaint filed by shareholders of Taro for undervalued calculation of share price for share swap.

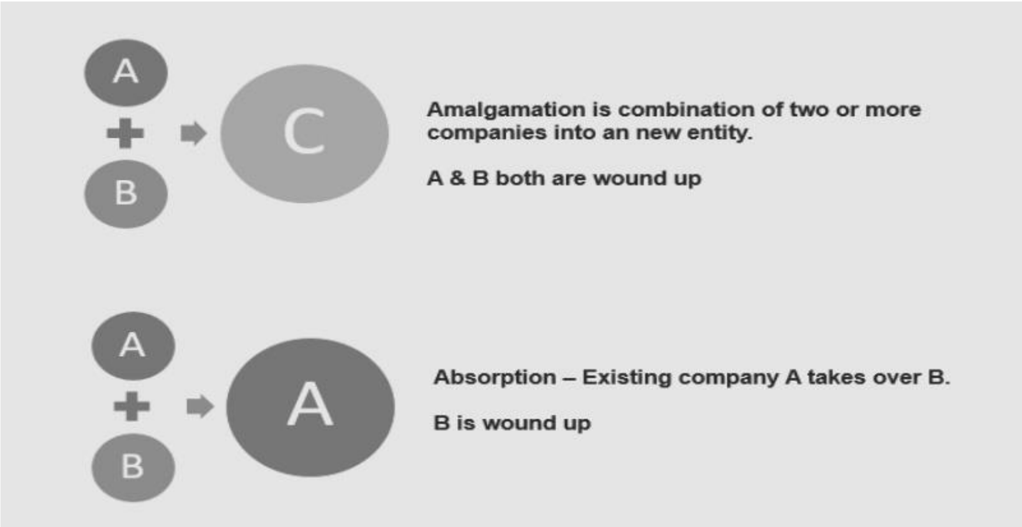
The top 5 Merger and Acquisition deals made In India till 2018

Target Name	Acquirer Name	Ranking value inc. of net debt of target company ($ Mn)	% Sought	Target ultimate parent
Flipkart Group	Walmart Inc	16000	77	Flipkart Group
Essar oil Ltd	Petrol Complex Pte Ltd	12907.251	49.1	Essar Group
Hutchison Essar Ltd	Vodafone Group PLC	12748	67	Hutchison Whampoa Ltd
Corus Group PLC	Tata Steel UK Ltd	12694.638	100	Corus Group PLC
Idea Cellular Ltd –Mobile Bus	Vodafone Group PLC – Vodafone Asts	11627.319	100	Idea Cellular Ltd

(Table 1.1 - Source: ICSI Study Material for Professionals)

Amalgamation

"It is termed as combination of two or more entities into a new entity. It includes either two or more entities join to form a new entity or absorption of one by another". [1]



(Figure 1.2 - Source: ICSI Study Material for Professionals)

A defined legal process has to be followed for combining two or more entities for forming a new entity or to absorb one entity by another. The shareholders of absorbed or merged or with lost identity will get shares of newly formed or existing entity's shares in exchange by considering appropriate swap ratio. Selected or all the resources namely property, assets, liabilities, human resource of one or more companies is taken over by another or are absorbed by and transferred to an existing entity or a new entity.

If a new entity named X is formed to take over the business of an existing entity named Y which is wound-up then the said transaction is called as External Reconstruction.

Consolidation

A consolidation creates a new company by combining resources of the two or more existing companies. "The approval of Shareholders of both the companies is required for the consolidation, and subsequent to the approval, receive common equity share in new company. *For Example*, In 1998 Citicorp and Traveler's Insurance Group announced a consolidation, which resulted in Citigroup". [3]

Tender Offer

One company offers directly to the other company's shareholders to purchase the outstanding stock of the other company at a specific price. The acquiring company communicates the offer. *For Example*, Johnson & Johnson made a tender offer in 2008 to acquire Omrix Biopharmaceuticals for US $438 million.

Acquisition of Asset

"In a purchase of assets, one company acquires the assets of another company with prior permission of that company's shareholders" [3]. The approval of shareholders is necessary to be taken for the companies, whose assets are being acquired. "The purchase of assets is typical during bankruptcy proceedings, where other companies bid for various assets of the bankrupt company". [3]

Management Buy Out

A management buyout means acquisition of the business by the employees (Managers) of such business. Management team of a company purchases the assets and operations of the business they used to manage. They find ownership of the business more beneficial rather than managing the same as an employee.

Recent Mergers and Acquisitions in India (Till 2018)

1. Vodafone India and Idea Cellular

A merger of Vodafone India and Idea Cellular is treated as country's biggest merger in telecom operator `Vodafone India Ltd.' Forbes magazine named it with the name of 'Mother of all Merger' in telecom industry. The value of said merger is nearly USD$23 billion with a 35% market share. It is the top merger and acquisition deal of 2017-18 in terms of deal value. Vodafone and the Aditya Birla Group will have a joint control of this combined company. Combining the Vodafone and idea customers, The merged entity will have over 408 million customers, nearly 42% customer market share (CMS) and nearly 33% revenue market share (RMS), leaving it stronger placed to take on competitive pressures created by Jio, with 160 million subscribers and over 16% CMS and 15.3% RMS. Airtel has a CMS of 29.5% and an RMS of 31.5%. The approval for Idea-Vodafone merger has been cleared by the stock exchanges, Securities and Exchange Board of India, Competition Commission of India, foreign direct investment clearance from the department of industrial policy and promotion, approval given by DoT as licensor and the merger after approval of NCLT is completed in August 2018.

2. Flipkart and eBay

Indian e-commerce giant Flipkart acquired the Indian business unit of eBay. The said acquisition happened in 2017. The transaction further having agreement between eBay and Flipkart for cross-border sale, in exchange of equity stake in Flipkart, eBay had made cash investment of $500 million and sold its eBay India business to Flipkart. As a benefit of this transaction, Flipkart customers will get additional product choices with the wide array of global inventory available on eBay while eBay customers will have access to more unique and traditional Indian inventory from Flipkart sellers.

- **Demerger**

"Demerger is a business strategy which allows making parts of one large business". [1] Demerged part of the business can be managed by own or sold or dissolved. It is suitable strategy to raise fund or to invite or prevent acquisition. A non-core business assets or unit can be sold and fund shall be raised through demerger. Demerger is also useful in creating separate legal entities to handle different operations. Demerger is transfer of some part / undertaking of one company to another company which operates separately from the original transferor company. Shareholders of the original company are generally given an equivalent share in the new company or paid off in cash. The demerger contract specifies all the rights and obligation of demerged company and resulting company along with restrictions, if any. *For Example,* SBS Biotech sold its unit of Brand oil Kesh King to Emami.

<u>The following are types of Demerger:</u>

- ***Divestiture***

"Divestiture means sell or disposal of assets or any of its business undertakings or unit of the company for cash". [1]

- ***Spin-off***

"The shares of the new entity are issued to the shareholders of the parent company on a pro-rata basis". [1] The parent company also retains ownership in the spin-off entity. Spin-offs have two approaches that can be followed.

In the *first approach*, the company distributes all the shares of the new entity to its existing shareholders on pro-rata basis. This leads to the creation of two different companies holding the same proportions of equity as compared to the single company existing previously.

The *second approach* is the floatation of a new entity with its equity being held by the parent company. The parent company later sells the assets of the spin-off company to another company.

- ***Split – up***

"It is a process of reorganizing a corporate structure whereby all the capital stock and assets are exchanged for those of two or more newly established companies resulting in the liquidation of the parent corporation". [1]

- ***Split – off***

"It is a process of transferring shares of demerged subsidiary or Division Company to the parent company". [1] It is a process of reorganizing a corporate structure. Some of the shareholders in the parent company are offered shares in a division company in exchange for their shares in the parent company.

- ***Equity Carve – out***

"Equity carve-outs means certain a percentage of shares of subsidiary company are being offered to public". [1] Due to this the assets of the parent company and the subsidiary entity are now treated as separate. Now, the shares of the subsidiary entity are available to trade publicly. *For Example*, India's one of the largest engineering and Construction Company Larsen and Toubro Ltd (L&T) adopted "asset- Light strategy" by separating business units into independent subsidiaries by selling a stake in businesses. It is useful strategy for generating capital for investment in fresh project. It is considered as corporate proxy in broader view of economy.

- **Slump Sale**

"The transfer of business unit or undertaking on going concern basis, for lump sum consideration, is known as slump sale". [1] This strategy is widely used in India as corporate strategy. The reasons of slump sale are as follows:

- ✓ To improve poor performance of business.
- ✓ To strengthen financial position of the company.
- ✓ To eliminate negative synergy and facilitates Strategic Investment.
- ✓ To avail tax benefits and regulatory advantage associated with slump sale.

Purchase consideration in slump sale shall be discharged lump sum without value being assigned to individual assets or liabilities in cash or kind.

- **Business Sale/ Divestiture**

"Divestiture means sell or dispose of assets or division of the company for cash of combination of cash and debt". [1] It is useful in enhancing liquidity or reduced debt burden of the company by realizing value of non-core business assets to utilize the same in for core business of the company. *For Example*, Nestle has sold its US chocolate businesses named Baby Ruth, Butterfinger and Crunch to Ferrero for US $2.8 billion. Nestle made smart move by applying strategy to sell underperforming brands and refocus on prime and healthier products and fast-growing market.

- **Joint Venture**

"A Joint Venture is a business which came into existing by contractual arrangement between two or more parties, who agree to pool resources for the purpose of accomplishing a specific task of the business". [1] In a joint venture (JV), each party is responsible for profits, losses and costs associated with it. Joint venture is useful in case of one company lacks required resources like knowledge, human capital, technology or access to a specific market for doing project on its own. It is strategy to grow together. *For Example*, A Ltd. owns manufacturing and technological facilities that B Ltd. needs to create and ultimately distribute a new product. A joint venture between the two companies gives B Ltd. access to the equipment without purchasing or leasing it, while A Ltd. is able to participate in production of a product without incurring costs to develop. Both companies can enjoy benefits in the joint venture.

The types of Joint Venture are as follows:

- ***Equity-based joint ventures***

In this type of joint venture, two or more companies set-up a separate company to work on certain project with specific objectives. The objectives of the joint venture should be mutually decided in order to enhance activity related to marketing and distribution, research, manufacturing, etc. Location of the new company or area of operation would be the place of any one company's country. Joint venture benefits majority of stakeholders associated with it having foreign and/or local private interests, or members of the general public through combine capital investment.

- ***Non-equity joint ventures***

Non-equity joint venture is also known as cooperative agreements, includes agreements related to technical service, franchise, brand use, management, rental, or one-time contracts. For example in a construction projects, non-equity arrangements means, a company is in need of technical services or technological expertise than capital. It is useful in modernizing business operation.

For Example;

1. A Vistara airline is a Joint Venture of Tata Sons with a foreign company named Singapore Airlines (SIA). A Vistara is the brand name of Tata SIA Airlines Ltd.

2. Tata Starbucks Pvt. Ltd. is a joint venture of Tata Sons with Starbucks Corporation of USA for running coffee shop in India.

- **Strategic alliance**

"A strategic alliance is an agreement to share resources between two companies for availing benefit of mutually exclusive project". [1] It is beautiful arrangement for making profit together. This strategy helps companies to develop and exploit the unique strengths over the competitive pressure. Companies can have widen customer base or utilize the surplus capacity. *For Example*, the world's largest producer of athletic foot-wear named Nike, do not produce a single shoe. Boeing, an aircraft company, makes little more than cockpits and wing bits. These companies, and other businesses in present times created strategic alliances with their suppliers for getting majority of things done in order to make final product ready for sale. Further, Etihad Airways of Abu Dhabi, had investment in India's Jet Airways in 2014. This alliance provided couple of benefits to both carriers, as it opens door for Etihad to 23 cities in India, and offers Jet Airways passengers' connectivity to the USA, Europe, Middle East and Africa that were previously unavailable to them. A Win-Win situation has been established.

- **Reverse Merger**

A reverse merger is exceptional merger to the merger process for availing benefits. A private company acquires a public company to become public company by saving time and money associated with the complicated process and expensive compliance of becoming a public company. So, Private Company acquires a public company first as an investment and then converts itself into a public company. There is another dimension exist for the concept of a reverse merger. A transaction is said to be reverse merger in case of; a weaker or smaller company acquires a bigger company (acquisition of Corus by Tata), or a parent company merges into its subsidiary company, or a loss-making company acquires a profit-making company. *For Example*, merger of Godrej Soaps, (profitable - turnover of 437 cr.) with Gujarat Godrej Innovative Chemicals (loss-making - turnover of 60 cr.), the merged company named Godrej Soaps. The following reasons for reverse merger are;

- ✓ To avail tax benefit under carry forward tax losses of the smaller firm, this allows the combined entity to pay lower taxes under Income Tax Act, 1961.
- ✓ To avail benefit of economies of scale of production.
- ✓ To establish stronger Marketing network
- ✓ To protect the trademark rights, license agreements, assets of small/loss making company

1.2.2 - Factors Responsible for Mergers and Acquisition.

- **External Factors**

- ***Regulatory Policies***

After independence large number of Mergers and Acquisitions happened but the government policies and regulations were not positively favorable. The horizontal pattern of mergers is found more in that period. The other pattern of corporate mergers had taken place during the controlled regime also. The government encouraged merger of sick units with healthy units.

For Example, Formation of Life Insurance Corporation (LIC) and nationalization of Life Insurance business in 1956 resulted in the takeover of 243 insurance companies.

The formation of National Textiles Corporation (NTC) was also to takeover of larger number of sick textiles units.

The introduction of section 72A in Income Tax Act 1961and The sections 18(1) and 18(2) of the Sick Industrial Companies (special provisions) Act 1985 encouraged the merger movement to merge sick companies to rehabilitate with healthy companies.

Before economic reforms also the industries were allowed to go for restructuring and consolidation through merger and acquisition but in liberalized format. After 1991 reforms government amended the MRTP Act, 1969 and removed sections related to concentration of economic power. So, now the permission of central government is not required for merger.

- ***Competitive Advantage***

To get competitive Advantage is one of the important motives for merger and acquisition. Reduce competition and achieving competitive strength by way of acquiring company is the main motive for hostile takeovers.

For Example, India Cements Ltd. Increased market share by acquiring Rassi Cements. In Pharmaceutical industries, Ranbaxy during 1996-97 acquired three companies to become market leader.

- ***Enhance Network***

The activity of merger and acquisition drives entire market. This activity creates a pattern and triggers a market change. It makes less geographical boundaries in terms of expansion in short time period. A span of customer base is possible only through the route of mergers.

For Example, ICICI Bank uses this route to enhance its customer base, for that it had acquired 57 years old Bank of Madura with its 264 branches and 1.2 million customers on March 2001. This acquisition gives a larger size balance sheet and extensive geographic reach to ICICI Bank.

➢ ***Pre-emptive motive***

Sometimes mergers and acquisitions have some pre-emptive motives. If the potential competitors plan to make a quick and easy entry in the market and then they used this track. In Indian market has also seen this type of acquisitions.

For Example, acquisition of Premier Tyres by Apollo Tyres.

Internal factors

➢ ***Growth***

Merge and Acquisition is mostly used as a strategy for Corporate Growth or expansion. Growth through merges may be in the form of product minded or empire builders. Product minded companies are seriously concerned with growth and profitability of a firm. But, however empire builders are typically concerned extensive acquisition of firms based on their financial acumen and their negotiating skills. HLL, RPG enterprises, Shaw Wallace, UB Group, Ranbaxy, Sun Pharma, etc. have used merger and acquisition route in establishing corporate empires.

