

# TAKEOVER PANORAMA

A monthly newsletter by Corporate Professionals

Year V-Vol VI-June 2011



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## LEGAL UPDATE

### SAT order in the matter of E-Land Fashion China Holding Limited

#### Facts:

E-Land Fashion China Holding Limited (Appellant) is a limited liability company incorporated under laws of Cayman Islands. On October 15, 2010, it had entered into share subscription agreement (SSA) with the promoters of Mudra Lifestyle Limited (Target Company) to subscribe 1,20,00,000 equity shares. On the same day the appellant also executed a SPA for acquisition of shares of the Target Company constituting 51% of the share capital of the Target Company subject to a maximum of 1,24,75,139 shares at a price of Rs.75 per share inclusive of a non-compete fee of Rs.15 per share.

Where the promoters sellers have extensive knowledge and expertise in the industry in which the Target Company is engaged, then the payment of non compete fees is justified notwithstanding the fact that they continue to be the co promoters with some shareholding as they always have the option to exit from the Target Company.

The appellant also executed on the same day a shareholders agreement with the Target Company and the promoters. The aforesaid transactions had resulted into triggering of Regulation 10 and 12 of SEBI (SAST) Regulations, 1997. Accordingly, on October 21, 2010, the appellant made a public announcement to acquire up to 95,98,094 equity shares amounting to 20% of the emerging voting capital of the target company at a price of Rs.60 per share.

On examining the draft letter of offer with SEBI, the Board was inclined to add the non-compete fees of Rs. 15 per share payable to promoters under SPA to the offer price on the following grounds:

- i. The promoters after the acquisition continue to be co-promoters with the Appellant holding 18.8% shares of the company;
- ii. The promoters have the right to appoint 2 members on the BOD, 2 independent directors therein who shall be jointly selected by the promoters and the acquirer and 1 JMD.

- iii. For a period of 3 years from the date of allotment of the Investor Shares to the Acquirer, the Promoters shall not be entitled to transfer the shares held by them in the Target Company, without the prior written consent of the Acquirer,
- iv. Thus the promoters are still in joint control of the Target Company and it is not likely that the promoters would be willing to separate themselves from the Target Company and offer competition. Therefore, it is advised to the Acquirer to include the amount of non-compete fees in the price of offer.

It is against this order, that the present appeal has been filed.

**Contention:**

The outgoing sellers are capable of providing competition to the business as they have the managerial as well as financial resources to compete with the Target Company and that they could any time resign from the board of directors and offer competition to the Target Company which has been taken over by the Appellant. Thus the non-compete clause has been put in the agreement to prevent the promoters from offering any competition.

**Issue:**

Where the non-compete fees is paid to the promoters who continues to be co-promoter of the Target Company after the Open Offer, then whether the payment of such non-compete fees is justified or it should be added in the offer price?

**Decision:**

In the case of Tata Tea Ltd. vs. SEBI, Hon'ble SAT had observed that when an acquirer takes over a business from the outgoing sellers, then in such cases, it would be legitimate for the acquirer to enter into a non compete agreement with the promoter sellers if he feels threatened by a lurking fear of competition from them. It is neither for the Board nor even for this Tribunal to analyse the threat perception of the acquirer. A non-compete agreement would protect not only the Target Company but also its continuing shareholders. The appellant as a new entrant in to the business as strategic player requires support from the promoters and not competition to realize its commercial objectives.

In the present case, SAT held that Mr. Murarilal Agarwal and Mr. Ravindra Agarwal are family members who were earlier promoters of Bombay Rayon Fashions Ltd. are carrying on business

similar to that of the Target Company and separated from that company and promoted the Target Company and built it up as a strong competitor in the Indian textiles business with the assistance of Mr. Vishwambharlal Bhoot. The promoters have more than 20 years of experience in textiles business and have extensive knowledge of the industry. Thus, they are capable of offering competition to the Target Company. Whereas the Appellant which has limited operating experience in the textile industry in India, by taking over the Target Company can take the benefit of the knowledge and expertise of the promoters in managing the business in India. Further the payment of non-compete fee is not an attempt on the part of the appellant to reduce the cost of acquisition to discriminate against the public shareholders.

Furthermore, as regards the allowance of the appeal is concerned, it is to be noted that Regulation 18(1) of the SEBI Takeover Regulations provides that the Board on examining the Draft letter of offer can require the merchant banker and the acquirer to make changes therein. If some changes are suggested, the acquirer and the merchant banker have no choice but to carry out those changes before sending the letter of offer to the shareholders. However the communication from the Board suggesting changes in the letter of offer is an order within the meaning of Section 15T of the Act and the person feeling aggrieved could always come up in appeal.

