

BEFORE THE SECURITIES APPELLATE TRIBUNAL
MUMBAI

Appeal No. 172 of 2010

Date of decision: 29.10.2010

1. ALSTOM Sextant 5
having its registered office at
3, Avenue Andre Malraux,
92300, Levallois – Perret,
France.
2. ALSTOM Holdings
having its registered office at
3, Avenue Andre Malraux,
92300, Levallois – Perret,
France.
3. Schneider Electric Industries SAS
having its registered office at
35, Rue Joseph Monier,
92500 Rueil-Malmaison,
France.
4. Schneider Electric Services International
having its registered office at
5, Place du Champs de Mars,
Tour Bastion, 14th Floor,
1050 Brussels,
Belgium.
5. Schneider Electric India Private Limited
having its registered office at
9th Floor, DLF Building No.10,
Tower C, DLF Cyber City, Phase II,
Gurgaon – 122 002.
Haryana, India.
6. T&D Holding SA
(formerly known as AREVA T&D Holding SA),
having its registered office at
3, Avenue Andre Malraux,
92300, Levallois – Perret,
France.
7. AREVA T&D SAS
having its registered office at
1, Place Jean Millier,
TOUR AREVA, 92084,
PARIS-LA DEFENSE,
France.

8. Long & Crawford Ltd.,
having its registered office at
St. Leonards Avenue,
ST17 4LX Stafford,
Great Britain.

..... Appellants

Versus

The Securities and Exchange Board of India
SEBI Bhavan, Plot No. C4-A, "G" Block,
Bandra Kurla Complex, Bandra (East),
Mumbai – 400 051.

..... Respondent

Mr. Soli Cooper, Senior Advocate with Mr. Tejas Karia and
Mr. Nitesh Jain, Advocates for Appellants.

Mr. Kumar Desai with Ms. Harshada Nagare, Advocates for the Respondent.

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

Per : Justice N.K. Sodhi, Presiding Officer

In this appeal we are concerned with the indirect acquisition of AREVA T&D India Limited, a listed company in India which is the target company. It is being indirectly acquired on the global acquisition in France of the parent company namely, T&D Holding SA (formerly known as AREVA T&D Holding SA) which has its registered office in France and is appellant no. 6 before us. AREVA T&D SAS, France and Long & Crawford Ltd., Great Britain, appellants no. 7 and 8 are the wholly owned subsidiaries of the parent company. The parent company and its two subsidiaries are the promoters of the target company and they together hold 72.18 per cent of its subscribed and paid-up share capital.

2. AREVA SA, a company with its registered office in Paris (France) (for short the seller) is selling its stake in the parent company and it conducted a competitive open bidding process for the transfer of its global transmission and distribution electrical business. The bidders were required to respond with their indicative offers by September 18, 2009. ALSTOM Holdings, appellant no.2 and Schneider Electric

Industries SAS, appellant no.3 together submitted an indicative offer for acquiring the business of the seller. These two appellants formed a Consortium and set up ALSTOM Sextant 5, the first appellant before us as a Special Purpose Vehicle for acquiring the stake of the seller. Apart from the Consortium, there were several other bidders. The seller short listed three bidders namely, the Consortium, General Electric and Toshiba/Innovation Network Corporation of Japan and they were required to respond to the seller with a final offer which they did. After holding discussions with the three short listed bidders, the Supervisory Board of the seller decided on November 30, 2009 to enter into exclusive negotiations with the Consortium for the proposed transaction and to finalize the share purchase agreement. After deciding to have exclusive negotiations with the Consortium, both the seller and the Consortium came out with their separate press releases on November 30, 2009 itself making it known that they were entering into exclusive negotiations for the transaction. The relevant portion of the press release issued by the Consortium reads as under:

“The Areva Supervisory Board on 30 November 2009 has announced its decision to enter into exclusive negotiations with Alstom and Schneider Electric for the acquisition of the activities of its transmission and distribution business, Areva T&D.

