

**BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI**

Appeal No.12 of 2009

Date of Decision: 5.8.2009

Hamlet Holding II ApS
DISA Holding II A/S
DISA Holding A/S
DISA Holding AG

..... Appellants

Versus

Securities and Exchange Board of India

..... Respondent

Mr. Soli Cooper, Senior Advocate with Mr. Indranil Deshmukh and Mr. Aditya Mehta,
Advocates for the Appellants.

Mr. J.J. Bhatt, Senior Advocate with Ms. Daya Gupta, Advocate for the Respondent.

CORAM : Justice N.K. Sodhi, Presiding Officer
Samar Ray, Member

Per : Justice N.K. Sodhi, Presiding Officer

DISA India Limited, a public limited company incorporated under the provisions of the Companies Act, 1956 with its registered office in Bangalore is the target company. It is a major supplier of equipments for foundry, shot blast & air filtration applications to domestic and foreign markets. The shares of the target company are currently listed and most frequently traded on the Bombay Stock Exchange, Mumbai (for short 'BSE').

2. Hamlet Holding II ApS is a Danish company with limited liability incorporated under the laws of Kingdom of Denmark. It is the first appellant before us. It is an unlisted company. On March 9, 2008 it executed a Share and Stock Purchase Agreement with the shareholders of DISA Holding II A/S another unlisted company registered in Denmark which is the second appellant herein. By this agreement the first appellant purchased 100 per cent of the shareholding of the second appellant. The second appellant owns 100 per cent shares of DISA Holding A/S which is the third appellant herein which in turn owns 100 per cent shares of DISA Holding AG which is the fourth appellant. Appellant no.3 is registered in Denmark whereas appellant no.4 is registered in Switzerland. The third appellant holds 3,02,749 shares and the fourth appellant holds

8,18,902 shares in the target company representing 20.05 per cent and 54.22 per cent of the paid up and voting equity share capital of the target company respectively. The second appellant is the holding company of DISA group of companies worldwide with subsidiaries in several countries including Germany and India. It was owned by two private equity funds, namely, Procuritas Capital Investors III A LP and Procuritas Capital Investors III B LP and they along with certain management shareholders agreed to transfer the full ownership of the second appellant to the first appellant by the aforesaid agreement.

3. With the first appellant acquiring 100 per cent of the shareholding of the second appellant, the former indirectly acquired 74.27% of the paid up and voting equity share capital of the target company through appellants no. 3 & 4. This indirect acquisition triggered the provisions of Regulations 10, 11 & 12 of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter called the takeover code). The first appellant alongwith appellants no. 2 to 4 (persons acting in concert with the first appellant) were required to make a public announcement for an open offer to acquire further shares of the target company. Since the acquisition was indirect, it was governed by Regulation 14(4) of the takeover code and in terms of this Regulation, the first appellant had three months time to make the public announcement from the date of consummation of such acquisition.

4. The acquisition, as per the aforesaid agreement, was global and its completion was subject to certain conditions precedent including clearance from German authorities. If the acquisition had not been completed, it could result in the reversal of the aforementioned sale. Even though the Share and Stock Purchase Agreement between the first and the second appellants was executed on March 9, 2008, the former was registered as a shareholder of the latter only on September 4, 2008 after completion of all formalities. In this background, the first appellant through STCI Capital Markets Limited approached the Securities and Exchange Board of India (for short the Board) under the Securities and Exchange Board of India (Informal Guidance) Scheme, 2003 for seeking an interpretation regarding the date of consummation of the acquisition in terms of Regulation 14(4) of the takeover code. The Board as per its letter dated December 15, 2008 clarified that September 4, 2008 would be treated as “the date of consummation”

