CROSS-BORDER MERGERS IN LIGHT OF THE FALLOUT OF THE BHARTI-MTN DEAL

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Mergers and acquisitions are increasingly being used and getting accepted by Indian business entities as a critical tool of business strategy. In recent times, with globalization being the byword of success, cross-border mergers are looked upon as a one way solution to gaining access to foreign market and creating an image to compete with big corporates. The attempt by Bharti enterprises to integrate with the South African giant, MTN Ltd., however, brought many lacunae in the Indian laws out of the closet. The article focuses on the deal that could have been, and seeks to look into the various legal and regulatory hurdles that were faced in the process. The authors try to delve into the details and analyse whether various Indian laws dealing with company, foreign exchange matters etc. need an overhaul to facilitate Indian companies to grow and be globally competitive.

I. INTRODUCTION

The merger and acquisition wave seen during the last ten years in the Indian business scenario has made it an important strategy for the twenty-first century organizations. A large number of recent mergers and acquisitions of/by Indian companies are witness to this phenomenon. In short, mergers and acquisitions are being widely used to gain strength, expand the customer base, cut competition, enter into a new market or product segment, or achieve economies of scale. "Mergers and acquisitions may be undertaken to access the market through an established brand, to get a market share, to eliminate competition, to reduce tax liabilities or to acquire competence or to set off accumulated losses of one entity against the profits of other entity."[1]

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1 Vikram Malik, *Revision of the Companies Act, 1956*, India Law Journal, available at www.indialawjournal.com/volume1/.../article_by_vikram_malik.html (Last visited on March 4, 2010).

Continuous development of a global mindset has consequently resulted in an increase in the number of cross-border mergers and acquisitions. It can be seen as a kind of hybrid between a domestic and a foreign corporate. They have become topics of interest mainly because they help a firm enter new international markets and thereby enhance their ability to compete in global markets.[2] Also, as seen with transactions completed in single countries, synergies are sought through such cross-border mergers and acquisitions for enhancing cost efficiencies of the new company which results from the process. Although similar in nature, a cross-border merger differs from a cross-border acquisition- a merger is a transaction in which two firms with their home operations in different countries agree to an integration of the companies on a relatively equal basis. Blending of such operations would make the two companies have capabilities that are expected to create competitive advantage that will contribute to success in the global marketplace.[3] An acquisition is a transaction in which an expanding firm buys either a controlling interest or all of an existing company in a foreign country. As goes with general mergers and acquisitions, the general purpose of a cross border process is to create more value through the newly formed firm than could be generated by the involved companies' operating as independent entities.[4] Thus in general, cross-border mergers and acquisitions are a quick pathway to enter a new market, permit the acquiring firm to achieve critical mass presence in a market rapidly and result in more control as compared to other market entry modes.[5] Some of the main reasons for firms to complete cross border mergers and acquisitions are gaining increased market power, overcoming entry barriers to enter a new market more rapidly, reducing the cost of new product development, increased speed to market and increased diversification.[6]

Having explained one side of the coin, one also needs to look into the other, i.e. resource mobilization for carrying out these cross-border transactions. Indian companies are involved in more and more merger/ acquisition activities, hence raising the importance of the issue. Earlier Indian capital markets were quite thin and meager and access to capital was quite restricted. The growing needs of the economy, have however, changed the face of the Indian financial system drastically and the capital markets have become important in the resource allocation process of the economy.[7] The financial market has evolved to better utilize the local market through equity and debt issues;

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2 Michael A. Hitt *et al.*, Mergers and Acquisitions- A Guide to Creating Value for Stakeholders 14 (2001).

3 *Id.*, 143-144; *See also* Chandrima Das, *Black and White Aspects of Cross Border Mergers*, available at http://www.caclubindia.com/articles/black-white-aspect-of-cross-border-mergers--3866.asp (Last visited on March 4, 2010).

4 *Id.,* 3.

5 *Supra* note 2, 150.

6 *Id.*, 5.