Thus on the basis of above facts the appeal is allowed and the non-compete fees is allowed to be paid to the sellers without including in the offer price.

### Informal guidelines in the matter of Vulcan Engineers Limited

#### Facts:

On November 20, 2009, Terruzzi Fercaix SpA (TERRUZZI), a foreign company incorporated in Italy, had acquired 33.50 lacs shares representing 40.90% of Vulcan Engineers Limited (VEL/Target Company) by way of preferential allotment and 21.30 lacs shares representing 25.86% shareholding of the Target Company from the promoters of the Company through SPA dated October 12, 2009. Thereafter it made an Open Offer under SEBI Takeover Regulations wherein it acquired 0.15% share capital of VEL. As on date TERRUZZI holds 54.8 lacs shares constituting 66.91% of the shareholding of VEL.

Now, an Italian financial institution SIMEST SpA is desirous of subscribing to 13.789% of the shareholding of VEL through preferential allotment, which will dilute the shareholding of TERRUZZI in VEL. The investment method of SIMEST places a requirement on SIMEST to compulsorily exit the investment within a maximum duration of 7 years from date of equity investment, within which a pre agreed buy back of SIMEST shares with partner firms is to established.

The pre agreed buy back arrangement through put/call agreement exclusively between two parties is not legal and valid derivative contract under Section 18A of SCRA.

SIMEST and TERRUZZI are desirous of executing an agreement in Italy in relation to the participation of SIMEST in the preferential allotment which is subject to following conditions:

- I. SIMEST can exercise its option to sell to TERRUZZI all VEL shares held by SIMEST by a Call/Put option starting from June 30, 2015 at a pre-determined price and TERRUZZI is obliged to purchase the shares.
- II. SIMEST and TERRUZZI are independent legal entities and there is no agreement or understanding between them highlighting a common objective to acquire voting rights or control over VEL through preferential allotment. There is no common directorship or shareholding between them.

**Issue:**

Whether SIMEST and TERRUZZI can be considered as person acting in concert under SEBI Takeover Regulations and would warrant the application of the said regulations in the light of proposed transactions described above?

**Decision:**

It was held that the legality of the aforesaid Put/Call Option agreement should be examined in terms of Securities Contracts (Regulation) Act, 1956. As this option would be exercised in a future date, therefore, the transaction under the agreement would not qualify as spot delivery contract under Section 2(i) of SCRA and since it is exclusively entered between two parties thus it is not legal and valid derivative contract under Section 18A of SCRA. Therefore as per the provisions of SCRA read

with SEBI Notification No S.O. 184 (E) dated March 1, 2000, the pre agreed buy back of VEL shares from SIMEST through Put/Call Option is not valid under SCRA.

Thus further examination with regard to the guidance sought in the interpretative letter does not arise.

## Informal guidelines in the matter of Disa India Limited

### Facts:

1. Hamlet Holding II ApS, Disa Holding II, DISA Holding AS and DISA Holding AG (Acquirers) had made an Open Offer to the shareholders of Disa India Limited (Target Company). However, SEBI directed the Acquirers to revise the offer price. Aggrieved by this order of SEBI, the Acquirers filed an appeal in SAT wherein Hon'ble SAT vide its order dated August 5, 2009 allowed the appeal of Acquirers and set aside the order of SEBI to revise the offer price, after which the Offer process was resumed. The Acquirers complied with all the Open Offer obligations and requirements.
2. Subsequently, SEBI filed an appeal in Hon'ble Supreme Court challenging the order of SAT, the final decision of which is pending as on date.
3. However due to non-receipt of completion certificate from Merchant Banker to the offer, the shares of Target Company could not be transferred in the name of Acquirers till date and the balance amount lying in the escrow account has not been released to the Acquirers.
4. Accordingly, the Acquirers made an application before Hon'ble Supreme Court for necessary direction in relation to issuance of completion certificate, in response of which Supreme Court passed an interim order stating that "*pendency of the appeal will not prevent Merchant Banker from issuing the Completion certificate. However if such certificate is issued it would be subject to result of such appeal.*" The Merchant Banker then issued a conditional Completion certificate dated August 12, 2010.

Where the issues are pending before any Tribunal or Court on matters which are sub judice, then in terms of para 8(vii) of the scheme relating to Informal Guidance, SEBI may not respond to the requests for Informal Guidance.

5. However the Merchant Letter expresses its inability to respond to queries that whether the aforesaid letter could be treated as completion certificate.

**Issue:**

To confirm whether SEBI will or will not take or recommend any action against DISA India and/or its Board of Directors in case they take no action for the time being with respect to effecting transfer of the shares acquired by the Acquirers in the Offer in the name of Acquirers?

