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Fair Competition
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COMPETITION COMMISSION OF INDIA

Ref. No.: M&A/10/2020/01/CD

14th January 2025

***In re:* Proceedings against Goldman Sachs (India) Alternative Investment Management Private Limited under Section 43A of the Competition Act, 2002**

CORAM:

Ms. Ravneet Kaur
Chairperson

Mr. Anil Agrawal
Member

Ms. Sweta Kakkad
Member

Mr. Deepak Anurag
Member

Appearances: Mr. Rajshekhar Rao, Senior Advocate; Mr. Harman Singh Sandhu, Mr. Mithun V. Thanks, Ms. Shraddha Suryavanshi, Ms. Raveena Kumari Sethia, Mr. Abhishek Hazari, Ms. Aashna Chawla and Mr. Wamic Wasim Nargal, Advocates; and Mr. Greg Flyn, Mr. Shaswata Dutta, representative of Goldman Sachs.

Order under Section 43A of the Competition Act, 2002

1. This order shall dispose of the proceedings against Goldman Sachs (India) Alternative Investment Management Private Limited (**GS AIMPL**), the investment manager of Goldman Sachs AIF Scheme-1 (**GS AIF**) [collectively '**GS**'], under Section 43A of the Competition Act, 2002 (**Act**) in relation to subscription by GS AIF, acting through GS AIMPL, to optionally convertible debentures (**OCDs**) issued by Biocon Biologics Limited (**Biocon**) which, if calculated on the date of the investment, would have converted to 3.81 percent of the entire shareholding of Biocon (on a fully diluted basis) [**Transaction**].

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I. Background

2. The Transaction was given effect pursuant to the execution of a Securities Subscription Agreement and a Shareholders Agreement (**SHA**) on 7th November 2020 and was closed on 9th December 2020. Pursuant to the Transaction, GS AIF gained certain rights in relation to reserved matters (**Reserved Matter Rights**) under the SHA and some of such rights were to be exercised with the prior written consent of the Investor Majority (as defined in the SHA) and some of such other rights were to be exercised with the prior written consent of all the Investors (as defined in the SHA). Further, GS AIF gained certain information rights (**Information Rights**) and access rights (**Access Rights**) under the SHA. The Information Rights allow GS AIF access to: (a) certified true copies of minutes of board/committee/shareholder meetings with related records after such a meeting has occurred (**Minutes Right**), and (b) information relating to any direct change in certain shareholdings, access to certified true copies of the latest capitalization table of Biocon, *etc.* The Access Rights allow GS AIF to access the premises and personnel of Biocon during normal business hours, upon providing a reasonable prior written notice.

3. GS AIF is an investment scheme under the Goldman Sachs India Alternative Investment Trust registered with the Securities and Exchange Board of India (**SEBI**) under the SEBI (Alternative Investment Funds) Regulations, 2012 (**AIF Regulations**). As stated, the primary objective of GS AIF is to carry out investment activities which are permissible for a Category II AIF under the AIF Regulations.

4. Biocon is a subsidiary of Biocon Limited. It has research and development centres in Bengaluru and Chennai, with manufacturing facilities in Bengaluru and Malaysia for monoclonal antibodies, recombinant proteins, and insulins.

5. The Commission observed that the Transaction was not notified and was consummated prior to the approval of the Commission. Subsequently, in this regard, a letter dated 4th February 2022 was issued under Section 36(4) of the Act to GS for furnishing of information and

documents relating to the Transaction in order to assess whether further proceeding is required under Section 20(1) and/or Section 43A of the Act (**First Letter**).

6. GS filed its response to the First Letter on 24th February 2022 (**First Response**). As the information provided in the First Response was incomplete in certain aspects, another letter dated 29th June 2022 was issued to GS (**Second Letter**) to provide complete information. The response to the Second Letter was filed by GS on 16th August 2022 (**Second Response**). In addition, GS provided certain additional clarifications regarding the Second Response on 21st September 2022 (**Clarification**) [hereinafter, First Response, Second Response, and Clarification are collectively referred to as the '**Response**'].

