

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

IN THE MATTER OF ACQUISITION OF SHARES/ VOTING RIGHTS AND CONTROL OF CENTURY ENKA LIMITED - VIOLATION OF REGULATIONS 10 & 12 OF THE SEBI (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 1997

NO. : CO/059/TO/06/2003

1.0 BACKGROUND

- 1.1 Century Enka Ltd (hereinafter referred to as the 'Target company') is a public limited company listed on Calcutta Stock Exchange, The Stock Exchange, Mumbai, Pune Stock Exchange, Delhi Stock Exchange and the National Stock Exchange. The Target company was formed and registered in 1965 as a result of collaboration between the Akzo Group of Holland and Germany and the Birla Group of India.
- 1.2 Akzo Nobel N.V., is a public limited liability company incorporated under the laws of the Netherlands.
- 1.3 CVC Capital Partners (hereinafter referred to as the 'Acquirer') is a limited company under UK law that manages a number of funds among others, a fund consisting of 64% participation in Acordis BV.
- 1.4 Acordis BV, is a private limited liability company incorporated under the laws of the Netherlands. At the time of incorporation i.e. 4.08.99, Acordis BV was 100% subsidiary of the Acquirer.
- 1.5 "Acordis" was a division of Akzo Nobel engaged in the development, production, marketing and sale of fibres and associated materials inside and outside Netherlands and consisting of the companies including the Target company.
- 1.6 Securities and Exchange Board of India (SEBI) received complaints dated 26.11.01 & 14.12.01, inter alia, alleging that the Acquirer has acquired shares/ voting rights/ control over the Target company pursuant to sale of "Accordis" by Akzo Nobel NV to the Acquirer for EUR 825 million and the Acquirer has not made public announcement under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as "the Regulations"). Pursuant to the aforesaid complaints, a letter dated 16.01.2002 was written to the Target company, Accordis AG and Accordis Overseas Investment BV inter alia seeking details regarding their shareholding in the Target company and the alleged acquisition.

1.7 The Target company submitted the details as called for by SEBI vide letter dated 25.01.02 and Accordis AG and Accordis Overseas Investment BV replied vide letter dated 10.04.02 and inter alia submitted the details regarding acquisition by the Acquirer and also stated that there was no violation of the provisions of the Regulations by them.

1.8 The Acquirer made an exemption application dated 26.8.2002 before SEBI under Regulation 4 seeking exemption from the applicability of Regulations 10, 11 & 12 of Regulations. In the application the Acquirer inter alia stated that the induction of the Acquirer as 64% shareholders into the Accordis group did not result in the slightest change in the control and management of the Target company. Further, it was also stated that in the facts of the case there has been no acquisition of holding companies and the induction of Acquirer was a result of global reorganization and restructuring of the Fibers business of the Accordis Group involving numerous corporate entities all over the world and therefore entitled to exemption under Regulation 3(1)(j)(ii) from the applicability of Regulations 10, 11 and 12. Further it was also submitted in the application that even if a direction for making a public offer is given, the minimum offer price taking 9.8.99 as the relevant date, the offer price plus interest would be less than the prevalent market price in the stock exchange and therefore it would not be prudent or necessary to direct the Acquirer to make the public offer.

1.9 Pursuant to the aforesaid exemption application made by the Acquirer, SEBI vide its letter dated 4.09.02 inter alia stated that the exemption application of the Acquirer was not maintainable since in terms of Regulation 4(2) of the Regulations, an acquirer can file an application seeking exemption u/r 4(1) in respect of a "proposed acquisition" and in the instant case admittedly the acquisition of shares/voting rights/control over the Target company had already taken place and beneficial ownership had also transferred. Further, various details were also sought from the Acquirer regarding the aforesaid acquisition transaction between the Acquirer and the Akzo Nobel group.

2.0 SHOW CAUSE NOTICE

2.1 A show cause notice dated 20.12.2002 was issued to the Acquirer inter alia stating that :

- (i) Birla Group of India and Akzo Nobel Group of Holland & Germany promoted the Target Company. It was incorporated on 17.11.65. At the time of incorporation Akzo Group held 45% shares and Birla Group held 17.75% shares in equity share capital of the Target Company. On account of disinvestment under FERA 1973, the shareholding of Akzo Group in the Target Company fell to 40% whereas the shareholding of Birla Group remained at 17.75%. Further, on amalgamation of Rajshree Polyfil Ltd with the Target Company, the share holding of Akzo Group in the Target Company got reduced to 36.50%, while the shareholding of Birla Group remained at 17.75%.

