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**A NOTE ON TENDERING SHARES IN OPEN OFFERS: ANALYSIS
WITHIN LEGAL PERSPECTIVES**

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ABSTRACT

Open offers are offers made by companies to public shareholders in order to raise cash for their respective corporations. The shares are sold at a price lower than the actual market price generally in order to raise funds. This research work deals with the concept of open offers and the ways shares of a stock are tenders thereto. This research commences with the explanation of the concept of open offers. This section explains in detail the concept of open offers in the stock market so that even a layman can understand. Then, PACs have been explained in relation to open offers.

This research also comprehensively deals with the pertinent topics like the needs and types of an open offer. These sections add more clarification to the topic under consideration. Within the section on types of open offers, mandatory and voluntary open offers have been discussed. These are the two forms of open offers. The ways of functioning of open offer in India have been discussed in the section that follows the types of open offers. Extensive legal analysis has been done by discussing in detail about Securities and Exchange Board of India (SEBI) and Takeover Code. This section specialised the legal purview of this topic and stands out from a solely economic viewpoint. The final section discusses two very important cases that prevented the unscrupulous use of open offers and precluded some people from exploiting the loopholes of the Indian financial system. This section also added to the legal analysis of the topic under research and concluded this research work.

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INTRODUCTION

There's a famous dialogue in the iconic movie "GodFather" that says "I'm going to make him an offer he can't refuse". Surely, the Acquirers are not Marlon Brando and a deal when made can be declined relying upon how rewarding it is. Trading offers is everything viewed as a brand name market trademark. The acquirers purchase their course into an affiliation giving impact on their takeover goals. Getting and takeovers are similarly utilised terms yet one is somewhat not comparable to the following. Takeovers not at all like acquisitions shouldn't for even a moment mess around with the consent of a top authoritative staff. The ordinary takeovers are finished by procuring a greater part stake in the affiliation. These days attributable to the rehash of associations and acquisitions the fundamental of specific guidelines has become possibly the primary part and that is the place where SEBI the Securities and Exchange Board of India applies its powers.²

WHAT IS AN OPEN OFFER?

Open offer is a piece of the takeover code as portrayed by the SEBI's SAST (Substantial Acquisition of Shares and Takeover) Regulation. As shown by SAST Regulation, when an association gets up to 15 percent stake in another recorded substance, an open arrangement gets set off. This suggests the getting association should make a proposition to existing financial backers to buy an additional 20 percent stake in the association. Besides, it is typically saved open for about a month, from the date of statement. It is highlighted giving the financial backers a leave decision, as there may be an organisation change post-getting and monetary supporters may see likely risks in the business. For example, After the request from the main assemblage of Satyam Computer Services, the Securities and Exchange Board of India (Sebi) has decided to modify the rule on assessing an open recommendation. Larsen and Toubro have bought more than 12% stake in Satyam.³⁴

² Esha Barua, Open offer process road map under takeover code, IPleaders (last visited on December 30, 2021 at 08:48 AM) <https://blog.ipleaders.in/open-offer-process-road-map-takeover-code>

³ Anand Rawani, Guidebook: What is an Open Offer? The Economic Times (last visited on December 30, 2021 at 10:39 AM) <https://economictimes.indiatimes.com/money-you/guidebook-what-is-an-open-offer/articleshow/4130211.cms?from=mdr>

⁴ James Chen, Open Offer; reviewed by Gordon Scott, investopedia.com (last visited on December 30, 2021 01:36 PM) <https://www.investopedia.com/terms/o/openoffer.asp>

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Such an arrangement is required and should be made to the public monetary benefactors permitting them a reasonable exit. The open proposal is to be made vide a public attestation and saved open for around 30 days (a month) from the date of its notification. The open plan is as such a super genuine expressing to depict the takeover offer by which to get one more recorded affiliation (Target) an acquirer needs to propose a recommendation to its present monetary patrons to sell their parts at an idea cost compelled by the acquirer. Open suggestion applies to the obtaining of offers, projecting a surveying structure honours, or control of a recorded affiliation. A recorded affiliation open proposal or takeover course of action can either be made by a current monetary sponsor or by a totally new acquirer close by PAC holding/planning to hold somewhere near 25 % shares/projecting a democratic structure right and more in an affiliation. The idea size ought to be some place close to 26 % of the rigid partitions of the objective affiliation. The arrangement assertion is done on a proportionate explanation. There is no affirmation that the offers the monetary sponsor touchy to the acquirer will 100 % be perceived by the acquirer. The degree between Total offers introduced by monetary benefactors and those perceived by the acquirer is relative and is known as the attestation degree. The letter of course of action uncovers data of the game plan's worth, reason, and the main body of the procuring affiliation and is shipped off to the accessories of the Target affiliation while making an open course of action. The overall letter will also make reference to the methodologies related with persevering through the assistants' offered shares.⁵⁶⁷

WHO IS THE PAC?

