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# Lack of dual listing law may bog down deal

Proposed Companies Amendment Bill, Fema need to be changed; deal would also require full rupee convertibility

Satish John

Mumbai: Many laws need to be amended and rules rewritten to make the dual listing of Bharti Airtel Ltd-MTN Group Ltd possible, according to analysts and experts, even though finance minister Pranab Mukherjee on Tuesday said the government was open to permitting dual-listed companies.



The process can take years, the experts said, putting a question mark on the fate of the proposed merger between the two telecom firms that would create the world's third largest mobile-phone group by subscribers.

Under the dual listing arrangement, two firms continue with their separate identities under a single management. According to Rajan Wadhawan, executive director at **PricewaterhouseCoopers**, dual listing

Regulation issues: The Bharti headquarters in New Delhi. Harikrishna Katragadda / Mint obviates the need for a merger. It is a relatively easy option as it can help avoid capital gains tax and other complex tax issues while offering the benefits of scale and merger synergies without the need for a disposal or transfer of shares.

The first precondition for dual listing is full convertibility of the rupee. Besides, the Foreign Exchange Management Act, or Fema, another Act that governs Indian companies, as well as the proposed Companies Amendment Bill would need to be changed to ensure such listings, they said.

Also, the listing agreement and the takeover code of the capital market regulator, Securities and Exchange Board of India, or Sebi, would need to be redefined to protect the rights of shareholders.

At present, the rupee is convertible on the current account, but capital account transactions are still subject to regulations. "Directly listing a foreign company's shares on an Indian stock exchange and the concomitant ability for an Indian resident to trade freely in a rupee-denominated security in stock markets abroad would require a change in law," said Kartik Ganapathy, partner, Nishith Desai Associates, a leading Mumbai-based international tax and legal counselling firm.

While legal experts admit that there is "still some debate" as to whether this demand (for dual listing of shares) has indeed been made by the South African government, they say it is difficult to assess how long it will take to materialize. They also say this may play the role of a "deal breaker", unless the government decides to exempt Bharti from existing norms.

Theoretically, if the Bharti-MTN deal happens with a dual listing provision, Bharti shares will be sold on the Johannesburg stock exchange and MTN shares will be sold in India. If Fema is not amended and capital account convertibility is not in place, South-African shareholders will not be able to cross-sell shares in India and repatriate the proceeds back to their homeland.

“The current Companies Act as well as the proposed Companies Amendment Bill would need further amendments. As the currency is not fully convertible, one cannot trade stocks of an Indian company on an international exchange,” said Narendra Rohira, tax partner, **Ernst and Young**.

Nitin Potdar, mergers and acquisitions lawyer and partner at J Sagar Associates, a law firm, said that apart from the serious implications for the exchange control regulations and certain provisions of the Companies Act, the listing agreement and Sebi’s takeover code would need to be changed.

These can be done if dual listing is seen as an opportunity to create new options for doing big merger deals, Potdar said. “The regulators must act more as facilitators and allow Indian companies to grow and be globally competitive.”

Immediately after Australia saw two of its largest corporate transactions, BHP Billiton and Brambles-GKN, consulting firm Allens Arthur Robinson in a 2001 report explained a dual listed structure as a series of contractual arrangements between two listed entities under which they operate as if they were a single economic enterprise while retaining their separate legal identities.

The most recent instance of dual listing of shares was between two media giants when they created two entities—Thomson Reuters Corp. and Thomson Reuters Plc, with shares traded in Canada and London. Dual-listed companies exist as separate legal entities but have a common board and share information about each other and equalize profits between them and pay the same dividend to both sets of shareholders.

It is a concept that very few countries have put in place in terms of rules and regulations. There are very few countries where dual listing of firms are possible. Mauritius and Delaware, a state in the US, allow it.

“In cases where a merger is not possible, dual listing works in the form of two separate companies being listed on two separate exchanges. While all the shareholders are not common, their rights are equalized so as to give them equivalent cash dividends and capital distribution,” Rohira said.

“Currently, Indian regulations do not contemplate a direct listing of a foreign company’s shares on an Indian stock exchange. Indian depository receipts, however, are an avenue that may be available to bridge the gap,” Ganapathy said.

The Bharti-MTN deal is subject to an end-September deadline. South Africa is reportedly pressing India for an agreement on the dual listing of firms before the deadline.

“The South African finance minister (Pravin Gordhan) met me at G-20 finance ministers meeting and there I suggested to him that this arrangement is being looked into in the India context,” Mukherjee said in Chennai on Tuesday.

*satish.j@livemint.com*