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

7. In its meeting held on 18th May 2023, the Commission considered the Response and observed that the Minutes Right is a right which is not available to an ordinary shareholder. The Commission noted that such an arrangement in substance may enable the provision of confidential and commercially sensitive information and strategic information of Biocon to GS. The Commission further noted that other rights *viz.*, the Access Rights and Reserved Matter Rights appear to indicate that the Transaction is strategic in nature and not in the ordinary course of business or made solely as an investment. Considering the same, the Commission observed that the Transaction may not be covered under Item 1 of Schedule 1 (**Item 1 Provision**) of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulation, 2011 (**Combination Regulations**) and ought to have been notified in terms of Section 6(2) of the Act.

8. Therefore, the Commission was of the *prima facie* view that the Transaction was given effect without giving notice to the Commission, thereby leading to contravention of Section 6(2) of the Act. Accordingly, the Commission issued a Show Cause Notice (**SCN**) under Regulation 48 of the Competition Commission of India (General) Regulations, 2009 read with Section 43A of the Act to GS on 25th May 2023 directing GS to show cause, in writing, as to why

penalty should not be imposed upon it, in terms of Section 43A of the Act for failure to file notice under Section 6(2) of the Act.

9. GS filed the response to the SCN on 29th June 2023 after seeking an extension of time, along with a request for an oral hearing in the matter (**Response to SCN**).

10. The Commission heard GS at length on 23rd July 2024 and, after considering the request of GS, granted liberty to GS to furnish written arguments/ submissions latest by 30th July 2024. Accordingly, GS submitted written arguments on 30th July 2024.

III. Submissions of GS

Transaction was solely as an investment

11. Transaction was solely for investment purposes and in GS AIF's ordinary course of business, with the objective of obtaining a return on its investment without any underlying strategic intent towards participating in the affairs and management of Biocon Biologics and therefore, it benefitted from Item 1 Provision.

12. Item 1 Provision provides an exemption for minority acquisitions, if all the following conditions are satisfied:

Condition 1: The acquisition does not entitle the acquirer to hold 25% or more of the total shares (on a fully diluted basis) or voting rights of the target enterprise, whether directly or indirectly (**Shareholding Condition**); and
Condition 2: The acquisition does not lead to an acquisition of control (including negative or joint control), voting arrangements, *de facto* control, or otherwise (**Control Condition**); and
Condition 3: The acquisition is solely as an investment (**SIP Condition**) or in the ordinary course of business of the acquirer (**OCB Condition**).

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13. Further, it was stated that the explanation to the Item 1 Provision clarifies that the acquisition of less than 10% of total shares/voting rights shall be treated as being "solely as an investment" if the acquirer: (a) has the 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 (**Rights Condition**), (b) is not a member of the board of directors of the target nor has the right to nominate such members in future (**Board Condition**), and (c) does not intend to participate in the management or affairs of the target (**Participation Condition**) [collectively, the **Explanation**].

14. In this backdrop, it was stated that:

    i. the Transaction satisfied the Shareholding Condition as the shareholding underlying the OCDs amount to less than 10 percent of the share capital of Biocon.

    ii. the Transaction satisfied the Control Condition as the limited rights acquired by GS AIF, as a shareholder, under the SHA, do not confer any "control" or "material influence" on the day-to-day management, or affairs, of Biocon and that the rights held by GS AIF are merely in the nature of minority shareholder investment protection rights.

    iii. the Transaction satisfied the SIP Condition in terms of the Explanation. As submitted, GS AIF acquired less than 10% of Biocon and the acquisition did not involve any right to appoint (or any right to nominate in the future) a member/observer on the board of directors of Biocon Biologics. Further, GS AIF had no intention to participate, and has not participated in the management or affairs of Biocon Biologics. Therefore, the Board Condition and the Participation Condition have been met. As regards the Rights Condition, further submissions were made as detailed hereunder.

15. The Rights Condition states that acquisition is deemed as solely as an investment if 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*". In this regard, it is stated that these rights have to be viewed

in the context of existing rights in the relevant enterprise *i.e.*, the target under consideration, and cannot be equated with rights available to ordinary shareholders in a listed company. With this perspective, it has been submitted that at the time of the Transaction, there were only three types of shareholders/stakeholders in Biocon *viz.*, promoters, Investors, and individuals. Accordingly, Biocon did not have any 'ordinary' shareholders *per se* as understood in the context of say, a public listed company. Further, it has been stated that the Minutes Right and the Access Right are available to all of the Investors in Biocon Biologics and not just to GS AIF and that these rights existed for other investors in Biocon Biologics prior to the Transaction and continued to exist post the Transaction and these were granted to GS AIF simply as a result of these rights being available to the other investors.