PAC refers to the Persons Acting in Concert. According to the Regulation 2(q) of the SAST Regulation; PAC are those with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company.⁸

⁵Tinesh Bhasin, De-jargoned: Buyback vs open offer, livemint (last visited on December 30, 2021 at 12:06 PM) <https://www.livemint.com/money/personal-finance/de-jargoned-buyback-vs-open-offer-11608870264575.html>

⁶ Esha Barua *Supra* Note 1

⁷ Thomson Reuters Practical Law, [https://uk.practicallaw.thomsonreuters.com/3-107-6931?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/3-107-6931?transitionType=Default&contextData=(sc.Default)&firstPage=true)

⁸ Regulation 2(q); SEBI SAST Regulation, 2011

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They can be people or legitimate elements or organisations having a typical reason for obtaining under an arrangement. It can even be relatives, dealer brokers, financial backers, and some other lawful individual related with the acquirer having a similar target towards securing.⁹

NEED FOR AN OPEN OFFER

As a financial backer when one chooses to place assets into the heap of the association the fundamental factors that one looks at are the chiefs, business strategy, efficiency, obligation, close by various other huge factors. Right when an acquirer adventures over the association these components can be obligated to change or adjust, thus the basic clarification reliant upon which an individual had bought the stock done leftover parts authentic. This is the inspiration driving why SEBI, requires the acquirer to make an Open Offer with the objective that all financial backers who bought the stock ward on explicit components get an opportunity to sell when the organisation or control of the association is changed. It is to give the financial backers who are up to speed in such a situation where they would prefer not to continue with the new organisation, a sensible exit. It is similarly to be brought into the world at the highest point of the need list that the financial backers' vision ought to be in compatibility with the new acquirer's vision in case they wish to remain.¹⁰

Types of Open Offers

Open offer can be by and large of two kinds; they are as follows:

Mandatory Open Offer

Voluntary Open Offer¹¹

Mandatory Open Offer

Mandatory Offer or also named as Mandatory Tender Offer/Mandatory Open Offer is an arrangement made to the current financial backers of the genuine association in a circumstance where the acquirer or any Person Acting in Concert (PAC) means to get fundamentally 26% (15% during SAST Regulations, 1997) of the parts of the singular

⁹ Esha Barua, *Supra* Note 2

¹⁰ Esha Barua *Supra* Note 3

¹¹ Esha Barua *Supra* Note 4

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objective association. There are four triggers to which it turns into a commitment for a current investor to give a compulsory deal:

Initial trigger

Consolidation trigger

Focussing on the notion of control trigger

Trigger on an indirect acquisition¹²

Voluntary Open Offer

A voluntary offer or voluntary open offer is made by the financial backers through a public presentation when an acquirer close by PAC expecting to be any, movement 25% or a more noteworthy measure of projecting a polling form privileges or control in the true association yet not actually the most outrageous sensible non-public shareholding then the acquirer needs to make an adamant proposition to at least get an additional a 10% of the shareholding in the goal association. The Takeover Regulation Advisory Committee ("TRAC ") feels that the purposeful open suggestion might be helpful in the mix of the stake of liberal financial backers. The FAQ conveyed by SEBI on December 12, 2011, clarified that whether or not the shareholding of an acquirer is under 25% in the goal association, they can regardless make a hard headed proposition to get an additional a 26% of the offers or projecting a voting form privileges over the goal association. Intentional deal requests specific qualification:

- (a) The acquirer or along with PAC, assuming any, will not have obtained the democratic freedoms or command over the objective organisation in the former 52 weeks without drawing in a required open deal);
- (b) Aside from three extraordinary situations for example another willful open proposition, reward issue, and split stocks or contending offer, the acquirer or along with PAC, assuming any, can't procure portions of the objective organisation for a time of a half year later finish of the open deal.¹³

HOW DOES IT WORK IN INDIA?

