COMPETITION COMMISSION OF INDIA

(Ref. No. C-2021/01/810)

30th September 2022

Proceedings against Trian Partners AM Holdco, Ltd. and Trian Fund Management, L.P., under Section 43A of the Competition Act, 2002

CORAM:

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Appearances during the hearing

For Trian Partners AM Holdco, Ltd. and Trian Fund Management, L.P.:	Mr. Amit Sibal, Senior Advocate with Ms. Shweta Shroff Chopra, Ms. Aparna Mehra, Advocates along with Mr. Brian Schorr and Mr. Dan Max, representatives of Trian Fund Management, L.P.

ORDER UNDER SECTION 43A OF THE COMPETITION ACT, 2002

This order shall govern the disposal of the proceedings initiated against Trian Partners AM Holdco, Ltd. (**'Trian Holdco'**) and Trian Fund Management, L.P. (**'Trian Fund'**) [Hereinafter, Trian Holdco and Trian Fund are collectively referred to as **'Trian'/'Acquirers']** under Section 43A of the Competition Act, 2002 (**'Act'**) in relation

to the acquisition of shareholding amounting to 9.9% in Invesco Limited (**'Invesco'/'Target'**) (**'Transaction'**). The Transaction was given effect to through the following steps: (a) Trian (through its affiliates) acquired 4.8% of the outstanding shares of the Target, by way of open-market purchases, in June 2020 (**'First Acquisition'**); and (b) Trian Holdco acquiring beneficial ownership over an additional 5.1% of the outstanding shares of Invesco through open-market purchases and derivative transactions entered into with a third-party financial institution during the period of 22nd – 30th September 2020 (**'Second Acquisition'**).

2. On 20th January 2021, the Competition Commission of India (**'Commission'**) received a Notice in Form I under Section 6(2) of the Act read with Regulation 5A of the Competition Commission of India (Procedure in regard to Transaction of Business relating to Combinations) Regulations, 2011 (**'Combination Regulations'**), given by Trian Holdco, whose investment activities are managed by Trian Fund. The Notice was given pursuant to a board resolution passed by the Trian Holdco on 8th December 2020 for acquisition of additional securities of the Target, pursuant to which, Trian Holdco would hold more than 10% of the outstanding shares of the Target (**'Combination'**). The said Combination was notified to the Commission by Trian Holdco in Combination Registration No. C-2021/01/810. As per the information provided in the Notice, it was observed that the Combination was preceded by the Transaction, which was not notified to the Commission under Section 6(2) of the Act.

A. Background

3. Trian Holdco is an alternate investment vehicle incorporated under the laws of Cayman Islands. Trian Fund is a global investment management firm founded in 2005 by Mr. Nelson Peltz, Mr. Edward Garden and Mr. Peter May (**'Trian Founding Partners'**), based out of the United States of America (**'USA'**). As of 1st February 2022, Trian Fund has approximately USD 8.2 billion worth of assets under management, out of which approximately 60% are based in the USA.

4. The Target is a public listed company incorporated under the laws of Bermuda, headquartered in the USA, and is listed on the New York Stock Exchange. Invesco is present in more than 20 countries and manages approximately USD 1.35 trillion in assets for investors around the world. The Target has four subsidiaries incorporated in India: Invesco Asset Management (India) Private Limited, Invesco Trustee Private Ltd., Invesco (India) Private Limited and Redblack Software Private Limited (collectively referred to as **'Invesco India Subsidiaries'**).

5. Pursuant to the closing of the Transaction, Trian filed a statement under Schedule 13D of the Securities Exchange Act of 1934 with the United States Securities Exchange Commission (**'SEC'**) on 2nd October 2020 (**'SEC Filing'**). The SEC Filing, *inter alia*, stated the following:

> *"The Reporting Persons have met and engaged in a constructive discussion with Martin Flanagan, a director and President and Chief Executive Officer of the Issuer (Invesco), and Allison Dukes, Senior Managing Director and Chief Financial Officer of the Issuer."*
>
> *"The Reporting Persons intend to continue to engage in discussions with the Board and/or management of the Issuer regarding various strategic and operational initiatives that the Reporting Persons believe can generate value. Such initiatives may include recommendations relating to the Issuer's operations, organizational structure, technology, product offerings, talent development and retention strategies, capital allocation and dividend policies and corporate governance (such as initiatives relating to the Issuer's executive compensation design, organizational documents and changes to Board composition)." (emphasis supplied)*
>
> *"During the meeting with Mr. Flanagan and Ms. Dukes, the Reporting Persons requested that the Board be expanded to include Trian partners Nelson Peltz and Ed Garden and also discussed Board refreshment." (emphasis supplied)*

