INDIAN TAKEOVER CODE

IN

SEARCH OF EXCELLENCE

(A CASE STUDY APPROACH)

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1. ABSTRACT

M&A and Takeovers are the powerful ways to achieve corporate growth, but because of their complex nature, to protect the interest of all the parties, curb the malpractices and to facilitate orderly development these activities are regulated by a takeover code in most part of the world. In India after liberalization Govt. started to regulate these activities by introducing a takeover code. This code has gone through various major and minor changes since then to respond the challenges it faced during implementation and also to overcome its shortcomings. My study is an attempt to discover what challenges it faced and what changes were incorporated in the code over the period of time. Whether these successive changes are leading Indian takeover code in a proper direction, also what are the major shortcomings of the code at present. What are the critical issues, which need immediate attention to make it more effective. In the paper I tried to explain these challenges by quoting major controversial takeover battles after 1990s.

2. INTRODUCTION

Business combination, corporate restructuring and corporate reorganizations are terms used to cover mergers, acquisitions, amalgamations and takeovers. M & A are very important tools of corporate growth and thus used worldwide. A study on the business activities of US companies revealed that so far there have been five major merger waves in US. ***First wave*** (1897-1904); during this period rapid economic growth through concentration was achieved. Expansion of business operations, economies of scale and drive for efficiency & technological changes were the motivating forces. It created monopoly and large companies absorbed smaller ones. For example, US Steel emerged on combination of 785 companies. Similarly, American Tobacco and General Electric emerged after absorbing large number of companies. ***Second wave*** (1916-1929); if first wave was the era of horizontal mergers, second wave was the period of vertical and diversified mergers. It created oligopoly. Achieving technical gain, avoid dependence on other firms and to consolidate sales and distribution networks were the driving forces. ***Third wave*** (1965-1969; during this period no pervasive motive could be identified. Merger activities were mainly influenced by the Anti-trust policies. Circumventing regulatory provisions, managerial reorganization, product diversity etc. were the governing forces. During this period a large number of firms

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disappeared from the market. ***Fourth wave*** (1981-1989); during this period Companies responded to a common set of environmental/macro factors and assumed an international dimension. Hostile takeovers and LBOS were the primarily acquisition strategy. ***Fifth wave*** (1990-2000); this is the era of cross border acquisitions. A number of mega mergers emerged involving companies from different countries. IT revolution, continued deregulation of the economies, reduction in trade barriers, globalization and privatization led to these mergers.

3. INDIAN SCENARIO

Mergers and takeovers are prevalent in India right from the post independence period. But Government policies of balanced economic development and to curb the concentration of economic power through introduction of Industrial Development and Regulation Act-1951, MRTP Act, FERA Act etc. made hostile takeover almost impossible and only a very few M&A and Takeovers took place in India prior to 90s. But policy of decontrol and liberalization coupled with globalization of the economy after 1980s, especially after liberalization in 1991 had exposed the corporate sector to severe domestic and global competition. This had been further accentuated by the recessionary trends, resulted in falling demand, which in turn resulted in overcapacity in several sectors of the economy. Companies started to consolidate themselves in areas of their core competence and divest those businesses where they do not have any competitive advantage. It led to an era of corporate restructuring through Mergers and Acquisitions in India.

4. MEANING OF MERGERS AND AMALGAMATION

According to section 2(1A) of Income Tax Act, 1961 amalgamation is the merger of one or more companies with another company OR merger of two or more companies (amalgamating companies) to form a new company (amalgamated company) in such a way that all the assets and liabilities of amalgamating companies becomes assets and liabilities of the amalgamated company and shareholders holding not less than $9/10^{th}$ in value of the amalgamating companies becomes shareholding of amalgamated company.

Sections 391 to 394 of the Companies Act, 1956, govern the process of mergers or amalgamations

5. MEANING OF ACQUISITION/TAKEOVER

Acquisition refers to the process in which a person or firm acquires controlling interest in another firm. Acquisition can be friendly or hostile. A friendly acquisition is one in which management of the target company or controlling group sells its controlling shares to another group at its accord. Acquisition can take market route also. If management of the target company is unwilling to negotiate a contact with prospective acquirer, it can approach directly to the shareholders of the target company by making an open offer. This is known as Hostile takeover.

Takeovers are governed by 'SEBI Regulation for Substantial Acquisition of Shares and Takeover' (most popularly known as **Takeover code**)

6. <u>NEED FOR TAKEOVER CODE</u>

In India activities of the companies from the point of view of M&A and takeover can be seen in term of three waves. ***First Wave:*** The first wave of takeover witnessed in India during 80s and in the beginning of 90s. It was altogether different from current scenario. There were hardly any regulation and making a tender offer was not compulsory. Takeover was considered as a willing buyer-seller negotiation. Mostly two types of cases were there. First, It was a case of foreign owner, who had diluted his stake to less than 50% and therefore lost interest in Indian company and sold it out to Indians (e.g. Shaw Wallace). Secondly, due to the pressure of financial crisis. During this period some cases were where acquirer was a strong person and loser were generally small investors e.g. Tata's acquisition of Special Steel and HLL's acquisition of Stepan Chemicals. During this period Swaraj Paul, RP Goenka, Manu Chabbria, Ambanis and Murrugappa group were the pioneers. ***Second Wave:*** Second wave in the Indian context however started after 1994. This was the era of Expansion, Consolidation and restructuring and a marked shift from friendly to hostile takeover was witnessed during this period. In fact liberalization of Indian economy, dismantling of MRTP and Licensing regime, relaxation under FERA, availability of foreign funds etc had led to a rise in the number of mergers and takeovers during this period. ***Third Wave***: The wave gaining momentum now is the third wave. It is significantly different from earlier two because role of Banks and FIS becomes important now.

Because of the complexity of the nature of takeover, to protect the interest of small investors as well as the target company a need was felt to develop a code to regulate the whole process of acquisition and takeovers based on the principle of transparency, fairness and equal opportunity to all. The impact of the SEBI's initiative on the takeover code in the interest of investors seems to be visible. According to a presentation made by SEBI in 2001, introduction of takeover code has been resulted in a benefit of Rs. 4250 crores to the shareholders of various companies.

7. <u>SOME IMPORTANT DEFINITIONS</u>

- ***<u>Threshold limit</u>***:
  It is the level of holding when holders have to observe certain provisions. Threshold limit is defined for two purposes. First, For the purpose of Disclosure; If a person holds 5%, 10% or 14% then at each level, he has to inform to concerned company and stock exchange about the level of his holding. Second, As the trigger point for open offer; it shows the level of holdings beyond which acquirer have to make open offer for further acquisition of shares or voting right.

