CROSS BORDER MERGERS & ACQUISITIONS IN INDIA: A CASE STUDY OF BHARTI AIRTEL-MTN FAILED MERGER DEAL

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ABSTRACT

Growing Indian economy, liberalisation and relaxation of foreign policies, extra cash with Indian corporates have all contributed to rise in cross-border M&A in India. The rapid growth of the global economy with liberalised economic and legal environments has resulted in restructuring of commercial entities on profitable lines so as to withstand global competition and to strengthen the business to maximise shareholder value. Realising the economies of scale to be gained as well as privatisation, globalisation and deregulation acting as necessary catalysts, cross-border M&A activities have increased in frequency in India. .But the attempt by Bharti enterprises to integrate with the South African giant, MTN Ltd., however, brought many lacunas in the Indian laws out of the closet. This paper studies rising trends of cross-border mergers in India in the background of failure of Bharti-MTN deal which brought many lacunas in the Indian laws out of the closet.

KEYWORDS: MERGERS, ACQUISITIONS, LIBERALISATION, DUAL LISTING, INDIAN DEPOSITORY RECEIPTS

1. Introduction

Mergers and acquisitions(M&As) have gained importance in recent times as globalisation and liberalisation has forced various business entities to restructure themselves by way of mergers, demergers and acquisitions.[1] Unless, a company is large in size and capital, it is very difficult to compete with overseas companies where the cost of production is lower due to economies of scales. In a free competitive world, it is necessary for a company to be placed in such a manner that it is in a position to compete with the best in the world. This could easily be achieved through M&As.

A merger is said to occur when two or more companies combine into one company. In a merger, one or more companies may merge with an existing company or they may merge to form a new company.[2] Acquisition, in general sense, is acquiring the ownership in the property. In the context of business combinations, an acquisition is the purchase by one company of a controlling interest in the share capital of another existing company. As the sweeping wave of economic reforms and liberalisation has transformed business scenario all over the world, the national economics have been integrated with 'market-oriented globalised economy'.

Growing Indian economy, liberalisation and relaxation of foreign policies, extra cash with Indian corporates have all contributed to rise in cross-border M&A in India. The recent times have seen a number of 'mega mergers'

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1 Bhasin, "Mergers and Acquisition: An Overview", *Manupatra Newsline*, Vol. 1, Issues 7, December 2006, pp. 11-13, p. 11.

2 I.M. Pandey, *Financial Management*, Vikas Publishing House (P.) Ltd., New Delhi, 2007, p. 672.

between companies headquartered in different parts of the world, resulting in truly global enterprises. The rapid growth of the global economy with liberalised economic and legal environments has resulted in restructuring of commercial entities on profitable lines so as to withstand global competition and to strengthen the business to maximise shareholder value.

Cross-border mergers and acquisitions take place when two companies of different countries merge together. Company jurisprudence of almost all countries provides a legal mechanism to facilities such mergers as world trade integration and globalisation have spurred a wave of international/cross-border mergers and acquisitions. International mergers and acquisitions may be regarded as a new cross-border strategy that aims at increasing corporate global competitiveness by pursuing related diversification and by integrating affiliates into a global network.[3]

Types of International or Cross-border mergers are:

1. Inbound acquisitions i.e. acquisition of domestic corporations by Multinational Corporations (MNCs).
2. Outbound acquisitions i.e. domestic corporations that become global through the acquisition of corporations at home and aboard.
3. Mergers of multinational corporation that affect economies through effects on their subsidiaries.

In the current times doing business has become an increasingly dynamic process, as the business operates not in isolation but is affected by the economic, social, political, cultural and legal environment of the country. As a result, with ushering in of the era of liberalisation and the shackles of contrite regulations broken away, India has woken up to being a major player with the advent of globalisation. Realising the economies of scale to be gained as well as privatisation, globalisation and deregulation acting as necessary catalysts, cross-border M&A activities have increased in frequency in India.[4] Thus the concept of cross-border M&A which gained popularity in US in 1970s have gained importance in India post 2000. This paper studies rising trends of cross-border mergers in India in the background of failure of Bharti-MTN deal which brought many lacunas in the Indian laws out of the closet.