"…and may encourage the Issuer to explore, certain strategic combinations (such as mergers, acquisitions, consolidations or other extraordinary corporate transactions) with one or more companies in the asset management industry (which may include companies in which the Reporting Persons are currently shareholders or may in the future become shareholders)."

"The Reporting Persons may seek to participate in any such strategic combinations and may initiate or participate in discussions with the board of directors and/or management of the proposed or contemplated counterparties in such transactions."

6. On 4th November 2020, the Target decided to expand its Board from 9 to 12 directors and invited 2 of Trian's Founding Partners, namely, Mr. Nelson Peltz and Mr. Ed Garden, on its Board of directors.

7. Pursuant to its board resolution, Trian filed the Notice with the Commission on 20th January 2021 only for the Combination under the Green Channel Route. The Combination was deemed to have been approved upon filing the Notice, in accordance with Regulation 5A of the Combination Regulations, as it did not result in any overlaps between the business activities of Trian Holdco/Trian Group and the Target in India.

8. The Commission issued an inquiry letter under Section 20(1) of the Act on 12th April 2021 regarding the Transaction. The response to the inquiry letter was filed by Trian on 16th August 2021 (**'Response to Letter'**).

B. Initiation of proceedings under Section 43A of the Act

9. In terms of Section 6(2) of the Act, an enterprise which proposes to enter into a combination is required to give a notice to the Commission, disclosing the details of the proposed combination within 30 days of the execution of any agreement or other document for acquisition. Further, as per Section 6(2A) of the Act, no combination shall come into effect until 210 days have passed from the day on which the notice has been given to the Commission under Section 6(2) or the Commission has passed an order under

Section 31 of the Act, whichever is earlier. The Central Government, in exercise of the powers conferred by Clause (a) of Section 54 of the Act, in public interest, has exempted every person or enterprise who is a party to a combination as referred to in Section 5 of the Act from giving notice within 30 days mentioned in Section 6(2) of the Act, subject to the provisions of Section 6(2A) and Section 43A of the Act.

10. The Commission, in its meeting held on 20th December 2021, considered the issue of consummation of the Transaction without filing a notice to the Commission. The Commission observed that the benefit under Item I of Schedule 1 of Combination Regulations ('**Item 1 Provision**') is available when an acquirer does not have the right or intention to nominate a director on the board of directors of the enterprise whose shares are being acquired. Thus, *prima facie*, even if it is accepted that Trian Holdco had no intention of participating in management of the Target at the time of acquisition of shares, Trian Holdco had vitiated the benefit of Item 1 Provision as soon as it initiated its pursuit for obtaining Board seat(s) on the Board of the Target after the Transaction. On the contrary, the Commission also observed that various disclosures made by Trian in SEC filing and other material on record indicate their intention to participate in the affairs or management of the Target. Thus, Trian had acquired shareholding of Invesco, which was strategic in nature and was accompanied with the intention of nominating a director on the Board of Invesco and which also resulted in the subsequent acquisition of Board seats. Further, it appeared that Trian intended to participate in the affairs or management of Invesco. In view of the foregoing, the Commission was of the *prima facie* view that the Transaction cannot be categorised or given a colour of 'Solely for Investment' /'Ordinary Course of Business' and therefore, cannot benefit from the Item 1 Provision. It was also observed that the absence of any binding documents between the parties doesn't necessarily preclude the existence of strategic intent behind an acquisition. Hence, the absence of a binding document executed between the parties to the combination doesn't exempt the Transaction from notification requirements.

11. Therefore, the Commission was of the *prima facie* view that the Transaction was given effect to without giving notice to the Commission, leading to contravention of sub-section (2) and (2A) of Section 6 of the Act. Accordingly, the Commission issued SCN under

Section 43A of the Act on 17th January 2021. Trian filed its response to the SCN on 29th March 2021 after seeking an extension of time (**'Response to SCN'**).