- ***<u>Open Offer:</u>***
  An invitation to the shareholders of the target company to surrender/sell their shares to acquirer at a specified price on or before of the closure of the offer period.

- ***<u>Conditional offer</u>***:

An open offer to the shareholders where acquirer makes a provision that he will accept the shares only if response is beyond a certain limit.

- ***Trigger Point:***
  Level of holdings under various circumstances beyond which the provisions of takeover code will be applicable.

- ***Negotiated Offer***:
  Friendly takeover where shares are acquired from substantial holder (either promoters, management, Banks and FIs etc.) on negotiation basis.

- ***Bail -Out Takeover***
  It refers to the process of rehabilitation of a financially weak company by a public financial institution or Bank.

- ***Creeping Facility:***
  A facility provided to the promoters of the company to increase their stake each year by a certain maximum limit.

- ***Person acting in concern***:
  It can be a person or firm or merchant banker or other who together works for a common cause of acquiring stake.

8. EVOLUTION OF TAKEOVER CODE:-

- **PRIOR TO 1990**

The first attempts at regulating takeovers were made in a limited way by incorporating a clause, viz. Clause 40, in the listing agreement, which provided for making a public offer to the shareholders of a company by any person who sought to acquire 25% or more of the voting rights of the company. Before 1990s M&A and takeovers were regulated by Companies Act, 1956, IDRA 1951, MRTP Act, 1969, FERA, 1973, and SCRA, 1956 (with respect to transfer of shares of listed companies vide clauses 40A and 40B). It was frustrating to the person who wanted to achieve corporate growth through this route. For example, in case of MNC related acquisitions, provisions of the FERA applied which imposed a general limit on foreign ownership at 40%. In addition, MRTP gave powers to the union government to prevent an acquisition if it was considered to lead to 'concentration of economic power to the common detriment'. Moreover, in the event of a hostile bid for the company, the board of a company had the power to refuse transfer to a particular buyer, thereby making it almost impossible for a takeover to occur without the acquiescence of the management of the target company.
Problem; In the due course Govt. found that the companies circumvented the threshold limit of 25% for making a public offer, simply by acquiring voting rights a little below the threshold limit of 25%. Besides it noted that it was possible to acquire control over a company in the Indian context with even holding 10% directly. Existing provisions were

also not sufficient to consider issues like pricing and change in the management and control.

<u>RELEVANT CASES</u>

- ***<u>Swaraj Paul- Escorts/ DCM</u>***

In 1980s London-based NRI Swaraj Paul sought to control the management of two Indian companies, Escorts Limited and DCM (Delhi Cloth Mills) Limited by picking up their shares from the stock market. Paul apparently used the tacit support of the then Prime Minister Indira Gandhi. But had to faced major obstacle from government-run financial institutions like the Life Insurance Corporation opposed him and the two companies refused to register the transfer of shares in his name. Promoters of the two companies - the Nanda and Shri Ram families – also used their political links to defeat Paul.
Though Swaraj Paul failed to fulfill his dream of controlling Escorts and DCM, but was successful in highlighting how particular families were able to exercise managerial control over large corporate entities despite holding a minuscule proportion of the concerned company's shares

- **<u>IN 1990</u>**

Govt. in consultation with SEBI made following **amendments** in the Clause 40: -

i. Lowering the threshold acquisition level for making a public offer by the acquirer, from 25% to 10%.
ii. Bringing within its fold the aspect of change in management and control (even without acquisition of shares beyond the threshold limit), as a sufficient ground for making a public offer;
iii. Introducing the requirement of acquiring a minimum of 20% from the shareholders;
iv. Stipulating a minimum price at which an offer should be made;
v. Providing for disclosure requirements through a mandatory public announcement
vi. Requiring a shareholder to disclose his shareholding at level of 5% or above to serve as an advance notice to the target company about the possible takeover threat

Problems: These changes helped in making the process of acquisition of shares and takeovers transparent, provided for protection of investors' interests in greater measure and introduced an element of equity between the various parties concerned by increasing the disclosure requirement. But the clause suffered from several deficiencies - particularly in its limited applicability and weak enforceability. Being a part of the listing agreement, it could be made binding only on listed companies and could not be effectively enforced against an acquirer unless the acquirer itself was a listed company. The penalty for non-compliance was one common to all violations of a listing agreement, namely, delisting of the company's shares, which ran contrary to the interest of investors. The amended clause was unable to provide a comprehensive regulatory framework governing takeovers.

- **IN 1994**

In 1992 SEBI was given statutory power to regulate the substantial acquisition of shares and takeovers. In November 1994 SEBI issued 'Substantial Acquisition of Shares and Takeovers Regulation, 1994' The Regulations preserved the basic framework of Clause 40 (A & B) by retaining the requirements of - initial disclosure at the level of 5%, threshold limit of 10% for public offer to acquire minimum percentage of shares at a minimum offer price and making of a public announcement by the acquirer followed by a letter of offer.

Several new provisions were introduced enabling both negotiated and open market acquisitions, competitive bids, revision of offer, withdrawal of offer under certain circumstances and restraining a second offer in relation to the same company within 6 months by the same acquirer, post offer public holding etc. The take-over code covers three types of takeovers-negotiated takeovers, open market takeovers and bailout takeovers (to help financially weak companies which do not fall under the purview of BIFR)

Features:

i. Requiring a shareholder to disclose his holding at 5%
ii. Threshold limit at 10% for making public offer
iii. Changes in management and control dropped as a requirement for making open offer
iv. If holding crosses to15% than open offer compulsory (No creeping facility for promoters).
v. Min. price offered to shareholders through open offer will be average of 26weeks high and low
vi. Price can be paid either in cash or through exchange of shares
vii. If a person were to cross the threshold of 10%, he must make a public offer to acquire a minimum of 20% of the share capital of the company, and consequent upon such offer, the public share holding must not fall below 20%. In addition, if a person holding more than 10% shares in a company, and who has not made any public offer before, were to acquire any further shares, the public offer will have to be made to the extent of the difference between his present holding and 30%.
viii. Acquisition of shares in companies pursuant to a scheme of arrangement or reconstruction including amalgamation or merger or demerger under any law or regulation, whether Indian or foreign has been exempted from the public offer provisions. However, prima facie it does not exempt international acquisitions or mergers carried out under normal course of business as a result of which there is a change in control of an Indian listed company. For that matter, the Code defines control very broadly to include both direct and indirect control.

Problems:

The above provisions raised some issues. **First**, in companies where public holding was less than 20%, or might fall below that level to comply with the minimum public offer requirement, it was not possible to comply with the requirement of maintaining a minimum level of post offer public holding. The two provisions was thus conflicting with each other. **Further,** a harmonious construction of all the three provisions implied that if a person was holding more than 30%, no public offer was required to be made by him, for further acquisition of shares in the company, even though he has not made any public offer earlier to reach his present holding. **Thirdly**, it was not clear from the three provisions whether full offer for a company could be made, i.e. a bid for 100% shares of the company could be made.

