

COMPETITION COMMISSION OF INDIA

20th March 2012

Form III Registration No. C-L/2011/12/03

1. On 30th December, 2011, the details of acquisition under sub-section (5) of Section 6 of the Competition Act, 2002 (hereinafter referred to as “Act”) in Form III under Regulation 6 of the Competition Commission of India (Procedure in regard to transaction of business relating to combinations) Regulations, 2011, (hereinafter referred to as “Combination Regulations”) were received by the Competition Commission of India (hereinafter referred to as “Commission”) along-with an application requesting for condonation of delay.
2. The details of acquisition were filed by GS Mace Holdings Ltd. (hereinafter referred to as “Acquirer”), a Mauritius based sub-account of Goldman Sachs & Co. which is a Foreign Institutional Investor (hereinafter referred to as “FII”) registered with Securities and Exchange Board of India under SEBI (Foreign Institutional Investors) Regulations, 1995, for acquisition of shares of Max India Ltd. (hereinafter referred to as “Max”).
3. The details of acquisition filed in Form III relate to the acquisition of 6.499 per cent of the issued and paid-up equity share capital of Max. The said acquisition was made by the acquirer on the National Stock Exchange on 13th December 2011. Prior to the said acquisition, Xenok Ltd., a Cyprus based company and an affiliate of the acquirer, pursuant to an investment agreement dated 25th February 2010, had acquired 9.101 per cent of the issued and paid-up equity share capital of Max. Also, 0.002 per cent of the issued and paid-up equity share capital of Max is held by an Indian affiliate of the acquirer. Therefore, after the said acquisition of shares in Max, the aggregate shareholding of the acquirer, along with its affiliates, had increased to 15.602 per cent of the issued and paid-up equity share capital of Max.
4. The Commission in its Ordinary Meeting held on 17th January, 2012 considered the details of acquisition filed by the acquirer in Form III and decided that a letter be sent



to the acquirer directing them to either provide a copy of the loan or investment agreement executed in respect of the said acquisition, or otherwise provide clarification as to why in respect of the said acquisition, the details of acquisition were filed in Form III under sub-section (5) of Section 6 instead of filing a notice of the proposed combination under sub-section (2) of Section 6 of the Act. A letter was accordingly sent to the acquirer on 18th January, 2012.

5. In its reply dated 25th January, 2012 and 22nd February, 2012, the acquirer, *inter alia*, provided a copy of the contract note issued by the stock broker and stated that the contract note provided by a stock broker to an FII in relation to the acquisition of shares on the stock exchange under the Portfolio Investment Scheme (“PIS”) is the investment agreement for the purposes of sub-section (4) of Section 6 of the Act, being the agreement evidencing the investment in shares by the FII. Further, the investments by FIIs under PIS are merely financial investments and are not intended to obtain rights beyond limited voting rights.
6. The Commission in its Ordinary Meeting held on 20th March, 2012 considered the response submitted by the acquirer along with the details of the acquisition filed in Form III and observed that the provisions of sub-section(4) of Section 6 of the Act apply to share subscription or financing facility or any acquisition by a public financial institution, foreign institutional investor, bank or venture capital fund, only if it is made pursuant to any covenant of a loan agreement or investment agreement. The contract note, stated by the acquirer to be the investment agreement for the purposes of sub-section (4) of Section 6 of the Act, is issued by a stock broker in terms of the National Stock Exchange (Capital Market) Trading Regulations, 1994, confirming the execution of trade on the stock exchange by the stockbroker on behalf of and as per the instructions of the buyer/ seller of the securities. The contract note is more in the nature of a receipt issued by the stock broker to its client, and is indicative of an agent- principal relationship between the broker and the client, rather than an investor-investee relationship which would be expected in case of an investment agreement. Further, the contract note is issued by the stock broker subsequent to the execution of trade on the stock exchange. Therefore, for the above-mentioned reasons, for the purposes of provisions of sub-section (4) of Section 6 of the Act, the contract



note cannot be considered to be an investment agreement.

7. From the facts of the case and the details provided by the acquirer, it is observed that as the said acquisition was not pursuant to any loan or investment agreement and also exceeded 15 per cent of the issued and paid up equity share capital of Max, neither the provisions of sub-section (4) of Section 6 and sub-section (5) of Section 6 of the Act apply to the present case nor the said acquisition could be said to be covered under the provisions of Regulation 4 read with Para 1 of Schedule 1 of the Combination Regulations as in force at the time of the acquisition. Therefore, in respect of the said acquisition, the notice ought to have been filed by the acquirer under sub-section (2) of Section 6 of the Act, prior to the acquisition of shares. As the acquirer has filed details of acquisition under sub-section (5) of Section 6 of the Act, there is a failure to give notice to the Commission under sub-section (2) of Section 6 of the Act.
8. Further, it is noted that according to the Combination Regulations as amended on 23rd February, 2012, an acquisition as specified in Para 1 of Schedule 1 thereof which does not entitle the acquirer to hold 25 percent or more of the total shares or voting rights of the company, is ordinarily not likely to cause an appreciable adverse effect on competition in India and now, in respect of such acquisition, the notice under sub-section (2) of Section 6 of the Act need not normally be filed.
9. In view of the forgoing, considering the facts of the case and the details of the acquisition filed by the acquirer, the Commission is of the opinion that the combination is not likely to have an appreciable adverse effect on competition in India. Therefore, the Commission decided to note the details of the said acquisition and not to call for the notice in Form II under the provisions of Regulation 8 of the Combination Regulations.
10. Considering the facts and circumstances of the case coupled with the fact that this being the first year of implementation of the provisions relating to combinations in the Act, the Commission also decided not to initiate proceedings for imposition of penalty under Section 43A of the Act for failure to file notice under sub-section (2) of Section 6 of the Act.



11. The Secretary is directed to communicate to the acquirer accordingly.



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