

ORDER IN THE MATTER OF PROPOSED ACQUISITION OF SHARES OF NHN CORPORATION LTD (FORMERLY KNOWN AS ATCO HEALTHCARE LTD) – EXEMPTION APPLICATION UNDER REGULATION 4(2) OF THE SEBI (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 1997

WTMO/3/CFD/09/03

1.0 BACKGROUND

- 1.1 NHN Corporation Ltd [formerly known as Atco Healthcare Ltd] (hereinafter referred to as the “Target company”) is a company incorporated under the Companies Act, 1956 and having its registered office at Plot No.2, Kurla Industrial Estate, Off. L B S Marg, Nari Seva Sadan Road, Ghatkopar (W), Mumbai – 400086. The target company is primarily engaged in the business of manufacture of mineral water and poly carbonated bottles.
- 1.2 The equity shares of the Target Company are listed at the Stock Exchange, Mumbai and OTC Exchange of India.
- 1.3 Shri Vikram A Doshi alongwith persons acting in concert (Shri Vineet A Doshi, Shri Sharad A Doshi, Shri Vikram A Doshi (HUF), Shri Vineet A Doshi (HUF), Shri Sharad A Doshi (HUF) and Smt Leena V Doshi) [hereinafter referred to as ‘Acquirers’], who are the part of promoters group of the Target Company proposes to acquire 1,37,84,000 equity shares of the Target Company representing 71.79% of the total paid up capital of the Target Company from the proposed seller, which is another promoter group entity namely M/s Atcom Technologies Ltd. (ATL) at a price of Rs.10/- per share.

2.0 APPLICATION FOR EXEMPTION

- 2.1 The Acquirer made an application dated August 12, 2002 to the Securities and Exchange Board of India (hereinafter referred to as SEBI) under sub-regulation (2) of regulation 4 of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as “the Regulations”) seeking exemption in terms of Regulation 3(1)(I) from the applicability of Regulation 10 and 12 of the Regulations.
- 2.2 As per the application seeking exemption, the shareholding pattern of the Target company, pre and post acquisition would be as under:

Shareholders' Category	Pre – Acquisition (as on Aug 12, 2002)		Post – Acquisition	
	Number of shares	% of shares	Number of shares	% of shares
(i)Atcom Technologies Ltd.	1,37,84,000	71.78	Nil	Nil
(ii) Others	3,10,000	1.62	3,10,000	1.62
Promoter Group	1,40,94,000	73.40	3,10,000	1.62
Acquirers (belonging to Promoter Group)	78,100	0.41	1,38,62,100	72.19
FIs / Banks	Nil	Nil	Nil	Nil
FIIIs / NRIs / OCBs	Nil	Nil	Nil	Nil
Public	50,29,400	26.19	50,29,400	26.19
Total	1,92,01,500	100.00	1,92,01,500	100.00

3.0 SUBMISSIONS IN THE EXEMPTION APPLICATION

In the aforesaid application, the Acquirers, inter-alia, submitted as under:

- 3.1 As on the date of the application, ATL is holding 71.79% of the paid up equity capital of the Target Company. Therefore, as per Regulation 2(1)(h)(i) of the Regulations, Atcom Technologies Ltd is in control of the Target Company.
- 3.2 Doshi family alongwith Persons acting in concert hold 40.78% of the paid up capital of Atcom Technologies Ltd . Therefore as per Regulation 2(1)(h)(i) of the Regulations, Doshi family is also the promoter of Atcom Technologies Ltd.

3.3 As per the Offer for sale document dated June 29, 1993 of Atcom Technologies Ltd, Doshi family are the promoters of Atcom Technologies Ltd.

3.4 As per Offer for sale document dated February 23, 1995 of the Target Company, Shri Vikram Doshi, Shri Vineet Doshi and Shri Sharad Doshi are promoters of the Target Company. Therefore, as per Regulation 2(1)(h)(ii) of the Regulations, Doshi family is also the promoter of the Target Company.

3.5 Atcom Technologies Ltd is holding more than 10% of the shares of the target company and Doshi family is holding more than 10% of shares of Atcom Technologies Ltd. Hence, both the Acquirers and Sellers are part of the promoters' group.