12. In its meeting held on 13th April 2022, the Commission considered the Response to SCN and decided to grant an oral hearing to Trian on 11th May 2022. The Acquirer was heard on 11th May 2022 and filed written submissions on 20th May 2022.

C. Submissions of the Acquirers

13. In the Response to SCN, Trian contended the following:

I. Applicability of Item 1 Provision to the Transaction

14. The Item I Provision contains three conditions that need to be satisfied in order to avail of the benefit. It may be noted that the three conditions are cumulative, and accordingly, all three conditions must be satisfied. However, the second condition provides two alternative scenarios, i.e., the acquisition is solely for investment purposes or is in the ordinary course of business of the acquirer. Further, it may be noted that the "Explanation" provided under Item I only relates to providing an explanation solely for the investment purposes condition and does not apply to the ordinary course of business condition.

15. It is submitted that the first condition of Item 1 Provision, which provides that the acquisition should not entitle the acquirer to hold 25% or more of the total shares or voting rights of the target, is satisfied in the present case, and this fact is not under contention.

16. With regard to the second condition of Item 1 Provision, it is submitted that the Transaction and subsequent appointment of Board members pursuant to the invitation were in the ordinary course of business of Trian. In a previous case, the Commission held that the term "ordinary course of business" is meant to refer to transactions which are "frequent, routine and usual"[1].

[1] Order under Section 43A of the Act pertaining to Combination Registration No. C-2017/06/516 dated 11th May 2018

17. It is also submitted that, based on various different sources/decisions (from various different authorities and jurisdictions), it appears that the following factors may be considered when examining whether a transaction is in the ordinary course of business of an entity: the transaction should be or shall result in (a) a frequent/repetitive, routine and usual form of transaction for the business, (b) in accordance with the usual customs and practices of the business and in furtherance of the business in which it is habitually engaged, (c) a part of the undistinguished common flow of business done and is not arising out of any special or particular situation, (d) not appear anomalous or unbusiness-like, (e) undertaken in a continuous and organised manner, (f) in line with the stated objective of the company in its charter documents, (g) income earned from the activity should be treated as business income (i.e., income from operations) in the company's books of accounts, (h) common in that particular industry, (i) evidence of historical practice of conducting such activities and (j) company should be investing a sizeable portion of its resources to such activities.

18. With regard to Trian, its business model is to operate as an engaged shareholder, and it typically engages with the management teams and boards of its investee companies. This is to protect its minority investments and provide suggestions (similar to the right enjoyed by all other shareholders) to the company to improve their operations in order to earn higher ROI. Presence of Trian on the board of the investee entities assists Trian in providing suggestions at the board level. It is routine for Trian to be invited to and accept a (minority) board seat of its investee entity.

19. Further, it may be noted that there is no prohibition on ordinary course of business being available where an ordinary shareholder is invited to the board, unlike solely for investment purposes (which is expressly not available if the transaction is accompanied with a board seat/intention to appoint a board seat).

20. With respect to the allegations pertaining to Trian discussing the dynamics of a combination of Target and another entity, it has been submitted that any prudent investor will undertake some amount of diligence on the target prior to investing, including

gathering basic information about a target's key managerial personnel. Such an exercise of assessing the impact of a hypothetical merger is typically undertaken by all companies prior to undertaking an acquisition purely from the perspective of return on investment, and this in itself cannot result in the transaction not being viewed as ordinary course of business.

21. Thus, based on the above, Trian has submitted that, in the present case, the Transaction qualifies for the ordinary course of business limb of the Item 1 Provision.

22. With regard to third condition of Item 1 Provision, Trian has submitted that, in its previous decisional practice, the Commission interpreted control to mean "the ability to exercise decisive influence over the management or affairs and strategic commercial decisions"[2] of a target enterprise, whether such decisive influence is being exercised by way of a majority shareholding, veto rights (attached to a minority shareholding) or contractual covenants. In a few recent cases[3], the Commission has indicated that it may rely on the "material influence" standard compared to the "decisive influence" standard discussed above, which is a lower standard for control. However, it may be noted that, in these limited cases, the Commission has not dealt with the express question of whether a single (or two) board seats, without any veto or affirmative rights, amounts to control from the perspective of the Item I Provision.