**Decision:**

It was held that the application is for seeking a No-Action letter from SEBI on an issue arising out of letter dated August 12, 2010 of the Merchant Banker to the Open Offer which prima-facie does not fall under the purview of the Scheme.

Further since the matter is pending in Hon’ble Supreme Court for its final decision, the same is sub judice. In this regard, para 8(vii) of the scheme states that SEBI may not respond to the requests where the connected issues are pending before any Tribunal or Court and on issues which are sub judice. Thus the request made fall under the preview of para 8(vii) of the Scheme and thus no response was given to the Acquirers.

**Adjudicating Officer/WTM Orders**

Target Company	Noticee	Regulations	Penalty Imposed
<b>Wellworth Overseas Limited</b>	Vijay Wadwa, Vinitha Wadwa, Ritu Wadwa and Sanjay Chabbria	Regulation 10 of SEBI (SAST) Regulations, 1997	Rs. 23,00,000
<b>Neelkanth Technologies Ltd</b>	Neelkanth Technologies Ltd	Regulations 6(2), 6(4), 7(3) and 8(3) of SEBI (SAST) Regulations, 1997	Rs. 2,00,000
<b>Ritesh Properties and Industries Limited</b>	Vishal Concast Ltd. (now known as Auster Securities Limited)	Regulation 7(1) read with Regulation 7(2) of the SEBI (SAST)	Rs. 2,00,000

		Regulations, 1997 and Regulation 13(1), 13(3) and 13(5) of SEBI (PIT) Regulations, 1992	
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### Consent Order in the matter of Edelweiss Capital Limited

SEBI had initiated the adjudication proceedings against Edelweiss Capital Limited (hereinafter referred to as Noticee) for the alleged violations of SEBI Merchant Banker Regulations, SEBI DIP Guideline, Regulation 18(2) of SEBI Takeover Regulations and SEBI Circular MRD/DoP/Cir-05/2007 dated April 27, 2007. While the adjudication proceedings were in progress, the Noticee made an application dated October 26, 2010 for settlement of the proceedings through Consent Order proposing to pay a sum of Rs. 15,00,000 towards settlement charges for the aforesaid proceedings.

The terms as proposed by the Noticee were placed before the High Powered Advisory Committee (HPAC) and on the basis of the recommendations of HPAC, SEBI settle the above non compliance of the Noticee.

### Consent Order in the matter of Gabriel International Inc.

Gabriel International Inc. (Applicant) had failed to comply with the provisions of Regulation 6(1) for the year 1997 and Regulation 8(1) of the SEBI (SAST) Regulations, 1997 for the years 1997 to 2009 in respect of its shareholding in Gabriel India Limited. Therefore, the applicant had filed the consent application and vide letter dated February 03, 2011, proposed the revised terms to settle the non compliance on the payment of Rs. 10,75,000 towards settlement charges. The terms as proposed by the applicant were placed before High Power Advisory Committee (HPAC) and on the recommendation of HPAC, SEBI settle the above non compliance of the applicant.

### Consent Order in the matter of Gujarat Gas Company Limited

SEBI had initiated the adjudication proceedings against Subhkam Securities Private Limited, Milton Securities Limited, Subhkam Ventures (I) Private Limited and Subhkam Stocks and Shares Private Limited (hereinafter referred to as Noticees) for the alleged violations of Regulation 7(1) and 7(2) of SEBI (SAST) Regulations, 1997, Regulation 4(b) of SEBI (PFUTP) Regulations, 1995 and SEBI (PFUTP)

Regulations, 2003 in the matter of Gujarat Gas Company Limited. While the adjudication proceedings were in progress, the Noticees jointly proposed the consolidated revised consent terms vide dated May 05, 2010 for settlement of the proceedings through Consent Order and proposed to pay a sum of Rs. 47,00,000.

The terms as proposed by the Noticees were placed before the High Powered Advisory Committee (HPAC) and on the basis of the recommendations of HPAC, SEBI settle the above non compliances of the Noticees.

#### **Consent Order in the matter of GEI Industrial Systems Ltd.**

GEI Industrial Systems Ltd. (Applicant) had failed to comply with the provisions of Regulation 6(2), 6(4) for the year 1997 and 8(3) of the SEBI (SAST) Regulations, 1997 for the years 1998 to 2005. Therefore, the applicant had filed the consent application on November 01, 2010 and vide letter dated January 25, 2011, proposed the revised terms to settle the non compliance on the payment of Rs. 8,25,000 towards settlement charges. The terms as proposed by the applicant were placed before High Power Advisory Committee (HPAC) and on the recommendation of HPAC, SEBI settle the above non compliance of the applicant.