It does not clearly specify obligations on the part of the acquirer, the board of directors of the target company and the merchant banker. Again It lend to an interpretation that further acquisitions outside of public offer, from the market or otherwise, may be permitted, once the public announcement of offer has been made

Regulations do not specify the circumstances and the time limit within which a revised offer can be made; nor do the Regulations specify whether revision of all the terms of offer, upward or downward, is permissible, and circumstances under which withdrawal of offer can be made.

Existing Regulation on the competitive bids was not very clear. First, there was the question of definition of a competitive bid. Secondly, was the position of the first bid if the acquirer did not want to compete in the offer?

These provisions were used later by some acquirers to launch hostile and competitive bids.

RELEVANT CASES

Sesa Goa-Mitsui: In 1996, Mitsui of Japan acquired the parent company of Sesa-Goa India Limited, a publicly traded listed company in India. As a result of this acquisition, Mitsui indirectly became the single largest shareholder of Sesa-Goa. The question then raised was whether Mitsui should make an open offer to other shareholders of Sesa-Goa under the Takeover Code. Mitsui applied to SEBI stating that the Takeover Code should not be triggered as the change in control of Sesa-Goa was a result of its acquisition of Sesa-Goa's parent. Luckily for Mitsui, the case was evaluated under the 1994 takeover code and the Ministry of Finance ruled that under the 1994 takeover code, SEBI had no jurisdiction over the developments abroad and therefore could not pass sentence on something that happened outside its jurisdiction and thereby no open offer was required.

Schenectady International Inc.

Schenectady International Inc. of USA filed an application with SEBI seeking exemption from the application of public offer provisions of the Takeover Code for its acquisition of

51% of the equity capital of Dr. Beck & Co. (India) Limited .The acquirer proposed to acquire 32.67% and 18.33% of the target from Beck and BASF AG of Germany respectively. The acquirer in its application stated that this acquisition of 51% of the target company was a part of the global acquisition of the Beck division from BASF which includes BASF and Beck's equity holding in the target company. The Takeover Panel rejected above application and accordingly SEBI ordered the acquirer to make open offer for 20% to the public.

Herbertsons Case

In 1993 Kishore Chabbaria acquires 27%stake in Vijay Mallaya's Herbertsons Ltd at Mallaya's invitation. Later on Chabbaria tried to takeover the Herbertsons. This is a very controversial case, which took around a decade for SEBI to solve it. During this period SEBI changed it's verdict several times, which made it more controversial. In this case both Chabbaria and Mallya are alleged to violate the code. Chhabbria used loopholes of the 1994 code to avoid an open offer. A drafting flaw in the 1994 regulations created a loophole allowing him to use a two step route to raising his stake without attracting the open offer provision Chabbaria acquired 10.9% stake in 1993. Later on he acquired another 9% in February 97, before the notification of New takeover code.

In May 1996, SEBI reacted in the case and ordered Chabbaria to make an open offer, which was against the interest of Mallaya because open offer was to give Chabbaria enough power to takeover Herbertsons. So Mallaya strongly opposed SEBI verdict.

In this case a new turn came when Herbertsons file and earlier letters lost from SEBI office. Later on even the secret documents were even found in the hands of both the parties.

This case came at a conclusion recently in August this year, when SAT ordered Kishore Chhabria to make an open offer to acquire an additional 20 per cent of Herbertsons' equity within three months at a price worked out with October 27, 1994, as the reference date. It has also ordered him to pay interest at the rate of 15 per cent to those investors who have been holding the shares as on January 25, 1995, and continue to be shareholders. Which worked out around Rs.210.74 per share.

A Committee was therefore set up by SEBI in November 1995, under the Chairmanship of Justice P.N. Bhagwati, former Chief Justice of India, to review the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994.Committee discussed all the issues, which came up before SEBI in the course of administration of the Regulations over the past two years or so, keeping in view the imminent scenario in the corporate sector following the economic reforms.

The Committee examined the principles and practices and the regulatory framework governing takeovers in as many as 14 countries. The Committee noted that the regulatory framework in these countries had evolved over a period of time drawing extensively upon the corporate culture and practice in these countries. Without an appreciation of these factors, a mere comparison of the procedures, regulatory requirements and various quantitative limits in these countries would be meaningless

Committee submitted its report in January, 1997 based on the recommendations of this committee SEBI enacted " substantial Acquisition of Shares and Takeover Code 1997"

- **SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVER CODE 1997**

MAIN FEATURES

Compulsory disclosure:-New regulation made it compulsorily to disclose holdings at the levels of 5%. So any person whose total holding in the company (Inclusive of shares and voting right already held) reaches to this limit has to compulsorily disclose his level of holding to the concerned company and stock exchange.
Continual disclosures:- If a person held more than 10% shares or voting right in a company, He has to disclose his holding within 21 days from the financial year ending on 31 march. (Note: **This limit was revised to 15% in Oct. 98**)

Trigger of takeover code: - If a person wants to increase his holding beyond 10% (this 10% would be inclusive of the rights or shares already held by the acquirer or by the persons acting in concert with him), he has to do make an open offer.

Consolidation of holdings/**Creeping Acquisition:-**
If a person hold more than 10% but less than 51% shares or voting right in a company and want to acquire more than 2% in a financial year can do only through public offer.
(Note: **In Oct. 98, 10%, 51 % and 2% limits were revised as 15%, 75 % and 5% respectively**)
Acquisition of any additional shares or voting rights when the acquirer already
Have 51 % of the shares or voting rights of the company can be done through open offer only.
(Note: **in oct.98, this limit was revised to 75 %)**

Minimum number of shares to be acquired**:-**
The public offer made by the acquirer to the shareholders of the target company shall be for a minimum ten per cent of the voting capital of the company.)
(**Revised in Feb 98 as 20%)**

Minimum Price**:** Minimum price to be offered to shareholders will be average of Highest and lowest in the preceding 26 weeks.

If the public offer results in the public shareholding being reduced to 10% or less of the voting capital of the company, or if the public offer is in respect of a company which has public shareholding of less than 10% of the voting capital of the company, the acquirer shall either, make an offer to buy the outstanding shares remaining with the shareholders OR undertake to disinvest through an offer for sale or by a fresh issue of capital to the public, which shall open within a period of 6 months from the date of closure of the public offer, such number of shares so as to satisfy the listing requirements

Offer conditional upon level of acceptance: - an acquirer may make an offer conditional as to the level of acceptance which may be less than twenty per cent: Conditional offer will be for minimum 20% percent, although Acceptance level may be less than 20%.

