

Market

Sebi adds to MTN suspense

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By **Vyas Mohan, Rajesh Abraham**

The Securities & Exchange Board of India (Sebi) on Tuesday decided to amend the takeover code, making an open offer mandatory if an issue of American depository receipts (ADRs) or global depository receipts (GDRs) with voting rights crosses 15 per cent of the share capital of the issuing company.

This immediately put the potential \$24 billion Bharti-MTN deal in the spotlight. On this eventful day Bharti chairman Sunil Mittal met prime minister Manmohan Singh, and a team from the treasury and central bank of South Africa was trying to meet RBI and finance ministry officials.

Mittal was believed to have discussed with Singh issues like dual listing and exempting MTN from an open offer. The twice extended deadline for Bharti's exclusive talks with MTN is set to expire a week from now.

In an official statement on May 25 on the complex deal, the two companies had said that at the end of the stock-and-cash transaction, MTN and its shareholders would own 36 per cent of Bharti Airtel via GDRs, while Bharti would have 49 per cent in MTN. The statement also said that post-deal MTN as a company would have 25 per cent equity-accounted 'economic interests' in Bharti.

It is still not clear – or at least not made public – what form these 'economic interests' will take. In absence of official elaboration from the two companies, three scenarios arise:

1) If MTN's 'economic interests' are in the shape of GDRs with voting rights, it would clearly trigger the changed Sebi takeover code. In other words, in such a scenario, MTN will have to make an open offer as it will have crossed the 15 per cent threshold.

2) Alternately, Bharti may issue GDRs without voting rights. In this case, the open offer trigger will not be activated. The question here is: will MTN agree to this arrangement which will render it only a sleeping partner?

3) Another option for Bharti is to split the GDR issue into two parts -- one part of 15 per cent with voting rights, and the balance 10 per cent without these rights. In this arrangement, MTN escapes the open offer trigger.

Explaining the new decision, Sebi chairman C B Bhave said, "If you are holding an ADR or GDR with voting rights, you will have to make an open offer." He did not say if the decision was taken in the context of Bharti-MTN talks but market analysts saw an impact on the structure of the deal. On the dual listing issue, Bhave said there was no formal proposal before Sebi.

Quickly responding to the speculation after the Sebi decision, a Bharti spokesperson said, "We can confirm that the structure, under discussion with MTN, will be fully compliant with the laws in both countries. All relevant approvals, including exemption from open offer from Sebi (if required), would be sought at the appropriate time."

The Sebi decision is in contrast to the informal guidance it gave to Bharti on June 22. In that guidance Sebi said MTN and/or its shareholders would be required to make an open offer to Bharti shareholders only upon conversion of the GDRs into equity shares with voting rights.

A Bharti shareholder had challenged Sebi's informal guidance at the securities appellate tribunal (SAT). Dismissing the petition, the tribunal said the informal guidance had come from a department of Sebi and that it was not binding on its board.

Commenting on the Sebi decision, Nitin Potdar, partner in the law firm, J Sagar Associates, said that after the new amendment, issuing companies would have to be careful in structuring their depository agreements. "With regard to the existing ADR/GDR holders, it would depend on whether they are currently exercising voting rights or not," he said. Such rights now vest with the depositories and not with the individual holders of the receipts.

R Vaidhyanadhan of Nishith Desai

Associates said the acquisition of ADRs / GDRs were now expressly exempted from the open offer requirement until conversion into underlying equity took place. "With the new amendment, any kind of voting arrangement between a depository and an ADR / GDR holder, holding beyond the prescribed threshold, may trigger the open offer even before conversion," he said.

(With inputs from Mehul Shah)