7 Narendra Jadhav, *Development of Securities Market: An Indian Experience,* available at www.drnarendrajadhav.info/ (Last visited on August 26, 2010).

alongside, foreign capital market through overseas issues (ADR/GDR)[8] have also gained importance in supplementing the domestic resource mobilization by the corporate.[9] "Hence the market has grown exponentially in terms of resource mobilization, number of listed stocks, market capitalization, trading volumes, and investors' base."[10] It has, however, been seen that the GDRs have primarily been sold to foreign institutional investors till now.[11] But with Indian companies having more and more mobility in the market, they are not hesitating in carrying out transactions of great magnitude, involving new permutations and combinations and raising resources through previously unused routes.

Keeping that in mind, the article looks into the dynamics of such cross-border transactions involving Indian companies and focuses on one particular example of an Indian telecom company, *Bharti* Enterprises'[12] recent attempts to enter into a complex merger deal with a South African company, MTN Ltd[13]. In recent years, mobile services have achieved a significant milestone in India, with the country having nearly 50 per cent telecom density.[14] Increasing competition, decreasing call rates and fluctuating net profit growth, however, made *Bharti* Airtel, the telecom arm of the company to enter into negotiations with the above mentioned company, with the intention to enter the

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8 *See infra* note 33.

9 *International Finance Management- Including Raising of Capital Abroad (ADRs, GDRs, ECB),* available at www.icai.org/resource_file/19354sm_sfm_finalnew_cp11.pdf (Last visited on August 26, 2010).

10 *Supra* note 8.

11 *Supra* note 9.

12 *Bharti* Airtel is the flagship company of *Bharti* enterprises. It is India's largest and first private telecom service provider *Bharti* Airtel since its inception has been at the forefront of technology and has steered the course of the telecom sector in the country with its world class products and services. The businesses at *Bharti* Airtel have been structured into three individual strategic business units - Mobile Services, Airtel Telemedia Services & Enterprise Services. The mobile business provides mobile & fixed wireless services using GSM technology across 23 telecom circles while the Airtel Telemedia Services business offers broadband & telephone services in 95 cities and has recently launched India's best Direct-to-Home service, Airtel digital TV. The Enterprise services provide end-to-end telecom solutions to corporate customers and national & international long distance services to carriers. All these services are provided under the Airtel brand. *See Bharti MTN Deal*, available at http://www.oppapers.com/essays/bharti-Mtn-Deal/244774 (Last visited on March 5, 2010); *The Likely Bharti Airtel & MTN Merger,* available at http://www.oppapers.com/essays/The-Likely-bharti-Airtel-Mtn/238156 (Last visited on March 5, 2010).

13 MTN Group Ltd, together with its subsidiaries, provides communication services. The company principally offers cellular network access and business solutions. It also offers convenience services, including ATM TopUp, voicemail, voicemail lite, WASP, and wakeup call; messaging services comprising SMS, MMS, Email2SMS, and SMS2Email; mobile banking services; and broadband services. MTN Group serves approximately 40 million subscribers in 21 countries, principally Botswana, Cameroon, Cote d'Ivoire, Nigeria, the Republic of Congo, Rwanda, South Africa, Swaziland, Uganda, Zambia, Iran, Afghanistan, Benin, Cyprus, Ghana, Guinea Bissau, etc. *See id.*, 7 for more details.

14 Telecom density in India is already at 47.89 per cent and is projected to touch 80 per cent by 2015; *See* M. Rajendran, *The Big Buy*, available at, www.businessworld.in/bw/2010_02_20_The_Big_Buy.html (Last visited on March 4, 2010).

African continent, which is an immensely growing market, with tremendous potential for growth, unlike India where telcos' growth is projected to reach a flat terrain in five years.[15] After a failed attempt, the two companies again tried to tie up a complex cross-border merger in 2009 which required *Bharti* to acquire about 36 per cent of MTN's equity and MTN to buy 25 per cent of *Bharti*; however the deal fell through mainly because of South African company's demand for dual listing of the shares of the company, which in turn required radical changes in foreign exchange, company, and takeover norms in India.[16] This particular example has been taken by the authors specifically because of the novelty in the process of carrying of the cross-border merger as well as unheard of hurdles arising out of it, which raises important question about the arrangement of capital controls and other policies of the country. The article gives a detailed outline of the reasons which resulted in the failure of the deal and the authors have tried to link up the reasons to the likely amendments and changes which Indian laws require for facilitating such cross-border mergers of Indian companies with their foreign counterparts.