Competitive bid:-

Any person other than the acquirer can made a competitive offer within 21 days of the public announcement of the offer.

Competitive offer shall be at least for the number of shares for which first public announcement has been made. In case of a competitive bid, the acquirer who made the first announcement shall have the option to revise his original offer within 14days of such competitive offer, if no such announcement is made by acquirer within 14 days than original offer will be continue to be valid.

The acquirers who have made the public announcement of offer(s) including the public announcement of competitive bid(s) shall have the option to make upward revisions in his offer(s), in respect to the price and the number of shares to be acquired, at any time up to seven working days prior to the date of closure of the offer:

Withdrawal of Offer:-

Withdrawal of offer can be made consequent to competitive offer or under following circumstances: - (1) the statutory approval(s) required have been refused; (2) the sole acquirer, being a natural person, has died; (3) such circumstances as in the opinion of the Board merits withdrawal.

Bail out takeovers*: -*

Separate provisions are given for substantial acquisition of shares in a financially weak company not being a sick industrial company, in pursuance to a scheme of rehabilitation approved by a public financial institution or a scheduled bank. The Financial institution shall be responsible for ensuring compliance with the provisions of this Chapter.

Exemptions from open offer: -

The public offer provisions of the Takeover Code will not be apply in the following cases:

i) Allotment in pursuance of an application made to a public issue;
ii) Allotment pursuant to an application made by the shareholder for rights issue,
   Subject to such rights issue not resulting in change in control and management of the company;
iii) Preferential allotment of shares, subject to the condition that at least 75% of the shareholders of the company shall have approved the preferential allotment and that sufficient disclosures relating to the post-allotment shareholding pattern, offer price etc., have been made to the shareholders;
iv) Allotment to the underwriters pursuant to any underwriting agreement;
v) Issue of American Depository Receipts and Global Depository Receipts or
   Foreign Currency Convertible Bonds, till such time, as they are not converted into equity shares.
vi) Shares held by banks and financial institutions by way of security against loans
vii) in addition to the above cases, even when there is a change in control and

management of the company, the Takeover Code would still not apply if at least 51% of the shareholders of the company have approved the acquisition by the acquirer after being made aware that such acquisition would result in change in control and management.

Preferential Offers: - Companies adopt the preferential offer route in varied situations for the purpose of consolidation of stake by the existing Indian or foreign promoters, induction of foreign collaborators with foreign technology, gaining management control of the company, injection of fresh funds for turning around sick companies., Regulations provide that the Board resolution is to be sent to the stock exchanges, SEBI will grant exemption on case to case basis under the powers granted to it under section 4 of the regulation .

Acquisitions during offer period : except where an offer is made conditional as to minimum level of acceptances, the acquirer may be allowed to make acquisitions during offer period subject to the condition that highest price paid for such acquisition be paid to the shareholders under the public offer, unless it is less than the minimum offer price.

CASE STUDIES:-

- ### ***INDAL-ALCAN-STERLITE CASE:-***

Brief Account: In 1998, sterlite industries made a conditional open offer for 10% (Note that at that time 10% was the trigger point) shares of Indian Aluminum Company (Indal) at a price Rs. 90 per share, that was 36% higher than prevailing market price. Sterlite's major intention behind this acquisition was to develop a long-term relationship, but it was obvious that Sterlite was more willing to take controlling stake in Indal. But this exercise was turned out as a hostile bidding game, when Canadian major Alcan Aluminum entered in the game. In the due course and subsequent revising of the offer prices reached as high as Rs. 221 per share by sterlite (Rs. 131 in cash and Rs. 90 by way of convertible preferential shares) and Rs.175 by Alcan. However, just on the day of closure of offer period, the FIs struck a deal with Alcan for Rs. 200 a share instead of Rs. 175. Although in this case Sterlite ultimately suffered defeat at the hands of Alcan, yet several issues as regards the fairness and effectiveness of the takeover code arose out of the above episode.

Issues related to takeover code;

i) If through a negotiated offer, Alcan could make market purchases at Rs. 200 and thereby hike its offer price to Rs. 200 on the very last day of the offer, what was the sanctity of the last date for upward revision of offer to be seven days prior to the date of the closure of the offer as required by Regulation 26 of the Takeover Code?

ii) Could the stated objective of the offer made by Sterlite change repeatedly after it has been filed and approved by SEBI? The objective changed progressively from a "strategic alliance" with acquisition of 10% stake to reach 20% (at the instance of SEBI) to grabbing a majority chunk of no less than 52.03% of Indal.

iii) Can the offeror change the mode of payment during the offer period, as Sterlite did, offering both cash and its own shares?

Issues relating to investor protection;

i. Only the initial offers by both SCL and Alcan were formally communicated to Indal's shareholders by way of letters of offer. When both the bidders increased their offers, this was communicated only through the media and no intimation was made to the investors.
ii. By allowing Alcan to revise its offer price to Rs. 200 on the last day of the offer did the SEBI expect investors to watch the Indal's price movement on the screen up to the last moment? This seemed to give out the impression that the SEBI whose objective is to protect small investors, was actually protecting interests of the large investors. The financial institutions, which struck deal at Rs. 200, had the knowledge of the enhanced price and tendered their 36% holding, accordingly.
iii. Did the investors who were unaware of the Rs. 200 price for Alcan's offer have a legitimate case for grievance? Should not SEBI have asked for an extension of the offer period?

- **RAASI CEMENTS-INDIA CEMENTS-SRI VISHNU CEMENT LTD.**

Brief Account; India Cements Limited ("**ICL**") in its hostile bid for Raasi Cements Limited ("**RCL**") made an open offer for RCL shares at Rs. 300 per share at the time when the share price on the Stock Exchange, Mumbai ("**BSE**") was around Rs. 100. After a long drawn battle between the two parties and also the financial institutions ("**FIs**") which held substantial stake in the target, the promoter of RCL, B. V. Raju sold out its 32% stake to ICL in a negotiated deal during the term of public offer at a price that was lower than the open offer price (ranging between Rs. 200 to Rs. 286 a share). This resulted in a situation wherein ICL acquired full control of RCL without having to purchase a single share from the institutional investors. The tendency of the Indian FIs has till recently always been to protect the existing promoters in case of a hostile takeover bid. However, in this case they felt cheated as the promoters themselves sold out their stake to the acquirer leaving little room for them to tender their stake to the acquirer during the open offer. However, ICL also bought out the FIs in the open offer and thereby increased their holding in RCL to 85%. The total, this bid raised several key issues which require some consideration:

Issues;

i. B.V. Raju's first demand was that there should exist a buyback provision in law for the defender. (The Companies Act has been subsequently amended to permit buyback of securities by a company subject to certain conditions). For promoters, since the raiding promoters can use their companies' funds to buy
ii. ICL decided to pay out a whopping Rs. 300 per share of RCL. This price far exceeded the book value of the target. The ICL lenders raised serious doubts as to how this would affect ICL's balance sheet. However, in the end, ICL was able to justify the price satisfactorily.
iii. Raju sold out before the institutions did. ICL did not need to buy out the

institutions, certainly not at the exorbitant open offer price. Institutions like UTI, which held 12% of RCL even threatened to approach SEBI in order to pursue ICL to purchase its stake in the open offer.