2.Indian Scenario

One of the beneficiaries of the continued globalisation, liberalisation and simplification of business has been the various sectors of Indian economy. From a small town trader running a family business, to the fearless and braving entrepreneur negotiating with multinational corporate powers to attract investment in his Indian business, or acquiring foreign competitors and raring to compete in the international arena, the image of corporate India has undergone a sea change in the past few decades. Surely the founding fathers of the TATA Group would not have

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[3] J. Cantwell and G.D. Santagelo, "Mergers and Acquisitions and the Global Strategies of TNCs", *The Developing Economies*, 2002, Vol. XL, No. 4, pp. 22-42, p. 36.

[4] Anni Singh and Himani Sharma, "Cross-border Mergers and Acquisitions: Indian Companies Aiming to be World Leaders", *Company Law Journal*, 2009, Vol. 5, pp. J1-J7, p. J1.

dreamt about acquiring Ford, Jaguar Land Rover or cracking the deal with Corus. With the cross-border merger and acquisitions activity in India growing at an exponential rate, a stage has been set for several smaller business enterprises to take the plunge and this seems quite beneficial for the Indian economy.[5]

The recent news report about Airtel acquisition of Zain Telecom, Tata Steel acquisition of Corus, Holcim's acquisition of ACC and Vodafone acquisition of Hutchisson-Essar has brought M&A activity in the limelight again. It has also emphasised the fact that Indian M&As transactions are reaching global scale, in terms of size and reach. The rules of mergers and acquisitions are also changing and changing fast. It reflects that entities which fund business expansion activities (like M&A activity) are increasingly more willing to take the risk of the transactions, rather than provide debt at a fixed rate of return. A well-entrenched capital markets and ease of transactions contributes to smooth exits for private equity players, thus making India an even more attractive investment destination.[6]

These and many such transactions have brought to the forefront the importance of cross-border Mergers and Acquisitions for both Indian and multinational companies. The companies have realised that organic growth needs to be supplemented by inorganic growth and 'size does matter' in the global business world. Thus, cross-border deals are becoming a regular feature of the Indian Mergers and Acquisitions landscape. The result being that foreign investment is seeing an unprecedented boom.

3.Applicable Law in Cross-border Mergers

Mergers and acquisitions are used as a means to achieve crucial growth and are becoming more and more accepted as a tool for implementing business strategy, whether they involve Indian companies wanting to expand or foreign companies wishing to acquire market share in India. A merger is required to comply with multiple regulations, non-compliance of which may lead to civil penalties or even civil prosecution under these regulations. When it comes to cross-border mergers, the number of regulations requiring compliance increase by two-fold, considering the fact that regulations of more than one country govern such mergers.[7] In India, the relevant laws that may be implicated in case of cross-border merger or acquisitions are as follows:

1. Company Law
2. Foreign Exchange Laws
3. Competition Law
4. Takeover Code Implications

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5 Priyanka Rathi, "Cross-border Mergers and Acquisitions in India with Special Reference to FEMA", retrieved from *http://www.taxmann.com/taxmannflashes/flashart 9-10-10_12.html.*

6 Bijesh Thakkar and Gautam Bhatt, "Key Issues in Cross-Border Merger and Acquisition Transaction", *Manupatra Newsline,* Vol. 1, Issue 7, December 2006, pp. 5-10, p. 5.

7 Shifali Goradia and Kalpesh Desai, "Cross-border Mergers", *Income Tax Review,* October 2010, Vol. VII, pp. 29-37, p. 29.

(1) Company Law:

In cross-border M&A both amalgamating and the amalgamated company are required to comply with the requirements of section 230-240 of the Companies Act,2013 which *inter-alia*, require the approval of the National Company Law Tribunal and the Reserve Bank of India.