II. BHARTI-MTN DEAL: LOOKING INTO THE LARGER PICTURE

A. HISTORY OF THE BHARTI-MTN DEAL

Talks of a mutual acquisition between the telecom giants of India and South Africa, *Bharti* Airtel and MTN, respectively was called off for a second time in two years. The history of the deal is provided below:

(*i*) In 2008, talks ended because of a last-minute demand by MTN that *Bharti* Airtel become its subsidiary.[17]

(*ii*) In 2009, *Bharti* Airtel and MTN were again close to a merger agreement as part of a $24-billion deal which would have created the world's third largest telecom company. The deal, however, could not go through due to regulatory hurdles from the Government of South Africa.

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[15] The company's presence in Africa could propel *Airtel* among the top five global players with a foothold in more than 20 countries; *See id*., 9 for more information.

[16] Details covered in Part I and II of the article.

[17] This was followed by an unsuccessful attempt by Reliance Communication headed by Anil Ambani to pull off a similar acquisition. *See No deal: Bharti, MTN hang up* available at http://www.indianexpress.com/news/no-deal-Bharti-mtn-hang-up/523666/0 (Last visited on March 5, 2010).

B. WHAT DEAL II ENTAILED AND WHY IT DID NOT SUCCEED

1. Details of Deal II

The mutual acquisition was to be achieved through a scheme of arrangement[18] with the following principal elements: MTN was to approximately acquire a 25 per cent economic interest in *Bharti* for an effective consideration of approximately $2.9 billion in cash and newly issued shares of MTN to the tune of approximately 25 per cent of the currently issued share capital of MTN.[19] *Bharti* would have acquired approximately 36 per cent of the currently issued share capital of MTN from MTN shareholders for a consideration of ZAR 86.00 in cash and 0.5 newly issued *Bharti* shares in the form of Global Depository Receipts ('GDRs') for every MTN share acquired which finally would take *Bharti*'s stake to 49 per cent of the enlarged capital of MTN.[20] Each GDR would be equivalent to one share in *Bharti* and would be listed on the Johannesburg Stock Exchange.[21]

2. Reasons for failure

The basic hurdle in the deal came in the form of requirement of dual listing by the South African government, which triggered off the requirement for other changes, like the open offer obligations under the Substantial Acquisition of Shares and Takeovers Regulations, 1997 ('SEBI takeover regulations'), and proposed issuance of American Depository Receipts, ('ADRs') and GDRs with voting rights to MTN, to name the important ones.

3. Dual Listing and its implications

The relatively large sizes of the companies made it imperative for them to enter into a merger, as mentioned above, whereby trading in both countries would have continued as it was for the two erstwhile companies. "In other words, the companies would have continued to obtain equity capital from the combined base of shareholders of both countries as the two components had

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18 Media Statement from *Bharti Airtel*, May 25, 2009, available at http://www.bharti.com/media-centre/media-releases/release-detail/article/media-statement-from-bharti-airtel-limited-2.html (Last visited on August 28, 2010).

19 VC Circle, *MTN and its shareholders would acquire a 36% economic interest in Bharti, while it's looking at 49% in MTN*, 25 May 2009, available at http://www.vccircle.com/500/news/bharti-airtel-south-africas-mtn-in-23-billion-merger-deal (Last visited on March 5, 2010).

20 *Id.*

21 *Id.*

obtained pre-merger, which required a concept called "dual listing" where one company is listed in two countries."[22]

To define a dual listed structure, it involves *"a company linking with a foreign company in a way that allows each to retain its individual identity, but with the shareholders of the two separate companies receiving a claim on the combined earnings as though they had undertaken a conventional merger.*"[23] A dual listed company ('DLC') structure (also referred to as a 'Siamese twin') engages two companies incorporated in different countries contractually agreeing to operate their businesses as if they were a single enterprise, while retaining their separate legal identity and existing stock exchange listings.[24] DLCs are the result of a merger between two firms incorporated in different countries in which the firms agree to combine their activities and cash flows. At the same time, the corporations keep separate shareholder registries and identities and distribute the cash flows to their shareholders using a ratio laid out in the 'equalization agreement'.[25] The equalization agreements are set up in such a way that equal treatment of both companies' shareholders in voting and cash flow rights is ensured under all circumstances. The contracts cover issues that determine the distribution of these legal and economic rights between the twin parents, including issues related to dividends, liquidation, and corporate governance.[26]

Usually the two companies will share a single board of directors and have an integrated management structure. "A DLC is somewhat like a joint venture, but the two parties share everything they own, not just a

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[22] Financial Express, *Deeper Lessons of Bharti/MTN dual listing*, October 5, 2009, available at http://www.mayin.org/ajayshah/MEDIA/2009/mtn.html (Last visited on March 4, 2010).