There was another interesting twist to this deal, which made matters more complicated. Raju transferred 39.5% stake of Shri Vishnu Cement Limited ("**SVCL**"), which was an subsidiary of RCL, to nine investment companies owned by Raju and his family barely days after the purchase by ICL of Raju's shares in RCL. This was in violation of Regulation 23(1) (g) of the Takeover Code, which prohibits a target company from transferring its significant assets after a public announcement has been made by the acquirer to make an open offer for purchase of shares from the public. Since SVCL was the crown jewel of RCL, and in fact the primary reason for ICL's interest in RCL, the matter was taken to SEBI, which held that the transfer was not valid. The matter was ultimately sorted out through a negotiated deal by which Raju's associates sold their shares of SVCL to ICL.

- **GESCO CORPORATION**

Brief Account; In October 2000 Abhishek Dalmia, made an open offer to acquire 45% of the share capital in Gesco Corporation.at Rs. 23 per share at a total. This transaction entered in to a drama of hostile takeover and a month long interesting battle, when Sheth, promoter of Gesco Corporation, made a game plan with Mahindras. Mahindra made a counter offer for entire floating stock available in the market excluding the Sheth's holding. Both the parties started to attract shareholders with continuously increasing offer prices and as a result offer prices go up as high as Rs. 45 per share.

The matter took a sudden about-turn when, on 7 January, both the Sheths-Mahindras combine and the Dalmia group announced to have reached an amicable settlement in the battle for Gesco, with the former buying out Dalmias' 10.5% stake at Rs 54 per share for a total consideration of Rs 16 crore.

Post-settlement with the Dalmias, the offer price of the combine automatically stood at Rs 54 per share. Finally in the end, the Dalmias claimed the open offer was made to exploit the synergies between the Sheths and Mahindras in the best interests of Gesco shareholders.

Issues:
The Dalmias made huge profits going strictly by Sebi's Substantial Acquisition of Shares and Takeovers Regulation of 1997. The deal, felt analysts, had set a precedent for companies in which promoters hold less than 20%. The Gesco episode proved that any shareholder with a 5% stake could make an open offer and exit with a neat profit after playing up the share price. The Gesco Corporation takeover drama showed that a bidder with admittedly poor financial resources could talk up a share only to exit later with a huge profit via a negotiated deal.

- ***<u>VST INDUSTRIES LTD.:-</u>***

Brief Account: In February 2001, Bright Star Investment, owned by Damani brothers, made an open offer for a 20% stake in VST at a price Rs. 112 per share. In fact Bright Stars main intention behind this offer was not to run the company in long run rather to make money by offloading its stake to major international cigarette giants. In fact Damani brothers were trying to exploit the fact that BAT, a U.K. based cigarette major and majority stake holder in VST, was eyeing on increasing its stake in VST but was not getting approval from FIPB.

Issue: This began a new trend in this field, where any one with strong mussels can make money. Infact Damani brothers were inspired by Gesco Corporations issue, where Dalmia made a good profit through the same route.

- ***<u>CASTROL INDIA:-</u>***

Brief Account; In march 2000, BP-Amoco acquires UK-based Burmah Castrol for three billion pounds at a price equivalent to Rs. 334.75 per share. Castrol India is a wholly owned subsidiary of Burmah Castrol Holdings, which in turn is a wholly owned subsidiary of Burmah Castrol. Burmah Castrol is the wholly owned subsidiary of BP Amoco. In July 2000, BP Amoco and Castrol, UK, parent companies of Castrol India, announced an open offer to acquire a 20% shareholding in Castrol India at a price of Rs 311.91 per share. The offer price was 34% higher than the market price of Rs 234 prevailing then. Castrol's offer price of Rs 311.91 was based on its 26 weeks average share price.

Surprisingly, the parent companies of Castrol India failed to get a green signal from SEBI regarding the same. SEBI announced its intention to examine whether the offer price should be calculated from March 2000, when the global takeover of Burmah Castrol by BP Amoco was announced, or July 2000 when the takeover actually went through. If the legal department of SEBI were to rule in favour of a revision of price, then Sebi's formula of last six-month average price would push the offer price to about Rs 350.

BP Amoco and Castrol, UK, decided to contest the SEBI order. They submitted an appeal to the appropriate Appellate Tribunal. However, at the end of April, the Securities Appellate Tribunal dismissed the petition of BP-Amoco and Castrol UK challenging the SEBI order asking them to base their open offer price on March 14, 2000, instead of July 7, 2000

Issues: -

This ruling set a legal precedent for determining the relevant date for calculating the price of an open offer made for an Indian company when its parent company abroad is merged into or taken over by another company.

Rationale of SEBI decision:

SEBI was right in its approach. Any takeover should be ultimately aimed towards benefiting the minority shareholders. If the global price is higher, then SEBI must aim at the higher price to make shareholders acquire this one-time benefit.

The only way Indian shareholders benefit in this era of liberalization is the domestic listing of MNCs. Unfortunately, there's a reverse trend. Efficient companies and good MNCs are getting delisted from Indian bourses by way of buy-back offers or open offers. Importantly, Indian corporates are tapping the global equity markets for raising funds. So it's a permanent loss for small shareholders

- ***GUJRAT AMBUJA CEMENT LTD.-ACC***

Brief Account: In December 1999, TATA and GACL entered into an option agreement under which GACL was to purchase 7.2% stake of TATA in ACC and also an option to purchase another 7.1% in January 2000 at a price Rs. 370 per share. After the purchase of 7.2% stake L&T appointed two persons on the board of ACC. Chairman of the ACC was also changed and an independent person from CII was appointed as new chairman.

Soon after these developments SEBI launched an investigation whether GACL has trigger off takeover code by virtue of the fact that control and management of

ACC had shifted to GACL.

GACL argued that their acquisition of stake in ACC was merely a strategic one and not intended at changing control and management of ACC. In fact it could not possibly have control over ACC as it had only two out of seventeen director on the board of ACC.GACL also brought in the claim that its acquisition of the ACC shares were aimed primarily at preventing a hostile takeover of ACC by foreign companies. SEBI, considering these arguments, held that there had been no change of control of ACC in favor of GACL and that the acquisition therefore, did not attract the public offer provisions of the Takeover Code.