(ii) It is submitted by Acordis Overseas Investment BV (a company belonging to Akzo Group) that at the time of incorporation of the Target Company, Akzo Group and Birla's had an understanding by virtue of which the Birla's will appoint 3 directors on board and 2 directors will be appointed by Akzo Group despite Akzo Group having more shares/voting rights.

(iii) Akzo Group in 1999 held 36.5% shares in the Target Company in the following manner :

Name	No. of Equity shares	Percentage
Acordis AG(formerly Akzo Nobel Fraser AG)	4651150	15.50
Akzo Nobel NV	4651150	15.50
Acordis Overseas Investments BV (formerly Akzo Fibres Overseas Investment)	1650000	5.50
TOTAL	1,09,52,300	36.50%

(iv) Acordis AG and Acordis Overseas Investment BV were indirect subsidiaries of Akzo Nobel NV.

(v) Akzo Nobel N V combined its fibre activities with Courtaulds' Fibres and Chemicals and launched the fibre division called Acordis in November 1998.

(vi) In a press release dated 27.11.98, Cees van Lede, Chairman of Akzo Nobel's Board of Management has stated the following on inception of Acordis :

".....as of today, we have the management and business structures in place. From 01.01.99, Acordis, while still 100% owned by Akzo Nobel's, will be operated as a separated business as if it were an independent company, although of course, under Akzo Nobels' responsibility this process will position Acordis as self sufficient in every respect....."

(vii) Acordis BV, after incorporation on 4.08.99, established several direct or indirect subsidiaries in the Netherlands and other countries. At the time of establishment, Acordis BV and the other subsidiaries established by it were shell companies.

(viii) On 30.07.99 the Acquirer made an offer to Akzo Noble NV to purchase Acordis, a division of Akzo Noble NV. Subsequently, on 09.08.99 the Akzo Nobel Group announced restructuring of its fibres Group and the induction of the Acquirer into the fibres division and through a press release of the

same date, Cees van Lede, Chairman of Akzo Nobel's Board of Management on the issue of offer received for divestment of its stake in Acordis had stated the following :

“.....under the terms of offer the Acquirer and Acordis management would acquire the majority of Acordis. Akzo Nobel has been given the opportunity to buy 20%. Both Akzo Nobel and the management of Acordis have reviewed the offer and consider it attractive.....”

- (ix) Pursuant to the aforesaid public announcement dated 09.08.99, Akzo Nobel NV and Acordis BV, entered into an agreement dated 17.11.99 for transferring Acordis to Acordis BV.
- (x) As per the agreement dated 17.11.99, Akzo Nobel NV was to be given the opportunity to acquire an equity stake in Acordis B V on the terms of a subscription and shareholders agreement.
- (xi) Upon closing of the transaction in pursuance of the aforesaid agreement dated 17.11.99, the subsidiaries of Acordis BV acquired from Akzo Nobel NV the shares in Akzo Nobel's Acordis companies. Among these companies were Acordis AG and Acordis Overseas Investment BV, both holding shares in the Target Company.
- (xii) Further, shares in Acordis BV were transferred in such a manner that 64% shares were held by several funds managed by the Acquirer, 21% were held by Akzo Nobel NV and 15% were held by the Acordis Management through a foundation called “Stitcting Acordis Management”.
- (xiii) As a result of transfer by Akzo Nobel NV of its fibre Division, “Acordis”, (consisting inter alia of the Target Company) to Acordis BV, the Acquirer (which is holding 64% shares in Acordis BV and is in its absolute control) acquired shares / voting rights albeit indirectly in the Target Company to the tune of 36.5%.
- (xiv) In view of the transfer by Akzo Nobel NV of its fibre division, Acordis (consisting inter alia of the Target Company) to Acordis BV, vide agreement dated 17.11.99, the Acquirer (which is holding 64% shares in Acordis BV and is in its absolute control) acquired indirect control through its subsidiaries and also acquired indirectly shares / voting rights in the Target Company to the tune of 36.5% and therefore, triggered the provisions of regulation 10.
- (xv) Further, after the acquisition of shares / voting rights in the Target Company indirectly on 17.11.99 held by Akzo Nobel NV pursuant to offer letter dated 30.07.99 and public announcement dated 09.08.99 made by

Akzo Nobel Group for restructuring of its fibres Group and induction of the Acquirer into the fibres division, the Acquirer acquired control indirectly in terms of regulation 2(1)(c) of Regulations (jointly with Birla's) over the Target Company and triggered the provisions of regulation 12.