[23] Jaideep Bedi & Paul Tennant, *Dual-listed Companies?,* October, 2002, Reserve Bank of Australia Bulletin. *See also* Abe de Jong *et al.*, The Characteristics and Trading Behaviour of Dual-listed Companies, August, 2008, 2 (where a Dual-listed Company has also been explained as involving "*two companies incorporated in different countries contractually agreeing to operate their businesses as if they were a single enterprise, while retaining their separate legal identity and existing stock exchange listings.*") *See also* Jaideep Bedi, et. al., *The Characteristics and Trading Behaviour of Dual-listed Companies,* International Department, Reserve Bank of Australia, Research Discussion Paper 2003-06 (has also explained a dual-listed company as follows: "*Dual-listed company (DLC) structures are effectively mergers between two companies in which they agree to combine their operations and cash flows and make similar dividend payments to shareholders in both companies, while retaining separate shareholder registries and identities. In this respect a dual listing is quite different to a cross listing. Whereas a dual listing involves the quasi merger of two separate entities, a cross listing occurs when an individual company establishes a secondary listing on a foreign stock exchange, the most prominent arrangement being via American Depositary Receipts (ADRs).*"

[24] Abe De Jong*, The Risk and Return of Arbitrage in Dual Listed Companies*, available at http://gates.comm.virginia.edu/uvafinanceseminar/2005-van%20DijkPaper.pdf (Last visited on March 4, 2010).

[25] *Id.*

[26] *Id.*

single project."[27] DLCs have special corporate governance requirements. The interest that the shareholders in each of the listed companies have in the business is the same. This is usually addressed by guaranteeing equal rights in all respects (most importantly voting rights and dividends) and by an appropriate management structure (such a unified board).[28] Often, management of the two companies believes that the merged company will have better access to capital if it maintains listings in each market, as local investors are already familiar with their respective companies.[29] When two companies in two countries enter into an equity alliance without an outright merger, dual listing means continued listing of the firms in both the countries.[30] The key point to note here is that shareholders can buy and sell shares of both the companies on bourses in the two countries. In other words, if the *Bharti*-MTN deal would have happened with a dual listing rider, a *Bharti* share could be sold on the Johannesburg Stock Exchange ('JSE') and vice-versa. Global experience suggests that companies at times choose the dual listing structure to avoid capital gains tax that results from a conventional merger. Many a time, complicated cross-border mergers require various forms of official approvals, and dual listing can preserve the existence of each company.[31]

The South African government wanted MTN to continue to be listed at the JSE, but Indian corporate laws do not allow dual listing, and it will need major amendments to key corporate laws of the country.[32] Currently, the scene in India is such that it allows only foreign firms to issue Indian Depository Receipts ('IDRs'), while Indian companies can issue ADRs and GDRs, which are consequential changes, which occur after deciding on the optimality of dual listing.

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27 Tax Guru, *Dual Listing Meaning, Problem and Reasons for the same*, September 17, 2005 available at http://www.taxguru.in/company-law/dual-listing-meaning-problem-reasons-for-the-same.html (Last visited on March 5, 2010)

28 *Id.*

29 Financial Express, *Two Countries, One Company*, available at http://www.financialexpress.com/news/fe-editorial-two-countries-one-company/517866/2 (Last visited on March 5, 2010).

30 Economic Times, *Dual Listing: its Implications*, available at http://economictimes.indiatimes.com/markets/analysis/Dual-listing-Its-implications/articleshow/5015937.cms (Last visited on March 5, 2010); (also, this is one of the major advantages of a dual-listed company structure. It can be effectively utilized for the unification of the activities of the companies, in situations where the respective governments are unwilling to sacrifice the national character of their respective companies. The other advantages could include: (*i*) the avoidance of capital gains tax; (*ii*) operational and corporate governance issues; and (*iii*) better access to capital markets.)