Schneider Electric and Alstom are satisfied with the decision of Areva to retain their offer for exclusive negotiations. The aim of these negotiations is to finalise the disposal agreement which should ultimately need the approval of the “Commission de la Participation et des Transferts”, the view of employee representatives and the agreement of the competition authorities.”

The press release issued by the seller also disseminated the same information and the relevant part is as under:

“AREVA’s Supervisory Board met on November 30, 2009 to examine the bids. After review, the Supervisory Board asked the Executive Board to begin exclusive negotiations with Alstom/Schneider.

The consortium offered 2.29 billion euros in equity value, i.e. 4.09 billion euros in enterprise value. The bid does not include any requirement for a seller’s warranty but includes a buyer’s commitment to maintain all European sites for a 3-year period.”

It is not in dispute that the Consortium extended on November 30, 2009 its revised final offer and agreed to keep it open till June 30, 2010. After holding negotiations and obtaining opinion from the Works’ Council and having completed the other formalities,

the seller and the Consortium executed a Share Purchase Agreement (SPA) on January 20, 2010 by which the first appellant agreed to acquire 100 per cent of the issued share capital and voting rights of the seller in the parent company for an aggregate purchase price of two billion and two hundred and ninety million Euros. The global acquisition of the parent company was announced on this day. On the signing of the SPA, the first appellant acquired not only the parent company but also indirectly the target company in which the parent company along with its wholly owned subsidiaries were holding 72.18 per cent of its share capital. It is this indirect acquisition of the target company that triggered the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (hereinafter referred to as the takeover code).

3. Regulation 10 read with Regulation 12 of the takeover code provides that an acquirer who acquires 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 him to exercise 15 per cent or more of the voting rights in a company or acquires control over the target company shall make a public announcement to acquire further shares in that company in accordance with the takeover code. Since the first appellant on behalf of the Consortium had acquired shares of the target company in excess of the threshold limit, it, acting in concert with others, made a public announcement on May 28, 2010 through the merchant banker namely, DSP Merrill Lynch Ltd. On June 11, 2010 the merchant banker on behalf of the acquirer(s) submitted a draft letter of offer to the Securities and Exchange Board of India (for short the Board) for its comments making all the necessary disclosures. The price of the shares that were offered to the public shareholders was Rs.295.34 per share which was worked out in terms of Regulation 20(4) read with Regulation 20(12) of the takeover code. This offer price was justified in para 5 of the draft letter of offer on the ground that it was the highest of the following:

A	The negotiated price	NA
B1	The highest price paid by the Acquirer and Persons Acting in Concert for acquisition of Shares during the 26 (twenty six) week period prior to May 28, 2010.	NA

B2	The average of the weekly high and low of the closing prices of the Shares on NSE during the 26 (twenty six) week period prior to may 28, 2010.	Rs.278.18
B3	The average of the daily high and low of the prices of the Shares on NSE during the 2 (two) week period prior to May 28,2010.	Rs.248.17
C1	The highest price paid by the Acquirer and Persons Acting in Concert for acquisition of Shares during the 26 (twenty six) week period prior to January 20, 2010, i.e. the date on which the Global Acquisition was announced.	NA
C2	The average of the weekly high and low of the closing prices of the Shares on NSE during the 26 (twenty six) week period prior to January 20, 2010, i.e. the date on which the Global Acquisition was announced.	Rs.295.33
C3	The average of the daily high and low the prices of the Shares on NSE during the 2 (two) week period prior to January 20, 2010, i.e. the date on which the Global Acquisition was announced.	Rs.280.21

It will be seen that the appellants had worked out the offer price with reference to May 28, 2010, the date on which the public announcement was made to the shareholders of the target company and also with reference to January 20, 2010, the date on which the parent company was acquired on the signing of the SPA and higher of the two has been offered to the shareholders. Subsequent to the filing of the draft letter of offer, the appellants through the merchant banker had several discussions with the Board on the issue of calculation of the offer price. The Board was of the view that the acquirer(s) “agreed to acquire” the business of the parent company on November 30, 2009 though the formal agreement was executed only on January 20, 2010 and, therefore, the offer price ought to have been calculated with reference to this date as well. In its comments on the draft letter of offer, the Board has finally observed as under;