(xvi) Accordingly, the Acquirer was under an obligation to make a public announcement to acquire a minimum of 20% shares within 4 working days from the date of 30.07.99 i.e. the date when the Acquirer decided to acquire shares / voting rights or control of the Target Company, in compliance with regulation 14(1) read with 14(3) of the Regulations.

(xvii) As the Acquirer has acquired the said shares/voting rights and control (jointly with Birla's) of the Target Company in the manner as stated above without making a public announcement as required by the provisions of the said regulations, the Acquirer has, prima-facie, violated the provisions of regulations 10 & 12 read with regulations 14(1) & 14 (3) of the Regulations and therefore, the Acquirer is liable for action as specified under the Regulations and the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "SEBI Act".)

(xviii) Why one or more or all action(s) under regulation 44 and regulation 45 of the Regulations and Sections 11, 11B, 11(4), 15H and 24 of the SEBI Act, should not be initiated against the Acquirer for violations specified above.

3.0 SUBMISSIONS

3.1 A hearing before the Chairman, SEBI, was granted to the Acquirer on 12.02.03 wherein the Acquirer made submissions. The submissions made by the Acquirer, Acordis AG and Acordis Overseas Investment BV pursuant to various correspondence exchanged with SEBI prior to issuance of show cause notice dated 20.12.2002, after the issuance of show cause notice, during the hearing dated 12.02.03 and written submissions filed on 24.02.03 subsequent to the hearing are reproduced hereinbelow :-

- (i) The Target Company was formed and registered in 1965 as a result of the collaboration between the Akzo Group of Holland and Germany and the Birla Group. It was agreed between Akzo Group and the Birla group that the Target Company would be controlled and managed by the Birla Group under the Chairmanship of Mr. B K Birla. It was agreed at that stage that the Birla Group will have a representation of 3 members on the Board of the Target Company while the Akzo Group would have 2 members representing them. Right from the incorporation of the Target Company, the company has been controlled and managed by the Birla Group spearheaded under the chairmanship of Mr. B K Birla. That position has remained completely unchanged till now.

- (ii) The induction of the Acquirer as 64% shareholders in the Acordis Group pursuant to the Agreement of November 1999 did not result in the acquisition either directly or indirectly of the shares or voting rights of the Target Company by the Acquirer so as to trigger Regulation 10 or Regulation 11 of the Takeover Code. The shareholding in the Target Company of 36.5% continues to be held by the Akzo Group which is now known as the Acordis Group. There was no transfer of shareholding in the Target Company. It is, therefore, not a case governed by Regulations 10 or 11. It is submitted that the explanation to Regulation 11 was intended to apply to an acquisition of a holding company whose sole or predomination purpose and objective was to hold shares in the Target company in India. That is not the case in the present instance.
- (iii) The induction of the Acquirer as 64% shareholders in the Acordis Group pursuant to the Agreement of November, 1999 did not result in the slightest change in the control and management of the Target Company.
- (iv) No change in control has ever occurred and the Target Company continues to be controlled by the Birla Group by virtue of their majority representation on the Board and also the Shareholders' Agreement. It is submitted that Regulation 12 is intended to apply only when transfer of defacto or dejure control is involved. Defacto change of control is clearly not involved in the present case as the company continues to be under the control and management of the Birla Group. By virtue of the Shareholders' Agreement there cannot either be dejure control in the hands of Acordis Group. Defacto and dejure control are with the Birla group. It is submitted that Regulation 12 is intended to afford an exit option to the Indian investor where change of control has occurred in the Target company.
- (v) That even as far as the management of the Acordis Group is concerned it has remained unaffected by the induction of the Acquirer. All members of the Board of Acordis BV and Acordis Overseas Investment BV have been nominated from within the Acordis organization and not from the Acquirer.
- (vi) The Acquirer has not violated the provisions of Regulation 12 read with Regulation 14(3) of the Regulations.
- (vii) If however, SEBI is inclined to come to the conclusion that the Acquirer has acquired shares / voting rights or control of the Target Company and therefore bound to make a public announcement, it is submitted that the following factors be considered by SEBI before passing an order directing the Acquirer to make a public announcement :
- a. Interest rates in the country have been steadily and sharply declining and now hovers between levels of 7% to 9%. The Hon'ble Supreme Court

has linked the rate of interest for compensation with the rate given by nationalized banks for Fixed Deposits. The Supreme Court has in several cases, either increased or decreased the rate of interest awarded by High Courts to the level of 9%. The yardstick employed by the Hon'ble Supreme Court should also be employed by SEBI. Regulation 44(i) also provides that whilst imposing interest for delay in making a public announcement, SEBI should take the "applicable rate of interest payable by Banks on fixed deposits" into consideration. SEBI should therefore not direct the Acquirer to pay interest at a rate higher than 9% p.a. to the shareholders who tender their shares in response to the public announcement which may be made.