#### **Consent Order in the matter of Nandan Exim Limited**

SEBI had initiated the adjudication proceedings against Mr. Shanti Sarup Reniwal and the PACs with him (hereinafter referred to as Noticees) in the matter of Nandan Exim Limited for the alleged violations of Regulation 7(1) and 7(2) of SEBI Takeover Regulations and Section 12A(f) of SEBI Act, 1992. While the adjudication proceedings were in progress, the Noticees made an application dated September 1, 2010 for the settlement of the proceedings through Consent Order proposing to pay a sum of Rs. 10,00,000 towards settlement charges for the aforesaid violation.

The terms as proposed by the Noticees were placed before the High Powered Advisory Committee (HPAC) and on the basis of the recommendations of HPAC, SEBI settle the above non compliance of the Noticees.

#### **Consent Order in the matter of Krishna Ventures Limited**

SEBI had initiated the adjudication proceedings against Krishna Ventures Limited (earlier known as Multifarious Trading & Agencies Ltd.) (hereinafter referred to as Noticee) for the alleged violations of Regulation 6(2) and 6(4), Regulation 7(3) for the year 2009 and Regulation 8(3) for the years 1998

to 2003 and 2005 of SEBI (SAST) Regulations, 1997 in the matter of Krishna Ventures Limited. While the adjudication proceedings were in progress, the Noticee made the consent application dated December 21, 2010 for settlement of the proceedings through Consent Order and proposed to pay a sum of Rs. 5,50,000.

The terms as proposed by the Noticee were placed before the High Powered Advisory Committee (HPAC) and on the basis of the recommendations of HPAC, SEBI settle the above non compliances of the Noticee.

### **Redemption of Indian Depository Receipts (IDRs) into Underlying Equity Shares**

As the end of first year after the listing of India's First Depository Receipts approaches i.e. the IDR issue of Standard Chartered PLC which listed on BSE and NSE on June 11, 2010, the market regulator SEBI has released a circular on June 03, 2011 allowing the redemption of **illiquid Depository Receipts** into the underlying equity shares.

The most important point to be noted here is that the circular allows the redemption of only **illiquid Depository Receipts** into the underlying equity shares i.e. where the annualized trading turnover in IDRs during the six calendar months immediately preceding the month of redemption is less than 5% of the listed IDRs. Further, the redemption is allowed after one year period from the date of issue of the IDRs. Thus, this move is to help the investors so that their money does not get stuck in the domestic market. Where the IDRs are frequently traded in the domestic market, such redemption is not allowed as in that case the investors have the options to trade in the IDRs.

Further, the circular also requires the issuer company to give the options to the investors through the announcement to redeem the IDRs into the underlying equity shares where the frequency of trading of IDRs calculated on a half yearly basis ending on June and December of every year is coming out to be "infrequently traded".

However, this may not have a significant impact on Standard Chartered IDRs as it is frequently traded in the market.

Furthermore, the concept of two-way fungibility, i.e., the ability to purchase existing shares on the London Stock Exchange and/or the Hong Kong Stock Exchange and deposit them into the IDR programme is not currently permitted.

## LATEST OPEN OFFERS

Name of the Target Company	Name of the Acquirers	Details of the offer	Reason of the offer	Concerned Parties
<p>Henkel India Limited</p> <p><b>Regd. Office</b> Chennai</p> <p><b>Paid up capital</b> Rs. 116.47 Crores</p> <p><b>Listed At</b> BSE, MSE &amp; CSE</p>	<p>Jyothy Laboratories Limited</p>	<p>Offer to acquire 2,32,90,855 (20%) Equity Shares at a price of Rs. 41.20 per share payable in cash.</p>	<p><b>Regulation 10 &amp; 12</b></p> <p>SPA to acquire 5,93,60,203 (50.97%) equity shares at a price of Rs. 20 per share</p>	<p><b>Merchant Banker</b> MAPE Advisory Group Private Limited</p> <p><b>Registrar to the Offer</b> Cameo Corporate Services Limited</p>
<p>Monotype India Limited</p> <p><b>Regd. Office</b> Kolkata</p> <p><b>Paid up capital</b> Rs. 414.85 Lacs</p> <p><b>Listed At</b> BSE &amp; CSE</p>	<p>Swagatam Tradevin Limited</p>	<p>Offer to acquire 3,29,700 (20%) Equity Shares at a price of Rs. 6 per share payable in cash.</p>	<p><b>Regulation 10 &amp; 12</b></p> <p>SPA to acquire 12,23,705 (74.23%) equity shares at a price of Rs. 6 per share and 2,50,000 (100%) preference shares at a price of Rs. 40 per share.</p>	<p><b>Merchant Banker</b> Microsec Capital Limited</p> <p><b>Registrar to the Offer</b> Maheshwari Datamatics Private Limited</p>
<p>Kemrock Industries and Exports Limited</p>	<p>RPM International Inc.</p>	<p>Offer to acquire 37,38,440 (22.289%) Equity</p>	<p><b>Regulation 10</b></p> <p>SPA to acquire</p>	<p><b>Merchant Banker</b> Kotak Mahindra Capital Company</p>