In the previous company law, it was section 394(4)(b) of the Companies Act, 1956 that applied to cross-border mergers and acquisitions. Section 394(4)(b) stated that the transferee company must be a company within the meaning of the Companies Act (i.e., an Indian company) whereas the transferor company may be any body corporate whether a company within the meaning of the Companies Act or not. A 'body corporate' includes a company incorporated outside India[8]. Thus, under the preview of section 394, a foreign company can amalgamate/merge into an Indian company with the sanction of the court but not vice-versa. Thus, on an apparent consideration of Section 394(4)(b), it seems that a transferee company has to be a company registered under the Act.

This provision acted as a hindrance in the case of cross-border M&As and was considered to be one of the major lacunas in the law. Even the report of the Expert Committee on Company Law, 2005 (Irani Committee Report) recommended that:

> "A forward-looking law on mergers and amalgamations needs to also recognise that an Indian company ought to be permitted with a foreign company to merge. -oth contract based mergers between an Indian company and a foreign company and court based mergers between such entities where the foreign company is the transferee needs to be recognised in Indian Law. The committee recognises that this would require some pioneering work between various jurisdictions in which such mergers and acquisitions are being executed/ created."[9]

Therefore, our recently enacted Companies Act, 2013 has incorporated this provision and allows for cross-border mergers, whereas the Companies Act, 1956 permitted merger of foreign companies with companies registered in India but not vice versa. The 2013 Act permits merger of Indian company with foreign companies as well. The foreign company can merge into a company registered under this act or vice versa but with the prior approval of National Company Law Tribunal and Reserve Bank of India.[10] The consideration to shareholders of the amalgamating company may be discharged by payment of cash or issuance of Indian Depository Receipts or a combination of both.[11] The Central Government will notify the jurisdiction of the foreign company which are allowed for such cross-border mergers.[12]

(2) The Competition Act, 2002: In pursuit of globalisation, India has opened up its economy, removing controls and resorting to liberalisation. The result was that the Indian market had to face competition from both within and outside the country. Keeping in line with global practices, the competition law of India makes provision for extra-territorial merger control. Justification for this form of extra-territorial application of laws is found in the

8 Section 2(7) of the Companies Act, 1956.
9 Para 22 of Chapter X of the Report on Company Law as quoted in Shefali Goradia and Kalpesh Desai, 2010, pp. 36-37.
10 Section 234(2) of the Companies Act, 2013.
11 *Ibid.*
12 Section 234(1) of the Companies Act, 2013.

realisation that even mergers taking place wholly outside the borders of a country can result in reducing or affecting the competition within a country, in numerous ways.[13] That's why, section 32 provides that the Commission shall have the power to inquire into combination even if it has taken place outside India or party or enterprise is outside India provided that it has an appreciable adverse effect on competition in the relevant market in India. Thus the governing factor is the effect in the domestic market, this is also referred to as the *'effects doctrine'*.[14]

(3) The Securities Laws of India: In India, takeovers and acquisitions are governed by the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. These regulations seek to regulate the whole process of acquisitions and takeovers, based on principles of transparency, fairness and equal opportunity for all. So any foreign company desirous of acquiring an Indian company has to comply with these regulations.

(5) Foreign Exchange Laws: The Indian legal system governs cross-border M&A by a set of laws which includes the Foreign Investment Policy of the Government of India along with press notes and clarificatory circulars issued by the Department of Investment Policy and Promotion, the Foreign Exchange Management Act, 1999 and regulations made there under, including circulars and notifications issued by the RBI from time to time, here in after together referred to as the 'FEMA Laws'. If the mergers result in a foreign entity acquiring shares in an Indian company, then provisions of the Foreign Exchange Management Act, 1999 (FEMA) read with Foreign Exchange Management (Transfer or issue of Security by a Person Resident Outside India) Regulations, 2000 becomes relevant. Moreover, any foreign entity desirous of acquiring an Indian company must pay attention to the foreign direct investment norms (latest FDI Policy).

