

Corpsec Hotline

January 30, 2002

CORPORATE AND SECURITIES LAWS UPDATE

Kiron Margadarsi Financiers vs. Adjudicating Officer, Securities and Exchange Board of India

Facts:

Kiron Margadarsi Financiers ("KMF") acquired 3,87,540 shares of Aurobindo Pharma Ltd. ("APL") a public listed Indian company, which constituted approximately 8 per cent of the paid up capital of APL pursuant to a pledge of shares by the promoters. Subsequently KMF acquired a further 3,80,040 shares of APL, pursuant to a pledge. As a result of the aforesaid acquisition, the total holding of KMF rose to 7,67,580 shares in APL, constituting 16 per cent of the paid up capital of the APL. Out of the said 7,67,580 shares, 3,32,540 shares (constituting 7 per cent of the paid up capital of the APL), were transferred in the name of KMF and the remaining 4,35,040 shares (constituting 9 per cent of the paid up capital of the APL) continued to remain in the name of the promoters on the register of members of APL although physical custody of the share certificates was handed over to KMF.

Issue:

As per Regulation 10 of the Securities Exchange Board of India ("SEBI") (Substantial Acquisition of Shares and Takeovers Regulation), 1997 ("Takeover Regulations"), an acquirer cannot acquire any shares or voting rights in a company if such acquisition of shares or voting rights (taken together with the existing shares or voting rights held by the acquirer himself or along with persons acting in concert with him) would entitle him to exercise 10%^[1] or more of voting rights in that company without making a public offer for the shares of the company.

The issue to be considered was whether the pledge of shares by the promoters in favor of KMF amounted to an acquisition of shares under the Takeover regulations, thereby requiring KMF to make a public offer or whether the public offer requirements would be triggered only upon KMF actually acquiring more than 10% of the shares of the company.

Held:

That the acquisition of 4,35,040 shares by KMF did not fall within the purview of regulation 10 of the Takeover Regulations. Hence KMF would not be required to make a public offer under the Takeover Regulations.

Rationale:

In the instant case it is seen that 3,32,540 shares (approximately 7 per cent) were transferred in the name of KMF and its name was entered in the members register maintained by APL, thereby entitling KMF to exercise voting rights attached to those shares. However, this was not the case with respect to the remaining 4,35,040 shares (constituting approximately 9 per cent of the paid up capital of the APL), which were not registered in KMF's name but only held by it physically. Also the voting rights in respect of the said shares remained with the promoters (i.e. pledgors). Hence acquisition of custody over shares pursuant to a pledge in it self does not attract the provisions of Regulation 10 of the Takeover Regulations, unless voting rights are conferred along with it by virtue of such pledge. Hence the acquisition of 4,35,040 shares did not fall within the purview of Regulation 10 of the Takeover Regulations since it did not entitle the Acquirer concerned to exercise voting rights in APL.

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Facts:

There were two groups of promoters, "Group A" and "Group B". Promoters belonging to Group A ("**Acquirers**") were interested in acquiring shares of Modi Rubber Limited ("**MRL**") while Modipon Ltd ("**Modipon**") one of the promoters belonging to Group B was interested in selling the shares of MRL to the Acquirers. The Acquirers had made a public offer for the purpose of acquiring shares in MRL.

The Acquirers had submitted a draft letter of offer to Securities and Exchange Board of India ("**SEBI**"), for the aforesaid purpose. SEBI thereafter issued a letter to the Acquirers stating that Modipon by virtue of being a part of the "promoter group" of MRL and "a person deemed to be acting in concert" with the Acquirers was not eligible to participate in the public offer made by the Acquirers.

Issues:

- Whether Modipon was a promoter and a person acting or deemed to be acting in concert with the Acquirers?
- Whether the Modipon was in any manner connected or associated with the Acquirers and whether Modipon or its directors were concerned in any manner with the management or control of MRL?

Held:

The Securities Appellate Tribunal held that Modipon although being a "promoter" of MRL cannot be regarded as "a person deemed to be acting in concert" with the Acquirers and hence Modipon must be allowed to participate in the public offer made by the Acquirers.

Rationale:

The provisions of regulation 2(1)(e)(2) of the SEBI (Substantial Acquisition of Shares and Takeovers Regulation), 1997 ("**Takeover Regulations**") defining person acting in concert being a deeming provision, must be read in conjunction of regulation 2(1)(e)(i) of the Takeover Regulations.

Regulation 2(1)(e)(i) of the Takeover Regulations defines "persons acting in concert with the acquirer" to comprise of persons who for a common objective or purpose of substantial acquisition of shares or voting rights or gaining control over the target company, pursuant to an agreement or understanding (formal or informal) directly or indirectly, co-operate by acquiring or agreeing to acquire shares or voting rights in the company or control over the target company.

As per the decision of the Securities Appellate Tribunal, persons who are "deemed to be acting in concert" must together have some intention or interest in the acquisition of shares of the target company. A seller of shares of the target company cannot therefore be a "person acting or deemed to be acting in concert" with an acquirer whose intent is to acquire the shares of the target company.

In the present case, Modipon's concern was not to acquire the shares of MRL but to sell its existing share holding in MRL to the Acquirer under the public offer. Hence it would be absurd to conclude that the seller of shares can also be considered as a "person acting in concert" with the Acquirers, whose sole aim is to acquire shares in the company.

Please note that an appeal from the decision of the SEBI would lie before the Securities Appellate Tribunal of India.

[1] SEBI had commenced its enquiry in this matter 1997 at which time the threshold limit set by the regulation (for triggering the public offer) was 10 %, which limit was subsequently increased to 15% vide an amendment that came into effect from October 28, 1998.

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