- b. It is further submitted that such interest, at whatever rate fixed by SEBI should be restricted in accordance with the judgement of this Hon'ble Tribunal in the case of Rhodia SA vs SEBI to only those persons who were holding shares on 30.7.1999 and who are in a position to tender in case the Acquirer makes a public offer as directed by SEBI.
- c. In calculating the interest, SEBI should order that the Acquirer should be entitled to take into account the pre-tax dividend received by the shareholders from the Target Company and direct that the amount of pre-tax dividend received be deducted from the interest payable. The Target Company has paid a dividend of Rs.2.50 per share and ex-dividend trading for this dividend commenced from June 28, 1999. The 26th week SEBI formula price taking 30th July, 1999 as the reference date as adjusted for this dividend in terms of Explanation 1 to Regulation 20 of the Regulations prior to 9th September, 2002 is Rs.41.38 on the National Stock Exchange. We may also mention that the Target Company has declared in total dividend of Rs.15 per share after 30th July, 1999.

(viii) It is submitted that if the above factors are not taken into consideration by SEBI whilst directing the Acquirer to make a public announcement, it would result in unjust enrichment of the shareholders at the cost of the Acquirer.

4.0 **ISSUES**

- 4.1 I have taken into consideration the facts of the case, the submissions written as well as oral made by the Acquirer during the hearings and also the documents submitted by the Acquirer, Acordis AG and Acordis Overseas Investments BV pursuant to various details sought by SEBI before and after issuance of Show Cause Notice and documents submitted by them in support of their submissions.

4.2 From the above the following issue arises which needs consideration:

- i) Whether the Acquirer has triggered the said Regulations. If yes, when did the obligation on the part of the Acquirer arise, to make public announcement ?

5.0 **CONSIDERATION OF ISSUE**

5.1 In this regard it will be pertinent to refer to regulations 10, 12 and 14 which are reproduced hereunder:

Regulation 10 (Acquisition of fifteen per cent or more of the shares or voting rights of any company)

“No acquirer shall acquire shares or voting rights which (taken together with shares or voting rights, if any, held by him or by the persons acting in concert with him), entitle such acquirer to exercise [fifteen] percent or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the Regulations”.

Regulation 11 (Consolidation of holdings)

Regulation 11(1)

Regulation 11(2)

Explanation: For the purposes of regulation 10 and regulation 11, acquisition shall mean and include –

- (a) direct acquisition in a listed company to which the regulations apply;
- (b) indirect acquisition by virtue of acquisition of holding companies, whether listed or unlisted, whether in India or abroad”

Regulation 12 (Acquisition of control over a company)

“Irrespective of whether or not there has been any acquisition of shares or voting rights in a company, no acquirer shall acquire control over the target company, unless such person makes a public announcement to acquire shares and acquires such shares in accordance with the regulations.

Provided that nothing contained herein shall apply to any change in control which takes place in pursuance to a resolution passed by the shareholders in a general meeting”.

Regulation 14 (Timing of the public announcement of offer)

Regulation 14(1) : “The public announcement referred to in Regulation 10 or Regulation 11 shall be made by the merchant banker not later than four working days of entering into an agreement for acquisition of shares or voting rights or deciding to acquire shares or voting rights exceeding the respective percentage specified therein”.

Regulation 14(3) : “The public announcement referred to in Regulation 12 shall be made by the merchant banker not later than four working days after any such change or changes are decided to be made as would result in the acquisition of control over the target company by the acquirer”.

