

SECURITIES AND EXCHANGE BOARD OF INDIA

ORDER

Under Sections 11(1), and 11B of Securities and Exchange Board of India Act, 1992 and Regulations 44 and 45 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 read with Regulations 32 and 35 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, in the matter of NDTV Ltd. in respect of Vishvapradhan Commercial Private Ltd. (VCPL)

1. M/s. New Delhi Television Ltd., (hereinafter referred to as "Target Company" / **"NDTV"** / **"Target company"**) is a company having its registered office at 207, Okhla Industrial Estate, Phase III, New Delhi, 110020 and its securities are listed on BSE and NSE. As per the shareholding pattern of the Target Company disclosed to the BSE, as on quarter ending December 2008, the Promoter Group of the Target Company included RRPR Holding Pvt. Ltd. (**"RRPR"**), Prannoy Roy and Radhika Roy (hereinafter referred to as **"Promoters"**). An open offer was made by the promoters of NDTV Ltd. in the year 2008. It was observed that a loan of Rs.540 Cr. was taken by the promoters from M/s. Indiabulls Financial Services Ltd. to fund the aforesaid open offer. To repay the aforesaid loan, another loan of Rs.375 Cr. was taken from ICICI Bank. The loan taken from ICICI Bank was repaid in the year 2009 by taking another loan of Rs.350 Cr. from Vishvapradhan Commercial Private Limited (**"VCPL"** / **"the noticee"**), vide an agreement dated July 21, 2009 (hereinafter referred to as **"the Loan Agreement"**).
2. Significant aspects/clauses of the Loan Agreement are as follows:
 - i. The term of the loan is 10 years i.e. upto July, 2019.
 - ii. The loan is an unsecured loan and without any interest payment.
 - iv. RRPR will issue a convertible warrant to VCPL, convertible into equity shares aggregating to 99.99% of the fully diluted equity share capital of RRPR at the time of conversion, convertible at any time during the tenure of the loan or thereafter.
 - v. VCPL shall have the right to purchase from the promoters all the equity shares of RRPR at par value.
 - vi. VCPL and its affiliates cannot purchase shares of NDTV which will increase their holding to more than 26% in NDTV without the consent of the promoters.

vii. One of the conditions precedent to the execution of agreement was sale of 11,563,683 shares of NDTV from the promoters to RRPR such that RRPR holds 26% shares of NDTV.

viii. Appointment of atleast one director (out of 3) nominated by VCPL on the Board of RRPR, whose presence is necessary to constitute quorum for any meeting of the Board.

ix. VCPL shall not interfere with the editorial policies of NDTV.

x. Over the next 3 to 5 years, RRPR and VCPL will look for a stable and reliable buyer of RRPR who will maintain the brand and credibility of NDTV.

xi. The promoters together with their affiliates shall exercise their voting rights in RRPR and NDTV.

xii. The following matters relating to RRPR would require prior written consent of VCPL:

- (a) Issue or agreement to issue any equity securities in RRPR.
- (b) Buyback of equity securities, reduction or alteration of share capital of RRPR.
- (c) Borrowing or raising money or issue of any debenture or assumption of debt.
- (d) Amending the charter documents of RRPR
- (e) Merger, amalgamation or consolidation of RRPR with any other entity or any entity with RRPR.
- (f) Set up any subsidiary.
- (g) Cause RRPR to take any steps towards bankruptcy, insolvency or reorganization, arrangement, adjustment, winding up, liquidation, dissolution, composition or other relief with respect to it or its debts or seeking appointment of a receiver, trustee, custodian or other similar official for it or all or any substantial part of its property.
- (h) Sell or otherwise dispose of any asset of RRPR or transfer any equity securities of NDTV or create any encumbrance on the equity securities of NDTV.
- (i) Sell, transfer or create any encumbrance on the equity securities of RRPR.
- (j) Take any action to issue any equity securities or enter into any agreement as a result of which the promoters cease to be in sole control of RRPR.

xiii. The following matters relating to NDTV would require prior written consent of VCPL:-

- (a) Issue any equity securities of NDTV which results in aggregate valuation of NDTV being less than Rs. 1346 Cr. (valuation at which lender has put money into the company).
- (b) Merger, amalgamation or consolidation of NDTV with any other entity.
- (c) Cause NDTV to take any steps towards bankruptcy, insolvency or reorganization, arrangement, adjustment, winding up, liquidation etc.
- (d) Buyback of equity securities, reduction or alteration of share capital of NDTV.
- (e) Take any action to issue any equity securities or enter into any agreement as a result of which the promoters cease to be in sole control of NDTV.

3. Taking note, inter alia, of the above, a notice dated December 20, 2016 (hereinafter referred to as “**the Show cause notice**”/ “**the SCN**”) was issued by SEBI to the Noticee alleging that the loan was not a normal investment transaction, that the primary purpose of the loan was to acquire the shares of NDTV Ltd. and that although VCPL had not acquired any shares of RRPR or NDTV directly, RRPR acquired shares from other promoters to increase its holding in NDTV to 26% as a pre-condition to the loan agreement. The SCN also stated that the loan has been granted by the Noticee for the considerations enlisted at (a) to (e) at para 8, which includes the right to purchase 99.99% shares of RRPR through convertible warrants along with right to purchase 26% shares of NDTV held with RRPR through call option agreements. It was thus concluded in the SCN that VCPL had acquired veto rights in RRPR and NDTV and indirectly rights over the 26% shareholding held by RRPR in NDTV which resulted in VCPL's acquisition of indirect control over NDTV, which thereby required VCPL to make public announcement of open offer in terms of regulation 12 read with regulation 14(3) of SEBI (SAST) Regulations, 1997. Since no such public announcement had been made, the Noticee was alleged to have violated the aforesaid regulations. Consequently, the SCN directed the Noticee to show cause why suitable directions under Sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 and Regulations 44 and 45 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 read with Regulations 32 and 35 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 should not be issued for the alleged violations referred to hereinabove.

