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CAIRN BUYOUT: WHAT THE EXPERTS SAY ABOUT THE NON-COMPETE FEE

Is non-compete fee justified?

The promoter of Cairn India will get ₹ 50 per share more than what each minority shareholder will get from suitor Vedanta. Understandably, the public shareholders are upset at what they see as a discriminatory offer. The question is, is the non-compete fee justified? Here's what some top legal minds have to say

NITIN POTDAR
M&A PARTNER, J SAGAR ASSOCIATES

The existing Takeover Code allows payment up to 25% of the offer price as non-compete fee to persons other than the target company. It is purely a commercial decision. The proposed amendment to remove non-compete fee from the existing Code is yet to be accepted by Sebi

VYAPAK DESAI
HEAD-CAPITAL MARKET NISHITH DESAI ASSOCIATES

So long as the acquirer is able to justify the payment of non-compete fees to sellers considering the target firm's business, Sebi may allow such payment. In the past, Sebi had directed the acquirer to add a non-compete payment for calculating the open offer price for the shareholders

AKIL HIRANI
MANAGING PARTNER MAJMUDAR & CO

The Indian Contract Act restricts the enforceability of non-compete covenants unless the seller is selling the entire business along with goodwill. As per case law, it is questionable, if a share purchase transaction can be categorised as a sale of business

SUHAIL NATHANI
PARTNER ELP

While it is an accepted norm to provide non-compete fees, the position today has to be looked at little differently. Section 3 of the anti-competitive agreement also needs to be considered, given the facts involved in this particular case