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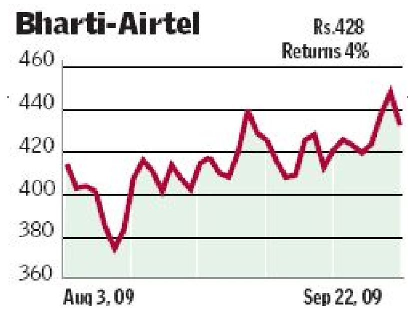
Bharti-MTN deal will trigger open offer

SEBI mandate on ADR/GDR holders could turn roadblock for deal.



Our Bureau

Mumbai, Sept 22

SEBI on Tuesday threw a spanner in the works of the proposed $24-billion (over Rs 1,15,000-crore) Bharti-MTN deal, making open offer obligations applicable in the case of ADR and GDR holders with voting rights.

The capital markets regulator amended its takeover regulations to say that ADR and GDR holders who have voting rights in a company and who cross the takeover threshold limits will now have to make an open offer to the shareholders of the company.

This would greatly complicate the Bharti-MTN deal, which was struck in May and which has been tripped up by one hurdle or another.

Under the agreement, South African telecom company MTN will be issued a stake of 25 per cent in Bharti-Airtel, and MTN shareholders a stake of 11 per cent, both in the form of GDRs. In exchange for this, and for an additional cash payment of $7.6 billion (subsequently revised to $10 billion, talks have it) Bharti would get a 49 per cent stake in MTN.

Open offer conditions

On signing this agreement Bharti had sought guidance from SEBI if MTN will have to make an open offer. The regulator (in July), while reserving its right to take a final call on the deal, said that as long as MTN did not convert its GDRs into Indian shares, open offer conditions would not apply.

In view of all this, SEBI's amendment of Tuesday would be a bolt from the blue for the deal, touted as the largest telecom merger so far.

"With the proposed amendments, *prima facie*, if MTN is issued GDRs of Bharti with voting arrangements beyond a certain threshold, then it may trigger an open offer under the Takeover Code. This is a shift from SEBI's informal guidance issued earlier on the matter," said Mr Vyapak Desai, Head, Capital Markets Practice, at law firm Nishith Desai Associates.

"At present, acquirers of ADRs/GDRs are exempt from open offer requirements under the Takeover Code, until conversion of such ADRs/GDRs into equity shares."

The Bharti-MTN deal will have to settle for one of three alternatives now, said an expert in corporate law.

Three options

The first would be for MTN to be issued GDRs worth less than 15 per cent stake in Bharti to avoid an open offer. Acquisition of a 15 per cent stake calls for an open offer for another 20 per cent stake in the target company.

The second alternative would be for MTN and its shareholders to be issued the originally agreed 36 per cent stake, but in the form of GDRs without voting rights.

This would, of course, affect the original valuation of the deal as MTN, even if it agrees to buy GDRs, without voting rights, is certain to demand higher cash payment from Bharti. The third would be for MTN to be issued GDRs with voting rights, which would be followed by an open offer.

At the current Bharti share price of Rs 428 a piece, MTN will have to set aside over Rs 16,000 crore for acquisition of an additional 20 per cent stake in the company.

At the $36-billion valuation (according to brokerage Sharekhan) of Bharti implied by the Bharti-MTN deal itself, a 20 per cent stake would work out to Rs 23,000 crore.

Although Indian companies have issued GDRs before, the question of open offer has not arisen because these instruments are typically picked up by institutions. This would be the first of its kind - where a large private placement of GDRs by an Indian company would be made to a single entity, which will get a stake that exceeds the threshold limit under the Indian Takeover Code.

The SEBI Chairman, Mr C. B. Bhave, said it was premature to comment on dual listing as there is no application with SEBI as of now. There was a request from the South African government to allow for dual listing of MTN and Bharti in both India and South Africa.