WTM/SR/ISD/79/04/2015

BEFORE THE SECURITIES AND EXCHANGE BOARD OF INDIA, MUMBAI
CORAM: S. RAMAN, WHOLE TIME MEMBER

ORDER

Under Sections 11, 11B and 11(4) of the Securities and Exchange Board of India Act, 1992 read with Regulation 11(1) of the SEBI (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003, in the matter of alleged market manipulation using GDR Issues.

Background –

1. In view of certain irregularities observed in the issuance of Global Depository Receipts ("**GDRs**") by IKF Technologies Limited ("**IKF**"), Securities and Exchange Board of India ("**SEBI**") vide an *ad interim ex-parte* Order dated September 21, 2011 ("**Interim Order**"), directed that company –

   "… not to issue equity shares or any other instrument convertible into equity shares or alter their capital structure in any manner till further directions."

2. The Interim Order was confirmed against IKF on December 30, 2011 ("**Confirmatory Order**") .

3. IKF filed a Miscellaneous Application alongwith an Appeal (*Misc. Application No. 143 of 2014 and Appeal No. 302 of 2014 – IKF vs. SEBI*) before the Hon'ble Securities Appellate Tribunal ("**SAT**"). The Hon'ble SAT disposed of the aforesaid vide its Order dated October 14, 2014, directing:

   "Counsel for the respondent on instructions states that show cause notice under 11B of Securities and Exchange Board of India Act, 1992 would be issued to the appellant within a period of three weeks from today and the same would be disposed of by passing an order within a period of four months thereafter. Statement made by the counsel for SEBI is accepted. In view of the statement made by the counsel for the respondent, we see no reason to entertain the appeal."

4. SEBI completed its investigation in the matter and based on the findings therein, a Show Cause Notice ("**SCN**") dated October 21, 2014, was issued to IKF.

5. IKF vide letter dated November 5, 2014, requested SEBI to grant inspection of documents alongwith additional time of 3 weeks post–inspection, for filing its reply to the SCN. SEBI acceded to IKF's request and *inter alia* granted inspection of documents on November 17, 2014. Thereafter, IKF vide letter dated December 5, 2014, requested for an extension of another 3 weeks to file its reply to the SCN, which was acceded to by SEBI. IKF then filed its reply to the SCN vide letter dated January 21, 2015.

6. Pursuant to receipt of IKF's reply to the SCN, SEBI filed a Miscellaneous Application (*Misc. Application No. 79 of 2015 in Appeal No. 302 of 2014–SEBI vs. IKF*) before the SAT, in respect of that Tribunal's Order dated October 14, 2014. The Hon'ble SAT disposed of the application vide its Order dated February 20, 2015, directing:

"By this Miscellaneous Application, applicant (Original Respondent) seeks 2 months extension of time for passing final order. Counsel for Respondent (Original Appellant) has no objection. Accordingly time to pass final order is extended by 2 months from today."

7. Subsequent to receipt of reply to SCN, an opportunity of personal hearing was granted to IKF on March 13, 2015, wherein IKF was directed to submit information as detailed at paragraph 10 of this Order.

8. Thereafter, a Supplementary SCN dated March 16, 2015, was issued to IKF.

9. Vide letter dated March 18, 2015, IKF provided the information sought during the hearing on March 13, 2015. Further, IKF filed its reply to the Supplementary SCN vide letter dated March 30, 2015.

Show Cause Notice dated October 21, 2014 –

9.1 The SCN dated October 21, 2014, which was issued under Sections 11, 11B and 11(4) of the Securities and Exchange Board of India Act, 1992 ("**SEBI Act**") read with Regulation 11 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 ("**PFUTP Regulations, 2003**"), related to the two GDR Issues made by IKF in March 2007 ("***GDR Issue I***") and May 2009 ("***GDR Issue II***") –

9.2 GDR Issue I – March 30, 2007

i. In *GDR Issue I*, Seazun Limited (now known as Clifford Capital Partners AG SA) ("**Seazun**"), a British Virgin Island based entity, was the original subscriber of GDRs. However, vide letter dated May 10, 2011, IKF had informed SEBI that the following entities were the original investors of the aforesaid Issue, viz. –

a. Unicorn Asset Management Limited;
b. Investec Bank (Switzerland) AG;
c. Animar Limited;
d. Albert Enterprises Limited.

ii. As the authorised signatory for IKF, Shri Mukesh Kumar Goel (Authorised Person during GDR Issue in March 2007 and subsequently appointed as a Director and Chief Executive Officer of IKF) ("**MK Goel**") signed an *Account Charge Agreement* dated March 27, 2007, with Banco Efisa, a Portugal based bank ("**Banco**"). MK Goel was also the authorised signatory for IKF's bank account with Banco.

iii. The *Account Charge Agreement* (signed between IKF and Banco) was an integral part of another agreement viz. *Credit Agreement* dated March 27, 2007*,* signed between Seazun and Banco. These Agreements enabled Seazun to avail a loan of US $11 Million from Banco for subscribing to the GDR issue of IKF on March 30, 2007.

iv. In terms of the *Account Charge Agreement*, IKF deposited the GDR subscription proceeds received from the subscriber i.e. Seazun, as security with Banco for the loan availed by that very same subscriber.

v. These *Agreements* i.e. *Account Charge Agreement & Credit Agreement,* effectively resulted in IKF itself financing the subscription of its GDR issue. Such an arrangement is specifically prohibited under Indian law in terms of Section 77(2) read with Section 77(4) of the Companies Act, 1956 ("**Companies Act**"). Further, this fraudulent arrangement resulting in full subscription of GDRs of the Issuer Company acted as an inducement for other investors to buy the shares of IKF in the Indian securities market.

vi. On September 28, 2007, IKF sent a letter to Banco authorizing a transfer of US $4.649 Million plus interests and fees, from the account of IKF to the account of Seazun

towards settlement of the loan taken by Seazun from Banco for subscribing to the GDRs of IKF.

9.3 GDR Issue II – May 15, 2009

i. In *GDR Issue II*, Vintage FZE (now known as Alta Vista International FZE) ("**Vintage**"), an entity under control of Shri Arun Panchariya ("**Panchariya**"), was the original subscriber of GDRs. However, vide letters dated May 10, 2011, IKF informed SEBI that the following entities were the original investors of the aforesaid Issue, viz. –

   a. Echelon India Investments Ltd;
   b. Imagination Network Inc.;
   c. Knightbridge Management Inc.;
   d. Tradetec Corporation;
   e. Trendsetter Enterprises Corp.

ii. As the authorised signatory for IKF, Shri Sunil Kumar Goel (Whole Time Director and Promoter of IKF during GDR Issue in May 2009) ("**SK Goel**") signed a *Pledge Agreement* dated April 28, 2009, with European American Investment Bank AG ("**Euram**"). SK Goel was also the authorised signatory for IKF's bank account with Banco.

iii. The *Pledge Agreement* (signed between IKF and Euram) was an integral part of another agreement viz. *Loan Agreement* dated April 28, 2009*,* signed between Vintage and Euram. These Agreements enabled Vintage to avail a loan of US $10.98 Million from Euram for subscribing to the GDR issue of IKF on May 15, 2009.

iv. In terms of the *Pledge Agreement*, IKF deposited the GDR subscription proceeds received from the subscriber i.e. Vintage, as security with Euram for the loan availed by that very same subscriber.

v. These *Agreements* i.e. *Pledge Agreement & Loan Agreement,* effectively resulted in IKF itself financing the subscription of its GDR issue and such an arrangement is specifically prohibited under Indian law in terms of Section 77(2) read with Section 77(4) of the Companies Act. Further, this fraudulent arrangement resulting in full subscription of GDRs of the Issuer Company acted as an inducement for other investors to offer to buy the shares of such Company in the Indian securities market.