23. In the instant case, Trian has no veto rights in Invesco and its ability to make suggestions cannot be equated to veto rights. Trian has never been party to any Shareholders' Agreement relating to Invesco. Trian Founding Partners were invited to occupy two out of a total 12 Board seats in Invesco on a temporary basis (the Board members resigned less than two years after appointment) and were not exercising any form of material influence over Invesco during their term. Invesco and Trian were under a legal obligation to assess whether Trian had acquired joint or sole control over Invesco, and neither Trian

[2] Order under Section 31 (1) of the Act pertaining to Combination Registration No. C-2012/03/47, dated 24th May 2012
[3] Order under Section 26 (2) of the Act pertaining Case No. 25 – 28/2017, dated 20th June 2018

nor Invesco itself (nor the SEC) were of the view that Trian had acquired joint or sole control over Invesco.

24. The Transaction and the appointment of Trian Founding Partners on Invesco's Board of Directors pursuant to an invitation took place entirely outside India and does not have any local nexus to India. Accordingly, they should not be assessed against the standards of 'control' under the Indian Competition Act. Trian has no Board seats in any of Invesco's Indian subsidiaries. India represents a minuscule portion of the business of Invesco, and Trian's presence in India is also negligible compared to its overall global presence.

25. Based on the above, Trian cannot be held to be in control of Invesco, and thus, it is submitted that all three conditions of Item I Provision are met in the present case.

II. Transaction and subsequent appointment of the board members pursuant to an invitation were not inter-connected

26. It is submitted that, even if the Transaction and the subsequent appointment of the Board members pursuant to an invitation from Invesco are viewed as being inter-connected by the Commission, both these transactions should be able to collectively avail the benefit of the Item I Provision. Both transactions separately would be exempt from/not require a notification to the Commission. The Transaction (in itself, independent of Board seats) would satisfy the 'solely as an investment' limb of Item 1 Provision (in addition to the Ordinary course of business limb) and board seat appointments (in itself) would not trigger a notification requirement. However, it is then mentioned that these were not inter-connected.

27. The Commission in the past has considered a few factors such as simultaneity in negotiation, execution and consummation of the transaction documents; if the two transactions stem from a single transaction document; if closing of one step of the transaction is a condition precedent to closing of the other transaction; and commercial feasibility of isolating the transactions.

28. The Transaction was undertaken by Trian through open market purchases and derivative transactions entered into with a third-party financial institution. The Transaction was made without the knowledge or consent of Invesco and without any communications with Invesco. In such a scenario, there can be no question of Invesco inviting Trian onto its Board at the time of the Transaction (or indicating that any such invitation will be provided in the future). This demonstrates that the Transaction was not conditional or dependent upon Invesco providing a Board seat to Trian.

29. Further, Trian and Invesco engaged in discussions around the Board seat only after the Transaction had already closed, and therefore, this was not a condition precedent for Trian to undertake the Transactions.

30. The appointment of the Board members took place more than four months after the First Acquisition and more than a month after the Second Acquisition. Moreover, Trian had not entered into any agreement/term sheet/any other document (or even had any discussions) with Invesco, let alone any documents/discussions relating to the Board seats. Initially, Invesco had not accepted Trian's suggestion to invite Trian onto their Board; however, this did not result in Trian selling off its shares in Invesco. Subsequently, on 1st February 2022, Trian's Board members resigned from Invesco's Board; however, Trian has not decreased its shareholdings in Invesco. This clearly evidences that both transactions are not inter-connected.

D. Analysis of the submissions of the Acquirers

31. The core issue in the instant case is whether the Transaction and subsequent appointment of directors on the Board of the Target was covered under the Item 1 Provision and accordingly, was eligible for not filing the notice under sub-section (2) of Section 6 of the Act. In the subsequent section, the Commission has considered and determined on all the submissions of the Acquirers, including those on the core issue and other submissions of the Acquirers.