4. Post issuance of the SCN, the Noticee had sought for several documents while exercising its right of inspection of documents relevant to the issuance of the SCN. Relevant documents were provided during the inspection carried out by the Noticee on February 14, 2017 and February 22, 2017. Vide letter dated March 16, 2017, VCPL sought further additional documents for inspection. In reply, SEBI vide email dated June 13 and June 22, 2017 inter-alia conveyed to VCPL that all the documents relied upon have been provided during the inspection and thus inspection of documents stood concluded. Not being satisfied with the stance of SEBI that the inspection had been concluded VCPL preferred Appeal no. 144 of 2017 before the Hon'ble SAT. The relief sought by VCPL before the Hon'ble SAT was to set aside the communications received by it from SEBI vide emails dated 13/06/2017 and 22/06/2017 inasmuch as SEBI contended that the inspection was complete and the reply on merits ought to be filed by VCPL. VCPL further sought directions of the Appellate Tribunal to be granted a complete inspection of all records as sought by them vide their letter dated 16/06/2017.
5. While the said appeal was pending before Hon'ble SAT, a hearing notice dated July 03, 2017 was served upon the appellants communicating the scheduled date of personal hearing to be August 3, 2017. Upon hearing the parties in Appeal No. 144 of 2017 on July 27, 2017, the Hon'ble SAT directed that since the hearing is fixed on August 3, 2017, it would be open to the appellant (VCPL) to raise the plea of inspection of documents before the Whole Time Member("WTM") and if raised, the WTM of SEBI, after hearing the appellant would pass appropriate order thereon. However, while the hearing was scheduled for submissions on merits, the noticee chose to make submissions only on the issue of documents that in its opinion should have been made available to it in inspection. Pursuant to the same, vide letter dated October 03, 2017 issued with the confirmation and approval of the Whole Time Member, SEBI provided its comments on the documents sought after taking a decision with respect to the relevance of each of the documents sought. Upon receipt of the said letter, VCPL has sent another letter dated October 12, 2017 basically contending the following issues:
- i) That the direction of the Hon'ble SAT was to pass an appropriate order on the matter of inspection;
 - ii) Seeking confirmation as to whether the contents of the letter dated October 3, 2017 is an order of WTM that was required to be passed in terms of the SAT Order dated 27th July, 2017 or whether it was a communication of an

order passed by WTM and if yes a copy of such order or whether these are submissions of the department made to the WTM in response to the submissions of VCPL etc.;

iii) In view of the affidavit/undertaking submitted by SEBI before the Hon'ble SAT in the matter of Adventz Finance Private Ltd vs. SEBI (Appeal No. 206/2016), if the letter dated October 3, 2017 is an order of the WTM, then SEBI's statements on Oath in the Adventz case would stand falsified.

iv) SEBI having taken two months to respond to the submissions of VCPL, there can be no basis to proceed ex-parte in the main matter.

6. SEBI passed a formal order dated November 03, 2017 stating inter alia the following:

- (i) Inspection constitutes a preliminary and procedural part of the quasi-judicial proceeding. Denial of inspection of a document on its own cannot be stated to be an objection for not addressing the merits of the allegations, especially in a case where all relevant documents have been provided and for the rejection of certain documents, elaborate reasons have been furnished.
- (ii) Once an order is passed or a letter is sent communicating the decision of the Competent Authority, then the same would again be agitated by the parties before the Appellate Tribunal disputing the reasons provided for such rejection.
- (iii) In the chain of litigations that can potentially be employed by resourceful noticee, the quasi-judicial proceedings initiated against the entity continue to remain pending before various authorities (WTMs or AOs) without reaching any conclusion for a prolonged period.
- (iv) Right of inspection of documents is a right of the noticee to understand the facts and circumstances that has led to the allegations in the SCN. Seeking documents or opinions/decisions of the regulator in factually different and distinct matters or making roving enquiries traverses beyond the reasonable bounds of the right to inspection.
- (v) Normally, as a matter of practice, the issues of the nature raised by the Noticee including inspection, cross-examination and such other procedural/interim/miscellaneous issues are dealt with and addressed by way of administrative notices sent by SEBI. If such orders are to be passed on every objection raised by each noticee in every proceeding, it will eventually result in a multiplicity of orders in one and the same proceeding and further

result in delay and also clog the quasi-judicial and appellate fora with unwarranted litigations.

Further, reasons earlier tendered for rejecting the request for additional documents were reiterated in the said order. Pursuant to hearing before the Hon'ble SAT dated January 04, 2018, additional documents were provided to the notice as directed in its order.

7. Subsequently, reply to the SCN was received vide letter dated February 20, 2018. During the personal hearing granted to the noticee on February 22, 2018, certain queries were raised with the noticee, to which it proposed to make a separate set of written submissions. Accordingly, reply dated March 09, 2018 was received from the noticee. In the said reply the noticee again sought an opportunity of a personal hearing which was granted on May 03, 2018. During the said hearing in response to the submissions made by the noticee, certain clarifications were sought to which the noticee chose to make written submissions dated May 21, 2018. Submissions during the opportunities of personal hearing were made by Advocate Somashekhar Sundaresan, who was accompanied by Advocates Dhaval Kotharai, Rahul Dutt and Manish Changani from Khaitan & Co. - Advocates & Solicitors, and Hariharan Mahadevan - authorized representative of VCPL. Summary of the noticee's written and oral submissions are as follows:

- (i)The SCN has been issued without being preceded by investigations. Twelve months after the issuance of the SCN, for the very first time, SEBI issued a summons on 11 December 2017 to VCPL for investigating into the very same matter.
- (ii)SEBI has failed to stipulate the specific action SEBI proposes to take against VCPL
- (iii)The SCN is issued nearly 8 years after the facts occurred, which in itself violates principles of natural justice — in other words, the SCN is severely eroded by extraordinary delays, making it very difficult to respond to the SCN.
- (iv)From publicly available records it is evident that since the quarter ending December 2008 and even as of now, the latest calendar quarter being the quarter ending December 2017, RRPR, Dr Prannoy Roy and Mrs Radhika Roy have continued to be the promoters of NDTV. Admittedly, even during the course of the long-drawn denial of inspection of the record to VCPL, SEBI has not even con-

sidered that the filings made by NDTV were allegedly wrong by depiction of a wrong promoter.

- (v) Under Clause 6.1 read with schedule I of the Loan Agreement VCPL is entitled to warrants of RRPR. These warrants are convertible at par from time to time (in tranches) at VCPL's option into equity shares aggregating upto 99.99%. Upon such conversions, if and when the Conversion Option were to be fully exercised, VCPL would then come to own RRPR which in turn holds shares of NDTV
- (vi) Under clause 6.2 of the Loan Agreement, VCPL has the option to purchase all equity shares of RRPR at par from Dr Prannoy Roy and Mrs. Radhika Roy ("Purchase Option"). If and when such purchase is effected, VCPL would then own RRPR which in turn holds shares of NDTV. There are two call option agreements which were contemporaneously entered into between Subhgami Trading Private Limited and RRPR, and Shyam Equities Private Limited and RRPR, respectively, on 21 July 2009. These companies were associates of VCPL's shareholders at the relevant times. The call option agreements gave Subhgami Trading Private Limited the right to purchase from RRPR equity shares of NDTV, representing up to 14.99% of the equity share capital of NDTV and Shyam Equities Private Limited the right to purchase from RRPR equity shares of NDTV, representing up to 11.01% of the equity share capital of NDTV, in each case at a fixed price of Rs.214.65 per share (collectively, "Call Option"). The call option agreements are enclosed as Annexure 3 and Annexure 4 respectively. As per Clause 7 of the Loan Agreement, any money paid to RRPR to purchase NDTV's shares from RRPR under the call option agreements is to be used by RRPR only for repayment of the loan to VCPL. It is a well-known legal position that unless and until either the Conversion Option or the Purchase Option or indeed the Call Option are exercised, there is no question of triggering an open offer under the Takeover Regulations, 1997 or the Takeover Regulations, 2011.
- (vii) No person connected with VCPL either directly or indirectly has been appointed as director of NDTV or RRPR at any time.
- (viii) Clause 6.1 read with Schedule 1 and Clause 6.2 of the Loan Agreement provides that as and when, if and when, the Conversion Option or the Purchase Option or the Call Option (which collectively are a part of the Collateral) gets exercised, at that point of time, the transfer of shares — whether of RRPR or of NDTV — would not be at the market price of such shares prevailing at such time, but the pre-fixed price as per the Loan Agreement or the call option