Issues:

SEBI could have used this opportunity to decide what will mean to change in control and could have laid down certain principle to determine the same. SEBI however, chose to not address the issue, by saying that "each case has to be decided on its facts and circumstances to decide whether there was change in management and control".

GACL-ACC and GRASIM, RELIANCE and L&T case are two very controversial cases, which are still keeping regulators and law experts busy in discussing what way these cases should be treated.

- **RAY BAN SUN OPTICS INDIA:-**

Brief Account: In April 1999, in a global acquisition, the Luxxoticca group of Italy acquired the sun-glass business of Bausch & Lomb, US, which had a 44% stake in Bausch & Lomb India through B&L South Asia Holdings, the control of the Indian subsidiary passed into the hands of Luxxoticca upon the takeover. The Luxxoticca group also appointed its nominees on the board of B&L India and later rechristened it as Ray Ban Sun Optics India. The board was reconstituted in October 2000. Despite a change in management control in B&L India, Luxxoticca failed to make the 20% mandatory open offer to shareholders. In August 2002, SEBI came out with a ruling that Luxxoticca had violated regulation 10 and 12 of the Takeover Code and directed Luxxoticca to make a 20% open offer

Issues: there are considerable uncertainty vis-à-vis takeovers -- especially global arrangements that do not attract SEBI takeover regulations. SEBI's takeover regulations are silent on this issue. Such cases are referred to the takeover panel to decide on case-to-case basis.

- **ARUN BAJORIA-BOMBAY DYING**

Brief Account: In March 2000, Bajoria crossed 5% holding limit in Bombay Dying and by September 2000 he increased it to 14%. As per the code, since his holding was below 15% he was not required to make an open offer. Bajoria also argued that his holding was a result of creeping position and he did not intend to takeover the company. Bajoria's only intention was to make money by offloading the shares at a price around Rs. 200 per share in near future as against the prevailing price of Rs. 115-120 per share. In this issue controversy evolved when Bombay Dying alleged Bajoria not to have disclosed his holding at 5% level.

Issues: The controversial battle between Arun Bajoria and Bombay Dying is also one of the important milestone case, which brought loopholes of the code in light that how an investor with strong financial arms can threaten the code with profit making objective. This case was totally different than what had happened in case of VST industries and Gesco Corp. The controversy of the case seems to be influenced by government interference in the DCM and Escorts case in the early 1980s that led to a perception that takeover bids would never be allowed and promoters of companies could afford to keep low holdings in companies without caring for the market valuation of their companies.

- **GRASIM- L & T- RELIANCE**

Brief Account: In November 2002, Grasim made an open offer to acquire 20% shares of L & T at a price Rs. 190 per share. There was no violation of the code, so far as this offer was concerned. But still this was one of the most controversial takeover cases in recent time, Because of the fact that in Novemver 2001 Grasim acquired 10.05% shares from Reliance at a whooping price Rs. 310 per share. This case was influenced by the decision of the SEBI in GACL-ACC case.

Issues: Pricing was the main issue in this case. It raised question that is it possible to offer such a high prices to bulk shareholders. If yes, then how the interest of the retail investors will be protected. It once again revealed that shortcoming of the code on the issue of 'change in management control'. SEBI initially granted clean chit to Grasim on this issue. But later it decided to reopen the case and take into consideration following points; Where there is no promoter prices paid is a key evaluation for change; Grasim put some of its nominees in the board of L&T; After Grasim's acquisition L& T buried its plans of de-mergers and Grasim's plea to the Securities and Appellate Tribunal that it should be allowed to go through the open offer and that it would give effect to any revision SEBI may order later, was interesting. It clearly shows that Grasim wanted to get on to the driving seat quickly without any room for challenge. Similarly SEBI is going to re-open the case of GACL- ACC. Both these case will now be examined under the new provisions of takeover code 2002.

- **<u>SOME IMPORTANT CHANGES IN TAKEOVER CODE AFTER 1997</u>**

i. ***February 1998***

SEBI proposes to revise the takeover code and make it mandatory for acquirers to make a minimum open offer for 20% (and not 10% as earlier) of the target company's equity, even if the holding goes beyond 51% as a result of the offer.

ii. ***June 1998***

Sebi’s proposes to raise the creeping acquisition limit under the Takeover Code from 2% to 5%. It also proposes to increase the share acquisition limit for triggering the takeover code from minimum 10% to 15% and maximum from 51% to 75%.

iii. ***November 1998***

Takeover panel amends the takeover code to incorporate buy-back offers by companies. The committee decides to allow takeover offers to be made when a buy-back offer is open and vice versa. .

iv. ***January 2000***

SEBI again proposes that all open offers made by promoters for consolidating their holding in a company will have to be for a minimum of 20% of equity. Exemption to the minimum 20% requirement should be given only in the case of such companies in which promoters hold over 75%.

The SEBI takeover committee also recommends that a special resolution approved by 75% of the shareholders should be made mandatory for effecting a change in the management of professionally managed companies. The step aims to avoid misuse of the earlier provision, under which certain groups with 51% stake could effect the changes through a simple resolution.
Another recommendation that follows was that venture capital funds should be treated on par with state financial institutions. And like financial institutions, they should be exempted from making a public offer, in the event of acquiring a 15% stake in a company.

v. ***November 2000***

SEBI made it mandatory for an `acquirer' to disclose his holdings in the target company, to the company as well exchanges at three levels – 5%, 10% and 14% -- instead of the existing stipulation of only 5%.

vi. ***August 2001***

SEBI relaxes the **creeping acquisition limit for shareholders (holding between 15-75%) to 10%** till March 2002 without the compulsion to obtain shareholder approval.

vii. September 2002

The Takeover Committee, headed by former chief justice of India P. N. Bhagwati, comes out with recommendations to amend the Code. SEBI approves the recommendations of the Takeover Committee with minor modifications and notifies the new Takeover Code. The new regulations are a finer version of the earlier Code and largely aim at benefiting the investing community. It aimed at increasing the ambit of open offer.

- **<u>SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVER CODE 2002</u>**

<u>MAIN FEATURES:</u>
(Where changes were made)
Creeping acquisition**:** reducing the creeping acquisition limit from 10 per cent to 5 per cent with effect from October 1, 2002.Also, that to calculate this limit financial year ending on 31st march will be considered instead of existing 12 month period.

Preferential allotments**:** SEBI has done well to remove the exemption altogether. Hereafter, all preferential allotment of shares aggregating to an equity stake of 15 per cent or more will be automatically referred to the Takeover Panel for applicability of open offers.

Offer Price: offer price should be the average of past 26 weeks prices or average of past 2 weeks preceding the date of the public announcement, whichever is higher". Thus it dropped the concept of average of high and low for last 26 weeks.

