



DEVELOPMENT OF SEBI TAKEOVER CODE

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ABSTRACT

The concept of takeovers in India found its roots in the late 20th century, particularly during the era of economic liberalisation in the 1990s. Large-scale reforms and increasing mergers and acquisitions (M&A) activity made regulation necessary to protect minority shareholders, ensure market transparency, and prevent hostile takeovers without due diligence. This concept emerged when Swaraj Paul started efforts to take over Escorts Ltd. and DCM Ltd.¹

Keywords: Mergers and Acquisitions, Swaraj Paul, Escorts Ltd., DCM Ltd.

INTRODUCTION

The Securities and Exchange Board of India (SEBI) was established as a statutory body in 1992 under the SEBI Act, 1992, with a mandate to regulate the securities market. Its main objectives were to:

1. protect the interests of investors in the securities market, and
2. to provide for the orderly development of the securities market.

Considering the earlier situations, the need for some law to regulate takeovers was strongly felt. Moreover, to achieve its objectives as stated in SEBI Act, 1992, SEBI enacted SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1994 in exercise of powers conferred under section 30 of the Act which laid down a procedure to be followed by an acquirer for acquiring majority shares or controlling in another company, so that process of takeover is carried out fairly and transparently. The code has been framed with a view to

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¹ *Takeovers in India- an overview*, by Vijay Sambhurti and Siddharth Shah

protecting the interests of investors in securities, promoting the development of and regulating the securities market, and for matters connected therewith or incidental thereto.²

Thereafter, these regulations have been amended a number of times according to the changing circumstances and needs of the corporate sector. In 1997, the SEBI Takeover Code was reintroduced by enacting SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1997, substituting SEBI (SAST) Regulations, 1994. After considering the recommendations from the Takeover Regulations Advisory Committee (TRAC), SEBI (SAST) Regulations, 2011 were introduced, substituting the SEBI (SAST) Regulations, 1997.

MEANING OF TAKEOVER

Takeover means acquisition or control of a company which is already registered through the purchase or exchange of shares. Takeover takes place usually by acquisition or purchase from the shareholders of a company, their shares at a specified price to the extent of at least a controlling interest in order to gain control of the company. Thus, when an “acquirer” takes over the control of the “Target Company”, it is termed a takeover. When an acquirer acquires “a substantial quantity of shares or voting rights” of the Target Company, it results in a substantial acquisition of shares.

NEED FOR TAKEOVER CODES

With the introduction of Globalisation (LPG Policy) in 1991, foreign investments were made easy, increasing the scale of business and with the ongoing scenario, Mergers and Acquisitions were the best option available, but the companies with huge disposable wealth started exploiting this opportunity to the prejudice of retail investors. This created a need for some regulation to protect the interests of investors so that the process of takeovers and mergers is used to develop the securities market. With the establishment of SEBI in 1992, it got power to make regulations and appointed a committee headed by P.N. Bhagwati to analyse the effect of takeovers and mergers on the securities market. In its report, the committee stated the necessity of a Takeover Code on the following grounds:³

1. The confidence of retail investors in the capital market is a crucial factor for its development. Therefore, their interests need to be protected.

² K.K. Modi v. SAT (2002) 35 SCL 230 Mum

³ Ch. Rejeshwar, *Mergers and Amalgamations: New perspective*, 2001, ICFAI Press, Hyderabad

2. An exit opportunity shall be given to the investors if they do not want to continue with the new management.
3. Full and truthful disclosure shall be made of all material information relating to the open offer to take an informed decision.
4. The acquirer shall ensure the sufficiency of financial resources for the payment of the acquisition price to the investors.
5. The process of acquisition and mergers shall be completed in a time-bound manner.
6. Disclosures shall be made of all material transactions at the earliest opportunity.

DEVELOPMENT OF SEBI TURNOVER CODE

The SEBI (Substantial Acquisition of Shares and Turnover) Regulation, also known as the SEBI Turnover code, has been amended a number of times to address the changing circumstances and needs of the corporate sector. It includes:

1. SEBI (Substantial Acquisition of Shares and Turnover) Regulation, 1994
2. SEBI (Substantial Acquisition of Shares and Turnover) Regulation, 1997
3. Takeover Regulations Advisory Committee (TRAC), 2009
4. SEBI (Substantial Acquisition of Shares and Turnover) Regulation, 2011

SEBI (Substantial Acquisition of Shares and Turnover) Regulation, 1994: It was the first formal takeover regulation which was introduced by SEBI to analyse the substantial acquisition of shares and takeovers of listed companies in India. The key aspect of the regulation includes:⁴