agreements, as the case may be. The difference in price between the market price and the exercise price is, therefore, the commercial consideration for the loan. Therefore, it is wholly untenable and unreasonable to insinuate that the financial assistance by way of the Loan Agreement without interest is bogus in nature and not a loan at all. The Loan Agreement represents a down-side protection for the financial assistance, with the returns being the value of the difference between the exercise price and the then prevailing market price. The commercial understanding was that instead of interest on the loan there will be a convertibility and purchase option in favour of VCPL which will, if exercised, result in VCPL becoming almost 100% shareholder of the borrower RRPR which in turn holds the collateralised asset, that is, shares of NDTV, a listed company. Once the collateral was available, it was vital that all necessary protective measures be taken to ensure that the security for the loan does not get diluted due to actions of RRPR or of its promoters. That is the reason for VCPL having the rights contained in Schedule 3 of the Loan Agreement.

(ix) In *Victor Fernandes & Anr. Vs SEBI & Ors*, the Hon'ble Securities Appellate Tribunal in its order dated 13 April 2016 referred to certain clauses of a "ZOCD agreement" and made a prima facie observation that such clauses might have resulted in acquisition of control and asked SEBI to investigate the same and arrive at a specific finding and report to the Hon'ble Securities Appellate Tribunal. SEBI did so vide its Investigation Report dated 10 October 2016. In it, SEBI has clearly conducted a clause-wise analysis, and concluded that those clauses do not result in control acquisition. Some of those clauses are similar to the clauses in the Loan Agreement.

(x) VCPL, has no positive rights to cause any decision whatsoever to be taken, whether it relates to day to day business or operations or management or policies, of RRPR or NDTV. VCPL does not even have veto rights in relation to management or policy decisions or the day to day business or operations of RRPR and NDTV. VCPL's rights in the Loan Agreement are only protective rights.

(xi) It is clear from publicly available information that Dr Prannoy Roy, Mrs Radhika Roy and their Affiliates, from the date of Loan Agreement till date (i) have owned and controlled 61.45% shareholding of NDTV and are the major shareholders of NDTV (ii) voted on 61.45% shareholding in NDTV in all meetings (iii) are promoters of NDTV (iv) have appointed the directors of RRPR and NDTV (v) appointed the chairman of RRPR and NDTV in all the meetings and (vi) have

exercised control and taken all policy decisions and managed the affairs of RRPR and NDTV.

(xii) It is evident from the conduct of VCPL, and of RRPR, Dr Prannoy Roy and Mrs Radhika Roy, that the intention of providing loan to RRPR was not to acquire "control" over RRPR or NDTV and the Loan Agreement is a normal lending transaction to enable RRPR repay its then existing debt. The following clearly establishes the same:-

- (a) VCPL has not exercised any of the rights provided under the Loan Agreement till date;
 - (b) The day-to-day operations of RRPR and NDTV have always been under the control and management of Dr Prannoy Roy and Mrs Radhika Roy;
 - (c) The directors and key managerial personnel of RRPR are appointed by Dr Prannoy Roy and Mrs Radhika Roy and NDTV is free to appoint any person or persons as its key managerial personnel without obtaining any approval of VCPL;
 - (d) No change in shareholding, directors or control of RRPR or NDTV at any time during the preceding 8 year period. No nominee of VCPL has been appointed on the Board of Directors of either RRPR or NDTV at any time after execution of the Loan Agreement and there has been no change in the Promoters' shareholding in either NDTV or RRPR except the inter se transfer between Promoter shareholders of NDTV;
 - (e) The Loan Agreement specifically provided that VCPL has no right to interfere with the editorial policies of NDTV, which in fact constitutes the day to day business of NDTV. This is a very significant clause since this means that even if VCPL were to exercise the Conversion Option or Purchase Option, VCPL would not have any right in relation to the editorial policies of NDTV which, for a broadcaster lies at the heart of control.
- (xiii) The loan provided by VCPL was an asset-recourse loan with the entitlement to have the outstanding loan amount returned to it on the Maturity Date. As a matter of right, the entitlement to have the outstanding loan amount repaid on Maturity Date was enshrined in the Loan Agreement.
- (xiv) The main objective in VCPL stipulating that RRPR should acquire 26 per cent holding in NDTV was to ensure there is enough collateral and would also entitle VCPL to special resolution rights under the Companies Act.
- (xv) The Call Option is an additional collateral - in addition to the Conversion Option and the Purchase Option. All these options complement each other

such that the net result of all or any of them fully would lead to VCPL acquiring directly or indirectly 26% shares in NDTV. The call option agreements do not refer to a specific outer limit. A Call Option maybe exercised at any time and the proceeds thereof are to be used by RRPR to repay the loan amount. However if, the Conversion Option or Purchase Option were exercised in full, the Call Options would naturally lapse. This is because once the Conversion Option or Purchase Option is exercised, VCPL would indirectly hold 26% shares in NDTV, and it would be pointless then to exercise the Call Option. Further, if the loan is repaid in full, the Call Options would lapse. The call option would have been an effective mechanism if say NDTV share prices increased up to a price so as to give a return on the investment. For VCPL to be incentivized to exercise it, the market value would have to be such as it would give a return. There was no specific trigger for their exercise, and nor was there any specific contingency; except that, as explained above call option would have been an effective mechanism if say NDTV share prices increased up to a price so as to give a return on the investment. Otherwise, if VCPL did decide to take over RRPR's shares in NDTV, a more effective mechanism would have been to exercise either the conversion option or the purchase option. The net result is that exercise of any of the options in full will mean VCPL would not exercise any other option, because VCPL would already have achieved 26% NDTV shares. The question to be framed is whether the "right to exercise an option" constitute "acquisition of shares"? This is because the law rightly recognises that it is when the holder of a convertible security, in fact, converts it, it is only then can it be said to be have acquired shares, and not before that. This position of law has been laid down in several cases.

- (xvi) The Loan Agreement clearly is a loan for the period between the execution date and the Maturity Date. If the loan is repaid in full, the Loan Agreement would cease to be in effect. Clause 8 of the Loan Agreement points out that the agreement would be in force and effect until the date of the repayment of the loan. So also, if the Call Options were exercised in full it would follow under Clause 7 that the proceeds would be utilised to repay the full loan which would in turn lead to the agreement ceasing to have force and effect.
- (xvii) Other companies have also issued optionally convertible instrument with zero interest. Some examples were set out in the reply.

