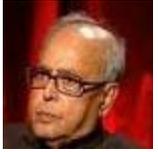


SEBI-IRDA ULIP row: What do legal experts think? April 12, 2010

The IRDA versus SEBI issue is now in the hands of the court. The finance minister Pranab Mukherjee has said that both regulators will have to jointly go to court to resolve this issue and that until the issue is resolved business will continue as usual for insurance companies.

“SEBI and IRDA Chairmen held discussions over jurisdiction over ULIPs. To resolve any ambiguity, and to ensure smooth functioning in the market, the regulators have agreed to jointly seek a binding legal mandate from an appropriate court meanwhile status quo is being restored,” said Mukherjee.

Reacting to the development, in an interview with CNBC-TV18, SB Mathur, Secretary General, Life Insurance Council said, "We fully support this move and we will comply with whatever decision is taken and accepted by all."

In an interview with CNBC-TV18, Somasekhar Sundaresan, Partner, J Sagar Associates and Siddharth Shah, Nishith Desai Associates gave their perspective on the ongoing row.

Here is a verbatim transcript of the interview. Also watch the accompanying video.

Q: As Mr Mathur was pointing out the uncertainty temporarily has been put to rest and that is because both Sebi and IRDA will now take this matter to the court and the court decision or the court order will be bidding on both regulators - How do you read the developments that have taken place this afternoon?



Shah: I think I do tend to agree that at least for the moment the confusion has been ended and I think as I read the statement made by the finance minister the immediate action would be for Sebi to issue a fresh order either suspending the current order or withdrawing the same pending the resolution on the matter.

So at least the affected parties the entities which were named in the order would be free to go ahead and continue business as usual. The regulators will have to mutually decide on the competent court to which this issue would be put to test.

I do tend to agree that this could have been an issue which can be easily resolved because at the end of the day for both the regulators whether it is the IRDA or SEBI, the ultimate objective is investor protection. I do not really see why this common objective could not have been achieved through mutual discussion and ultimately in the best interest of the unit holders or policy holders.

Q: Reason perhaps it reached this stage because there was no compromise solution on the fact that can two regulators regulate a domain. We have enough instances in other financial products but it wasn't about saying that you do it and I will do it, it was about let both of us do it. Legally how tenable is that stand?

Shah: As far as India is concerned, multiplicity of the regulator has time and again created this confusion whether it is SEBI and RBI, or whether it is DoT and TRAI and several other instances. To that extent the powers for each of these regulatory authority are derived from the respective acts.

To the extent that each of these regulators are operating within the powers, within the act, such a situation can arise where the act itself creates an overlap on the financial products.

So to that extent I think many other developed markets where you have a single regulator governing the securities market, insurance as well as banking, to that extent a more harmonious regime could prevail. But in India I am sure with the current philosophy of multiple regulators this issue would continue. I think it is only a matter of resolving the conflicts as and when they arise.

Q: Is SEBI right in law to say that under its act it also needs to have a look under certain provisions of its act at this entire instrument. Do you think that is legally a correct stand? Never mind the merits of it but legally can a regulator under its act say that as per my act these are products which seem to be in sync with some of the products that I regulate and I therefore in addition to the other regulator need to have a look at them?

Sundaresan: I will disclose that I have advised some of the insurance companies that have these ULIP products. Very clearly even in my personal profession I do not think given the law as it stands today there is room for SEBI to have a look in at this stage.



If it wants to have a look in, the law would need to be amended and that was the expectation one had when people tried to resolve these differences. But it is a little disappointing that the policymakers instead of resolving policy actually want courts to run the system and want the court to interpret the position.

Q: If I can take that point forward because clearly policymakers are not able to actually get regulators on board. If you look at how the HLCC (High Level Coordination Committee) seems to be functioning at this point in time clearly we have not made any headway which is perhaps why you actually saw this order coming by way of SEBI so in its assessment, the government at this point in time we do not have that super regulator in place. Let the court decide what is wrong with that.

Sundaresan: The government runs the system and if the government can't resolve policy it is a sad scene of affairs. That is again my personal view.

