BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

[ADJUDICATION ORDER NO. Order/SM/SM/2022-23/16241-16243]

UNDER SECTION 15-I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992, READ WITH RULE 5 OF SEBI (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES BY ADJUDICATING OFFICER) RULES, 1995

In respect of

The BOC Group Limited	**Praxair, Inc**	**Linde Holdings Netherlands B.V.**
LEI: 5299002CYZP8TP8ZK455	**LEI:ZU69GUVQGZ6Z1UOOO79**	**LEI:529900H7YXNVPQNVI034**

In the matter of Linde India Ltd.

FACTS OF THE CASE IN BRIEF

1. Securities and Exchange Board of India (hereinafter referred to as '**SEBI**'), was in receipt of Draft of Letter of Offer (hereinafter referred to as '**DLOO**') vide letter dated August 26,2019 for an open offer for acquisition of upto 2,13,21,056 equity shares of Rs.10/- each representing 25% of the voting share capital of Linde India Limited (hereinafter referred to as '**Linde/Target Company**') was made by The BOC Group Limited (hereinafter referred to as '**BOC/Acquirer/Noticee 1**') along with Praxair, Inc. (hereinafter referred to as '**Praxair/PAC 1/Noticee 2**') and Linde Holdings Netherlands B.V.(hereinafter referred to as '**Linde Holdings/ PAC 2/Noticee 3**'). (Noticee 1 to 3 are collectively referred to as '**Noticees')**. The shares of the Target Company are listed at BSE Ltd (hereinafter referred to as "**BSE**").

APPOINTMENT OF ADJUDICATING OFFICER

2. Vide order dated February 26, 2021,(copy of communiqué dated April 12, 2021 is placed as **Annexure- 3**), SEBI appointed the undersigned as the Adjudicating Officer under

Section 15-I of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as '**SEBI Act**') and Rule 3 of SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995 (hereinafter referred to as '**Adjudication Rules**') to inquire into and adjudge under:

a. Section 15H(ii) of SEBI Act for the alleged violations of Regulation 13(2)(e) read with Regulation 13(1) of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (SAST Regulations) by Noticees 1 to 3.

b. Section 15A(b) of SEBI Act for the alleged violations of Regulation 29(2) read with Regulation 29(3) and Regulation 30(2) read with Regulation 30(3) of SAST Regulations by Noticee 1.

<u>SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING</u>

3. A show-cause notice dated July 29, 2021 (hereinafter referred to as '**SCN**') was issued to Noticee under Rule 4 of the Adjudication Rules to show-cause as to why an inquiry should not be initiated against Noticee and penalty, if any, not be imposed upon them under the provisions of Sections 15H(ii) and 15A(b) of SEBI Act, for the aforesaid violation alleged to have been committed by them.

4. The allegations levelled against Noticee in the SCN are as under:

A. <u>VIOLATION OF REGULATION 13(2)(e) READ WITH REGULATION 13(1) OF SAST REGULATIONS BY NOTICEES 1 TO 3</u>

a) "While examining the letter of offer filed in the matter, SEBI found that the public announcement for the aforesaid open offer was made after the stipulated time period. There were certain other delays in filing disclosures under the SAST Regulations."

*b) "During examination, it was observed that on December 20, 2016, Linde AG and Praxair, Inc issued a press release wherein the aforesaid two companies announced their intention to merge by way of merger of equals under a holding company, Linde plc. Consequent to this and certain other transactions, Noticees acquired indirect control of the target company and thereafter made the Public Announcement (hereinafter referred to as '**PA**') for open offer".*

c) *"Regulation 13(2)(e) of SAST Regulations requires that in the case of indirect acquisition of shares or voting rights in, or control over the target company where none of the parameters referred to in sub-regulation (2) of regulation 5 are met, the public announcement may be made at any time within four working days from the earlier of either the date on which the primary acquisition is contracted, or the date on which the intention or the decision to make the primary acquisition is announced in the public domain."*

d) *"It was observed that the PA was made on October 24, 2018 (Copy of PA dated October 24, 2018 submitted by MB vide its letter dated October 25, 2018 is placed as* ***Annexure-4****). It was observed that the open offer was triggered on December 2016 and so, in terms of Regulation 13(2)(e) of SAST Regulations, the PA for open offer was required to be made within four working days, i.e., by December 27, 2016. However, the same had been made by Acquirer along with PAC 1 and PAC 2 on October 24, 2018, i.e. with a delay of 666 days from the stipulated time period. Therefore, it is alleged that that by delaying the PA beyond the stipulated time period, Noticees have violated Regulation 13(2) (e) read with Regulation 13(1) of the SAST Regulations."*

B. VIOLATION OF 15A(B) OF SEBI ACT FOR THE ALLEGED VIOLATIONS OF REGULATION 29(2) READ WITH REGULATION 29(3) AND REGULATION 30(2) READ WITH REGULATION 30(3) OF SAST REGULATIONS BY NOTICEE 1

a) "*It was also observed during the examination of the letter of offer that the Noticee 1 had sold shares by way of Offer for sales through Exchange mechanism on May 20, 2013 and as a result the shareholding of Noticee 1 decreased from 89.48% to 75% i.e. more than 2% shareholding in the Target Company. In this regard, it was observed that the disclosure to be filed under Regulation 29(2) SAST Regulations was made on May 23, 2013 i.e. with a delay of 1 day (copy of disclosures made with stock exchange is enclosed as Annexure- 5). It is therefore alleged that Noticee 1 had violated the provisions of Regulation 29(2) read with Regulation 29(3) of the SAST Regulations.*"

b) *"In terms of Regulation 30(2) read with regulation 30(3), the promoters are required to disclose their shareholding to the company and to stock exchanges within 7 workings days from the end of each financial year. However, it was* *observed that Noticee 1, being the promoter of the Target Company, had delayed the filing of such disclosures, the details of which are as under:*

a. For Financial Year ending March 2012, disclosures were made by Noticee 1 on April 13, 2012 i.e. with a delay of 1 day.

b. For Financial Year ending March 2017, disclosures were made by Noticee 1 was made on April 21, 2017 i.e. with a delay of 9 days."

c) *"It is therefore alleged that Noticee 1 had violated the provisions of Regulation 30(2) read with 30(3) of the SAST Regulations. The letter dated February 01, 2019 received from MB in this regard is placed as* ***Annexure 6****".*

d) *"The aforesaid alleged violations by Noticees, if established, makes Noticees 1 to 3 liable for monetary penalty under the provisions of Section 15(H)(ii) & Noticee 1 liable for monetary penalty under 15A(b) of SEBI Act."*

5. The SCN was sent to the Noticees through digitally signed email and the same digitally signed email dated July 29, 2021 was duly served on Noticee. In this regard, it is stated that the SCN could not be served by way of Speed Post Acknowledgement due (herein after referred to as '**SPAD**') because of the disruption of international postal/courier services at the time of issuance of SCN owing to the situation arising out of COVID-19 pandemic. Noticees were given fifteen (15) days' time to make submissions in respect of the allegations made in the SCN. Subsequently, the Noticees, vide letter dated August 13, 2021, sought extension of time to reply to the SCN and submitted a request for inspection of the documents relied upon by SEBI. Accordingly the Ms. Sudarshana Basu of M/s. Finsec Law Advisors, Authorised Representative of the Noticees, were granted an opportunity for online inspection of documents on October 14, 2021. The Noticees sought further time to file a reply to the SCN vide letter dated November 05, 2021. Thus, the Noticees were granted time till December 01, 2021 to file reply to the SCN. Thereafter the Noticees submitted their reply vide letter dated December 01, 2021 to the allegations levelled in the SCN.

6. In the interest of natural justice, vide hearing notice dated December 09, 2021, Noticee was granted an opportunity of personal hearing before the undersigned on January 04, 2022. The aforesaid hearing notice was sent to Noticee through digitally signed email on December 09, 2021 and was duly served upon it. Noticee availed the opportunity of hearing granted to it on January 04, 2022. During the hearing, Noticees made their

submissions, reiterating the earlier reply filed in the matter on December 01, 2021. In view of the difficulties posed due to Covid-19 pandemic, hearing proceedings were conducted online through videoconferencing on the Webex platform.