- (xviii) The price per share attributed to the financing provided was Rs 214.65 per share which was at a premium of 51% of the 60-day average share price of NDTV. This premium is reasonable considering the conversion / purchase right given to VCPL for taking ownership at its option of a bulk quantity of a listed company's shares (namely 26% shares of NDTV). The value of the collateral (the NDTV shares) at the time of giving the loan and making the investment does not have any bearing at all in a matter involving the question of whether VCPL has triggered an open offer. At the time of giving the loan, however, the difference between the market value and the loan cum investment amount was obviously not so large so as to have been a deterrent for such a decision. A potential would have been seen for the company's value increasing. Whether or not the value would decrease or increase is ultimately a commercial assessment made at the time of giving the loan / making the investment.
- (xix) Just because this is the only transaction done by VCPL, it would not follow that the Takeover Regulations would get triggered.
- (xx) One must not lose sight of the other element of the transaction in question, namely, that VCPL also acquired the right to acquire, if it so desired, in future, an interest in one of the largest media companies in the country. If and when, and as and when, such acquisition in fact occurs, whether such acquisition would trigger an open offer obligation would have to be considered at that point in time.
- (xxi) "At least" one (mentioned in clause 11 of the Loan Agreement) simply means that VCPL should not be left by the borrower in a position where VCPL is unable to have even one director nominated by it, to be appointed.
- (xxii) The absence of an interim repayment schedule is purely a matter of contract and it is quite conventional to even see prohibition on prepayment in loan agreements.
- (xxiii) The Maturity Date falls 10 years from the disbursement. That is a long time. In that time, VCPL has options and if it does not exercise them then the loan becomes repayable. VCPL took a long-term view on the investment.
- (xxiv) Since VCPL has provided the loan to RRPR, and it holds the options to the shares, it is but natural for VCPL to expect that any buyer of RRPR should be acceptable to VCPL and must be a 'stable and reliable' buyer.

8. Issue for Determination

The Noticee has raised several preliminary objections during the proceedings and the same will be taken up for consideration after the deliberation of the merits of the violations alleged in the SCN. However, the main issue for consideration in the matter is hereunder:

Whether the execution of the set of agreements (*i.e the Loan Agreement between VCPL and RRPR along with the Call Option agreements through VCPL's affiliates binding the Promoters of NDTV*) partakes of the structure of a loan transaction or an arrangement entered into by the parties to acquire "control" over NDTV under Regulation 12 read with regulation 14(3) of SEBI (SAST) Regulations, 1997, as alleged in the SCN.

9. Relevant provisions of SAST Regulations, 1997 as existed during the relevant period are reproduced hereunder for ease of reference:

Regulation 2(1)(c) of the SAST Regulations- Definition of 'control'

(c) "control shall include the right to appoint majority of the directors or to control the management or policy decisions 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."

Regulation 12 - Acquisition of control

"12. 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 special resolution passed by the shareholders in a general meeting:

Provided further that for passing of the special resolution facility of voting through postal ballot as specified under the Companies (Passing of the Resolutions by Postal Ballot) Rules, 2001 shall also be provided.

Explanation.— For the purposes of this regulation, acquisition shall include direct or indirect acquisition of control of target company by virtue of acquisition of companies, whether listed or unlisted and whether in India or abroad."

Regulation 14(3) - Timing of the public announcement of offer

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."*

10. A background of the loan transaction which is a matter of record becomes relevant for consideration. An open offer was made by the Promoters of NDTV (*i.e. the RRPR Holding Pvt Ltd., Prannoy Roy and Radhika Roy*) in the year 2008. For this

purpose, the Promoters availed of a loan of Rs. 540 Cr. from M/s. Indiabulls Financial Services Ltd. To repay the said loan, another loan of Rs. 375 Cr. was taken from ICICI Bank. The loan taken from ICICI Bank was repaid in the year 2009 by taking another loan of Rs. 350 Cr from VCPL i.e. the Noticee, vide the Loan agreement executed on 21st July, 2009.

11. On 21st July, 2009, three simultaneous or co-existing agreements were executed by VCPL and its affiliates with RRPR as part of the financial transaction between VCPL and RRPR- (i) the Loan agreement between VCPL and RRPR; (ii) Call option agreement between VCPL and Shubhgami Trading Pvt Ltd (STPL) and; (iii) Call option agreement between VCPL and Shyam Equities Pvt. Ltd. (SEPL). I have perused the contents of each of these agreements and sought the comments of the Noticee regarding the same during the multiple opportunities of hearings that were granted.
12. I proceed to examine the relevant clauses of the Loan Agreement and the parallel Call Option Agreements to ascertain whether the same were in fact part of a lending transaction or not. Clause 2 of the Loan Agreement deals with the debt obligation which makes it clear that the Lender agrees to lend Rs.350 Cr. without any interest and that the same shall be repayable on the Maturity Date. The Maturity Date means the date falling at the end of 10 years from the Drawdown Date. The consideration for the loan is provided in Clause 6, which obligated the borrower RRPR, immediately upon execution of the loan agreement, to issue convertible warrants upto 99.99% of its Equity Share Capital, subject to the terms and conditions set out in Schedule 1. Schedule I provides that the warrants of RRPR may be converted at the sole option of the Noticee **at any time during the tenure of the Loan or thereafter** without requiring any further act or deed on the part of VCPL except for a written notice to that effect. Additionally, the Loan Agreement confers upon the Noticee, a right to purchase all the equity shares of RRPR held by the Promoters, at par value and also restricts the Noticee from purchasing shares of NDTV which will increase their holding in the aggregate to more than 26% of the paid up Equity Share Capital of NDTV without the consent of the Borrowers and Promoters. In addition to this, the Repayment clause 7 ensures repayment by separately invoking the call option rights under the agreements. Clause 13 provides that any breach of the terms of the Loan Agreement or related agreements, by the promoters of NDTV or by RRPR, would lead to the loan becoming immedi-

ately payable. Clause 14 provides that the Agreement shall not be capable of being assigned by the Promoters and the Borrower but the Noticee shall have the right to assign the Agreement, the Loan and the rights therein. Clause 19 of the Loan Agreement provides that both the Borrower and the Lender will look for a 'stable' and 'reliable' buyer of RRPR, who will maintain the brand and the credibility of NDTV. Clause 20 reads as 'Further Assurances' ; "The promoters together with their Affiliates shall exercise their voting rights attached to the Equity Shares held by them in the Borrower and the Promoters together with its Affiliates and the borrower shall exercise the voting rights attached to the equity shares held by them in NDTV and NDTV Group to give full and complete effect to the provisions of the Transaction Documents including but not limited to give effect to the provisions contained in Schedule 3 read with Clause 12. The promoters together with their Affiliates shall amend the Charter Documents of the Borrower to give full effect to the provisions of the Transaction Documents." Transaction Documents of the loan Agreement means *"(i) the Loan Agreement (ii) the Call Option agreements and (iii) all other documents and agreements relating to the above and or designated as such by the lender in relation to the Loan, as such documents may be amended or supplemented from time to time."*