- 5.2 From perusal of the provisions of regulations 10 and 12, it is clear that there is a prohibition on the acquirer, not to acquire shares or voting rights or control of the target company unless the acquirer makes a public announcement to acquire shares in accordance with the regulations and acquires such shares in accordance with the regulations.
- 5.3 Further, in terms of regulations 14(1) and 14(3) the public announcement has to be made by the acquirer within 4 working days of entering into an agreement or taking any decision which would result in change in control of the target company. Accordingly, once the said Regulations have been triggered the acquirer is under an obligation, to make a public announcement in terms of the Regulations.
- 5.4 I find from the facts of the case, that the Target company was controlled by Akzo Nobel Group comprising Akzo Nobel NV, Acordis AG (formerly Akzo Nobel Fraser AG) and Acordis Overseas Investment BV (formerly Akzo Fibers Overseas Investment) and by Birla Group. Acordis AG and Acordis Overseas Investment BV were 100% subsidiaries of Akzo Nobel NV. In the Target company Acordis AG was holding 15.50% shares, Akzo Nobel NV was holding 15.50% shares, Acordis Overseas Investment BV was holding 5.50% shares and the Birla Group was holding 17.75% shares. Further, the Akzo Nobel Group had 2 directors and the Birla Group had 3 directors on the Board of the Target company.
- 5.5 On 30.7.99, the Acquirer made an offer to Akzo Nobel NV to purchase the fibre business of Akzo Nobel NV. Pursuant to the aforesaid offer from the Acquirer, Akzo Nobel NV announced restructuring of its Fibre business.
- 5.6 On 4.8.99, the Acquirer floated a 100% subsidiary i.e. Acordis BV for the purposes of acquiring Akzo Nobel group companies carrying out fibre business.

5.7 On 9.8.99, the Acquirer made a public announcement to acquire the fibre business of Akzo Nobel Group. Pursuant to the aforesaid public announcement Acordis BV, and Akzo Nobel NV entered into an agreement dated 17 November 1999, wherein it was inter alia agreed between the parties that the Acordis BV will purchase Acordis (a division of Akzo Nobel NV i.e. engaged in the development, production, marketing and sale of fibres and associated materials inside and outside of The Netherlands and consisting of companies and businesses listed in Schedule 2 to the Agreement – which included the Target company) by means of a purchase of the shares as described in Schedule 3 and the Assets and Liabilities described in Schedule 4. The Indian Target company was in Schedule 3. Thus the shares of Target company were proposed to be acquired.

5.8 Further, as per the terms of the Agreement, Akzo Nobel NV was to be given the opportunity to acquire an equity stake in Acordis BV on the terms of a subscription and shareholders agreement entered into by certain parties who have already agreed to become shareholders in Acordis BV. In short, in terms of the aforesaid Agreement, upon closing of the transaction, the shareholding of the Target company held by Akzo Nobel NV, Acordis AG and Acordis Overseas Investment BV was to be transferred to the Acquirer.

5.9 Further, in terms of the agreement, on closing of the transaction, the shareholding of Acordis BV also underwent a change. Post acquisition of fibres business from Akzo Nobel Group, by Acordis BV- the subsidiary of the Acquirer, the Acquirer through its various funds held 64% shares in Acordis BV. Out of the balance 36% shares, Akzo Nobel NV held 21% shares and Acordis Management through a foundation called 'Stitcting Acordis Management' held 15% shares.

5.10 Further, as stated by Acordis Investment Overseas BV for the reasons of simplification it was decided that Acordis Investment Overseas BV should hold all the shares in the Target Company of the Acordis Group. Therefore, in December 2000 Acordis Investment Overseas BV acquired 15.5% shares held by Akzo Nobel NV in the Target Company and 15.5% shares held by Acordis AG in the Target Company. Acordis Investment Overseas BV paid 1000 EURO per share to Acordis AG for 15.5% shares of the Target Company and 1000 EURO per share to Akzo Nobel NV for its 15.5% shares of the Target Company. As a result of the said transfer Acordis Investment Overseas BV now holds 36.5% shares in the Target Company.

5.11 Consequent to the aforesaid transfer of shares of the Target Company from Akzo Nobel NV and Acordis AG in favour of Acordis Investment Overseas BV to the tune of 31% shares, Acordis Investment Overseas BV filed a report under Regulation 3(4) of the Regulations claiming exemption under Regulations 3 (1) (e)(i) and 3(1) (e)(iii)(b) on the ground of interse transfer of shares amongst promoters / group companies. In the aforesaid application, it was stated that Akzo Nobel NV and Acordis Investment Overseas BV are promoters and Acordis AG and Acordis Investment

5.12 Acordis Investment Overseas BV didn't disclose, inter alia, the following material information in the said report:

- Ownership of Acordis AG and Acordis Investment Overseas BV has changed hands.
- The Acquirer controlled Acordis AG and Acordis Investment Overseas BV at the time of acquisition of shares by Acordis Investment Overseas BV.
- Details of the agreement entered into between Akzo Nobel NV and the Acquirer.
- Details of open offer made by the Acquirer for the purchase of the Fibre business of Akzo Nobel, which was carried on by Acordis.