4.Case Study-Fallout of the Bharti-MTN Deal

In the recent terms, with globalisation being the byword of success, cross-border mergers are looked upon as a one-way solution to gaining access to foreign market and creating an image to compete with big corporates. But the attempt by Bharti enterprises to integrate with the South African giant, MTN Ltd., however, brought many lacunas in the Indian laws out of the closet.[15] Here, let's have a look at the deal and the lacunas in the Indian laws. This deal has been specifically taken up for case study because of the novelty in the process of carrying of the cross-border mergers as well as unheard hurdles arising out of it which raised important questions about the management of capital controls and other policies of the country.

4.1 A Look into the Larger Picture of the Deal: In recent years, mobile services have achieved a significant milestone in India, with the country having nearly 50 percent telecom density.[16] Increasing competition, decreasing call rates and fluctuating net profit growth, however, made Bharti Airtel, the telecom arm of the company to enter into negotiations with MTN, so as to make new customers in African continent which is also

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13 Snighdha Pandey, "Concept Paper: Extra Territoriality and Merger Control: Study from Major Jurisdictions (US, EU and Canada) and Provisions in Indian Competition Law", *A Project Report*, Submitted to Competition Commission of India (CCI), retrieved from *http://cci.gov.in/images/media/ ResearchReports/Concept_20081202123940.pdf* .

14 Vinod Dhall, "The Indian Competition Act, 2002, in Vinod Dhall (ed.), *Competition Law Today (Concepts, Issues and the Law in Practice)*, Oxford University Press, New Delhi, 2007, pp. 498-539, pp. 530-531.

15 Esha Shekhar and Vasudha Sharma, "Cross-border Mergers in Light of the Fallout of the Bharti-MTN Deal", *NUJS Law Review*, January-March 2011, Vol. 99, No. 4, pp. 101-113, p. 102.

16 Telecom density in India is already at 50 percent and is projected to touch 80 percent by 2015.

regarded as immensely growing market, with tremendous potential for growth, unlike India where teleco's growth is projected to reach a flat terrain in five years. Bharti Airtel and MTN have been two telecommunication companies that enjoy a dominant position in India and South Africa respectively. But the deal didn't get through between these two companies, in fact it fell through twice. The primary logic which perhaps formed the basis of this deal's failure was that these two companies were seen in their home territories as prized possessions and their respective governments were not willing to let them relinquish their national identities.[17] Keeping this basic premise in mind, it is pertinent to dwell deep into the legal issues involved in this deal and how they were instrumental in the failure of this deal. The three primary legal issues involved in this deal were (1) Dual listing of the combined entity, (2) FDI regime in India and (3) India's Takeover Code.

4.2. Prologue: Bharti Airtel Ltd. is an India based multinational mobile telecommunication company. It is the largest cellular service provider in India and makes up for about 23 percent of the India's mobile market. On the other hand, MTN group is a South Africa based multinational mobile telecommunication company, operating in many African and middle eastern countries. It has presence in nearly 20 countries in Africa and Middle East.[18] The two companies conducted exclusive negotiations twice,[19] in just one year to create a transnational alliance which in future could lead to a full-blown merger, however, both time the negotiations fell through.

In 2008, talks ended because of a last minute demand by MTN that Bharti Airtel become its subsidiary.[20] After the above failed attempt, the two companies again tried to negotiate in 2009 which required Bharti to acquire about 36 percent of MTN equity and MTN to buy 25 percent of Bharti. However, the deal could not materialise mainly because of South African company's demand for dual listing of the shares of the company, which required radical changes in foreign exchange, company and takeover norms in India.

4.3. Dual Listing and Its Implications: The legal setup of both the countries presented a unique challenge for this strategic alliance. As their respective governments were not willing that these companies should relinquish their national identities, therefore, one of the novel suggestions put forth in this alliance to overcome the national identity issue was to allow for the combined entity to be dual listed at Johannesburg and Mumbai. A dual listed company (DLC) structure engages two companies incorporated in different countries contractually agreeing to operate their business as if they were a single enterprise, while retaining their separate legal identity and existing stock exchange listings.[21] Thus, dual listing is a process by which a company would be allowed to be listed and traded on the stock exchanges of two countries.

