



ERGO

Analysing developments impacting business

COMPANIES ACT TAKEOVER PROVISIONS NOTIFIED

17 February 2020

The Ministry of Corporate Affairs has, on 3 February 2020, issued the long pending notification of sub-sections 11 and 12 of Section 230 of the Companies Act, 2013 (Companies Act). These sub-sections provide for the takeover of minority shareholders by majority shareholders in unlisted companies through a scheme of arrangement placed before the National Company Law Tribunal (NCLT) in the same manner as other schemes of arrangement under Section 230, subject to the specific changes below. The procedural aspects of these takeovers have been set out in new rules inserted in the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (Merger Rules) as well as the National Company Law Tribunal Rules, 2016 (NCLT Rules) on the same day.

The new sub-rule (5) inserted in Rule 3 of the Merger Rules allows for a 'member' (i.e., an initial subscriber to the memorandum of association or a person whose name is entered in the register of members or as a beneficial owner in the records of a depository) of a company who, together with other members of the company who hold at least three-fourths of the shares in the company, to apply to the NCLT for the acquisition of any part of the remaining shares of the company. The explanation to the said rule clarifies that "shares" includes only equity shares with voting rights and any other securities that entitles the holder thereof to exercise voting rights. The takeover offer made by the aforementioned three-fourth majority must compulsorily contain:

- the report on the price of shares from a registered valuer that takes into account (i) the highest price paid for the acquisition of the shares of the company during the last twelve months, and (ii) the fair price after taking into account valuation parameters including return on net worth, book value of shares, earning per share, price earning multiple vis-à-vis the industry average and any other customary valuation parameters for such companies; and
- details of a separate bank account opened by the applicant where one-half of the offered consideration has to be deposited.

Section 230 (12) allows any person aggrieved with a takeover offer to make an application to the NCLT. Rule 80A included in the NCLT Rules adds that such application is to be made in Form NCLT-1 and has to be accompanied by (i) a verifying affidavit, (ii) a memorandum of appearance with authorising board resolution or vakalatnama, (iii) documents in support of the grievance, and (iv) any other relevant documents.

It remains to be seen how many shareholders will actually be able to make use of these provisions, given the difficulty faced in the execution of the minority acquisition provisions under the Companies Act that have been in force prior to this notification, i.e., Sections 235 and 236 of the Companies Act. The conferment of powers on shareholders to file grievances with the NCLT without laying out parameters for the NCLT to evaluate such grievances seems counterintuitive for the purposes of a process that is court supervised to begin with. It is, therefore, likely that there will be much confusion around the implementation of schemes under these provisions as well as doubts about its utility until there is a substantial body of precedents from the NCLT and its appellate authorities. Also, the requirement to compute the required shareholding threshold through equity shares and other securities carrying voting rights may result in the exclusion of many security-holders from the process and skewed representation of the "majority" and "minority" in these matters given the usage of convertible or hybrid instruments for making investments or acquiring interest in companies these days.

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