➢ ***Scale and Synergy***

A merger and acquisition can improve acquiring company's profit earning capacity through cut in overhead costs, effective usage of facilities and resources. The activity is to raise funds at a less cost and effective application of surplus funds with high returns. This testifies economies of scale and synergy.

For Example,

Company A – Sale - 200 Cr.

Company B – Sale – 200 Cr.

Merged as AB – Sale – 500 Cr.

The difference of 100 Cr. (AB – (A+B)) is called as synergy gain out of transaction.

- ***Long-term Financial Considerations***

A Merger and acquisitions have long-term financial obligation. The companies now wish for group consolidation in order to strengthen their capital base and to build up their potential presence in domestic and global financial markets.

1.2.3 - Benefits of Mergers & Acquisitions

- **Benefits to the Company**

- ***Economies of Scale***

A merged giant entity yields various economies of scale. Merger increases profitability of the companies due to reduction in overhead cost and effective utilization of available resources. Economies of scale can be achieved with the effective and maximum utilization of combined production facility, distribution network, research and development and data processing system. In horizontal merger the available identical resources can be used in a better way. But vertical merger enjoy economies of scale from hi-tech efficiency, control over production process and better co-ordination.

- ***Synergy***

Merger is the way to generate synergies in managerial, operating and financial areas. Synergy is attained by reducing cost and to identify the distribution networks. ICICI took over ITC Classic and the former company got an opportunity to access latter's distribution network in a short-time frame.

- ***Technology***

The Company can enjoy the benefit of advanced technology by merging it with technologically dynamic industries. Mahindra and Mahindra (M & M) has acquired Schnowesis in 2007 by its subsidiary named MFGL Mauritius, which is the largest manufacturer of suspension, Power train and engine parts in Europe. Recent trends of the merger and takeover is based on technology only. *For Example*, Byju’s – whitehat jr.

- ***Diversification Strategy***

It is a growth strategy of a company to achieve firms already serving the target market or institute new facilities in the target region. Diversification is tool to hedge risk. A company when it wishes to diversify its business, it can better use the merger route rather than dependence on internal expansion. The board of directors of ICICI Bank has approved the acquisition of Sangli Bank for every 925 shares of Sangli Bank as 100 shares in ICICI Bank. Through this acquisition ICICI Bank can seek to leverage Sangli Bank's network over 190 branches and the existing customers and employees base across urban and rural area of Maharashtra and Karnataka.

- ***Deployment of Surplus Funds***

The rich companies having more surplus of fund invest their surplus funds by takeover of firms which starved of funds. The companies having sound track record can easily risk funds. These companies can make use of merger to invest their surplus funds. They acquire smaller competitors to eliminate competition in the market or they acquire totally unrelated business to penetrate the market into new segment.

- ***Avoid Unhealthy Competition***

Unhealthy Competition means more companies are doing business in limited market area. Market can experience cut throat pricing war between companies to attract the customers.

For Example, VIP Industries of Primal Group acquired Universal luggage and stopped the discount war between them.

- ***Acquisition of Brand names***

A well established and popular brand name is acquired for easy market penetration. The company having more surpluses of fund or to penetrate or to become a market leader buys well-known brand.

For Example, the wall mart acquires flipkart to penetrate India market. The Size of an entity is one of the important parameters for competition in domestic and global markets. The Enhancement of size is an attempt to achieve economies of scale.

Benefits to The Economy

- ***Consolidation of Capacities***

Mergers and acquisitions is an effective strategy to consolidate the company's earning profits or losses. Consolidation is used to revive sick units and to prevent industrial sickness. Competitive Strength can be increased through consolidation. Prof. Byung Naksong a Korean Economist said, *"Promotion of scale of economics and efficiency by encouraging mergers is one of the effective instruments used for the growth process, which made many of the large Korean firms highly competitive in the international market"*

- ***Concentrating on Core Competences***

The restrictions imposed by the Indian government in the past did not permit the big companies to diversify their business in the area of their core competencies. That was called 'license raj'. Economic liberalization initiated since 1991, facilitated the business units to rationalize their portfolios. Stiff competition made to them realize that time has come with the need for Indian Companies and Industries to focus on their core competencies.

- **Disciplining the Capital Markets**

Merger and acquisition is the way for the Capital Market to discipline itself. Inefficient and low performing companies were taken over by high performing companies, thanks to their low book value and share prices. If the acquirer feels that there is prospect in acquiring such companies and the shareholders are rewarded better, and thereby go for a merger and acquisition.

1.2.4 - Merger and Acquisition and Industry Life Cycle

Life of an every industry passes through different stages of life cycle like introduction, growth, maturity and decline. The merger or acquisition takes place during these stages of industrial life cycle are given below,

- **Introduction Stage**

Established firms in mature industries may acquire medium or small size firms in related or conglomerate business, because of their inability to take risk or due to lack of management competence that is required to manage the firms in the introduction stage. Small firms sell their business either to enjoy capital gain of the merger or they do not want to lease huge investments with managers who do not have long successful track record. Horizontal mergers take place in this stage between small firms and thereby these firms helping themselves in bringing together capital resources and management.

- **Growth Stage**

The same pattern of mergers and acquisitions in the introduction stage is also found in the Growth Stage. Such merger increases the possibilities of future rapid growth and profit prospects by mobilizing and investing plentiful financial resources.

- **Maturity Stage**

The motives of mergers in this stage are generally to avail the economies of scale in research and development, production and marketing. Many vertical mergers have witnessed this stage. Some times smaller firms also acquired by big firms with a view to inject management skill and to create broader financial base to the small firms.

- **Decline Stage**

Many horizontal mergers have witnessed in this stage in order to ensure the firm's survival. Vertical mergers witnessed during this stage have come forward to improve efficiency and profit margin. Concentric mergers between firms in related industries carve synergy by using existing capabilities. Conglomerate mergers are very common in the decline stage because of diversion of cash from the portfolios of declining firms to high growth business in other industries.

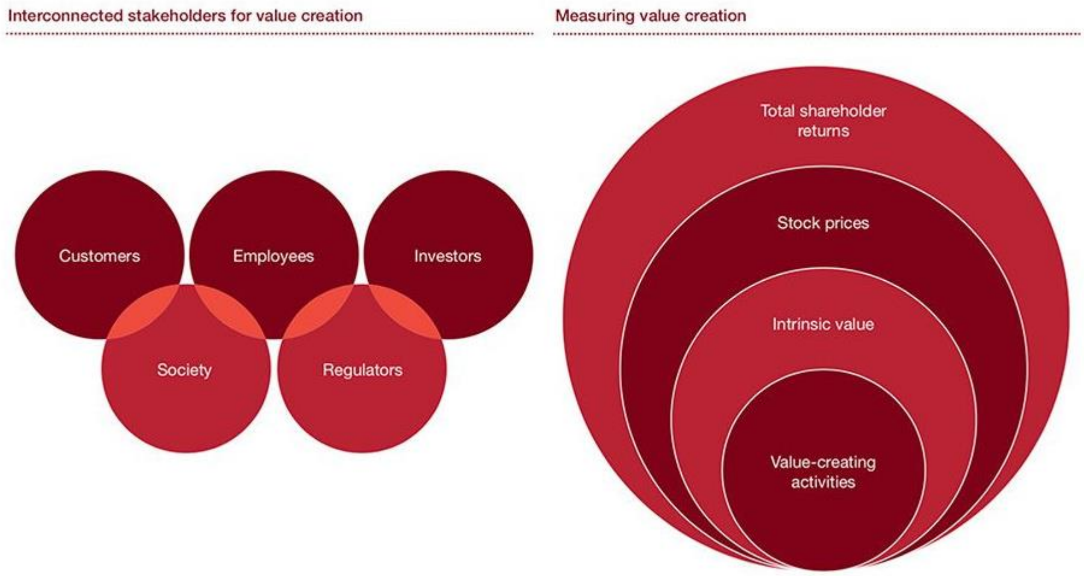
1.2.5 - Cross - Border Mergers & Acquisitions

Worldwide corporate entities continue to become more closely integrated through the process that is commonly referred to as globalization. Increasing globalization of international business and high degree of technological innovations adds strength to this present situation. Corporate restructuring, particularly mergers and acquisitions, has assumed an international dimension due to global economic integration and deconstructing of barriers to trade and investment. This trend encouraged not only cross-border mergers and acquisitions, but also organizational innovations such as strategic alliances to achieve competitive advantage. The approach to cross-border mergers and acquisitions is not a straight forward extension of the approach in domestic acquisitions. Cross-border mergers and acquisitions are complex due to differences in political and economic environment, corporate organization, culture, tradition, tax law and accounting policies between the countries of the acquire and the target company. Cross-border mergers and acquisitions have become a significant attribute to the global business landscape.

1.2.6 - Trend of Merger and Acquisition in India

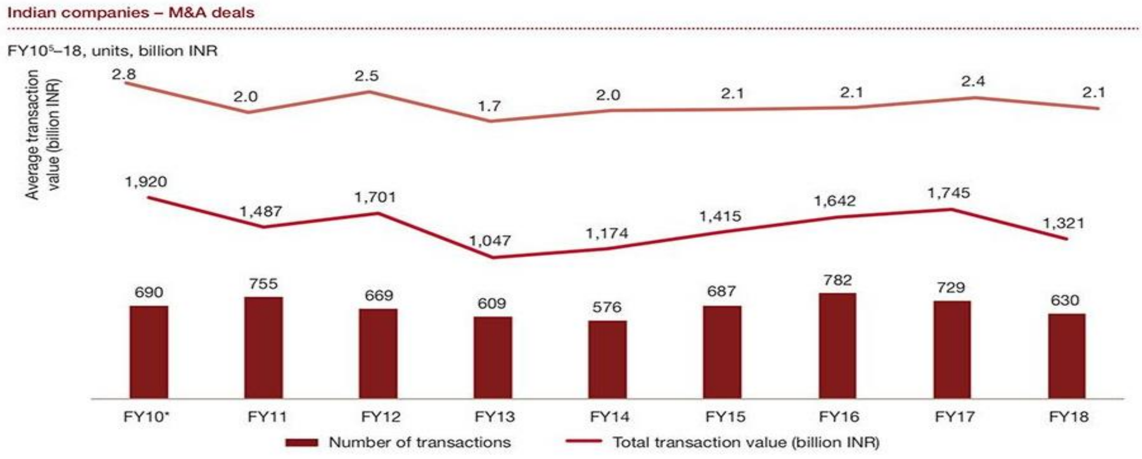
- **"Indian companies recognize the importance of merger and acquisition in value creation"** [4]

Merger and acquisition is a growth technique which is the most reliable way of generating additional value to the companies. Indian Companies have increasingly recognized this importance over the last decade. According to analysis from PwC, between 650 and 700 companies are acquired in India on an annual basis. In its report named 'Value Creation: Laying the foundation for mergers and acquisitions,' Big Four accounting and advisory firm PwC has explained the importance of value creation and the various factors to take into consideration when looking to generate more returns. The firm divides value creating into two broad categories, namely returns for the owner and returns for other stakeholders. When operating a business, most entrepreneurs are looking to achieve a few fundamental goals, including but not limited to reaching a revenue level higher than their capital costs.



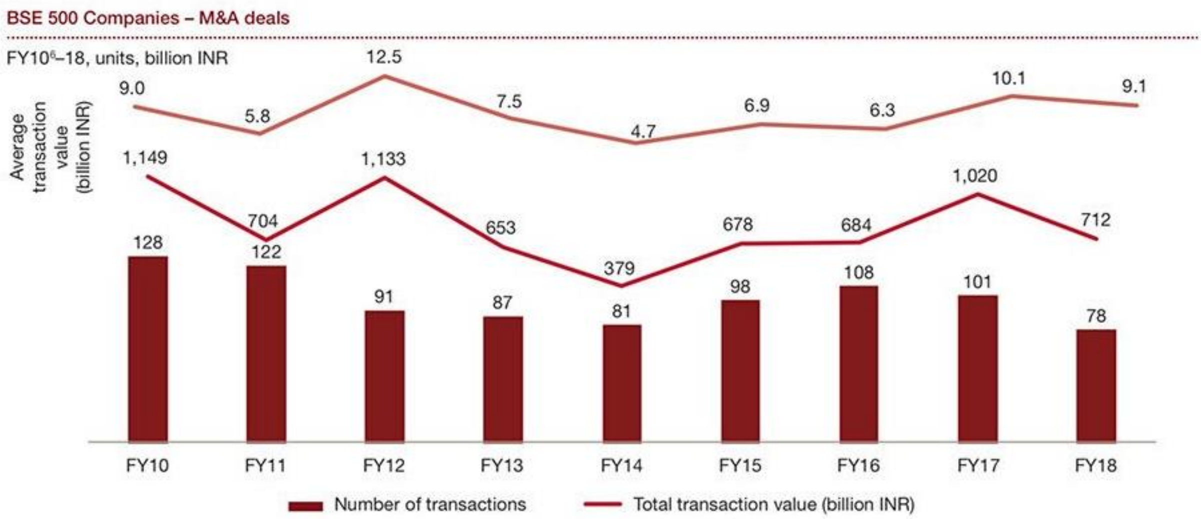
(Figure 1.3 -Source: Consultancy.in- News)

On the other hand, value creation becomes more complex. If successful, a business develops a relatively stable customer base, which gives a certain minimum level of value expectations. A large part of these expectations is the assumption that the company will remain up to date with the state of the art. Aside from customers, other stakeholders like company's own employees, investors and society as a whole, whose expectations are also likely to link with a company's growth. Those involved in creating a regulatory environment are also stakeholders in a firm's development. To this end, PwC has developed a multi- layered mechanism to measure value creation that extends beyond traditional frameworks such as EBITDA (earnings before interest, depreciation and tax as a percentage of revenues). According to PwC, EBITDA falls short in terms of measuring a firm's potential earnings.



(Figure 1.4 - Source: Consultancy.in- News)

As a result, PwC’s mechanism places value-creating activities at the center of measuring a firm’s success in this domain. The firm then places other broad metrics within the assessment framework, with intrinsic value being the next most important factor, followed by stock prices and total shareholder returns. In light of such a scenario of growing expectations, one of the most effective and time efficient methods of adding value for a company is through mergers & acquisitions. Inorganic growth offers immediate access to new customer bases, new technology as well as new products. Over the past decade, Indian companies have chosen precisely this avenue towards value creation. Nearly 3,400 Indian companies have engaged in merger and acquisition activity in some form or the other over the last decade. Annually, an average of 600-750 companies have been acquired in India over the last decade, each involved in transactions averaging at Rs. 2 billion.