7. The relevant extracts of the reply submitted by Noticee vide letter dated December 06, 2021 are given hereunder:-

1. **<u>Submission regarding the violation of Regulation 13(2)(e) read with Regulation 13(1) of SAST Regulations</u>**

A. "The SCN ought to be quashed and set aside and the present proceedings ought to be dismissed on account of the gross and inordinate delay in the issuance of the SCN:-

i *It is a matter of record that the events to which the SCN pertains, particularly the alleged delay in filing of disclosures on part of Noticee No.1, transpired during the period between FYs 2012-2017, while the SCN was issued to the Noticees only on July 29, 2021. With respect to the alleged delay in making disclosure regarding the disposal of shares by Noticee No.1 of Linde India by way of an offer for sale through exchange mechanism on May 20, 2013, it is pertinent to note that the alleged violation took place more than eight years prior to the issuance of the SCN. Similarly, the alleged delay in filing disclosures of Noticee No.1's shareholding in Linde India, in its capacity as the promoter of Linde India, pertains to the FYs 2012 and 2017, respectively. It is therefore submitted that the present proceedings ought to be dismissed at the threshold on account of the gross and inexplicable delay on part of SEBI in issuing the present SCN.*

ii *It is submitted that although there is no period of limitation prescribed in the SEBI Act or the rules or regulations made thereunder, the power of SEBI to initiate action against the Noticees must be exercised within a reasonable period. In the context of a demand notice issued for recovery of excise duty, the Hon'ble Supreme Court of India, in Government of India v. Citadel Fine Pharmaceuticals Madras,[1] had held as under:*

"6. ... In the absence of any period of limitation it is settled that every authority is to exercise the power within a reasonable period. What would be a reasonable period, would depend upon the facts of each case. Whenever a question regarding

[1] AIR 1989 SC 1771.

inordinate delay in issuance of notice of demand is raised, it would be open to the assessee to contend that it is bad on the ground of delay and it will be for the relevant officer to consider the question whether in the facts and circumstances of the case notice or demand for recovery was made within reasonable period. …"

iii *The above position has been reiterated by the Hon'ble Supreme Court in several judgments, including: Bhavnagar University v. Palitana Sugar Mill,[2] State of Punjab v. Bhatinda District Coop. Milk P. Union Ltd.,[3] Joint Collector Ranga Reddy Dist. & Anr. v. D. Narsing Rao & Ors.,[4] and Adjudicating Officer, SEBI v. Bhavesh Pabari.[5]*

iv *In Ashok Shivlal Rupani v. SEBI, the SAT held that the order for imposition of penalty under the SEBI Act could not be sustained due to an inordinate delay of eight years in the issuance of the show cause notice:*

> *"6. Having considering the matter, we are of the view that there has been an inordinate delay on the part of the respondent in initiating proceedings against the appellants for alleged violations. Much water has flown since the alleged violations and at this belated stage the appellants cannot be penalized. …*
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> *…*
>
> *8. In the light of the aforesaid, we are of the opinion that there has been an inordinate delay in the issuance of the show cause notice and for completion of the adjudication proceedings. Since the power to adjudicate has not been exercised within a reasonable period no penalty could have been imposed for the alleged violations.*
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> *9. As a result, without going into the merits of the case, we are of the opinion that on account of inordinate delay in initiation of proceedings by issuance of the show cause notice which culminated into a penalty order cannot be sustained. The show cause notice and the impugned orders passed by the AO are quashed. Both the appeals are allowed."*

v *In Bharat J. Patel v. SEBI,[6] there was a delay of seven years on SEBI's part to issue the show cause notice and the appellant had pleaded inability to defend himself for want of records. The SAT held that "There is no dispute on the principle that if the delay has caused prejudice to the parties then the proceedings are required to be quashed."[7] Accordingly, in the said matter, SAT set aside the order passed by SEBI against the appellant therein. It is submitted that SEBI ought to follow the binding judgments of SAT in Bharat J. Patel v. SEBI, Ashok Shivlal Rupani v. SEBI, and Rajeev Bhanot & Ors. v. SEBI, among others, and withdraw*

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[2] (2002) SS OnLine SC 1169.
[3] (2007) 11 SCC 363.
[4] (2015) 3 SCC 695.
[5] (2019) SCC Online SC 294.
[6] *Bharat J. Patel* v. *SEBI*, SAT Appeal No. 154 of 2020, decided on September 08, 2020.
[7] Paragraph 10.b. of the said judgment.

and/or dismiss the charges levied under the present SCN, in so far as the allegations regarding delay in disclosures against Noticee No.1 are concerned.

vi *In view of what is stated above, it is submitted that on the ground of delay alone, it is just and equitable that the SCN be quashed and set aside and the present proceedings be dismissed. It is submitted that continuance of these proceedings after a delay of several years would be extremely prejudicial to the Noticees, and would also be in gross violation of the principles of natural justice."*

B. "Positive Remedial Measures have been taken by the Noticees in relation to the Open Offer:-

i *It is submitted that though the Open Offer was made by the Noticees on October 24, 2018, an additional interest of INR 101.77 per equity share was paid by the Noticees over and above the New Base Price of INR 376.33 per equity share. The said interest amount not only included an interest of INR 71.10 per equity share at the rate of 10% per annum for the period between December 20, 2016 and the date of publication of the DPS, but also included an additional interest of INR 30.67/- per equity share at the rate of 10% per annum for the period between January 24, 2019 and the revised date of payment of consideration to the public shareholders, i.e., October 01, 2019, in view of the failure of the delisting offer. It is submitted that the above interest amount was not only calculated in accordance with the provisions of the Takeover Regulations, 2011, but the same was also brought to the notice of SEBI at the time of filing of the letter of offer on February 01, 2019.*

ii *It is submitted that the revised Offer Price took into account the price of the shares of the Company as on the date of issuance of the Press Release, i.e., December 20, 2016, along with an additional interest of INR 71.10/- per equity share at the rate of 10% per annum for the period between December 20, 2016 and the date of publication of the DPS. Therefore, it is submitted that the Open Offer has been made to the shareholders of the Company on the basis of December 20, 2016 as the deemed date of public announcement. Further, in view of the fact that the shareholders were also informed by way of appropriate disclosures regarding the Press Release, there is no cause of action for SEBI to penalise the Noticees for the same.*

iii *Similarly, in the matter of Karvy Financial Services Ltd., the fact that the Noticee had compensated the investors by paying interest for the delayed public* *announcement of open offer was considered as a mitigating factor by the AO while deciding the quantum of penalty.*

iv *In this regard, further reliance is placed on the observation of the SAT in Sterling Investment Corporation Ltd. & Ors. v. SEBI,*

"23. Therefore, we hold that it would be a sheer wasteful expenditure on the part of the respondent to start adjudication proceedings at the drop of a hat in spite of the fact that the appellant complied with the show cause notice and paid interest for the delayed payment.

[..]