31 *See supra* note 7.

32 *See supra* note 5; *See also* Part II of the article for further information. *See also* 360 view of money, *Bharti MTN deal failure- why it happened*, available at http://www.sathyamurthy.com/finance/2009/10/mtn-bharti-airtel-deal-failure-why-it-happened/ (Last visited on March 4, 2010) .

4. Issuance of GDRs-another tussle with the existing law

The deal entailed the entire equity expansion of *Bharti* Airtel to be in the form of GDRs[33] issued to MTN and its shareholders. Accordingly, MTN was to buy a 25 per cent stake in *Bharti*, while another 11 per cent was to be held directly by MTN shareholders.[34]

The main question involved was whether the acquisition of 36% GDRs in *Bharti* Airtel by MTN and its shareholders as part of the combination transaction would trigger various obligations under the SEBI Takeovers Regulations.[35] With reference to this negotiation, Chapter III of the SEBI Takeover Regulations requires the acquirer to make an open public offer to buy an additional 20 per cent equity in case of acquiring more than 15 per cent of the economic interest in an entity as a measure to regulate substantial acquisition of shares. Further, Regulation 3(2) of the Takeover Regulations prior to amendment provided, "[n]othing contained in Chapter III of the regulations shall apply to the acquisition of Global Depository Receipts or American Depository Receipts so long as they are not converted into shares carrying voting rights". Also as mentioned earlier, MTN was to acquire an 'economic interest'[36] in *Bharti* Airtel; the concept of economic interest was instrumental in the entire deal since it helped in triggering the exception under Regulation 3(1) (*j*) of the Takeover Code, which stated that "any acquisition of shares or voting

[33] A Global Depositary Receipt is a negotiable certificate held in the bank of one country representing a specific number of shares of a stock traded on an exchange of another country. In case of ADRs/GDRs, the companies deposit their equity shares with a custodian, say a bank, which in turn issues depository receipts to the investors. These receipts have all the rights, barring voting rights. Investors can convert ADRs/GDRs into underlying shares, which can be issued only within India and traded only on domestic bourses. *See* Tax Guru, *Dual Listing Meaning, Problem and Reasons for the same*, September 17, 2005 available at, http://www.taxguru.in/company-law/dual-listing-meaning-problem-reasons-for-the-same.html (Last visited on March 5, 2010).

[34] This has been allowed by the new foreign holding norms which give enough headroom for *Bharti* to route MTN's entire holdings in it through GDRs on an expanded equity base. This is because, new FDI norms, notified under Press Notes 2, 3 and 4 by the previous UPA government, considers a company Indian-owned if Indian promoters hold a majority stake in it, and the investments made by such companies in any JV or downstream venture are also treated as Indian. *See* Joji Thomas Philip, *MTN may take GDR route for 25% stake in Bharti Airtel,* Economic Times, June 15, 2009, available at http://economictimes.indiatimes.com/news/news-by-industry/telecom/MTN-may-take-GDR-route-for-25-stake-in-bharti-Airtel/articleshow/4656410.cms (Last visited on March 5, 2010).

[35] *Depository Receipts and the Takeover Regulations*, July 7, 2009, available at http://indiacorplaw.blogspot.com/search?q=bharti+mtn+GDR (Last visited on March 5, 2010).

[36] Economic interest refers to the right over the pecuniary receivables of / from a company. Typically, when a shareholder is said to have economic interest, it is understood to mean the right to receive dividends or other pecuniary benefits from the company sans voting rights. *See SEBI Change may affect Bharti MTN deal*, available at http://spoonfeedin.wordpress.com/2009/09/23/business-sebi-change-may-affect-bharti-mtn-deal/ (Last visited on August 21, 2010). *See Bharti MTN Deal Dissected*, available at www.nishithdesai.com/.../bharti-Airtel-Limited%20-%20June%205%202009.pdf (Last visited on August 21, 2010) *See also supra* note 18.

rights made pursuant to a scheme of arrangement (Scheme) is exempt from the application of Regulations 10, 11 and 12 which deal with open offer requirements." MTN was supposed to be a board controlled subsidiary of *Bharti*.[37] The term economic interest helped the company in complying with §42 of the Indian Companies Act wherein a subsidiary cannot hold voting equity in its parent; hence while MTN was holding 25 per cent equity in *Bharti* from an economic rights point of view, that equity was non-voting because the scheme under which it was issued was to comply with §42. Hence the combination of shares plus the issuance of GDRs gave the shareholders an economic interest, as well as a sort of control, but not the control which would have triggered an open offer under the Takeover Code. Hence, the acquisition of economic interest of *Bharti* by MTN made it possible for it to take the benefit of exemption.