<p><b>Regd. Office</b> Vadodara</p> <p><b>Paid up capital</b> Rs. 16.77 crore</p> <p><b>Listed At</b> BSE &amp; NSE</p>		<p>Shares at a price of Rs. 539 per share payable in cash.</p>	<p>1,000 equity share at a price of Rs. 539 per share which taken together with the shares already held by the Acquirer constitutes more than 15% of voting rights of the Target Company</p>	<p>Limited</p> <p><b>Registrar to the Offer</b> Link Intime India Private Limited</p>
<p>KSK Energy Ventures Limited</p> <p><b>Regd. Office</b> Hyderabad</p> <p><b>Paid up capital</b> Rs. 472.63 crore</p> <p><b>Listed At</b> BSE &amp; NSE</p>	<p>KSK Energy Company Private Limited, KSK Energy Limited and KSK Surya Limited</p>	<p>Offer to acquire 7,45,26,091 (20%) Equity Shares at a price of Rs. 125 per share payable in cash.</p>	<p><b>Regulation 11(1)</b></p> <p>For the purpose of consolidation of holdings.</p>	<p><b>Merchant Banker</b> Axis Bank Limited</p> <p><b>Registrar to the Offer</b> Karvy Computershare Private Limited</p>
<p>Modex International Securities Limited</p> <p><b>Regd. Office</b> New Delhi</p>	<p>Pavan Sachdeva</p>	<p>Offer to acquire 6,00,000 (20%) Equity Shares at a price of Rs. 30 per share payable in cash.</p>	<p><b>Regulation 10 &amp; 12</b></p> <p>SPA to acquire 7,16,000 (23.87%) equity share at a price of Rs. 22 per share</p>	<p><b>Merchant Banker</b> Nexgen Financial Solutions Private Limited</p> <p><b>Registrar to the Offer</b> MAS Services Limited</p>

<p><b>Paid up capital</b> Rs. 300 Lacs</p> <p><b>Listed At</b> DSE</p>				
<p>Petron Engineering Construction Limited</p> <p><b>Regd. Office</b> Mumbai</p> <p><b>Paid up capital</b> Rs. 7.53 crore</p> <p><b>Listed At</b> NSE and BSE</p>	<p>Kazstroy Service Global B.V. along with PACs</p>	<p>Offer to acquire 15,07,680 (20%) Equity Shares at a price of Rs. 386.58 per share payable in cash.</p>	<p><b>Regulation 10 &amp; 12</b></p> <p>Indirect Acquisition of 39,55,523 (52.47%) equity shares of the Target Company.</p>	<p><b>Merchant Banker</b> Citigroup Global Markets India Private Limited</p> <p><b>Registrar to the Offer</b> Link Intime India Private Limited</p>
<p>Indian Infotech &amp; Software Limited</p> <p><b>Regd. Office</b> Mumbai</p> <p><b>Paid up capital</b> Rs 442.97 Lakhs</p> <p><b>Listed At</b> BSE &amp; ASE</p>	<p>Jayanti Prime Software Advisory Private Limited.</p>	<p>Offer to acquire 8,65,661 (20%) Equity Shares at a price of Rs. 18.50 per share payable in cash.</p>	<p><b>Regulation 10 &amp; 12</b></p> <p>SPA to acquire 26,17,050 (60.46%) Equity Shares at a price of Rs. 10 Per share</p>	<p><b>Merchant Banker</b> Microsec Capital Limited</p> <p><b>Registrar to the Offer</b> CB Management Services (P) Limited</p>

## HINT OF THE MONTH

Where an acquirer acquires the shares pursuant to an agreement which along with the shares already held by him increase his shareholding beyond 15%, then such an agreement shall contain a clause that in case of non-compliance of any provisions of this regulation, the agreement for such sale shall not be acted upon by the seller or the acquirer.