5.13 The aforesaid disclosures, as discussed elsewhere in the order, were material to consider whether the said acquisition by Acordis Investment Overseas BV was covered u/r 3(1)(e)(i) and/or 3(1)(e)(iii) and eligible for exemption from the applicability of Regulation 10, 11 & 12 as claimed by the Acquirer. Had these material information been disclosed in the report filed by Acordis Investment Overseas BV, the fact that the ultimate ownership of Acordis AG (which held 15.5%) and Acordis Investment Overseas BV (which held 5.5%) had been acquired by the Acquirer would have come to the knowledge of SEBI. Thus, it is observed that Acordis Investment Overseas BV had concealed these material information and furnished incomplete information in the aforesaid report.

5.14 Therefore, had Acordis Investment Overseas BV furnished complete facts of the case, SEBI would have examined the report accordingly and the submissions would not have been taken on record.

5.15 From the aforesaid facts, it is implicit that prior to the acquisition by the Acquirer the shares to the tune of 36.5% were held by Akzo Nobel group in the Target Company and after the acquisition by the Acquirer of fibre business of the Akzo Noble group it acquired 36.5% shares of the Target Company indirectly through Acordis BV and Acordis Investment Overseas BV.

5.16 I have noted the contention of the Acquirer that the induction of the Acquirer as 64% shareholders in the Acordis Group pursuant to the Agreement of November, 1999 did not result in the acquisition, either directly or indirectly, of shares or voting rights of the Target Company by the Acquirer, so as to trigger Regulation 10 or Regulation 11. In this context, it is stated that the Regulations cover both direct and indirect acquisitions of shares and voting rights. From the facts of the case, it is clear that prior to the acquisition by the

Acquirer the Akzo Nobel group was holding 36.5% shares in the Target Company as follows : Acordis AG – 15.5%, Akzo Nobel NV – 15.5% and Acordis Investment Overseas BV – 5.5%. After the acquisition by the Acquirer of the fibers business of Akzo Nobel Group, the share holding of the Target Company underwent a change in terms of agreement dated November 17, 1999 entered into between Acordis BV and Akzo Nobel NV. In pursuance of the aforesaid agreement, the shares of the Target Company held by Akzo Nobel Group were to be transferred to the Acquirer since the Target Company was in the fibre business. Accordingly, the shares held by Akzo Nobel NV (15.5%) and the shares held by Acordis AG (15.5%) in the Target Company were first transferred to Acordis Investment Overseas BV which was holding 5.5% shares in the Target Company. Pursuant to the aforesaid transfer, the share holding of Akzo Nobel NV and Acordis AG in the Target Company became NIL and the share holding of Acordis Investment Overseas BV increased to 36.5% shares in the Target Company. Thereafter, Acordis Investment Overseas BV was transferred to Acordis BV which was the subsidiary of the Acquirer. Thus, the Acquirer indirectly for the first time, through Acordis BV and Acordis Investment Overseas BV acquired 36.5% shares in the Target Company which were earlier held by Akzo Nobel Group. From the aforesaid, it is evident that there was a shift in the ownership of 36.5% shares of the Target Company from Akzo Nobel Group to the Acquirer and by virtue of indirect acquisition of 36.5% shares of the Target Company the Acquirer triggered the provisions of Regulation 10 of the Regulations.

5.17 I have noted the contention of the Acquirer that in a instant case, the Acquirer has not acquired the holding company of the Target Company and therefore, the provisions of Regulation 10 read with Explanation (b) to Regulation 11 are not applicable to the facts of instant case. The aforesaid contention of the Acquirer is not tenable since by virtue of the aforesaid acquisition, the Acquirer has indirectly increased its share holding from NIL to 36.5% shares in the Target Company through Acordis BV (subsidiary of the Acquirer) and Acordis Investment Overseas BV and has thus crossed the threshold limit of 15% as stipulated in Regulation 10.