To help the matter further, SEBI issued an informal guidance[38] on July 7, 2009 pertaining to *Bharti*-MTN exempting MTN from making an open offer unless the GDRs were converted into shares with voting rights in consonance with the Takeover Regulations.[39]

The problem arose with the proposed changes in the Takeover Regulations, called the Proposed Changes to the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997.[40] As it has been mentioned above, *Bharti* had planned to issue GDRs to the extent of 25 per cent stake to MTN and 11 per cent to the shareholders of MTN. SEBI had announced that mandatory public offer to acquire the shares would not be required to be made by MTN on crossing the 15 per cent threshold, until the GDRs were converted into shares of the company. However, SEBI revised its Takeover norms on September 22, 2009 by bringing ADRs/GDRs with voting rights at par with domestic shares, thereby triggering the open offer requirement even in case of issuance of GDRs if the 15 per cent limit under Chapter III of the Takeover Regulations is crossed.[41]

This led to the detriment of the interests of the players in the deal as MTN now was getting no voting rights upon acquiring GDRs and with the additional open offer requirement MTN was seeking to totally acquire a majority 56 per cent share in *Bharti* which was not envisaged by the deal. The

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37 *Supra* note 13.

38 *SEBI (Informal Guidance) Scheme, 2003 regarding the proposed transaction between Bharti Airtel Ltd. and MTN Group Ltd,* June 22, 2009, available at http://www.sebi.gov.in/informal-guide/bharatiinformal.pdf (last visited on March 5, 2010).

39 *See* Regulation 3(2) and 14(2); *Depository Receipts and the Takeover Regulations*, July 7, 2009, available at http://indiacorplaw.blogspot.com/search?q=bharti+mtn+GDR (Last visited on March 5, 2010).

40 *Amendment to the Takeover Regulation by SEBI*, available at http:// www.sebi.gov.in / press/2009/2009300.html (Last visited on March 6, 2010).

41 *Takeover Code revision to impact Bharti-MTN deal: Analysis,* available at http://www.money-control.com/news/cnbc-tv18comments/takeover-code-revision-to-impact-bharti-mtn-deala-nalysis_416446.html (last visited on March 5, 2010).

options which MTN had was to issued GDRs worth less than 15 per cent stake in *Bharti* to avoid an open offer, or MTN and its shareholders to be issued the originally agreed 36 per cent stake, but in the form of GDRs without voting rights.[42] The entire valuation of the deal was, however, affected since even if MTN would have agreed to buy GDRs without voting rights, demand of higher cash payment from *Bharti* had to be made.[43] Also, political considerations also came into play with the earlier demands that the national character of the South African company was not to be affected, hence putting a question mark into the option of buying out GDR without voting rights. Hence, among others, the refusal to grant dual listing and the variety of complications arising out of the SEBI Amendment led to the deal being scrapped.

III. EXTENT OF OVERHAUL IN INDIAN LAWS NEEDED

The previous section dealt with the reasons as to why the deal was unsuccessful. The various regulatory hurdles that were faced during such a complex merger have thrown light on the various lacunae in Indian laws. This being a one off incident does not take away the fact that subsequent deals like this would again bring the matter into light. The above example shows the continuing collision between the growing Indian economy and the existing framework of capital controls in the country.[44] Even though this merger has been in the limelight, it raises deeper questions about the old arrangements for capital control; the incremental reforms like SEBI's guidelines of June, 2009 to help the deal is an excessive response to the political pressures that went along this deal and removes the emphasis from the deeper economic and monetary policy problems.[45] The authors in this part try to look into the various changes which are required in various company and foreign exchange laws to accommodate such cross-border deals as well as the feasibility of such an overhaul.