9.4 As a result of the *Account Charge Agreement (with Banco) and Pledge Agreement (with Euram),* IKF did not have any free capital available from the abovementioned *GDR Issues I & II* since the capital raised through these two Issues were provided as security against loans taken by Seazun and Vintage from Banco and Euram, respectively. However, IKF concealed this crucial information and portrayed that GDR Issues I & II were successfully subscribed by few foreign investors thereby resulting in that company having free funds to the tune of US $11 Million at the time of *GDR Issue I* and US $10.98 Million at the time of *GDR Issue II*.

9.5 Around 68.70% of total capital raised through *GDR Issue II* was also routed to a foreign subsidiary, viz. Biofuel FZE. In order to examine the utilization of the GDR proceeds, SEBI sought information from IKF vide Summons dated January 12, 2012; letter dated April 20, 2012 and e-mails dated April 18, 2012; April 19, 2012 and April 20, 2012. However, IKF kept on furnishing incorrect submissions and also concealed material information from SEBI.

9.6 In view of the above, IKF is alleged to have *prima facie* violated the provisions of Sections 12A(a), (b) and (c) of the SEBI Act read with Regulations 3(b), 3(c), 3(d) and 4(2)(c), 4(2)(f), 4(2)(k) and 4(2)(r) of the PFUTP Regulations; Section 77(2) read with Section 77(4) of the Companies Act. In addition, IKF is alleged to have *prima facie* violated the provisions of Section 11C(3) of the SEBI Act.

Hearing –

10. During the course of hearing held on March 13, 2015, IKF was directed to provide the following information by March 18, 2015, viz. –

i. In view of IKF's denial that it had authorised signing of *Account Charge Agreement (with Banco) and Pledge Agreement (with Euram),* the company was asked to submit details of action taken by it against MK Goel (Authorised Person during the GDR Issue in March 2007 and subsequently appointed as Director and Chief Executive Officer of IKF) and SK Goel (Whole Time Director and Promoter of IKF during the GDR Issue in May 2009) including criminal complaints, if any, filed before any authority, police, etc.

ii. Complete Statements of its bank accounts maintained with Banco and ICICI Bank respectively, where funds (GDR proceeds) were transferred during the period from March 2007 till March 2008.

iii. Complete Statements of its bank accounts maintained with Euram and other Banks to which funds (GDR proceeds) were transferred during the period from May 2009 till May 2011.

iv. An explanation for the staggered receipt/remittance of funds (GDR proceeds) into India.

v. Verified copies of all documents submitted during the hearing and also documents sought at paragraph 4(v) of the SCN dated October 21, 2014.

Supplementary SCN dated March 16, 2015 –

11. A Supplementary SCN was also issued to IKF vide letter dated March 16, 2015, with the following charges:

i. As regards *GDR Issue I,* it was observed that as and when Seazun was making repayments to the loan taken by it, the same amount was made available for withdrawal/utilization by IKF, which was followed by remittance to IKF.

ii. It was observed that at no time IKF withdrew any money in excess of the sum of the loan repaid by Seazun and the interest accrued in its account. The same indicated that the withdrawal of the GDR proceeds by IKF was directly dependent on part loan repayment by Seazun.

iii. It was seen that on September 28, 2007, US $5.149 Million was released from the collateral deposit in IKF's account and transferred into Seazun's account, by way of allowing full payoff of the amount owed by Seazun to Banco. The same appeared to have been done in accordance with the directions in IKF's letter dated September 28, 2007, to Banco, whereby IKF had authorised Banco to transfer the amount of US $4.649 Million plus interest and fees towards settlement of the loan availed by Seazun.

iv. As regards *GDR Issue II,* it was observed that at no point in time could IKF withdraw amounts in excess of the loan part repaid by Vintage. The same indicated that the withdrawal of the GDR proceeds by IKF was directly dependent on loan repayment by Vintage.

Submissions made by IKF –

12. During the hearing before me and in its reply (dated January 21, 2015) to the SCN and reply (dated March 30, 2015) to the Supplementary SCN, IKF made the following submissions –

i. GDRs were issued outside India and to persons who were not Resident in India.

ii. The issuance of GDRs and the terms and conditions for the same, are stipulated in and governed by -
   a. The Issue of Foreign Currency Convertible Bonds and Ordinary Shares (through Depositary Receipt Mechanism) Scheme, 1993;
   b. The Reserve Bank of India Master Circular on Foreign Investment in India;
   c. The Foreign Exchange Management Act, 1999 ("**FEMA**");
   d. The Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside of India], Regulations, 2000.

iii. Only RBI and/or the Ministry of Finance have exclusive jurisdiction in respect of the issuance, trading and conversion of GDRs into shares; have the power to promulgate the relevant Schemes, Guidelines, Circulars, etc. governing the GDRs.

iv. Consequently, RBI and Ministry of Finance have exclusive jurisdiction to investigate/adjudicate any alleged wrongdoings in respect of GDRs; and SEBI has no such powers.

v. The issuance and trading of GDRs is outside the territory of India and therefore, beyond the territorial jurisdiction of SEBI.

vi. IKF was not aware of the *Credit Agreement (Seazun and Banco)* and the *Account Charge Agreement (IKF and Banco)*, both dated March 27, 2007, respectively.

vii. IKF was not aware of the *Loan Agreement (Vintage and Euram)* and the *Pledge Agreement (IKF and Euram)*, both dated April 28, 2009.

viii. IKF had not given any authorisation to MK Goel to sign the *Account Charge Agreement (with Banco).*

ix. IKF had not given any authorisation to SK Goel to sign the *Pledge Agreement (with Euram).*

x. The resolution of the Board of Directors in their meetings held on January 31, 2007 and January 30, 2008, did not contain authorisation to enter into such arrangements (i.e. providing the GDR subscription proceeds as security for loans availed by Seazun and Vintage, respectively).

xi. Assuming without admitting that *Account Charge Agreement (with Banco)* and the *Pledge Agreement (with Euram)* were executed, there would be no basis to impute any illegality to the document.

xii. IKF was not aware of the letter dated September 28, 2007, purportedly issued to Banco and the same appears to have been issued without its authority. IKF has received the entire proceeds of *GDR Issue I* of March 2007. IKF is not aware of any debit to its account for the purpose of settlement of all loans taken by Seazun.

xiii. IKF was not aware of the identities of the initial subscribers to *GDR Issues I & II*, since the allotment of GDRs was done by the Depository Bank viz. the Bank of New

York Mellon. The list of initial subscribers was provided to it by the Lead Manager and the same was informed to the stock exchanges. The existence of the entities shown as subscriber to *GDR Issue I* has also not been disputed by SEBI.

xiv. The funds belonging to IKF were not legally used to guarantee or secure the loans granted to third party whether for subscription to the GDRs or otherwise and hence, the allegation that the company acted in violation of Section 77(2) of the Companies Act is erroneous, false and baseless.

xv. It is denied that any capital was unavailable to IKF for its use due to the alleged *Account Charge Agreement (with Banco) and the Pledge Agreement (with Euram)*. The fact that IKF received the proceeds of *GDR Issues I & II* and deployed the same clearly shows that the capital was in fact raised through such *Issues*.

xvi. The letters dated February 1, 2012 and February 10, 2012, were not signed by MK Goel, as alleged. These letters were signed by the company secretary, Shri Soumyabrata Bhattacharya. Since, IKF was not aware of the *Account Charge Agreement (with Banco)* and the *Pledge Agreement (with Euram)* or its letter dated September 28, 2007, to Banco, the company secretary correctly informed SEBI that IKF did not have any agreement with EURAM or any other entity for financing the subscription of *GDR Issues I & II*.

xvii. With regards to SEBI Summons dated January 12, 2012, it is submitted that since IKF was not aware of the *Account Charge Agreement (with Banco)* and the *Pledge Agreement (with Euram)*, it did not have any reason to believe that there was any condition or restriction on withdrawal of funds from the accounts into which GDR proceeds were deposited.

xviii. Vide letter dated February 10, 2012, a detailed statement on the usage of the GDR proceeds was provided by IKF to SEBI and the same is once again being submitted.