- It established the mandatory procedure for acquirers purchasing substantial shares or control in a listed company to ensure fairness and transparency in takeovers.⁵
- Defined key terms like acquirers, person acting in concert and control to classify the scope of regulation.⁶
- Underlines the requirement for an acquirer to make a public announcement if the acquisition crosses specific thresholds in shareholding or control, providing timely information for the minority shareholders.⁷

⁴ Securities and Exchange Board of India, *Substantial Acquisition of Shares and Takeovers) Regulations, 1994*

⁵ Regulation 4 of the SEBI (SAST) Regulation, 1994

⁶ Regulation 3 of the SEBI (SAST) Regulation, 1994

⁷ Regulation 6 of the SEBI (SAST) Regulation, 1994

- Provision for the protection of minority shareholders by mandating a public offer to acquire shares from them at a fair price if someone breaches the acquisition threshold.⁸
- It determined the SEBI's authority to investigate and take action against violations of takeover rules.

SEBI (Substantial Acquisition of Shares and Turnover) Regulation, 1997: Due to the limitations in the 1994 SAST Code, the Bhagwati Committee was formed and recommended a more comprehensive framework. The 1997 Code provided clearer trigger points for open offers, procedural guidelines and emphasised minority shareholder protection. Key aspects of regulation include⁹:

Consolidation of holdings¹⁰ which lays down certain obligations of an "acquirer" who, together with persons acting in concert with him, has acquired 15% or more but less than 55% of the shares or voting rights in a company.

Time limit¹¹ within which the public announcement stipulated in Regulation 10 is to be made. The public announcement shall be made by the merchant banker not later than four working days of entering into an agreement, acquisition of shares or voting rights or deciding to acquire shares or voting rights exceeding the respective percentage specified therein.

Content of the public announcement of the offer¹² Clause (ix) provides for the object and purpose of the acquisition of the shares and plans, if any, of the acquirer for the target company.

The Second Bhagwati Committee recommended a separate and extended time period for making the public offer for a company that gets taken over following the acquisition of a target company.

Offer price¹³ for the shares of a company being taken over indirectly and as a consequence of the acquisition of the primary target, would be determined with reference to two dates, one when the public offer was made regarding the "Parent company" and the other when the public

⁸ Regulation 5 of the SEBI (SAST) Regulation, 1994

⁹ Prof. Dr. Tabrez Ahmad & Satya Ranjan Swain, *The Takeover Code: A Comprehensive Overview*, Journal of Human Development, Brown Walker (U.S.), 2011-2012

¹⁰ Regulation 11 of SEBI (SAST) Code, 1997

¹¹ Regulation 14 of SEBI (SAST) Code, 1997

¹² Regulation 16 of SEBI (SAST) Code, 1997

¹³ Regulation 20(12) of SEBI (SAST) Code, 1997

offer is made for the secondary target company and the higher of the two will be taken as the offer price.

Takeover Regulations Advisory Committee (TRAC), 2009: The growing level of M&A in India and the increasing sophistication of the takeover market made it necessary to review the Takeover Regulations of 1997. So, SEBI¹⁰ constituted the Takeover Regulations Advisory Committee (TRAC) headed by Mr C. Achuthan, with the mandate to examine and review the Takeover Regulations of 1997 and to suggest suitable amendments. Their reports were released in 2010, which laid the foundation for the SEBI (Substantial Acquisition of Shares and Turnover) Regulation, 2011. The committee recommended that:¹⁴

That acquisitions of an aggregate of 25% or more voting rights in a target company would require the acquirer to make an open offer.¹² So, the committee has increased the aggregate voting right by 10%.¹⁵

Promoters who own more than 25% of voting rights may buy up to 5% of the company's shares every year, through a creeping acquisition, up to a maximum of 75%, without making a Public Announcement.¹⁶

Irrespective of whether the target company is material to the parent transaction, open offer obligations have to be triggered. Where a change in control over the target company occurs, shareholders of the target company ought to rightfully get an adequate exit opportunity.¹⁷

Shareholders holding shares entitling them to exercise 25% or more of the voting rights in the target company may, without breaching minimum public shareholding requirements under the listing agreement, voluntarily make an open offer to consolidate their shareholding.¹⁸

In addition to the grounds currently existing, an open offer may be withdrawn where any condition stipulated in the agreement for acquisition attracting the obligation to make the open offer is not met for reasons outside the reasonable control of the acquirer, and such agreement