29. Taking these two precedents into account, we feel that there is no need to proceed against the appellant by way of adjudication proceedings since the appellants have complied with the requirement in the show cause notice and have paid 15% interest to all the shareholders with effect from 15.10.2001."

v *In the present matter, it is submitted that the Noticees have taken significant positive remedial measures to protect the interests of investors and shareholders of Linde India by way of payment of not only 10% interest from the date of the issuance of the Press Release but also an additional 10% interest on the New Base Price in view of the failure of the delisting offer. Therefore, in light of the payment of such interest to the shareholders by the Noticees, any further penalty would amount to double jeopardy and be inconsistent with above-mentioned judgments and rulings."*

C. "There was no adverse effect on any public shareholders of the Company:-

i *It is submitted that the stated objectives of the Takeover Regulations, 2011 are to protect the interests of investors in securities and the securities market, and to balance the various, and at times, conflicting objectives and interests of various stakeholders involved in the context of substantial acquisition of shares in, and takeovers of, listed companies.*

ii *As per the report of the Takeover Regulations Advisory Committee dated July 19, 2010 ("TRAC Report"), the objective of the Takeover Regulations, 2011 is to provide each shareholder an opportunity to exit his investment in the target company when a substantial acquisition of shares in, or takeover of a target company takes place, on terms that are not inferior to the terms on which substantial shareholders exit their investments. In this regard, it is to be noted that the minimum price offered to the shareholders, in case of an open offer, was* *proposed to be one that is 'not inferior' to that received by substantial shareholders / paid by the acquirer.*

iii *In the present case, initially in the DPS, an offer price of INR 328.21/- per equity share was offered, consisting of a base price of INR 276.09 per equity share plus interest of INR 52.12/- in terms of Regulation 8 of the Takeover Regulations, 2011. However, pursuant to the SEBI letter dated August 14, 2019, the base price was revised to INR 376.63/- per equity share, as per the fair value determined by CNK Associates LLP, Chartered Accountants appointed by SEBI for computation of fair price of the equity shares of the Company. Accordingly, the Offer Price was enhanced to INR 478.40/- taking into account the parameters provided under Regulation 8 of the Takeover Regulations, 2011 read with Regulation 5A(3) of the Takeover Regulations, 2011. Therefore, the Offer Price was not only duly computed in accordance with the provisions of the Takeover Regulations, 2011 but in fact, also approved by SEBI before filing of the letter of offer.*

iv *Accordingly, it is submitted that no penalty should be imposed on the Noticees for the alleged delay in making of the PA for the Open Offer and Noticee No.1 for the alleged delay in filing of disclosures, as stated in the SCN, in view of the mitigating factors elaborated above."*

D. *"The Open Offer was made by the Noticees in good faith, after the regulatory approvals were received:-*

i *It is submitted that the allegations in the SCN with respect to the alleged delay in making PA revolve around a merger involving global transactions which were executed between multiple companies, and which required a number of regulatory approvals for the merger to be consummated. In such a scenario, it would be unreasonable for acquirers to make a public announcement for acquisition of shares of the target listed company for a proposed merger when there did not exist even a formal agreement between the transacting parties to effect such merger. Further, such hasty public announcement in the absence of any definitive arrangements would have been detrimental to the interests of the investors as there was no certainty to the Merger as on the date of the Press Release.*

ii *As stated above, in connection with the Merger, Linde AG and Praxair had also jointly made an application to the CCI on January 11, 2018 in terms of Section 6(2) of the Competition Act, 2002. The clearance letter from CCI in regard to such application was received on September 07, 2018 and an order dated September 06, 2018, which was issued to Linde AG and Praxair on September 17, 2018, was* *passed by the CCI approving the Merger, subject to divestiture of certain businesses of Linde AG in India.*

iii *It is further submitted that while the Merger was finally consummated on October 31, 2018, the PA was made prior to the consummation of the Merger and even prior to the ceasing of trading of shares of Linde AG and Praxair at Frankfurt Stock Exchange on October 26, 2018 and at New York Stock Exchange on October 30, 2018, respectively. Thus, the Noticees, in good faith, had made the PA for the Open Offer post crystallisation of the regulatory approvals to the Merger. On the other hand, should the Noticees have issued the PA immediately after issuance of the Press Release, and the Merger would not have fructified due to regulatory impediments, the same would have been detrimental to the interests of the investors.*

iv *Therefore, it is evident that the fact that there could be a delay in payment to the shareholder due to a time lag in completion of the primary acquisition, especially in cases where the target company is not a significant part of the primary acquisition, was taken into consideration and hence, payment of interest at the rate of 10% per annum was proposed in such cases for the period between announcement of the primary acquisition and the date on which the DPS is actually made, as a means of compensation to the investors for such delay."*

2. Submission regarding the violation of 29(2) read with Regulation 29(3) and Regulation 30(2) read with regulation 30(3) of SAST Regulations

A. "Delay in disclosure of shareholding or change in shareholding was purely unintentional and a technical lapse:-

i *It is further submitted that the alleged delay in filing of disclosures by Noticees No.1 was merely unintentional and technical in nature, with some of them being filed with an alleged delay of only one working day.*

ii *For instance, with respect to the disclosure pertaining to change in shareholding of Noticee No.1 in Linde India pursuant to offer for sale, it is submitted that Regulation 29(2) of the Takeover Regulations, 2011 requires that any person, who together with persons acting in concert, holds shares or voting rights equivalent to five percent or more in a target company, shall disclose the change in shareholding or voting rights, if such change exceeds two per cent of total shareholding or voting rights in the target company, and such disclosure is to be made within* two working days *of the receipt of intimation of allotment of shares, or acquisition of shares or voting rights in the target company.*

iii *In the instant matter, Noticee No.1 sold its shares pursuant to the offer for sale through exchange mechanism on May 20, 2013 and the disclosure was filed by Noticee No.1 on May 23, 2013, i.e., with an alleged delay of merely one day.*

iv *Similarly, with respect to other alleged disclosure violations stated in the SCN, in terms of Regulation 30(2) read with Regulation 30(3) of the Takeover Regulations, 2011, it is submitted that as per the above provisions, the promoters are required to disclose their shareholding to the company and to stock exchanges within seven working days from the end of each financial year.*

v *In the present matter, the said disclosures by Noticee No.1, being the promoter of Linde India, for the Financial Year ending March 31, 2012 was made on April 13, 2012, i.e. with a delay of merely one day, and for Financial Year ending March 31, 2017, the same was made on April 21, 2017, i.e. with a delay of nine days. Thus, it is submitted that the alleged delay on part of Noticee No.1 was unintentional and merely technical in nature.*

vi *In view of the above observations, it is submitted that no penalty should be imposed on Noticee No.1 in relation to the alleged delay in filing of disclosures, as elaborated above, and the present proceedings ought to be dismissed."*

B. "No penalty should be imposed on the Noticees for the alleged violations in view of the mitigating factors present in the instant matter

i *Without prejudice to what is submitted hereinabove and without conceding but assuming for the sake of argument that the Noticees are held liable for imposition of penalty under Section 15H(ii) or Noticee No.1 is held liable for imposition of penalty under Section 15A(b) of the SEBI Act, the SEBI Act prescribes mitigating factors that an adjudicating officer is mandated to take into account at the time of determining the quantum of penalty to be imposed.*

ii *It is further submitted that with respect to the facts shared in the paragraph above, non-issuance of the PA immediately after the issuance of the Press Release did not result in any adverse effect on the interests of the shareholders of the Company. Further, the alleged delay in making of the PA on part of the Noticees and the alleged delay in filing of disclosures by Noticee No.1 did not result in any disproportionate gain or unfair advantage whatsoever to the Noticees. It is submitted that timely disclosures under the provisions of the Takeover Regulations, 2011 are important for transparency in transactions involving* *directors/promoters and it also allows investors to take informed decisions with respect to the concerned shares of a company. However, the alleged violations stated in the SCN did not in any manner impair the ability of the investors to deal in the securities of the Company and no loss was caused to the investors.*

iii *In light of the factual and legal submissions made above, it is submitted that the present SCN is liable to be dismissed and furthermore, it is submitted that no case has been made out against the Noticees with respect to violation of the provisions of the Takeover Regulations, 2011. The Noticees submit that they have shown sufficient cause for SEBI to not hold any proceeding in terms of the present SCN.*

iv *Accordingly, we request you to dismiss the charges against all the Noticees and pass a reasoned order to that effect."*

CONSIDERATION OF ISSUES, EVIDENCE AND FINDINGS

8. I have carefully perused the charges levelled against Noticees, replies/submissions filed by Noticees and other documents/ evidence available on record. The issues that arise for consideration in the present case are:

   1) a) Whether Noticees have violated Regulation 13(2)(e) read with Regulation 13(1) of SAST Regulations?
      b) Whether Noticees have violated Regulation 29(2) read with Regulation 29(3), and Regulation 30(2) read with Regulation 30(3) of SAST Regulations?

   2) Does the violation, if any, attract monetary penalty under Section 15H(ii) and Section 15A(b) of SEBI Act?

   3) If the answer to the aforesaid issues is in affirmative, then what should be the quantum of monetary penalty?

