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"Is dual listing of shares a good idea?"

Cross-border M&As get cheaper and easier, but this requires one set of laws — on takeover codes, for instance — for local firms and another for the dual-listed ones

DEBATE

SANDEEP PAREKH
Visiting Associate Faculty
IIM, Ahmedabad

'The key issue is that a company listed overseas has a major impact on the fortunes of the Indian company, but it has no obligation to make the same level of disclosure that the Indian firm does'

The government of South Africa has been quoted as seeking dual listing of Bharti Airtel and South Africa's MTN. According to the deal which was negotiated several months ago, Bharti would acquire 49 per cent of MTN which would then acquire 36 per cent of Bharti in an ambitious international merger of sorts. Dual listing implies segregation of the two legal entities which are based and listed in different countries, while maintaining a single economic structure. This structure is in place in very few countries and requires that both companies are managed by a single set of managers, that the Board of Directors is appointed by the two sets of shareholders jointly, and that shareholders of both companies receive identical economic benefit including dividend and capital distribution on liquidation.

While many people have pointed out problems of foreign exchange control regulations and the problem of buying shares in one country and selling them in another, this is in fact the least of the problems. While there are some issues relating to foreign exchange regulation, they can easily be sorted out by changing some of the regulations. Even today, Foreign Institutional Investors (FIIs) can buy and sell as many Indian equity securities as they want with caps only on holdings of an individual company and that too with a single easy to get one time registration. Conversely, an Indian family of four can invest up to $1 million (Rs 4.8 crore) each year abroad. Thus even today's exchange control laws are not a big constraint. In any case, since the two companies' shareholders have identical dividend, voting and liquidation rights, there would be no reason for a material price difference between the two companies this will make buying in one country and selling in another unnecessary.

The much more substantial problem relates to fundamental issues of corporate, tax, securities and even bankruptcy law. Key amongst them is how shareholders of another company a wholly different legal entity, connected only by a contract and not even listed in India can influence the voting rights in terms of appointment of directors of the Indian listed company without a re writing of the Companies Act and a wholesale re writing of the listing agreement with the Indian stock exchanges. Financial disclosures are required only of the Indian listed company, so another company, which is not obliged to make the disclosures and whose performance is key to the performance of the Indian company, is not legally obliged to have disclosure of financial details of the same standard as those of Indian company. There would also be extensive problems with various tax laws particularly income tax, as different laws would apply to, say, the dividend distribution and to remittance of income instead of dividend. The bankruptcy laws of the country which applies to Indian companies too would not allow transfer of capital distribution on liquidation. To give another instance from securities law, what would be the implication of acquiring over 15 per cent in the Indian company? Would the law require a compulsory tender offer only of the Indian company? Clearly, that would be an outcome that is not consistent with the contract of dual listing or its economics. These are only some of the handful of dozens of issues which will crop up.

Even if there is an aggressive political will to change so many laws, such a transaction would more likely be permissible in 2019 instead of in 2009 roughly the timeframe in which Delhi has to ready itself for the Commonwealth Games.

(Sandeep Parekh is a World Economic Forum young global leader)

KARTIK GANAPATHY
Partner
Nishith Desai Associates

'Greater flexibility in structuring cross-border M&As, avoiding the takeover-triggered open offers as well as using stock for acquisition are all potential benefits of a dual listing'

Companies and financial investors constantly seek to reduce risk and increase returns. Dramatic changes in markets and regulations are often prompted by these concerns. However, going by news reports, it appears that the Bharti MTN deal which was expected to have significant consequences seems to have hit a roadblock. It was reported that the South African government requested the Indian government to allow dual listing of the South Africa listed MTN shares on the Indian bourses.

Dual listing is achieved when a company's securities are listed on more than one stock exchange (in this case the South African exchange and in India), or by creating an ownership structure of two holding companies, each of which is listed in a different market.

The Indian legal system is yet to recognise the concept of dual listing. Dual listing commonly involves a series of contractual arrangements between two entities, listed in different jurisdictions, so as to achieve economic synergies of a traditional merger along with retaining their separate identities, shareholders and stock exchange listings. Other models of dual listing include the combined entity structure where a jointly held separate entity with pooled assets contributed by its constituent owners is listed, and the 'stapled stock structure' where the shares of both entities involved are paired together to inhibit separate trading of each stock.

Theoretically, dual listing contributes to the liquidity of the shares listed. This enables investors to have a greater choice as to where and when they can trade their shares. A significant apparent advantage of a dual listed structure for companies is the benefit of scale and access to foreign capital.

From a cross border transaction perspective where various regulatory approvals are required, preserving the existence of both entities by using dual listing company concepts may make these approvals easier to obtain. Enhanced options in structuring cross border transactions, avoiding takeover triggered public offerings as well as using stock for acquisition currency are other potential benefits of a dual listing. With the need to synergise two separate legal systems, opportunities abound for dual listing rules to adopt best of breed audit and corporate governance standards.

Indian law will require changes to effectively implement dual listing. Company law would require significant changes to facilitate accounting disclosures, prospectus disclosures, financial formats, common board and common shareholder meetings as well as defining the implications of dissolution of one of the dual listed companies. Securities laws would require changes to listing requirements and prospectus disclosures. Exchange control regulations may need to be amended vis à vis trading of dual listed stock.

In a dual listed companies structure, the equalisation agreement between the entities and the need for multi jurisdictional shareholder and board approvals add complexity to both decision making as well as company function. Audit and compliance cost could be significant as well.

Other countries, such as Australia (BHP Billiton), have favoured the creation of dual listed companies as a way of ensuring their economies benefit from big business combinations. Dual listing may certainly present challenges in terms of change in law and mindset, and requiring more disclosure and compliance. However, the dual listing benefits of tax efficient structures, enhanced access to multiple capital markets, better governance, and a higher regulatory standard are hard to ignore.

(Views expressed are personal)