*As substantiated from Regulation 22(16) of SEBI (SAST) Regulations, 1997*

## REGULAR SECTION

### Concept of Control

#### SEBI (SAST) Regulations, 2010 (TRAC Report)

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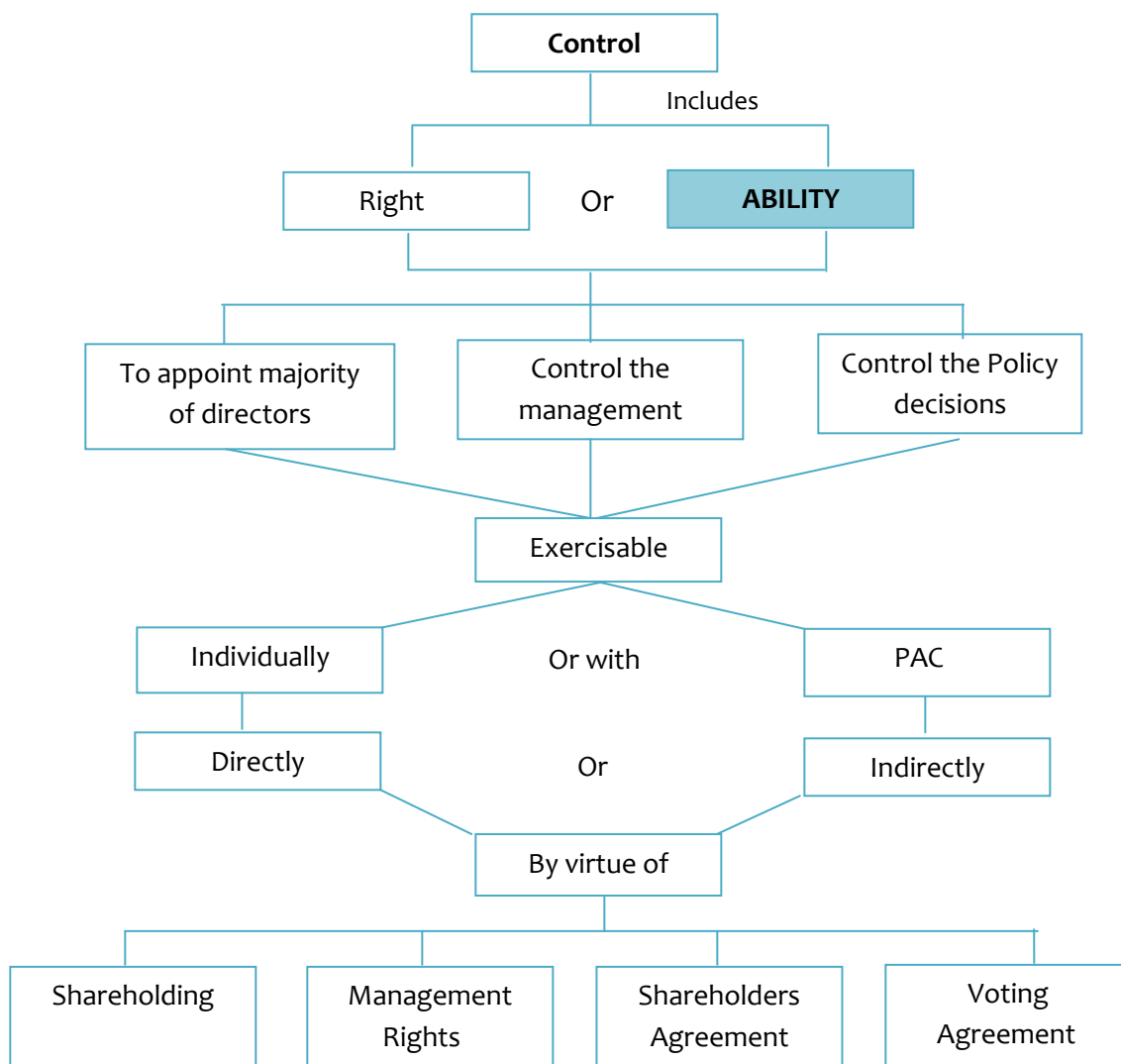
*“Control includes the **right or the ability** to appoint majority of the directors or to control the management or policy decisions of the target company, exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.”*

*Provided that a director or officer of a target company shall not be considered to be in control over such target company, merely by virtue of holding such position;*

The Proposed Takeover Regulations have widened the scope of term **Control** to include not only the **right** but also the situations where the persons have the **ability** to appoint majority of the directors or to control the management or policy decisions of the target company either individually or with person acting in concert. This control can be exercised by virtue of their shareholding or

management rights or shareholders agreements or voting agreements or in any other manner. However, the existing definition of Control as specified in SEBI (SAST) Regulations, 1997 covers only the **right** to appoint majority of the directors or to exercise control in any other manner. Thus, by inserting the word **ability** in the definition, the scope of term Control has been prolonged to mean not only the de jure control but de facto control also.