The major changes would start with the amendments which would usher in the system of dual listing. Dual Listing, which is currently not allowed in India, would need major amendments to key corporate laws of the country. For example, the existing Companies Act and its proposed successor would both need to be amended; apart from that, Securities Contracts (Regulation) Act, takeover regulations and the listing agreement need to be amended to enable dual listings. The listing agreement and the takeover code of the capital market regulator, Securities and Exchange Board of India, would

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42 The Hindu, *Bharti MTN deal would trigger open offer*, available at http://www.thehindubusinessline.com/2009/09/23/stories/2009092351890100.htm (Last visited on August 21, 2010).

43 *Id*.

44 *Supra* note 22.

45 *Id*.

need to be redefined to protect the rights of shareholders.[46] In the case of a dual listed company, an investor can buy shares in one country and sell it in an overseas market.

Also, permission shall be needed for trading of shares denominated or expressed in a foreign currency (if shares are expressed in Rupee and shares of foreign company are expressed in local currency, the equalisation will be disturbed).[47] That would need the Indian rupee to be fully convertible, something that the central bank is yet to allow.[48] It would require India to change its system to full capital account convertibility (at the moment, it is regulated).[49] A Capital Account Transaction has been defined as meaning a transaction "which alters the assets or liabilities including contingent liabilities, outside India of persons resident in India or assets or liabilities in India or persons outside India, and includes transactions referred to in sub-section (3) of section 6 [of the Foreign Exchange Management Act, 1999][50]." The dual listing arrangements would simultaneously require capital account convertibility since a shareholder should be able to acquire the shares on one stock exchange and sell them on another.[51] The current convertibility rules do not allow an Indian citizen to hold shares in foreign currency, which is different from the cash that such an individual would hold in foreign currency.[52] As seen, "shares are a common currency for acquisition and Indian companies would be shut out of overseas buyout opportunities if they are not allowed to issue them."[53]

It is not that Indian laws have not started to change according to the changing situation. The change in FDI guidelines, substantially through

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46 Mint, *Lack of dual listing law may bog down deal*, available at http://www.livemint.com/2009/09/16232432/Lack-of-dual-listing-law-may-b.html, (Last visited on March 4, 2010).

47 *See supra* note 20.

48 *Id*.

49 Foreign Exchange Management Act, 1999, §6 [regarding restrictions on capital account transactions by the Reserve Bank of India (the "RBI")] read with Rule 4 of the Foreign Exchange Management (Permissible Capital Account Transactions) Regulations, 2000, [regarding the prohibitions on the capital account transactions]. Rule 3 [regarding restriction on issue or transfer of Security by a person resident outside India] and Rule 4 [Restriction on an Indian entity to issue security to a person resident outside India or to record a transfer of security from or to such a person in its books] of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000, prevent the dual-listed company arrangement. Furthermore, the restrictions specified in Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 would also apply.

50 Foreign Exchange Management Act, 1999, § 2 (e). §6(3)(*a*) includes within its scope: (*i*) transfer or issue of any foreign security by a person resident in India; and (*ii*) transfer or issue of any security by a person resident outside India.

51 Since, an arrangement as mentioned above, would result in the government losing control over the transfer of money across the border, therefore, it was not permitted.

52 Subhomoy Bhattacharjee, *Learn to love a rupee that's convertible*, Financial Express, 19 September 2009, available at http://www.financialexpress.com/news/column-learn-to-love-a-rupee-thats-convertible/518801/0, (Last visited on March 6, 2010).

53 *Bharti Airtel MTN Deal Called off*, available at http://www.cainindia.org/news/10_2009/bharti_airtelmtn_deal_called_off.html (Last visited on August 21, 2010).

Press Notes 2, 3 and 4 in 2009, was brought in response to the needs of the industry.[54] It also helped to bring the deal back on the tables after the failure in 2008. The changes brought earlier, however, have only impacted the flow of foreign investment into the country. But as this deal shows, the demand now, is to change rules for outward investments, [55] and it hence refers to change in rules to relax the way the Indian currency flows out of India, bringing back the same concern- change in capital account convertibility rules. It would help to "conduct transactions of local financial assets (like shares) into foreign financial assets, freely and at prices determined by the markets."[56] Even though the schedule for the change according to the Tarapore Committee report has been set out to be in 2012, however, the frequency of such deals begs the decision to be taken before that.