13. In addition to the above and in compliance with the directions issued during the hearing held on March 13, 2015, IKF vide letter dated March 18, 2015, submitted the following information:

i. Regarding action taken against MK Goel and SK Goel, a Committee to conduct a search of the records was formed to ascertain whether the documents [viz. the *Account Charge Agreement (with Banco)* and the *Pledge Agreement (with Euram)* and letter dated September 28, 2007, to Banco] were in fact available with IKF. Thereafter, in a meeting held on February 7, 2015, the Board of Directors decided to seek explanation from MK Goel and SK Goel regarding the unauthorised execution of the aforesaid *Account Charge Agreement (with Banco)* and the *Pledge Agreement (with Euram)*. Company notices in this regard were sent to MK Goel and SK Goel on February 21, 2015.

ii. IKF's bank statements of its account with Banco, Euram, ICICI Bank, Axis Bank and HSBC Bank.

iii. Regarding the staggered receipt of funds (GDR proceeds) in IKF's abovementioned bank accounts, IKF submitted that company funds were kept in Fixed Deposit with Banco and Euram and it remitted the funds to India as and when required.

iv. Regarding verified copies provided to SEBI during the hearing held on March 13, 2015 and the documents sought in paragraph 4(v) of the SCN (regarding Biofuel FZE), IKF submitted:

a. Affidavit by IKF's Chief Financial Officer stating that the GDR proceeds were received in its bank accounts held with ICICI Bank, Axis Bank and HSBC Bank..

b. Certificate by the head of IKF's Information Technology Department that e–mails (received from the Lead Manager regarding the initial subscribers) have been printed from the inbox of the respective e–mail accounts viz. deepti.ikf@gmail.com and sakshi.ikftec@gmail.com, for the purpose of submission to SEBI.

c. Incorporation Certificate of Biofuel FZE, wholly owned subsidiary of IKF; statement of ADCB Bank for the period January 31, 2011 to March 10, 2015; Utilization statement for the period January 31, 2011 to March 10, 2015.

Consideration of Issues and Findings –

14. I have considered the material available on record i.e. SCN dated October 21, 2014 alongwith the Investigation Report provided therein and Supplementary SCN dated March 16, 2015, which were issued to IKF; IKF's replies to the aforesaid SCNs alongwith the submissions made during the personal hearing before me and all other relevant material available on record. In light of the same, I shall now proceed to deal with the charges levelled against IKF in the SCN and Supplementary SCN and the contentions raised by IKF.

SEBI does not have any jurisdiction to investigate or impose any penalty in relation to GDR Issues.

15.1 In its replies, IKF has submitted that only the Reserve Bank of India ("**RBI**") and/or the Ministry of Finance have exclusive jurisdiction in respect of issuance, trading and conversion of GDRs into shares. Further, IKF have also submitted that SEBI will only have jurisdiction after the GDRs are cancelled and converted into shares and such shares are subsequently traded in the Indian Securities Market.

15.2 In this regard, I note that –

i. The issuance of GDRs is from the authorised share capital of a company listed in Indian stock exchanges. Any structuring or manipulation related to GDRs has a direct impact on securities of companies trading in Indian market. Further, the underlying of GDRs are shares of Indian companies with two–way fungibility, which allows for conversion of GDRs in Indian market and vice versa. Hence, the impact of such issuance, cancellation/conversion and sale/transfer of shares so converted has a direct bearing on the securities market in India. Such issuance, etc. of GDRs by Indian companies also greatly influence decision-making by investors in the securities market. It cannot be anybody's argument that the issuance of GDRs where the underlying are *'marketable securities'* under Section 2(h) of the Securities Contracts (Regulation) Act, 1956 ("**SCRA**"), can be regarded as an activity totally insulated from and not impacting the securities market in India.

ii. As per the Listing Agreement –

a. Clause 24(a) *inter alia* states: *"24.(a) The company agrees to obtain 'in-principle' approval for listing from the exchanges having nationwide trading terminals where it is listed, before issuing further shares or securities…The company agrees to make an application to the Exchange for the listing of any new issue of shares or securities and of the provisional documents relating thereto."* Further, Clause 36 *inter alia* states: *"36. The company will also immediately inform the Exchange of all the events, which will have bearing on the performance/operations of the company as well as price sensitive information. The material events may be events such as: … i) Issue of any class of securities."*

b. Clause 24(a) of the Listing Agreement, therefore, clearly requires that a Company issuing GDRs would have to take *in–principle approval* from the relevant Stock Exchange where it is listed for issuing of further securities (GDRs in the present case). Further, under Clause 36 of the Listing Agreement, any Company issuing GDRs, has to mandatorily file information regarding completion of such GDR Issue with the relevant Stock Exchanges.

c. Upon a consideration of the abovementioned provisions, the jurisdiction of SEBI is clearly established in the instant matter since it has powers to specify requirements of listing in terms of Section 11A(2) of the SEBI Act and also penal powers under the SCRA, in respect of violations of the Listing Agreement. In the

instant matter, the GDR Issues were made by IKF by way of further issue of underlying shares.

iii. Clause (e) of RBI's *Operative Guidelines For Limited Two–Way Fungibility under the "Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993"* dated February 13, 2002, clearly specifies that the custodian is required to monitor the reissuance of GDRs and furnish a report to SEBI and RBI. In terms of Clause (q) of the aforesaid *Guidelines*, a monthly report about the ADR/GDR transactions under the two–way fungibility arrangement is required to be submitted to SEBI. SEBI has also issued Circular No. IMD/CUST/11/2003 dated December 11, 2003, in this connection.

iv. While other Regulatory Agencies monitor aspects of GDRs from the point of view of FEMA, etc. however, for aspects related to issuance of securities, market manipulation and fraud affecting the Indian Securities Market, SEBI would have jurisdiction since the relevant law in such cases will be the SEBI Act alongwith Rules and Regulations, etc. framed thereunder.

v. Under the SEBI Act, SEBI has been mandated with the task of investor protection alongwith the development and regulation of the securities market. In furtherance of the aforesaid mandate, powers have been conferred upon SEBI *inter alia* under the SEBI Act to prevent any fraudulent or manipulative activity being carried out which is detrimental to interests of investors in India. If any such activity is observed by SEBI, then it would be justified in invoking various powers conferred under such Act, Rules and Regulations made thereunder and take appropriate measures as it deems fit. Considering the same, any manipulation through issuance of GDR by a listed Indian Company will impact the Indian securities market. In such cases, SEBI indeed has full jurisdiction to look into the matter.

vi. I note that the Hon'ble SAT in the matter of *Pan Asia Advisors and Arun Panchariya v. SEBI (SAT order dated September 30, 2013)* ("**Arun Panchariya decision**") held that SEBI does not have any jurisdiction to investigate or impose any penalty in relation to Issue of GDRs. In this regard and with due respect to the Order passed by the Hon'ble Tribunal, it is pertinent to mention that as the matter has raised important questions of law which have a bearing on many matters before SEBI including the instant matter, SEBI has filed an appeal against the Arun Panchariya decision in the Hon'ble Supreme