In a conventional merger or acquisition, the merging companies become a single legal entity, with one business buying (for cash or stock) the outstanding shares of the other. However, when a dual listed company is created, the two companies continue to exist and to have separate bodies of shareholders, but they agree to share all the

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17 S.V. Adithya Vidyasagar, "MTN & Airtel's African Tryst: The Legal Angle", *University of Botswana Law Journal*, December 2010, pp. 159-167, pp. 160.

18 *Ibid.*

19 The first round began on 5 May 2008 and the second round on 25 May 2009.

20 This was followed by an unsuccessful attempt by Reliance Communications headed by Anil Ambani to pull off a similar acquisition.

21 Abe De Jong, "The Risk and Return of Arbitage in Dual Listed Companies", as quoted in Esha Shekhar and Vasudha Sharma, 2011, p. 106.

risks and rewards of the ownership of all their operating business in a fixed proportion, laid out in a contract called an 'equalisation' agreement.[22] Usually the two companies share a single board of directors and have an integrated management structure. When two companies in two countries enter into an equity alliance without an outright merger, dual listing means continued listing of the firms in both the countries. The key point to note here is that shareholders can buy and sell shares of both the companies on bourses in the two countries. In other words, if the Bharti-MTN deal would have happened with a dual listing rider, a Bharti share could be sold on the Johannesburg Stock Exchange (JSE) and vice-versa.[23] The dual listing is beneficial as it prevents companies from various forms of official approvals as the existence of each company is preserved.

So the major hurdle to deal was the dual listing as the South African Government wanted MTN to be continue to be listed at JSE, but Indian corporate laws as they stood at that date, do not allow dual listing. This is because there is no full capital account convertibility[24] in India. India introduced full capital account convertibility first for NRIs in early 2002[25] and with the decisions in January 2004 it has substantially begun the process of introducing full convertibility for the benefit of foreigners. However, this process has not been completed as India is slowly moving in this direction. Moreover, the Government of India was not willing to change its policy on full convertibility of rupee at the time of the deal. Exemption could have been granted in this case but it was not thought feasible due to the RBI's perception of the Indian rupee and the fiscal debt position.[26] So the dual listing was totally ruled out which the South African government badly wanted in order to approve the deal. On top of that the Independent Communications Authority of South Africa also asserted that the proposed deal would require their approval and may face public hearings before such approval is granted.[27]

4.4. FDI Regime for Telecom Sector in India: Another major hurdle for the deal was the complex FDI regime applicable to telecom sector in India. Radical changes to the FDI norms were made through Press Notes February 2009, March 2009 and April 2009 in anticipation of increased foreign investment which expanded upon and modified the various previous policies and the method of calculating direct and indirect foreign investment.

Press Note February 2009 laid down criteria as to how and when will a company will be considered to be 'owned' and 'controlled' by an Indian. It also clearly differentiated between direct and indirect investment. Press Note March 2009 further provided that for the assessment of FDI, foreign investment will now include investment by foreign institutional investors, non-resident Indians, American depositary receipts, global depositary receipts, foreign currency convertible bonds, convertible preference shares and convertible currency debentures. These were earlier regulated separately. It further made it mandatory to procure FIPB approval where the control or

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22 For details, see, L. Rosenthlal and C. Young, "The Seemingly Anamolous Price Behaviour of Royal Dutch/Shell and Uni Lever NV/PLC", *Journal of Financial Economics*, 1990, Vol. 26, pp. 123-141.

23 Esha Shekhar and Vashuda Sharma, 2011, p. 107.

24 Capital account convertibility is normally understood as the freedom to convert local financial assets into foreign financial assets and vice versa at market determined rates of exchange.

25 For details, see, T.G. Arun and J.D. Tumer, "Financial Sector Reforms: The Indian Experience", *The World Economy*, 2002, Vol. 25, Issue 3, pp. 429-445.

