REVIEWING THE AMBIT OF 'CONTROL' APROPOS TO THE OBJECTIVE OF 'MANDATORY BIDS': AN ANALYSIS UNDER THE TAKEOVER REGULATIONS

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The advisory committees and the capital market regulator in India have every so often tried to arrive at a definition of control that may allow them to fittingly mandate the release of takeover bids on acquisition of control over a company. Bearing in mind that merely a quantitative test to determine control may be easy to circumvent, the regulator has adopted the use of a qualitative test, along with the quantitative test, to determine the acquirers who may said to be in control of the company. However, this approach towards the interpretation of control has raised many issues, with the adjudicators failing to conclusively determine what constitutes control. This has subsequently led to the regulator necessitating or exempting the investors from coming out with an open offer in an incoherent way, injuring the interests of the investors or the minority shareholders, respectively. In light of this unsettled approach with respect to control and mandatory takeover bids under the takeover regulations, I try to decipher the actual purpose behind mandatory takeover bids to suggest what shall in fact result in a change of control that the minority shareholders had not assented to originally. Keeping in mind this change of control that mandates a takeover bid, I shall then attempt to show what actually constitutes control over a company, and why, partial equity ownerships below the numerical threshold may at times constitute control even if any additional right may only be reactive. Concurrently, I critique the approach taken by the advisory committees in suggesting the numerical threshold for triggering an open offer. Eventually, I conclude by suggesting a germane approach with respect to the interpretation of control and the release of takeover bids, hypothesising an increased numerical threshold.

I. INTRODUCTION

Takeover agreements in the securities markets, including cross-border acquisitions, have to get approved by a number of regulatory bodies before their execution. In such a framework, it becomes essential for the investors to be informed of their obligations post the acquisition of control in a company.

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However, the open-ended definition of control[1] adopted by the capital market regulator, i.e., the Securities Exchange Board of India ('SEBI'), has made the investors edgy because of the unforeseen possibility of the trigger of a mandatory takeover bid ('MTB') (also referred to as 'mandatory open offers'). A MTB necessitates an acquirer, under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ('Takeover Regulations, 2011'), who acquires 'control' over a company, to give an option to the minority shareholders to sell their shares to the acquirer, as an exit option.[2]However, the domestic as well as the foreign investors have been relentlessly expressing their apprehension with respect to the unsettled definition of control that may create financial uncertainties for them.[3]

Certain set of shareholders may be extant who invest in a company without any intention to acquire any control but may still be compelled to release an open offer in view of their indirect acquisition of control. The average holdings of these shareholders may not cross the numerical threshold of MTBs but the conferment of either affirmative, negative or management rights allows them to exercise a certain degree of influence over the decisions. SEBI and the Securities Appellate Tribunal ('SAT') have often taken antithetical approaches to determine if these rights constitute control or not.[4] To resolve this unpredictability that surrounds the term 'control', SEBI released a discussion paper in March, 2016, asking for public opinion on the tests proposed by it.[5] The alternatives provided by it included an option to provide an exhaustive list of protective rights to allay the consternation of the investors or to clear up the confusion by setting a definite numerical threshold.[6] Nevertheless, in September, 2017, SEBI eventually decided to stick to its previous definition of control, to allow it to decide on a case to case basis using the subjective test so as to avoid any undesirable complications, keeping in mind the similar definition in the Companies Act, 2013.[7] Hence, the adjudicating bodies are yet to arrive at a unanimous interpretation of 'control'.

This approach of following the qualitative and quantitative evaluation of control has previously created a lot of incertitude in the way the regulatory

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1 SEBI has adopted a subjective test wherein it not only assesses the voting rights, i.e. de jure control, but also the indirect control, i.e., de facto control. *See* SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Reg. 2(1)(e).

2 SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Reg. 3(1).

3 Sudipto Dey, *Legal quirks: When control overtakes ownership*, Business Standard (New Delhi) June 25, 2013, available at http://www.business-standard.com/article/companies/legal-quirks-when-control-overtakes-ownership-113062500038_1.html (Last visited on October 21, 2017).

4 *See Subhkam Ventures (India) (P) Ltd*. v. *SEBI*, 2010 SCC OnLine SAT 35 : (2010) 99 SCL 159; See also *Rhodia SA* v. *SEBI*, 2001 SCC Online SAT 30 : (2001) 34 SCL 597.

5 SEBI, *Discussion Paper on "Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations"*, March 14, 2016, available at http://www.sebi.gov.in/sebi_data/attachdocs/1457945258522.pdf (Last visited on December 20, 2017).

6 *Id*., 5-8.

7 Press Release, SEBI, September 8, 2017, available at http://www.sebi.gov.in/media/press-releases/sep-2017/acquisition-of-control-under-the-sebi-substantial-acquisition-of-shares-and-takeovers-regulations-2011_35891.html (Last visited on December 20, 2017).

bodies have interpreted it.[8] Certain investors may try to gain control by circumventing the numerical threshold by gaining control via contractual arrangements such as *veto* rights, affirmative rights, convertible bonds, quasi-equity instruments and power to appoint the directors, amongst others. This has made it a difficult task for the capital market regulator to arrive at a settled approach to determine control. This may be so because of the jurisprudential vacuum as to the equality rights of the minority shareholders, which has led to the imprecise comprehension of what constitutes a 'change in control' by SEBI and SAT. In this paper, I attempt to give a thorough analysis of the reasoning behind having MTBs, and further endeavour to ratiocinate the meaning of control that was envisaged while assuring the minority shareholders a protection of their interests, and to assess the extent to which SEBI and SAT have interpreted it rightly.

In Part II of this paper, I juxtapose the interests of the minority shareholders and the investors to understand the intention of the law makers while legislating the definition of control under the Takeover Regulations, 2011. In light of this, I analyse the basis of MTBs and its objective with respect to the protection of interests of the minority shareholders, and accordingly, expostulate the current numerical threshold under the Takeover Regulations, 2011. Part III of this paper is divided into several parts where I expound the meaning of control under the Takeover Regulations, 2011. I analyse the instances where SEBI and SAT have interpreted various contractual rights that may or may not tantamount to control, trying to argue how control should have been actually interpreted, while bearing in mind what actually constitutes a change in control. Subsequently, I attempt to correlate the interpretation of control under competition law and the practices under corporate governance, and argue how significant influence over the decisions of the company may actually tantamount to control, a conception of control that has been overlooked by the regulator. Further, I evaluate the practice of creeping acquisition and argue why the trigger of mandatory bids at each instance has a chilling effect on the investors and show how this is unnecessary and deleterious to the growth of the capital markets in the country, and the companies particularly.

Interlinking the aforementioned parts, in part IV of the paper, I propound an approach that the market regulator should adopt while granting exemptions using its discretion. In doing so, I discuss the numerical thresholds and various exemptions provided by different jurisdictions from releasing an open offer. I compare this latitude of exemptions provided by different countries with the ones in India, and show how a higher numerical threshold would be a more plausiblealternativeto avoid the incertitude concerning control, and would work in the interests of all the stakeholders.

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[8] SEBI, *Discussion Paper on "Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations"*, March 14, 2016,¶8, available at http://www.sebi.gov.in/sebi_data/attachdocs/1457945258522.pdf (Last visited on December 20, 2017).

II. BASIS AND INCIPIENCE OF MANDATORY TAKEOVER BIDS IN INDIA

The minority shareholders may often be uninformed when the acts of the company are performed without accounting for their interests.[9] Furthermore, attenuating the statutory remedy, courts have precluded themselves from hearing matters on the internal affairs of companies, as long as the companies functioned within the purview of the Articles of Association and the Memorandum of Association.[10] Nevertheless, the Companies Act, 2013,[11] the Takeover Regulations, 2011,[12] the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015[13] and other such statutory regulations as well as fiduciary obligations,[14] have been enacted to ensure that the interests of the minority shareholders are not being capitalised on by the majority shareholders. However, due to the limits of observing and regulating the conduct of the promoters by SEBI, shareholder activism by the minority shareholders as well, has seen a rise in the country.[15] They have been witnessed taking active part in protecting their interests by ensuring efficacious distribution of returns, especially in the companies that are financially unstable.[16] However, control not being an asset of the company,[17] there is little that the shareholders can do when the majority shareholders sell their shares to

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9 The Companies Act, 2013, §166(2) (It requires the directors to act in the interests of the stakeholders of the company, including its shareholders, who may not partake in the functioning of the company).

10 Foss v. Harbottle, (1843) 67 ER 189; Rajahmundry Electric Supply Corpn. Ltd. v. A. Nageshwara Rao, AIR 1956 SC 213; Bagree Cereals (P) Ltd. v. Hanuman Prasad *Bagri*, 2000 SCC OnLine Cal 371: (2001) 105 Comp Cas 465; R.K. Agarwal v. SEBI, Appeal No. 1/2001(plz chk citation) (unless the intervention is justifiable); Third Asian Roundtable on Corporate Governance, April 4, 2001,*The Principal Fiduciary Duties of Boards of Directors*, pp. 7-8, available at http://www.oecd.org/daf/ca/corporategovernanceprinciples/1872746.pdf (Last visited on December 21, 2017).