(Figure 1.5 - Source: Consultacy.in- News)

As per the report, total value of merger and acquisition activity in India over the last three years stands at $120 billion, which jumps to $180 billion for the last five years, and a surprising $345 billion over the last five years. The growth in merger and acquisition activity has gone hand in hand with substantial growth in India's private equity sector in recent years. Commenting on the merger and acquisition scenario in India and across the world, Partner & Leader for Deals & Private Equity at PwC India, Sanjeev Krishan said, "*We live in a volatile, uncertain, complex and ambiguous world, and it will continue to become more so. This only means that what may seem right today may not be so tomorrow. These observations also apply to any pre-investment appraisal process, which has accordingly seen a significant jump in the intensity of efforts in recent times.*"

- **"EY: India to see healthy merger and acquisition activity driven by domestic deals"** [5]

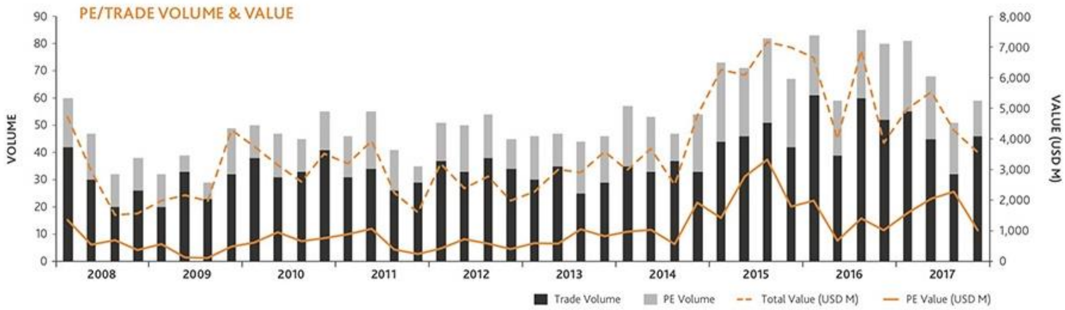
As India moves into the top 100 countries for ease of doing business, the activity of merger & acquisition in the country is expected to grow rapidly over the next years, according to one of the big fours global professional services firm EY. More than 50% of Indian corporate executives expect some form of merger and acquisition activity for their companies this year. Market trends across the globe, and particularly in India, are ripe for merger and acquisition activity. EY's Capital Confidence Barometer (CCB) for 2017 suggests that economic conditions such as domestic consolidation, market share expansion, and new market entry are all creating an environment in India that is conducive to deal making. Similar to the rest of the globe, India is riding a wave of digital advancement, as a result of which innovative startups are emerging rapidly, posing a significant threat to larger industry players. In response, incumbents of the industry are either strengthening their own digital capabilities in the country, For example, Deloitte and Grant Thornton - partnering with the smaller innovative firms or going on acquisition drives to engulf smaller operations. As a result, the expectation for growth in the merger and acquisition sector over the next year has grown substantially. In last year's CCB, 39% of the corporate executives surveyed expected their firm to engage in some sort of merger and acquisition activity in the following 12 months. This year, that percentage rose to 55%, in light of a 90% positive response to the macroeconomic scenario in the country.

(Figure 1.6 - Source: Consultancy.in – News)

In addition to their individual companies, 64% of the respondents surveyed expected an overall improvement in the domestic merger and acquisition market, which is strikingly higher than the 27% recorded in 2017. 69% of the respondents, meanwhile, expect deal pipelines to improve as well, particularly in light of a Rs. 2.1 trillion capital infusions into public sector banks. In terms of concrete deal closures, the number of corporate executive anticipating a spike in the number of closures has nearly doubled from 2017’s value to reach 74%. Indian executives don’t necessarily expect too much competition from Private Equity funds, with 20% expecting the same, although 26% believe that Private Equity has the potential to make a significant impact on the merger and acquisition sector in India. In light of a booming consumer market, change in consumer behavior is the biggest disruptor to the current market. Expectedly, digital transformation and increasing competition for digitally enabled players drew the second and third highest number of responses, at 28% and 24% respectively. 62% of the respondents expressed an interest in partnering with or acquiring smaller tech savvy firms. In summary, the report states, *“Overall, the outlook for merger and acquisition deal activity in the Indian market looks promising as companies embrace the on-going sector convergence/digital disruption and explore inorganic avenues to charter growth against a backdrop of supportive economy and easing credit conditions.”*

- **"Merger and acquisition activity in Indian mid-market industry slows to $18 billion"** [6]

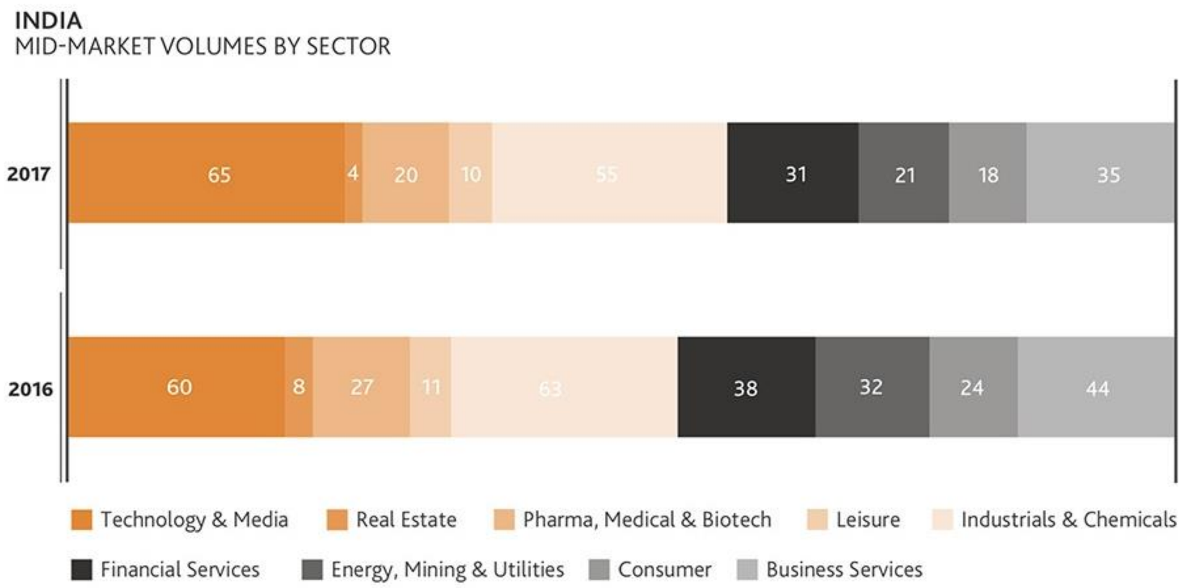
According to Karan Gupta, head of the Corporate Finance department at BDO India (Earlier known as Binder Seidman International Group), reflects on the state of the Indian mergers & acquisitions market for the mid-market segment. India is fast growing country with a growing major youth population and an emerging middle class that is driving consumption. These combined factors increase in demand for technological advancements, infrastructure development & upgrading, adoptive in new regulatory policy framework, and the 'Make in India' are driving sectorial growth. At the same time with the introduction of the new Bankruptcy code (IBC), stressed assets are available at attractive valuations. As a result, merger and acquisition activity is expected to surge, with ASSOCHAM's Year Ahead Outlook (AYAO) putting the overall merger and acquisition activity estimate in India at $50 billion in 2018. Despite the slowdown observed in early 2017 due to effects from the demonetization policy, the outlook for India remains largely positive. The Indian economy is expected to grow at 7.2% in 2018 and accelerate to 7.4% in the forthcoming year. following robust private consumption, public investment and structural reforms, according to a United Nations report.



(Figure 1.7 - Source: Consultancy.in-News)

India has continued to be a healthy deal-making market throughout 2017 and is expected to keep growing in the coming years. In the calendar year 2017, India witnessed more than $18billion worth of merger and acquisition activity in the mid-market segment. However, compared to 2016, when the mid-market witnessed merger and acquisition worth more than $21 billion, merger and acquisition transactions were lower in 2017 in terms of both volume and value.

This could partly be attributed to effects of demonetization, the initial phase of Goods & Services Tax (GST) implementation and rigorous implementation of the Insolvency and Bankruptcy Code (IBC) 2016. This in turn had temporarily paused a lot of merger and acquisition's due to take place in 2017. The total of mid-market deals in 2017 was 259 as compared to 307 in 2016. However, with the 'Make in India' theme, growth in consumption and effective structural reforms, the mid-market segment continues to see lots of activity. This is also driven by the mid-market businesses' investment in technology, need for capital for growth, increasing domestic market penetration and grabbing of overseas opportunities. Trade deals accounted for 69% of the total deals whereas private equity deals stood at 31%. This is very similar to 2016. Though the number of private equity deals in the mid-market reduced from 95 in 2016 to 81 in 2017, the private equity deal value increased by 36% for 2017 to $6.9 billion from $5 billion in 2016. Additionally, in Q4 of 2017, just 13 private equity deals carried a value of $3.5 billion – a stark contrast with the 28 deals at a value of $3.9 billion in 2016.

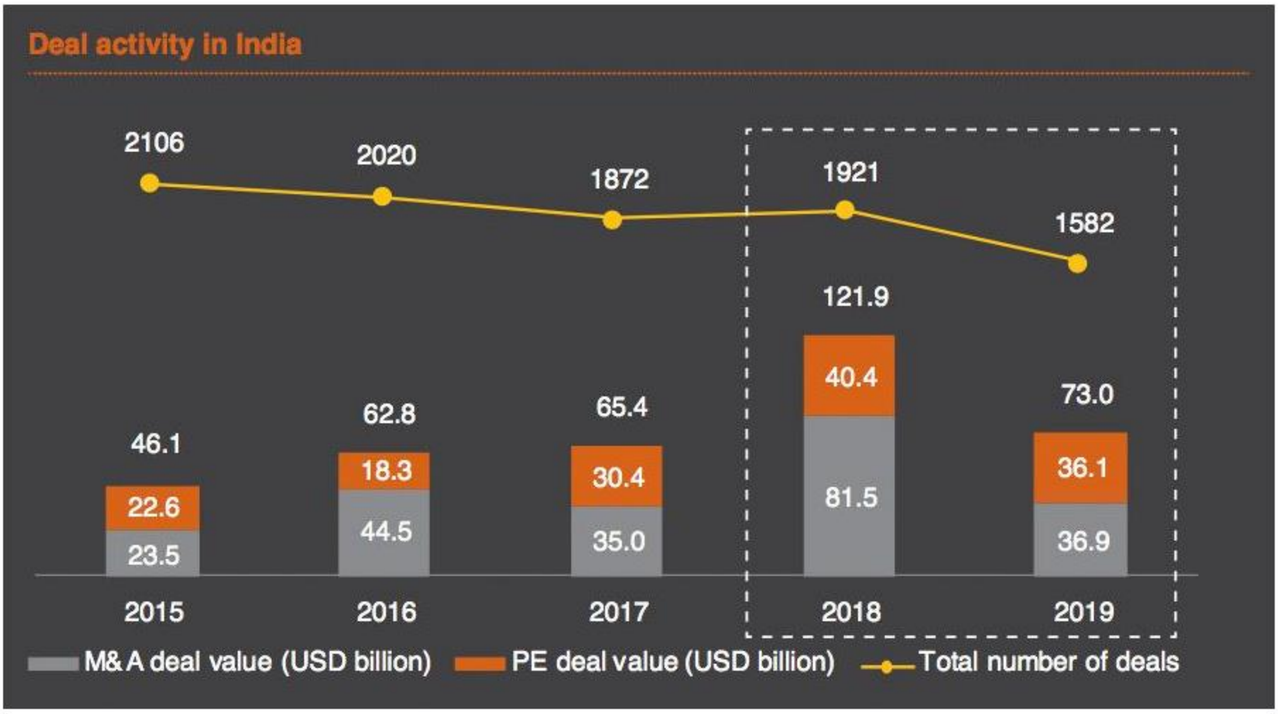


(Figure 1.8 - Source: Consultancy.in-News)

In 2017, Industrials & Chemicals tallied 55 deals (contributing to 21% of the total) followed by Consumer accounting for 12% and Financial Services with 7%.

- **"Deal value increased in India in global uncertainty"** [7]

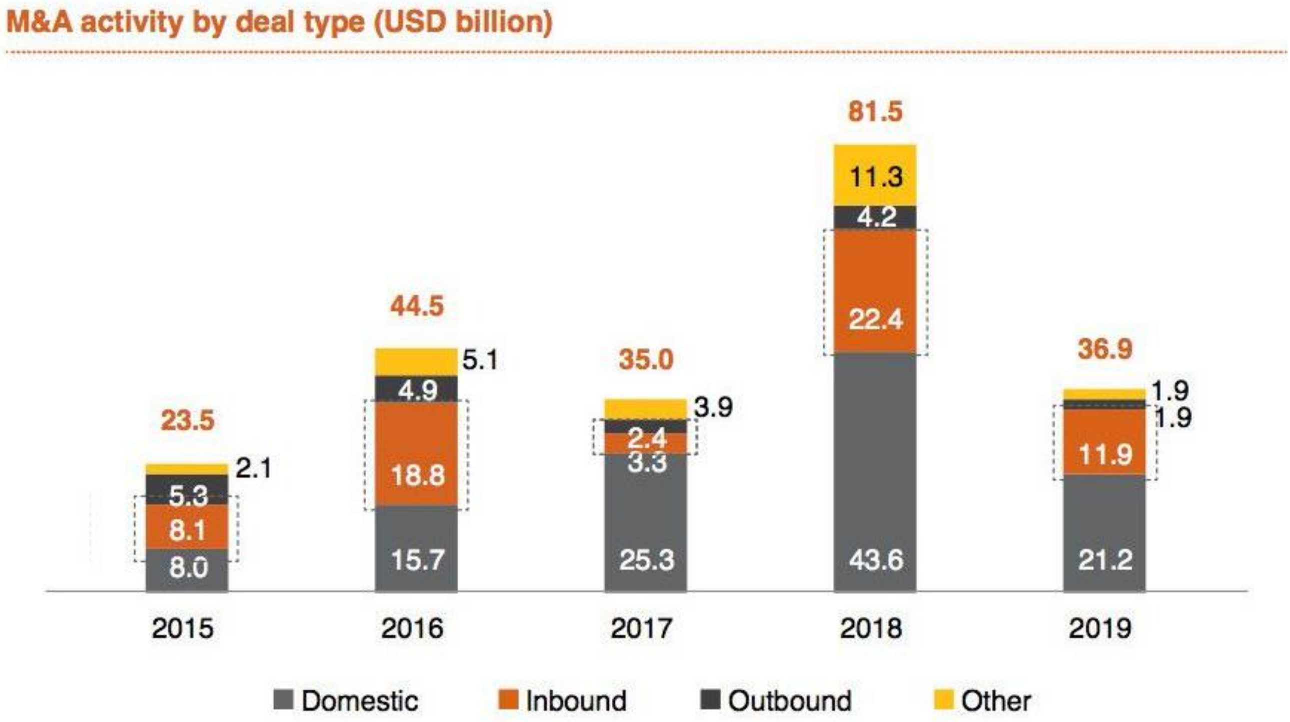
A variety of factors has dragged the total deal value in India down in 2019 compared to record breaking numbers booked in 2018, according to a new year-end review from PwC, one of the Big Fours accounting and advisory firm attributes this decline, in part, to a dip in the number of megadeals last year. 2018 was a record year for deals in India, with PwC's estimates placing overall deal value at $120 billion for the whole year. In the summer of 2018, EY reported that the number of initial public offering (IPO) deals in India had surpassed the rest of the world. The trade war between the US and China is an example of the many geopolitical developments that have affected deals activity globally.



(Figure 1.9 - Source: Consultancy.in-News)

In 2019, developments on the global stage started taking its toll on the Indian market. PwC reports that deal volume in India (2018) amounted to $73 billion across more than 1,500 transactions, with much of this decline attributed to an "overall decline in the global business atmosphere". However, a more long term view shows that performance was not as bad as the numbers signify. While deal volume in 2019 fell short of the 2018 figure, it lies ahead of the volume recorded in 2016 and 2017.

Transactions backed by private equity remained largely consistent between 2018 and 2019, amounting to roughly $40 billion across both years. 2018 was already a strong year for private equity in India, indicating a continuation of strong momentum. What has changed in the market, according to PwC, is the size of the deals being completed. "This slowdown in deal activity could be primarily attributed to fewer billion-dollar bets in 2019. 2018 witnessed 25 megadeals in comparison to 2019, which recorded only 11 deals, each valued at over a billion dollars," said the report.