It is further made clear that any person who is holding the position of any director or officer of the target company shall not be considered to be in control over such target company, merely by virtue of holding such position.



It is to be noted that the existing definition of control as specified under SEBI (SAST) Regulations, 1997 provides the exemption in case of transfer from Joint Control to Sole Control provided that the same is effected in accordance with regulation 3(1)(e) i.e. through inter se transfer of shares. However, such an exemption is not specified in TRAC Report.

#### Regulation 4 – Acquisition of Control

Regulation 4 of the TRAC Report provides that *“Irrespective of acquisition or holding of shares or voting rights in a target company, no acquirer shall acquire, directly or indirectly, control over such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.”*

The Takeover Code recognizes both voting rights as well as control irrespective of acquisition of shares. This regulation deals with acquisition of control, irrespective of whether or not there has been any acquisition of shares or voting rights.

The regulation states that if any acquirer acquires control over the target company irrespective of any acquisition of shares or not he has to give public announcement to acquire shares from shareholders of the target company.

It is appreciable that the acquisition of control also includes both direct & indirect acquisition of control over target company by virtue of acquisitions of companies whether listed or unlisted and whether in India or abroad.

In the TRAC Report, the exemption from Open Offer available in case of change in control without acquisition of substantial shares, through a special resolution by postal ballot process, has been withdrawn and now the only route available for change in management and control is through the Open Offer to the shareholders of the target company. This is in contrast with the Regulation 12 of the existing SEBI Takeover Regulations which provides for the change in control through the special resolution passed by way of postal ballot.

Regulation 12 of the existing SEBI Takeover Regulations provides a whitewash provision wherein an Open Offer would not be required in case of change in control of the target company where the change in control has been approved by the shareholders of the target company by passing a special resolution through postal ballot. The rationale for such a framework may be that an Open Offer is

ultimately made for the benefit of the shareholders and it is well within the shareholders' rights to renounce such a benefit if they so desire.

However, the Committee observed that the Indian market do not provide strong regulations on proxy solicitation, thus any provision for shareholder waiver for an Open Offer may not be in the best interests of investors at large. Moreover, in the present provision for passing the Special Resolution, the majority shareholders may exercise their power to waive the requirement of Open Offer which will be imposed on the minority shareholders of the target company without their will. Further, in the case of Open Offer the shareholders always have the option not to tender their shares if they so desire. Moreover, SEBI also have the discretionary powers to grant exemptions from Open Offers on case to case basis.

Thus, in accordance with the TRAC Report, if any acquirer acquires control over the target company, he has to give public announcement to acquire shares from shareholders of the target company irrespective of any acquisition of shares or not and notwithstanding the fact that the shareholders have approved such change in control through special resolution. However, such as acquirer always has the option to make an application to SEBI for exemption from the requirement of Open Offer and the SEBI if it may deem fit can grant exemption to the Acquirer.

## CASE STUDY

### Camlin-Kokuyo Deal (Joint Venture)

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#### About Camlin Limited (Target Company/Camlin)

Camlin Limited stated its operation in the year 1931 with Horse Brand Ink Powders and Tablets, followed by Camlin Ink. The "Camel" was chosen as a symbol due to its capacity to endure long periods of difficulty in the trips across deserts. The Company is engaged in manufacturing of wide range of products which includes various stationery like pens, pencils, colours, drawing materials, brushes, glues, craft range, office products like, carbon papers, stamp pads, adhesives and many others. At present the shares of the Target Company are listed on NSE and BSE.

### About Kokuyo S&T Co. Ltd. (Acquirer)

Kokuyo S&T is a wholly owned subsidiary of Kokuyo Co, a leading firm in Japan with over 100 years of experience in stationery and furniture products, design and construction of office and store interiors, mail order business, lifestyle retail and distribution.

### Japan's Kokuyo to acquire majority stake in Camlin

On May 30, 2011, Japan's Kokuyo has executed a Joint Venture Agreement and a Share Subscription Agreement with Camlin and its Promoters to acquire the majority stake in the Camlin in the following manner:

- I. Preferential allotment 69,34,000 shares representing 10% of the diluted equity capital of the Target Company at a price of Rs. 85 per share to be paid in cash; and
- II. Acquisition of 1,40,44,850 shares representing 20.3% of the diluted equity capital from the promoters of the Target Company at a price of Rs. 110 per share to be paid in cash;

The business partnership between Japan's Kokuyo and Camlin commenced last year co-operating in the sale of notebooks. The present transaction is a friendly acquisition, made on the footing of a mutual understanding of the corporate cultures and transaction objectives. The business will be launched as a joint venture between Kokuyo S&T and Camlin and will accelerate business expansion in the rapidly growing stationery market of India.