11 *See* The Companies Act, 2013, §§ 241-246 (These provisions protect the interests of the minority shareholders from oppression and mismanagement).

12 The Takeover Regulations, 2011, is formulated on equitable principles to look after the interests of the minority shareholders in case of any change in control in the company. *See* SEBI, *Report of the Takeover Regulations Advisory Committee dated July 19, 2010*, 1, available at http://www.sebi.gov.in/sebi_data/attachdocs/1287826537018.pdf (Last visited on December 21, 2017).

13 *See* SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Reg. 4(2)(a)(viii) & 4(c).

14 OECD, *Improving Corporate Governance in India - Related Party Transactions and Minority Shareholder Protection*, 29 (2014), available at https://www.oecd.org/daf/ca/Improving-Corporate-Governance-India.pdf (Last visited on May 16, 2018); Umakanth Varottil, *Directors' Duties And Liabilities In The New Era*, April, 2014, available at https://www.nseindia.com/research/content/res_QB5.pdf (Last visited on May 20, 2018).

15 *See* Khusboo Narayan, *The advent of shareholder activism in India*, Livemint, November 27, 2014, available at http://www.livemint.com/Companies/hri4Acn53de1Q48RFAcNwJ/The-advent-of-shareholder-activism-in-India.html (Last visited on December 21, 2017).

16 *See* Rupali Mukherjee, *Minority investors rush to be part of cos' mgmt.*, Times of India, September 22, 2017, available at https://timesofindia.indiatimes.com/business/india-business/minority-investors-rush-to-be-part-of-cos-mgmt/articleshow/60787117.cms (Last visited on December 22, 2017).

17 Jesper Lau Hansen, *The Mandatory Bid Rule: The Rise to Prominence of a Misconception*, 45 Scandinavian Studies in Law 173 (2003), 181.

a third party.[18] Moreover, investors of this class are generally not in a position to bargain for tag-along rights/other exit options, to protect themselves with an exit right.[19] In any case, exiting the company using such options may not be absolute since the tag-along right generally works on a pro-rata basis.[20] Hence, the Takeover Regulations, 2011, play an important role when a majority shareholder sells his interest to another acquirer that may lead to a change in control over the company that the minority shareholders had not assented to.

The law makers enacted MTBs under the Takeover Regulations, 2011 to avert the detriment of non-consensual change in control.[21] The rationale behind the rule of MTBs was also inspired by the principle of equality between the shareholders.[22] Despite many criticisms, the reasoning of equality in the premium gained on selling shares *and* the reasoning of change in control over the firm without the consent of the minority shareholders were given greater consideration.[23] As Professor W. D. Andrews noted, if a controlling shareholder sold his shares, every other shareholder should be given an equal or proportionate opportunity to sell their shares.[24]

Inspired by this, the rule of MTBs was first incorporated in the Indian laws under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994 ('Takeover Regulations, 1994'), which required the release of an open offer on acquiring ten percent control in the company.[25] The Takeover Regulations, 1994, was subsequently revised as per the recommendations of the Bhagwati Committee, increasing the numerical threshold from ten percent to fifteen percent.[26] This was again substantively amended as per the recommendation of the Takeover Regulations Advisory Committee ('TRAC')[27] in 2011 that is being

18 *Id*.

19 Tag-along rights are vested on minority shareholders, if contracted to in the shareholder agreement, to protect their interests. It gives the minority shareholders the right to join in a transaction for sale of shares, entered into by a majority shareholder.

20 *See*, *e.g.*, McNally Bharat Engineering Company Limited, Articles of Association, Art. 43C(2), available at http://www.mcnallybharat.com/assets/pdf/investor/MBE-annexure-june2015.pdf (Last visited on March 30, 2018) (While each and every company has the discretion to bargain the rights, the general practice is to not discriminate between the same class of shareholders).

21 SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994, Reg. 9.

22 For the principle of equality of opportunity *See generally* V. Brudney, *Equal Treatment of Shareholders in Corporate Distributions and Reorganizations*, 71 Cal. L. Rev. 4 (1983); W.D. Andrews, *The Stockholder's Right to Equal Opportunity in the Sale of Shares*, 78 Harv. L. Rev. 3 (1965); G.B. Jawaras, *Equal Opportunity in the Sale of Controlling Shares: A Reply to Professor Andrews*, 32 U. Chi. L. Rev. (1964-1965); S, Maul & A. Kouloridas, *The Takeover Bids Directive*, 5 German Law Journal 4 (2004).

23 Most of the countries in the world having functional capital markets have embodied the principle of MTBs in their takeover regulations. *See generally* Hansen, *supra* note 17, 177.

24 Andrews, *supra* note 22.

25 SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994, Reg. 9 & Reg. 10.

26 SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, Reg. 10.

27 SEBI constituted the Takeover Regulations Advisory Committee under the Chairmanship of Shri. C. Achuthan. The TRAC was formed in 2010 in light of the increasing variations and rearrangements in the capital markets. It had submitted its report to the then SEBI Chairman, Shri. C.B.

followed currently.[28] Under the current regulations, any acquirer gaining direct (crossing twenty-five percent share holding in the company) or indirect control over a company, is required to make an offer to purchase an additional twenty-six percent shares of the company.[29]

While the requirement of the release of an open offer has become a universally accepted practice,[30] the question of when to release the offer i.e. what constitutes control still remains a debatable issue. In the following sub-parts, I first assess the primary reasons that were considered and the ones that should be considered in India, before requiring the release of an open offer. Qualifying this, second, I argue against the sustainability of the current numerical threshold that is said to constitute control under the Takeover Regulations, 2011, in light of the nature of shareholding patterns. Last, in the Indian context, I shall assess the extent of control that the minority shareholders consent to, while purchasing the shares and how it is being misinterpreted in understanding the release of open offers. Further, I analyse the reasoning of the Bhagwati Committee and the TRAC in setting up the numerical threshold, and argue on the need to increase it.

A. THE SUPERSEDING MERITS OF MANDATORY TAKEOVERBIDS TO MINORITY SHAREHOLDERS OVER THE INTERESTS OF THE INVESTORS

It is incontrovertible that one of the essential purposes of any capital market is to attract investments from institutional and private equity investors.[31] Accordingly, the protection of the interests of such shareholders becomes imperative to maintain their trust in the rate of cash outflow, assure them of the absence of deleterious practices by the promoters, and preserve their confidence in other such transactional practices. MTB is one such rule that helps to protect the interests of the minority shareholders for the non-consensual actions of the majority shareholders. In a case where there is a change in control of the company i.e. a new acquirer gains control over the company, the acquirer is required to make an offer to the minority shareholders to purchase their shares.[32]

Bhave. Amongst various other suggestions, it suggested an increase the numerical threshold for the release of MTBs to twenty-five percent.

[28] SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

[29] *Id.*, Reg. 3(1).

[30] Most of the countries require the release of an open offer on a change of control in the company. This has been discussed in the discussion paper of SEBI on the brightline tests. *See* SEBI, *Discussion Paper on "Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations"*, March 14, 2016, available at http://www.sebi.gov.in/sebi_data/attachdocs/1457945258522.pdf (Last visited on December 20, 2017).

[31] *See* Michael Regan, *Capital Markets, Infrastructure Investment and Growth in the Asia Pacific Region*, 5 International Journal of Financial Studies 5 (February, 2017).

[32] *See* SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Reg. 3(1).

One of the principal reasons behind the rule of MTBs was the equal sharing of premiums gained from selling the shares to the new acquirer.[33] However, skeptics had argued on how the premium on control is not an asset of the company, and furthered this to reject the rationale of MTBs, drawing a contradistinction of the same with the 'law of trusts'.[34] The counter-argument is also premised on the basis that if there is differentiation of voting rights and shares for different shareholders, control cannot be limited to a commodity that cannot be traded.[35] However, the above mentioned arguments had been refuted, stating that shares were the results of a contract and those of the same class were identical in nature, in light of the contract exemplified in the certificate of incorporation.[36] Analysts also argued that the purpose of MTBs was to serve only in an unregulated era.[37] Otherwise, MTBs indefinitely disincentivise the investors in the market due to the burden of the exorbitant, undesirable costs.[38] The fact that the public offers are generally financed by banks was acknowledged by the Bhagwati Committee as well.[39] Further, it is also possible that while entering into M&A agreements, the shareholders may have specific intentions including the extent of the control that they wish to sell. However, the current rule in India either allows the acquirer of shares to have a very limited investment or to have a major acquisition of at least fifty-one percent; there is no possibility of enjoying control by owning between twenty-five percent to fifty-one percent shares of the company.[40]

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33 Simon M. Sepe, *Private Sale Of Corporate Control: Why The Mandatory Bid Rule Is Inefficient* 15-16, available at http://ssrn.com/abstract=1086321 (Last visited on May 16, 2018); *Pedro Testa, The mandatory bid rule in the European Community and in Brazil: A Critical View*, November 9, 2006, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=943089 (Last visited on May 16, 2018).

