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NEW OPPORTUNITIES FOR COMPANIES IN THE TIME OF COVID

1. Video-conferencing to the rescue: how company law formalities were relaxed to remain practical and beyond

With social distancing requirements and corporate offices working with limited workforce, some compliance requirements become unfeasible and had to be modified. But what is encouraging to see is that the Ministry of Corporate Affairs not only adjusted its regulations, but took the opportunity to make the most of this 'down-period'.

The 'Companies Fresh Start Scheme, 2020'[1] announced by the Ministry of Corporate Affairs on the 24th of March, gives companies a one-time opportunity to complete pending compliances without incurring penalties on account of the delay and provides immunity from launching of prosecution for such delay. The non-compliances covered are defaults in filing any of the required documents, statements, returns, and annual statutory documents. This however does not absolve the company's liability with respect to consequential proceedings. For example, every company is required, under section 42(8) of the Companies Act, to file a return of allotment within the required period. Section 42(4) of the Companies Act also requires that the utilization of the amounts raised through private placement be made only after the return of allotment is filed. The immunity under the Fresh Start Scheme provides immunity only to the delay in filing the return of allotment and not to the utilization of funds prior to filing of such return.

[1] Companies Fresh Start Scheme, Ministry of Corporate Affairs, Press Release dated 30th March 2020. The same can be accessed at https://www.mca.gov.in/Ministry/pdf/Circular12_30032020.pdf

Where any adjudicating authority under the company law has made a decision in favor of the applicant in respect of the subject matter covered by the scheme, the authorities will not pursue an appeal in accordance with the immunity granted by the scheme. If an applicant has failed to file an appeal in a decision decided against the applicant in the prescribed time limit, the scheme extends any such limit by 120 days. Where an appeal has been filed by the applicant, an immunity certificate will be provided on proof that the applicant has withdrawn the appeal.

The Ministry of Corporate Affairs has also relaxed requirements to hold board meetings. Unlisted companies, which under section 173 of the Companies Act, had to hold board meetings with a maximum interval of 60 days, may now hold meetings with an interval of up to 180 days until the 30th of September 2020. The requirement of independent directors to hold at least one exclusive meeting has been scrapped for the financial year of 2019-20. Finally, companies were reminded of the possibility of conducting OGMs (Ordinary General Meetings) and EOGMs (Extra-Ordinary General Meetings) through video conferencing and using e-voting facilities.[2]

Along with the extension of time to file statutory documents and deposits, an additional time of 6 months (180 days has been increased to 360 days) has been granted to newly incorporated companies to file declaration for commencement of business. The Securities and Exchange Board of India has also provided an extension of time for various filings and conducting of meetings by listed companies.

Government action with respect to company compliances was extremely swift and a burden has been removed from off their back. By cutting board meetings and statutory disclosure requirements for this period, executives can act swiftly in response to the diverging problems of this unstable period, which will only help in getting through this period.

2. Is it a time to play it safe or bet on the future? Scope of getting out of burdensome commitments and the opportunities of takeovers/acquisitions

The outbreak has forced companies to throw away old rulebooks and made them reconsider expansion/diversification plans that were in play before. Executives across companies wish magical foresight would have turned them away from expanding in markets that have suffered tremendously at the hands of the virus. While some remain tied to burdensome commitments, many investment and other

[2] Ministry of Corporate Affairs, press notification of the 5th of May 2020, 'clarification on holding of annual general meeting (AGM) through video conferencing (VC) or other audio visual means (OAVM)'. The same can be accessed at http://www.mca.gov.in/Ministry/pdf/Circular20_05052020.pdf

financing instruments provide for Material Adverse Change (MAC) clauses which give a company a door to walk out from.

Material Adverse Change clauses are included in investment agreements to give buyers/sellers/lenders the possibility to exit the contract on a 'material change' in circumstances, if expressly provided in the agreement. Generally, these 'material changes' are definite in nature and include, a party becomes insolvent, or material change in financials, assets, liabilities, or any other change in circumstances which has a material effect. These changes need to be of a long term effect, and as explained by a Delaware Court in the US,[3] a short term effect such as a disappointing financial year of the acquired company cannot be construed to be a material adverse change to the objectives of the merger.