Consolidation of holdings: Acquirers who already hold 75 per cent in a company and wish to increase their stake further will have to make a minimum offer of 20 per cent, as against the earlier provision allowing them to make an offer of less than 20 per cent.

Interse transfer: A share transfer among different promoters or groups will not attract the provisions of the code if it is made at a price above less than 25 per cent of that arrived at by the SEBI formula. However, if the price exceeds 25 per cent, it will attract the provisions of the code. Inter-se transfers are transfers between shareholders who have been promoters for at least three years and hold over 5% in the target company. So far, transfer of stakes between promoters were fully exempt from the Takeover Code

Indirect acquisition: indirect acquisitions were brought under the purview of takeover code. Any indirect acquisition of over 5% will trigger an open offer. Earlier this was applicable (with a limit of 15%) only for listed companies.

Conditional Offer: An acquirer or any person acting in concert with him may make an offer conditional as to the level of acceptance which may be less than twenty per cent: only in case the acquirer

i. Has deposited in escrow account in cash a sum of fifty per cent of the consideration payable under the public offer;
ii. Only if he binds himself to rescind the acquisition under the Memorandum of Understanding, in case the desired level of acceptance is not received."

Competitive Bid: Here a change made in the manner that competitive bid shall be for such number of shares which will make the total holding of the bidder at least equals to the holding of the original acquirer together with the shares or voting power already held.

Withdrawal of Offer*:* No public offer, once made, shall be withdrawn except under the following circumstances: -

i. The statutory approval(s) required have been refused
ii. The sole acquirer, being a natural person, has died
iii. Such circumstances as in the opinion of the Board merits withdrawal. .

Earlier provision of withdrawal consequent to competitive bid was removed also if acquirer withdraws the offer, he cannot make another offer for the same company for 6 months.

Exemptions from code (New Added): If shares are transferred from state level financial corporations or its subsidiaries to the co-promoters or their successors or assignee(s) or acquirer who has substituted erstwhile promoter.

Investors have been given the freedom to withdraw shares already tendered in an open offer. On the other hand, if competitive bids exist, the code has removed the facility of the first acquirer withdrawing from the offer. The code has done away with the need for acquirers to inform SEBI and the stock exchanges two days prior to a public announcement. A newspaper advertisement would suffice.

The capital markets regulator has also amended the takeover code to stipulate that an "acquirer" who has made a public offer and seeking to acquire further shares under the creeping acquisition route cannot acquire shares at a price higher than the offer price during the period of six months from the date of closure of public offer. This stipulation, however, will not be applicable in cases where the acquisition is made through the stock exchanges.

(Where status quo maintained)

Disclosure of holdings**:** Three-stage disclosure — at 5 per cent, 10 per cent and 14 per cent of equity to the target company and the stock exchanges.

Minimum offer: Minimum size of the offer kept at existing 20%.

Mode of Payment**:** Acquirer can pay either in cash or in terms of exchange of shares

***Changes in control*:** change in control" is possible only when a special resolution (as against a general resolution applicable currently) is passed by shareholders in a general meeting. In addition, postal ballots are to be allowed at such meetings.

***Indirect acquisitions/global level arrangement*:** in the case of indirect acquisition or change in control, a public announcement has to be made by the acquirer within three months of the consummation of such acquisition or change in control or restructuring of the parent or the company holding shares of or control over the target company in India."

viii. ***November 2002***

A SEBI committee suggests closed book-building (where the book will not be made public) so that applicants have to take a call on the price at which they make the bid without having access to information regarding the bids made by other applicants. Further, companies may be allowed to disclose the minimum floor price just prior to the bid opening date.

The SEBI has decided to make promoters of companies more accountable for the information disclosed in offer documents and has made it mandatory for the board of directors to approve and sign the draft offer document. The committee recommended that companies should not be allowed to come out with a public or rights issue unless 75 per cent of the stated means of finance are tied up.

9. CRITICAL EVALUATION OF VARIOUS CHANGES MADE IN CODE IN SEPTEMVBER,2002

- **THREE STAGE DISCLOSURE**:

Logic; instead of compulsorily disclosure at 5% level, SEBI introduced three stages disclosure at 5, 10 and 14% level. Rationale behind this move is to aware the management about the prospective takeover threat in future.
Upside: The share price will get a boost as the acquirer announces his acquisition in three stages.
Downside: The move favors existing promoters as it makes a hostile takeover exercise difficult and expensive. This will hurt the vibrant development of capital market for corporate control, because management can use this information in unfair way to corner the shares through the creeping limit prior to such threat.

- **CREEPING ACQUISITION LIMIT BACK AT 5%**

Logic: SEBI increased this limit from 2% in 97 to 5% in Oct.98 and to 10% in August 2001. The objective behind this move was that it would motivate promoters like Tata, Birla, Mahindra etc. to increase their stake in the companies, because they were controlling

the companies with as low holdings as 25%. It was also aimed at positive developments in capital market.
Upward: Experience shows that only a very few promoters used this initiative. They were using it only prior to takeover threat to corner the shares. So SEBI ultimately decide to bring it back at 5% level. The earlier limit of 10% seemed high as it allowed promoters to take advantage of low share prices to increase their stakes. Had the limit been retained at 10%, the scales would have been tilted against a potential bidder who makes a takeover attempt with the aim of uncovering shareholder value in the stock.
Downward: The limit was extended to 10% primarily to revive the market. Now, the rise in share prices will be slow and exit opportunity for shareholders will also become limited.

- **CREEPING ACQUISITION LIMIT WITH REFRENCES TO FINANCIAL YEAR**

In the earlier case of 12 months, if a person acquired shares in say December of any year than he has to wait until December next year. But In fact present changes is also not in the interest of fair practice. Assuming a promoter acquires 10% in March 2002, the clause permits him to gain another 10% in the next financial year beginning April 2002. Hence, he can legally acquire a total of 20% within two months. Not only does the recommendation give promoters the leeway to acquire 20% in two months, but also leaves little floating stock for investors.