34 *See* W.W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J Corp. L. 3 (2001) (Berle & Means introduced the notion of control as an asset of the company, that was later expanded upon by W. Andrews); *See* W. Andrews, *The Stockholder's Right to Equal Opportunity in the Sale of Shares*, 78 Harv. L. Rev. 505 (1965). Berle & Means argued that the limited liability of a company is distinguished as a separation of its internal economic affairs from the extraneous affairs of its shareowners. The shareowners have no dominion over the funds given to the company. Rather, they have complete ownership of their shares, i.e., they can sell their shares at will, and if they do decide to sell, they can do so without influencing the assets of the company. The control premium referred above arises in relation to a transaction of shares, i.e., extraneously, but it has no pertinence as to the assets of the company).

35 Hansen, *supra* note 17, 184.

36 R. Skog, *Does Sweden Need a Mandatory Bid Rule? A Critical Analysis*, 1997, available at https://www.suerf.org/docx/o_21be9a4bd4f81549a9d1d241981cec3c_1771_suerf.pdf (Last visited on May 26, 2018).

37 Hansen, *supra* note 17.

38 William Magnuson, *Takeover regulation in the United States and Europe: an institutional approach*, 21 Pace Int'l L. Rev. 205 (2009).

39 SEBI, *Justice P.N. Bhagwati Committee Report on Takeovers January 1997*, 6.12, available at http://www.takeovercode.com/committee_reports/pnbhagwatti.php (Last visited on December 22, 2017).

40 In case a person purchases twenty-five percent shares of the company, the takeover regulations will automatically be triggered, requiring him to purchase another twenty-six percent of the shares. *See* SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Reg. 7(1).

It is important to understand that the ability to control a company is not vested in a single person or a group of persons but in the company as a whole.[41] Unless exempted by SEBI, the Indian laws require a public company to have a minimum public shareholding of twenty-five percent.[42] Hence, a normal shareholding of a company would not have a single person/entity having the requisite control to take all the decisions of the company. Assuming that a person has ownership of seventy-five percent of the shares (the highest possible)[43], a new acquirer (X) can try to gain control by purchasing anything below and close to twenty-five percent of shares along with other rights vesting control. Even in such a scenario, the person with the highest shares will have around fifty-one percent of the shares, and the minority shareholders had agreed to this person as the controlling shareholder. A major issue may arise if this highest shareholder further divests his shareholding to others, none of the new acquirers having anything greater than twenty-four percent. X, in such a case, would be the biggest shareholder, but still, his only main controlling power would be his near ability to *veto* special resolutions. Evidently, as per the current threshold in India, the issue boils down to the power of certain acquirers to block special resolutions. The TRAC had considered this ability, i.e., the ability to block special resolutions to constitute control.[44] Hence, if one was to look from the lens of the TRAC, the threshold of twenty-five percent in addition to the qualitative test would be justified.

While the most plausible demurral to this can be the power to appoint those who manage the company, in a situation as stated above where the new acquirer is not yet the biggest shareholder,[45] such a counter-argument may be rather futile. One may say that the regulator would also have to consider the surrounding circumstances to determine the intention of the acquirer, and exempt him in absence of any intention to control. However, exponents of this rule have countered this on the ground that purchasing shares of such amount would, regardless of their intentions, give them enough control over the company.[46] Nonetheless, the financial difficulties that the person bears in gaining this control may possibly be detrimental to the interests of the company in the future. Minority shareholders

[41] J.S. Letts, *Sales Of Control Stock And The Rights Of Minority Shareholders*, 26 The Business Lawyer 3 (1971).

[42] SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Reg. 38.

[43] *Id*.

[44] *See* SEBI, *Report of the Takeover Regulations Advisory Committee dated July 19, 2010* 3.7, available at http://www.sebi.gov.in/sebi_data/attachdocs/1287826537018.pdf (Last visited on December 21, 2017).

[45] Generally, the person owning the majority of shares has the power of appointment and removal of the directors. Hence, considering the fact that the directors would not want to get removed from their post, it is implied that these directors would work for the interests of the majority shareholder. *See* B.K. Dixit, *Board characteristics, ownership structure and the market for corporate control in India*, April 7, 2015, available at https://www.nseindia.com/research/content/NSE-IGIDR-WP2.pdf (Last visited on May 17, 2018).

[46] Ionna Balta, *Criticizing the mandatory bid rule of the takeover bid Directive* (November 29, 2013) (dissertation, International Hellenic University), available at https://repository.ihu.edu.gr/xmlui/bitstream/handle/11544/266/Ioanna%20Balta_4059_assignsubmission_file_Dissertation_ioanna.balta.pdf?sequence=1 (Last visited on December 23, 2017).

may tend to accept the open offers in fear of the reduction in the volumes of transactions in the company with other shareholders exiting. There also may be a threat to the share prices depending upon the repute of the acquirer. One cannot exclude the possibility of a situation where nearly all minority shareholders accept the open offer. This leaves the market open to takeovers only for those investors who have adequate money to buy the minimum shares of fifty-one percent. Otherwise, the promoters may have to wind up the whole company and enter into a new agreement before listing the company; a process that may look good as an argument, but is inordinately impracticable. Furthermore, acquirers may be unwilling to purchase such a huge amount at first, bearing in mind the possible departure of public shareholders from the company and the obvious disinclination of the previous promoters to manage the same.

While the above disadvantages do not justify the invalidation of the rule, it necessitates a balanced approach to preserve the interests of the minority shareholders as well as the investors. The seeming requirement of MTBs can also be evinced from its universal application.[47] Its effect in each country is different depending on the concentration of shareholding patterns in that country, amongst other factors.[48] Policymakers, after scrutinising the positive and negative aspects of MTBs, have given protection of the interests of minority shareholders a greater consideration over the interests of the acquirers or takeovers in general. The argument that stands above all of the aforementioned contentions against MTBs is that the minority shareholders had never consented to the new acquirer controlling the management and policy decisions of the company and hence should be given an exit option.[49] Otherwise, the acquirer may control the company against the interests of the minority shareholders.

During such instances of change of control, division of the premium among the shareholders needs to be merely calculated, and hence, if approved by the law makers, does not pose to be an issue. The issue that arises is – what is to be considered as a change of control, that the minority shareholders had not consented to, and that may be detrimental to their interests? Giving the minority shareholders an exit option, at every stage of change of control may not be a suitable practice to follow for the growth of the capital markets.[50] While purchasing the

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47 *Supra* note 30; The only major jurisdiction that has not adopted the MBR is the United States (US), although certain states (principally Pennsylvania and Maine) have prescribed rules that carry a similar effect to the MBR. *See* Jeremy Grant, Tom Kirchmaier & J.A. Kirshner, *Financial Tunnelling and the Mandatory Bid Rule*, 10 European Business Organization Law Review 233 (2009), 236-237

48 Nataliya Taran, *Mandatory Bid Rule Problems and effects of its implementation* 39 (2008, 2009) (Master Thesis, Lund University).

49 Nicholas Jennings, *Mandatory Bids Revisited*, 5 J. Corp. L. Stud.37 (2005).

50 Allowing the minority shareholders to exit at any time would require the company to buy their shares, thereby reducing their operating capital and increasing financial burden. *See generally* SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Reg. 11(1) (It allows SEBI to grant an exemption to the acquirer from making an open offer if required in the interests of investors and the securities market).

shares of a company, a minority shareholder cannot claim to have not expected any changes in the shareholding patterns/management that a company may undergo. It can hardly be said that they purchase the shares on the goodwill of the promoter. There are several other factors including the past performance of the firm's stock, expected corporate earnings, stock marketability, *inter alia*.[51] Now, when there is a new acquirer gaining control of the company, it becomes important to observe the interests of the minority shareholders in light of the extent of the control gained. Hence, any control gained by a new acquirer should not mandate the release of an open offer. In the following sub-parts of Part II of the paper, I shall,in light of the nature of concentration of shares in India, try to show what should constitute a change in control that may affect the interests of the minority shareholders.

