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The proposed watchdog merger

By **Barnik Ghosh**

"I also propose to merge the Forwards Markets Commission with SEBI to strengthen regulation of commodity forward markets and reduce wild speculation. Enabling legislation, amending the Government Securities Act and the RBI Act is proposed in the Finance Bill, 2015."

In Budget 2015 being heralded as anywhere between good and excellent, the above portion has caught the attention of many. This move had been suggested by the Financial Sector Legislative Reforms Commission (FSLRC), which had recommended that the Securities and Exchange Board of India (SEBI), Insurance Regulatory and Development Authority (IRDA), Pension Fund Regulatory and Development Authority (PFRDA) and the Forward Market Commission (FMC) should be merged into a single entity as a unified financial agency (UFA).

The FMC was moved to the Finance Ministry in September 2013. The move had come in the light of Rs 5,600 crores payment crisis at National Spot Exchange Ltd (NSEL). FMC was earlier with the Consumer Affairs Ministry.

The benefits

It is expected that the proposed merger will be beneficial on several fronts. A few of them are listed here.

- Help streamline the monitoring of commodity futures trading. It would also help in curbing the wild speculations which normally exists in the commodities market.
- Make it easier for the single unit to track the movement of money among group companies engaged in different tradable products.
- Aid faster integration of commodities futures industry with the financial trading landscape.
- Enhance possibility of a faster introduction of new products in commodities like options and indices trading.
- Usher in a common clearing house across all assets, thus providing the investors with access to all trading assets in a common screen.
- Reduce the transaction costs for markets, as many companies need not have to form multiple entities and administrative hurdles to comply with the various regulations.
- Aid in faster introduction of new derivative contacts.

SEBI is expected (and is required) to be better equipped to handle the new challenges that will arise with the introduction of a new line of activity under its regulatory umbrella. However, the Reserve Bank of India (RBI) would continue to be the interface for currency derivatives.

The proposed amendments

The Finance Bill, 2015 ("the Bill") has already introduced the proposed amendments to the Forward Contracts (Regulation) Act, 1952 (FCRA) and the Securities Contracts (Regulation) Act, 1956 (SCRA).

Amendments to FCRA

According to Clause 158 of the Bill, all recognized associations under the FCRA, 1952 shall be deemed to be recognized stock exchanges under the SCRA, 1956. This clause seeks to insert new Section 28A in the existing FCRA 1952. Such a deeming provision effectively allows SEBI to be the common watchdog for both securities and commodities market. Further, as per the proposed Section 28A(5) of the FCRA, SEBI has also been granted more powers in addition to the powers granted under SCRA to exercise all powers of the FMC with respect to the recognized associations for a period of one year.

Clause 159 of the Bill seeks to insert new Section 29A in the FCRA which states that the FCRA stands repealed. The proposed Section 29A(d) and (e) lays down that all offences committed under the FCRA, 1952 and the existing proceedings shall continue to be governed by the FCRA, 1952 and all fresh proceedings may be initiated by SEBI under the FCRA, 1952 within a period of three years from the date on which FCRA, 1952 is repealed, as if the FCRA 1952 was not repealed. Proposed Section 29B of the FCRA, 1952 states that the undertaking of the FMC shall be transferred and vest with SEBI.

Amendments to SCRA, 1956

Clause 160 of the Bill proposes amendments to the SCRA wherein the relevant definitions namely *"commodity derivative"*, *"non-transferable specific delivery contract"*, *"ready delivery contract"*, *"specific delivery contract"*, *"reverse repo"*, *"repo"* pertaining to the commodities market have been inserted in the SCRA.

Clause 162 of the Bill seeks to insert Section 30A in the SCRA, 1956 which states that the SCRA shall not apply to non-transferable specific delivery contracts. A proviso has been provided wherein it has been stated that no person shall be a member of an association in any area specified under Section 13 (contracts in notified areas illegal in certain circumstances). Hence, Section 13 of the SCRA shall be applicable.

Conclusion

The proposed merger will be highly beneficial to the growth of the commodities market in general and make it open to a larger section of the retail public. The amendments made in the SCRA and the FCRA are also of significance as the same provide a clear roadmap for the proposed merger to be completed. However, as a matter of caution and to ensure that the impact of the merger is fully understood and assimilated, it may be prudent to introduce the same in stages after awareness and training programs to benefit the investors and traders alike.