9. The relevant provisions of the SAST Regulations, which were in force at the time of the merger, are reproduced as under:

   "Regulation 13(1)

   The public announcement referred to in regulation 3 and regulation 4 shall be made in accordance with regulation 14 and regulation 15, on the date of agreeing to acquire shares or voting rights in, or control over the target company."

*“**Regulation 13(2)(e)**:*

Such public announcement -

(e) in the case of indirect acquisition of shares or voting rights in, or control over the target company where none of the parameters referred to in sub-regulation (2) of regulation 5 are met, may be made at any time within four working days from the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain.”

“Regulation 29:

(2) Any person, who together with persons acting in concert with him, holds shares or voting rights entitling them to five per cent or more of the shares or voting rights in a target company, shall disclose the number of shares or voting rights held and change in shareholding or voting rights, even if such change results in shareholding falling below five per cent, if there has been change in such holdings from the last disclosure made under sub-regulation (1) or under this sub-regulation; and such change exceeds two per cent of total shareholding or voting rights in the target company, in such form as may be specified.

(3) The disclosures required under sub-regulation (1) and sub-regulation (2) shall be made within two working days of the receipt of intimation of allotment of shares, or the acquisition of shares or voting rights in the target company to:

(a) every stock exchange where the shares of the target company are listed; and
(b) the target company at its registered office.”

“Regulation 30:

(2) The promoter of every target company shall together with persons acting in concert with him, disclose their aggregate shareholding and voting rights as of the thirty-first day of March, in such target company in such form as may be specified.”

(3) The disclosures required under sub-regulation (1) and sub-regulation (2) shall be made within seven working days from the end of each financial year to,

(a) every stock exchange where the shares of the target company are listed; and

(b) the target company at its registered office."

Issue No. 1 (a)- Whether Noticees have violated Regulation 13(2)(e) read with Regulation 13(1) of SAST Regulations?

10. Before going into the merits, I note that the Noticees have made a preliminary objection that there has been an inordinate delay in the issuance of SCN, which has prejudiced them and, on this ground, the SCN ought to be dropped. It has been contended by the Noticees that the events to which the SCN pertains, particularly the alleged delay in filing of disclosures on part of Noticee No.1, transpired during the period between FYs 2012 and 2017, while the SCN was issued to the Noticees only on July 29, 2021. It has also been contended that the alleged violation in respect of alleged delay in making disclosure regarding the disposal of shares of Linde India by Noticee 1 by way of an offer for sale through exchange mechanism on May 20, 2013, took place more than eight years prior to the issuance of the SCN. Noticee 1 has further contended that the alleged delay in filing disclosures of shareholding of Noticee 1 in Linde India, in its capacity as the promoter of Linde India, which pertains to the FYs 2012 and 2017, also took place more than 8 years prior to the issuance of SCN and have submitted that the present proceedings ought to be dismissed at the threshold on account of the gross and inexplicable delay on part of SEBI in issuing the present SCN. The Noticees, in their replies, have relied on the various judgments including those by Hon'ble Securities Appellate Tribunal in the matter of Ashok Shivlal Rupani vs. SEBI and Rajeev Bhanot & Ors. vs. SEBI. In this regard, I note that during the examination of the DLOO submitted on February 01, 2019, SEBI scrutinized the complaints received relating to offer price and also appointed an independent chartered accountant for computation of fair price of the shares of the target company in terms of Regulation 8(16) of SAST Regulations. After completion of scrutiny of DLOO, an observation letter containing comments on the DLOO was issued by SEBI on August 14, 2019. Simultaneously, since it was found that there were violations of SAST Regulations by Noticee 1, the matter was subjected to further examination. Pursuant to the examination, recommended actions were approved on February 12, 2020. Thereafter, Ms. Sangeeta Rathod was appointed vide order dated March 13, 2020 for commencing adjudication proceeding against Noticee 1. Consequent upon the transfer of Ms. Sangeeta Rathod, the undersigned was appointed as Adjudicating Officer in the matter vide order dated December 04, 2020. During the adjudication proceeding, certain necessary clarification was sought in relation to the examination report and for inclusion of PAC 1 and PAC 2 within the ambit of the adjudication proceeding, and necessary clarification was provided on February 15, 2021, and adjudication proceeding was approved against

Noticee 1 along with PAC 1 and PAC 2 vide fresh order dated February 26, 2021 which was forwarded to the undersigned vide communiqué dated April 12, 2021. Subsequently, the SCN was issued to the Noticees on July 29, 2021.

11. In view of the aforesaid chronology of events, I find that SCN in the present proceeding has been issued within a reasonable period of time and there has been no delay in issuance of SCN. After issuance of SCN, adequate opportunities were granted to Noticees to represent their cases and reply was also received from Noticees with regard to the allegations against them in the SCN. Further, I note that Noticees were provided with all the relevant material with respect to the charges levelled in the SCN, to form a definite defense to the charges in the SCN, which the Noticees have provided through their reply dated December 01, 2021. Thus, looking at the material available at the disposal of the Noticees, I find that Noticees have been provided with all the material that would have been abundantly adequate to facilitate recollection of events or collection of relevant data and thereby enabling them to form a definite defense to the charges in the SCN, which Noticees have provided through their common reply/submissions. Hence, I note that Noticees have failed to show that, how delay, if any, in the instant matter has prejudiced their interest. Therefore, I do not find any merit in the contention raised by Noticees that there has been inordinate delay in issuance of SCN due to which prejudice has been caused to them.

12. I also note the observations of the Hon'ble Supreme Court in the case of Adjudicating Officer, SEBI vs. Bhavesh Pabari (decided on February 28, 2019) in which it was held that: "*There are judgments which hold that when the period of limitation is not prescribed, such power must be exercised within a reasonable time. What would be reasonable time would depend upon the facts and circumstances of the case, nature of the default/statute, prejudice caused, whether the third party rights had been created etc*."

13. In this regard, I also place reliance on the judgement of Hon'ble Securities Appellate Tribunal (SAT) in the matter of Girrajkumar Gupta HUF (Appeal No. 424/ 2019) dated August 11, 2021, wherein Hon'ble SAT held that, "*We find that the investigation started in the year 2015 which involved examining several entities in the order logs, trade logs, off market transactions and gathering evidence from the Stock Exchange. The show cause notice was issued in the October, 2017 and accordingly we find that there is no inordinate delay in the initiation of the proceedings. The contention raised is, thus, erroneous and cannot be accepted*."

14. Thus, in view of aforesaid judgments, I note that instant adjudication proceeding has been initiated within a reasonable period of time and no prejudice has been caused to the Noticees. I also note that the facts and circumstances of the present proceedings are not similar to those in the judgments quoted by Noticees because there has been no delay in the initiation of the present proceeding as already stated above. Therefore, I conclude that I do not find any merit in the contention raised by Noticees that there has been inordinate delay in issuance of SCN due to which prejudice has been caused to them.

15. I now proceed to deal with the merits of the case in respect of the alleged contraventions of SAST Regulations by Noticees.

16. It has been alleged that the Noticees have violated Regulation 13(2)(e) r/w Regulation 13(1) of SAST Regulations in relation to the indirect acquisition of the Target Company. In this regard, I note the following chronology of events with respect to the open offer with respect to the Target Company, from the material available on record:-

i. **Date of press release on merger of Linde AG and Praxair Inc.**:- December 20, 2016
ii. **Date of Public Announcement**:- October 24, 2018
iii. **Date of Detailed Public Statement**:- November 09, 2018
iv. **Date of submission of Draft Letter of Offer**:- February 01, 2019
v. **Date on which SEBI provided its comments on DLOO**:- August 14, 2019
vi. **Date of Letter of Offer**:- August 26, 2019
vii. **Last Date for recommendation by Independent Directors:-** August 29, 2019
viii. **Date of Issue Opening**:- August 30, 2019
ix. **Date of commencement of Tendering Period**:- September 03, 2019
x. **Date of expiry of Tendering Period**:- September 17, 2019
xi. **Last date of completion of all requirements including payment of consideration**: - October 01, 2019 (As per Tentative Schedule of activities mentioned in the DLOO).