3.6 There will be no change in control and management including Board of directors consequent to the proposed acquisition.

3.7 The Acquirers will be able to infuse cash flow in the Target Company pursuant to the abovementioned proposed transfer of shares.

4.0 CONSIDERATION OF THE APPLICATION

4.1 The said application dated August 12, 2002 was forwarded to the Takeover Panel in terms of sub-regulation (2) of regulation 4 of the Regulations. The Takeover Panel in its meeting held on August 22, 2002 considered the application and sought further clarifications from the applicant. Accordingly a letter dated August 23, 2002 was sent to the acquirers.

4.2 From the reply received from the applicant vide letter dated August 28, 2002 it was observed that the sellers and acquirers were a part of the same promoter group.

4.3 It is noted from the status of compliance with the provisions of Chapter II of the Regulations furnished by the Acquirers, there was a delay of 16 days in making disclosures under Regulation 6(1) and 6(2) for the year 1997.

4.4 Further, as per the disclosure made by the target company to the stock exchanges in terms of Regulation 8(3), ATL was holding 1,46,48,000 shares (76.29%) in the target company on March 31, 2001.

- 4.5 it was also observed, inter alia that ATL which was holding 76.29% shareholding in the target company had acquired 2,00,000 shares representing 1.04% of the Target Company on April 05, 2001, increasing its shareholding in the Target Company to 77.33% and that no public announcement was made by ATL in terms of Regulation 11(2) of the Regulations.
- 4.6 A show cause notice was issued by SEBI to ATL on January 24, 2003 seeking its explanation as to why action should not be initiated against it for violation of Regulation 11(2) and 14(1) of the Regulations.
- 4.7 The reply to the show cause notice was received on February 25, 2003. ATL submitted that "the whole transaction is only in form of the simple security created by placing the shares and no consideration is paid during the transaction thus no acquisition or further addition was taken place". This submission was not found acceptable as it was observed that the said shares had been in fact credited to the demat account of the acquirers and remained there for a period of one year. In light of these findings, Adjudication Proceedings have been initiated against the ATL for the said violation.

5.0 RECONSIDERATION OF APPLICATION FOR EXEMPTION

- 5.1 After referring the matter for Adjudication, the Exemption application was again forwarded to the Takeover Panel on May 07, 2003 in terms of sub-regulation(2) of regulation 4 of the Regulations for further consideration. The Takeover Panel considered the application for exemption and in its report dated May 15, 2003, the Takeover Panel stated as under :

"As per facts stated in the application, the proposed acquisition of equity shares is in the nature of inter se transfer between the promoters of the target company. The adjudication proceedings against Atcom Technologies Ltd initiated by SEBI pursuant to the show cause notice dated 24th January 2003 in terms of Section 15H(ii) of SEBI Act, 1992 for failure to make public announcement under Regulation 11(2) read with Regulation 14(1) of the Takeover Code are in progress.

Admittedly, the required disclosure under Chapter II of the Takeover Code has not been made within the prescribed period. Though compliance of other requirements of eligibility of exemption as sought merit recommendation for grant of exemption, grant of exemption as sought is not recommended in view of non-compliance of condition as contained in proviso to Regulation 3(1)(e)(iii)(b) of the Takeover Code”.

6.0 HEARING AND SUBMISSIONS

6.1 As the Panel did not recommend grant of exemption as sought by the Acquirers, they were granted an opportunity of hearing in terms of sub regulation (6) of regulation 4 of the Regulations, on 19.6.2003. The acquirers, vide fax dated June 18, 2003 sought for adjournment. The hearing was then held on July 28, 2003 before me. The hearing was attended by Shri Vikram Doshi, CMD- Atcom Ltd., Shri Shailesh Bathiya, C.A. and Shri Surendra Jain, the Company Secretary of Atcom. During the course of hearing, the acquirers, after making oral submissions, sought and were granted one weeks time to file written submissions. Pursuant thereto, the acquirers vide their letter dated August 05, 2003 made written submissions, in which they ‘interalia’ stated that:

- “ a) Required disclosures under chapter II of the Takeover Code has been made within the prescribed period in all the years except for the 16 days delay in the 1997, which was the first year of Introduction of 1997 Code. Since this was newly introduced requirement, we came to know about this a little late, and hence the delay. In view of this, the small delay may be pardoned.
- b) Even if it is admitted that there is a small delay in making required disclosure under chapter II of the Takeover Code, that fact can not be a consideration for rejecting the Application for exemption. Because precondition of Disclosure is the requirement of Regulation 3 (1)(e)(iii)(b) while the application for exemption has been made under Regulation 3(1)(i) under which no such pre-condition exists.
- c) There is no non-compliance of condition as contained in proviso to Regulation 3(1)(e)(iii)(b) of Chapter I of the Takeover Code. Transferor and Transferees have been holding shares in the target company for a period of at least three years and thus, the condition of the said Proviso has been complied with. In any case, condition of

3 years' holding is the requirement of Proviso to Regulation 3(1)(e) (iii)(b) while the application for exemption has been made under Regulation 3(1)(l) under which no such condition exists. The requirement of Transferor and Transferee holding not less than 5% shares in the target company has been done away with by SEBI (SAST) (Second Amendment) Regulations, 2002 w.e.f. September 09, 2002.

- d) Transfer price of the Shares of the targeted Company was requested at par value vide application dated August 12, 2002 as per the valuation of the Company recommended at that time but since it is very long time the application is not materialise and there may be many developments arise in the organisation, which requires us further implementation of the new valuation reports to determine the transfer price which will be subsequently available from any of the reputed valuer.
- e) As per the Takeover Panel itself compliance by us of other requirements of eligibility of exemption merit recommendation for grant of exemption.
- f) Explanation (ii) to Regulation 2(1)(c) as amended relating to definition of "control" mentions as follows :-

(ii) if consequent upon change in control of the Target company in accordance with Regulation 3, the control acquired is equal to or less than the control exercised by person(s) prior to such acquisition of control, such control shall not be deemed to be a change in Control.
- g) As can be seen in our case also control acquired is equal to the existing control exercised by the transferors and transferees prior to acquisition of such control and therefore, there is no change in control due to proposed acquisition. There will be no change in management or control due to Proposed acquisition and, therefore, objectives of Takeover Code will not be jeopardised either in letter or in spirit, if the exemption is granted. This is a fit case for exemption."

7.0 CONSIDERATION OF THE ISSUES AND FINDINGS

7.1 I have considered the application made by the Acquirers under the Clause (I) of sub regulation (1) of regulation 3 of the Regulations, for exemption of "interse transfer" of shares amongst promoters from the applicability of provisions of the Regulations. I have also taken into account oral and written submissions made during the hearing and vide letters dated 28th August 2002 and 5th August 2003, the material available on record and the recommendation of the Takeover Panel.

7.2 The arguments raised in favour of exemption sought are two fold:

- i) Consequent on proposed acquisition of shares by the Acquirers in the target company there would be no "change of control" in as much as the percentage of shareholding of the promoters including Acquirers would be the same i.e. 73.81%.
- ii) The Application for exemption has been made under regulation 3(1) (I) of the Regulations, which does not require the regulation 6 to have been complied with for availing the benefit of exemption.

7.3 In terms of regulation 12 of the Regulations, no Acquirer shall acquire control over the target company unless such a person makes public announcement to acquire shares and acquire such shares in accordance with the Regulations. I agree with the Acquirers' contention that with the proposed acquisition of shares in the target company there would be no change in the control. The regulation 12 of the Regulations, thus, does not get triggered.

7.4 However, I do not agree with the contention of the Acquirer that the requirement of compliance with the regulation 6 of the Regulations will not be applicable. In terms of regulation 10 of the Regulations no Acquirer shall acquire shares or voting rights which (taken together with shares or voting rights if any, held by him or by persons acting in concert with him) entitle such Acquirer to exercise 15% or more of the voting rights in a company unless such Acquirer makes a public announcement to acquire shares of such company in accordance with the Regulations. However, as per Regulation 3(1)(e)(iii)(b), the provisions of regulation 10 will not apply to "interse transfer" of shares amongst the promoters. But, as per explanation 2 of the regulation, this benefit of availability of exemption is subject to the transferor and transferee having complied with regulation 6, dealing with disclosure requirement.