I. Applicability of Item 1 Provision to the Transaction

32. The Item 1 Provision reads as follows:

> *"An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, solely as an investment or in the ordinary course of business in so far as the total shares or voting rights held by the acquirer directly or indirectly, does not entitle the acquirer to hold twenty five per cent (25%) or more of the total shares or voting rights of the company, of which shares or voting rights are being acquired, directly or indirectly or in accordance with the execution of any document including a shareholders agreement or articles of association, not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired.*
>
> *Explanation:- The acquisition of less than ten per cent of the total shares or voting rights of an enterprise shall be treated as solely as an investment: Provided that in relation to the said acquisition,-*
> *(A) the Acquirer has ability to exercise only such rights that are exercisable by the ordinary shareholders of the enterprise whose shares or voting rights are being acquired to the extent of their respective shareholding; and*
> *(B) the Acquirer is not a member of the board of directors of the enterprise whose shares or voting rights are being acquired and does not have a right or intention to nominate a director on the board of directors of the enterprise whose shares or voting rights are being acquired and does not intend to participate in the affairs or management of the enterprise whose shares or voting rights are being acquired."*

33. Further, Regulation 4 of the Combination Regulations states that:

> *"…categories of combinations mentioned in Schedule I are ordinarily not likely to cause an appreciable adverse effect on competition in India, notice under sub-section (2) of section 6 of the Act need not normally be filed".*

34. From the Item 1 Provision read with Regulation 4 of the Combination Regulations, it is clear that benefit of this provision is not available to instances where there has been an acquisition of control. The benefit of Item 1 Provision has been normally available to the acquisition of shareholding or voting rights less than 25% and which are in the 'ordinary course of business' or 'solely as an investment'. The objective of this provision is to distinguish between instances of ordinary shareholding and strategic shareholding, falling short of position of acquisition of control.

35. The primary issue relevant for determination of notifiability of the Transaction is whether it was in 'ordinary course of business' or 'solely as an investment' or not. Hence, the issue of notifiability of Transaction is settled in terms of applicability of Item 1 Provision in this case. Item 1 Provision comprises three conditions, i.e., acquisition of less than 25% of shares or voting rights, acquisition done solely as an investment or in the ordinary course of business and acquisition should not be leading to control. Even if one of the three conditions prescribed under this item is not satisfied, the benefit of Item 1 Provision is not available. Accordingly, the Commission observed that the question of acquisition of control is irrelevant to the primary issue in the instant matter.

36. In the Response to the Letter, it was submitted that the "Transaction was made by the Acquirer solely as an investment and/ or in the ordinary course of business", whereas in the Response to SCN, it was submitted that the Transaction is in ordinary course of business. Thus, though the submission of the Acquirers is fluid, the Commission has considered both limbs to determine to notifiability.

37. To begin with, the Transaction will be examined if it was in the nature of 'solely as an investment'. Trian on its part has submitted that, in the absence of any veto rights or other contractual rights, such a minority representation on the Board in and of itself would not make the Transaction strategic, as it does not confer Trian with the right to make any operational or management decisions of Invesco, and that such a minority representation on the Board was always intended to allow Trian to provide suggestions to the company to improve their operations in order to earn higher ROI (viz., return on investment).

38. In this regard, it would be appropriate to highlight that, often, the competitive dynamics are not influenced only by active decisions; rather, a broad understanding or awareness of the competitively sensitive information is sufficient to lead to coordinated outcomes, frustrating the process of competition.

39. Firstly, considering proviso (B) to explanation of Item 1 Provision, it is noted that the first condition prescribes therein that there be no representation of the acquirer on the board of directors of the enterprise whose shares or voting rights are being acquired. This is meant to ensure that an acquirer with minority shareholding does not become privy to competitively sensitive information, access or awareness of which may be sufficient to lead to coordinated outcomes.

40. The second condition of the same proviso requires there shouldn't be a right or intention to nominate a director on the board of directors of the enterprise whose shares or voting rights are being acquired and there shouldn't be any intention on the part of the acquirer to participate in the affairs or management of the enterprise whose shares or voting rights are being acquired. The reference to 'right', i.e., an existing right captured in the transaction documents, and 'intention', i.e., a futuristic right or position, is meant to ensure that the regulatory framework is consistent with the core principle of 'substance over form'. There could be a situation where the parties can first acquire only shares and subsequently negotiate or agree for board representation or participation in management. There could also be a situation where the board seat or management participation may be a subsequent unrelated development. In cases when there is an intention to participate in management or to have board representation, the notice is required to be filed *ex-ante*, while in cases where such developments are subsequent and unrelated, the party should file the notice before giving effect to such subsequent arrangements or developments. It goes without saying that the onus to prove that the developments were subsequent to the acquisition of shares or voting rights will be on the acquirer.