¹⁴ Prof. Dr. Tabrez Ahmad & Satya Ranjan Swain, *The Takeover Code: A Comprehensive Overview*, Journal of Human Development, Brown Walker (U.S.), 2011-2012

¹⁵ Regulation 3(1), the TRAC report

¹⁶ Regulation 3(2), the TRAC report

¹⁷ Regulation 5, the TRAC report

¹⁸ Regulation 6, the TRAC report

is rescinded, subject to such conditions having been disclosed in the detailed public statement and the letter of offer.¹⁹

The acquirer promoter/shareholders shall be asked to disclose their acquisition on a periodic as well as transaction-specific basis upon crossing the limits specified therein to the Stock Exchange.²⁰

SEBI (Substantial Acquisition of Shares and Turnover) Regulation, 2011: The 2011 regulation was a major revision based on the Takeover Regulations Advisory Committee (TRAC) report. It introduced an investor-friendly and internationally comparable takeover regime to India. Various amendments have been introduced over the years, which include:²¹

Creeping Acquisition Trigger:²² The Takeover Regulations currently provide that if any shareholders holding above 55% but below 75% or voting rights can make additional share acquisitions, provided their total holding does not exceed 75%.

Offer Price Calculation Flexibility:²³ Permit the exclusion of short-term share price movements resulting from specific disclosures or material events under Regulation 30(11) of SEBI's Listing Obligations and Disclosure Requirements (LODR), when calculating the open offer price.

Higher Thresholds for Innovators Growth Platform (IGP):²⁴ For companies listed on the IGP, higher thresholds are prescribed for triggering open offers to 49% (instead of 25%), acquirers can now acquire up to 49% of the voting rights in an IGP listed company before triggering the obligation to make an open offer to public shareholders and disclosure requirements for substantial shareholding raised to 10% (instead of 5%) to accommodate the startup ecosystem.

Bank Guarantee for Early Acquisition Completion:²⁵ Parties can complete acquisition transactions before the end of the open offer period (after 21 working days from the detailed

¹⁹ Regulation 23, the TRAC report

²⁰ Regulation 28, the TRAC report

²¹ Varsha Das & Aishwarya Mishra, *The New Takeover Code by the Securities and Exchange Board of India*, 4 J. Soc. & Dev. Sci. 303 (2013).

²² Regulation 11(1) of the SEBI (SAST) Regulations, 2011

²³ Regulation 8 of the SEBI (SAST) Regulations, 2011

²⁴ Regulation 3,6 and 29 of the SEBI (SAST) Regulations, 2011

²⁵ Regulation 22(2) of the SEBI (SAST) Regulations, 2011

public statement) by providing an unconditional and irrevocable bank guarantee to SEBI covering the entire consideration amount

Combined Delisting and Takeover Offers:²⁶ Acquirers can now make a combined public offer and delisting offer with a fixed price, with provisions to scale down acquisitions to comply with minimum public shareholding norms if the delisting offer fails.

Self- Attestation of Documents: Parties can now submit self-attested documents in place of requiring notarization or affidavits, making compliance significantly easier. It reduces compliance costs and speeds up processing under the SAST rules.

OCL INDIA LIMITED²⁷

The Appellants are the promoters of OCL India Limited (Target Company). The Target Company came out with a Buy Back offer and declared that the promoters of the company would not participate in the offer. SEBI received a complaint from Jindal Securities Private Limited alleging that pursuant to the buyback offer, the percentage of voting rights of the promoters had increased, and they had violated the provision of Regulation 11 of the SEBI (SAST) Regulations, 1997. On examining the complaint, SEBI held that the promoters of the Target Company had violated the provision of Regulation 11 of the SEBI (SAST) Regulations, 1997, even though they did not actually acquire the shares. As per the SEBI, the mode of acquisition did not matter, and since the promoters have acquired more than 5% of the voting rights, they should have made a Public Announcement. An Adjudicating Officer was appointed, and while the adjudication proceeding was pending, the appeal was filed to SAT. While admitting the appeal, it was directed to the adjudicating officer to continue with the proceedings, but not to pass any final order till the final disposal of the appeal.

Decision: SAT stated that the appellants would have made an application for exemption from the applicability of the provision of Regulation 11 of SEBI (SAST) Regulations, 1997. SAT disposed of the appeal with a direction to the Board to consider the appellant's application for exemption in accordance with the law without being influenced by any observation or finding recorded in the impugned order.

²⁶ Regulation 5A, 7(4) and others of the SEBI (SAST) Regulations, 2011

²⁷ Order of SEBI, WTM/KMA/CFD/212/01/2011

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