for the purpose of Regulation 14(4). Since the clarification was given only on December 15, 2008, the Board condoned the delay in making the public announcement and the first appellant was advised to make the public announcement within 15 days from the date of the letter. It is common ground between the parties that the appellants made the public announcement on December 17, 2008 in different newspapers. In the public announcement, the appellants acting in concert with each other have made an offer for acquiring up to 3,02,041 equity shares from the existing shareholders of the target company representing 20 per cent of its paid up and voting equity share capital at a price of Rs.1657 per share payable in cash. The offer price of Rs.1657 was worked out in terms of Regulation 20(4)(c) of the takeover code which, according to the appellants, was applicable to the case. Soon after the public announcement, the appellants through their merchant bankers sent to the Board a draft of the letter of offer for its comments. While commenting on the offer price, this is what the Board said in para 5 (a) of its letter dated February 6, 2009:

“5. Offer Price / Financial Agreements:

- a. The offer price may be calculated in terms of regulation 20(4) read with 20(12) and the date of PA for the parent company may be treated as date of Share Sale and Purchase Agreement i.e. March 9, 2008”. Accordingly the consequential changes may be made in the revised offer document.”

The first proviso to Regulation 18(2) mandates that if the Board specifies changes in the letter of offer, “the merchant banker and the acquirer shall carry out such changes before the letter of offer is dispatched to the shareholders”. Feeling aggrieved by the aforesaid comments of the Board, the appellants have filed the present appeal.

5. We have heard the learned senior counsel on both sides. The primary dispute between the parties is in regard to the calculation of the offer price. The Board wants the price to be calculated in terms of Regulation 20(4) read with Regulation 20(12) and the date of public announcement for the parent company as March 9, 2008, the date on which the Share and Stock Purchase Agreement was executed between the first and the second appellants. The appellants, on the other hand, contend that Regulation 20(12) does not apply to the case in hand and that the price has been rightly calculated in terms of Regulation 20(4)(c) of the takeover code. Before we deal with the rival contentions of

the parties, it is necessary to refer to the relevant provisions of the takeover code which have a bearing on the issue. They are reproduced hereunder for facility of reference:-

“2.(1) In these regulations, unless the context otherwise requires:-

- (a)
- (b)
- (c)
- (o) “target company” means a listed company whose shares or voting rights or control is directly or indirectly acquired or is being acquired;

Acquisition of fifteen per cent or more of the shares or voting rights of any company.

10. 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 fifteen per cent 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.

Consolidation of holdings.

11. (1) No acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15 per cent or more but less than fifty five per cent (55%) of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him, additional shares or voting rights entitling him to exercise more than 5 per cent of the voting rights, in any financial year ending on 31st March unless such acquirer makes a public announcement to acquire shares in accordance with the regulations.

(2) No acquirer, who together with persons acting in concert with him holds, fifty-five per cent (55%) or more but less than seventy-five per cent (75%) of the shares or voting rights in a target company, shall acquire either by himself or through persons acting in concert with him any additional shares or voting rights therein, unless he makes a public announcement to acquire shares in accordance with these Regulations:

.....

(3)

Explanation.—For the purposes of regulation 10 and regulation 11, acquisition shall mean and include,—

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

Acquisition of control over a company.

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

.....

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

Appointment of a merchant banker.

13. Before making any public announcement of offer referred to in regulation 10 or regulation 11 or regulation 12, the acquirer shall appoint a merchant banker in Category I holding a certificate of registration granted by the Board, who is not an associate of or group of the acquirer or the target company.

Timing of the public announcement of offer.

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

.....

(2)

(3)

(4) In case of indirect acquisition or change in control, a public announcement shall be made by the acquirer within three months of consummation of such acquisition or change in control or restructuring of the parent or the company holding shares of or control over the target company in India.

Public announcement of offer.

15. (1) The public announcement to be made under regulation 10 or 11 or 12 shall be made in all editions of one English national daily with wide circulation, one Hindi national daily with wide circulation and a regional language daily with wide circulation at the place where the registered office of the target company is situated and at the place of the stock exchange where the shares of the target company are most frequently traded.