26 S.V. Adithya Vidyasagar, 2010, pp. 163-164.

27 *Id.*, p. 164.

ownership of an existing Indian company is transferred by resident Indians and companies to a non-resident entity as a consequence of a transfer of shares through a merger or amalgamation.[28]

Press Note April 2009 elucidated the new guidelines for downstream investment by Indian companies. On an overall reading of these guidelines it became clear that the Bharti-Airtel-MTN deal was made further complex as these new regulations changed the definitions of important terms like company owned and controlled by Indians, calculation of direct investment, indirect investment, downstream investment etc. It was apparent that retaining ownership and control with Indian companies and Indian residents was of paramount importance for the Government of India.[29]

4.5. Issuance of GDR and the SEBI Takeover Code: The deal entailed the entire equity expansion of Bharti Airtel to be in the form of GDR's[30] issued to MTN and its shareholders. The main issue that arose was that whether the acquisition of 36 percent GDR in Bharti Airtel by MTN and its shareholders as part of the combination transaction would trigger open offer obligations under the SEBI Takeover Code. Chapter III of the SEBI Takeover Code requires the acquirer to make an open public offer of additional 20 percent in case it acquires 15 percent more than the economic interest in an entity. But regulation 3(2) of SEBI Takeover Code 1997 exempts Global Depository Receipts and American Depository Receipts so long they are not converted into shares carrying voting rights.

To help the matter further, the SEBI delivered its informal guidance on 22 June 2009 and clarified that such acquisition would only trigger the disclosure requirements under Chapter II of the Takeover Code and not the open offer obligation. It was also clarified by the SEBI that the open offer obligation under Chapter III of the Takeover Code would be triggered only upon conversion of the GDRs into underlying equity.[31] This informal guidance was one of the main pillars on which the deal was being structured. This informal guidance seemed to suggest that SEBI was in favour of the deal and necessary exemptions would be granted.[32]

It was thought that the SEBI has made its stand in relation to the deal clear but the twist in the tale rendered all the assumptions incorrect. There was a complete U-turn by SEBI from its earlier position. Earlier, SEBI had announced that mandatory public offer to acquire the shares would not be required to be made by MTN on crossing the 15 percent threshold until the GDRs were converted into shares of the company. However, SEBI revised its takeover norms on 22 September 2009 by bringing ADR/GDRs with voting rights at par with domestic shares, thereby triggering the open offer requirement even in case of issuance of GDRs of the 15 percent limit under chapter III of the takeover regulations is crossed.[33]

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28 *Id.*, p. 165.

29 *Ibid.*

30 A Global Depository Receipt is a negotiable certificate held in the bank of one country representing a specific number of shares of a stock traded on an exchange of another country. In case of ADRs/ GDRs, the companies deposit their equity shares with a custodian, say a bank which in turn issues depository receipts to the investors. These receipts have all the rights barring voting rights.

31 Sidharrth Shankar and Vatsal Gaur, "Takeover Code Implications of Voting Rights Arrangements Arising under a GDR Issuance", *SEBI and Corporate Laws*, 8-14 March 2010, Vol. 98, pp. 52-65, p. 58.

32 S.V. Adithya Vidyasagar, 2010, p. 166.

33 "Bharti-MTN Deal would Trigger Open Offer", *The Hindu*, 21 August 2010, p. 12.

This new amendment virtually changed the dynamics of the deal. The options which MTN had was to issue GDR worth less than 15 percent stake in Bharti to avoid an open offer or MTN and its shareholders to be issued the originally agreed 36 percent stake but in the form of GDR without voting rights.[34] The entire valuation of the deal was, however, affected since even if MTN would have agreed to buy GDRs without voting rights, demand of higher cash payment from Bharti had to be made.[35] To add to this, political considerations also effected the deal putting again the earlier demands that the national character of the South African company was not to be affected, hence putting a question mark into the option of buying out GDR without voting rights.

Thus, the refusal to grant dual listing, change in FDI norms and complications arising out of the SEBI amendment led to the deal being scrapped.