B. THE IMPRACTICALITY OF BASING MANDATORY TAKEOVER BIDS ON A PRESUMPTION OF CONCENTRATED SHAREHOLDINGS

Initially, the Bhagwati Committee had set the numerical threshold that would constitute control to be of fifteen percent.[52] However, the TRAC recommended the increase to twenty-five percent, noticing that only six percent of the companies had promoters with fifteen to twenty percent share of the ownership.[53] It was also stated that a person acquiring twenty-five percent of shares may be able to block the special resolutions, and shall therefore be said to have control over the company.[54] After taking into account the change in controlling patterns in the country, the TRAC arrived at a conclusion to increase the threshold.[55] Nonetheless, there were companies (around eight percent of them) with promoters having less than fifteen percent ownership and yet controlling it.[56] Furthermore, as noted previously, another six percent of the companies had promoters' ownership from fifteen percent to twenty-five percent.[57] The TRAC had noted that numerous companies in India are controlled by shareholders with holdings varying from twenty-five percent to thirty percent, and on the basis of this, suggested the twenty-five percent threshold.[58] However, TRAC failed to realise that exercise of control in such companies would have been dependant on the overall shareholding composition in those companies. For instance, a company may possibly have two

[51] *See* A.H. Hussein, *Factors Influencing Individual Investor Behaviour: An Empirical Study of the UAE Financial Markets*, 5 The Business Review 2, 225-233.

[52] SEBI, *Justice P.N. Bhagwati Committee Report on Takeovers January 1997*, 6.12, available at http://www.takeovercode.com/committee_reports/pnbhagwatti.php (Last visited on December 22, 2017).

[53] SEBI, *Report of the Takeover Regulations Advisory Committee dated July 19, 2010*, 2.6, available at http://www.sebi.gov.in/sebi_data/attachdocs/1287826537018.pdf (Last visited on December 21, 2017), 2.4.

[54] *Id*.

[55] *Id*., 2.7.

[56] *Id*., 2.3.

[57] *Id*., 2.4.

[58] *Id*., 2.6.

shareholders having control over the company and none of them holding more than thirty percent of the shares.

Ownership concentration is dependent on a number of factors: economic factors like the economies of scale, profit flow, owner's preferences and other system-based factors like the financial system and efficiency in the markets in light of the macro-economic effects, amongst others.[59] It is said to play an imperative role in affecting the management control of the company.[60] For instance, low ownership promoters' companies have greater independency in their functioning and are also subject to a constant and potential change in control.[61] Naturally, a company with concentrated shareholdings should have a higher threshold for MTBs and vice-versa.[62] It goes without saying that the chances of a takeover of a company having a low promoters' ownership are drastically high as compared to a company where the shareholdings are majorly owned by shareholders. However, it is practically not possible to have a uniform legislation for companies of concentrated and dispersed shareholdings. Even though India has had a consistent pattern of concentration of ownership in the hands of the promoters, an apparent change is visible with the institutional investors, especially the foreign institutional investors ('FIIs') trying to amalgamate their holdings.[63] Moreover, the increasing foreign investments in light of the liberalist policies of the government in trade and investment and proliferated instances of divestment,[64] may lead to a constant change in the shareholding pattern of the companies.

While it may be undisputed that a takeover of a company with decentralised ownership may greatly benefit the shareholders,[65] MTBs tend to

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59 T. Pedersen & S. Thomsen, *Business Systems and Corporate Governance*, 29 International Studies of Management and Organization 2 (1999).

60 Aamir Sarwar & Ghadeer Afaf, *A comparison between psychological and economic factors affecting individual investor's decision-making behaviour*, 3 Cogent Business and Management 1(2016).

61 For instance, in Larsen & Toubro, the shareholdings of the promoters were not sufficient to control the company. *See* N. Balasubramaniam & R.V. Anand, *Ownership Trends in Corporate India 2001 – 2011 Evidence and Implications* 16 (IIM Bangalore Working Paper No: 419), available at http://www.iimb.ac.in/node/13908 (Last visited on May 17, 2018)

62 Umakanth Varottil, *Comparative Takeover Regulation And The Concept Of 'Control'*, Singapore Journal of Legal Studies (2015).

63 *See* Brajesh Kumar, Capital Markets 57 (2012); Ami Shah, *Domestic institutional investors inflows in equities hit record high in September quarter*, Livemint, September 30, 2017.

64 *See* PTI, *Foreign funds flock to Indian markets with over $30 billion inflows in 2017*, Business Today, December 17, 2017; Paramjit Kaur & Suveera Gill, *Patterns of corporate ownership: evidence from BSE-200 Index companies*, 13 Indian Institute of Management Technology 2 (July-December, 2009), available at http://www.freepatentsonline.com/article/Paradigm/238426581.html (Last visited on January 1, 2018).

65 *See generally* Press Release, Credit Suisse Research Institute publishes its third report on family-owned companies, September 27, 2017, available at https://www.credit-suisse.com/corporate/en/articles/media-releases/family-owned-businesses--comfortably-outperforming-their-peers-i-201709.html (Last visited on December 22, 2017).

have a major chilling effect,[66] deterring investments in such companies. High promoters' ownership diminishes the agency cost because of the unquenchable monitoring of the management by them.[67] Furthermore, anecdotal evidence also suggests how investors would be reluctant to invest in companies lacking dominant shareholdings.[68]

Significant numbers of shares held by family groups is generally to exercise control and gain profits, unlike other individuals/bodies whose purpose may be restricted to an investment.[69] Clearly, the functioning of a company majorly depends on the shareholding pattern and cannot be presumed to be the same for all of them, and the same may also affect the management and policy decisions of the company[70] as well as its overall corporate performance.[71] Considering that SEBI has the discretion to require the release of an open offer without crossing the threshold, such a low threshold is unnecessarily stringent. In companies with dispersed ownership, there is a lack of incentive for any shareholder to handle the managerial agency, thereby leaving it on market control.[72] Hence, bearing in mind the nature of concentration of shareholdings in India, the finding of the Bhagwati committee and the TRAC regarding the low numerical thresholdis not objectively appropriate.

C. *THE EXTENT OF CHANGE IN CONTROL THAT ABROGATES THE CONSENT OF THE MINORITY SHAREHOLDERS*

After deliberating and discussing the regulations on the numerical threshold, the issue that essentially needs to be considered is the degree of change in control that actually changes the affairs and management of the company, not consented to by the minority shareholders. The role of SEBI is to observe and require only those companies whose investment is targeted to control a company,

66 Edmund-Philipp Schuster, *Efficiency in Private Control Sales – The Case for Mandatory Bids* (LSE Law, Society and Economy Working Papers 08/2010) ; Varottil, *supra* note 62, 214.

67 Dixit, *supra* note 45.

68 Hansen, *supra* note 17.

69 Paramjit Kaur & Suveera Gill, *Patterns of corporate ownership: evidence from BSE-200 Index companies*, 13 Indian Institute of Management Technology 2 (July-December, 2009), available at http://www.freepatentsonline.com/article/Paradigm/238426581.html (Last visited on January 1, 2018).

70 McConnell, J. & H. Servaes, *Additional evidence on equity ownership and corporate value*, 27 Journal of Financial Economics 2 (1990); E. Maug, 1998, *Large Shareholders As Monitors: Is There A Trade-Off Between Liquidity And Control?*, 53 Journal of Finance 1 (1998).

71 Harold Demsetz & Kenneth Lehn, *The Structure of Corporate Ownership: Causes and Consequences*, 93 Journal of Political Economy 6 (December, 1985).

72 *See* Stuart S. Gillan, *Recent Developments in Corporate Governance: An Overview*, 12 Journal of Corporate Finance 3 (2006); *See* Pankaj Madhani, *Ownership Concentration, Corporate Governance and Disclosure Practices: A Study of Firms Listed in Bombay Stock Exchange*, 15 The IUP Journal of Corporate Governance 4 (2016).

to come out with a MTB.[73] It is possible that a majority of the minority shareholders may not want to exit the company. However, they may exit on observing the remaining shareholders exit, as they may change the shareholding pattern and the cash outflow in the company. Internationally, there are many countries that allow the minority shareholders to vote on the takeovers, often referred to as the whitewash provision.[74] If a majority of the minority shareholders vote for it, the acquirer would not be required to release an open offer.[75] Unfortunately, this international practice was rejected by the advisory committee on unfounded reasons.[76] It goes without saying that the regulations in India need to be more advantageous to the investors and the minority shareholders who are in approval of the takeover, and not just the dissenting shareholders. This also needs to be reconsidered with the fact that the shareholders otherwise as well, have exit options in a company, and therefore, such a rigid regulation may not be called for. Additionally, anecdotal evidence has suggested that takeover augments the value of a company.[77] To constitute a successful bid, the bid must be profitable and exceed the *ex-post* takeover value of the company.[78] Hence, this is just another factor that may be considered in adopting a lenient approach in mandating open offers.