“OFFER PRICE:

- a. As regards the date of public announcement for the parent acquisition under regulation 20(12), it is noted from the facts of the case that on November 30, 2009, Alstom/Schneider (acquirers) were selected by Areva S.A. for exclusive negotiations for the sale of its transmission and distribution business. Simultaneously, by press release dated November 30, 2009, the acquirers announced that they were satisfied with the decision of Areva S.A. (parent company) to retain their offer for exclusive negotiations. It was clearly stated in the press release that the aim of those negotiations was to finalize the disposal agreement.

It is therefore observed that the acquirers “agreed to acquire” the business of the parent company on November 30, 2009, though the formal agreement was executed only on January 20, 2010. Since the relevant regulations are triggered on agreement to acquire the parent company in case of indirect acquisitions, the reference date for the purpose of regulation 20(12) in the instant case should be November 30, 2009, and not January 20, 2010.

- b. It is further noted that since the completion of the primary acquisition in the instant case happened on June 7, 2010, the public announcement should have been made, as per regulation 14(4), within three months of this date, i.e. between June 7, 2010 and September 7, 2010, and not on May 28, 2010. Therefore, June 7, 2010, being the earliest date on which the public announcement could have been made as per the SAST Regulations, should also be taken as one of the reference dates for computation of offer price.
- c. In view of the above, you are advised to re-compute the offer price in accordance with regulation 20(4), taking into account the following three reference dates –
 - November 30, 2009;
 - May 28, 2010; and
 - June 7, 2010

The highest price arrived at based on the aforesaid three reference dates shall be the offer price for the instant offer.

- d. Suitably modify Para 5 in line with the above.”

What is relevant to note is that the Board has directed the appellants to work out the offer price of the shares with reference to three dates namely, November 30, 2009, May 29, 2010 and June 7, 2010. Feeling aggrieved by this direction, the appellants have filed the present appeal.

4. We have heard Mr. Soli Cooper, learned senior counsel for the appellants and Mr. Kumar Desai, learned counsel for the Board who have taken us through the records of the case. The sole question that arises for consideration is whether the appellants are required to work out the offer price with reference to the three dates referred to by the Board in the impugned communication. According to the appellants they are required to work out the offer price for the indirect acquisition of the target company with reference to the date of the public announcement of the parent company and again with reference to the date of the public announcement for acquisition of shares of the target company and offer the higher of the two prices to the shareholders. The Board, on the

other hand, contends that the appellants agreed to acquire the business of the parent company on November 30, 2009 and since the takeover code got triggered on this date, the offer price needs to be worked out with reference to this date as well.

5. There is no gainsaying the fact that the target company was indirectly acquired on the global acquisition of the parent company and it is for this indirect acquisition that we need to work out the price of the shares to be offered to the public shareholders of the target company. Regulation 20 of the takeover code deals with offer price both for direct as well as indirect acquisition. The relevant parts of this Regulation which concern us are reproduced hereunder for facility of reference:

“Offer price.

20.(1) The offer to acquire shares under regulation 10, 11 or 12 shall be made 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:

[Provided that the requirement of average of the daily high and low of the closing 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, shall not be applicable in case of disinvestment of a Public Sector Undertaking.]

Explanation

.....
.....

(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).”