The founding family of Camlin will continue in New Camlin to hold 13.34% of the shares (fully diluted basis) and two directors from the founding family will continue to participate in the joint efforts with Kokuyo S&T to expand the business in India.

### Key features of JVA

- i. If the Acquirer is unable to obtain majority of the Diluted Equity Capital in the Target Company pursuant to the JVA and the SSA and this Offer, then the Acquirer shall be entitled to subscribe to additional Shares of the Target Company in the same financial year or during successive financial years after the JVA Completion Date such that it acquires majority shareholding of the Target Company.

Except as provided above, the Acquirer shall not acquire any further shareholding in the Target Company, for a period of 1 year from the JVA Completion Date.

- ii. The exiting Promoters for a period commencing from the execution of the JVA up to 36 months from the JVA Completion Date and/or the continuing Promoters from the date of execution of the JVA may not acquire any Shares of the Target Company in any manner, without the prior written consent of the Acquirer. The parties to the JVA agree that in the event the exiting Promoters acquire any Shares after a period of 3 (three) years from the JVA Completion Date, they shall not be termed as "promoter" or "promoter group" as defined in the SEBI (Issue of Capital and Disclosure Requirements) Regulations 2009.
- iii. The continuing Promoters can pursue the current business, only through the Target Company and the continuing Promoters shall not and shall procure that their Affiliates do not directly, indirectly or beneficially, inter alia commence, establish, invest in (other than a financial investment), canvass or solicit business for any undertaking or any person that is engaged in business operations and activities similar to that of the Target Company or offers products similar to that of the Target Company or in any other manner competes with the Target Company or its subsidiaries.

#### **Mandatory Open Offer – Exit opportunity to the shareholders of the Camlin**

Pursuant to the above transactions, the Acquirer along with PAC has made a public announcement to the shareholders of the Target Company to acquire 1,38,57,370 Equity Shares representing 22.7% of the current equity capital (20% of the diluted equity capital) of the Target Company at a price of Rs. 110 per fully paid up equity share payable in cash.

The completion of the transaction is subject to the approval of RBI under the Foreign Exchange Management Act, 1999.

#### **Advantage to Kokuyo's from the deal**

##### **I. Acquisition of National Distribution Channel and Brand in India**

Camlin has approximately 300 thousand distribution outlets in India, approximately 150 thousand of which Camlin has direct relationship with, and holds distribution channels throughout India which were developed over the 80 years of Camlin's history.

The Camlin brand has taken root throughout India with the expansion of its distribution channels, and is widely recognized by Indian customers. Thus, through this deal, Kokuyo's intend to take advantage of Camlin's brand to increase the exposure of the Kokuyo brand in part.

## II. Joint Development of Products

Development of new products and new design materials with originality and ingenuity, with a leading edge that meets the needs of the Indian market by bringing the respective strength of both companies.

## III. Sales of Camlin and New Camlin Products in other Asian Regions

Selling of Camlin's existing products and products developed by New Camlin through Kokuyo Group's Asian distribution channels in various forms by taking advantage of its competitiveness in cost and quality.

## IV. Introduction of Kokuyo S&T's Management System Developed in Japan

Introducing a series of advanced management systems such as product management, manufacturing management, distribution management and logistics, which supports the stationery business infrastructure of Kokuyo Group in Japan, to New Camlin in the Indian market, to improve the operating margin of Camlin's existing business and to decrease the inventory ratio.

## MARKET UPDATE

### Mawana Sugars in the process to sell Chemical business

Mawana Sugars Limited, a Siddharth Shriram controlled company is in the process to sell its chemical business by way of slump sale route. The sale funds will be used by the Company to deposit its debt of Rs. 470 Cr to below Rs 200 Cr. This route will enable the buyer to value the business independent of its assets and liabilities at a lump-sum amount.

### Yash Birla Group acquires Aircon Engineering Services

Business conglomerate with over 20 diversified companies, Yash Birla Group has further widened its business in the infrastructure sector by acquiring Aircon Engineering Services, a Kolkata based company. The acquisition is made partly in cash and partly in shares. Aircon has recently acquired an order of Rs 36 crore from WB Housing Board and a road project worth Rs 15 crore from KMDA.

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### OUR GAMUT OF SERVICES:-

Investment Banking; Corporate Restructuring-M & A; FEMA Advisory; Securities Laws Advisory; Corporate Finance & Taxation; India Entry Services; Capital Market & Intermediaries Services; Corporate Compliances & Due Diligence.

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