17. I note that in terms of the provisions of Regulation 3(1) of SAST Regulations, no acquirer himself or with persons acting in concert with him (PAC) can acquire shares or voting rights in a target company which entitle such acquirer to exercise 25% or more voting rights in the target company unless such acquirer makes a public announcement to acquire shares of such company in accordance with SAST Regulations. I also note that in terms of Regulation 5(1) of SAST Regulations, an acquirer, acting with/without PAC, who acquires shares or voting rights in, or control over, any company or other entity, so as to enable it to exercise such percentage of voting rights in, or control over, a target company, the acquisition of which would otherwise attract the obligation to make a public announcement

of an open offer, shall be considered as an indirect acquisition of shares or voting rights in, or control over the target company. I also note that in terms of Regulation 13(1) of SAST Regulations, it is mandatory to make a public announcement referred to in Regulation 3 and Regulation 4 in accordance with Regulation 14 and Regulation 15, on the date of agreeing to acquire shares or voting rights in, or control over the target company. In terms of Regulation 13(2)(e) r/w Regulation 13(1) of SAST Regulations, in the case of indirect acquisition of shares or voting rights in, or control over the target company, where none of the parameters referred to in sub-regulation (2) of Regulation 5 are met, the public announcement of open offer must be made within four working days from the earlier of either of the following dates: (1) the date on which the primary acquisition is contracted, or (2) the date on which the intention or the decision to make the primary acquisition is announced in the public domain.

18. I note that it is a matter of record that Linde AG is a public company incorporated under the laws of Germany which holds directly or indirectly 100% shareholding of Linde UK Holdings Limited, which in turn holds, together with other group entities, 100% shareholding of Noticee 1. On the other hand, PAC 1 is a private limited company incorporated under the laws of Delaware in the United States of America and PAC 2 is a private limited company incorporated under the laws of the Netherlands and is a wholly owned subsidiary of Linde AG. On December 20, 2016, Linde AG, and PAC 1 issued a press release wherein the aforesaid two companies announced their intention to merge under a holding company, Linde plc which is a public limited company under the laws of Ireland (hereinafter referred to as "**primary acquisition**"). Consequent to this proposed merger, Noticee 1 would become an indirect subsidiary of Linde plc. Thus, Linde plc was set to acquire indirect control of the target company by virtue of the majority shareholding of Noticee 1 in the target company (hereinafter referred to as "**indirect acquisition**"). I note that in terms of Regulation 13(2)(e) r/w Regulation 13(1) of SAST Regulations, the public announcement was required to be made within four working days from the date of announcement of the intention to make the primary acquisition, i.e. by December 20, 2016. Therefore, I note that in terms of the aforesaid Regulation, the last date for making public announcement for the impugned open offer was December 27, 2016. However, I observe that the Acquirer along with PAC 1 and PAC 2 made a public announcement for the open offer on October 24, 2018 i.e. with a delay of 666 days. The aforesaid facts are a matter of record and Noticees, in their replies, have not disputed the same.

19. I note that the Noticees have contended that the Target Company and the Noticees had duly disclosed all information about the said Merger at every stage. It has been contended

that that though the PA was made by the Noticees on October 24, 2018, the information related to the said Press Release was already in public domain and was also available with the stock exchanges prior to the issuance of the PA. It has been contended that on December 21, 2016, i.e., one day after the Press Release was issued, BSE had sought clarifications from Linde India in relation to a news item published on ET NOW on December 21, 2016 captioned "*Praxair to buy Linde AG in $35bn deal*" and in its response vide letter dated December 21, 2016, the Target Company had also provided information related to the Press Release issued by the Linde Group to BSE. In this regard, firstly, I note that the aforesaid letter dated December 21, 2016 which was addressed solely to BSE merely reiterated the contents of the Press Release dated December 20, 2016 and thus, the same did not fulfil the mandatory regulatory obligation in terms of Regulation 13(2)(e) r/w Regulation 13(1) of SAST Regulations. Secondly, I also note that the aforesaid letter did not provide any comprehensive details pertaining to the proposed merger. Thus, I note that the Noticees had not disclosed information about the said merger at every stage of the transaction but merely communicated to BSE only once for the purpose of only reiterating the contents of the aforesaid Press Release. Thirdly, I note that the violation of SAST Regulations in relation to the proposed merger came to light only during the examination of the DLOO submitted on February 01, 2019. Therefore, I am not inclined to accept the aforesaid contention of the Noticees.

20. I note that the Noticees, in their reply, have submitted that the Noticees, in good faith, had made the public announcement for the Open Offer after crystallisation of the regulatory approvals to the proposed merger because of the apprehension that if the Noticees issued the public announcement immediately after issuance of the press release, the same would have been detrimental to the interests of the investors, in the event of failure of the merger owing to potential regulatory impediments. I note that Regulation 13(4) read with the proviso and explanation thereof, exempts an acquirer from the requirement of publication of Detailed Public Statement of an open offer for acquisition of shares under SAST Regulations, in the event of the acquirer's failure to acquire the ability to exercise or direct the exercise of voting rights in or control over the target company. Thus, the Noticees were under a mandatory obligation to make the public announcement and in case of any failure of the primary acquisition the Noticees had the option of not publishing the Detailed Public Statement of the open offer. I also note that Regulation 23(1)(a) and 23(1)(d) provides for the withdrawal of the open offer in case an acquirer fails to conclude the open offer process on account of denial of regulatory approvals. Consequently, I find that the Noticees would not have been bound by the mandatory requirements of the open offer process if the primary acquisition had failed on account of denial of regulatory approvals. Moreover, on

the failure of the primary acquisition if any, status quo would have prevailed. Thus, I find no merit in the contention of the Noticees that if the public announcement had been made immediately after issuance of the press release, the same would have been detrimental to the interests of the investors, in the event of failure of the merger owing to potential regulatory impediments. Therefore, I note that the aforesaid contention is not a valid reason for not complying with the mandatory regulatory obligation.

21. I note that in their submissions, the Noticees have admitted to the delay by stating that positive remedial steps have been taken by them in the matter as the Open Offer has been made to the shareholders of the Company on the basis of December 20, 2016 as the deemed date of public announcement and accordingly the offer price was enhanced by adding interest of INR 71.10 per equity share at the rate of 10% per annum for the period between December 20, 2016 and the date of publication of the DPS. Thus, it was contended by the Noticees that adjudication proceeding should not be initiated and penalty should not be imposed in the matter due to the aforesaid positive remedial steps. The Noticees have also contended that there was a delay in payment to the shareholder due to a time lag in completion of the primary acquisition, and that such delay takes place in cases where the target company is not a significant part of the primary acquisition. Thus it has been contended that the aforesaid time lag was taken into consideration and hence, payment of interest at the rate of 10% per annum was proposed for the period between announcement of the primary acquisition and the date on which the DPS is actually made, as a means of compensation to the investors for such delay. In respect of the aforesaid submission of Noticees, I am inclined to view the stated remedial measures by way of interest payment for the delay in making the PA as proof of delay on the part of Noticees in making the PA. In any case, such measures which the Noticees are presenting as justification for their non-compliance with the mandatory provisions under SAST Regulations, do not absolve them of their obligations cast on them as Acquirers and PACs by the aforesaid provision of the SAST Regulations. I note that by way of the aforesaid contention, the Noticees have accepted that December 20, 2016 was the stipulated date for the purpose of timeline for making public announcement pursuant to a mandatory open offer under SAST Regulations. Thus, I conclude that the aforesaid enhancement of offer price is not a valid ground for contending that adjudication proceeding should not be initiated for the violation of Regulation 13(2)(e) r/w Regulation 13(1) of SAST Regulations and I find that the aforesaid contention of Noticees is devoid of merit.