Broader Item 1 Provision applies to the Transaction

16. As submitted, if the Explanation is not available, the broader Item 1 Provision would still apply to the facts at hand. In this regard, a reference was also made to the Frequently Asked Questions (FAQs) published by the Commission in September 2022 which note: "*Explanation to Item 1 provides that the acquisition of less than 10% of the total shares or voting rights of an enterprise shall be treated solely as an investment if certain conditions are satisfied.* ***<u>However, it does not presume the opposite</u>***, *i.e., the explanation does not presume that acquisition in excess of 10% of share capital of any target cannot qualify solely as an investment…*" (emphasis added).

Existence of minority investor protection rights cannot affect the availability of the benefit of Item 1 Provision

17. As submitted, the availability of minority investment protection rights cannot take away the benefit of the Item 1 Exemption. As stated, limiting the benefit of Item 1 Provision would lead to drastic results and be antithetical to the established practice of the Commission and its jurisprudence. The same would be onerous and contrary to the ease of doing business as a shareholder/investor who is investing hundreds and is simply getting rights which allow it to protect its minority investment (without any control or material influence on the day-to-

day or material functioning of the target) has to notify and seek a prior approval. The same would be against the intention of the Commission in framing the Combination Regulations as the statutory rights are the baseline of rights which could be available to a shareholder, and it follows that a minority investor investing a certain high quantum of money would naturally have certain proportionate rights to protect any value depletion. Further, as stated, given the suspensory nature of the merger control regime in India, it will add significantly to the administrative costs of transactions (including but not limited to costs of the filing, legal and financing costs involved and time cost of obtaining approvals) without any strong economic rationale or theory of harm being explained or guidance provided.

Decisional Practice

18. GS has made a reference to the Commission's decisional practice and stated that the Commission had not penalised any investor for investing *via* OCDs with such rights (where the right to appoint a board member/observer has also not been granted) and that the Commission has interpreted "solely as an investment", as a passive investment where the investor does not intend to be involved in the formulation or determination of the day-to-day business decisions of the target.

Safeguards to prevent exchange of confidential information

19. It has been stated that any investor/lender will need access to certain commercially sensitive information to evaluate whether funds being invested in a company are being utilized as per the agreed upon commercial purposes and to ensure their invested capital is otherwise protected. Therefore, like every other Investor, GS AIF would also need access to certain financial information of Biocon to periodically assess the valuation of the debt/investment as well as the proposed utilization of the funds being provided by GS AIF to Biocon. However, in this regard, it has been stated that GS AIF is in the business of investing in accordance with a defined investment policy for the benefit of its investors and in addition to the general confidentiality obligations applicable to GS AIF under the AIF Regulations by virtue of being a registered AIF, GS AIF is also bound by confidentiality provisions under the SHA.

20. Further reference has been made to the arrangement agreed as per the SHA. As submitted, the SHA specifically states that during the term of the SHA and for a period of three years thereafter, recipients of the information may not use confidential information for a purpose other than the performance of its obligations under the agreement or another transaction document, may not disclose confidential information to a person (except with prior written consent) and must make every reasonable effort to prevent the misuse or unauthorized disclosure of confidential information.

21. It has been stated that the intent of the Commission is to address the issue of common minority shareholdings in competing enterprises or vertical enterprises primarily due to concerns of information sharing and the likelihood of collusion between such enterprises. However, in the current fact pattern, while an Investor is allowed to disclose confidential information to its affiliates, the definition of affiliates (as per the SHA) specifically excludes any portfolio company or entity in which the said Investor holds an investment. In this backdrop, it has been stated that GS AIF is specifically barred from sharing any confidential information of Biocon with its other portfolio companies. Further, it has been clarified that at the time of the closing of the Transaction, GS AIF did not directly or indirectly have investments in any company in India that was engaged in the same or a similar line of business as Biocon.