41. Another condition prescribed in proviso (A) to explanation of Item 1 Provision is that the acquirer, if it wants to benefit from the application of this item, should only have the ability to exercise rights that are exercisable by the ordinary shareholder of the enterprise

whose shares or voting rights are being acquired to the extent of their respective shareholding. The Item 1 Provision covers the transactions not amounting to the acquisition of control and accordingly, does not differentiate between various rights, viz., investor protection rights, informational rights, etc.

42. When the facts of the instant case are examined against the above backdrop, it is observed that:

(a) Trian closed the Second Acquisition (and thus, the Transaction) and, on the same date, negotiated for the Board seat(s) on the Target. This is evident from its own submissions as well as its disclosure in SEC Filing. Thus, Trian intended to participate in the affairs and management of the Target.

(b) Trian acquired two Board seats in a matter of less than two months from the date of closing of the Transaction. Such rights are not available to ordinary shareholders.

Based on the aforesaid, it appears that the Acquirers clearly had the intention to participate in the affairs and management of the Target. Hence, the Transaction does not satisfy the conditions of the Explanation to Item 1 Provision and it cannot be solely as an investment.

43. The Transaction is also examined if it was in the ordinary course of business. In this regard, the Commission observed[4] that the relevance of classification of business transactions as revenue transactions and capital transactions and in that backdrop noted that, *"[T]he term "ordinary course of business" is meant to refer to transactions which are frequent, routine and usual and therefore it may be said that the term "ordinary course of business" corresponds to revenue transactions for the competition law purposes."* In the same order, the Commission noted that, *"Revenue transactions may simply be defined as those transactions which are short term and constitute income and expenditure and are accordingly reflected in profit and loss account or income statement*

[4] Order under Section 43A of the Act pertaining to Combination Registration No. C-2017/05/509 dated 11th May 2018

of the enterprise. Capital transactions on the other hand are those which affect non-current items such as fixed assets, long term debt etc. and affect the position statement of an enterprise." The aforesaid decision was given in context of a transaction involving acquisition of assets, however, the basic principles underlying the same are equally applicable in case of transactions involving acquisition of shares. Accordingly, while examining the issue of scope of 'ordinary course of business' in context of acquisition of shares, the Commission observed[5] that*, "[T]ransactions in ordinary course of sale and purchase of securities are done solely with the intent to get benefited from short term price movement of securities"* which re-emphasises the underlying aspects of frequency, duration of holding, intent etc.

44. Thus, the first test for examining a transaction for being in ordinary course of business is whether the same is a revenue transaction or a capital transaction. In this regard, the submissions of Trian are noteworthy. Trian has submitted that their business model is that it operates as an 'engaged shareholder' and the rationale stated is to *'protect its minority* ***investments'*** (emphasis added). Further, it has been stated that they provide suggestions to the investee entity to improve their operations in order to earn a higher ROI. Thus, first and foremost, it becomes explicitly clear that even Trian considers the Transaction as an 'investment' and that 'investments' are in the nature of a capital transaction and not a revenue transaction. Thus, going by the same, in the context of this Transaction in particular and the aforesaid business models in general, it is observed that the business models which have at their core, the intent to operate as an 'engaged shareholder' and work with the management to earn a higher ROI fulfil the characteristics of an 'investment' and cannot be considered to be in ordinary course of business for competition law purposes.

45. The aforesaid business model, if tested on the parameter of whether the parties 'intended to get benefited from short term price movement of securities' would also yield similar results. The aforesaid business model which seeks to participate and work with the management for earning a higher ROI is premised on a longer time horizon of investment

[5] Order under Section 31(1) of the Act in relation to Combination Registration No. C – 2022/02/905, dated 23rd March 2022

and its intended nature of returns goes against the scope of ordinary course of business activities which are intended to benefit from short term price movement of securities. This premise is also reflected in the fact that Trian's Founding Partners were on the Board of the Target for more than a year, and even after their exit, Trian continues to hold its stake in Target.