Keeping in mind these factors, it is now imperative to understand what shall actually be interpreted to a change in control, in light of the interests of the minority shareholders. It has been often argued that 'actual control' matters for the change of control as was to be envisaged under the takeover regulations i.e. the ability to proactively affect the decisions of the company.[79] The acquirer's ability to significantly influence the decisions has been excluded from it.[80] However, if one were to go in accordance with the motive behind the mandatory takeover bids (control over the company that was not assented to by the minority shareholders), a change in control that allows the acquirer to direct decisions or coerces the promoters to necessarily take into account his interests, should constitute change

73 L.A. Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 Harvard Law Review 1695 (1985).

74 For example – United Kingdom & Hongkong. *See* Thomas Meyding & Peter Huber, *CMS Guide to Mandatory Offers and Squeeze-Outs* (April, 2011); HongKong Takeover Code, 2018, Rule 26 Note 1.

75 *Id*.

76 *Id*., 12.16-12.21.

77 Marina Martynova & Luc Renneboog, *The Performance of the European Market for Corporate Control: Evidence from the 5th Takeover Wave* 4 (European Financial Management Journal, ECGI - Finance Working Paper No. 135, 2006); *See also* Marc Goergen & Luc Renneboog, *Shareholder Wealth Effects of European Domestic and Cross-border Takeover Bids*, 10 European Financial Management 1 (March, 2004).

78 Clas Bergström, Peter Högfeldt & Johan Molin, *The Optimality of the Mandatory Bid Rule*, 13 Journal of Law, Economics, & Organization 2 (October, 1997).

79 *Subhkam Ventures (India) (P) Ltd*. v. *SEBI*, 2010 SCC OnLine SAT 35 : (2010) 99 SCL 159.

80 Vinod Kothari, *Choosing between a blurred line and a bright line: SEBI proposes an objective test for "control"*, IndiaCorpLaw (March 21, 2016), available at https://indiacorplaw.in/2016/03/choosing-between-blurred-line-and.html (Last visited on December 24, 2016); Sumeet Jain & Romit Guha, *Indian Regulator Changes Takeover Code*, The Wall Street Journal, July 29, 2011, available at https://www.wsj.com/articles/SB10001424053111904888304576473882960254822 (Last visited on January 1, 2018).

in control. This also involves any change in the business decisions that were only made because of the existence of certain new shareholders in the company. Instead of considering the consequences that the acquisition of shares can have on the decision making of the company, the regulators have required the release of open offer obligations by basing it on certain proactive rights that allows the acquirers to direct the decisions in the company.[81] However, this principle is also contrary to their interpretation of *veto* and protective rights. Due to a clear inability of the regulator to decipher the intention of the acquirers, it would have been safest to require the shareholders to come out with an open offer when they can substantially affect the decisions considering their approach. This should be done simultaneously after increasing the numerical threshold for MTBs by changing their interpretation on the consent given by the minority shareholders while purchasing the shares. However, considering the power to block special resolutions as constitutive of control while not considering the possibility of significant influence to do the same or to affect the decisions of the company, I argue, is a contradictory approach taken by the adjudicators.

The TRAC's reasoning of setting the twenty-five percent threshold was also based on the ability of an acquirer to block a special resolution of the company.[82] However, not always can a shareholder block a special resolution with twenty-five percent voting rights.[83] Furthermore, it is highly possible that the 'effective control' in such situations lies with some other shareholder. For instance, in the case of *R Systems International Ltd*,[84] SEBI exempted the individual having 34.82 percent from releasing an open offer. The acquirer stated in the reply to the open offer notice that he had no intention of appointing anyone in the Board of Directors ('BODs') or to make any changes therein.[85] SEBI thus exempted him, overlooking the fact that the 34.82 percent would enable him to block any special resolution.[86] It may be rather counterproductive to consider this reactive power to constitute control, as they are generally bound to abide by the decision of the biggest shareholder, considering it has the power to decide on other decisions requiring a general resolution.

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81 *See Tailwinds Ltd., In re, [Acquisition of Shares of Jet (India) Ltd.]*, 2014 SCC OnLine SEBI 283, Mr. Naresh Goyal, Ms. Anita Naresh Goyal and *Etihad In re*, (*Control over the Management*), 2014 SCC OnLine SEBI 57.

82 *See* SEBI, *Report of the Takeover Regulations Advisory Committee dated July 19, 2010* 2.6, available at http://www.sebi.gov.in/sebi_data/attachdocs/1287826537018.pdf (Last visited on December 21, 2017).

83 *See* R Systems International Ltd. , Informal Guidance, CFD/PC/AT/KJ/OW/817/2014; Prarthana Bharanwal, *SEBI's Bright Line Test for 'Control' – an Analysis*,available at https://www.lakshmisri.com/News-and-Publications/Publications/Articles/Corporate/sebi-bright-line-tests-for-control-an-analysis (Last visited on May 17, 2018).

84 R Systems International Ltd., Informal Guidance, CFD/PC/AT/KJ/OW/817/2014.

85 R Systems International Ltd., Letter of Offer, available at http://www.sebi.gov.in/sebi_data/commondocs/rsystemsfinallof_p.pdf (Last visited on May 11, 2018).

86 *Id*.

Even though SEBI may leniently use its discretion depending on the facts of each case, it still does not justify a twenty-five percent threshold. The reasoning with respect to the variable shareholding pattern has been explicated above. Additionally, the reasoning on the basis of the power to block special resolutions is also flawed. The same does not constitute 'proactive rights' as required by SEBI while deciding its cases.[87] SEBI has often interpreted affirmative and negative rights that are merely vested to protect the interests of the shareholders as not constituting control. Similarly, *veto* rights, especially when there is a shareholder having greater number of shares, should not constitute control. The minority shareholders had originally consented to be indirectly bound by the decisions of the company who would still have the highest shareholding. Hence, the power to block special resolutions does not justify the release of an open offer, after considering the factors in the previous part. SEBI can make exceptions in cases where the new acquirer is the highest shareholder and has the power to block special resolutions. This would work beneficially for companies having concentrated and dispersed shareholdings.

Moreover, if one were to closely look into market reality, control is actually gained through significant representation in the board, a majority say in policymaking, ownership and potential influence of existing voting rights, *inter alia*.[88] Despite this, the numerical threshold in India is much lower as compared to the international average. For instance, the threshold is of thirty percent in Austria,[89] Belgium,[90] Czech Republic,[91] Germany,[92] Ireland,[93] United Kingdom,[94] etc. In countries like Portugal[95] and Latvia[96], the threshold is as high as fifty percent. Further, these countries are also lenient in granting exemptions while determining effective control, unlike in India.[97] Hence, such an unbalanced approach towards the investors clearly demands for an increase in the threshold. This shall be further elucidated in the next part of the paper by showing why, having twenty-five percent of voting rights does not always constitute control.

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87 *Subhkam Ventures (India) (P) Ltd*. v. *SEBI*, 2010 SCC OnLine SAT 35 : (2010) 99 SCL 159.

88 Varottil, *supra* note 62.

89 The Austrian Takeover Act, 2006, §22.

90 The Belgian Takeover Act, 2007, Art. 5.

91 The Czech Takeover Act, 2008, §2(6) & §35.

92 The WpÜG, §29(2).

93 The Irish Takeover Rules, 2007, Rule 9.

94 The UK Takeover Directive, 2006, Rule 9.

95 The Portuguese Securities Code, 1999, Art. 20.

96 The Latvian Takeover Directive, 2006.

97 The number of exemptions granted in India are relatively low as compared to other countries. *See* Part IV, Table I of this paper and SEBI, (Substantial Acquisition of Shares and Takeovers) Regulations, 2011), Reg. 10 &Reg. 11.

III. EXPOUNDING THE AMBIT OF CONTROL UNDER THE TAKEOVER REGULATIONS, 2011

The principle of separation of ownership and management in a company has been firmly embodied in company law. The managers or the Board of Directors are generally the ones expected to run the daily affairs of the company.[98] However, in companies having a high concentration of ownership that are generally family-owned companies in India, the directors that are appointed may also be the members of the family.[99] This, however, is a complete overlook of the principle, whose basis was to avert a situation of them carrying out activities for their personal interests. In this regard, while one may argue that an absence of checks and balances on the company may be counterproductive to the interests of the company,[100] it has been countered that the market forces are a sufficient check on their mismanagement.[101] Regardless, the possibility of controlling the company without having voting rights has necessitated the consideration of indirect control. In recent past, SEBI has reaffirmed its position with respect to interpreting and approaching control on a case to case basis.[102] While it may have been an attempt to settle the confusion around the qualitative and quantitative tests to interpret control, the question of what constitutes control remains unsettled. In this part of the paper, I attempt to analyse the contractual rights that may enable the shareholders to control the company. I separately analyse the power of management, *veto* and protective rights to show when the release of open offers should be mandated, linking it with the first part of the paper, i.e., the amount of change in control that abrogates the consent of the minority shareholders. Further, I also delve in the argument of including significant influence within the ambit of control, in light of the actual objective of MTBs.

A. DELINEATING THE AMBIT OF 'DE FACTO' CONTROL

The legislative drafters can indeed not be denigrated for not providing a bright line test or an unambiguous definition of control. Acquirers often acquire control clandestinely via pyramid structures, cross-holdings and by other means of financial tunneling.[103] Moreover, in light of the unconventional

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[98] *See* The Companies Act, 2013, §166 & §179.

[99] The promoters/majority shareholders are the ones who generally have the right to appoint most of the executive directors. Considering their high stake of interest, they tend to appoint qualified directors from the members of their family/relatives.

[100] Marc Moore & Martin Petrin, Corporate Governance: Law, Regulation and Theory 178 (2017).

[101] *Id.*; *A.* Rahmani, *Shareholder control and its nemesis*, 23 ICCLR 1 (2012).

[102] Press Release, SEBI, September 8, 2017, available at http://www.sebi.gov.in/media/press-releases/sep-2017/acquisition-of-control-under-the-sebi-substantial-acquisition-of-shares-and-takeovers-regulations-2011_35891.html (Last visited on December 20, 2017).

[103] M. Bertrand, P. Mehta & S. Mullainathan, *Ferreting Out Tunnelling: An Application to Indian Business Groups*, 117 Quarterly Journal of Economics 1 (2002).

structures of the company today, for instance the emergence of dual structures,[104] coupled with craftily drafted agreements or tacit agreements,[105] it is presumably difficult for the regulators to avert acquirers from circumventing the open offer regulations, even using the qualitative test. In light of this, the case by case analysis to determine control, as suggested by the Bhagwati Committee,[106] is certainly a better option of determining control than having a simple numerical threshold. The actual complications that emanated, I argue, were because of the failure of the adjudicators to actually understand the mischief that was expected to be solved by these provisions. In the following sub-parts, I shall attempt to expound the way in which SEBI should determine the commonly used contractual rights.

1. Business decisions and Management Rights

The Takeover Regulations, 2011, explicitly include the power to control the 'management' in the definition of 'control'.[107] Management control refers to power vested with the BODs and other key personnel to manage functions of the company.[108] The BODs are generally appointed and removed by the promoters/majority shareholders of the company and are thus answerable to them.[109] Resultantly, primacy is always given to the interests of these majority shareholders by the management in light of their personal interests of employment.[110] While the market regulators have tried to make the decision making transparent by mandating certain disclosure obligations,[111] a complete accountability is a far-fetched expectation. It would not be too much to assume that the shareholders entering into secondary transactions are not oblivious to this. While investing in a company having concentrated ownership, any shareholder can reasonably expect that the BODs will first try to serve the interests of the shareholders in case of any conflict. In light of this, the institutional investors have argued for giving substantial voting rights to

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[104] Umakanth Varottil, *"Dual-class" Share Structures,* September 24, 2014, available at http://indiacorplaw.blogspot.in/2014/09/dual-class-share-structures.html (Last visited on January 28, 2018).

[105] For instance, in the recent merger of HPCL and ONGC, the Government is considered to have changed the terms to avoid an open offer. *See* PTI, *Govt tweaks HPCL's terms of sale to ONGC to avoid 'open offer'*, Business Standard (New Delhi) August 10, 2017, available at http://www.business-standard.com/article/companies/govt-tweaks-hpcl-s-terms-of-sale-to-ongc-to-avoid-open-offer-117080900485_1.html (Last visited on December 23, 2017).

[106] SEBI, *Justice P.N. Bhagwati Committee Report on Takeovers January 1997*, 6.12, available at http://www.takeovercode.com/committee_reports/pnbhagwatti.php (Last visited on December 22, 2017).

[107] SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011, Reg. 2(1)(e).

[108] Varottil, supra note 62.

[109] The Articles of a company, as prepared by the promoters, generally vest the rights in the promoters/majority shareholders themselves to appoint the directors.

[110] P.L. Davies, *The Board of Directors: Composition, Structure, Duties and Powers*, December, 2000, available at https://www.oecd.org/daf/ca/corporategovernanceprinciples/1857291.pdf (Last visited on May 17, 2018).

[111] *See* SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Reg. 4, 23 & 30; *See* The Companies Act, 2013, §166.

the minority shareholders in the appointment of the board but to no avail.[112] Hence, any act that may be done in favour of the majority shareholders may be unknown to the minority shareholders, or even if known, it may not be verifiable. It is only in extreme cases where it becomes apparent that the directors are solely acting in the interests of the majority shareholders, can it be proved before SEBI.[113]

On the other hand, it is imperative to note that the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, requires a listed company to have at least one-third of its board of directors as independent directors if the chairman is a non-executive director and a company should have half of its directors as independent directors if the chairman is an executive director.[114] Considering this, it was proposed by SEBI that it would not be possible for any shareholders to have control over the majority of the directors.[115] However, the role of independent directors is that of a watchdog to a greater extent, and they do not interfere in the daily affairs of the company.[116] In any event, the right to appoint the majority of the executive directors vests the proactive rights in those shareholders to run the company.[117] Nevertheless, the degree of management control that should mandate the release of an open offer has often been a contentious issue.

SAT has reinterpreted the ambit of the term 'control' excluding the control on the day-to-day management of affairs.[118] There seems to be an unfounded presumption in the decisions of the regulator of restricting the ambit of management control to the power to appoint the majority of executive directors.[119] However, this definition of management control may not be consistent with the principle of equality to the minority shareholders. The primary reason behind giving the option of an open offer to the minority shareholders is the change of control to which they had not consented to.[120] Hence, any change in the functioning of the company that may affect its profitability and further the share prices, by a new controlling shareholder, should theoretically mandate an open offer. It is in the daily affairs of the company that the directors may decide to give primacy to

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[112] Michael S. Kang, *Shareholder Voting as Veto*, 88 Indiana Law Journal 4 (2013); *See* Shivani Saxena, *Minority Shareholder In PTC India Seeks Board Seat And Better Use Of Cash*, Bloomberg Quint (September 18, 2017), available at https://www.bloombergquint.com/law-and-policy/2017/09/18/minority-shareholder-in-ptc-india-seeks-board-seat-and-better-use-of-cash (Last visited on May 11, 2018).

[113] *See, e.g.,* J.P. Singh & N. Kumar, S. Uzma, *Satyam Fiasco: Corporate Governance Failure and Lessons Therefrom*, 9 IUP Journal of Corporate Governance 4 (2010).

[114] SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, Reg. 17(1)(b).

[115] SEBI, *Discussion Paper on "Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations"*, March 14, 2016, available at http://www.sebi.gov.in/sebi_data/attachdocs/1457945258522.pdf (Last visited on December 20, 2017), ¶32.

[116] *See* the Companies Act, 2013, Schedule IV (The independent directors are not involved in all the decisions made by the Board but merely keep a check at intervals to see for any frauds).

[117] Varottil, *supra* note 62.

[118] *Rhodia SA* v. *SEBI*, 2001 SCC Online SAT 30 : (2001) 34 SCL 597.

[119] *Id*.

[120] Jennings, *supra* note 49.

short-term profits over long-term prospects or vice-versa.[121] The policies of employment, daily strategies of the company including which services and products to sell, are things that profoundly affect the business of the company. The promoters/majority shareholders of the company would have a long-term perspective, unlike the minority shareholders.[122] Hence, their approach of running the company may be completely different from what the minority shareholders had anticipated while investing.

For instance, in the Jet-Etihad case,[123] after assessing the co-operative commercial arrangement between the two parties and requiring certain changes in the terms,[124] no open offer obligation was imposed on Etihad by SEBI.[125] It was reasoned that the agreement did not give Etihad any control over the management and policy decisions of Jet.[126] The reasoning was further supported by showing no dilution in the control of Jet Airways.[127] However, it cannot be ignored that having twenty-four percent ownership in Jet, and in light of the agreement to share other services, Etihad would now have a considerable amount of say in the company's functioning. Moreover, Etihad had also agreed to arrange for loans for Jet.[128] Before its revised agreement, Etihad was to have the right to nominate three directors out of seven, excluding the independent directors.[129] While on paper, the contractors tweaked the terms to avoid an open offer, factors such as– their prior intentions, same nature of business, financial assistance by Etihad, etc., clearly shows that it was to have some control over the functioning that would definitely be beyond the ambit of the original consent given by the minority shareholders.

Even in cases where the parties may simply have the right to appoint less than half of the executive directors, it 'may' be said to constitute control. Even though that shareholder may not have the right to appoint the majority of the board of directors, there always exists a possibility of that director having the power to look into an imperative policy decision or of playing a significant role in running an important part of that business. Furthermore, three out of seven directors appointed by a shareholder having substantial stake in the company can have

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121 *See* Companies Act, 2013, §179 & §166 (These provisions allow the Board of Directors to take decisions on behalf of the company to further business. While §166 requires the Board to act in the interest of the company and other stakeholders, there is no stipulation or principle that necessitates it to act in the long-term or the short-term interests. For instance, the Board needs to decide if the profits should be distributed as dividends or should be invested further to expand the business.)