- 13.** It is observed that the loan agreement was entered into between VCPL, the Noticee on one side and RRPR, Prannoy Roy and Radhika Roy, on the other side in the capacity of promoters of NDTV Ltd. The loan amounted to 350 crore rupees with a repayment period of ten years from the loan amount being drawn down. According to the Noticee, the loan had the following collateral, as stated in para 32 of its reply dated 20th February, 2018: (i) Conversion Option i.e., the convertible warrants aggregating to 99.99% of RRPR's equity capital which when converted translated into the 26% equity of NDTV, since RRPR held the said quantum of NDTVs shares; (ii) Purchase Option-i.e. the option to purchase all equity shares of RRPR from Dr. Roy and Radhika Roy at par; (iii) Call Option – i.e. a call option in favour of the Noticee's associates to purchase upto 26% (14.99% and 11.01% respectively through two entities) at fixed price of Rs.214.65 per share and (iv) Need to obtain the Noticee's prior consent with respect to items enlisted in Schedule 3 of the loan agreement which deals with the equity securities of RRPR and NDTV separately.

14. The noticee has repeatedly described the impugned transaction as being in the nature of asset-recourse lending. However a closer look at the terms of the loan agreement reveals that this may not be the case for the following reasons:

- (i) The loan has an inbuilt agreement to purchase the company's stock (NDTV) at a fixed price much above the then prevailing current market price as also the average market price of the scrip (computed over the 6-month period prior to the agreement) through the call option agreements which are contemporaneous with the loan agreement;
- (ii) From a perusal of clause 6, it is observed that even without exercising the conversion option of Equity Share capital of RRPR, the Noticee had a right to purchase the shares of RRPR at par value (see Clause 6.2);
- (iii) The terms of Warrant in Schedule I(a) of the Loan Agreement reads as "At the sole option of the Lender, the Warrant may be converted into such number of Equity Shares at par aggregating to 99.99% of the fully diluted Equity Share Capital at the time of conversion of the Borrower **at any time during the tenure of the Loan or thereafter** without requiring any further act or deed on the part of the Lender." From this term, it can be seen that the exercise of the right to convert warrants into shares of RRPR thereby indirectly acquiring 26% of NDTV's equity is **not** dependant on the repayment of the loan. Whether or not the loan is repaid, the noticee i.e. VCPL could validly seek conversion of the warrants it held with RRPR thereby being indirect shareholders of 26% of NDTV's equity, this right explicitly extending beyond the tenure of the Loan Agreement by the words "*during the tenure of the Loan or thereafter*".
- (iv) To summarise, the lenders' rights under (i), (ii) and (iii) above are absolute without being in any way connected to repayment of loan. Consequently, this certainly does not appear to be a case of a simple secured loan or an instance of asset-recourse lending as put forth by the noticee.
- (v) Even assuming the noticee's description of the asset as being 'collateral' were to be accepted, the valuation of the collateral seems very peculiar. The per share value of NDTV's shares quantified based on the loan agreement and call option agreements was Rs 214.65 (the number having been arrived at by dividing the number of shares in

NDTV from the 'loan' amount advanced to RRPR). I note that at the time of the execution of the loan agreement, the market value of NDTV's shares was substantially lower than the value of the collateral of the loan agreement. On the 21st of July, 2009, market price touched a high of Rs 130 and closed at around Rs 127. Therefore the collateral was valued around Rs 84 more than its market value. Normally when loans are advanced on the back of security or collateral, the value of collateral undergoes a haircut to provide for exigencies. This unusual valuation reinforces the belief that the said convertible warrants could not be referred to as collateral.

- (vi) Clause 20 of the Loan Agreement dealing with the Promoters and Borrower's voting rights in NDTV unambiguously binds them to exercise the voting rights attached to the equity shares held by them in NDTV and NDTV Group to give full and complete effect to the provisions of the Transaction Documents **including but not limited to give effect to the provisions contained in Schedule 3 read with Clause 12.**
- (vii) The said clause 20 does not give any discretion to the Promoters and the Borrowers with respect to the exercise of their voting rights in NDTV, as they may have exercised prior to the Loan Agreement. The Borrowers and Promoters have in effect ceded their voting rights, if not entire, at least the 26 % covered in the Loan Agreement and another 26% covered in the Call Option Agreements, upon the execution of the Agreements. This, in other words, would mean that the exercise of Voting Rights in NDTV, pursuant to the execution of these documents will be controlled by the terms of the Transaction Documents. More specifically, this clause provides that such exercise of voting rights shall give full and complete effect to the provisions of the Transaction Documents *"including but not limited to the Veto rights"* as claimed by the Noticee in Schedule 3 to the Loan Agreement. An explicit power to vote in consonance with the Transaction Documents on issues outside Schedule 3 of the Loan Agreement has been certainly acquired by the Noticee, through Clause 20. In view of the above the contention that the noticee has no 'positive rights' to cause any decision whatsoever to be taken with respect to NDTV does not hold merit.

- (viii) Besides the above, Schedule 3 of the Loan Agreement titled "Prior Consents" cast obligations on the Promoters, to obtain the Lender's prior consent as far as the changes in capital structure or the constitution of the holding company and NDTV is concerned.

15. Therefore the clauses in the loan agreement and the contention of the noticee is that the transaction was in the nature of a secured loan advanced by VCPL to RRPR appear only to be a façade for a loan transaction. Moreover the loan agreement did not have a clause of termination upon repayment and this was raised to the Noticee during the hearing proceedings. The query and reply are extracted hereunder:

"Query : Which provision in the Loan Agreement confer RRPR or its promoters the right to terminate the Loan Agreement in the event of them having repaid the loan back to VCPL?"

The Loan Agreement clearly is a loan for the period between the execution date and the Maturity Date. If the loan is repaid in full, the Loan Agreement would cease to be in effect. Please see Clause 8 which points out that the agreement would be in force and effect until the date of the repayment of the loan. So also, if the Call Option were exercised in full it would follow under clause 7 that the proceeds would be utilized to repay the full loan which would in turn lead to the agreement ceasing to have force and effect."