5.18 I have noted the contention of the Acquirer that the induction of the Acquirer has also not resulted in the slightest change in the control and management of the Target Company. The Target Company continues to be controlled by the Birla Group by virtue of their majority representation on the Board and also the Shareholders' agreement. Defacto and de jure control are with the Birla Group. It is further submitted that the management of Acordis Group has remained unaffected by induction of the Acquirer. In this context it is clear from the facts of the case that admittedly before the acquisition of the Acquirer the Birla Group and the Akzo Nobel Group were in joint control of the Target Company and the Birlas had 3 Directors on the Board of the Target

Company and the Akzo Nobel Group had 2 Directors on the Board of the Target Company despite its share holding of 36.5% in the Target Company as against the shareholding of 17.75% of the Birla Group. After the acquisition by the Acquirer the share holding of the Target Company underwent a change and the shares to the extent of 36.5% earlier held by Akzo Noble Group were transferred to the Acquirer. Thus, after the acquisition by the Acquirer the 2 Directors on the Board of the Target Company who were earlier representing Akzo Noble Group were now representing the Acquirer. From the aforesaid it is clear that after the acquisition by the Acquirer instead of Akzo Noble Group the Acquirer acquired the joint control of the Target Company along with Birla group and thereby the Acquirer triggered the provisions of Regulation 12 as it acquired control, though joint control along with Birla Group, over the Target Company for the first time by virtue of indirect acquisition of shares in the Target Company to the tune of 36.5% shares.

5.19 I have noted the contention of the Acquirer that in view of interest rate prevailing in the country and the Hon'ble Supreme Court linking rate of interest for compensation with the rate given by nationalized bank for fixed deposit, SEBI should not direct the Acquirer to pay interest at a rate higher than 9% p.a. to the shareholders to tender their shares in response to the public announcement which may be made. In this context, it may be noted that the payment was to be made, in case the offer had been made according to the provisions of the Regulations, by the Acquirer by 28.11.99 and the amount to be paid remains unpaid till date. Therefore, the interest rate applicable should be the rate which was prevailing on 28.11.99 and not the one prevailing today. As per Rule 3, sub-rule (1), clause (c) of the Companies (Acceptance of Deposits) Rule, 1975, the maximum rate of interest at which a company could invite or renew any deposit in 1999 was 15% p.a. at rests which shall not be shorter than monthly rests. Thus, had the shareholders invested the consideration received at the then prevailing interest rate of 15% p.a., on monthly rests basis, the interest earned for 4 year duration would be approximately 20% p.a. and therefore, I am not inclined to agree with the Acquirer's submissions that it should not be directed to pay interest higher than 9% to the shareholders. However, after taking into consideration the facts and circumstances of the instant case, it would be just and equitable to direct the Acquirer to pay interest @15% p.a.

5.20 I have noted the contention of the Acquirer that in view of the Securities Appellate Tribunal (SAT) order in case of Rhodia SA, payment of interest should be restricted to only those persons who were holding shares on 30.07.99 and who are in a position to tender in case of the Acquirer makes a public offer as directed by SEBI. In this context it may be noted that if the aforesaid contention of the Acquirer is accepted then the same will not be in the interest of securities market in general and the shareholders of the Target company in particular. It may also be mentioned that all the shares traded in the securities

market are pari-passu and whoever buys the shares at any point of time does so with all the rights and obligations of his predecessor shareholder. Therefore, any distinction for the restriction of interest to only those shareholders who were holding shares on July 30, 1999 will not be tenable. Further, in terms of Regulations the Acquirer is obligated to pay the offer price including interest, if any, to all the shareholders who tender their shares in the open offer made by the Acquirer and whose shares are accepted in the open offer.

5.21 I have noted the contention of the Acquirer that in calculating the interest, SEBI should order that the Acquirer should be entitled to take into account the pre-tax dividend received by the shareholders from the Target Company and direct that the amount of pre-tax dividend received be deducted from the interest payable. In this regard, it is submitted that the Target Company has declared in total dividend of Rs 15 per shares after 30.07.99. In this context it need be noted that the direction to pay interest is on the Acquirer. The reason for directing the Acquirer to pay interest is that it was due to their failure, to make timely payment the shareholders suffered. The interest is directed to be paid to make good the loss of interest caused to the shareholders by the Acquirer. The obligation to make the payment is on the Acquirer and not on the target company. The Dividend is paid by the target company and it has nothing to do with the obligation of the Acquirer to make payment for the shares acquired by them or for making payment of interest for the delay involved in making the payment. It is also to be noted that interest and dividend are not one and the same. Interest is paid to a person deprived of the use of money to which he is legitimately entitled as he has a right to be compensated for the deprivation. Dividend in its ordinary connotation means the sum paid to or received by a shareholder proportionate to his shareholding in a company out of the sum total of profit distributed. Dividend is not paid as a compensation. Dividend is a participatory benefit available to the shareholder in a company.