Here is a situation where two regulators believe that they are going to have a say, they have got to reconcile with themselves and if they can't the system that they are reporting to ought to create a framework where both can work side by side if at all.

If you want the courts to interpret the courts will interpret but it is a bit like asking the courts to resolve policy where you have an opportunity to create policy. You do not do it and then you want courts to interpret. It is just a commentary on the way the system functions.

Q: The point is that this is a legal interpretation issue. There is one regulator which says I am empowered under my act to conduct a certain kind of enquiry into this and ask for registration. There is another regulator which says under my act I can even strike down the other regulator's order. So pretty much this is a legal interpretation issue and I think courts should be doing it rather than the government giving directive to two autonomous regulators?

Sundaresan: It depends on perspective. I mean that it's a perspective that you bring to bed, no regulator has said that it has the ability to strike down the others order. There is a regulator which says what you are doing seems akin to mutual funds. I regulate mutual funds. There is another regulator which has actually been mandated by parliament to protect the interest of unit holders and policy holders who take insurance cover.

So there are two regulators one which actually does it, there is another regulator which wants to do it. If the system which deals with policy believes that both regulators need to work, it needs to step in and amend the law, it needs to step in and amend the policy. If it can't do that, there is little point in saying that let the courts decide.

Q: Would you like to respond to what Som is saying? He has a slightly contradictory view compared to yours?

Shah: I think I would still believe that as the jurisdiction of each of these regulators really emerge out of the statuette and to that extent one option is obviously to go back and amend the statuette to provide segregation of powers.

But having said that, interpreting the statuette today and I think to a certain extent I would beg to differ from Mr Somashekhar on the aspect that investor protection clearly also falls within the domain of SEBI.

Personally as an investor, the way certain of these products were distributed I think there was a lot of similarity between a mutual fund and a ULIP product. So from an investor protection perspective both the regulators are working towards a common objective.

But as long as it is the interpretation of law and statuette, I think that courts would be probably the most competent authority than really the government.

Q: Which would be the four of the appropriate court is how the the finance minister mentioned. Would it be the high court in this case or do you see both of them going directly to the Supreme Court?

Shah: It would be the High Court. It would be through a writ filed with the High Court. Now which of the high court is to be seen.

Q: That would be another question right because one is in Hyderabad and one is in Bombay, which one would you choose?

Shah: I guess the finance minister has clearly laid out that it is going to be a consensus decision. So to that extent I think both the

regulators to that extent would really decide.

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Q: You had a point to make?

Sundaresan: There are a couple of things to be borne in mind at the end of this dispute resolution by a court. Suppose a court says SEBI is right or the court says IRDA is right, are the issues at hand going to vanish. The issues in hand are not going to vanish.

Are we going to say whoever says that things are done in a manner which was inappropriate we are then going to say the court is going to decide that if things that were done were legally right, the policymakers intend to make things more appropriate is going to be a non-intent? It is not. It is going to be addressed.

So that is the point about letting courts do what government ought to do. We can then say courts are active, courts are running governments. But the government ought to do what they ought to do.

Secondly, you have two regulators who want to regulate the same thing. They do not see eye to eye. There is one regulator which said anything that is remotely connected to the securities market in whatever proportion will be regulated by me. So I take housing society which has surplus funds. It invests those funds in securities, in mutual fund units and so would you say that is mutual.

It has a pool, it has got money from various people and that is a mutual fund. So these are issues which really have to be dealt with from a policy perspective.

As regards which court you are again going to have one saying I will go to X court the other saying I will go to Y court. So you will have to go by a writ petition to the Supreme Court which would be a neutral sort of ultimate court. The Supreme Court could say go to an alternate remedy in the High Court and go back.

The court is not bound by what the government thinks the court should do. The Supreme Court could send it back and go to the relevant High Court. The two regulators who can't see eye to eye and government can't resolve them are not being able to see eye to eye, will then have to say go to X court or Y court. If they could do that then they might as well resolve this issue.

So this is not a very happy state of affairs in the history of financial sector regulation in the country.