122 Anne Simpson, *Shareholders and Stakeholders: "the tyranny of the or"*, April 3, 2001, available at http://www.oecd.org/daf/ca/corporategovernanceprinciples/1873246.pdf (Last visited on January 4, 2018).

123 *Tailwinds Ltd., In re*, *[Acquisition of Shares of Jet (India) Ltd.]*, 2014 SCC OnLine SEBI 283, Mr. Naresh Goyal, Ms. Anita Naresh Goyal and *Etihad*, *In re*, (*Control over the Management)*, 2014 SCC OnLine SEBI 57.

124 *Id*.

125 *Id*.

126 *Id*.

127 *Id*.

128 *Id*.

129 *Id*.

a significant influence, even while deliberating the issues with the other directors. This again would affect to a greater extent at times, the decisions of the company.

Parties having management control of a corporation are in a position to extract private benefits of control that do not accrue to dispersed shareholders.[130] There have been many instances of non-accountability of the BODs to the minority shareholders as in the Lehman Brothers instance[131] or the Satyam scam.[132] Thus, it is required to have more stringent disclosure obligations and so on, with activism of minority shareholders. However, the BODs cannot act completely in disregard of the minority shareholders even if it may be within the limits of their Articles. Sale of shares by the minority holders due to this may devalue the company's market value in the capital markets, further attracting the possibility of a hostile takeover. However, the practices carried would be carried out discreetly by the BODs and hence, the aforementioned means of control cannot be ignored.

Hence, in principle, SEBI would have to take into account the smallest of considerations before deciding if there is any change in control that may affect the business in any manner. Considering that the market regulator does not disregard the existence of indirect control, if one were to give full effect to ensure the implementation behind the meaning of MTBs, these instances may definitely fall under the 'change in control' that was not anticipated originally by the minority shareholders. On the whole, the power to command the company and the contract between the parties need to be read in light of the bargaining powers of the acquirers as well. Even though certain conclusions may seem abstract, that is how SEBI can best employ the qualitative test.

2. Protective Covenants and the Opportunity to Control

Financial investors like venture capitalists, FIIs/Foreign Portfolio Investors ('FPIs') and private equity investors, often negotiate certain protective rights with the promoters to safeguard their investments from any blatant decisions of the majority shareholders.[133] These protective rights may either be in the form of *veto* rights or affirmative rights that allow the investors to reject decisions

[130] Tatiana Nenova, *The value of corporate voting rights and control: A cross-country analysis*, Journal of Financial Economics 68 (2003); *See* Van Der Elst & Lientje Van Den Steen, *Opportunities in the M&A aftermarket: squeezing out and selling out* (Financial Law Institute Working Paper Series 12, 2006).

[131] *See, e.g.*, John Gillespie & David Zweig, Money For Nothing: How The Failure Of Corporate Boards Is Ruining American Business And Costing Us Trillions (2010).

[132] The Satyam scam was a corporate scandal in which the company's accounts had been falsified. Investigations showed that many of the directors were also involved in the scam. *See* Krishna Palepu, *Satyam Scam: Board Of directors also party to Fraud*, India CSR Network, July 12, 2010, available at http://indiacsr.in/satyam-scam-board-of-directors-also-party-to-fraud/(Last visited on December 30, 2017).

[133] *See Tailwinds Ltd. In re*, *[Acquisition of Shares of Jet (India) Ltd.]*, 2014 SCC OnLine SEBI 283, Mr Naresh Goyal, Ms Anita Naresh Goyal and *Etihad*, *In re*, (*Control over the Management), 2*014 SCC OnLine SEBI 57; *Subhkam Ventures (India) (P) Ltd.* v. *SEBI*, 2010 SCC OnLine SAT 35 : (2010) 99 SCL 159.

or require their permission before execution, respectively. *Veto* rights in voting have a political aspect in consociationalism.[134] This kind of a right was developed in social groups to prevent the execution of decisions that would be unfavourable to the interests of the minorities.[135] As a matter of course, *veto* rights to protect the minority interests are not said to be constitutive of control.[136] Similarly, investors purchasing more than ten percent of the shares of a company tend to enter into agreements with the company, endowing them with certain affirmative rights to protect their interests.[137]

SAT in its so called landmark judgment in *Subhkam Ventures (India) (P) Ltd.* v. *SEBI* ('Subhkam Ventures'), revised the definition of negative control by limiting it to decisions that only allow the shareholders to block structural or strategic decisions.[138] However, this decision was appealed before the Supreme Court that not only disposed of the appeal in light of the subsequent selling of shares by Subhkam, but also refused to recognise this decision as a valid precedent to this extent. Nonetheless, holding a similar rationale, SEBI in the case of Kamat Hotels noted in its *obiter* that only the conferment of proactive rights would enable a person to control the company and not reactive power or the power to *veto* decisions.[139] It was held that these rights did not amount to provide control over the day-to-day management over the affairs of the company.[140] Besides, in SEBI's discussion paper as well, SEBI had given an illustrative list of *veto* rights that could not, in isolation, be said to constitute control.[141] It was reasoned by SEBI that *veto* rights over the amendment of the articles, alteration to the capital structure, decisions on material acquisition or divestment, *inter alia*, do not vest the power to control the daily affairs of the business.[142] Moreover, it has been widely accepted that the *veto* rights provided to the private equity investors and FIIs/FPIs are merely for them to protect their interests.[143] Accordingly, it can be understood from the approach of the adjudicators that *veto* rights do not constitute control. For instance in the case of Re NRB Bearings India Ltd.,[144] despite having negative rights over amendments

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[134] *See generally* John McGarry & Brendan O' Leary, *Consociational Theory, Northern Ireland's Conflict, and its Agreement. Part 1: What Consociationalists Can Learn from Northern Ireland*, 2006, available at https://pdfs.semanticscholar.org/bd5d/845d5d3ff51d0e785e3b2a8166486873 2fc0.pdf (Last visited on May 27, 2018).

[135] *Id.*

[136] *Rhodia SA* v. *SEBI*, 2001 SCC Online SAT 30 : (2001) 34 SCL 597.

[137] Equity investors often bargain certain protective rights with the promoters to protect their interests. These rights may give them the right to nominate a director who may monitor the board meetings or certain affirmative rights before making decisions on winding up, payment of dividends, amongst others.

[138] *Rhodia SA* v. *SEBI*, 2001 SCC Online SAT 30 : (2001) 34 SCL 597.

[139] *Clearwater Capital Partners (Cyprus) Ltd., In re*, 2017 SCC OnLine SEBI 332.

[140] *Id.*

[141] SEBI, *Discussion Paper on "Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations"*, March 14, 2016, available at http://www.sebi.gov.in/sebi_data/attachdocs/1457945258522.pdf (Last visited on December 20, 2017).

[142] *Id.*

[143] *Clearwater Capital Partners (Cyprus) Ltd., In re*, 2017 SCC OnLine SEBI 332.

[144] *Trilochan Singh Sahney Trust 2, In re (Acquisition of Shares)*, 2014 SCC OnLine SEBI 28.

related to declaration of dividends, modification in the structure of share capital, *inter alia*, the rights were held not sufficient to constitute control.[145]

However, it is of paramount significance that SEBI does not have an intractable approach while interpreting such protective rights. It not only needs to discern the potential consequences that those rights may have but also comprehend its controlling nature, bearing in mind the dispersion of shareholdings in a company, the existence of inter-se promoters and other relevant factors. Such an approach was observed in 2002 in the case of *Sandip Save* v. *SEBI* ('Sandip Save') where approval rights on the appointment and the removal of board of directors were not considered as constituting control.[146] This was held keeping in mind the existence of promoters holding large shareholdings and the fact that the acquirer was shown to be a mere lending institution with no intentions of acquiring any control.[147]

It would be wrong to presume that an acquirer having protective covenants would have no intentions of controlling the company. For instance, in the case of Sandip Save, had the shareholding pattern in the company been diffused and if the acquirer had such protective covenants, the outcome of the case may have varied. Further, while these rights are considered merely as 'protective rights', possession of such rights tends to give the acquirers a major say in the decision making. The promoters would have to inevitably take into account the interests of these acquirers, who can otherwise use these protective rights or their substantial voting rights in addition, to impede their actions, hence using them as a means of coercion. Moreover, certain rights, for instance the right to *veto* material acquisition or divestment or the requirement of approval of distributing dividends may substantially affect the interests and the rights of the minority shareholders. Such activities tend to have an immediate effect on the stock prices of the company.[148] Now, considering that the minority investors may have short-term intentions of their acquisition and would clearly not have been willing to consent to such activities that may possibly hinder the progress of the company and hence their interests. These dissenting shareholders, as explained in the previous part, should therefore be given an exit option.