5.22 It has to be noted that the claim of interest arises on account of the delay involved in making payment by the acquirer and the obligation to pay interest is on the acquirer. The Acquirer cannot escape from his obligation claiming that the shareholder has been paid dividend by the Target company. In my view payment of dividend by the Target company is not compensatory in nature and it cannot be considered as a payment in lieu of the interest due to the shareholders from a third party for the transaction to which the Target company is not even a party. The argument that the shareholders of the Target company have, as a matter of fact, received dividend on the shares and the same being a benefit accrued to them must be adjusted against the interest payable by the Acquirer, in my view is untenable, taking into consideration the distinct nature of interest and dividend. It does not stand to reason to say that since the shareholders have enjoyed participatory benefit in the company and., therefore, shareholders are not to be compensated for an entirely different cause of action

in the hands of the Acquirer.

5.23 I have noted the submission of the Acquirer that, made at the time of hearing, that in case it makes public announcement, the offer price (after adjusting for dividends and including interest) as per the regulations taking 30.07.99 (date of alleged violation) as the reference date will be less than the prevailing market price. Therefore, any direction by SEBI to the Acquirer for making the open offer will be superfluous as the market price of the shares of the Target company will be higher than the offer price. The aforesaid contention of the Acquirer is not tenable. In this regard, we may refer to observation made by SAT in a similar case of [B.P. Plc \(formerly B.P.Amoco\) & Foseco Plc Vs. SEBI \[30 of 2001\]](#):

“..It is not the monetary gain to the Indian shareholders that is to be taken as the guiding factor. It is the governing legal provision, that is required to be followed. If under the regulations the shareholders are entitled to benefit, it should be granted, if the regulation is not in favour, the benefit cannot be granted. Therefore the impugned order has to be tested from the legal angle.”

5.24 Thus, the contention of the Acquirer that price as per the reference date is less than the prevailing market price and any direction to make offer will be superfluous is not tenable and the Acquirer has to come with an open offer, if it has violated the provisions of the Regulations, irrespective of the price prevailing in the market, and comply with the requirements of law.

5.25 In view of the above, the Acquirer has triggered the said Regulations and obligation on the part of the Acquirer to make the public announcement arose on July 30, 1999 i.e when it decided to indirectly acquire shares / voting rights / control of the Target Company, which was to be made within 4 working days from the date of July 30, 1999 I find that as required under the aforesaid regulations, no public announcement has been made by the Acquirer and therefore it has violated regulations 10 and 12 read with Regulations 14(1) & 14(3) of the said Regulations.

6.0 **CONCLUSION**

6.1 In view of the aforesaid, I find that the Acquirer has violated regulations 10 and 12 read with sub-regulations (1) and (3) of regulation 14, as the Acquirer has acquired 36.5% shares/voting rights and joint control in the Target company, without making public announcement to acquire shares/voting rights or control of the Target company in accordance with the said Regulations

7.0 **ORDER**

- 7.1 In view of the findings made above, in exercise of the powers conferred upon me under sub-section (3) of Section 4 read with Section 11B SEBI Act further read with regulations 44 and 45 of the said Regulations, I hereby direct the Acquirer to make public announcement as required under Chapter III of the said Regulations in terms of regulations 10 & 12 taking 30.07.99 as the reference date for calculation of offer price. The public announcement shall be made within 45 days of passing of this order.
- 7.2 Further, in terms of sub regulation (12) of regulation 22, the payment of consideration to the shareholders of the Target Company has to be paid within 30 days of the closure of the offer. The maximum time period provided in the said Regulations for completing the offer formalities in respect of an open offer, is 120 days from the date of public announcement. The public announcement in the instant case ought to have been made taking 30.07.99 a reference date and thus the entire offer process would have been completed latest by 27.11.99. Since no public announcement for acquisition of shares of the Target Company has been made by the Acquirer when the Regulations were triggered i.e. on 30.07.99, it would be just and equitable to direct the Acquirer to pay interest @ 15% per annum on the offer price, from 28.11.99 till the actual date of payment of consideration by the Acquirer, to all the shareholders who tender the shares in the open offer to be made by the Acquirer in terms of this Order and whose shares are accepted by the Acquirer .
- 7.3 This order shall come into force with immediate effect.

G.N. BAJPAI

CHAIRMAN

SECURITIES AND EXCHANGE BOARD OF INDIA

Date : 25th June, 03

Place : Mumbai