46. Further, the Commission considered Trian's submissions that transactions which are in the ordinary course of business activities can be distinguished from those that are intended to be solely as an investment and thus the two are completely exclusive requirements in context of Item 1 Provision. Accordingly, a transaction may not qualify as a solely for investment activity but may still qualify for being an ordinary course activity. In this regard, it may be noted that the 'ordinary course of business' activities are revenue transactions and therefore 'investments' do not come in their ambit. The moment it is concluded that the activity in question is an 'investment', the question for determination of notifiability is whether the same is 'solely as an investment' i.e., the nature of the investment is such which is not likely to impact the competition dynamics or otherwise. Going by the same, the key consideration for 'ordinary course of business' test is that the activity in question should not even be an 'investment'. Once the activity is held to be an 'investment', even if it does satisfy 'solely as an investment' test, it cannot be considered to be in 'ordinary course of business' by implication.

47. Based on the foregoing, it is evident that the Transaction is not in ordinary course of business and cannot avail the benefit of Item 1 Provision.

II. Trigger for notifiability of Transaction and subsequent appointment of the board members

48. In the Response to Letter, Trian had submitted that, post the completion of the Transaction and after trading hours, Mr. Nelson Peltz and Mr. Ed Garden met and engaged in a constructive discussion with the Chief Executive Officer and the Chief Financial Officer of the Target. During the meeting, Messrs. Peltz and Garden requested that the Target's Board be expanded to include each of Messrs. Peltz and Garden.

49. In the Response to SCN, Trian also submitted that Trian always engages as an engaged shareholder in its investee entities. Trian has also disclosed in the SEC Filing under 'Item 4. Purpose of Transaction' its various intentions to participate in the affairs and management of the Target. A joint reading of these disclosures implies that the appointment of the Board members succeeded the Transaction and the subsequent discussions between the parties. Also, as the Transaction was a condition precedent to the appointment of Board members, failing the completion of former, the latter would not have occurred.

50. Further, Trian has submitted that it did discuss the merger of Target with another investee entity. Even though it may have been a hypothetical merger as contended by Trian in its response, to give effect to such a merger, Trian's representation on the Board would have been required and/or any other rights which are not available to ordinary shareholders, at the very least. As an ordinary shareholder of the Target, Trian would practically not stand a chance to convince the Board of the Target to even consider such a proposition.

51. Despite the above submissions, Trian, in the Response to SCN, submitted that its representation on the Board of the Target did not occur as a result of Mr. Nelson Peltz and Mr. Ed Garden meeting with the key personnel of the Target post the completion of the Transaction and after trading hours. But based on the aforesaid, it is clear that Trian intended to participate in the affairs and management of the Target without ruling out the possibility that there may have been an understanding with the Target in that regard. However, even if Trian's contentions were to be believed, that there was no such intention or understanding, it was incumbent on Trian to approach the Commission before accepting the positions on the Board, which allowed Trian to participate in the management or affairs of the Target.

52. Thus, based on the analysis of the response of Trian, the Commission is of the opinion that, in consummating the Transaction without approval of the Commission, Trian has failed to file a notice for the Transaction in accordance with Section 6(2) of the Act, which reads as under:

"Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, [shall] give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within [thirty days] of—

(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;

(b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section."

Further, Section 6 (2A) of the Act reads as follows:

"No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section (2) or the Commission has passed orders under section 31, whichever is earlier."

Accordingly, the Transaction attracts a penalty under Section 43A of the Act, which reads as under:

"If any person or enterprise who fails to give notice to the Commission under sub section (2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one percent of the total turnover or the assets, whichever is higher, of such a combination."

53. Accordingly, in terms of Section 43A of the Act, the Commission can levy a maximum penalty of one per cent of the total turnover or the assets, whichever is higher, of such a combination. While determining the quantum of penalty, the Commission considered the mitigating factors as well as the aggravating factors. In view of the foregoing, the Commission considered it appropriate to impose a penalty of INR 20,00,000 (Indian

Rupees Twenty lakh only) on the Acquirers. The Acquirers are directed to pay the penalty within 60 days from the date of receipt of this order.

54. The Secretary is directed to communicate to the Acquirers accordingly.