¹²Aman Gupta, Distinguishing between a mandatory and a voluntary offer, iPleaders (last visited on December 30, 10:51 AM) <https://blog.iplayers.in/distinguishing-mandatory-voluntary-offer/>

¹³*Ibid*

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In India, an open offer is by and large initiated when an organisation gains one more recorded organisation by up to 15% offers. In such cases, the current partners will be given an open proposal to buy an extra 20% of the organisation shares. Existing investors of the gained organisation are likewise given the advantage of a leave choice, in the event that they anticipate that potential risks due should change in the administration and business. When the proposition cost is dictated by the gaining organisation, a public declaration is to be made in the paper. The declaration will likewise be accessible on the Securities and Exchange Board of India (SEBI) site as the takeover code is controlled by the SEBI. The letter of proposition, unveiling data of the deal value, reason, and the executives of the obtaining organisation, will be shipped off to the partners of the organisation being procured. The tended to letter will likewise specify the methods associated with tolerating the partners offered shares.¹⁴

TAKEOVER CODE AND SEBI

In the buyout world, the open offer is a popular takeover code. Acquiring publicly traded firms is a lengthy and difficult process. Due to the application of several business rules, it is frequently done in big teams of legal and corporate professionals. When one firm acquires another, so many consents are required since the shareholding pattern and voting rights of the shareholders change. As a result, when the open offer of acquisition is initiated, the acquirer must take the proper actions.¹⁵

To begin the process of open offer we need to understand what is Takeover code and what role does Securities and Exchange Board of India play in this whole process.

In simpler terms, a takeover is a company's acquisition by another company, it happens by either purchasing shares of the company or claiming an adequate amount right over the same, for more clarity to have voting rights or control of the ownership of the target company. A code is set to inspect and monitor this mechanism. The takeover code is commonly known as Substantial Acquisition of Shares and Takeover (SAST). It is a set of rules and conducts that should be followed during a takeover. There is an obligation of SEBI to protect the

¹⁴Vishnu, Open Offer, cleartax.in (last visited on December 30, 2021 at 01:13 PM) <https://cleartax.in/g/terms/open-offer>

¹⁵Narendra Kumar, *What is the Step-by-Step Procedure to be followed by the Acquirer when Open offer is Triggered?*, Enterslice (Apr. 5, 2019), <https://enterslice.com/learning/acquirer-when-open-offer-is-triggered/>

vulnerable present in the market. The code helps in regulating acquisitions and takeovers by authorising the rules of procedures, timing, disclosure of necessary information, the announcements that must happen and other legalities. These set of rules were brought so that the rights of shareholders don't get violated, they came into force in 1994 and were repealed in 1997. The takeover code which was framed in 2011 is the present code and it is also the newer version of Regulations of SAST that were brought up in 1997 by a committee which was established to look at takeover regulations and the committee prescribed some amendments in the process of open offers.¹⁶SEBI plays a very crucial role in this scenario, the code is important to ensure that there is a market which is very information efficient and also to fundamentally ensure that when an acquisition offer is made to the company then shareholders are not prevented from buying those shares. The motive of the open offer under the takeover law is to prevent company's owners from completing a covert agreement that benefits them a lot but leaves the shareholders out in the cold. The sole purpose behind this is to guarantee that shareholders are sufficiently informed to make an educated decision on whether to accept or reject the offer.¹⁷ SEBI aims to achieve a compromise between shareholder rights by ensuring efficiency of takeover processes, putting market complexity in the rearview mirror and facilitating takeovers. It is focused on levelling the ground for participants of the market and ensuring that takeovers are carried out properly. It serves as the game's umpire.¹⁸This necessity of open offers arises when the acquirer wants to buy an amount of shares in a targeted company calculated alongwith the shares or voting rights already clenched by the acquirer along with Persons Acting in Concert (PACs) which gives them a twenty five percent or more voting right in the company.¹⁹

HOW OPEN OFFERS ARE TRIGGERED?