22. In this regard, I note that Hon’ble SAT, in its order dated July 20, 2015, in the matter of Shri Housing Pvt. Ltd. vs SEBI has observed that:

"…..We are of the considered opinion that the very purpose of public offer envisaged under the Takeover Regulations, 1997 would be frustrated if the acquirers are given opportunity to make public announcement after a long lapse of time from the date of acquisition i.e. the date of SPA's are signed by the parties to acquire shares beyond 15% and/or control of a particular company by the acquirer…………It has, therefore, caused definite prejudice to the shareholders of Premier in the matter of exercising their statutory rights / option to exit or to continue with the said company through open offer mechanism at the very inception when the SPA's were entered into by the appellant. Therefore, the violation of such a valuable statutory right of shareholders to exit and/or to continue with the company cannot be compensated by paying meagre interest by the acquirer. The time limit of 4 days prescribed in Regulation 14(1) is crucial and important as time is of the essence in such acquisitions and consequent open offer. Therefore, any offer made by an acquirer after the statutory time limit of 4 days prescribed in Regulations 14(1) would not amount to sufficient compliance of Takeover Regulations and, therefore, the respondent would be justified in imposing suitable penalty in a given situation depending upon the facts and circumstances of each case… Lastly, section 15H undoubtedly talks about making of open offer by the acquirer in accordance with law and does not talk of delayed open offer. However, such open offer by an acquirer has to be made under the Takeover Regulations, 1997 and regulations have to be looked into and interpreted in totality. Therefore, any offer made by an acquirer after the statutory time limit of 4 days prescribed in Regulations 14(1) would not amount to sufficient compliance of Takeover Regulations and, therefore, the respondent would be justified in imposing suitable penalty in a given situation depending upon the facts and circumstances of each case."

23. Thus, in view of the foregoing findings, and Noticees' own admission of delay in making the PA, I find that the allegation that Noticees have violated Regulation 13(2)(e) r/w Regulation 13(1) of SAST Regulations stands established.

<u>Issue No. 1 (b)- Whether Noticee 1 has violated Regulation 29(2) read with 29(3) and Regulation 30(2) read with regulation 30(3) of the SAST Regulations?</u>

24. The allegation against Noticee 1 is that it failed to make the requisite disclosures under Regulation 29(2) and (3) in respect of the change in its shareholding in the Target Company as it disposed of shares by way of Offer for Sale through stock exchange mechanism on 20 May, 2013. In this regard, I note from the material available on record that on May 20, 2013, the BOC Group Limited has sold shares of the Target Company by way of Offer for Sale through stock exchange mechanism and as a result the change in shareholding was as follows:

Date	No of shares held – before transaction	No of shares acquired	% of shares before transaction	% of shares after transaction	No of shares sold	% of shares sold	Disclosure required under SAST Regulations	Date of Disclosure
20 May 2013	7,63,08,293	0	89.48%	75%	1,23,45,126	14.48	Yes. Change of >2%	23.05.2013

25. I note that Noticee 1 had sold shares by way of Offer for Sale through Exchange mechanism on May 20, 2013 and as a result the shareholding of Noticee 1 decreased from 89.48% to 75% i.e. more than 2% shareholding in the Target Company. It has been alleged that requisite disclosure under Regulation 29(2) r/w Regulation 29(3) of SAST Regulations had to be filed by Noticee 1 within 2 working days i.e. by May 22, 2013. In this regard, I note that Noticee 1 has contended that the delay in making the aforesaid disclosures was unintentional and amounted to a delay of merely one day. Therefore, Noticee 1 has also contended that the aforesaid delay was merely a technical lapse on its part, and no harm has been caused to the shareholders due to the delayed disclosures.

26. In regard to the aforesaid allegation pertaining to violation of Regulation 29(2) r/w Regulation 29(3) of SAST Regulations by Noticee 1, I note that Regulation 29 (2) of SAST Regulations specifically mentions about disclosure of acquisition as well as disposal of shares. However, I observe that Regulation 29 (3) of SAST Regulations, as applicable at the time of the impugned transactions, mentions the timelines for disclosures in case of acquisition of shares only and not for disposal of shares. In this regard, I would like to rely on the decision of Hon'ble SAT in Vizwise Commerce Pvt. Ltd Vs. SEBI (Appeal No. 383 of 2014, decided on January, 28, 2015), wherein, the Learned Member of Hon'ble SAT had held as follows:

> *" It may be pointed out that Regulation 29(3) of SAST Regulations is not in consonance with Regulation 29(2), since Regulation 29(2) requires intimation for every acquisition or disposal, but Regulation 29(3) requires such disclosure "to be made within two days of receipt of intimation of allotment of shares or the acquisition of shares or voting rights in the target company" and there is no time limit for disclosure of disposal of shares or voting rights, although there is a requirement under Regulation 29(2)"*

27. I also note that the words "or the disposal" were inserted in Regulation 29 (3) of SAST Regulations by an amendment with effect from September 11, 2018. In this context, I would further like to rely upon judgment of Hon'ble SAT in the matter of the Ravi Mohan vs. SEBI (Appeal No. 97 of 2014, decided on December 16, 2015) involving the

interpretation of provisions of Regulation 7 (1A) of the erstwhile Takeover Regulations 1997, which is similar to Regulation 29 (2) and 29 (3) of SAST Regulations. The Hon'ble SAT in the aforesaid decision had held as follows:

> "………
>
> *27. It is relevant to note that while inserting regulation 7(1A), SEBI has deemed it proper to amend regulation 7(2) with effect from 09.09.2002 by providing that the disclosure obligation under regulation 7(1) and 7(1A) shall be discharged within two days of the events specified under regulation 7(2). Thus, as a result of insertion of regulation 7(1A) and amendment of regulation 7(2), the disclosure obligation in relation to purchase or sale of shares referred to in regulation 7(1A) has to be made within two days of the events specified in regulation 7(2). On perusal of regulation 7(2) it is seen that the events enumerated therein relate only to acquisition of shares and do not relate to sale of shares or voting rights in excess of the limits prescribed under regulation 7(1A). As a result, even though regulation 7(1A) contemplates that an acquirer together with persons acting in concert with him when sell shares of the target company in excess of the limits prescribed under regulation 7(1A) must make disclosure within two days of such sale, in view of the amendment to regulation 7(2), the disclosure obligation under regulation 7(1A) has to be discharged within two days of the events specified under regulation 7(2). Since regulation 7(2) as amended does not contemplate any obligation to disclose sale of shares by an acquirer covered under regulation 7(1A), the question of discharging that obligation arising under regulation 7(1A) read with regulation 7(2) does not arise at all.*
>
> 28………… *Thus, by 2002 amendment it is made clear that although disclosure of purchase or sale referred to under regulation 7(1A) has to discharged within two days of purchase or sale, of shares referred to therein, by amending regulation 7(2) it is provided that two days time to make disclosure under regulation 7(1A) shall commence on the happening of events specified under regulation 7(2). Since regulation 7(2) (as amended) does not set out any event relating to sale of shares specified under regulation 7(1A), the question of complying with regulation 7(1A) within two days of sale of shares does not arise at all*.
>
> 29………. *Therefore, when the Takeover Regulations, 1997 provides that the disclosure obligation specified under regulation 7(1A) has to be discharged in the manner specified under regulation 7(1A) read with regulation 7(2) and regulation 7(2) does not provide for disclosure in relation to sale of shares in excess of the*

limits prescribed under regulation 7(1A), SEBI is not justified in holding that the appellants by failing to make disclosure of sales covered under regulation 7(1A) within the stipulated time, have violated regulation 7(1A) read with regulation 7(2) of the Takeover Regulations, 1997. Consequently, SEBI is not justified in imposing penalty on the appellants. ....

For all the aforesaid reasons, the issues raised in these appeals are answered as follows:-
a)...
b) Disclosure obligation under regulation 7(1A) has to be discharged in accordance with regulation 7(1A) read with regulation 7(2). Since regulation 7(2) does not contemplate for disclosure relating to sale of shares in excess of the limits set out under regulation 7(1A), appellants herein cannot be said to have failed to comply with regulation 7(1A) within the time stipulated under regulation 7(1A) read with regulation 7(2). Consequently penalty imposed on the appellants cannot be sustained ...."

28. I note that the ratio of the above judgments apply with equal force to the facts of the present case. In view of the aforesaid judgments and observations in the foregoing, I find that Regulation 29 (2) read with Regulation 29(3) of SAST Regulations is not applicable to the aforesaid disposal of shares by Noticee 1 on May 20, 2013. Therefore, I find that the allegation that Noticee 1 has violated the provisions of Regulations 29(2) read with 29(3) of the SAST Regulations for the aforesaid disposal of shares does not stand established.

