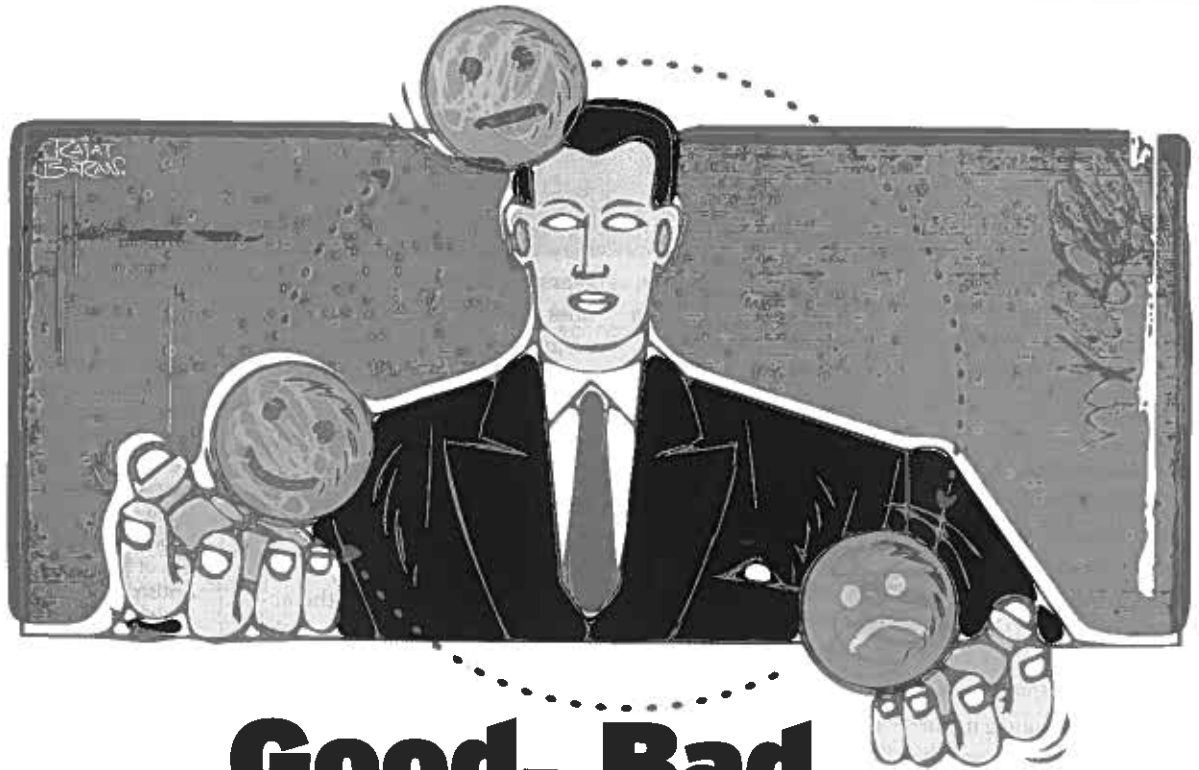


FOCUS

- 18 Second Wind
- 19 Better Than Nothing
- 24 Banking on Tech
- 28 No Kidding



Good, Bad and Ugly

The new takeover code tries to juggle the interests of different stakeholders, say NISHCHAL JOSHIPURA and ARUN SCARIA

Last month, the Securities and Exchange Board of India, or SEBI, approved the recommendations of its Takeover Regulations Advisory Committee, or TRAC, with some modifications. Interestingly, it has played the good cop and the bad cop with equal élan. Although the complete text of the revised takeover code is awaited, the key changes pertain to the initial threshold for takeover triggers, the minimum

size of the mandatory open offer, non-compete fee, competitive bids, voluntary offers to shareholders, mandatory approval from the board of the target company, and delisting.

The initial takeover trigger points in the UK, Singapore, Hong Kong, the European Union and South Africa are in the range of 30 to 35 per cent, at which level a potential acquirer can exercise *de facto* positive control over a company. SEBI has increased the initial

trigger point from 15 per cent to 25 per cent, as most Indian firms are controlled by shareholders with 25 per cent to 30 per cent holding and special resolutions can be blocked above the 25 per cent threshold.

This increase in the threshold should excite private equity players and strategic acquirers. Earlier, investors had to limit their stake to 14.99 per cent in a company and had no say in its affairs. Now, an investor can acquire up to 24.99 per cent in a company without making an open offer and can also comfortably block special resolutions of the promoters with some scattered support. For Indian companies, wooing investors will become a lot easier now.

While the new code augurs well for investors and target companies, it exposes the promoters of Indian companies to hostile bids. It is no secret that the promoter shareholding in most Indian companies is in the range of 20 per cent to 40 per cent. An acquirer can now gatecrash the promoter's party by acquiring in excess of 25 per cent in a private transaction and thereon acquire 26 per cent in the open offer, the new mandatory limit – it was 20 per cent earlier. This will compel promoters to constantly watch their backs as well as ensure the highest corporate governance standards in their companies.

Owing to industry pressure, SEBI has now fixed the open offer size at a minimum 26 per cent of the voting capital. The TRAC had proposed to increase the open offer size to 100 per cent in line with the UK code, but that could have made the takeover process exceedingly expensive for the acquirers. Especially for Indian acquirers, this move could have proved fatal, as Indian banks do not provide financial assistance for acquisitions. Fixing the offer size at 26 per cent will make the open offer process an affordable one for

strategic acquirers and also create a level playing field between Indian acquirers and their foreign counterparts.

However, it is a huge setback for the public shareholders as they are not guaranteed a complete exit even if they tender all the shares in the open offer. Since the acquirer is required to acquire at least 26 per cent (and not the balance), public shareholders may get stuck in the target company after the open offer with part shareholding.

The revised code ignores the efforts of promoters of Indian companies in building value for the companies. Acquirers now will not be required to pay any non-compete fee to the promoters unless the offer price paid to the shareholders is revised to that extent. While this may be unfair to the exiting promoters, it upholds the basic objective of the takeover code – provide equitable treatment to all shareholders.

TRAC had recommended automatic delisting of the target company if the acquirer's shareholding exceeds the 90 per cent delisting threshold through the open offer, and the intention to delist has been declared upfront. SEBI has rejected this proposal much to the displeasure of acquirers who plan on 'going private' in India.

Evidently, SEBI has carefully attempted to juggle the interests of all the stakeholders and strike a balance that is not very easy to achieve. As always, the market reaction seems to be mixed ranging from excitement to displeasure. But what is certain is that the Indian takeovers scene is set to see a lot of action – good, bad and ugly.

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JOSHIPURA AND SCARIA'S TAKE

The new Takeover Code tries to balance interests of all stakeholders

While it makes wooing investors easy, it exposes Indian promoters to hostile bids

It seeks to create a level playing field for Indian acquirers by fixing the open offer size at 26 per cent

But the open offer rule fails to ensure a complete exit for public shareholders

WORDSMITH (NEW WORDS IN BUSINESS)



Washup

What it means:

A washup is a follow-up discussion after an important incident to suggest improvements or resolve difficult situations at work.

Origin:

Although the noun has been around for centuries, its usage in corporate houses began in the 1990s, when several business concepts were being worked on.

Usage:

"The boss has called for a washup meeting."