Court of India. The Hon'ble Supreme Court of India vide its Order dated December 13, 2013, has stayed the operation of the aforesaid Order of the Hon'ble SAT.

vii. Reliance is also placed on the observations of the Hon'ble Supreme Court in the case of *Sahara India Real Estate Corporation Ltd. & Ors. vs. SEBI reported in (2013) 1 SCC 1*, wherein it *inter alia* held: *"303.1 Subsection (1) of Section 11 of the SEBI Act casts an obligation on SEBI to protect the interest of investors in securities, to promote the development of the securities market, and to regulate the securities market, "by such measures as it thinks fit". It is therefore apparent that the measures to be adopted by SEBI in carrying out its obligations are couched in open ended terms having no prearranged limits. In other words, the extent of the nature and the manner of measures which can be adopted by SEBI for giving effect to the functions assigned to SEBI have been left to the discretion and wisdom of SEBI. It is necessary to record here that the aforesaid power to adopt "such measures as it thinks fit" to promote investors' interest, to promote the development of the securities market and to regulate the securities market, has not been curtailed or whittled down in any manner by any other provisions under the SEBI Act, as no provision has been given overriding effect over subsection (1) of Section 11 of the SEBI Act."*

viii. Further, in the matter of *GVK Industries Limited & Anr. vs. the Income Tax Officer & Anr.[(2011) 197 Taxman 337 (SC)],* while deciding as to whether the laws enacted by the Parliament can have extra-territorial effect, the Hon'ble Supreme Court had observed: *"…the Parliament may exercise its legislative powers with respect to extra-territorial aspects or causes, - events, things, phenomena (howsoever commonplace they may be), resources, actions or transactions, and the like, that occur, arise or exist or may be expected to do so, naturally or on account of some human agency, in the social, political, economic, cultural, biological, environmental or physical spheres outside the territory of India, and seek to control, modulate, mitigate or transform the effects of such extra-territorial aspects or causes, or in appropriate cases, eliminate or engender such extra-territorial aspects or causes, only when such extra-territorial aspects or causes have, or are expected to have, some impact on, or effect in, or consequences for: (a) the territory of India, or any part of India; or (b) the interests of, welfare of, wellbeing of, or security of inhabitants of India, and Indians."* In accordance with these observations, where the impact of actions/omissions, etc. of an entity are felt in the securities market in India, such entity would be subject to regulatory jurisdiction of SEBI.

ix. In view of the above, I am of the considered view that SEBI has full jurisdiction to issue directions in the instant matter if it has reason to believe that IKF acted fraudulently to the detriment of investors in the Indian securities market.

Section 77(2) of the Companies Act applies only to shares and not to GDRs.

16. In its replies, IKF has submitted that the allegation that it acted in violation of Section 77(2) of the Companies Act, is erroneous, false and baseless since the funds belonging to the company were not legally used to guarantee/secure the loans granted to a third party whether for subscription to GDRs or otherwise. In this regard, I note that –

i. As per Section 77(2) of the Companies Act, *"No public company, and no private company which is a subsidiary of a public company, shall give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or in its holding company".*

ii. From the preceding paragraphs,

a. For <u>*GDR Issue I,*</u> it is clear that the *Account Charge Agreement* entered into between IKF and Banco forms an integral part of the other Bi-partite agreement viz. *Credit Agreement,* entered into between Seazun and Banco dated March 27, 2007. These Agreements enabled Seazun to avail a loan of US $11 Million from Banco for subscribing to the GDR issue of IKF on March 30, 2007. In addition, IKF vide letter dated September 28, 2007, authorized Banco for transfer of US $4.649 Million plus interests and fees, from its account towards settlement of Seazun's outstanding loan on account of the *Credit Agreement* (Total amount debited by Banco from IKF's bank account was US $5.149 Million). The difference between the amounts of US $4.649 Million and US $5.149 Million i.e. US $0.500 Million, was presumably towards the interests and fees charged by Banco. Incidentally, subsequent to the full repayment of US $11 Million with the closure of the loan availed by Seazun from Banco on September 28, 2007, some more amounts were being received by IKF in its bank account with Banco, which were continued to be remitted to India till the total of such amount remitted to India approached US $11 Million. In its submissions, IKF has contended that it is not aware of any debit to its bank account with Banco for the purpose of settlement of loan taken by Seazun. However, subsequent to the hearing held on March 13, 2015, IKF (vide letter dated March 18, 2015) submitted complete statement of its bank account with Banco, which clearly reveals the aforesaid debit of US $5.149 Million from its account towards settlement of Seazun's loan.

b. Similarly, For <u>*GDR Issue II,*</u> the *Pledge Agreement* (signed between IKF and Euram) was an integral part of another agreement viz. *Loan Agreement,* signed between Vintage and Euram dated April 28, 2009. These Agreements enabled Vintage to avail a loan of US $10.98 Million from Euram for subscribing to the GDR issue of IKF on May 15, 2009.

c. In my view, since the underlying of the GDRs are equity shares and issue of GDRs also result in an increase in capital of the company, the provisions of Section 77(2) of the Companies Act would clearly be attracted in any issue of GDRs. Therefore, the arrangement resulting from the aforesaid *Agreements* i.e. *Account Charge Agreement & Credit Agreement* and *Pledge Agreement & Loan Agreement* allowed IKF to effectively help finance the purchase of its own shares since it deposited the proceeds of GDR subscription as collateral for the Dollar Term–Loan Facility provided by Banco to Seazun and also the loan provided by Euram to Vintage. Such arrangement is specifically prohibited under Indian laws in view of Section 77(2) of the Companies Act.

iii. In this regard, I also note that in the matter of *Gammon India Limited vs. SEBI,* the Hon'ble SAT vide its Order dated June 20, 2008, had observed that providing funds to entities by the company for the purpose of buying its own shares amounted to a violation of the PFUTP Regulations.

iv. I, therefore, find no merit in IKF's submission that they did not act in violation of Section 77 of the Companies Act.

No knowledge of the Account Charge Agreement (with Banco) alongwith Credit Agreement (Seazun with Banco) & Pledge Agreement (with Euram) alongwith Loan Agreement (Vintage with Euram).

17.1 In its replies, IKF has denied any knowledge of the *Account Charge Agreement (with Banco) alongwith Credit Agreement (Seazun with Banco)* and *Pledge Agreement (with Euram) alongwith Loan Agreement (Vintage with Euram).* Further, IKF has submitted that no authorisation was given to either MK Goel or SK Goel to enter into such *Agreements.*

17.2.1 *GDR Issue I* –

i. A *Credit Agreement* dated March 27, 2007, was executed between Seazun and Banco, whereby Seazun availed a loan of US $11 Million from Banco for subscribing to the GDR issue of IKF on March 30, 2007. As per the aforesaid *Credit Agreement,* -

   a. Banco shall make available to Seazun a Dollar Term–Loan Facility of upto US $14 Million for the purpose of subscription to GDRs issued by IKF.
   b. Banco shall not be under any obligation to make the Dollar Term–Loan Facility available to Seazun unless it has notified the borrower (Seazun) that it has received all the documents listed in Schedule 1 of the *Credit Agreement*, which included *inter alia* certified copies of board minutes and resolutions of IKF approving and authorizing the execution, delivery and performance by it of each Security Document (Deposit Charge i.e. Charge over the deposit made by IKF with Banco dated on or around the date of the *Credit Agreement*, and any other guarantee or document creating, evidencing or acknowledging security in respect of any of the obligations and liabilities of Seazun and IKF under the *Credit Agreement*, etc.) to which it is a party on the terms and conditions of those documents and authorizing person(s) to sign or otherwise attest the due execution of those documents and any other documents to be executed by it pursuant to those documents together with a certificate of a duly authorised officer of IKF setting out the names and signatures of the persons authorised to sign such documents on its behalf.