(Figure 1.10 - Source: Consultancy.in-News)

Prior to last year, large deals in India had been steadily on the rise, particularly since the Insolvency and Bankruptcy code was passed in 2015. In a recent analysis, global management consultancy Bain & Company uncovered that 60 large deals in excess of $250 million were closed between 2015 and 2018. This momentum appears to be slowing down in India, driving down average deal value. On encouraging trend, the volume of inbound deals is increasing. PwC reports that inbound deal activity constituted more than 30% of all merger & acquisition deal value last year, compared to 28% in 2018. "*Inbound activity amounted to around $12 billion during the year in comparison to 2018, which saw deals worth $22.4 billion and which included a noteworthy capital infusion in the e-commerce space*," stated the PwC report. The surge is further exemplified by an increase in deals involving sovereign wealth funds (SWFs).

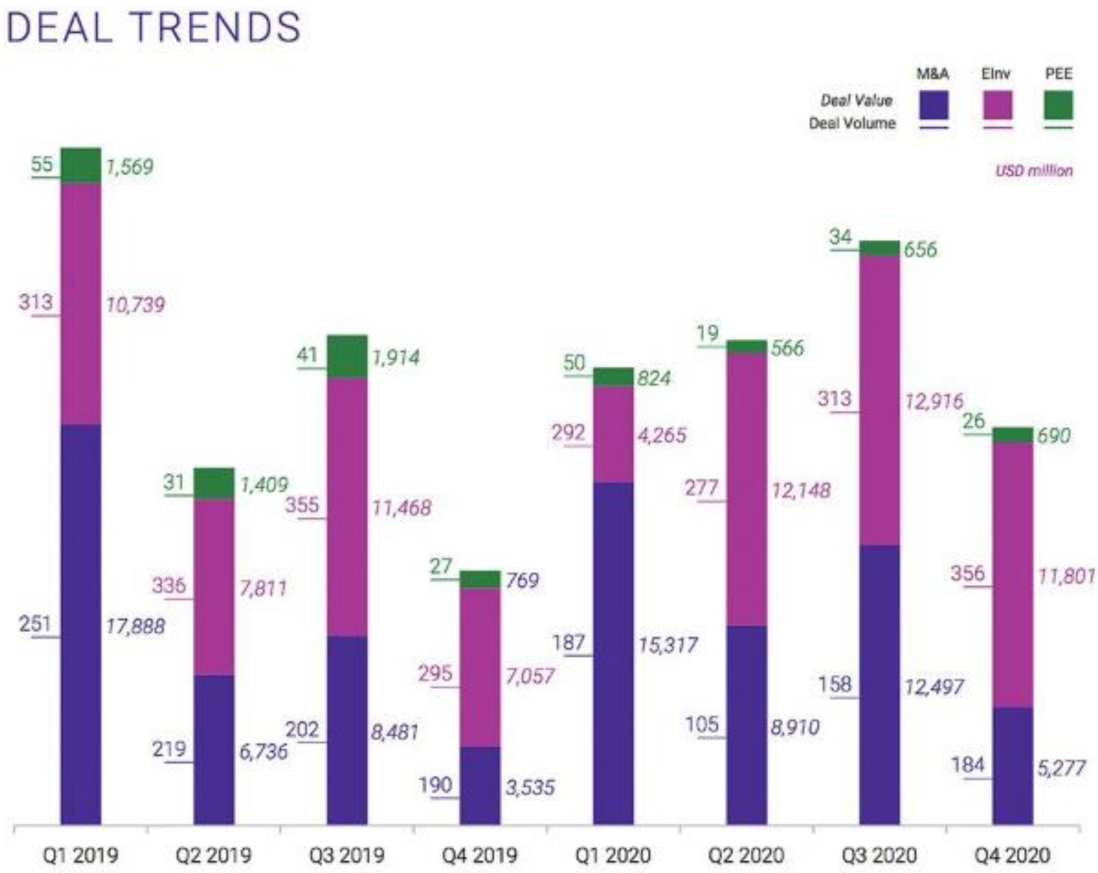
(Figure 1.11 - Source: Consultancy.in-News)

India has long been touted as an attractive market for foreign investment, in light of promising indicators such as a young and increasingly tech savvy population and a thriving IT business environment. However, the initial excitement around the Indian market has also deflated to some extent.

- **"A review of India's merger and acquisition, equity investments and exits market in 2020"** [8]

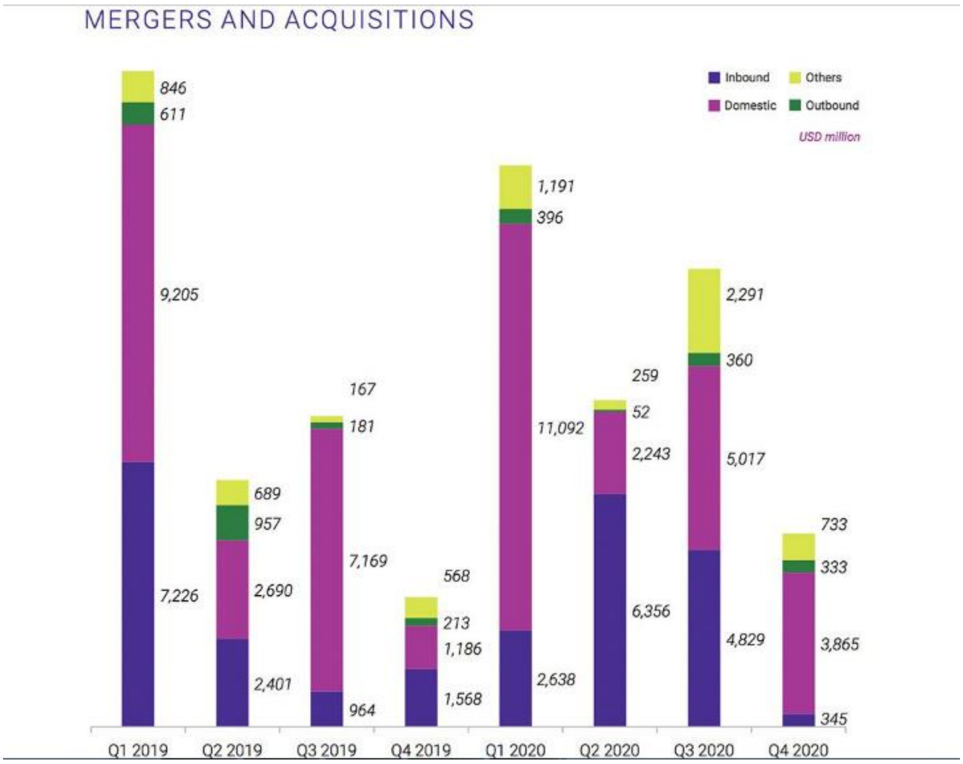
International consulting firm Nexdigm (SKP) has released its full year review of India's mergers & acquisitions market, providing insights into 2020's developments in deals, equity investments, and exits. According to the researchers, despite the severe global economic distress induced by the Covid-19 pandemic, India's mergers & acquisitions market remained less affected, in fact performing better than the year previous of 2018. Total transactions value stood at $85.9 billion.

Merger and acquisition was the largest contributor to the deal landscape, just ahead of equity investments. Deal value reached $42 billion, however, the pandemic's wrath was more pronounced in deal volumes, with the number of deals hitting a five-year low.



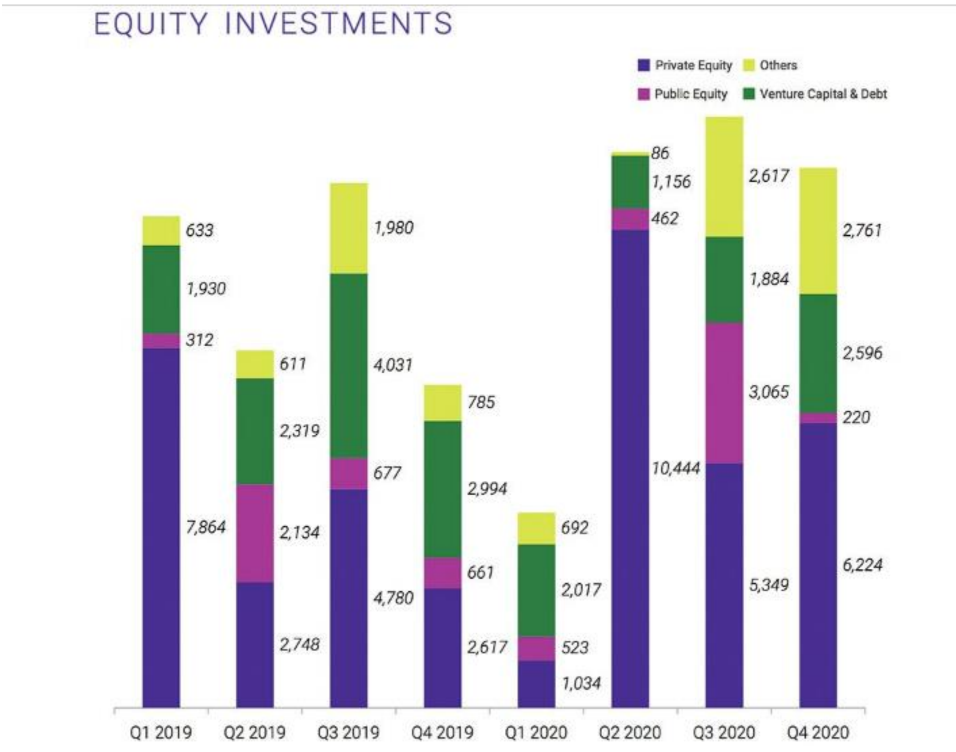
(Figure 1.12 - Source: Consultancy.in – News)

The key deal affecting factor was consolidation on opportunity-driven acquisition, with obvious segments such as telecom, financials, consumer discretionary and industrials the most in-demand. In these four sectors, big-ticket transactions amounted to around 50% of the deal value. The IT segment led the way in terms of deal volume as the need for cloud computing and cyber security services surged with remote operations. "*Another section of buyers leading merger and acquisition activity this year has been private equity backed players, as investors aim to enhance their portfolio's marketability for monetization through tuck-in acquisitions. Start-ups in spaces such as EdTech and e-health have steadily bought out companies to diversify their portfolio,*" explained Maulik Doshi, a Senior Executive Director in Nexdigm's Transaction Advisory practice. Distress-fuelled divestments was also a good performing segment, as several companies were compelled to restructure and divest their stressed and non-core assets to deleverage their balance sheets and sustain core growth plans debt reduction and portfolio enhancement/diversification.



(Figure 1.13 - Source: Consultancy.in- News)

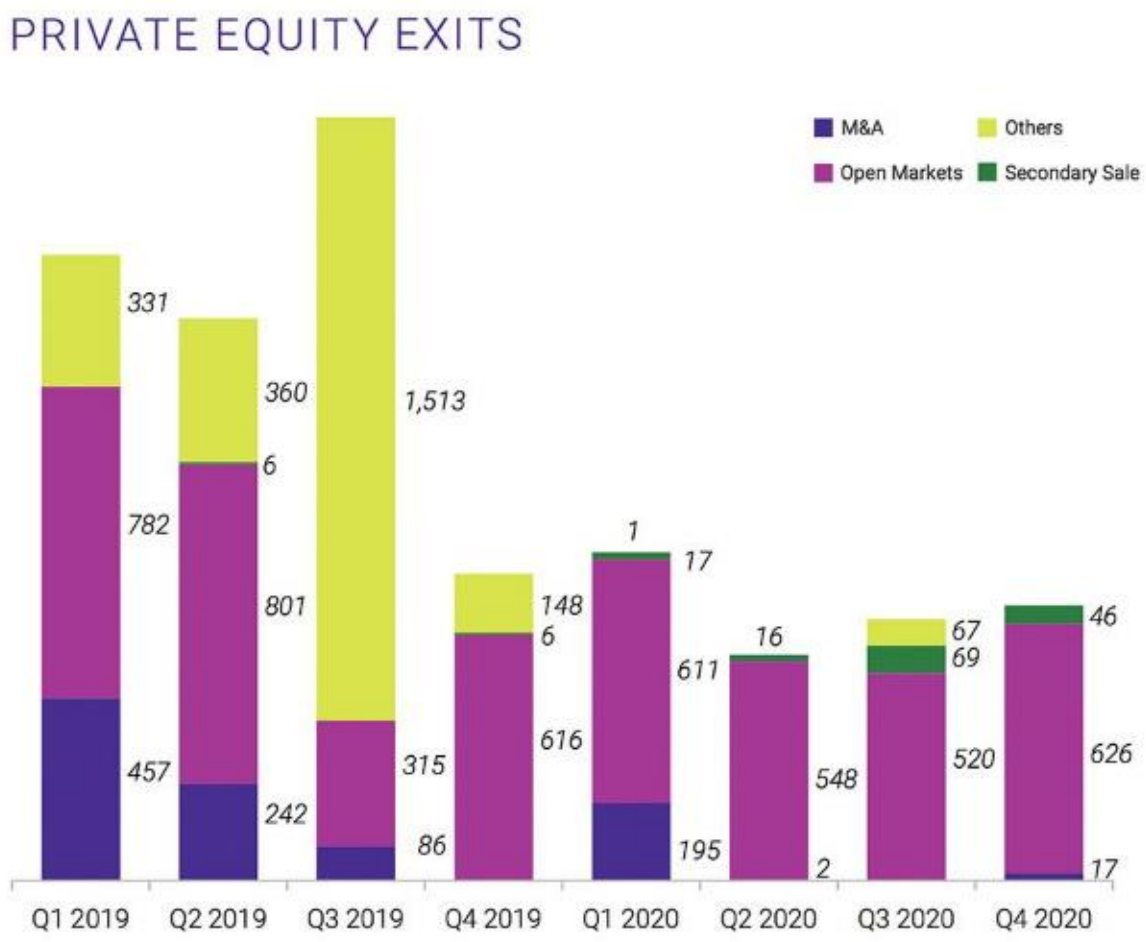
- ***Equity investments:*** With a value of $41.1 billion, and deal volume almost at par with the previous year, equity investments enjoyed a "phenomenal performance" said the authors. This was driven by 11 deals crossing the $1 billion mark in the telecommunications, financials and consumer discretionary sectors. Notably, the start-up environment carried much of the equity deal volume, comprising 85% of the total deals in 2020. Doshi: "*With trends similar to merger and acquisition, the growing need for digitization and automation has propelled information technology to lead with close to 700 deals. The imperative shift in education delivery has increased investor focus on EdTech providers as over 90 start-ups received funding this year.*"



(Figure 1.14 - Source: Consultancy.in-News)

Healthcare was another bright spot. "*India's position as a forerunner in drug manufacturing, an essential aspect in the current climate, and the government's determination to reduce dependence on imports reinforced investments in the healthcare sector. This year, the sector witnessed over 100 deals at undeterred valuations as past advantageous exits drive investor confidence*."

- ***Private equity exits:*** Continuing its slide on 2019, private equity exits witnessed more of a downturn in Q1 of 2020, with transactions only worth $2,735 million. Deal volume reduced by 16% compared to 2019, scaling down the average deal size by 40% to $21 million. The information technology and financial services sectors contribute most proactively to the exit deal volume, at around 55% of the total. The investors expect their portfolio to recoup in 2021 on the back of a better economic landscape.