29. It has also been alleged that Noticee 1 failed to disclose its shareholding in terms of Regulation 30(2) read with Regulation 30(3) of SAST Regulations within 7 working days from the end of Financial Year 2011-2012 and Financial Year 2016-2017 respectively. I note that it is a matter of record that Noticee 1 is a promoter of the target company by virtue of owning majority shareholding of the target company. I note that in terms of Regulation 30(2) read with Regulation 30(3) of SAST Regulations, a promoter is required to disclose its shareholding to the target company and to stock exchanges within 7 workings days from the end of each financial year. In this regard I note that Noticee 1 had filed the requisite disclosures under Regulation 30(2) read with Regulation 30(3) of the SAST Regulations as under:

Financial Year	Disclosure required under SAST Regulations	Required Date of disclosure	Date of Disclosure
For FY ended March 31, 2012	Regulations 30(2) & 30(3)	April 12, 2012	April 13, 2012
For FY ended March 31, 2017	Regulations 30(2) & 30(3)	April 12, 2017	April 21, 2017

30. It is clear from the above table that disclosures under Regulation 30(2) read with Regulation 30(3) of the SAST Regulations for the Financial Year ending March 2012 should have been made by April 12, 2012 and the aforesaid disclosure for the Financial Year ending March 2017 should have been made by April 12, 2017. However, I note that the disclosure in terms of the aforesaid Regulations for Financial Year ending March 2012 was made on April 13, 2012, i.e. with a delay of 1 day and the aforesaid disclosure for Financial Year ending March 2017 was made on April 21, 2017 i.e. with a delay of 9 days. I note that the the aforesaid facts are a matter of record and Noticees have not disputed the same. Noticee 1 has contended that the aforesaid delay of 1 day in making the aforesaid disclosure for the Financial Year ending March 2012, was merely a technical lapse on its part, and no harm has been caused to the shareholders due to the same. I note that there is merit in the aforesaid contention of Noticee 1 because the said delay is a technical default of an insignificant nature. Therefore I conclude that the aforesaid delay in making the aforesaid disclosure for the Financial Year ending March 2012, does not attract violation of Regulation 30(2) r/w Regulation 30(3) of SAST Regulations. However, I note that the aforesaid disclosure for Financial Year ending March 2017 was made on April 21, 2017 i.e. with a delay of 9 days, which is a substantial default on the part of Noticee 1. Therefore, I find that Noticee 1 failed to make the regulatory disclosure under Regulation 30(2) r/w Regulation 30(3) of SAST Regulations within the stipulated time period for the Financial Year ending 2017.

31. I note that Noticee 1 has contended that the aforesaid delay in making disclosures under Regulation 30(2) and (3) of SAST Regulations was unintentional and merely a technical lapse on its part, and no harm has been caused to the shareholders due to the delayed disclosures. Thus, Noticee 1 admitted that there was a delay in the making the aforesaid disclosures and has sought to justify the delay. I note that these are not valid reasons for not complying with the mandatory regulatory obligation. Timely disclosures under the SAST Regulations are mandated for the benefit of the investors at large. There can be no dispute that compliance of these regulations is mandatory without any exception. In this context, it is relevant to note that Hon'ble SAT, in Appeal no. 66 of 2003, in the case of Milan Mahendra Securities Pvt. Ltd. vs. SEBI, vide its order dated November 15, 2006, had held that "*the Regulations were framed on the basis of the input provided by a*

committee headed by Justice P. N. Bhagwati which had recommended that substantial acquisition of shares and takeovers should operate principally to ensure fair and equal treatment to all shareholders in relation to substantial acquisition of shares and takeovers. The object of the Regulations is to give equal treatment and opportunity to all the shareholders and protect their interests. To translate these principles into reality measures have to be taken by the Board to bring about transparency in the transactions and it is for this purpose that dissemination of full information is required."

32. Further, the Hon'ble SAT in its Order dated September 30, 2014, in the matter of Akriti Global Traders Ltd. vs. SEBI had observed the following:
"Obligation to make disclosures under the provisions contained in SAST Regulations, 2011 as also under PIT Regulations, 1992 would arise as soon as there is acquisition of shares by a person in excess of the limits prescribed under the respective regulations and it is immaterial as to how the shares are acquired. Therefore, irrespective of the fact as to whether the shares were purchased from open market or shares were received on account of amalgamation or by way of bonus shares, if, as a result of such acquisition/ receipt, percentage of shares held by that person exceeds the limits prescribed under the respective regulations, then, it is mandatory to make disclosures under those regulations."

33. In view of the foregoing findings, I find that the allegation that Noticee 1 has violated the provisions of Regulation 30(2) read with regulation 30(3) of the SAST Regulations stands established in respect of allegation regarding non-disclosure under Regulation 30(2) read with regulation 30(3) of the SAST Regulations for the Financial Year ending 2017.

Issue No. 2- Does the violation, if any, attract monetary penalty under Section 15H(ii) and Section 15A(b) of SEBI Act?

34. It has been established in the foregoing paragraphs that the Noticees have violated Regulation 13(2)(e) r/w Regulation 13(1), and Noticee 1 has violated Regulation 30(2) read with Regulation 30(3) of SAST Regulations. In context of the above, I refer to the observations of Hon'ble Supreme Court in the matter of Chairman, SEBI vs. Shriram Mutual Fund {[2006] 5 SCC 361} wherein the Hon'ble Court had held that: "*In our considered opinion, penalty is attracted as soon as the contravention of the statutory obligation as contemplated by the Act and the Regulations is established……*"

35. Therefore, in view of the findings that Noticees have violated Regulation of SAST Regulations and placing reliance on the above judgment of Hon'ble Supreme Court, I find

that the aforesaid violation of Regulation 13(2)(e) r/w Regulation 13(1) committed by the Noticees will attract monetary penalty under Section 15H(ii) and violation of Regulation 30(2) read with Regulation 30(3) of SAST Regulations by Noticee 1 will attract monetary penalty under Section 15A(b) of the SEBI Act. The respective provisions as applicable at the time of the impugned transactions are reproduced as under:

Penalty for non-disclosure of acquisition of shares and takeovers.

15H. If any person, who is required under this Act or any rules or regulations made thereunder, fails to,—

(ii) make a public announcement to acquire shares at a minimum price;

…

he shall be liable to a penalty which shall not be less than ten lakh rupees but which may extend to twenty-five crore rupees or three times the amount of profits made out of such failure, whichever is higher.

Penalty for failure to furnish information, return, etc.

***15A.** If any person, who is required under this Act or any rules or regulations made there under-*

(b) to file any return or furnish any information, books or other documents within the time specified therefor in the regulations, fails to file return or furnish the same within the time specified therefor in the regulations, he shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one lakh rupees for each day during which such failure continues subject to a maximum of one crore rupees.

<u>Issue No.3 - What should be the quantum of monetary penalty</u>?

36. While determining the quantum of penalty under Section 15H(ii) and Section 15A(b) of the SEBI Act, it is important to consider the factors as stipulated in Section 15J of the SEBI Act, which reads as under:-

<u>SEBI Act</u>

Factors to be taken into account by the adjudicating officer.

***Section 15J** - While adjudging quantum of penalty under section 15-I, the adjudicating officer shall have due regard to the following factors, namely:-*

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the amount of loss caused to an investor or group of investors as a result of the default;

(c) the repetitive nature of the default.