¹⁶Esha Barua, *Open offer process road map under takeover code*, iPleaders (May 10, 2021), <https://blog.ipleaders.in/open-offer-process-road-map-takeover-code/>

¹⁷*Ibid.*

¹⁸ Narendra, *Supra* note 16

¹⁹ Our Bureau, *SEBI's takeover code raises open offer trigger to 25%*, The Hindu Businessline (Mar. 12, 2018), <https://www.thehindubusinessline.com/markets/stock-markets/sebis-takeover-code-raises-open-offer-trigger-to-25/article20312244.ece1>

Firstly, a merchant banker needs to be appointed for this process, the merchant banker should hold a certificate by SEBI, We can say that the manager of these types of offers is a merchant banker. It's the duty of a merchant banker to complete the transaction with full integrity.²⁰

Secondly, there should be a public announcement by a merchant banker on the day when parties have agreed on the terms of buying and selling of shares between them basically after deciding the voting rights. The announcement should be present in Hindi, English and Regional newspapers with vast circulation and its copy should be submitted to SEBI, target company's registered office and stock exchanges company's shares are listed.

Thirdly, an escrow account needs to be opened, a third part is appointed for receiving and disbursing money in the correct manner of the concerned parties.

A detailed public statement also needs to come out within 5 days of public announcement. Some suggestions are also presented from the board of Directors of the target company. There should be valid reasons for backing suggestions presented to shareholders. Lastly, filling the letter of offer with the Board.

In an order issued by the SEBI in January 2010 regarding a company named OCL India Ltd., it clarified the question of the applicability of the Takeover Regulations in the case of a listed business's buy-back of shares leading to anresistingincrease in voting rights of acquirers in the company. The case was like, In 2003 OCL announced a buyback of 11,83,708 equity shares. The voting rights of the people who were acquiring the company, who did not participate in the buy-back increased from 62.56 percent to 75 percent as a result of the aforementioned buy-back. Despite the fact that this increase in voting rights triggered the open offer requirement under regulation 11(1), the acquirers did not make an open offer to buy at least 20% of OCL's voting capital from its existing public shareholders, as required by the Takeover Regulations. The order issued by the SEBI in this case of OCL India Ltd. was consistent with the SEBI's previous stance. This order clarified the definition of the terms "acquisition of shares" and "voting rights," removing any ambiguity regarding the applicability of the Takeover Regulations in the case of a listed company's buy-back of shares resulting in a passive rise in promoters' shareholding or voting rights.²¹

²⁰Narendra, *supra* note 1

²¹Vivek Sadhale, *Buy-back of shares: Triggers an OpenOffer!!!*, Taxmann (2011), [2011] 105 SCL 7 (MAG).
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CASES RELATED TO OPEN OFFERS

To better understand the concept of tendering of shares of a holding in open offers, it is imperative to discuss certain cases and the judgements pronounced thereof. These judgements direct the ways in which this process is supposed to work and point out the irregularities in our financial bidding system. Moreover, these cases set limits and restrictions on various financial manoeuvres that breach the legal system or simply misuse the share market because appropriate legal mechanisms don't exist to counter them. There are various loopholes that also exist which need to be dealt with and the judiciary is often found directing financial authorities to do so.

*Securities and Exchange Board of India v. Akshya Infrastructure Pvt. Ltd.*²²

In this case, the respondent (Akshya Infrastructure Pvt. Ltd.), sought to withdraw an open offer made by them giving the reason that the open offer was no more economical and hence they were unwilling to perform the same. The respondent had made a voluntary open offer by the means of a public announcement. The announcement was made through the means of publication in a newspaper. The public shareholders were given an opportunity to make an exit by selling their shares at ₹ 91. This was an offer price for the public stakeholders to make an exit from the said company. The respondent sought to withdraw the open offer on the reason of it being uneconomical and commercially unfeasible. In the pursuance of this demand the respondent demanded SEBI (the appellant) to permit them to withdraw the open offer as it has now become outdated and commercially unfeasible.

The appellant rescinded to the demand negatively and stated that failure to carry out demands of the open offer will lead to certain actions and the respondent will be held liable. To this, the respondent took the matter to Securities Appellate Tribunal which decided in the favour of the respondent. Contesting the impugned decision, the appellant filed an appeal in the Supreme Court of India. The Apex Court set aside the Securities Appellate Tribunal's (SAT's) decision and upheld the directions given by SEBI.²³

The Court held that once an open offer is made, it can only be withdrawn in three cases:

²²*Securities and Exchange Board of India v. Akshya Infrastructure Pvt. Ltd.*, AIR 2014 SC 1963.