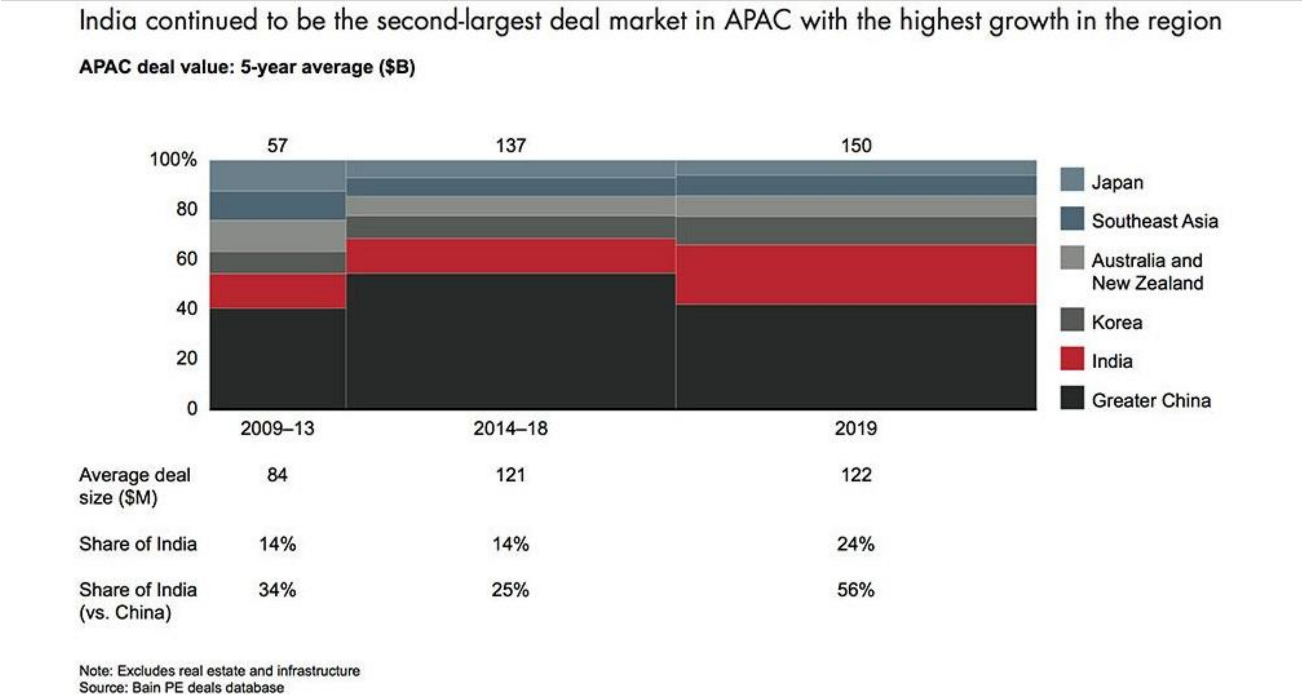


(Figure 1.15 - Source: Consultancy.in-News)

Among the big ticket deals that rocked India's deals landscape include: ADP acquired a 49% stake in GMR Airports for $1.51 billion, Adani Ports and Special Economic Zone acquiring a major stake in Krishnapatnam Port for$1.43 billion, Yes Bank raising funds $1.35 billion worth of funds, Canadian investor Brookfield Asset Management buying core real estate assets of RMZ Corp for $2 billion, and the 51% stake acquisition worth $1 billion by Abu Dhabi Investment Authority and Public Investment fund of Saudi Arabia in India's Jio Digital Fibre. In conclusion Doshi said "*Even as the GDP forecasts for 2021 improve to over 8%, policy implementation and the mapping out of announcements made in the Union Budget will be the key for economic recovery. Overall, we expect the trends of 2020 to largely continue in the coming year*,"

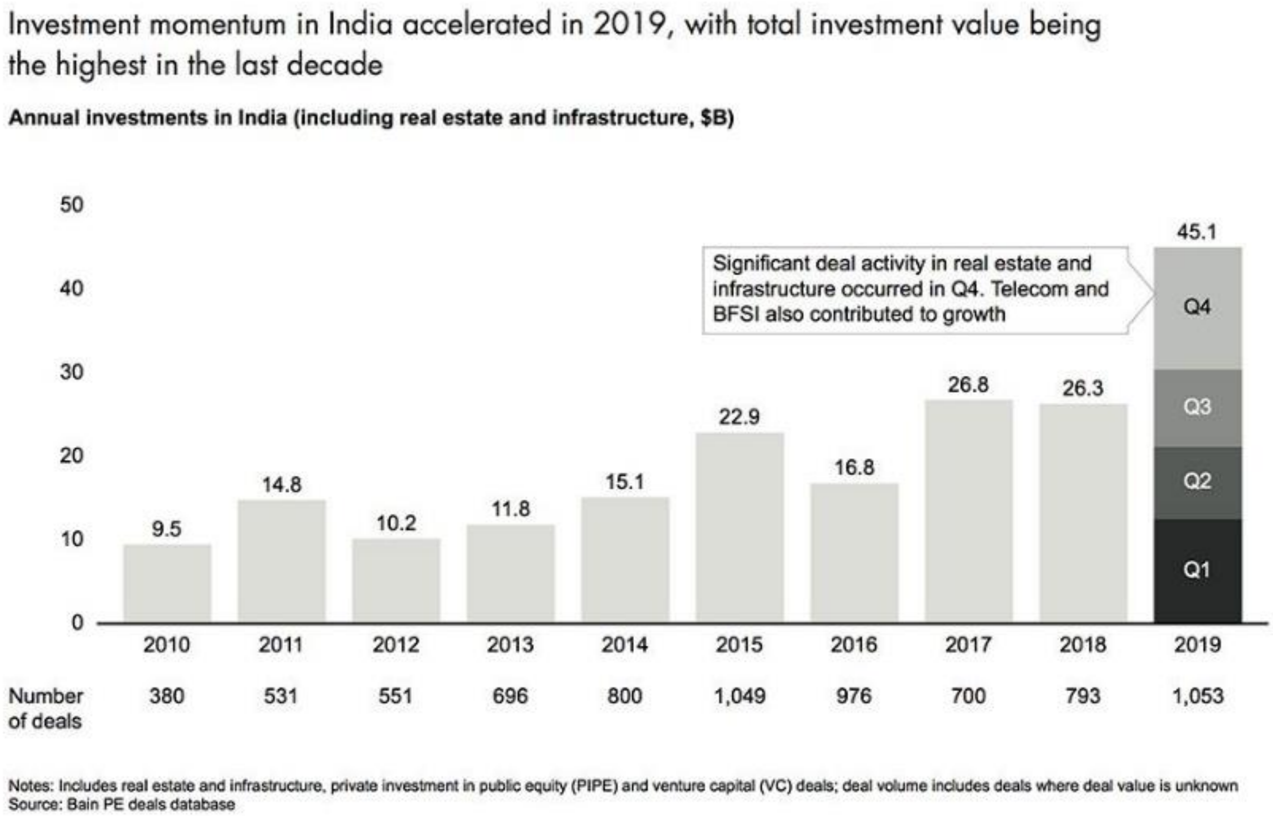
"India remains Asia Pacific's second largest deal market after china" [9]

Investments in India's private equity and venture capital markets surpassed the $45 billion mark last year, making it the best year for the market in a decade and securing its position as the second largest deal market in the Asia-Pacific (APAC), behind only China. This is according to Bain & Company's latest assessment of investments across India and APAC. In its analysis, the management consultancy acknowledges the significant effects that Covid-19 will have on the market, but points out that the scenario will throw up some interesting opportunities for cautious investors. India's position in the APAC market only grew stronger over the course of last year. This is partly due to a slowdown across the region, particularly in China where tensed government restrictions on private equity investments has reduced deal activity. China remained the top market for investments, although India's challenge to its position at the top is escalating.



(Figure 1.16 – Source Consultancy.in\News)

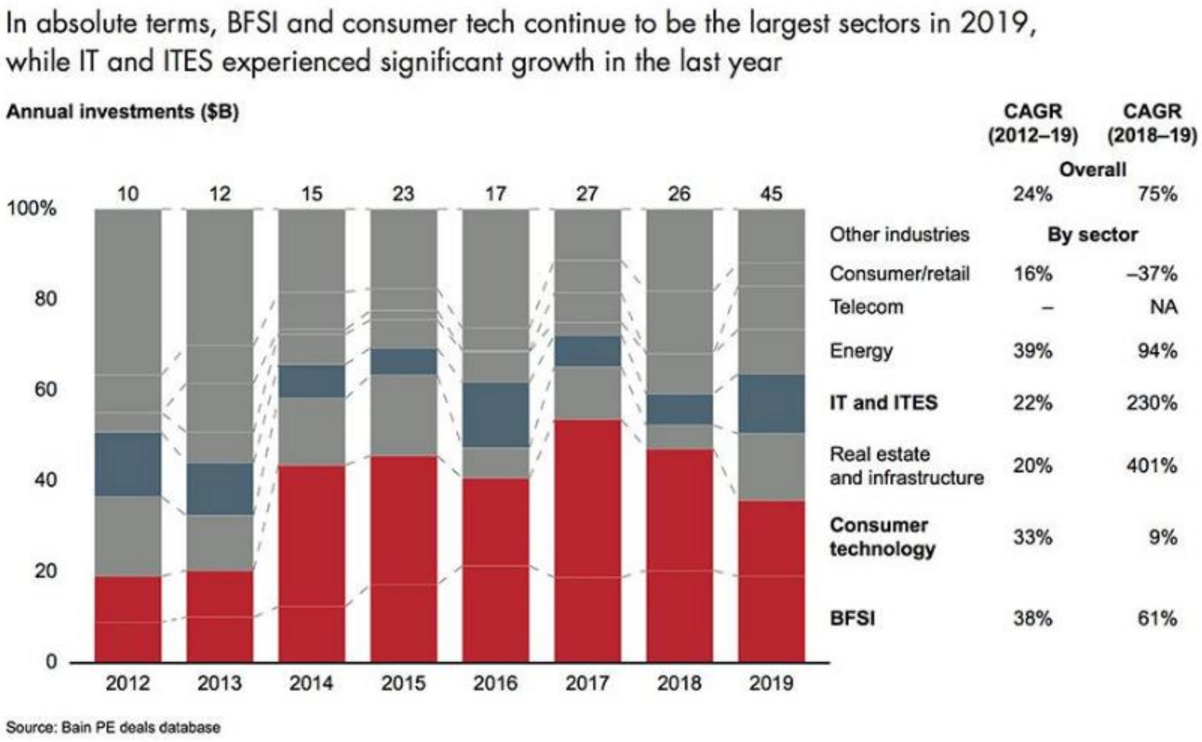
Investments in India grew faster than any other market across the region, taking its investment value higher than other major APAC economies such as South Korea, Australia, New Zealand and Japan. The country's investment value was also higher than the Southeast Asia average. Bain & Company reports that there were more than 1,000 deals last year, a significant number of which were large deals in excess of $100 million. As a result, the overall sum of investments registered a 70% jump from 2018, and was more than 100% higher than the average of the previous half decade. The usual suspects such as the banking, financial services and insurance (BFSI) sector as well as consumer technology dominated the investment scenario. The former has steadily been among the numbers, driven by a number of deals in the banking sector as well as a growing non-banking financial company (NBFC) market.



(Figure 1.17 – Source Consultancy.in - News)

Overall value of the BFSI segment grew to more than $8 billion last year, accounting for 35% of total merger and acquisition-related investments in India. The consumer tech segment, meanwhile, grew to nearly $8 billion, driven by the rapid development of Industry 4.0 tech across the country. As businesses look to implement digital transformation strategies, Bain reports that cloud technology has emerged as a particularly strong market for investments, given its role as an entryway to other Industry 4.0 tech such as data analytics, artificial intelligence and machine learning.

According to the authors, Arpan Sheth, Sriwatsan Krishnan, Aditya Shukla and Prabhav Kashyap, India's cloud and software-as-a-service (SaaS) market is likely to grow from its current $6 billion value to more than $20 bilion by 2022. The biggest driver of consumer tech growth is India's booming financial technology (fintech) market. One of the big fours accounting and advisory firm EY reported last year that the Indian market was the fastest in the world when it comes to fintech adoption. This is driving significant investments in the market and driving up consumer tech value in the country.



(Figure 1.18 – Source: Consultancy.in – News)

According to Bain, E-commerce had a large part to play in consumer tech investments last year. Outside of the BFSI and consumer tech segments, the real estate and infrastructure sectors were strong performers from a growth perspective, as well as the telecom, IT and ITES sectors in India. The only downside uncovered is a fall in exit value, which is due to market uncertainty and unpredictability and other macroeconomic conditions. The Covid-19 crisis will also no doubt have its effect on deals in the coming months and years, although Bain has pointed out opportunities therein. "*From an investment perspective, we will likely see a short-term dip in investment activity with Covid-19, as already evidenced globally. However, this* *forthcoming price correction across the board will present an investment opportunity*," explained Arpan Sheth, a partner at Bain & Company India. "Investors need to redefine their portfolio and take actions to adapt to the changes in the economy. The market disruption caused by Covid-19 could lead to growth in selected sector and services such as e-commerce, enterprise technology/SaaS, healthcare, on-demand services."

1.2.7 - Reasons for success or failure of Merger and Acquisition

Corporate executives and private equity investors has high expectations from the mergers and acquisitions. The success and failure of merger and acquisition is depending upon various factors. These factors are monitory and non-monitory, micro and macro factors of business environment, cultural environment etc. In India, cultural and political differences are wide in nature which creates a barrier to the success of merger and acquisition. As per the study conducted and reported by the Deloitte one of the big fours of professional financial service provider in 2020 named 'The State of The Deal: M&A 2020', explained the key success and failure factor affecting the merger and acquisition.

The internal factor is more affecting then the external in failure of merger and acquisition. Following are the factors for not achieving expected result by merger and acquisition;

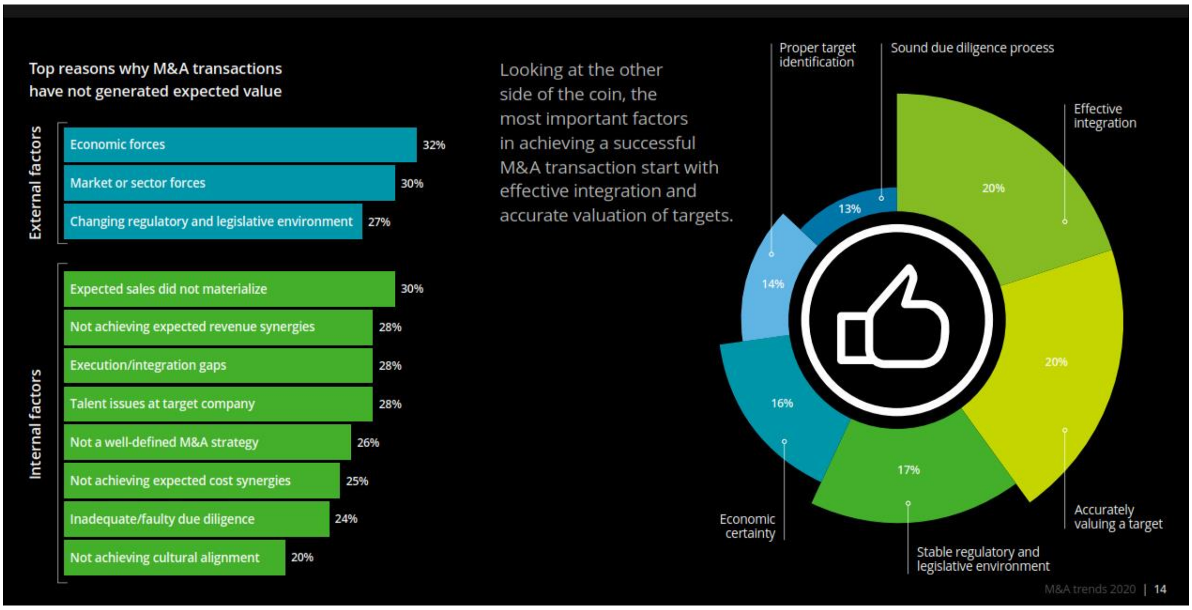
- External Factor:
  - ✓ Economic Forces – Advancement of Technology, Environmental change, Industrial 4.0, etc.
  - ✓ Market or sector forces – Entry of strong competitor with product attracting customers
  - ✓ Regulatory and legislative (Political) environment – change in laws, rules and regulations.