ii. An *Account Charge Agreement* dated March 27, 2007, was executed between IKF and Banco. As per the aforesaid *Account Charge Agreement*, –

   a. IKF shall deposit in its designated account with Banco, an amount not exceeding US $14 Million as security for all the obligations of Seazun under the *Credit Agreement* (which was signed between Banco and Seazun by which Banco agreed to lend Seazun an amount of upto US $14 Million – However, actual loan availed by Seazun and loan disbursed by Banco was US $11 Million), which amount shall in turn be assigned and charged in favour of Banco as a continuing security for the due and punctual payment and discharge of the aforementioned obligations of Seazun, subject to the terms of the *Account Charge Agreement* .
   b. Upon payment of all or part of the amounts due under the *Credit Agreement*, IKF may withdraw from the Account the equivalent amount.

c. Each and every notice or other communication to be given under the Agreement shall be made by letter or fax to:

IKF Technologies Ltd.,

Address: Block EP & GP, Plot No. XI-16,Sector V Salt Lake City, Kolkata 700091, India

Attention: Mr. Mukesh Kumar Goel.

d. The *Account Charge Agreement* was signed on behalf of IKF by MK Goel.

iii. From the Deposit Account Application and other Client Documents in respect of IKF's bank account with Banco, it is observed that –

a. The authorised signatory for the operation of the bank account was MK Goel (Subsequently appointed as Chief Executive Officer and Director of IKF).

b. MK Goel had irrevocably authorised Banco to carry out, as soon as practicable upon receipt, instructions transmitted by Telephone, Telefax and/or email, without waiting for a written confirmation by letter thereof.

iv. Upon a consideration of the abovementioned paragraphs, I find it difficult to accept IKF's contention that it had no knowledge of the *Account Charge Agreement alongwith Credit Agreement*. In this context, the following is noted –

a. The obligation of Seazun under the *Credit Agreement* was secured by IKF through the *Account Charge Agreement* whereby it deposited an amount of US $11 Million with Banco i.e. GDR subscription proceeds received from the subscriber – Seazun, which amount was assigned and charged in favour of Banco as a continuing security. Further, on examining the debits made from the said bank account of IKF and Seazun, it is found that it was only after part payment by Seazun of the amounts due under the *Credit Agreement* that IKF was able to withdraw funds from its bank account with Banco, in accordance with the terms of the *Account Charge Agreement*. The series of transactions in the account of IKF clearly indicate that IKF was never able to remit any amount from its account in excess of the amounts repaid by Seazun to Banco and the interest amount, which had accrued in its account. The remittances by IKF invariably followed part repayment of loan by Seazun and never preceded it. This is a clear indication that the withdrawal of GDRs proceeds by IKF was entirely dependent on the repayment by Seazun to Banco under the *Credit Agreement*. This is illustrated in **Table A** on the following page:

TABLE A –
REPAYMENT OF LOAN BY SEAZUN AND CORRESPONDING REMITTANCE OF GDR PROCEEDS BY IKF

I ***Date***	***II*** ***Loan repaid by Seazun ($)***	***III*** ***Interest credited in the account of IKF ($)***	***IV*** ***Amount remitted by IKF ($)***	***V*** ***Cumulative of Loan repaid by Seazun and Interest credited in IKF's account as on date ($)***	***VI*** ***Cumulative amount remitted by IKF as on date ($)***
21-06-2007	500,000	6,241.67		506,241.67	-
22-06-2007			500,000	506,241.67	500,000
25-06-2007	300,000	3,923.33		810,165.00	500,000
26-06-2007			300,000	810,165.00	800,000
02-07-2007		139,456.67		949,621.67	800,000
03-07-2007	670,000	398.28	475,000	1,620,019.95	1,275,000
05-07-2007	100,000	89.17	195,000	1,720,109.12	1,470,000
06-07-2007			200,000	1,720,109.12	1,670,000
11-07-2007	281,000	501.12	330,000	2,001,610.24	2,000,000
08-08-2007	325,000	1,931.94	325,000	2,328,542.18	2,325,000
14-08-2007	500,000	3,418.06	500,000	2,831,960.24	2,825,000
20-08-2007	675,000	5,216.25	500,000	3,512,176.49	3,325,000
21-08-2007			175,000	3,512,176.49	3,500,000
28-08-2007	500,000	4,458.33	500,000	4,016,634.82	4,000,000
04-09-2007	500,000	4,978.47	500,000	4,521,613.29	4,500,000
10-09-2007	300,000	3,254.58	300,000	4,824,867.87	4,800,000
14-09-2007	200,000	2,288.61	200,000	5,027,156.48	5,000,000
17-09-2007	500,000	5,944.44	500,000	5,533,100.92	5,500,000
21-09-2007	500,000	6,241.67	500,000	6,039,342.59	6,000,000
28-09-2007	**5,149,000	69,633.07	500,000	11,257,975.66	6,500,000
Total	**11,000,000**	**257,975.66**	**6,500,000**		

********IKF vide letter dated September 28, 2007, authorized Banco for transfer of US $4.649 Million plus interests and fees, from its account towards settlement of Seazun's outstanding loan on account of the Credit Agreement.*

Note: *Columns II and IV, respectively represent the amount of loan repaid by Seazun and the amount remitted by IKF. For example, on 21.7.2007, Seazun repaid US $500,000 to Banco. IKF remitted US $500,000 on 22.6.2007. Similarly, on 8.8.2007, Seazun repaid US $325,000. On the same day, IKF remitted US $325,000 from its account. This has been the case with every single remittance into India except for a very brief period from 3.7.2007 to 11.7.2007, when the total amount remitted to India i.e. US $1.2 Million, exceeded the amount repaid by Seazun i.e. US $1.051 Million, by an amount of US $149,000. However, this amount is more than covered by the interests credited to IKF's account on the deposit kept with Banco, which was more that US $150,000 till then.*

b. From the certified copy of an extract from the Minutes of the Meeting of the Board of Directors of IKF held on January 31, 2007 *(certified by MK* Goel*)*, which was received from Banco, the following is observed:

"RESOLVED THAT a bank account be opened with Banco Efisa S. A. Lisbon ("the Bank") or any branch of Banco Efisa S. A. including Offshore Branch outside India for the purpose of receiving subscription money in respect of Global Depository Receipt issue of the Company.

RESOLVED FURTHER THAT Mr. Mukesh Kumar, Authorised Person be and are hereby severally authorized to sign, execute, any application, agreement, escrow agreement, document, undertaking, confirmation, declaration and any other paper(s) from time to time as may be required by the Bank and to carry and affix, Common Seal of the Company thereon, if and when so required.

RESOLVED FURTHER THAT Mr. Mukesh Kumar, Authorised Person be and are hereby severally authorised to draw cheques and other documents and to give instructions from time to time as may be necessary to the said Banco Efisa S. A. or any other branch of Banco Efisa S. A., Lisbon including Offshore Branch, for the purpose of operation of and dealing with the said account and carry out other relevant and necessary transactions and generally to take all such steps and to do such things as may be required from time to time on behalf of the Company.

RESOLVED FURTHER THAT the Bank be and is hereby authorised to use the funds so deposited in the aforesaid bank account as security in connection with loans, if any, as well as to enter into any Escrow Agreement or similar arrangements if and when so required."