A reading of the aforesaid provisions would make it clear that offer price for indirect acquisition, as in the case before us, has to be determined in terms of Regulation 20(12) with reference to the date of the public announcement for the parent company and also with reference to the date of the public announcement for acquisition of shares of the target company and the higher of the two as worked out in accordance with sub-regulation (4) would be the offer price. In other words, the only two dates that are relevant for the purpose of determining the offer price for indirect acquisition is the date of the public announcement of the parent company and the date of public announcement for the acquisition of shares of the target company. This Regulation does not envisage any other date. However, to work out the offer price even with reference to these two dates, we have to work out the highest of the price according to the mode prescribed in sub-regulation (4) of Regulation 20. This sub-regulation 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. When we read Regulation 20(12) with Regulation 20(4) it becomes clear that the offer price has to be worked out according to the three different modes prescribed in sub-regulation (4) with reference to the two dates mentioned in sub-regulation (12) and the highest of all shall be the offer price.

6. From the rival contentions of the parties as noticed above, we need to examine whether November 30, 2009 is a relevant date for the purpose of determining the offer price. According to the learned senior counsel for the appellants, it is not and we are in agreement with him for the reasons that follow. It must be noted that the announcements made by the Consortium and the seller in their press releases of November 30, 2009, the relevant portions of which have been reproduced hereinabove, merely notified to the public that they were entering into exclusive negotiations for the acquisition of the parent company. It is clear from the press releases that no agreement was reached between them on that date and the parties in fact only agreed to negotiate in an exclusive manner in order to reach a final agreement for the proposed sale. Mr. Cooper was right in contending that the press releases did not amount to an announcement of the global acquisition of the parent company. How could these

announcements amount to a concluded contract between the parties for the takeover of the parent company when one of the parties namely, the Consortium had admittedly extended its offer on that day to keep the negotiations open till June 30, 2010? There is yet another reason why we cannot hold that there was a concluded contract for the takeover of the parent company on November 30, 2009. According to the French laws, the parties were required to inform and consult their respective Works' Councils, which are similar to labour unions in India, before entering into any SPA. This consultation process had yet to commence and, therefore, the parties were not in a position to enter into any definitive agreement. Further, the Works' Councils could have called for further information before giving their opinions on the acquisition and could have even opposed the transaction. While such opposition, if any, would not have constituted a prohibition on entering into an agreement once the consultation process was complete, the parties could have reconsidered the feasibility of entering into an agreement if there was an opposition.

7. Mr. Kumar Desai, learned counsel for the Board strenuously argued that since the Consortium and the seller had agreed on the price of the business to be taken over by the acquirer, the announcements made on November 30, 2009 should be taken as a concluded contract between the parties on which date the parent company had been taken over and, therefore, the Board was right in directing the appellants to work out the offer price with reference to this date as well. We cannot accept this argument. Price of the business is, no doubt, one of the essential ingredients of a concluded contract but surely that is not the only one. The press releases made on November 30, 2009 do not constitute a fully negotiated document as they did not include several disclosure schedules and other clauses that were yet to be negotiated and agreed. Since the SPA was executed between the parties on January 20, 2010, we cannot but hold that a legally binding and concluded contract for taking over the parent company came into existence only on that date. It was on this date that the global acquisition of the parent company was also announced. We are, therefore, satisfied that November 30, 2009 cannot be considered as a reference date for calculating the offer price as on that date there was no

agreement to acquire the parent company and there was only an intention to try and reach an agreement in that regard.

8. Apart from November 30, 2009, the Board has also directed the appellants to workout the offer price with reference to June 7, 2010. The appellants have objected to this date as well. However, during the course of the hearing, the learned senior counsel appearing for the appellants did not press this plea since this date had no financial implications for the appellants. Since this plea has been given up, it is not necessary for us to examine this issue any further.

9. As a result of the aforesaid discussion, we hold that the Board was in error in directing the appellants to recalculate the offer price with reference to November 30, 2009. This date shall be ignored and the parties to proceed further in accordance with law. The appeal is disposed of accordingly with no order as to costs.

Sd/-
Justice N. K. Sodhi
Presiding Officer

Sd/-
Samar Ray
Member

Sd/-
P.K. Malhotra
Member

29.10.2010

Prepared and compared by-ddg/-