- Internal Factor:
  - ✓ Sales – unable to achieve expected target
  - ✓ Revenue – unable to get synergy effect
  - ✓ Execution gap

- ✓ Personnel – lack of skill workers or managers
- ✓ Strategy – fail to select appropriate strategy for merger and acquisition
- ✓ High cost – unable to reduce cost of operations by taking advantage of synergy effect.
- ✓ Inadequate Due diligence
- ✓ Cultural alignment – fails to adopt culture

The key success factors are as follows;

- ✓ Proper target identification – with the core competency of business and going concern test
- ✓ Sound due diligence
- ✓ Effective integration – in terms of operations, management and culture
- ✓ Accurately valuation of target
- ✓ Stable regulatory and legislative environment – e.g. BJP government in Gujarat from last 20 years
- ✓ Economic certainty where geographic conditions and consumer behavior is nearly stable.



(Figure 1.19 – Source: Deloitte report on merger and acquisition, 2020)

Deloitte explained that for getting success in merger and acquisition; consider two major affecting factors having half of the total weight (40%) excluding regulatory environment, valuation of the target must be done accurately and effective integration. Regulatory environment is out of control of the entity. Favorable condition is expected. On the other hand remaining half weight is shared by due diligence, identification and economic certainty (43%) aggregated.

PART B: Legal Aspects and Framework of Merger and Acquisition

1.3 - Legal Process of Merger and Acquisition in India.

The definition of word merger and amalgamation has not given in the Companies Act, 2013. The merger is basically the combination of two or more companies voluntarily or by force created by factors affecting business to form a new company. In general the shareholders of company to be merged get offered shares or stock or securities in acquiring company in exchange for the surrender of their share or stock. Merger and Amalgamation are used as synonyms of each other. In order to get competitive advantage and increase in operational efficiency, the company or companies adopt merger or amalgamation. The legal provisions related to Merger and Amalgamation has been defined under section 391 to 396A of part 5 of Chapter 6 of the Companies Act, 2013. A step by step process defined in the statue is as follows;

- **Examination of Object clause**

The first procedural step for the merger of companies; is to verify or examine the object clause of memorandum of association. The object clause is important clause of memorandum of association. It consist the primary object of the company and other secondary objectives which the company may follow during the lifetime. The object clause of company defines the scope and limitations of the business activities of the company. The object clauses of the memorandum of association should have granted power to amalgamate is available to form a new company. The object clause of both the companies namely (amalgamated company and amalgamating company) should have contained power to amalgamate in similar manner. In absence of such power in object clause, necessary approvals from the Board of directors, shareholders and company law board are required to make necessary change in object clause of memorandum.

- **Intimation to Stock Exchange**

The Second procedural Step for the merger of companies; both amalgamated and amalgamating companies are required to inform respected stock exchanges for perusal of scheme of merger. It is applicable to companies who are registered with stock exchanges and shares are freely available to trade by stock exchange. The respected stock exchange is required to be informed about Proposal scheme of merger or amalgamation along with the copies of all notices, resolutions and orders. The approval of scheme of merger from stock exchange is not compulsory in nature. It is only procedural step to be followed because company can file a petition forgetting approval of scheme of merger from stock exchange in case of non-receipt of approval.

- **Approval of the draft merger proposal by the respective boards**

The merger proposal means draft created for scheme of merger defining clauses, objectives and terms of compromise, arrangement, business combination or understanding. A scheme should be in written format. The approval of draft scheme shall be approved by passing the special resolution in board meeting by board of directors.

- **Application to high court**

Third procedural step of merger is to file an application in form of petition before tribunal or high court for getting approval of the scheme of merger and to organize meetings of shareholders and creditors. The provision related to application has been described under section 230-232 of the Companies Act, 2013 for both the companies to be followed. However board resolution shall have to be passed before making an application to high court or tribunal.

- **Joint Application**

In case of registered office or headquarter of the companies involved in merger process is in different states. They have to file separate application before tribunal for getting approval having different jurisdiction, however option of making joint single application is available with the companies when the rights of the creditors and shareholders along with no change in capital structure of the transferee company. Hence, Transferee Company can file a single joint application. The said application have to be made in form NCLT-1 before the National Company Law Tribunal (NCLT) of respective jurisdiction along with form NCLT-2 ‘a notice of admission’ and NCLT-6 ‘an affidavit’.

A draft scheme of merger named scheme of compromise or arrangements shall states all significant facts relating to a company like pending investigation or proceedings against the company, audited financial statements stating financial position of the company, auditor's report etc.

In case of scheme having reduction in share capital, there is no separate application is required to be filled before tribunal under section 100 of the company's act, 2013 and said reduction in share capital is considered part of the scheme of merger and procedure shall be followed under section 391 of the company's act,2013 as whole scheme. The approval should be in explicit terms for the reduction in share capital within the scheme of merger.

A scheme of merger or corporate restructuring is in requirement acceptance by 3/4 or more than or equal to 75% the secured creditors in value, along with—

- Form CAA-1 stating creditor's responsibility statement.
- Explanatory statement describing safety measure taken for the protection of remaining secured and unsecured creditors.
- As per the approval of the scheme and new capital structure, requirement of debt fund shall be confirmed by auditor's report and board of directors shall confirm the liquidity test accordingly.
- The guidelines given by the RBI are properly adopted and followed.
- Registered value's valuation report for all the assets of the company.
- The fee paid as prescribed in the Schedule of Fees.

Further, it is required to disclose the base of classification of creditors and members for getting approval of the scheme before tribunal.

The meetings of the creditor and class of creditor shall be held at discretion of the tribunal in case of joint application.

- **Dispatch of notice to shareholders and creditors**

After getting approval from the NCLT, A meeting of creditor and shareholders of both the companies have to be held and notice of the meeting with the explanatory note has to be sent before 21 days. The notice of the meeting is required to be published in minimum two newspapers (Vernacular and English). An affidavit is also to be filed with NCLT stating information that notice of the meeting has been sent by each company to shareholders and creditors and same has been published in two newspapers.

- **Holding of meetings of shareholders and creditors**

As per the requirement of section 391(2) of the company's act, 2013, at least ¾ or more than or equal to shareholders or class of shareholders shall vote in favor of the scheme of merger. Vote by Proxy is allowed in absence of shareholder. The meeting of creditors of the company shall be held in similar manner. NCLT appoints a chairperson for conducting meeting in well manner. The court issue the directions on the following matters using the discretionary power:

- ✓ Date of the meeting.
- ✓ Time of the meeting.
- ✓ Place of meeting.
- ✓ Appointment of chairperson and alternate appointment of chairperson for the meeting.
- ✓ Fact and content of notice along with manner of service of notice.
- ✓ Requirement of quorum.
- ✓ Any other matter the court may deem fit.

The chairperson of the meeting is required to submit the report before the court/NCLT of proceedings of meetings on the following matters:

- ✓ The number of shareholders/creditors present and at the voting.
- ✓ The number of persons voting in person and proxy.
- ✓ The votes casted in the favor and against the resolution.

- **Petition to high court for approval and passing the order**

After getting approval of shareholders and creditors by passing resolution in the respective meetings, an application in form of a petition has to be filed before honorable High Court by both the companies stating the scheme of merger of the companies has been approved by the members and creditors. A specific date of hearing will be given by the High Court. A notice shall require to be published in two newspapers stating that the scheme of the merger is approved by the companies. After hearing of the High Court, companies involved in merger scheme declares that the scheme is fair and with reasonable intention. The High Court using its discretionary power must give its verdict either approving the scheme or to modify the scheme even though the said scheme has been approved by the members and creditors of such companies. The high court has power to modify the scheme by itself. The high court has following powers binding on the companies:

- ✓ Any change in the transfer of undertaking, property, assets or liabilities of the transferor company to the transferee company related to scheme of merger.
- ✓ Any change in appropriation of any shares, debentures, policies or any other interest in the Transferor Company or person under the scheme of merger by the transferee company.
- ✓ The continuation of any pending legal proceedings by or against the Transferee Company and Transferor Company vice a versa.
- ✓ The transferor company can be dissolved without following the winding up procedure.
- ✓ The provisions and matters mandatory in nature, shall be followed effectively by the person, within time prescribe, as per the direction of court, to secure reconstruction.

- **Filling the order with registrar**

A certified true copy of the order passed by High Court is required to be filed with the registrar of companies within the specific time. The report of registrar of the companies is necessary to be considered by high court before approving the scheme of merger of the company.

- **Transfer of asset and liability**

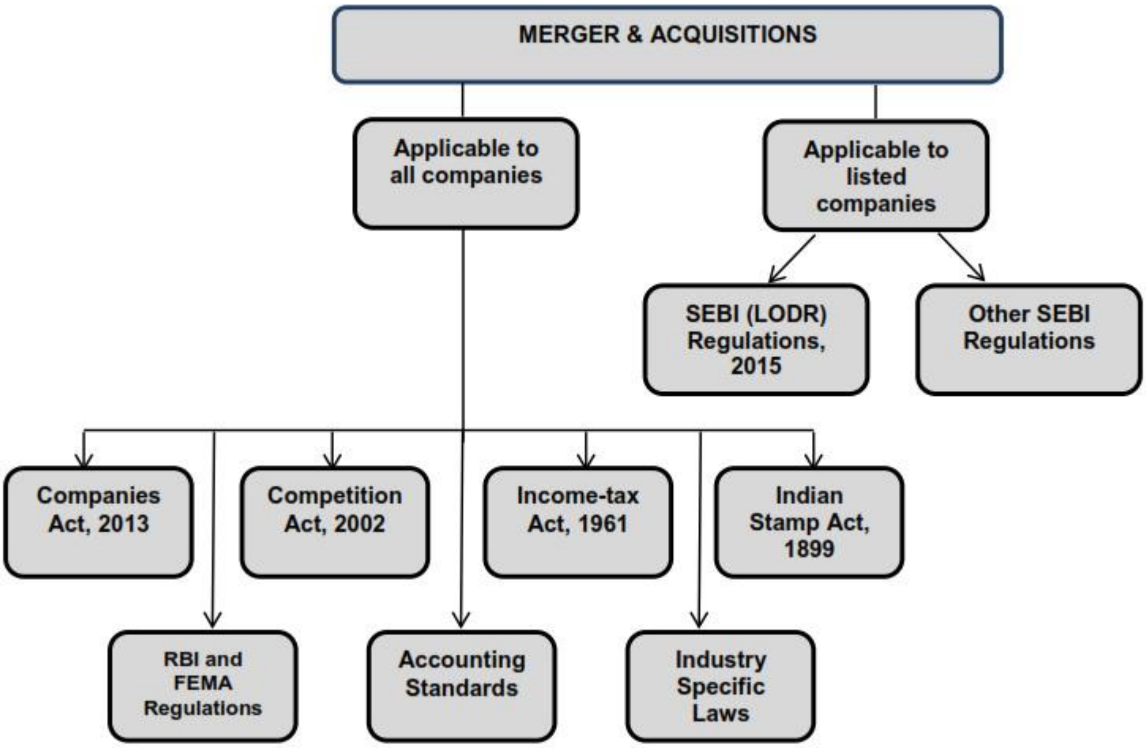
The transfer of asset and liabilities of the merged companies can be made after getting the order of the Honorable High Court sanctioning the scheme of merger, to the newly or existing new entity.

- **Issue of shares and debenture**

After the formation of merged company, shares and debentures can be issued and the same will be registered with the stock exchange in case of public company.

1.4 - Applicable Legal Framework to Merger and Acquisition

The second consecutive term of the BJP (Modi) government came with the agenda of reforms in several policies in order to attract foreign investor. The working pattern of this government brought back the faith in investor community in India. There was also an upwelling in merger and acquisition activity due to the introduction of new bankruptcy law named Insolvency and bankruptcy Code, 2016, The procedure for getting approvals of initiating business are now faster than earlier as a part of 'Make in India' campaign which makes the business ease of doing. Further relaxations provided in Foreign Direct Investment ("FDI") norms. The Income Tax Act, 1961 (ITA) define the term 'amalgamation' as the merger of one or more companies with another company, or the merger of two or more companies to form one company. The Income Tax Act provides with couple of more conditions to be fulfilled for availing tax benefits arising from the activity of merger. The Companies Act, 2013 defines merger provision under section 230-234, which specify the schemes of merger, arrangement or compromise between a company, its shareholders and/or its creditors. Commercially and practically depending upon the objective, mergers and amalgamations are having several types, Company law is not worrying about the different commercial type and/or forms of merger/amalgamation, the Competition Act, 2002 does pay special attention to the forms.



(Figure 1.20 - Source: ICSI – Corporate Restructuring, Insolvency, Liquidation and Winding-up)

1.4.1 - Key Consideration of the Companies Act, 2013

- **Procedure to be followed under merger provision**

The detailed procedure to be followed has been explained on the page no. 41-46.

- **Fast track Merger**

The procedure for Fast Track merger has been covered under section 233 of Companies Act, 2013. The procedure requires approval from shareholders, creditors, the Registrar of Companies, the Official Liquidator and the Regional Director. *The fast track merger scheme shall be made available to the following companies:*

- small companies (companies having paid-up share capital of less than Rs.50 Lakhs and turnover of less than Rs.200 lakhs as per last audited financial statements); or

- a holding company with its wholly owned subsidiary; or
- Such other companies or class of companies as may be prescribed.

The scheme requires approval from at least 90% shareholder in total number of shares and 90% of creditor representing in value of outstanding debt. After getting approval from shareholder and creditor, it is sent to Regional Director and the Official Liquidator for getting their approval. Further it is communicated to the central government. The central government at its discretion directs NCLT to take up the scheme with general process under Section 232 of the companies act, 2013 or pass the final order confirming the scheme under the Fast Track process under section 233 of Companies Act, 2013.

The fast track merger provision is not applicable to public companies, section 8 companies and companies regulated under special act.

Cross border Merger

The provision of the Companies Act, 2013 under section 234 allows mergers between Indian and foreign companies. The merger between companies registered under territory of two different nations known as cross border merger. As per section 234, prior approval of the Reserve Bank of India ("RBI") is required for cross border merger. A foreign company means any company or body corporate registered outside India, whether having a place of business in India or not. *The following conditions must be fulfilled for a cross border merger:*

- The foreign company should be incorporated in a legal manner by following applicable all the conditions in its jurisdiction.
- The transferee company is required to ensure that the valuation has been done by a recognized professional body or a person in its jurisdiction and international principles of accounting and valuation has been followed.
- The procedure prescribed under section 234 of the Companies Act, 2013 for undertaking cross border mergers must be followed.