²³*Supreme Court bars Withdrawal of Voluntary Open Offer*, FINSEC Law Advisors (Sept. 28, 2015), <http://finseclaw.com/service/supreme-court-bars-withdrawal-of-voluntary-open-offer/>.

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1. Death of the acquirer
2. Legal Impossibility
3. Natural Disaster.²⁴

The respondent's case presented none of the three circumstances and hence the open offer cannot be made to be withdrawn.²⁵

*Nirma Industries Ltd. and Ors. v. Securities and Exchange Board of India*²⁶

The appellant first of all claimed that they had not been given reasonable opportunity in being heard before the Securities Appellate Tribunal (SAT). It was held that the claim does not stand and the appellants were provided with a reasonable opportunity to be heard. They were not condemned unheard as they claim to be. Moreover, the appellants had not made a request for the grant of personal hearing as is required and also the Court had reason to believe they did it voluntarily. Therefore, it cannot be said that the appellants were not given a chance to be heard and therefore, this aspect of the appeal was dismissed.

Secondly, it was found that the appellant sought to withdraw the open offer they had made in the apprehension of suffering economic losses and commercial failures. The Court held that open offer cannot be withdrawn under the pretext of suffering economic losses as it was against the rules and regulations set forth by SEBI. If the withdrawal is allowed, it would lead to the encouragement of immoral practises in the stock market.²⁷ It would also sharply affect the stability of the market and shaper stable and sober functioning of the same. Citing all these information, the court held that the appellant cannot be allowed to withdraw the open offer and hence the appeal stands dismissed.²⁸

²⁴ Ashwin Mohan, *Open offers cannot be withdrawn, SC rules*, The Economic Times (Apr. 28, 2014, 09:41 p.m.), <https://economictimes.indiatimes.com/open-offers-cannot-be-withdrawn-sc-rules/articleshow/34336485.cms?from=mdr>.

²⁵ Umakanth Varottil, *Supreme Court on the Sanctity of a Takeover Offer*, IndiaCorpLaw (May 7, 2014), <https://indiacorplaw.in/2014/05/supreme-court-on-sanctity-of-takeover.html>.

²⁶ *Nirma Industries Ltd. and Ors. v. Securities and Exchange Board of India*, AIR 2013 SC 2360.

²⁷ Umakanth Varottil, *Supreme Court on Withdrawal of a Takeover Offer*, IndiaCorpLaw (May 30, 2013), <https://indiacorplaw.in/2013/05/supreme-court-on-withdrawal-of-takeover.html>.

²⁸ Deep, *SUPREME COURT'S VERDICT ON WITHDRAWAL OF OPEN OFFER BY NIRMA*, Bulwark Solicitors (May 28, 2017), <https://www.bulwarksolicitors.com/securities-law/supreme-courts-verdict-on-withdrawal-of-open-offer-by-nirma/>.

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Finally, the appellant claimed that there was a delay on SEBI's behalf in approving the letter for open offer. It was held by the court that the very draft letter sent by the appellant was deficient in detail of the open offer. When detail was sought by SEBI, there was delay on the part of the appellant themselves. After considering all these facts, the Court held that there was no delay on the part of SEBI, instead it was on the part of the appellant.²⁹

CONCLUSION

Undoubtedly, buybacks are complicated procedures in terms of legalities and they require much compliance with applicable laws. Changes in voting rights and shareholding patterns are involved in it. This procedure needs the guidance of appropriate professionals so that no fundamentals are left behind because that can attract numerous problems for both companies, It should be ensured that acquisition is done well under the concern of ethics related to corporate governance. The guidelines prescribed by SEBI should be strictly followed. Even under the takeover code, the basic principle of preserving shareholder interests in a takeover situation remains whole.

²⁹*Public offer made under SEBI takeover regulations cannot be withdrawn. Mere Delay by SEBI, alienation of assets by Board no ground for withdrawal-SC*, ABCAUS (Nov. 7, 2016), <https://abcaus.in/sebi/public-offer-made-under-sebi-takeover-regulations-can-not-be-withdrawn.html>.

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