Although Indian Courts have not decided upon matters where a MAC clause was provided, the concept of backing out of an acquisition is permitted only in cases of complete impossibility. In the matter ***of Nirma Industries v. SEBI***,[4] the applicant applied to SEBI for withdrawal of an open-offer[5] to acquire Shree Ram Multi Tech Ltd., on account of coming to knowledge of serious irregularities in the financial statement. The company also cited economic difficulty in proceeding ahead with the acquisition. The Supreme Court upheld the rejection of the withdrawal and while reminding the party of the principle of caveat emptor, maintained that an agreement can only be vitiated on account of impossibility.

While the applicability of the clause is reliant on clear and unambiguous drafting, it also remains to be seen whether the impact of the outbreak is of such a long term nature that it causes material change in circumstances. If present in the agreement, it can be envisaged to apply to short term financing of supply/service units but not deals of a more long-term nature.

On the other hand, even if FDI has dropped and market analysis project some difficulties in the medium term, as witnessed before with the 2008 housing crisis and the European recession of 2012, periods like these afford investors the opportunity to get in on a trend, early and cheap. Companies have even looked at restructuring through the acquisition of key strategic partners/suppliers to help them overcome the turbulent times. On the logistical side of it, companies have found it desirable to join forces to tackle the disruptions brought by the outbreak. While these are welcomed steps in contribution to a flexible and

[3] In Re IBP Inc., Shareholders Litigation, 789 A.2d 14 (Del. Ch. 2001)
[4] Nirma Industries Ltd. & Ors. v/s. SEBI, (2013) 8 SCC 20
[5] Rule 27 of the Substantial Acquisition of Shares and Takeover Regulations of 1997

adaptive economy, companies crossing the threshold of section 5 of the Competition Act[6] should give due regard to competition regulatory framework to avoid penalties for anti-competitive practices.

By notification dated 19th April,[7] the Competition Commission stated that collaborative action between companies, which aimed at increasing efficiency in the outbreak period, would not constitute anti-competitive practices. This brings it in line with the defense of 'efficiency enhancing' recognized in other countries. With respect to more opportunistic takeovers, the Commission may consider 'failing firm defense', which, in the takeover of Deliveroo (A food delivery app) by Amazon, was given the approval of the UK competition regulators.[8] In such a situation, the Commission should be satisfied that more damage would be done in allowing the acquired firm to exit the market than by keeping it alive through the particular takeover.

Most importantly, executives, intermediaries, and legal advisors are taking additional steps to analyze all position options and efficiently complete the required due diligence in spite of the physical/procedural obstacles. With the restrictions to complete on-site due diligence, intermediaries and other advisors should embrace virtual rooms and video-conferencing.

Restructuring through the mobilization of new strategic takeovers may prove to be a good bet and the turbulent environment may provide a cheap way in. However, analysts must be even more attentive to all the variables and be open to backing out of opportunities which might have been lucrative before but now impose a burden on already strained functioning.

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[6] Section 5 of the Competition Act, 2002, provides the lower limits for the applicability of the Act. At enterprise level, assets amounting to INR 20 Billion (if situated in India), USD 1 Billion with INR 10 Billion in India (Worldwide with presence in India) or turnover of INR 60 Billion (if situated in India), USD 3 Billion with INR 30 Billion in India (Worldwide with presence in India). At group level, assets amounting to INR 80 Billion (if situated in India), USD 4 Billion with Rupees 10 Billion in India (Worldwide with presence in India) or turnover of INR 240 Billion (if situated in India), USD 12 Billion with INR 30 Billion in India (Worldwide with presence in India).

[7] Competition Commission of India, Advisory to businesses in time of COVID-19 dated 19th April 2020. It can be accessed at: https://www.cci.gov.in/sites/default/files/whats_newdocument/Advisory.pdf

[8] https://www.gov.uk/government/news/cma-provisionally-clears-amazon-s-investment-in-deliveroo