Although the noticee has made the above assertion, a careful reading of the terms of the agreements reveals the contrary. Clause 8 of the loan agreement clearly alludes to the agreement being in full force till the repayment of the loan or exercise of call options in full, whichever is later, which means mere repayment of the loan is not a sufficient condition for termination of the agreements. The said Clause 8 reads as follows: *"The Agreement shall become binding on the Parties on and from the date first above written. Notwithstanding anything contained in this Agreement, this Agreement shall be in full force and effect till the later of: (1) all the monies due and payable by the Borrower under the Transaction Documents are fully paid off to the satisfaction of the Lender and (2) the exercise of the call options in full under the call option agreements."*

16. Added to the above, the noticee has submitted that in this particular case, its real interest in the transaction was the increase in value of the shares of NDTV, which is why the loan was offered at zero interest rate. According to the noticee, *"...in convertible loan transactions of this nature, lenders would look to and take a view that there will be an appreciation in the value of the underlying collateral securities over a period of time...."*. I find this contention to be in itself an admission by the Noticee that the principal purpose or the underlying motive behind executing the loan agreement was to acquire beneficial interest in the shares of NDTV rather than receive financial returns from the loan advanced to RRPR. The intent behind RRPR's raising of fund may have been to repay its debt obligation to ICICI but that in itself would not change the nature of the financial transaction VCPL entered into with RRPR. As often, the borrower's need cannot define the motive of the person who is ready to lend amounts, on the basis of a right of conversion which would ultimately result in acquisition of 26% NDTV shares. The noticee's contention for not charging interest on the loan is predicated upon the unlikely event of call option yielding a substantial return through the price of NDTV shares spurring beyond the strike price. The price history of NDTV shares or the matrix of performance by NDTV do not bear out this argument and hence to collateralize the loans keeping an abnormally high strike price of underlying NDTV shares looks like an exercise of self deprivation of a commercially reasonable return (in the absence of interest) from the call option structure. This naturally casts a doubt on the very requirement to have a call option in the context of an under-collateralised loan that was dependant on the valuation of shares of NDTV.

17. An examination of the covenants in the Call Option Agreement also becomes relevant to ascertain the true intention of the parties. The crux of the agreement is in clause 2 by which the Noticee purchased the Call option rights and it reads as follows - *"...the Purchaser shall have the right but not the obligation, to purchase **at any time all or part (at the sole discretion of the purchaser) of the Call shares from RRPR**"*. The detailed procedure of formalities to be followed for such exercise is elaborated thereafter. Clause 3 dealing with "Right Of First Refusal" provides that *"The Promoters and their Affiliates are **not permitted to sell or transfer** either directly or indirectly in any manner whatsoever their Equity Securities in NDTV to a third person prior to the expiry of five years from the date of this Agreement **without the prior written consent of the Purchaser**. The Purchaser and its Affiliates are not permitted to sell the Call shares prior to the expiry of five*

years from the date of this Agreement without the prior written consent of the Promoters.” The Non Compete Clause in Clause 4 states “*The Promoters together with their Affiliates **shall not** directly, indirectly or **beneficially invest in or participate in or be** financially engaged, concerned with or interested in any undertaking or in the management of any Person (including, but not limited to, any joint venture, partnership or other arrangement of whatsoever nature) **engaged in the business of the NDTV group or the business of undertaking broadcasting of news and current affairs channels without the prior written consent of the Lender.** Provided nothing herein shall apply to the holding of the Promoters in NDTV and NDTV Group. The Promoters shall exclusively devote substantial time to the business affairs of the NDTV Group”.* Thus, the Call Option Agreement reinforces a ROFR and Non Compete right against the Promoters/Borrower along with the basic call option right of the Purchaser.

18. I now come to the effect of the execution of the Call Option Agreements. The entities which entered into call option agreements i.e. STPL and SEPL were admittedly affiliates of VCPL. Both the agreements were executed on the same day i.e. July 21, 2009 and were in relation to the option of the Purchaser to purchase NDTV's shares (call shares) at a strike price of Rs 214.65. The clauses and terms of the said agreements are largely identical with the exception of the quantum of Call Shares. Clause 2 of the said Agreement permits the Purchaser (STPL/SEPL) or its nominated Affiliate/third person to purchase all or part of the Call Shares at any time, at the sole discretion of the Purchaser, in consideration of Two lakh rupees paid to RRPR. The Call Shares under both the agreements together amounted to 26% of NDTV's equity capital. Upon exercise of the option, the Agreement mandated that another agreement must be entered into declaring that the Option Holders (STPL/SEPL) would act along with the Promoters of NDTV as a single block for purposes of the Information and Broadcasting Ministry's Guidelines. The right to exercise the purchase option over the Call shares is not dependant on any contingency nor does it cease within a defined time and the Agreement records that the Option Holder (STPL/SEPL) will acquire a valid and marketable title to the Call Exercise Shares. From the submissions of the noticee, I note that STPL was struck off from the register of the Registrar of Companies and that SEPL had merged with Shinano Retail Pvt. Ltd. vide orders of the Hon'ble Bombay High Court dated September 28, 2012 and Hon'ble Karnataka High Court dated March 09, 2013. I also note that in terms of the Call Option Contracts (clause 2(a)) the

Purchaser may nominate an Affiliate or a third person for the purpose of exercise of the Call Option and in such case such third person would become the 'Option Holder'. Consequently the right to exercise options could get transferred to a third person as determined by the Purchaser, thereby effectively leaving the obligations in relation to the Call Option Contracts on RRPR and the Promoters of NDTV, unchanged.

- 19.** It is not clear why the lender (VCPL) had to resort to execution of Call Option agreements in addition to the Loan Agreement if it was an outright lending transaction. The explanation offered by the noticee is that the call option agreements protected the lenders interest in acquiring NDTV's shares in case the price of NDTV's shares increased beyond the strike price. This infact reinforces the opposite argument i.e. the primary purpose of the Loan Agreement and related agreements was towards acquiring a stake or control in NDTV. The specific submissions of the Noticee with respect to Call Option agreements is extracted below as the same is relevant to decide the intent of VCPL:

“Query: Is the call option over NDTV's shares in addition to the warrants issued through the loan agreement?”

Yes. The Call Option is an additional collateral- in addition to the Conversion Option and the Purchase Option. Of course, all these options complement each other such that the net result of all or any of them fully would lead to VCPL acquiring directly or indirectly 26% shares in NDTV.

Query : What is the tenure of the call option agreements? In other words, is the option exercisable by STPL and SEPL to purchase NDTV's shares , not limited to any specific period? Can it be exercised any time (American Option)?

The call option agreements do not refer to a specific outer limit. A call option may be exercised at any time and the proceeds thereof are to be used by RRPR to repay loan amount.

*However if, say the Conversion Option or Purchase Option were exercised in full, the Call Option would naturally lapse. This is because once the Conversion Option or Purchase Option is exercised, VCPL would indirectly hold 26% shares in NDTV, and it would be pointless then to exercise the Call Option. **Further, if the loan is repaid in full, the Call Option would lapse.**”*

(emphasis supplied)

The highlighted text above is contrary to the stated provisions of Clause 8 of the Loan Agreement among other provisions of the agreements. Infact the Loan Agreement would continue to be in force even after loan repayment till call options are exercised.