7.5 It is observed that the transferee i.e. Doshi family members who are the

promoters of the Target company failed to disclose the shareholding to the Target company within two months of the notification of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 1997 i.e. on or before 20th April 1997 resulting in non compliance with the Regulation 6(3) of the Regulations. It is also observed that there was a delay of 16 days in making such a disclosure. A lenient view could have been taken in respect of this delay but for the following:

The Acquirers, who failed to make the disclosure as aforesaid, also failed to take advantage of the SEBI Regularisation Scheme 2002 to regularise their non compliance with regulation 6. More importantly the regulation 3 dealing with exemption from the Regulation is categorical that the benefit of availing exemption shall be subject to the transferors and transferees having complied with regulation 6. Thus there is no discretion available to condone the delay, howsoever minor, in meeting the disclosure requirement. In this regard the judgement dated 29th October 2002 of the Hon'ble Securities Appellate Tribunal in Appeal No.2/2003-**Hement Sonawala Vs. SEBI** (in the matter of **Hinditron Informatics Ltd.**) is relevant. The observations of Hon'ble SAT in that case are as under:

"The whole thrust of the learned Counsel's argument on availability of exemption provided under Regulation 3(1)(iii)(b) was to avail of exemption from complying with the requirements of public announcement to acquire shares from the other shareholders of the company. However, the exemption provided under Regulation 3(1)(e) is available not merely on satisfying the condition of the minimum shareholding of 5% stipulated in the proviso, but also subject to compliance of the requirement of Regulations 6,7 and 8. Since it is an admitted fact that the Appellant had not complied with requirement of Regulation 6, the exemption is not available to the acquisition. In this context it is to be noted that in terms of the explanation to Regulation 3(1)(e)—"The benefit of availing of exemption from applicability of Regulations for increasing shareholding or inter se transfer of shareholding among group companies, relatives and promoters shall be subject to such group companies or relatives or promoters filing statements concerning group and individual shareholding as required under Regulation 6,7 and 8." Therefore, the statement has to be filed as required under the concerned regulation. As per Regulation 6(3) " A promoter or any person having control over a company shall within two months of notification of these Regulations disclose the number of percentage of shares or voting rights held by him " So the requirement is to disclose the information within two months of the notification of the Regulation and since the Appellant had admittedly failed to fulfil the said condition exemption even if otherwise available would not be available and, therefore, the Appellant is required to comply with the requirements of Regulation 10, 11, 12, as the case may."

(l) of the Regulations the provisions contained in the explanation to 3(1)(e) (iii) are not applicable is not valid. The regulation 3(1)(l) deals with "other cases" as may be exempted from the applicability of Chapter III of the Regulations. In other words, this regulation deals with such of the cases which do not fall under the categories listed under sub regulation (a) to (k) of regulation 3(l). Admittedly this case falls under the category 3(1)(e)(iii) (b). Therefore, the benefit of availing exemption from applicability of the Regulations for interse transfer of shareholdings amongst the promoters shall be subject to the transferors and transferees having complied with the regulation 6. As the transferors/ transferees have not complied with the regulation 6, the exemption will not be available, as rightly observed by the Takeover Panel.

8 ORDER

8.1 Having regard to the above, and the recommendations made by the Takeover Panel and also in the interest of the public shareholders of the Target company, I, in exercise of the powers conferred upon me under Section 19 of the Securities and Exchange Board of India Act 1992 read with sub regulation (6) of regulation 4 of the Regulations, hereby reject the application of the Acquirers seeking exemption from applicability of Regulation 10 of the Takeover Regulations and direct the acquirers to comply with the provisions of the Takeover Regulations regarding open offer as and when the acquirer acquires the shares / voting rights.

8.2 This order shall come into force with immediate effect.

T. M. NAGARAJAN

WHOLE TIME MEMBER

SECURITIES AND EXCHANGE BOARD OF INDIA

Place : Mumbai

Dated : September 04, 2003