Any cross border merger transaction shall be deemed to have been approved by the RBI under The Foreign Exchange Management (Cross Border Merger) Regulations, 2018 on March 20, 2018. Which also known as Merger Regulations.

1.4.2 - Key Securities Laws Consideration

- **The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 - Takeover Code**

The Securities and Exchange Board of India known as SEBI is the top most regulatory authority of entities listed or to be listed on stock exchanges in India. The SEBI introduced provision for Substantial Acquisition of Shares and Takeovers named the "Takeover Code". The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 imposes restrictions and regulates the acquisition of shares, voting rights and control in listed companies

As per the takeover code, in a financial year an open offer is required to be made by the acquirer company to remaining shareholders of the target company, to entitle the acquirer to exercise 25% or more of the voting rights in the Target Company or acquisition of control. The offer must be turned up into cumulative acquisition of at least 26% of the voting capital of the company. The exemption to make open offer is available if acquirer already holds 25% shares of the target company and acquires at least 5% shares or voting rights in the target company from remaining shares. An application to grant exemption can be made to SEBI by acquirer. SEBI can grant the exemption from the applicability of takeover code at its discretion after considering the interest of investors and the securities market. If the scheme is already approved by the NCLT, such exemption is deemed to be granted.

- **The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 - Listing Regulations**

The SEBI introduced complete set of obligations to be followed by every listed entity under the Listing Obligations and Disclosure Requirements (LODR) Regulations, 2015. The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 prescribed various provisions to be followed by a listed company while making an application before the NCLT, for approval of a scheme of merger/ amalgamation/ reconstruction etc.

Certain key provisions under the Listing Regulations applicable in case of a scheme involving a listed company are as follows;

- ✓ ***Filing of scheme with stock exchanges:*** the draft scheme of arrangement has to be filled with the relevant stock exchange in order to get observation letter or no-objection letter from the relevant stock exchange. After getting NOC from stock exchange further application can be made to the NCLT for approval of the scheme.
- ✓ ***Compliance with securities law:*** The listed companies shall have to ensure that the scheme of arrangement is in proper manner and fulfilled every provisions of the applicable securities law or a requirement of the stock exchanges has been fulfilled.
- ✓ ***Change in shareholding pattern:*** In home country, the listed companies have to file the pre and post structure of shareholding pattern and the capital structure with the relevant stock exchanges.
- ✓ ***Corporate actions pursuant to merger:*** The listed company have to disclose all the necessary information relating to operation and price sensitivity to the relevant stock exchanges.

1.4.3 - Key Consideration of the Competition Act, 2002

The gap of corporate law has been filled by introduction of The Competition Act, 2002, which replaced the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP) with the objective of providing securities to the stakeholders by covering primarily anti-competitive agreements, abuse of dominance and combinations. The Competition Commission of India (CCI) established under Combination Regulations, 2011 to regulate Procedure in regard to the Transaction of Business relating to Combinations. It gives procedure and manner in which the CCI will regulate combinations which have caused or are likely to cause an Appreciable Adverse Effect on Competition (AAEC) in India.

- **Anti-competitive agreements**

The anti-competitive agreements are of two types; one is Horizontal Agreements and second is Vertical Agreements. An agreements having adverse effect on competition are void in India under the provision of the Competition Act.

Agreement related to followings is considered as AAEC and treated as void;

- ✓ Determination of purchase/sale prices, or
- ✓ Setting up limits or controls production supply, markets, technical development, investment or
- ✓ Making provision of services or
- ✓ shares the market or
- ✓ source of production or
- ✓ Tie-in arrangement by allocation of geographical areas/type of goods or services or number of customers in the market, or results in bid rigging / collusive bidding.

- **Abuse of dominance**

Any entity is having ability to affect behavior of competitors and consumer in favor of entity by using competitive forces independently known to be in a dominant position. The dominant practice can lead to the unfair business practices in terms of discriminatory or predatory pricing, restriction on production or service, control on research and development and ultimately leads to the monopoly practice. The Competition Act came into force to prohibit an entity from abusing its dominant position.

- **Combinations**

According to section 5 of the Competition Act, a ‘combination’ means the acquisition of control by shares or voting rights or assets of an entity by a person or an entity. The competition act sets the financial threshold limits for acquisition of control directly or indirectly by combination or merger or acquisition.

The financial thresholds for a combination considers two variables, one is value of asset and second is turnover. In the case of acquisition, the combined value of asset and turnover of the acquirer and the target shall be taken into consideration. In the case of an amalgamation or merger, the combined value of asset and turnover of the combined resultant company shall be taken into consideration. In the case of target/resultant company will belong to the Group, the combined value of asset and turnover of the "group" shall be taken into consideration. Section 32 of the Competition Act gives addition powers to the CCI in terms of extra-territorial jurisdiction. It means, in any merger or acquisition or combination the value of assets or turnover exceed financial thresholds or specified limits are in India, would be subject to the scrutiny of the CCI, even if the acquirer and target entities are located outside India.

- **Financial Threshold**

The Competition Act sets financial thresholds for the purposes of determining whether a particular transaction qualifies as a 'combination'. *The following table shows threshold limits to qualify as Combination;*

Territory	**Test**	**Asset**	**Turnover**
the acquirer and the target, jointly have			
India	1	> Rs. 2000cr	> Rs. 6000cr
Global	2	>Rs. 1000cr in India out of total US$ 1 billion	>Rs. 3000cr in India out of total US$ 3 billion
The acquirer group has			
India	1	> Rs. 8000cr	> Rs. 24000cr
Global	2	>Rs. 1000cr in India out of total US$ 4 billion	>Rs. 3000cr in India out of total US$ 12 billion

(Table 1.2 – Prepared by Researcher)

- **Small Company Exemption**

The Central Government has provided exemption from threshold provisions of Section 5 of the competition Act to the certain entity having value of assets of the target entity or the merged entity is not more than RS.3.5 billion In India or turnover is not more than RS.10 billion globally. This exemption is also applied to the part acquisition or merger or combination. The value of asset and turnover of that particular part of the business shall be taken into consideration. This exemption was circulated on March 4, 2016 with the applicability for the period of five years. The government at its discretion will take further notice of extension or amendment to the same.

- **Pre-Filing Consultation**

Any entity wish to enter into combination is required to make an application in written to the CCI.

- **Mandatory Reporting before Consummation of the Combination**

Any transaction of combination which is having adverse effect on competition or is likely to cause AAEC within India is treated as Void. Accordingly, section 6 of the Competition Act requires every acquirer to notify the CCI of a combination. The draft scheme of combination has to be filled with the CCI and CCI has to form a prima facie opinion on the combination that whether it causes AAEC or not in the market of the country. The entire process of combination shall be completed in 210 days from the date on which notice is given to the CCI, or after the CCI has passed an order approving the combination.

- **Multiple Tranche**

Small individual transactions would not attract the threshold provision in individual capacity but the series of inter related or connected transactions may attract the threshold. The parties to the combination shall be required to file a single notice with CCI to inform the resultant transaction. The Combinations Regulations were amended in 2014, It is mandatory for the parties to notify CCI if substance on transaction or series of transaction result into combination and that has the effect of avoiding notice in respect of the whole or a part of the combination shall be disregarded.

- **Green Channel**

The green channel means transaction of any form of combination can be completed without permission of CCI. In the year 2019 this amended has been entered into combination regulation and known as “2019 Amendment Regulations” by CCI. This amendment came into force with effect from August 15, 2019. To avail benefit of green channel route, certain prescribed conditions shall have to be met. Entities involve in combination transaction, have to file form under green channel route, the acknowledgement generated after filling is deemed to be approval of the transaction and entities can move further to complete transaction. The qualifying criteria for availing the benefit of the Green Channel route; the parties involved in transaction or group or investee either in direct or indirect manner shall not:

- ✓ Produce/provide similar or identical or substitutable product or service or;
- ✓ Engage in any activity relating to production, supply, distribution, storage, sale and service or trade in product or service, which are at different stage or level of production chain, or which are complementary to each other;

The declaration has to be filled by acquirer that the combination falls under the Green Channel. The qualifying criteria have been followed. Any discrepancy found in declaration, deemed approval shall be considered void-ab-intio. The combination transaction treated as cancelled.

Exception to filling

In certain transactions, which are not resulting into AAEC, are exempt from the filling procedure and approval process of CCI. The Schedule I of the Combination Regulations specifies this type of transaction due to they are not falling under the definition of business combination and threshold limit prescribed by the act. This transaction is having objective of an investment. The following transactions are fall under the specific transaction, though exempt from the filling.;

- ✓ The unrelated acquisition of business or assets other than substantial business operation or asset has been made. Further, Acquisitions of shares or voting right by bonus or rights issues, or buyback of shares, not leading to acquisition of control.
- ✓ An acquisition of shares or assets within the same group.
- ✓ Merger or amalgamation of holding and subsidiary company or companies held by same group, except transfer shall not lead to sole control from joint control.
- ✓ Any loan or investment agreement in case of acquisition by public financial institution, foreign institutional investor, bank or venture capital fund or entity

providing facility of financing and underwriting services. However they are required to notify the CCI of the details of the acquisition within 7 days of completion of the acquisition.

1.4.4 - Key Consideration of Foreign Direct Investment

In recent times, to trigger the development with fast moving approach, India is changing its stringent policies and regulations cautiously towards full capital account convertibility. The significant controls have been removed from FDI and now, foreign companies can freely acquire Indian companies across all sectors, except few. They have to follow regulations and policies related to strict pricing and reporting requirements imposed by the Central Government and the RBI. The Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 has been issued in place of Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000 to regulate the investment in or acquisition of Indian companies by foreign entity or individual. Further, the Department of Industrial Policy and Promotion, Government of India issues the press note in relevance of the subject matter time to time. The finance act, 2015 had Sections 139, 143 and 144, which are stated proposal regarding amendments to the certain sections of the Foreign Exchange Management Act, 1999 (FEMA), being Section 6 (Capital Account Transactions), Section 46 (Power of Central Government to make rules) and Section 47 (Power of RBI to make regulations) respectively. The said amendments are of shifting of power from RBI to central government and bifurcation of instruments into debt instruments and non-debt instruments. The drafted rule of non-debt instrument (notified by central government) and debt instrument (notified by RBI) are entrusted mutually. The Non-Debt Instruments Rules has several types of foreign investments;

- ✓ Person resident outside India,
- ✓ Person non-resident Indian (NRI) or an Overseas Citizen of India (OCI),
- ✓ Foreign portfolio investor (FPI),
- ✓ Other non- resident investors and foreign venture capital investments (FVCI).

The RBI issued the Foreign Exchange Management (Mode of Payment and Reporting of Non-Debt Instruments) Regulations, 2019 which states the reporting requirements in relation to any investment made under the Non- Debt Instruments Rules. Further this rule has been amended on December 5, 2019 and same has been circulated through press note by the Department for Promotion of Industry and Internal Trade (DPIIT). Contract manufacturing, digital media, e-commerce, single brand retail trading conditions are now fall under the Non-Debt Instruments Rules.

FDI means investment in an unlisted Indian company through equity instruments by a non-resident Indian; or in 10% or more of the post-issue paid-up equity capital on a fully diluted basis of a listed Indian company. An existing investment of level below 10%, of the post-issue paid-up capital on a fully diluted basis, the investment shall continue to be treated as FDI.

The scheme of FDI and conditions for FDI in India has been prescribed in schedule I of the Non-Debt Instruments Rules. FDI is allowed up to 100% in all other sectors providing that all applicable laws and conditions are fulfilled except sectors specified by government namely chit funds, Nidhi company, lottery business, gambling and betting, trading in transferable development rights and real estate business or construction of farm houses, manufacturing of cigars or tobacco, atomic energy, railway operations, Intellectual properties rights or assets franchise, trademark, brand name, management contract for lottery business and gambling and betting activities.

- ***Automatic Route*** means the prior approval of the RBI or the Central Government is not required to make an investment by a person resident outside India. Hassle free entry.
- ***Government route*** requires prior approval of government along with fulfillment of conditions specified by it for investment received under this route.

Through Press Note 5 published on April 17, 2020, the Government of India has announced that an investment from any neighbor country with which India shares land border (Bangladesh, China, Pakistan, Nepal, Myanmar, Bhutan and Afghanistan) is mandatorily requires government approval route for making investments by any entity or person resident of that country, irrespective of sectors. On June 5, 2017 via an Office Memorandum, the Government of India has established Foreign Investment Promotion Board (FIPB) with primarily responsible for granting government approval for foreign investments. The Department for Promotion of Industry and Internal Trade (DPIIT) has been replaced.

Issuance by Indian company: An Indian Company can issue equity instruments to a non-resident Indian through entry routes ensuring sectorial caps and conditions prescribed in the FDI Scheme are fulfilled.

Issuance by listed Indian company: A non-resident Indian can make an investment in Indian listed company by purchasing equity instruments through a stock exchange in India, subject to the person making the investment has already acquired control of such company in accordance with SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011 and continues to hold such control and the amount of consideration can be paid as per the mode prescribed by RBI or out of the dividend payable by the Indian investee company; provided further that such dividend is credited to a specially designated non-interest bearing rupee account for acquisition of shares on the recognized stock exchange.

Issuance against pre-incorporation expenses: In case of setting up a wholly owned subsidiary in India by a non-resident entity, operating in a sector where 100% foreign investment is allowed under the automatic route and there are no FDI linked performance conditions, may issue equity instruments to the said non-resident parent entity against pre-incorporation or pre-operative expenses incurred by it lower of the 5% of its authorized capital or US $500,000.

Issuances by Indian company for other consideration: An Indian Company can issue, equity instruments to a person non-resident Indian, if the Indian investee company is engaged in an automatic sector, against –

- ✓ swap of equity instruments; (Valuation shall be done by merchant banker registered with SEBI or investment banker outside India registered with the appropriate authority in such country) or
- ✓ Import of capital goods or machinery or equipment (Only New); or
- ✓ Pre-operative or pre-incorporation expenses born by parent non-resident entity.

1.4.5 - Key Consideration of Income Tax Act, 1961

The Income Tax Act, 1961 is applicable on the transaction of merger, Amalgamation, demerger or spin-off, Slump sale of business or asset and Transfer of shares. All this transactions are associated with the tax implication arising from it, specifically capital gain.

The transaction of merger can be considered as a transaction of amalgamation subject to following condition prescribed under Income tax act, 1961;

- all the assets and liabilities of the amalgamating companies becomes the property of the amalgamated company;
- Shareholders holding at least 75% or more shares (in value) of the amalgamating company become shareholders of the amalgamated company.

Tax on Capital Gains

The Income Tax Act, 1961 defines tax treatment on capital gain transaction under section 45 to 55. Section 45 is the charging section of the capital gain tax treatment. Capital gain tax means tax arises on the transfer of capital asset. The term ‘transfer’ is defined under section 2(47) of the ITA, which include;

- ✓ Sale or exchange or relinquishment of the asset; or
- ✓ extinguishment of any rights therein; or
- ✓ compulsory acquisition of capital asset; or
- ✓ conversion of capital asset into stock in trade; or
- ✓ Maturity of Zero coupon bond; or
- ✓ Part transfer as per section 53A of transfer of Immovable Properties Act.
- ✓ Any other transaction, which is having effect of transferring capital asset from one person to another.

Further, Section 9(1) (i) of the ITA provides that the capital gains arising from the transfer of a capital asset situated in India by a non-resident either directly or indirectly shall be considered taxable in India.