[The author is a Senior Associate, Lakshmikumaran & Sridharan, Kolkata]

Notifications & Circulars

Loans and advances by company to employees clarified: The Ministry of Corporate Affairs has clarified that loans or advances made by the companies to their employees, other than to the managing or whole time directors (which is governed by Section 185) are not governed by the requirements of Section 186 of the Companies Act, 2013. Earlier, the provisions of Section 186 were applicable to loans to '*any person*' or other body corporate. There was nothing explicitly mentioned in the said section regarding the meaning of the term '*any person*'. Thus, it was construed that any person included employees as well. Further, General Circular No. 4/2015, dated 10-3-2015, issued for this purpose also states that this will be applicable only if such loans/advances to employees are in accordance with the conditions of service applicable to employees, or the remuneration policy, in case where such policy is required to be formulated.

Foreign investment limit in insurance sector revised: Ministry of Finance has by a notification dated 19-2-2015, notified the Indian Insurance Companies (Foreign Investment) Rules, 2015, permitting investment of up to 49% in the insurance sector. Pursuant to the notification, the Department of Industrial Policy and Promotion (DIPP), Ministry of Commerce has reviewed the foreign investment policy in respect of insurance sector and has affected changes in the foreign investment policy vide Press Note No. 3 of 2015, dated 2-3-2015. Foreign investment would be under the automatic route up to 26% and under the government or approval route for any investment above 26% till 49%. The limit of 49% shall include direct and indirect foreign direct investment (FDI) as well as foreign portfolio investment.

According to the Press Note, Indian insurance company has to ensure that its ownership and control remain at all times in the hands of resident Indian entities. The company bringing in capital would be required to obtain necessary licenses from the Insurance Regulatory Development Authority of India (IRDAI) for undertaking insurance activities.

Filing of e-form DIR-12 when all directors have resigned: In order to enable filing of e-form DIR-12 relating to particulars of appointment of Directors and Key Managerial Personnel, in cases when all the Directors of the firm have resigned and the Digital Signature Certificates pertaining to them have been deactivated, the Ministry of Corporate Affairs has clarified that the Registrar shall in such cases allow one of the resigned directors to file form DIR-12. General Circular No. 3/2015, dated 3-3-2015 notes that the Registrar may allow such filing along with additional fees.

Companies (Indian Accounting Standards) Rules, 2015 notified: Indian Accounting Standards (Ind AS) as applicable to specified class of companies have been notified by the Ministry of Corporate Affairs. New rules issued for this purpose also state that accounting standards as specified in the Companies (Accounting Standards) Rules, 2006 will however be applicable for companies other than those specified in the new rules. Rule 4 of the new rules specifies different type of companies who have to follow the standards from 1-4-2015 or other such specified date. Notification dated 16-2-2015 issued for this purpose also states that any company opting to apply the new standards voluntarily has to prepare its financial statements as per the Indian Accounting Standards (Ind AS) consistently.

ECB Policy and trade credit to imports – All-in-cost ceiling to continue: The Reserve Bank of India has reviewed the ECB policy and has decided that the all-in-cost ceiling as specified in A.P. (DIR Series) Circular No. 99 dated March 30, 2012, shall continue to be applicable till March 31, 2015 and is subject to review thereafter. All other aspects of the ECB policy shall remain unchanged. A.P. (DIR Series) Circular No. 80, dated 3-3-2015 has been issued in this regard. On similar lines, all-in-cost ceiling of trade credits for imports into India, as specified in the 2012 Circular would also be applicable till 31-3-2015. A.P. (DIR Series) Circular No. 81, dated 3-3-2015 has been issued in this regard.

Ratio Decidendi

Implied exclusion of Indian laws under an arbitration agreement: The agreement stipulated that the contract is to be governed and construed according to the English law in the arbitration clause. No other clause stating the applicable law was included in the agreement. Although there was no express exclusion of Indian laws or the Arbitration and Conciliation Act, 1996, there was ample indication of this through various phrases like 'arbitration in London to apply', arbitrators are to be the members of the 'London Arbitration Association' and that the contract 'to be governed and construed according to English Law'. It was also postulated that if the dispute is for an amount less that US $ 50000 then, the arbitration should be conducted in accordance with small claims procedure of the London Maritime Arbitration Association. The Supreme Court has held that in such a situation, the precedent in the landmark case *Bhatia International* shall be applicable. To come to this conclusion, the Apex Court relied on the commercial background, the context of the contract, the circumstances of the parties and the background in which the contract was entered into. The Supreme Court held that the applicable law could not be denied only because it would put one of the disputing parties in an advantageous position. [*Harmony Innovation Shipping Ltd.* v. *Gupta Coal India Ltd.* - Civil Appeal No. 610 of 2015 decided by Supreme Court of India on 10-3-2015]