- **CONSOLIDATION OF HOLDINGS BEYOND 75%**

Logic: SEBI wants these companies to delist from the stock exchange, as their market float will go down 10%. This is not likely to make much difference, as recent examples of various MNCs and Indian companies showed that the companies sought to hike their stake from 75% have preferred to buy out the entire capital. Hence, a 20% open offer gives shareholders a chance to exit from the company at a decent price (based on SEBI formula) before promoters delist by consolidating their stake cheaply through creeping acquisitions.
Case: In august 2002 Kodak India, the leading player in photographic equipment, decided to delist and turn into a 100 per cent subsidiary of Eastman Kodak, U.S.
Similarly in June 2002 Reckitt Benckiser, in April 2002 Inox Leasing, Otis Elevator India and Madura Coats delisted from Indian stock exchanges. A host of other MNCs have made moves to delist from Indian bourses. Cadbury, Philips, Carrier Aircon, Otis, Industrial Oxygen, ITW Signode, Wartsila, Rossel, Steelage, Cabot, Hoganas, Sandvik, Infar, Ciba Speciality Chemicals and Reckitt Benckiser are among the other MNCs, which have either delisted or are in the process of delisting

- **MINIMUM PRICE**

Logic: A stock begins its upward journey on the whiff of an open offer. Thus, the last 2 weeks average price is likely to be higher than the average of the preceding 26 weeks. For example, if Colour Chem continues to trade in the Rs 200-214 range, the last two-week average price will be Rs 207, while that of the last 26 weeks will be roughly Rs 180. As the higher price of the two will be considered, the new move will benefit small investors who will get to exit at a higher price.

- **INTER-SE TRANSFER**

Logic: Now besides quantum of the shares, prices of shares will also trigger takeover code. So it will avoid malpractices which large promoters often resort to and help in building investors confidence.
Upside: The very fact that the acquirer is willing to pay a sizeable premium for an inter-se transfer indicates there is hidden value in the stock. Hence, an open offer benefits shareholders of the target company by giving them an exit option at a huge premium to the market price
Cases: There were a number of such cases in recent past that forced SEBI to incorporate this change in the code. For example in Nov.2001, Grasim picked up 10.5% stake of Reliance industries in L&T at price Rs. 306 per shares as against to prevalent market price of Rs. 164 per share. In another case in 1999-2000, Gujarat ambuja cements purchased Tata's stake in ACC at Rs. 370 per shares against prevailing prices Rs.120 per share.

- **PREFERENTIAL ALLOTMENT**

Logic: The previous exemption was providing unfair advantage to promoters to shore up their stake in the company. It eliminates the possibility of consolidating the fragmented non-promoter stake. Promoters were easily hiking their stake while an acquirer was to disclose his holding even at 5% level also. This was against to the interest of small and retail investors, because open offer helps to unlock the value of shares.
Upward: The move will curb promoters from allotting shares to themselves at throw-away prices to jack up their stakes.
Downside: Hostile bidders can exploit this change as in case of a widely held company even a less-than-15% stake may affect a charge in management control.

- **INDIRECT ACQUISITION**

Upward: The move gives shareholders of a company indirectly acquired by another promoter an exit route. Especially through GLOBAL-LEVEL arrangements, which have increasingly started to impact the structure of their Indian affiliates.
Downward: It can prevent bidders to takeover a company. Generally an acquirer takes up a stake in another company for either of the two reasons – consolidation of business or to unlock shareholder value. But the fear of indirect acquisition and a resultant open offer in a third company may discourage acquisition.

- **WITHDRAWAL OF SHARES BY SHAREHOLDERS**

The new code allows shareholders to withdraw shares already been tendered in an open offer and sell them either in the open market or to another acquirer at a higher price.

Upward: This move will benefit investors in hostile takeover bids where the counter-parties keep raising their offer prices and also will provide a liberty to them if takeover process is taking undue long time.

Case: This is what happened during the time of Sterlite-Indal-Alcan takeover battle, where shares were blocked for a long time.

- **<u>CHANGE IN MANAGEMENT CONTROL</u>**

Logic: Change in management control sufficient ground to trigger takeover code, even if holding may be below 15%. It is possible for a company to gain management control in the target company even by keeping the equity stake less than 15%.
Case: This happened in Gujarat Ambuja-ACC case and Grasim-L&T deal.

- **<u>WITHDRAWAL OF OFFER</u>**

Logic: According to new code offer once made by an acquirer can not be withdraw on the ground that someone has made an counter offer. Infact this changes was made to discourage the persons who do not have an intention to run the target company in long run, rather want to make money through the whole exercise.
Case: This is the game played by Damani Brothers and Dalmia in their exercise to takeover to VST Industries and Gesco Corporation respectively.

9. COMPARISION WITH OTHER COUNTRIES

Although before preparing Takeover code, Bhagwati Committee made an attempt to analysis different takeover codes prevalent in different countries. Committee observed that the selection of a particular type of code depends upon the fundamental character of that market For example; takeover code in the UK is not imposed by any regulatory body but has evolved as a self-regulatory framework.
Similarly, if we compare Indian takeover with that of prevalent in US (Williams Act, 1968) we can notice that it is on the same route. In US also there is a compulsory initial disclosure provision at 5% and also a creeping facility for 2% in 12 months period.

10. CONCLUSION

In my opinion SEBI takeover code is not full proof. It still has some lacunas and some sort of vagueness. It is improving gradually and learning from experiences. The 1994 document was just a two-three-page guideline and prepared hurriedly. 1994 code was a comprehensive and dynamic one. Although there were some loopholes in that code also, which corporates used for their benefits. But SEBI has done a great job to put a definite process in progress. To make our code a full proof one a proper co-operation from all the concerned parties like regulators, Corporates, Bidders, Target Company’s management, FIs etc. is required.

In India takeovers, especially hostile ones are still taken in negative sense. One should not forget the important role played by takeover. It helps to unlock the hidden value of the shares, also put pressure on the management to work efficiently and thus contribute in Corporate Governance.

Regulators are expected to protect the interest and right of the shareholders, curb malpractices and ensure a free, fair, transparent and equitable place for takeover. A study showed that in India 84% takeovers are taking place through the route of exemption. This is not only anti-investors but also against the very purpose of the takeover code. There are still some areas where code is not clear. One such debatable issue is what is meant for change in management control, especially when such changes are the result of some arrangements at global level. Provisions related to indirect acquisition are also not very clear.

In the code undue advantages are given to the promoter at the cost of small investors, so in due course SEBI should try to bring promoters also on the same level.

Provisions related to acquisition of shares by Govt. Company are also need a change. According to present code a govt. company can purchase shares of another govt. company from govt. without making open offer, but open offer will be necessarily in case of a private company. This does not provide a level playing field to private companies. It provides Govt. an easy exit route but not to small investors.
In this process FIs also have an important role to play. They should have a long-term perspective, rather than short-term profit-booking motive, while deciding upon an open offer.

Acquirers should ensure full information to the public. Make pricing decisions properly. Pricing decisions should not be left upon counter checks/offers, which unnecessarily delay the whole process and sometimes at the end it creates a wrong market image also, as it happened with Sterlite during their acquisition of Indal.

Target Company’s management is also expected to observe certain changes in attitude. First, they should concentrate on efficiency so that can prevent the threat of hostile takeover. Still if someone makes an offer for their company they should not resort to unfair practices, as was done by Sheth of Gesco Corp.

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