(2) Simultaneously with publication of the public announcement in the newspaper in terms of sub-regulation (1), a copy of the public announcement shall be,

- (i) submitted to the Board through the merchant banker,
- (ii) sent to all the stock exchanges on which the shares of the company are listed for being notified on the notice board,
- (iii) sent to the target company at its registered office for being placed before the Board of Directors of the company.

(3) Omitted

(4) The offer under these regulations shall be deemed to have been made on the date on which the public announcement has appeared in any of the newspapers referred to in sub-regulation (1).

Contents of the public announcement of offer.

16. The public announcement referred to in regulation 10 or 11 or 12 shall contain the following particulars, namely:—

- (i) the paid-up share capital of the target company, the number of fully paid-up and partly paid-up shares;
- (ii) the total number and percentage of shares proposed to be acquired from the public, subject to a minimum as specified in sub-regulation (1) of regulation 21;

- (iii) the minimum offer price for each fully paid-up or partly paid-up share;
 - (iv) mode of payment of consideration;
 - (v) the identity of the acquirer(s) and in case the acquirer is a company or companies, the identity of the promoters and, or the persons having control over such company(ies) and the group, if any, to which the company(ies) belong;
 - (vi) the existing holding, if any, of the acquirer in the shares of the target company, including holdings of persons acting in concert with him;
 - (via) the existing shareholding, if any, of the merchant banker in the target company;
 - (vii) the salient features of the agreement, if any, such as the date, the name of the seller, the price at which the shares are being acquired, the manner of payment of the consideration and the number and percentage of shares in respect of which the acquirer has entered into the agreement to acquire the shares or the consideration, monetary or otherwise, for the acquisition of control over the target company, as the case may be;
 - (viii) the highest and the average price paid by the acquirer or persons acting in concert with him for acquisition, if any, of shares of the target company made by him during the twelve months period prior to the date of public announcement;
 - (ix) the object and purpose of the acquisition of the shares and future plans, if any, of the acquirer for the target company, including disclosures whether the acquirer proposes to dispose of or otherwise encumber any assets of the target company in the succeeding two years except in the ordinary course of business of the target company:
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- (ixa) an undertaking that the acquirer shall not sell, dispose of or otherwise encumber any substantial asset of the target company except with the prior approval of the shareholders;
 - (x) the “specified date” as mentioned in regulation 19;
 - (xi) the date by which individual letters of offer would be posted to each of the shareholders;
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- (xviii) whether the offer is subject to a minimum level of acceptances from the shareholders; and
 - (xix) such other information as is essential for the shareholders to make an informed decision in regard to the offer.

Brochures, advertising material, etc.

17. The public announcement of the offer or any other advertisement, circular, brochure, publicity material or letter of offer issued in relation to the acquisition of shares shall not contain any misleading information.

Submission of letter of offer to the Board.

18. (1) Within fourteen days from the date of public announcement made under regulation 10, 11 or 12 as the case may be, the acquirer shall, through its merchant banker, file with the Board, the draft of the letter of offer containing disclosures as specified by the Board.

(2) The letter of offer shall be despatched to the shareholders not earlier than 21 days from its submission to the Board under sub-regulation (1):

Provided that if, within 21 days from the date of submission of the letter of offer, the Board specifies changes, if any, in the letter of offer (without being under any obligation to do so), the merchant banker and the acquirer shall carry out such changes before the letter of offer is despatched to the shareholders :

.....

Specified date.

19. The public announcement shall specify a date, which shall be the “specified date” for the purpose of determining the names of the shareholders to whom the letter of offer should be sent:
Provided that such specified date shall not be later than the thirtieth day from the date of the public announcement.

Offer price.

20. (1) The offer to acquire shares under regulation 10, 11 or 12 shall be made at a price not lower than the price determined as per sub-regulations (4) and (5).