Arbitrator cannot be appointed if arbitration clause is very vague: The parties to the agreement had agreed to refer the dispute to arbitration under the provisions of the 'By-laws of Indian Companies Act, 1956'. However, there are no by-laws framed under the provisions of the Indian Companies Act, 1956. It was contended that in a reply to a winding up petition, one of the parties had agreed to refer the matter to arbitration. However, the reference to submit the matter to arbitration in the reply was also found to be vague. The Supreme Court held that even willingness to refer the dispute to an arbitrator cannot be said to be an arbitration agreement. The Apex Court in this regard noting that since the clause with regard to arbitration was quite vague and it was evident that there are no by-laws framed under the provisions of the Companies Act to which the arbitration could be submitted, held that in such a case no arbitrator can be appointed. [*System for International Agencies* v. *Rahul Coach Builders Pvt. Ltd.* - Arbitration Petition No. 6 of 2014 decided by Supreme Court of India on 16-2-2015]

Financial duress may be a reason for delisting a company: National Stock Exchange of India Ltd. (NSE) communicated to the appellant company that the trading in securities of the appellant will be suspended on account of non compliance with Clause 41 of the Listing Agreement and / or Regulation 55A of the SEBI (Depositories and Participants) Regulations, 1996 for consecutive quarters, requiring the company to submit its quarterly unaudited financial statements to NSE. The appellant company submitted that it was unable to provide its quarterly unaudited financial statements due to dire financial duress pushing the company into debt trap, litigations initiated against it at various forums, internal reconstruction process undertaken to accrete funds through prospective investors and loss of huge amount of workforce due to high attrition rate, which are beyond its control and that there was no malafide intention on appellant's part in doing so. The Tribunal has held that in such circumstances no fault can be found with the NSE in seeking to suspend the trading in the securities of the appellant. It was held that if due to severe financial crisis appellant was unable even to submit the unaudited financial statements for three quarters in spite of repeated penalties imposed against the appellant, then, it was necessary to suspend the trading in the securities of the appellant immediately, because, any delay in doing so may harm the interests of investors. It was observed that assuming that the financial crisis of the appellant was genuine, permitting the investors to trade in the securities of the appellant without disclosing the unaudited financial status of the appellant would be hazardous to the interests of the investors as well as the securities market and contrary to the policy decision of SEBI. [*JHS Svendgaard Laboratories Ltd.* v. *National Stock Exchange of India Ltd.* - Appeal No. 133 of 2015 decided by Securities Appellate Tribunal (SAT) on 24-2-2015]

Competition law – COMPAT sets aside Commission's order on abuse of dominance: The Competition Appellate Tribunal (COMPAT) has set aside the order of the Competition Commission of India which had found abuse of dominance reasoning that information downloaded from the net and similar other material as relied upon by the Commission do not have any evidentiary value. The Tribunal in this regard noted that information available in the public domain could not have been used by the Commission because no one had appeared in the witness box to prove the same. It was also held that in any case, the same was not reliable without giving an effective opportunity to the appellant to controvert the same.

The Tribunal, while setting aside the impugned order of the CCI, also held that if the Commission wanted to differ with the Director General on the issue of 'relevant market' then it should have given notice spelling out its intention to do so and should have provided an opportunity of hearing to the appellant to allow them to contest the proposed determination of the 'relevant market' by the Commission. It was noted that while holding an inquiry under Section 26(7) or Section 26(8) of the Competition Act, the Commission was required to comply with the rule of *audi alteram partem* and give an effective opportunity of hearing to the person against whom a finding was likely to be recorded on the issue of contravention of Section 3 or Section 4 not only to controvert the allegation made against him as also the evidence/ material proposed to be used in support of such allegation but also to produce evidence to show that he had not violated any provision of the Competition Act. [*Board of Control for Cricket in India* v. *Competition Commission of India* - Appeal No.17 of 2013, decided on 23-2-2015, COMPAT]