- 20.** From the replies, it is noted that (i) call option agreements do not have a specific outer time limit, within which it can be exercised and (ii) the option is not linked to any contingent event which will trigger its exercise. The exercise of the option is so open-ended and uncircumscribed by any pre-requisite that it is as good as having control over the shares in one's hands without any further act. In other words, at all times from the point of execution of the Call Option Agreement, the Promoters were supposed to earmark the said 26% of NDTV shares to meet the call option requirement as and when the lender exercises his option. This requirement along with the mandate of clause 20 of the Loan Agreement, as discussed in the foregoing paragraphs, would indicate that the 'control' over the 26% of NDTV shares has effectively passed on to the lender and that the borrowers are only acting to the dictates of the lender. Moreover, the agreements do not provide that upon repayment of the loan amount within 10 years, the Call option agreements would cease to exist or lapse. The explanation is now being furnished by the Noticee (i.e. at the stage of the present quasi-judicial proceedings) as an afterthought that "if the loan is repaid in full, the Call Option would lapse." This explanation is not acceptable as it amounts, infact to rewriting the original terms of the agreement. Clause 3(a) of the Call Option Agreement dealing with 'Right of First Refusal' binds both the borrower and the lender and restricts them from selling or transferring the equity securities in NDTV to a third person prior to the expiry of five years from the date of the Call Option Agreement. From the said clause 3(a) of the Agreement, it appears that VCPL through its affiliate has an ascertainable or enforceable right over the shares that prevents the borrower from selling the said 26% of NDTV shares without its permission. Such a non-disposal covenant or a ROFR contained in a Call Option Agreement to the extent of 26% of NDTV shares coupled with another 26% entitlement which is in lieu of repayment of loan, makes it evident that the loan agreement is to disguise the acquisition of control. The ROFR clause, in the first reading, appears to balance out the mutual interests of the parties. However the burden of ROFR on the Borrower or the Promoter is much more than on the No-

ticee as the Noticee did not have 26% of NDTV shares on the date of the agreement with it to be bound equally by the covenant. Thus, this strengthens the inference that the Lender was clamping its hold over the Borrower by not allowing the borrower to dispose of the 26% of shares without its permission, all the while when it was having the Conversion Option and Purchase Option concurrently extending upto another 26% of NDTV shares with itself. Moreover, the Non-compete clause in the Call Option Agreement which restricts the Promoters from engaging/investing/participating in other business undertaking or activities of broadcasting of news and current affairs without the written consent of the Lender shows the intention of the Noticee to control the Promoters of NDTV in toto. This fortifies the strategy adopted by the Noticee to spread its reach upto 52% of NDTV shares in two ways – one, by way of indirect acquisition of convertible warrants of the holding company through the loan agreement and two, by way of acquisition of a freely exercisable call option to buy 26% shares of NDTV and in both the limbs of the transaction ensuring that the takeover code does not appear to be triggered; either for want of conversion of warrants or for want of exercise of option. In effect, the promoters having agreed to the covenants of both the agreements, have to that extent ceded their rights of control over NDTV. The call option covenants are definitely independent of the Loan agreement and are freely and separately exercisable and the same seen in the context of the fact that there was no separate consideration for the same, besides a nominal sum of Rs. 4 lakhs, confirms the clear intent on the side of the Noticee to clandestinely exercise control over NDTV, without going for an open offer before such acquisition of “control”. The clauses such as ‘ROFR’ and ‘Non-Compete’ are akin to those normally seen in Share Purchase Agreements or Share Holders Agreements. These clauses are out of place in connection with a lending transaction, as sought to be portrayed by the Noticee.

- 21.** The Loan agreement also provides that in the event the call option was exercised by the associates of the lender, the money received by RRPR from the said purchase would be used to repay the loan to VCPL, thereby the money moving from one associate to another, all the while the shares of NDTV being acquired directly or indirectly by one of the said associates. Similar to the Loan Agreement, the call option agreements are open ended i.e. those neither envisage the contingency based on which the call option is exercised nor do the said agreements circumscribe the period within which call option may be exercised. When the loan

agreement itself binds the borrowing transaction thereunder along with the transactions under the call option agreements, it strengthens the assumption that this is not a simple case of lending. Though questions regarding the call option agreements were specifically put to them, the Noticee has not contested this aspect in detail except to submit that the net effect of the three agreements was the 'lenders' right to acquire 26% of NDTV's voting capital. This submission is not one that I am able to accept on a thorough and conjoint reading of the loan agreement and call option agreements. The right to purchase shares under the call option agreements seems to be independent of the conversion of warrants into shares in terms of the Loan Agreement. The only caveat under the Loan Agreement is that money paid towards purchase of shares under the call option agreement must be used by RRPR to repay the loan. It may also be noted that VCPL appears to be the end beneficiary of the call option agreements as can be seen from the clauses of the loan agreement.

- 22.** The nature and structure of the 'lending' entities is also an issue that evokes suspicion. The SCN at para 7(vii) thereof, records that the noticee had vide letter dated March 25, 2016 stated that the *"source for the loan was the borrowing from Reliance Strategic Investment Limited, a wholly owned subsidiary of Reliance Industries Limited."* On enquiry, the noticee also submitted memorandum of association, articles of association and annual reports of each of the three companies who had entered into agreements with RRPR. VCPL submitted that three companies were associated with each other. I have perused the documents submitted by the noticee and in particular the financial statements included in the annual reports of the said companies and do not find that they had any worthwhile history of such lending activity. As per the MoA of the noticee, VCPL's main objective was wholesale trading and related business activities. The financial statements in the annual reports paint a very odd picture of the noticee and the two associate companies who had entered into the impugned transaction with the promoters of NDTV Ltd. In the year ending March 2017, VCPL is shown to have a revenue of only Rs 60,000/- but on its asset side had more than 400 crore in long term loans and advances. These reports as provided by the noticee question the motive of the noticee in entering into the transaction with the promoters of NDTV Ltd. A company or financial institution in the general practice of lending may be expected to have such exceptional clauses in loan agreements. Instead, in the current set of facts and circumstances, it is clear that the noticee and its associate companies

had neither the history of advancing such loans nor do they appear to have had the financial wherewithal to advance loans on such liberal terms. Further, assuming the shares of NDTV did form the collateral for the loan, despite the loan being substantially under-collateralised, the lender/noticee has not sought any repayment despite market value having almost continuously eroded till date. A prudent person would not expect that a financial lender would be so unperturbed as to not seek repayment of its protected principal amount till date.

23. All the aforesaid concerns attached to the manner in which the loan agreements and call option agreements were entered into and the subsequent conduct of the noticee do not substantiate its argument that the transaction was only in the nature of a loan. Instead, it appears that the loan agreement and call option agreements were used to shroud the true nature of the transaction which was acquisition of beneficial interest in NDTV Ltd. The elaborate mechanism adopted by the noticee and its associates appear to be solely to deflect attention from this acquisition and thus covetously overcome the obligations imposed by the Takeover Regulations.