17.2.2 As stated in the preceding paragraphs, events subsequent to the execution of the *Account Charge Agreement* clearly reveal that IKF did indeed use the funds deposited in its bank account as security for obligation of Seazun. Considering the aforesaid, the only and inescapable conclusion that can be drawn is that IKF had in fact authorized MK Goel for signing the *Account Charge Agreement* for operating the bank account as otherwise there was no reason for it to act as per the terms of such *Agreement*.

17.2.3 In addition, IKF was very much aware of the *Account Charge Agreement* as is evident from its conduct. In this regard, I note that -

a. From the Deposit Account Application and other Client Documents in respect of IKF's bank account with Banco, the authorised signatory for the operation of IKF's account with Banco was MK Goel.

b. IKF, through MK Goel (Authorised Person during GDR Issue in March 2007 and subsequently appointed as Director and Chief Executive Officer of IKF), had irrevocably authorised Banco to carry out instructions transmitted by Telephone, Telefax and/or email, without waiting for a written confirmation by letter thereof.
c. The withdrawal of GDRs proceeds by IKF from its bank account with Banco was dependent on the repayment by Seazun under the *Credit Agreement*.

17.2.4 *GDR Issue II* –

i. A *Loan Agreement* dated April 28, 2009, was executed between Vintage and Euram, whereby Vintage availed a loan of US $10.98 Million from Euram for subscribing to the GDR issue of IKF on May 15, 2009. The aforesaid *Loan Agreement* also stated that the *Pledge Agreement* was an integral part of the said *Loan Agreement*.

ii. A *Pledge Agreement* dated April 28, 2009, was also executed between IKF and Euram. As per the aforesaid *Pledge Agreement*, –

a. The Preamble of the *Pledge Agreement* makes reference to the *Loan Agreement* signed between Vintage and Euram. It further mentions that *"The Pledgor has received a copy of the Loan Agreement … and acknowledges and agrees to its terms and conditions"*.
b. In accordance with the *Pledge Agreement*, IKF agreed to pledge securities and funds existing in the account where GDR proceeds from *GDR Issue II* have been deposited.
c. The *Pledge Agreement* states: *"In the case that the Borrower fails to make payment on any due amount, or defaults in accordance with the Loan Agreement, the Pledgor herewith grants its express consent and the Bank is entitled to apply the funds in the Pledged Accounts to settle the Obligations."*
d. The *Pledge Agreement* was signed on behalf of IKF by SK Goel.

iii. From the Deposit Account Application and other Client Documents in respect of IKF's bank account with Euram, it is observed that the authorised signatory for the operation of the bank account was SK Goel (Whole Time Director and Promoter of IKF during GDR Issue in May 2009).

iv. Upon a consideration of the abovementioned paragraphs, I find it difficult to accept IKF's contention that it had no knowledge of the *Pledge Agreement alongwith Loan Agreement*. In this context, the following is noted –

a. The obligation of Vintage under the *Loan Agreement* was secured by IKF through the *Pledge Agreement* whereby it deposited an amount of US $10.98 Million with Euram i.e. GDR subscription proceeds received from the subscriber – Vintage, which amount was assigned and charged in favour of Euram as a continuing security. Further, on examining the debits made from the said bank account of IKF and Vintage, it is found that it was only after part payment by Vintage of the amounts due under the *Loan Agreement* that IKF was able to withdraw funds from its bank account with Euram, in accordance with the terms of the *Pledge Agreement*. The series of transactions in the account of IKF clearly indicate that IKF was never able to remit any amount from its account in excess of the amounts repaid by Vintage to Euram. The remittances by IKF always therefore, followed repayment of loan by Vintage and never preceded it. This is a clear indication that the withdrawal of GDRs proceeds by IKF was entirely dependent on the repayment by Vintage to Euram under the *Loan Agreement*. This is illustrated in **Table B** below:

TABLE B –
REPAYMENT OF LOAN BY VINTAGE AND CORRESPONDING REMITTANCE OF GDR PROCEEDS BY IKF

Date	***II*** **Loan repaid by Vintage as on date ($)**	***III*** **Amount remitted by IKF as on date ($)**	**Cumulative amount repaid by Vintage ($)**	**Cumulative amount remitted by IKF ($)**
23-07-2009	100,000	100,000	100,000	100,000
12-08-2009	1,675,000	1,675,000	1,775,000	1,775,000
08-09-2009	200,000	200,000	1,975,000	1,975,000
23-09-2009	200,000	200,000	2,175,000	2,175,000
16-11-2009	100,000	100,000	2,275,000	2,275,000
01-02-2010	204,000	200,000	2,479,000	2,475,000
10-03-2010	100,000	100,000	2,579,000	2,575,000
29-03-2010	231,000	231,000	2,810,000	2,806,000
06-04-2010	100,000	100,000	2,910,000	2,906,000
07-10-2010	500,000	500,000	3,410,000	3,406,000
04-11-2010	500,000	500,000	3,910,000	3,906,000
Total	**3,910,000**	**3,906,000**		

The important point to note is that part repayment by Vintage has always preceded the remittance made by IKF. Columns II and III, respectively represent the amount of loan repaid by Vintage and the amount remitted by IKF. For example, on July 23, 2009, Vintage repaid US $100,000 to Euram. IKF remitted US $100,000 on that same day.

b. From the certified copy of an extract from the Minutes of the Meeting of the Board of Directors of IKF held on January 30, 2008, which was received from Euram, the following is observed:

"RESOLVED THAT a bank account be opened with EURAM Bank ("the Bank") or any branch of EURAM Bank including Offshore Branch outside India for the purpose of receiving subscription money in respect of Global Depository Receipt issue of the Company.
RESOLVED FURTHER THAT Mr. Sunil Kumar Goel, Whole Time Director of the Company, be and is hereby severally authorized to sign, execute, any application, agreement, escrow agreement, document, undertaking, confirmation, declaration and any other paper(s) from time to time as may be required by the Bank and to carry and affix, Common Seal of the Company thereon, if and when so required.
RESOLVED FURTHER THAT Mr. Sunil Kumar Goel, Whole Time Director of the Company, be and are hereby severally authorised to draw cheques and other documents and to give instructions from time to time as may be necessary to the said EURAM Bank or any other branch of EURAM Bank, including the Offshore Branch, for the purpose of operation of and dealing with the said account and carry out other relevant and necessary transactions and generally to take all such steps and to do such things as may be required from time to time on behalf of the Company.
RESOLVED FURTHER THAT the Bank be and is hereby authorised to use the funds so deposited in the aforesaid bank account as security in connection with loans, if any, as well as to enter into any Escrow Agreement or similar arrangements if and when so required."

17.2.5 As stated in the preceding paragraphs, events subsequent to the execution of the *Pledge Agreement* clearly reveal that IKF did indeed use the funds deposited in its bank account as security for obligation of Vintage. Considering the aforesaid, the only and inescapable conclusion that can be drawn is that IKF had in fact authorized SK Goel for signing the *Pledge Agreement* for operating the bank account as otherwise there was no reason for it to act as per the terms of such *Agreement*.