Another change is required in the Foreign Exchange Management Act (FEMA). Also, domestic trading in shares denominated in foreign currency cannot happen without the permission of the Reserve Bank of India.[57] The above mentioned changes would primarily mean that a foreign company would be listed on the Indian bourses, which is currently disallowed. Foreign companies can be listed in India, but only in the form of Indian Depository Receipts (IDRs) and not their underlying shares. Although the legal regime relating to IDRs has been in place for the last few years, no company is yet to avail of it.[58] The regime for IDRs can work as an alternative for the major changes. The listing obstacle, where lack of capital account convertibility in the erstwhile deal meant that neither MTN nor *Bharti* shareholders could access each other bourses while dealing with shares, can maybe solved for the time being, through depository receipts.[59] If seen in terms of the *Bharti* MTN deal, trading in South Africa could be done in the home currency for both the sets of shares with *Bharti* Airtel being traded in the form of a depository receipt.[60]

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[54] Press Note 5 of 2005 ("Press Note 5"), Press Note 3 of 2007 ("Press Note 3") and Press Note 2 of 2009 ("Press Note 2 of 2009") have provided for the regulatory framework for FDI in telecom sector and ascertain the trend and degree of regulation on FDI attendant downstream investments in the telecom sector. As regards computation of FDI, Press Note 5 provided that 74% FDI limit shall apply to FDI infused into the telecom services company both directly (that is, by investing directly into the company engaged in the business of telecom) or indirectly (that is, by investing into the holding company, of which the company engaged in the business of telecom is a subsidiary). Press Note 5 clarified that in the instances of indirect holding in the operating company, the extent of FDI would be calculated on a proportionate basis. Press Note 2 of 2009 clarifies the manner and mechanism for calculating indirect foreign investments in Indian companies. *See Bharti MTN Deal Dissected*, available at www.nishithdesai.com/malab.html (Last visited on August 21, 2010).

[55] *Supra* note 42.

[56] *Id*.

[57] *Id*.

[58] *The Legal Aspects of Dual Listing*, available at http://indiacorplaw.blogspot.com/2009/09/legal-aspects-of-dual-listings.html (Last visited on March 4, 2010).

[59] Hindu Business Line, *Dual Listing truths*, available at http://www.thehindubusinessline.com/2009/09/19/stories/2009091950080900.htm (Last visited on March 4, 2010).

[60] *Id*.

In the same manner, in the Indian bourses, MTN could be listed through India Depository Receipts (IDRs) which then would have facilitated quotation for MTN's shares in rupees. "In short, absence of capital account convertibility need not be a stumbling block to the informal Siamese twin's agreement between the two companies. Perhaps, this would incidentally kick-start the comatose market for IDRs in India."[61]

IV. CONCLUSION

We have discussed the legal aspects of the reasons available to public knowledge, the which led to the transaction falling through. The transaction could have fallen through because of commercial reasons as well, which would have been kept confidential. As per common practice, a Memorandum of Understanding (MOU) precedes any large commercial transaction, setting out the stand of parties on preliminary issues relating to the deal. A confidentiality clause is usually included in every Memorandum of Understanding between parties looking at a commercial transaction, and the possibility of certain business reasons cannot be ruled out. It is also possible that parties could have presumed that it would be possible to receive government approvals and exemptions on the legal front for the transaction. The deal was in trouble ever since the requirement for a DLC structure was in place. A potential solution to the above-mentioned problem could have been a DLC arrangement, whereby each company would have continued to be listed on its own stock-exchange. This could have avoided the issues of full capital account convertibility; however, the aforementioned structures of a DLC would have fallen foul of the proposed amendments in the SEBI Takeovers Regulations.

This deal should act as an eye opener for the Indian policy makers because the current state of globalization makes it imperative that this deal would not remain a one-off incident. Companies prefer such complex merger schemes to better cater to their business interests. Hence, the need of the hour is to make necessary changes in the law and regulatory procedures, which are inter connected, and does not result in a situation where one change in a law is going against the other. A holistic approach is needed to prevent such a situation to rise again, and prevent companies, from trying back door entries, when a legally regulated front door entry is possible.

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[61] *Id.*