(2)

(3)

(4) For the purposes of sub-regulation (1), the offer price shall be the highest of—

(a) the negotiated price under the agreement referred to in sub-regulation (1) of regulation 14;

(b) price paid by the acquirer or persons acting in concert with him for acquisition, if any, including by way of allotment in a public or rights or preferential issue during the twenty-six week period prior to the date of public announcement, whichever is higher;

(c) the average of the weekly high and low of the closing prices of the shares of the target company as quoted on the stock exchange where the shares of the company are most frequently traded during the twenty-six weeks or the average of the daily high and low of the prices of the shares as quoted on the stock exchange where the shares of the company are most frequently traded during the two weeks preceding the date of public announcement, whichever is higher:

.....
Explanation.—In case of disinvestment of a Public Sector Undertaking, the relevant date for the calculation of the average of the weekly prices of the shares of the Public Sector Undertaking, as quoted on the stock exchange where its shares are most frequently traded, shall be the date preceding the date when the Central Government or the State Government opens the financial bid.

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(12) The offer price for indirect acquisition or control shall be determined with reference to the date of the public announcement for the parent company and the date of the public announcement for acquisition of shares of the target company, whichever is higher, in accordance with sub-regulation (4) or sub-regulation (5).”

6. From the rival contentions of the parties the question that arises for our consideration is whether Regulation 20(12) is applicable to the indirect acquisition of the target company by the appellants. Regulation 20 deals with the offer price. It lays down that the offer to acquire shares under Regulations 10, 11 or 12 has to be made at a price not lower than the price determined as per sub-regulations (4) and (5). We are concerned

with sub-regulation (4) only as the shares of the target company are most frequently traded on BSE. Sub-regulation (4) prescribes three different modes in clauses (a), (b) and (c) for determining the offer price and the highest of the three shall be the offer price. We are really concerned with clause (c) according to which the average of the weekly high and low of the closing prices of the shares of the target company as quoted on the stock exchange during the 26 weeks preceding the date of public announcement is to be worked out and again, the average of the daily high and low prices during the two weeks preceding the date of public announcement also has to be worked out and the higher of the two shall be the offer price. In the case before us, the average of the daily high and low prices of shares of the target company during the two weeks preceding the date of public announcement which was higher came to Rs.1656.15. Accordingly, the appellants fixed Rs.1657 per share as the offer price in the public announcement which is even higher than the highest price worked out as per the parameters prescribed by sub-regulation (4). Sub-regulation (12) of Regulation 20, however, prescribes the method of determining the offer price for indirect acquisition. When we examine this sub-regulation, it becomes clear that the offer price is first to be determined with reference to the date of the public announcement for the parent company and thereafter the same has to be determined with reference to the date of public announcement for the acquisition of shares of the target company and whichever of the two is higher in accordance with sub-regulation (4) shall be the offer price. Regulation 20(12) pre-supposes that when the parent company gets acquired, the takeover code would get triggered and a public announcement made. If it does not get triggered and no public announcement is made, sub-regulation 12 shall not apply. In the instant case, no public announcement was made when the parent company, namely, the second appellant was acquired by the first appellant and none was required to be made because the parent company is an unlisted company and does not fall within the meaning of the “target company” as defined in the takeover code. In other words, the takeover code did not get triggered when the second appellant was acquired by the first appellant. Another reason why the takeover code did not apply to the acquisition of the second appellant is that the acquisition took place outside India. It is a different matter that the acquisition outside India had the effect of indirect acquisition of the target company in India. It is this indirect acquisition which