17.2.6 In addition, IKF was very much aware of the *Pledge Agreement* as is evident from its conduct. In this regard, I note that -

a. From the Deposit Account Application and other Client Documents in respect of IKF's bank account with Euram, the authorised signatory for the operation of IKF's account with Banco was SK Goel (Whole Time Director and Promoter of IKF during GDR Issue in May 2009).

b. The withdrawal of GDRs proceeds by IKF from its bank account with Euram was dependent on the repayment by Vintage under the *Loan Agreement.*

17.3 IKF has contended that it was not aware of the actions of its Authorised Person, MK Goel and Whole Time Director, SK Goel. It is axiomatic that a company does not have a mind of its own but rather acts through its Board of Directors or authorised representatives. As per IKF's Annual Report for the Financial Year 2009–10, MK Goel was *"designated as the Chief Executive Officer of the Company and took over the charge of operations and activities of the Company"*. Incidentally, the same MK Goel was the *Authorised Person* on behalf of IKF for execution of *Account Charge Agreement (with Banco)* and other documents in relation to *GDR Issue I*. Similarly, SK Goel was a Whole Time Director of IKF. It was he who signed the *Pledge Agreement* and other documents in relation to *GDR Issue II*. It is evident from the stature of MK Goel and SK Goel that they were hugely important in the hierarchy of IKF. For the company to know anything, it could well be said that it had to be known to these two persons, who were the signatories to the *Account Charge Agreement and Pledge Agreement.* This being the case, it is preposterous for IKF to now suggest that it was not aware of the existence of these vital *Agreements.* The attempts of IKF to therefore, disown the actions of the signatories to the aforementioned *Agreements* are nothing but an afterthought aimed solely at covering up the illegality perpetrated through the aforesaid arrangements. It is also significant to note that all the actions of IKF have been in accordance with the terms of the aforementioned *Agreements* and hence, the evidence available in the matter fully corroborate the fact that IKF was very much aware of such *Agreements*, which are now being sought to be denied.

17.4 During the course of hearing held on March 13, 2015, in view of IKF's denial that it had authorised signing of *Account Charge Agreement (with Banco) and Pledge Agreement (with Euram),* the company was asked to submit details of action, if any, taken by it against MK Goel and SK Goel including criminal complaints, if any, filed. This would normally be the most logical action to take against any similarly placed officials in the circumstances. In its reply dated March 18, 2015, IKF has submitted that it has now sought explanation from MK Goel and SK Goel regarding the unauthorised execution and signing of the *Account Charge Agreement (with Banco) and Pledge Agreement (with Euram)*, respectively and sent notices to both of them on February 21, 2015. All this is nothing but a sham to show that only these officials and not the company were at the centre of the illegality perpetrated through the aforesaid arrangements. The fact undoubtedly is that IKF had, from the very beginning, full knowledge of the *Account Charge Agreement (with Banco) and Pledge Agreement (with Euram),* as evidenced by its adherence to the terms of such *Agreements.* Such sending of notices is merely

an eyewash on the part of IKF to cover its complicity in the illegalities surrounding *GDR Issues I & II*.

17.5 In view of the above, I find no merit in IKF's submissions that it had no knowledge of the *Account Charge Agreement (with Banco) alongwith Credit Agreement (Seazun with Banco)* and *Pledge Agreement (with Euram) alongwith Loan Agreement (Vintage with Euram)* or that it had not authorised either MK Goel or SK Goel to enter into such *Agreements*.

No false information regarding initial subscribers to the GDR Issues of IKF, was submitted to SEBI.

18. In its replies, IKF has submitted that it was not aware of the identities of initial subscribers to *GDR Issues I & II* and allotment of such GDRs were made by the depository bank i.e. Bank of New York Mellon. Further, the list of initial subscribers was provided to IKF by the Lead Manager i.e. Pan Asia Advisors Limited and the same was informed to the Stock Exchange. Accordingly, IKF has contended that no false information regarding initial subscribers was submitted to SEBI. In this regard, I note that –

i. From the findings in the preceding paragraphs, it is evident that IKF was very much aware of the *Credit Agreement* (Seazun and Banco), which was an integral part of the *Account Charge Agreement with Banco,* and also of the *Loan Agreement* (Vintage and Euram) was an integral part of the *Pledge Agreement with Euram*. Further, IKF was aware that Seazun and Vintage were the sole subscriber to *GDR Issues I & II*, respectively.

ii. *GDR Issue I*

a. I find from the *Account Charge Agreement* that IKF had deposited in its designated account with Banco an amount of US $11 Million as security in respect of all the obligations of Seazun under the *Credit Agreement*. In the information provided to BSE and SEBI, IKF had submitted a list of initial subscribers to the *GDR Issue I* [Paragraph 9.2(i)]. It is pertinent to note that in the aforesaid list provided by IKF, the name of Seazun was not mentioned. However, as stated before, Seazun was the initial subscriber to the *GDR Issue I* of IKF by virtue of the *Credit Agreement* and *Account Charge Agreement.*

iii. *GDR Issue II*

a. Similarly, from the *Pledge Agreement* it is noted that IKF deposited in its designated account with Euram an amount of US $10.98 Million as security in respect of all the obligations of Vintage under the *Loan Agreement*. In the information provided to BSE and SEBI, IKF had submitted a list of initial subscribers to the *GDR Issue II* [Paragraph 9.3(i)]. It is pertinent to note that in the aforesaid list provided by IKF, the name of Vintage was not mentioned. However, as stated before, Vintage was the initial subscriber to the *GDR Issue II* of IKF by virtue of the *Loan Agreement* and *Pledge Agreement*.

b. Further, from the list of 5 initial subscribers submitted by IKF in respect of the aforesaid *Issue,* SEBI has received confirmation from the Monetary Authority of Singapore vide its letter dated July 27, 2012, that 2 entities viz. Tradetec Corporation and Knightbridge Management Inc. are not listed in the Office Directory i.e. *"For Tradetec's address at the Prudential Tower, there is no level 47 (the highest floor is level 30)."* and *"For Knightsbridge's address at Ngee Ann City Tower A, we discovered that #12-01 does not exist; the first unit on the 12th floor is #12-02"*. As regards the remaining 3 entities, the Securities and Futures Commission, Hong Kong, vide e–mail dated July 31, 2012, informed SEBI that said entities were not found at the addresses provided.

iv. In view of the above, IKF's submission that it was not aware of the identities of initial subscribers to *GDR Issues I & II*, is incorrect. I, therefore, find that IKF had indeed provided false information in respect of the initial subscribers to its GDR Issues.

Failure to provide correct information to and concealment of material information from SEBI.

19.1 As per the SCN, IKF provided incorrect information and concealed material information in response to the Summons issued under Section 11C(3) and queries raised vide various SEBI letters during the investigation conducted in the instant proceedings.

19.2 From the Investigation Report and SCN, it is observed that out of US $10.98 Million raised by IKF through *GDR Issue II,* US$ 7.54 Million (68.70% of total GDR proceeds) was routed to its subsidiary i.e. Biofuel FZE. In order to examine the utilization of GDR proceeds from *GDR Issue II*, SEBI issued Summons dated April 20, 2012 to IKF, seeking information like address, contact person and contact number of its foreign subsidiary i.e. Biofuel FZE. Additionally, the following information was also sought from IKF, viz.:

i. Bank Account Statements of Biofuel FZE;
ii. Details of nature of business and Audit reports of Biofuel FZE for March 2010 and March 2011;
iii. Details such as name of entities involved, amount used, and purpose behind the purchases, expenses and payments done by Biofuel FZE.

19.3 Despite several reminders, which were issued vide SEBI letter dated April 20, 2012 and e–mails dated April 18, 2012; April 19, 2012 and April 20, 2012, IKF failed to submit the requisite information to SEBI.

19.4 I note that vide letters dated February 1, 2012; February 10, 2012 and April 24, 2012, IKF submitted that it did not have an *Agreement* with Euram for any other services except for *Escrow Agreement*. IKF also denied having any *Agreement* with any entity regarding financing for the purpose of subscription by initial investors of GDRs. These statements were totally untrue since IKF always knew that it had entered into an *Account Charge Agreement* with Banco and a *Pledge Agreement* with Euram. Further, in its aforementioned letters, IKF stated that it did not have any *Agreement/Understanding* with Vintage or Panchariya. This statement is also entirely untrue since the *Pledge Agreement* signed between IKF and Euram was an integral part of the *Loan Agreement* signed between Vintage and Euram. Similarly, it was mentioned in the *Pledge Agreement* that the *Pledgor* had received the *Loan Agreement* and agreed to its conditions. In response to a specific query raised by SEBI in the Summons dated January 12, 2012 i.e. whether there were any conditions regarding the withdrawal of funds from the account with Euram, IKF (vide letter dated February 1, 2012) failed to disclose the conditions imposed on that company on account of the *Pledge Agreement* executed between IKF and Euram. Thus, IKF consistently provided false information and concealed material information during the investigation conducted in the instant proceedings.

19.5 From the above, I find that material information, which was necessary to carry out investigations in the instant proceedings, were either not furnished correctly or were concealed by IKF. In view of the aforesaid, it is evident that IKF did not co-operate with the Investigating Officer and hampered investigations in the instant proceedings. IKF indeed tried to mislead SEBI in this regard thereby violating *inter alia* the provisions of Section 11(C)(3) of the SEBI Act. It is interesting to note that during the hearing held on March 13, 2015, IKF was directed to submit the abovementioned information to SEBI, some of which it did promptly within a period of 5 days while it never did so for more than 3 years.

Conclusion –

20. As noted above, the *modus operandi* adopted by IKF in conceiving the fraudulent arrangement of *GDR Issues I & II* to defraud investors has been fraught with mala fides at every stage of its execution. The consequences resulting from violations committed by IKF are of very grave nature and are prejudicial to the interests of investors in the securities market. If violations of this nature and magnitude are not dealt with seriously with a firm hand then investors will lose faith in the Indian Securities Market and even good companies will find it extremely difficult to raise capital in future. In view of the same, I am of the view that stringent measures are warranted in the instant case for dealing with such violations. The directions must be commensurate with the gravity of the violations so that it would act as an effective deterrent.

21. I note that the provisions of Section 12A(a)–(c) of the SEBI Act read with Regulations 3(b)–(d) of the PFUTP Regulations, *inter alia* prohibit buying, selling or dealing in securities in a fraudulent manner; employment of any manipulative/deceptive device, scheme or artifice to defraud in connection with dealing in securities; engaging in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with dealing in securities. Further, Regulations 4(2)(c), 4(2)(f), 4(2)(k), 4(2)(r) of the PFUTP Regulations, 2003, *inter alia* prohibit fraudulent and unfair trade practices in securities through various acts, omissions stated therein. In my view, any fraudulent or deceptive device, scheme, act, omission, etc. which has the potential to *inter alia* induce sale/purchase of securities of any company; influence investment decisions of investors in such company; or result in wrongful gain, etc. would be covered within the prohibition under the aforementioned provisions of law.

22. SEBI has been entrusted with the important mandate of protecting the interests of investors and safeguarding the integrity of the securities market. In this regard, necessary powers have been conferred upon it under the securities laws. It is, therefore, necessary that SEBI exercise these powers firmly and effectively to insulate the market and its investors from the fraudulent actions of any of the participants in the securities market, thereby fulfilling its legal mandate. A basic premise that underlines the integrity of securities market is that persons connected with securities market conform to standards of transparency, good governance and ethical behaviour prescribed in securities laws and do not resort to fraudulent activities. In this case, IKF has conceived the fraudulent arrangement with Seazun and Vintage with regard to the subscription of *GDR Issues I & II* and submitted incorrect/concealed information to SEBI. All the aforementioned entities have clearly acted in a manner which is fraudulent and deceptive and hence, detriment to the interests of

investors in the Indian securities market.

23.1 It is pertinent to refer to the judgment of the Hon'ble Securities Appellate Tribunal in the matter of *V. Natarajan vs. SEBI, SAT Appeal No.104 of 2011*, wherein it was held as follows:-

"… we are satisfied that the provisions of Regulations 3 and 4 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003, were violated. These regulations, among others, prohibit any person from employing any device, scheme or artifice to defraud in connection with dealing in or Issue of securities which are listed or proposed to be listed on an exchange. They also prohibit persons from engaging in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities that are listed on stock exchanges. These regulations also prohibit persons from indulging in a fraudulent or unfair trade practice in securities which includes publishing any information which is not true or which he does not believe to be true. Any advertisement that is misleading or contains information in a distorted manner which may influence the decision of the investors is also an unfair trade practice in securities which is prohibited. The regulations also make it clear that planting false or misleading news which may induce the public for selling or purchasing securities would also come within the ambit of unfair trade practice in securities…

… A basic premise that underlies the integrity of securities market is that persons connected with securities market conform to standards of transparency, good governance and ethical behaviour prescribed in securities laws and do not resort to fraudulent activities."

23.2 Reference may also be made to the following observations made by the Hon'ble Supreme Court in its judgment dated April 26, 2013, in *N. Narayanan v. Adjudicating Officer SEBI (Civil Appeal Nos.4112-4113 of 2013)* wherein it held that: *"SEBI, the market regulator, has to deal sternly with companies and their Directors indulging in manipulative and deceptive devices, insider trading etc. or else they will be failing in their duty to promote orderly and healthy growth of the Securities market. Economic offence, people of this country should know, is a serious crime which, if not properly dealt with, as it should be, will affect not only country's economic growth, but also slow the inflow of foreign investment by genuine investors and also casts a slur on India's securities market. Message should go that our country will not tolerate "market abuse" and that we are governed by the "Rule of Law". Fraud, deceit, artificiality, SEBI should ensure, have no place in the securities market of this country and 'market security' is our motto."*

24. For reasons detailed in the preceding paragraphs 14–23, I have no hesitation in concluding that IKF has indeed violated the provisions of Section 12A (a)–(d) of the SEBI Act read with Regulations 3(b)–(d), Regulations 4(1) and 4(2)(c), (f), (k) and (r) of the PFUTP Regulations,

2003. In addition, I find that IKF has violated Section 11C(3) of the SEBI Act and Section 77(2) read with 77(4) of the Companies Act.

Order –

25.1 In view of the foregoing, I, therefore, in exercise of the powers conferred upon me by virtue of Section 19 read with Section 11, 11(4) and 11B of the SEBI Act and Regulation 11(1) of the PFUTP Regulations, 2003, hereby direct IKF (**PAN: AAACI8167K**) not to issue equity shares or any other instrument convertible into equity shares or any other security for a period of **ten years** from the date of this Order.

25.2 I note that vide the Interim Order dated September 21, 2011 (later confirmed through the Confirmatory Order on December 30, 2011), IKF was directed not to issue equity shares or any other instrument convertible into equity shares or alter their capital structure in any manner till further directions. In this context, I note that IKF has already undergone the prohibition imposed vide the Interim Order for a period of approximately **3 years and 7 months**. In view of this factual situation, it is clarified that the prohibition already undergone by IKF pursuant to the aforementioned SEBI Order shall be reduced while computing the period in respect of the prohibition imposed vide this order.

25.3 This Order shall come into force with immediate effect.

25.4 This Order shall be served on all recognized stock exchanges and depositories to ensure necessary compliance.

Place: Mumbai
Date: April 20, 2015

S. RAMAN
WHOLE TIME MEMBER
SECURITIES AND EXCHANGE BOARD OF INDIA