Transaction is made in ordinary course of business

22. Apart from submissions on the Transaction being solely as an investment, it has been stated that the Transaction also satisfies the test of being in ordinary course of business. Referring to the Commission's practice and FAQs, it has been stated that the term "ordinary course of business" is meant to refer to transactions which are "frequent, routine and usual". In the context of the Transaction, it has been stated that: (a) GS AIF routinely provides funding to numerous companies in India; (b) making investments where a good opportunity to generate return arises, is in the ordinary course of business for GS AIF; (c) such arrangements are frequent and repetitive for GS AIF; (d) the activities undertaken by Biocon do not correlate with the core business operations or activities of GS AIF; and (e) Biocon Biologics has raised

money from several similarly situated lenders/investors, each of whom has a similar set of rights as GS AIF, seeing an opportunity to generate a return from their investment in the company. Accordingly, it has been submitted that the Transaction qualifies for being an ordinary course of business transaction as well.

23. Notwithstanding the aforesaid submissions, GS submitted that if the Commission still considers that in order to alleviate its concerns and for it to close the present case without penalty, it would need GS AIF to undertake to give up and not exercise the Minutes Right and Access Right of the SHA, then GS AIF gives such an undertaking.

IV. Observations and Findings of the Commission

24. First and foremost, it may be noted that the Act defines shares as, *"…shares in the share capital of a company carrying voting rights and includes— (i) any security which entitles the holder to receive shares with voting rights; (ii) stock except where a distinction between stock and share is expressed or implied;"* Thus, the convertible securities constitute shares and are treated accordingly. Thus, before going into the specific submissions of GS on the aspect of notification of Transaction, it is clarified that there is no separate framework for OCDs and thus the fact that GS has acquired OCDs is irrelevant to assessment.

25. The issue of whether the Transaction was required to be notified or not is primarily the subject matter of Item 1 Provision. As stated above, the applicability of Item I Provision requires a transaction to satisfy the Shareholding Condition and Control Condition and SIP Condition or OCB Condition. In this regard, given the information on record and observations in the SCN, the Transaction satisfies the Shareholding Condition and Control Condition and those aspects do not require any assessment or findings. The key aspect relevant for determining the notification requirement of the Transaction is the SIP Condition and OCB Condition and thus, the Transaction has been assessed accordingly.

Whether the Transaction satisfies the SIP Condition?

26. In this regard, GS has firstly made submissions on the construct of Transaction in terms of various conditions provided in the Explanation and on applicability of Item 1 Provision even if the Explanation is not available.

27. In this regard, the Commission observed that Item 1 Provision is always applied holistically. If the Explanation were to be considered disjointed with the broader Item 1 Provision, then there was no need for any analysis to conclude that the Transaction does not satisfy SIP Condition. The rights forming part of the subject matter definitely go beyond the rights of ordinary shareholders and therefore the very fact that these rights are being examined for being consistent with the SIP Condition exemplifies that the Commission considers Item 1 Provision holistically. The nature of rights acquired is indeed relevant to determination of need for a transaction to be notified or not and this assessment of nature of right harmonises the overall Item 1 Provision including the Explanation as the focus is the assessment of any transaction being strategic or not.

28. Another issue which has been raised by GS is that the Rights Condition needs to be applied in the context of existing rights of investors in the relevant enterprise *i.e.*, the target under consideration and cannot be equated with rights available to ordinary shareholders in a listed company. The interpretation of Rights Condition as given by GS is not tenable as the same potentially implies that if any enterprise grants control conferring rights/strategic rights to a class or classes of investors, the same should be considered as ordinary rights not considering the nature of rights but only because these rights have been granted to all investors or a sub-set of investors. Item 1 Provision is premised on ensuring assessment of transactions where an investor acquires rights which can potentially have impact on competition or operational dynamics of the target and therefore the only relevant aspect is the nature or substance of the underlying ‘right’. In this backdrop of overall Item 1 Provision including the Explanation and the relevant yardstick for evaluation of rights of ordinary shareholders, the Transaction has been assessed for its compliance with Item 1 Provision.