4.6. Lessons from the Deal-Amendments in the Indian Laws: In the previous part, the reasons for the failure of the deal were highlighted. The deal faced a lot of regulatory hurdles which have thrown light on the various lacunas in the Indian laws. The researcher has made the following recommendations so that in future if such a kind of deal comes up, it does not has to face such regulatory hurdles which may result in the failure of the deal. The above case-study was taken up as it shows the continuing interface between the growing Indian economy and the existing framework of capital controls in the country. Therefore, the various changes which are required in various company and foreign exchange laws to accommodate such prominent and complex cross-border deals are discussed hereunder:

(1) Dual Listing to be Allowed: Amendments are required in the Indian laws to enable dual listing in India. To allow for dual listing in India, key corporate laws of our country such as Companies Act 1956 as well as its successor-the new Companies Act, 2013, the Securities Contracts (Regulation) Act, Takeover Regulations and the Listing Agreement need to be amended. Another important amendment that will be required is that of introduction of full capital account convertibility. The dual listing arrangements require full capital account convertibility so that a shareholder should be able to acquire the shares on one stock exchange and sell them on another. The current convertibility rules do not allow an Indian citizen to hold shares in foreign currency. In this way, Indian companies would be shut out of overseas buyout opportunities if they are not allowed to issue them.

(2) Change in Rules for Outward Investment: Changes were brought to FDI Guidelines, through Press Notes 2, 3 and 4 which have impacted the flow of foreign investment into the country. But this deal has brought into forefront the facts that there is need to change rules for outward investments. This refers to change in rules to relax the way the Indian currency flows out of India. It would help to conduct transactions of local financial assets (like shares) into foreign financial assets freely and at prices determined by the markets.[36]

(3) Listing in the Form of Indian Depository Receipts: Absence of capital account convertibility should not act as a stumbling block in the way of deal. This could be done by adopting an alternative way of listing of foreign companies in the form of Indian Depository Receipts (IDRs) and not their underlying shares. Although the legal

[34] *Ibid.*
[35] Esha Shekhar and Vasudha Sharma, 2011, p. 110.
[36] *Id.*, p. 112.

regime relating to IDRs has been in place for the last few years, no company is yet to avail of it. The regime for IDR can work as an alternative for the major changes. The listing obstacle, where lack of capital account convertibility in the erstwhile deal meant that neither MTN nor Bharti shareholders could access each other bourses while dealing with shares, could have been temporarily solved through depository receipts.[37] Bharti Airtel could be traded in South Africa in form of depository receipts in their home currency whereas MTN could be listed through IDRs in the Indian bourses which would have facilitated quotation for MTNs shares in rupees. Perhaps, this would incidentally kick-start the comatose market for IDR's in India.[38]

5.Conclusion

The 23 billion US dollar deal for the merger of Bharti Airtel and MTN fell through finally on 30 September 2009.[39] All the factors discussed above have been responsible for the deal failure. Both the companies since then have worked on their separate strategies to achieve their respective objectives. Bharti Airtel acquired 70 percent stake in Bangladesh based Warid telecom in 2010. It also acquired African assets of Zain Telecom, a Kuwait based telecom company.

It does seem that both the companies have moved on from the failed deal but certainly this deal's exceptional potential because of the market penetration opportunities available in the African markets and the low cost model running experience of Bharti Airtel cannot be ignored.[40] This deal should act as an eye opener for the Indian policy makers because the current state of globalisation makes it imperative that this deal would not remain a one off incident.[41] Hence, need of the hour is to make necessary changes in the law and regulatory procedures so that such a situation does not arise in future. Thus, the need of the hour is prevent such a situation to rise again and prevent companies from trying back door entries when a legally regulated front-door entry is possible.

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37 *Ibid.*

38 Hemant Singh and Dhruva Rathore, "Regulations Governing Cross-Border Mergers in India with Special Reference to Companies Act, 1956", retrieved from *http://papers.ssrn.com/SO13/ Delivery. cfm/SSRN_ID2254314_code1881024.pdf?abstractid=2254314&mirid=1*

39 S.V. Aditiya Vidyasagar, 2010, p. 166.

40 *Id.*, p. 167.

41 Esha Shekhar and Vasudha Sharma, 2011, p. 113.