24. In effect, the transaction is not to secure the loan but to acquire control over all the affairs of the Target Company leaving only the right to control the “editorial policies of NDTV” to the Promoters and Borrowers, right from the day of execution of the loan agreement. Thus in my view, the takeover exercise has been conveniently couched as a loan agreement with the predominant intention of the Noticee being to acquire control over NDTV without contemplating any repayment of the loan, whatsoever, from the Promoters or Borrowers. The transaction documents admittedly confer Conversion Option, Purchase Option and the Call option, and if the voting rights is to give full effect to the Transaction Documents, it would straightaway mean that the 52% of the voting rights of NDTV have to be exercised by the Promoters as per the dictates of the Lender and the same may traverse the specified Veto rights under Schedule 3. What is certain is the idea of the Noticee to start exercising control through the Promoters by keeping a tight hold on 52% of the shares of NDTV, through the threefold 'Options' conveyed by the Promoters, by helping them to meet the loan repayment that was pending to ICICI Bank.

25. The related issue as to whether veto rights confer any rights of control in favour of the noticee is not relevant for consideration in the instant case, in view of Clause

20 of the Loan Agreement which specifically provides that the promoters/ borrowers shall exercise their voting rights attached to NDTV to give full and complete effect to the obligations under the Agreements executed and not limited to the veto rights specified in Schedule 3 of the Loan Agreement. In other words, the veto rights in Schedule 3 are eclipsed by the operative provision in Clause 20 of the Loan Agreement and are not significant enough for an independent consideration from the 'control' angle.

26. The noticee has strenuously contended that the Zero interest Loan provided in terms of the Loan Agreement is similar to the Zero Coupon Convertible Bonds which have been issued by several other companies and have not been subject to proven allegations of acquisition of control by the subscriber to such instruments. I do not find merit in noticee's attempt to rely on past precedents of financial instruments issued by other companies. The exact facts and circumstances surrounding such issuances are not before me for a detailed comparison. As such, any comparison with normal ZOCD kind of convertibles, can in this case be only applicable to the part of convertibles of RRPR held by the Noticee and not to the extent of 26% of NDTV shares covered under the call option agreement. It is clear that the Noticee's call option rights over 26% of the NDTV shares held by the Promoters, overshadowed the comparable points with ZOCDs narrated in para 8.1.13 of the Noticee's reply dated 21st May 2018 , viz., the aspect of interest free loan; ability to convert at pre-agreed rate and the right of repayment to the extent of the uncovered part. Thus the call option rights coupled with the voting rights in Clause 20 of the Loan Agreement in the instant case would bear no resemblance to any other case involving ZOCDs as convertibles in the course of transactions.

27. A close look at the structure of the transaction revolving around the conversion option and the purchase option (outlined in the loan agreement) on the one hand and a call option on the other clearly reveals that the transaction structure is unusual and peculiar to say the least. The conversion option which entitles the Noticee to 99.99% of RRPR shares has a perpetual existence not circumscribed by the tenure of the loan. The Noticee has a right to exercise his conversion option even after the loan is settled. In essence, it means that the entitlement of the notices to 99.99% of RRPR shares is absolute, and not contingent upon any event or bounded by limitations of time. The absence of an explicit clause in the Loan Agreement rendering the conversion option void on repayment of loan is strikingly abnormal

and it clearly lays out an unfettered path for the noticee to stake its access to NDTV, albeit through the medium of RRPR. The call option construct is also strangely devoid of any time limitations and it endows the noticee (and its affiliates) the right to acquire 26% of NDTV shares from RRPR, at any time with no linkage to the loan. The strike price of the call option has been set so high (at a premium of 51% to the then average market price by noticee's own admission in its reply dated May 21, 2018) that it renders the whole exercise of collateralization of the loan a non-starter. Given the price history of NDTV shares, the argument of the noticee about the call option serving as a collateral seems very hollow.

28. Other Miscellaneous Issues

The Noticee has made three preliminary contentions with respect to the SCN issued against it-

- i. that that no investigation was conducted into the matter before the SCN was issued thereby prejudicing any finding on the aspect of 'control';
- ii. that specific action proposed has not been disclosed in the SCN; and
- iii. that by efflux of time the proceedings would cause unfair and irreparable prejudice.

I do not find merit in these preliminary objections. Firstly, it is not a matter of necessity that every enforcement action initiated must necessarily be preceded by a formal investigation particularly when examination of the agreements in question and the submissions made by the parties concerned are sufficient to draw conclusions. Investigation is resorted to only when complex questions of fact and/or detailed evaluation of facts and circumstances are required to come to a decision regarding enforcement action. When apparent violations are noted, it is not necessary for it to be followed up with detailed investigation. Secondly, in cases of acquisition of shares beyond defined thresholds or acquisition of control in a listed company, it is a settled position of law that the first and foremost responsibility of the regulator is to ensure that shareholders get an exit opportunity in accordance with the provisions of the Takeover Regulations. However this does not preclude SEBI from passing additional or alternative directions in the interest of investors and the securities market. The ambit of directions that can be passed in such cases is already well settled and therefore specifics of directions which are appropriate in a given case do not require mention in the show cause notice. Thirdly, there being no statutory limitation period on initiation of enforcement action, the

claim that the proceedings must be dropped due to efflux of time runs contrary to the objective of ensuring justice; particularly so when the alleged violation contravenes the rights of the investors in a listed company. In the instant case, if the Noticee is held to have had acquired control, statutorily it was required to provide an exit opportunity. Not providing that opportunity would be a serious violation of the statutory rights of shareholders. The Noticee has addressed several other related issues individually and extensively by relying on various case law. However, I find those issues do not warrant any detailed consideration as most have become irrelevant in the light of the above examination and analysis. The instances of SAT and SEBI orders as well as SEBI's Informal Guidances quoted by the noticee in its submissions are all in relation to acquisition of shares and not in relation to acquisition of control. To conclude, I am of the view that a conjoint reading of the facts and circumstances involved in this case brings out its uniqueness and leads me to conclude that the noticee i.e. VCPL did indirectly acquire control in NDTV Ltd., by entering into the Loan agreement and the Call Option agreements on 21st July, 2009, thereby obligating it to make a public announcement of an open offer under Regulation 12 read with regulation 14(3) of SEBI (SAST) Regulations, 1997, as alleged in the SCN.

29. I, therefore, in exercise of powers conferred upon me under sections 11, 11B read with section 19 of the SEBI Act, 1992, regulation 44 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 and regulation 32 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, hereby issue the following directions to the noticee acquirers :

- a) The noticee shall make a public announcement to acquire shares of the target company in accordance with the provisions of the SAST Regulations, 1997, within a period of 45 days from the date of this order;
- b) The noticee shall along with the offer price, pay interest at the rate of 10% per annum from the date when they incurred the liability to make the public announcement till the date of payment of consideration, to the shareholders who were holding shares in the target company on the date of violation and whose shares are accepted in the open offer, after adjustment of dividend paid, if any.

30. This Order is without prejudice to any other enforcement action that SEBI may initiate as it deems fit in accordance with the provisions of the SEBI Act, 1992 and

SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 read with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

- 31.** This order shall come into force with immediate effect. A copy of this order shall be served upon the noticee, stock exchanges and depositories for ensuring compliance with the above directions.

DATE: June 26 2018

G. MAHALINGAM

PLACE: Mumbai

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA