

SEBI Order: AstraZeneca Pharma and the Elliott Group

In connection with a proposed delisting of shares of AstraZeneca Pharma India Limited (“**AZPIL**”) in 2014, the SEBI recently issued an order dated June 5, 2020 under Sections 11(1), 11(4) and 11B of the Securities and Exchange Board of India Act, 1992, holding that:

- (i) AstraZeneca Pharmaceuticals AB Sweden (“**AZPAB**”), the promoter of AZPIL, and the Elliott Group (a group of related foreign institutional investors that collectively held a significant shareholding in AZPIL) colluded with each other to get the shares of AZPIL delisted and influence the delisting price of such shares without considering the interests of the retail shareholders of AZPIL; and
- (ii) The conduct of AZPAB and the Elliott Group amounted to a manipulative and fraudulent trade practice under the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Practice Relating to Securities Market) Regulations, 2003 (“**PFUTP Regulations**”).

The SEBI questioned the conduct of AZPAB and the Elliott Group and concluded that there existed a ‘meeting of minds’ between AZPAB and the Elliott Group prior to the delisting announcement.

SEBI proceedings in relation to the proposed delisting have been ongoing since 2014 and there have been other orders issued in the past. The proposed delisting has not occurred. Although the SEBI order concluded that there had been a violation of the regulations, no monetary or other serious penalties were imposed and the SEBI order only censured AZPAB and the Elliott Group and directed them to refrain from indulging in such practices in the future.

As background, delisting under the then-existing Securities and Exchange Board of India (Delisting of Equity Shares) Regulations, 2009 (“**Delisting Regulations**”)

required the active participation of the public shareholders (i.e., the non-promoter (non-controlling) shareholders). Shareholder approval for a delisting includes the requirement that the votes cast by the public shareholders in favor of the proposal should be at least twice the number of votes cast against such proposal (the shareholding of the promoters and promoter group does not count in such vote). A delisting was successful only if the total shareholding of the promoters (along with persons acting in concert) after the offer reached the higher of (i) 90% of the total issued capital and (ii) the aggregate percentage of pre-offer promoter shareholding (along with persons acting in concert) plus half the offer size.¹ Also, importantly, the delisting offer price was determined under the “reverse book building” process (“**RBB process**”) pursuant to which the final offer price would be the price at which the maximum number of equity shares were tendered by the public shareholders (which price the promoter was free to accept or reject).² Therefore, public shareholders holding a large number of shares played a crucial role in the discovered price and a successful delisting. Although some of these regulations were amended in 2015 and 2018, the role of large public shareholders continues to be important and a promoter seeking to delist the shares of a listed Indian company needs to consider whether the large public shareholders would be supportive of such transaction.

A brief summary of the SEBI order is set out below:

CONDUCT OF AZPAB AND THE ELLIOTT GROUP

Elliott Group’s acquisition of AZPIL shares and its vote in support of the delisting resolution

In May 2013, the Elliott Group acquired 14.10% of the equity shareholding of AZPIL in a secondary offer for sale through the stock exchange mechanism (**OFS**) carried out by AZPAB. Subsequent to the OFS, between May 2013 and September 2013, the Elliott Group purchased an additional 1.42% shares of AZPIL from the open market. The SEBI order noted that the Elliott Group did not have any exposure in AZPIL prior to the OFS, and the Elliott Group had stated that there was market speculation that

¹ Under the current Delisting Regulations, a delisting offer is deemed successful only if (i) the post-offer promoter shareholding (along with the persons acting in concert) reaches 90% of the total issued shares and (ii) at least 25% of the public shareholders as on the date of the board meeting approving the delisting proposal participate in the RBB process. The requirement in (ii) above does not apply in certain specified circumstances.

² Under the current Delisting Regulations, the final offer price is the highest price at which the promoter (along with persons acting in concert) achieves the threshold limit of 90% of the total issued shares. Further, in addition to the right to reject the offer, the promoter now also has a right to make a counter-offer to the public shareholders if the discovered price is not acceptable to such promoter as long as such counter-offer is not less than the book value of the company.

AZPAB would again seek to delist AZPIL (it had made two previous failed attempts that were publicly disclosed). Also, in the past, the Elliott Group had supported the delisting of another Indian company. The SEBI order observed that an inference could be drawn from the above facts that the Elliott Group's decision to purchase the additional 1.42% shares of AZPIL after the OFS (which took its aggregate shareholding in AZPIL to 15.52%) was prompted by a motive to play a decisive role in influencing the delisting process that may be initiated by AZPAB in the near future.

The SEBI order observed that the post-OFS shareholding of the Elliott Group in AZPIL assumed significance, as it held 15.52% of the total public shareholding of 25% (with AZPAB holding the remaining 75%). This was important as it allowed AZPAB to obtain shareholder approval and achieve the desired threshold of 90% for a successful delisting. Allegations on fraudulent conduct in the acquisition of shares in the OFS itself were found to be without substance and the focus was on the conduct of the parties after the completion of the OFS.

Communications/meetings by AZPAB and the Elliott Group

The SEBI order examined certain emails/communications, including with the merchant bank that acted as the seller's broker for the OFS and the merchant banker for the delisting offer. It also examined internal reports and details of certain calls and meetings between representatives of AZPAB and the Elliott Group and others during the period between April 2013 (immediately prior to the OFS) and February 2014 (immediately prior to the announcement to delist the shares of AZPIL). These communications included requests from AZPAB to the merchant banker on internal rate of return (*IRR*) calculations to buy-out the shareholders of AZPIL; internal AZPAB emails that referred to the Elliott Group's intention to sell AZPIL shares short term, its IRR expectation and that AZPAB would need to negotiate price, and described the Elliott Group as a "willing seller sufficient to achieve delisting"; and AZPAB's internal calls and to the representative of the Elliott Group to inform them of AZPAB's forthcoming announcement to delist AZPIL.

Based on the sequence of events, communications and meetings, the SEBI concluded that after the OFS, AZPAB and the Elliott Group were engaged in discussions and negotiations to ensure a successful delisting on the basis of a mutually arrived best possible price or range of prices, prior to the delisting announcement. The SEBI order concluded that the entire mechanism of negotiations between AZPAB and the Elliott Group constituted a scheme to defraud the other minority shareholders and such scheme was employed to fraudulently circumvent the price discovery through the RBB process mandated under the Delisting Regulations.

SEBI ACTION

AZPAB and the Elliott Group

The SEBI order noted that while AZPAB and the Elliott Group had engaged in manipulative and fraudulent trade practice in violation of the provisions of the PFUTP Regulations, pursuant to a court order, AZPIL had been restrained from completing the delisting process and therefore the fraudulent scheme of AZPAB and the Elliott Group had not fructified. It also noted that subsequently the Elliott Group had sold its shareholding in AZPIL through the open market. Accordingly, since the actions of AZPAB and the Elliott Group did not result in any injury to the minority shareholders of AZPIL, the SEBI only censured AZPAB and the Elliott Group and directed them to refrain from indulging in such practices in the future.

Role of the Merchant Banker

While the SEBI order relied on certain correspondence exchanged with representatives of the merchant banker in support of the allegation that discussions and negotiations were underway between AZPAB and the Elliott Group in relation to the delisting price, the SEBI did not take any action against the merchant banker. The SEBI rejected objections by the noticees that action should also have been taken against the merchant banker as it was also involved in the discussions.

CONCLUSION

The SEBI order is a reminder that listed Indian companies and their promoters considering a delisting, together with their advisers, should exercise caution while communicating or interacting with any non-promoter shareholder during the delisting process to avoid any possibility or perception of communication of any unpublished price sensitive information or any collusive or manipulative conduct.

*This insight has been authored by **Sandip Bhagat** (Partner) and **Juhi Singh** (Partner). They can be reached on sbhagat@snrlaw.in and jsingh@snrlaw.in for any questions. This insight is intended only as a general discussion of issues and is not intended for any solicitation of work. It should not be regarded as legal advice and no legal or business decision should be based on its content.*

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