Capital gain provision is applicable on transaction, subject to transfer of capital asset only. There is two types of capital assets;

- ✓ Short term Capital Asset defined under section 2(42A) – Any capital asset being listed securities, units of equity oriented fund, units of UTI, Zero coupon bonds held by an assessee for the period of not more than 12 months; Any capital asset being unlisted shares, Land, Building held by an assessee for the period of not more than 24 months; Any other capital asset held by an assessee for the period of not more than 36 months.

- ✓ Long term Capital Asset defined under section 2(29A) – Any capital asset not being short term capital asset is called long term capital asset.

Any gain from the transfer of asset either short term or long term is chargeable to tax under the head of capital gain. As per the section 2(29B) gain arising from transfer of long term capital asset is called long term capital gain (LTCG) and 2(42B) any gain arising from transfer of short term capital asset is called Short Term Capital Gain (STCG). The computation of income under the head of capital gain is stated below;

Sale Consideration	xxx
Less: Expenses on Transfer	(xxx)
= Net Sale Consideration	**xxx**
Less: Cost of Acquisition or	
Indexed cost of acquisition in case of LTCA	(xxx)
Less: Cost of Improvement or	
Indexed cost of improvement in case of LTCA	(xxx)
= Taxable LTCG/STCG	**xxx**

As per section 49(1) (e), the cost of acquisition of assets transferred by way of amalgamation shall be deemed to be the cost of acquisition of the assets by the amalgamating company.

In similar manner, as per section 49(2), provides that the cost of acquisition of share for a shareholder of the amalgamated company shall be deemed to be the cost of acquisition of the shares of the amalgamating company.

- ***Capital Gains Tax Implications for Mergers***

Section 47 describes certain transactions which are not considered as transfer. Such transfer is exempt from the purview of capital gain tax. The relevant exemptions applicable in the event of merger transaction are provided below:

- ✓ ***For an amalgamating company (transferor)***

Section 47(vi) is applicable on transfer of capital asset by amalgamating company to amalgamated company. Such transfer shall be treated as exempt from the capital gain tax subject to the condition that amalgamated company must be an Indian company.

Section 47(via) is applicable in the case of foreign amalgamating company (transferor), transfer of shares in an Indian company through the scheme of amalgamation. A foreign holding company transfers its shareholding in an Indian company to another foreign company as a result of a scheme of amalgamation, such a transfer of shares in the Indian company, shall be exempt from tax on capital gains in India for the foreign amalgamating company, *subject to the following conditions*:

- At least 25% of the shareholders of the amalgamating foreign company shall continue to be the shareholders of the amalgamated foreign company, and
- Such transfer shall not attract capital gains tax provision in that foreign country where the amalgamating company is incorporated.

As per section 47(vii), the share transfer by the shareholders of the amalgamating company to the shareholders of the amalgamated company through the scheme of amalgamation shall be treated as exempt from the purview of capital gain tax, subject to the fulfillment of the condition that resulting amalgamated company shall be an Indian company and shares must be transferred in consideration of shares. Consideration other than shares such as cash or bond is chargeable to tax.

- ***Capital gains tax implications for demergers***

As per section 2(19AA) the term ‘demerger’ means the transfer under the scheme of arrangement by demerged company to any one or more resulting company. In simple term it is a reverse of merger. As per section 2(41A) a “resulting company” means one or more companies (including a wholly owned subsidiary) to which the undertaking (including assets and liabilities) of the demerged company is transferred in a demerger and, the resulting company in consideration issues shares to the shareholders of the demerged company. Further it also provides that the transfer of assets and liabilities of demerged company to resulting undertaking shall be at book value immediately before the demerger. The said condition is next to impossible to be met by resulting company due to Indian accounting standards advice to record the transaction at fair value.

In order to provide relaxation from above provision, the amendment has been taken place in Finance Act, 2019 under section 2(19AA). The said amendment states that to eliminate contrast of fair value and book value in the case of demerger, any assets or liabilities are transferred to resulting company by demerged company shall be recorded at fair value by resulting company and shares shall be issued in consideration to the shareholders of the demerged company on a proportionate basis.

- ✓ ***Capital gains tax implications on transfer of shares***

Basically for the resident of the India, capital gain arise from transfer of asset situated anywhere in the world is chargeable to tax. But for the non-resident Indian, capital gain arise from transfer of asset situated in India is chargeable to tax in India. The honorable Supreme Court judgment clarifies in the case of Vodafone International Holdings B.V. v. Union of India (shares are transferred, between two non-residents Company of a non-resident company) that shares are legally treated as situated in the country where the company is incorporated. So, shares of Indian company are considered as situated in India and shares of foreign company are considered as situated in the country of its incorporation. Subsequent to the judgment, Government of India made an amendment to the section 9(1) (i) that the transfer of shares of a non-resident company which derives its value substantially from assets located in India shall be subject to capital gains tax in India having retrospective effect. It is treated as indirect transfer subject to value of such transfer exceeds RS. 100 million and represents at least 50% of the value of all the assets owned by the company or the entity, as the case may be. As per the explanation 6, the value of asset in such transfer would be the fair market value calculated by internationally accepted valuation methodologies without reduction of liabilities. Such calculation should be computed as on a specified date; specified date means;

- Last date of preceding financial year before the date of transfer; or
- The date of transfer, if the book value exceeds 15% of the above value.

The exemption from the indirect tax treatment shall be available to small shareholders who together with associated enterprises hold shares less than 5% by virtue of section 9(1)(i) Explanation 7.

Applicable tax rate of capital gain after being paid Securities Transaction tax (STT) on the transfer of equity shares or securities is as follows;

Particular		**LTCG**			**STCG**		
		Listed		**Unlisted**	**Listed**		**Unlisted**
		Stock Exchange	**IFSC**		**Stock Exchange**	**IFSC**	
Individual							
	Resident	10%	10%	20%	15%	15%	Slab Rates
	Non-Resident	10%	10%	10%	15%	15%	Slab Rates
Company							
	Resident	10%	10%	20%	15%	15%	30%
	Non-Resident	10%	10%	10%	15%	15%	40%

(Table 1.3: Prepared by researcher)

As per section 111A of income tax act, STCG at the rate of 15% is beneficial rate available on the transfer of the listed securities. The similar beneficial rate of 10% is applicable on LTCG under section 112. However, STT shall be paid at the time of purchase and sale both time, subject to value of such gain on transfer exceed Rs.1 lakh. As per the notification issued by The Central Board of Direct Taxes (CBDT), STT shall not be required to pay on the acquisition of share if share purchase before October 1, 2004. Certain exception to the beneficial rate of tax of 10% has been given under section 112A. No benefits of indexing and currency fluctuation will be available to non-resident individual and company in case of transfer of unlisted securities and listed securities transfer through recognized stock exchange in an International Financial Services Center irrespective of payment of STT. Generally security transaction tax rate is applicable on transaction value and in case of transfer on a delivery basis then the rate of 0.125% for both buyer and seller. As per section 112, rate of tax of LTCG on transfer of securities (other than unit of mutual funds) or zero coupon bond shall be 10% with indexing or 20% without indexing benefit, whichever is more beneficial to the assessee.

Further in order to strengthen the international relation, India has an agreement called tax treaties between countries like Mauritius or Singapore, subject to certain condition. Due to these tax treaties assessee is not required to be pay tax dual time, and claim of such tax paid shall be available in resident or non-resident country respectively.

In case of transfer of unlisted shares of a company at lower than the Fair Market Value (FMV), the FMV shall be treated as full value of consideration for such transfer. In this case, transferee is also liable to tax on the difference amount of FMV and actual consideration paid or value of transfer under the head of Income from Other Sources. According to section 56(2)(viib) of the ITA, In case of issue of shares by private company to resident t premium then difference of consideration received and FMV shall be chargeable to tax in the hands of such issuing company. certain transactions are exempt from this provision namely share received by a venture capital undertaking from a venture capital company or a VCF, by a company from a class or classes of persons notified by the Government and eligible start-ups.

- ✓ ***Capital Gains Tax Implications for a Slump Sale***

A slump sale means transfer one or more of business unit on a going concern basis for a lump sum purchase consideration; the values are not assigned to the individual assets and liabilities of such business unit. Computation of capital gain shall be on the basis of net worth of the undertaking on the date of transfer treated as cost of acquisition. The ‘net worth’ means the difference between the aggregate value of total assets and total liabilities as per the books of accounts of the transferor/seller.

The aggregate value of total assets shall be, the written down value of block of assets for the Depreciable assets, Nil for capital assets irrespective of expenditure allowed or not as per section 35AD and the book value of such other assets.

The applicable tax rate is 20% for LTCG and 30% for the STCG excluding surcharge and education cess. The procedure for slump sale is requiring less time compare to merger transaction. Slump sale provision is applicable only in case of purchase consideration is paid in cash, transfer of undertaking having consideration for issue of share or any property shall be excluded due to the definition given in the income tax act. It uses the term ‘sale’ specifically and excludes other type of transfer.

- ✓ ***Capital gains tax implications for an asset sale (itemized sale)***

In case of an asset sale individually not for lump sum consideration of slump sale, the value shall be attributed to each of the asset. The capital gains tax payable by the seller shall be computed on the basis of holding period assets transferred. The applicable tax rate is 20% for LTCG and 30% for the STCG excluding surcharge and education cess. Prevailing rate of surcharge would be applicable depending upon the transaction and person. Education cess will be levied after surcharge at respective prevailing rate.

In case of any cross border transfer between related parties, the applicability and requirements of transfer pricing agreement shall be fulfilled the ITA and other Indian laws. Mainly such transfer shall have to be done at an ‘arm’s length price’ and other documentation requirements have to be fulfilled.

- ✓ ***Tax on Business Income – Carry Forward of Losses***

As per section 72A of the ITA, the accumulated loss and the unabsorbed depreciation of the amalgamating companies shall deemed to be entitled to carry forward by amalgamated company, subject to certain conditions. The amalgamated company shall require holding at least 75%fixed assets (book value) acquired from the amalgamating companies and it shall require to be in the business continuously for a period of 5 years from the date of amalgamation. Further amalgamated company shall require carrying business of amalgamating company at least for 5 years from the date of amalgamation along with any other prescribed conditions. The amalgamating companies shall incurred the loss or unabsorbed depreciation for 3 years or more and had held continuously in the business having at least 75% fixed assets (book value) for 2 years prior to the date of amalgamation. In case of demerger, loss and unabsorbed depreciation shall be carried forward without need of satisfying any condition.

- ✓ ***Transfers declared void under Section 281***

In case of any pending assessment proceedings or tax litigations of any person, including a company, any charge created on or transfer envisaged of any assets by such person shall be considered void subject to prior permission of assessing officer and adequate consideration for such transfer. A certificate under section 281 is a significant document before initiating process of merger and acquisition.

1.4.6 - Key Consideration of Goods and Service Tax

The Goods and Services Tax (GST) has come into force with effect from July 1, 2017. GST has replaced the entire indirect tax regime. Under the GST, Central GST (CGST) and State GST (SGST) or Union Territory GST (UTGST) is levied on all intra-state / union territory supplies of goods and/or services, and Integrated GST (IGST) is levied on imports and all supplies of goods and/or services undertaken in the course of inter-state trade or commerce. The rates for the levy of GST is divided between center and state or union territory, on the supply of goods/services are fixed at 5% (2.5% CGST and 2.5% SGST/UTGST), 12% (6% CGST and 6% SGST/UTGST), 18% (9% CGST and 9% SGST/UTGST) or 28% (14% CGST and 14% SGST/UTGST). The rates are subject to change time to time with finance budget and requirement on industry and as government thinks fit. GST varied in case of purchase of asset due to different rates is defined for different class of asset being sold. Business is not cover under the definition of good or service, therefore, no GST is levied on slump sale transactions. On the other hand, ‘shares’ are specifically excluded From the GST laws by considering it under the definition of ‘securities’. Even in case of amalgamations and demergers no GST liability exists upon transfer of shares.

1.4.7 - Key Consideration of Stamp Duty

Stamp duty is a duty specified by state government according to state stamp duty statue. It is payable on certain specified instruments or documents. Widely, in case of conveyance or transfer of any movable or immovable property, the instrument or document affecting the transfer is liable to payment of stamp duty. i.e. Sale deed, sale agreement or paper which shows status of ownership.

Stamp duty is payable on court order for mergers/demergers (order passed by NCLT). The amount of stamp duty varies with states.

Stamp duty is payable on transfer of share at the rate of 0.25% of the value of consideration. With effect from 1 July, 2020, stamp duty at 0.015% of the purchase consideration is charged on share transferred of unlisted securities in both form physical and dematerialized form. For stamp duty at 0.015% to 0.003% of the purchase consideration is charged on transfer listed entities depending on whether securities are traded on cash on delivery basis or pre-paid basis.

According to the state specific stamp law, Stamp duty is necessary to be paid on shareholder agreements/joint venture agreements.

Stamp duty is to be paid on share purchase agreements at the time of recording the purchase of shares/debentures of a company. It is in addition to the stamp duty on the share transfers mentioned above.

1.5 Organization of the Thesis

This research study is divided into seven (7) Chapters. The bird eye view of chapters and contents are described as follows;

- **CHAPTER 1:- AN INTRODUCTION OF CORPORATE EXPANSION STRATEGY – MERGER AND ACQUISTION.**

The First chapter of the study provides basic information and theoretical background of widely used corporate expansion strategy named merger and acquisition. The chapter includes definition and meaning, types, reasons, factors affecting (success and failure), legal and regulatory framework of merger and acquisition. The trend analysis of merger and acquisition is also described in this chapter.

- **CHAPTER 2:- A REVIEW OF LITERATURE.**

This Second chapter includes study of various articles and research papers have been published in renowned journals and newspapers time to time. This chapter is also made an attempt to classify study of articles in different categories and tried to justify the present study.

- **CHAPTER 3:- AN ADOPTION OF RESEARCH METHODOLOGY.**

This third chapter includes identification of samples and defining pathway for the study. This chapter defines criteria for the study, tools and technique to be used and selection of samples from the population using statistical technique for the study based on understanding developed from the previous chapter.

- **CHAPTER 4:- A PANORAMIC VIEW OF SAMPLE PROFILE AND BASES OF ANALYSIS.**

This fourth chapter contains historical information of the sample companies along with the information related to merger and acquisition deal has been described. This chapter is also gives information about the importance and explanations of financial ratios, which are taken into consideration for the purpose of the study.

- **CHAPTER 5:- THE PERFORMANCE ANALYSIS OF THE COMPANIES – BEFORE MERGER AND ACQUISITION**

  This fifth chapter contains comparative analysis of acquirer and acquiree companies before merger and acquisition for the stated period. It is first core part of the present study. This comparative study contains deal wise as well as sector wise performance of the companies before the merger and acquisition.

- **CHAPTER 6:- THE PERFORMANCE ANALYSIS OF THE COMPANIES – AFTER MERGER AND ACQUISITION**

  This is second core part of present study. This chapter includes analysis of financial ratios by applying statistical method for testing hypothesis and ascertains achievement of objectives. The hypothesis has been tested on the before and after performance of acquirer company. The interpretation and analysis has been given in this chapter after getting applied test's result.

- **CHAPTER 7:- FINDINGS, CONCLUSION AND SUGGESTION**

  This last chapter describes the summary of the entire study along with findings observed by the researcher. The conclusion and suggestion notes are given in this chapter.

- **ANNEXURES :**

  This includes list of various Publication and Plagiarism report.

- **BIBLIOGRAPHY:**

  This includes list of references used for making this study valuable and effective. This includes information reviewed from journals, research papers, websites, books, personnel etc.