37. Noticees have submitted that consequent to the open offer made by the Noticees on October 24, 2018, an additional interest of INR 101.77 per equity share was paid by the Noticees over and above the New Base Price of INR 376.33 per equity share. The said interest amount not only included an interest of INR 71.10 per equity share at the rate of 10% per annum for the period between December 20, 2016 and the date of publication of the DPS, but also included an additional interest of INR 30.67/- per equity share at the rate of 10% per annum for the period between January 24, 2019 and the revised date of payment of consideration to the public shareholders, i.e., October 01, 2019. Thus, the Noticees have contended that the stated remedial measures by way of payment of interest should be taken into consideration to exonerate them in the instant adjudication proceeding. In this regard, I note that the Noticees have placed reliance upon the Adjudication Orders in the matter of Anil Monga & Ors. and Karvy Financial Services Ltd. in which the payment of interest in view of delay in making open offer was considered as a mitigating factor, and the judgement of Hon'ble SAT in the matter of Sterling Investment Corporation Ltd. & Ors. v. SEBI in which the Hon'ble SAT held that adjudication proceeding was not warranted in view of the interest paid by the Noticees with respect to the failure to make open offer within the stipulated time. However, I note that the aforesaid judgement in Sterling Investment Corporation Ltd. & Ors. v. SEBI was based on the provisions of the SEBI (Substantial Acquisition of Shares and Takeover) Regulation, 1997 (hereinafter referred to as "Takeover Code, 1997"). I also note that the aforesaid Adjudication Orders and SAT judgement did not pertain to indirect acquisition by way of an overseas merger. I note that the Adjudication Order in Anil Monga & Ors pertained to the failure to make open offer within the stipulated time despite acquisition of control pursuant to conversion of warrants. I further note that the Adjudication Order in Karvy Financial Services Ltd., pertained to failure to make open offer within the stipulated time despite acquisition of control pursuant to invocation of pledge. Thus, I note that the facts and circumstances in the present proceeding are not similar to those in the judgments quoted by the Noticees. Thus, the aforesaid judgements relied upon by Noticees are not relevant to the present proceeding which relates to a case of indirect acquisition of control and failure to make public announcement within the time stipulated under Regulation 13(2)(e) r/w Regulation 13(1) of SAST Regulations. Therefore, I am not inclined to accept the aforesaid contentions of the Noticees.

38. However, I note that payment of interest is the compensation paid to the shareholders of the target companies due to their losing an exit opportunity at the right time as a result of the failure on the part of the acquirers to make the public announcement within the stipulated time period prescribed under the SAST Regulations and such interest payment by the acquirer cannot be considered as a penalty that has been paid by the acquirer, although it can certainly be considered a mitigating factor.

39. The Noticees have stated in their submissions that they have not made any gains or derived any unfair advantage because of alleged delay in making open offer and that the delay has also not caused any loss to the investors or group of investors. In this regard, I note the observations of the Hon'ble SAT in the matter of Luharuka Commotrade Pvt., Ltd., vs. SEBI decided on January 13, 2016, wherein the Hon'ble SAT observed that,

"Similarly, argument of the appellant that the delayed compliance of open offer has occurred inadvertently and since delayed compliance has not caused any loss to the shareholders no penalty could be imposed is without any merit. Under the Takeover Regulations, 1997 imposition of penalty is not dependent on the loss caused to the shareholders on account of the delay in making open offer and the penalty is imposable when the regulations are violated even if such violation does not result in any loss to the investors."

40. I note that losing an exit opportunity by the shareholders at the right time as a result of the failure on the part of the acquirers to make the public announcement within the stipulated time period prescribed under the SAST Regulations, is a loss to the investors. In view of the above and in line with the ratio laid down by the Hon'ble SAT I find no merit in the submissions made by the Noticees. I also note that Noticee 1 has contended that delay in making the disclosures under Regulation 29(2) read with Regulation 29(3) and Regulation 30(2) read with regulation 30(3) of SAST Regulations was unintentional and merely a technical lapse on their part, and no harm has been caused to the shareholders due to the delayed disclosures. However in view of the mandatory nature of the aforesaid regulatory provisions, I do not find merit in the aforesaid contention.

41. In view of the charges as established, the facts and circumstances of the case, the quantum of penalty would depend on the factors referred in Section 15-J of the SEBI Act, stated as above. In this regard, from the material available on record, I note that there is no evidence placed on record to quantify the amount of disproportionate gain or unfair advantage or consequent loss to investors resulting from the failure on the part of Noticees

to make public announcement and default of Noticee 1 in making disclosures as established above. Material on record does not show that failure on the part of Noticees is repetitive in nature. However, as already observed above, I am of the view that by not making the mandatory public announcement within the stipulated time period and by failing to comply with the disclosure requirements specified under the SAST Regulations within the prescribed time period, as established above, Noticees have violated mandatory regulatory provisions. The contention of the Noticees that they have compensated the investors by paying interest for the delayed public announcement of open offer cannot be a valid ground to escape liability. However, I have nevertheless considered the same as a mitigating factor while arriving at the quantum of penalty on the Noticees.

42. I note that Section 15H(ii) of SEBI Act provides that any person failing to make public announcement shall be liable to a penalty which shall not be less than ten lakh rupees but which may extend to twenty five crore rupees or three times the profits made out of failure to make public announcement. In this regard I note that there is no evidence placed on record to quantify the amount of disproportionate gain or unfair advantage or consequent loss to investors resulting from the failure on the part of Noticees to make public announcement. However, I have nevertheless considered the payment of interest by the Noticees for the delayed public announcement of open offer as a mitigating factor while arriving at the quantum of penalty on the Noticees. I also note that as stated above, the allegation of violation of Regulation 30(2) read with Regulation 30(3) of SAST Regulations by Noticee 1, was established only with respect to one instance of delay in disclosure pertaining to the Financial Year ending 2017. Therefore, I find that the minimum penalty of one lakh rupees under Section 15A(b) of SEBI Act is commensurate with the aforesaid delay in disclosure in terms of Regulation 30(2) read with Regulation 30(3) of SAST Regulations.

ORDER

43. Having considered all the facts and circumstances of the case, the material available on record, the submissions made by Noticees and also the factors mentioned in Section 15J of the SEBI Act, as enumerated above, I, in exercise of the powers conferred upon me under Section 15-I of the SEBI Act read with Rule 5 of the Adjudication Rules, hereby impose the following minimum penalties on Noticees 1 to 3, jointly and severally, under Section 15H(ii) of SEBI Act and on Noticee 1 under Section 15A(b) of SEBI Act:

Penalty for violation of SAST Regulations

Name of Noticee	**Penalty under Section 15H(ii) of SEBI Act**	**For the violation of following provisions of SAST Regulations**
The BOC Group Limited	Rs. 10,00,000/- (Rupees Ten Lakhs only) jointly and severally	Regulation 13(2)(e) read with Regulation 13(1) of SAST Regulations
Praxair, Inc		
Linde Holdings Netherlands B.V.		
Name of Noticee	**Penalty under Section 15A(b) of SEBI Act**	**For the violation of following provisions of SAST Regulations**
The BOC Group Limited	Rs. 1,00,000/- (Rupees One Lakh only)	Regulation 30(2) read with regulation 30(3) of SAST Regulations

44. Noticees shall remit / pay the said amount of penalty within 45 days of receipt of this order through online payment facility available on the website of SEBI, i.e., www.sebi.gov.in on the following path, by clicking on the payment link: ENFORCEMENT -> Orders -> Orders of AO -> PAY NOW. In case of any difficulties in payment of penalties, Noticees may contact the support at portalhelp@sebi.gov.in.

45. The said confirmation of e-payment made in the format as given in table below should be sent to "The Division Chief, EFD – DRA - 4, Securities and Exchange Board of India, SEBI Bhavan, Plot no. C- 7, "G" Block, Bandra Kurla Complex, Bandra (E), Mumbai - 400 051" and also to e-mail id:- tad@sebi.gov.in

1. Case Name:	
2. Name of payee:	
3. Date of payment:	
4. Amount paid:	
5. Transaction no.:	
6. Bank details in which payment is made:	
7. Payment is made for: (like penalties/ disgorgement/ recovery/ settlement amount and legal charges along with order details)	

46. In the event of failure to pay the said amount of penalty within 45 days of the receipt of this Order, recovery proceedings may be initiated under Section 28A of the SEBI Act for

realization of the said amount of penalty along with interest thereon, *inter alia*, by attachment and sale of movable and immovable properties of Noticees.

47. In terms of the provisions of Rule 6 of the Adjudication Rules, a copy of this order is being sent to Noticees and also to SEBI.

Place: Mumbai **SOMA MAJUMDER**
Date: April 28, 2022 **ADJUDICATING OFFICER**