29. The Commission observed that Minutes Right and Access Right goes beyond the rights of ordinary shareholders both in terms of form and substance. With access to Minutes Right, GS AIF gains privileged access to all commercially sensitive information discussed and deliberated upon during the Board meetings of Biocon. This information could include strategic plans, financial data, proprietary technology, business forecasts, and other confidential matters crucial to the competitive advantage and market position of the entities involved. In form, such access is not allowed to the 'ordinary shareholders' and in substance, such access is indicative of GS considering the Transaction as strategic. Further, while GS has made a reference to the Commission's decisional practice and stated that the Commission had not penalised any investor for investing with such rights (where the right to appoint a board member/observer has also not been granted), it is important to note that Minutes Right also confers potential access to commercially sensitive information which, *inter alia*, is the substantive underlying concern of Item 1 Provision.

30. The Commission also considered submissions of GS AIF on the safeguards to prevent the exchange of any confidential information obtained with regard to both the AIF Regulations in general and the SHA. In this regard, it is important to note that the key issue here is the notifiability of a transaction, and notifiability criteria have to be objective and cannot be applied considering the specificities of the legal framework applicable to a set of firms or their *inter se* arrangements. Such specificities may be relevant to the assessment of a transaction but not the notifiability and therefore the submissions on safeguards are not relevant to the proceedings.

Whether the Transaction satisfies the OCB Condition?

31. GS has submitted that the Transaction also satisfies the test of being in ordinary course of business considering that the activities of GS AIF of providing funding, making investments *etc.* are "frequent, routine and usual". In this regard, it may be noted that in context of transactions involving shares, the real test for determination of the activity being "frequent, routine and usual" is whether a transaction has been done solely with the intent to get

benefited from short term price movement of securities. All these issues need to be considered in light of the facts of a transaction.

32. Considering the facts of the impugned Transaction, the Commission observed that GS acquired OCDs in 2020 and the final maturity date was fixed as 9th January 2026 which implies a significant holding period. Further, GS AIF had a right to convert the OCDs into equity shares at any time prior to the final maturity date (Conversion Right). The acquisition of Conversion Right allows GS to weigh whether to exit the Target on final maturity date or to convert the debentures into shares and stay invested. Furthermore, GS acquired certain Reserved Matter Rights, Information Rights, *etc.* All these aspects of the Transaction point to the fact that the Transaction has not been made with an intent of benefiting from short term price movements. The "frequent, routine and usual" test for the ordinary course of business transactions is not limited to the execution of transactions but also weighs the intended span or time period of investment and the agreed role as an investor. The ordinary course of business transactions are the transactions where the intended/actual span of investment is short, and the role of an investor is limited to that of an ordinary shareholder and the investor shall have no rights at all apart from beneficial rights attached to shares and voting rights. Any transaction which is made with the intent of remaining invested for a relatively longer period and involves the acquisition of any additional rights (compared to the rights of an ordinary shareholder) cannot be considered as in ordinary course of business. The competition dynamics are influenced by the substance of arrangements between the parties and not the form of their organization. The regulatory framework is agnostic to the form of an organization and therefore the same is applicable to all enterprises in equal measure.

33. Basis the aforesaid, the Commission is of the opinion that the Transaction was notifiable and by consummating the same without filing a notice under Section 6(2) of the Act, GS is liable to penalty under Section 43A of the Act. Section 43A of the Act provides that if any person or enterprise fails to give notice to the Commission under Section 6(2) of the Act, the Commission shall impose on such person or enterprise a penalty which may extend to 1% of the total turnover or the assets, whichever is higher, of such a combination. Thus, Section

43A of the Act empowers the Commission to determine the appropriate amount of penalty in a matter, subject to the maximum of 1% of the total turnover or the assets, whichever is higher.

34. Considering the facts and circumstances of the instant matter, the conduct of GS during the proceedings, the Commission considers it appropriate to impose a penalty of INR 40,00,000 (Rupees Forty Lakhs Only) on GS, which is directed to pay the penalty within 60 days from the date of receipt of this order.

35. It is made clear that nothing used in this order shall be deemed to be confidential or deemed to have been granted confidentiality, as the same has been used for the purposes of the Act in terms of the provisions contained in Section 57 thereof.

36. The Secretary is directed to communicate to GS accordingly.