triggered the takeover code for the first time and the appellants came out with a public announcement on December 17, 2008. This being the position, the offer price in regard to the date of public announcement with reference to the parent company (the second appellant) could not be worked out and sub-regulation (12) of Regulation 20 would not apply. One instance that comes to mind as to when sub-regulation (12) would apply is where the parent company is an Indian listed company. What is contended by Shri J.J. Bhatt, the learned senior counsel appearing for the Board is that sub-regulation (12) of Regulation 20 is applicable to the indirect acquisition in question and that the words “public announcement” as used therein with reference to the parent company would mean the act of making known publicly the acquisition of the second appellant and this, according to the learned senior counsel, was made known on March 9, 2008 when the Share and Stock Purchase Agreement was executed between the first and the second appellants. It is argued that the Board was right in asking the appellants to work out the offer price of the shares of the target company by treating March 9, 2008 as the date of public announcement with reference to the parent company (the second appellant). We cannot accept this argument. The words “public announcement” appear twice in sub-regulation (12) of Regulation 20. First, with reference to the parent company and then with reference to the acquisition of shares of the target company and in the context in which they appear they must carry the same meaning. Even though these words have not been defined in the takeover code, they have a specific connotation and cannot mean a mere intimation of the acquisition to the general public. A public announcement is an announcement made in newspapers by the acquirer primarily disclosing his intention to acquire shares of the target company from the existing shareholders by means of an open offer. Before a public announcement can be said to have been made for the purposes of the takeover code, the various provisions thereof quoted hereinabove have to be complied with. It has to be published in English, Hindi and vernacular newspapers having wide publicity and they have to be sent to all the stock exchanges where the shares of the target company are listed and the offer is said to have been made only on the date when the public announcement appears in the newspaper(s). This apart, the contents of the public announcement have to contain all the particulars mentioned in Regulation 16 giving details of the paid up share capital of the target company, the percentage of the shares

proposed to be acquired from the public, the minimum offer price, mode of payment of consideration, the identity of the acquirers and their holding in the target company. All these and many other details have to be mentioned in the public announcement. The takeover code requires that the public announcement should not contain any misleading information and that it is to be made within the time specified. It has also to specify a date called “specified date” for the purpose of determining the name of shareholders to whom the letter of offer is to be sent. It, thus, follows that a public announcement has to meet all the requirements of the takeover code. Since no public announcement was made nor was any required to be made when the second appellant was acquired by the first appellant outside India, the date on which the Share and Stock Purchase Agreement was executed between the two appellants cannot be taken as the date of public announcement for the purposes of the takeover code. Even if one were to assume (though we are holding to the contrary) that mere intimation of acquisition to the general public amounts to public announcement, March 9, 2008 can never be the date of such intimation. On that date, only the Share and Stock Purchase Agreement was executed between the first and the second appellants and that by itself does not mean intimation to the public. The intimation of the takeover was given to the public through the BSE only on March 11, 2008 when it was informed about the agreement and not on March 9, 2008. Looked at from any angle, the direction of the Board to treat March 9, 2008 as the date of public announcement with reference to the second appellant cannot be sustained. In the result, it has to be held that Regulation 20(12) of the takeover code does not apply to the indirect acquisition of the target company and that the appellants were right in calculating the offer price in terms of Regulation 20(4)(c) which alone is applicable to the case in hand.

7. Before concluding, we may deal with M.A. no.6 of 2009 filed by one Mrs. Damayanti P. Desai who is a shareholder of the target company and holds 500 equity shares. The prayer made in the application is that she be allowed to intervene in the matter as she is interested in the offer price, being a shareholder of the target company. This application was heard alongwith the main appeal. The applicant wants March 11, 2008 as the date of public announcement with reference to the parent company. Her contention cannot be accepted. March 11, 2008 is the date when the appellants informed the BSE regarding the Share and Stock Purchase Agreement

executed on March 9, 2008. This date could, at the most be taken as the date on which the general public in India had been informed through the BSE but this date cannot be the date of public announcement with reference to the parent company. As already observed, no public announcement was made when the parent company was acquired outside India. We have already held that Regulation 20(12) does not apply to the indirect acquisition of the target company. In this view of the matter, the claim made by the applicant has to be rejected.

For the reasons recorded above, the appeal is allowed and the direction of the Board contained in para 5(a) of its letter dated February 6, 2009 set aside. There is no order as to costs.

Sd/-
Justice N.K.Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

05.08.2009

Prepared and compared by
RHN