Protective rights have been said to not constitute control even under the Indian Accounting Standard ('Ind-AS').[149] However, Ind-AS recognises the requirement of consent of a person to be constitutive of control, if it is required to

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145 *Id*.

146 *Sandip Save* v. *SEBI*, (2003) 41 SCL 47.

147 *Id*.

148 *See* Abdullah Al Masum, *Dividend Policy and Its Impact on Stock Price – A Study on Commercial Banks Listed in Dhaka Stock Exchange*, 3 Global Disclosure of Economics and Business 1 (2014).

149 Indian Accounting Standards 110, Consolidated Financial Statements, 441, available at http://mca.gov.in/Ministry/pdf/INDAS110.pdf (Last visited on January 30, 2018).

effectuate the 'relevant activities'.[150] Even the Competition Commission of India ('CCI') in the case of Century Tokyo Leasing Corporation has interpreted affirmative rights related to the annual budget plan and beginning a different segment of business, *inter alia*, as amounting to control.[151] Moreover, even though implicitly overruled by SAT in Subhkam Ventures, negative rights permitting the acquirer to make decisions on the payment of dividends, purchase and sale of assets, *inter alia*, were held to constitute control in the case of Rhodia S.A.[152] The management and the BOD in the factual matrix of the Rhodia S.A. could not make decisions on giving dividends and disposal of assets of more than twenty percent,the issuance of any equity securities or subordinated debt or other securities and other corporate decisions like stock splits or reclassifications of capital stock, without the approval of the appellant company.[153] In light of this,SAT concluded that while *veto* rights on day-to-day management decisions may not tantamount to control, it would when it is with respect to the structural and strategic decisions of the company.[154]

It is important to understand that the regulators cannot determine control in the future, depending on the actions of the acquirer. However, an *ex-ante* approach of determining control also becomes difficult, due to the unclear intentions of the parties. The regulator then needs to take a pro-minority shareholders stance or a pro-acquirer stance. The same would be required only in the present approach of the adjudicators. If the adjudicators were to widely interpret the consent given by the minority shareholders while purchasing the shares, assuming them to consent to the basic negative rights of any new acquirers while the owner of the highest shares remains unchanged, a need to go into the anticipation of the intentions of the investors would not arise. In countries where such an *ex-post* approach is allowed, the majority consent of the minority shareholders is required before allowing the exemption from an open offer. However, since SEBI uses the qualitative test in India, it should exempt such acquisitions with protective covenants after meticulously assessing the agreement and the possible intentions of the acquirers in light of their line of business, any conflicts of interest, the shareholding pattern and the management control in the company, amongst others.

B. CONTROL V. SIGNIFICANT INFLUENCE

TRAC had proposed to include the ability to appoint the majority of directors or to control the decision making of the business within its ambit

[150] Indian Accounting Standards 111, Joint Arrangements, 480, available at http://mca.gov.in/Ministry/pdf/INDAS111.pdf (Last visited on January 30, 2018).

[151] *Century Tokyo Leasing Corpn*. v. *Tata Capital Financial Services Ltd*., 2012 SCC OnLine CCI 138. *See also Cairnhill CIPEF Ltd*. v. *Cairnhill CGPE Ltd*., 2017 SCC OnLine CCI 106.

[152] *Rhodia SA* v. *SEBI*, 2001 SCC Online SAT 30 : (2001) 34 SCL 597.

[153] *Id*.

[154] *Id*.

of indirect control.[155]However, this delineation of control still excludes the exercise of significant influence that may greatly affect the decisions of the company. Partial equity ownership generally allows the shareholders to appoint a few BODs along with other influential rights.[156] To maintain some objectivity in the definition of control, the adjudicators have precluded the consideration of the power gained through 'significant influence' from a consideration of the change in control. However, this runs completely contrary to the principle behind the mandatory takeover bids which is merely based on anything that amounts to change of control which has surpassed the ambit of consent of the minority shareholders. In this part of the paper, I shall be expounding the situations which may also lead to a change in decision-making and affect the business decisions of the company, but are not included within the ambit of Regulations 3(1) and (2) of the Takeover Regulations, 2011. In doing the same, I shall be majorly relying on the interpretation of control under competition law and the impact of corporate governance on control that still allow certain investors to circumvent the threshold.

1. The erroneous exclusion of significant influence from the Takeover Regulations

Time and again, it has been argued that the objective of competition law as compared to that of the Takeover Regulations, 2011 is distinct and thus, a dissimilar interpretation by both the tribunals with respect to the definition of control is justifiable.[157] In this regard, it is worth noticing that while the Takeover Regulations, 2011 define control also as the power to control the management and policy decisions,[158] the Competition Act, 2002, ('Competition Act') defines control as the power to control the affairs or management of the company.[159] The merger regulators have tried to distinguish the intent behind the definitions by interpreting the word 'affairs' in the Competition Act to connote a wider meaning. Hence, while the competition regulator has accounted for significant influence in determining control,[160] the same has been overlooked by SEBI. However, this supposition by the regulators has been done without comprehending the reason behind MTBs.

[155] SEBI, *Report of the Takeover Regulations Advisory Committee dated July 19, 2010* 3.7, available at http://www.sebi.gov.in/sebi_data/attachdocs/1287826537018.pdf (Last visited on December 21, 2017).

[156] *See* Avirup Bose, *The Concept of Control under the Indian Competition Act: an analysis (Part I)*, June 6, 2012, available at https://indiacorplaw.in/2012/06/concept-of-control-under-indian.html (Last visited on December 24, 2017).

[157] Kothari, *supra* note 80.

[158] SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Reg. 2(1)(e).

[159] The Competition Act, 2002, §5 (Explanation (a)).

[160] *See UltraTech Cement Ltd.* v. *UltraTech and Jaiprakash Associates Ltd.*, 2018 SCC OnLine CCI 27; *Century Tokyo Leasing Corpn.* v. *Tata Capital Financial Services Ltd.*, 2012 SCC OnLine CCI 138.

The Companies Act, 2013, while defining associate companies refer to 'significant influence' as a control over twenty percent of a company or its decision making.[161] Ind-AS 28 defines significant influence as "the power to participate in the financial and operating policy decisions of the investee but is not control or joint control of those policies."[162] The appointment/removal of BOD (not the majority), involvement and impact in decision making, convertible voting rights, *inter alia*, fall under some of the several means to exercise significant influence.[163] While Company law requires the adoption of a definition of 'control' for multiple purposes and the Ind-AS with respect to the issuance of financial statements,[164] the underlying reason behind these laws is not to ensure rights of equity to the minority shareholders, unlike the Takeover Regulations, 2011.[165] In the Companies Act of the United Kingdom, the ability to exercise significant influence over the company or over the activities of a firm falls under the definition of control.[166] The guidance further outlines significant influence as the power of the person to "ensure that the company or trust adopts those polices or activities which are desired by the holder of the significant influence", and it need not necessarily be to gain monetary benefits.[167] The ability of altering the scope/objectives of the business or its nature generally, to modify the business plans, schemes for employees, and so on, may constitute significant influence though depending on the nature of the business.[168] This power to significantly influence the decisions of the company that may further affect the interests of the minority shareholders should fall within the ambit of control under the Takeover Regulations, 2011. Hence, SEBI should rightfully use its discretion under the subjective test to prevent acquirers from dodging the law.

For instance, the U.K. Monopolies and Mergers Commission while assessing the control held by an acquirer having twenty-two percent shares of the company, observed that although the acquirer did not have any other voting rights,

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[161] The Companies Act, 2013, §2(6).

[162] Indian Accounting Standard 28, Investments in Associates and Joint Ventures, available at http://mca.gov.in/Ministry/pdf/INDAS28.pdf (Last visited on January 30, 2018).

[163] Niren Patel & Aravind Venugopal, *Indian Accounting Standards and 'control' quagmire*, Money Control (May 26, 2017), available at http://www.moneycontrol.com/news/trends/legal-trends/indian-accounting-standards-and-control-quagmire-2289991.html (Last visited on January 28, 2018); *See UltraTech Cement Ltd.* v. *UltraTech and Jaiprakash Associates Ltd.*, 2018 SCC OnLine CCI 27.

[164] Framework for the Preparation and Presentation of Financial Statements in accordance with Indian Accounting Standards, available at https://resource.cdn.icai.org/23732frameworkIndAS.pdf (Last visited on January 30, 2018).

[165] SEBI, *Report of the Takeover Regulations Advisory Committee dated July 19, 2010*, available at http://www.sebi.gov.in/sebi_data/attachdocs/1287826537018.pdf (Last visited on December 21, 2017).

[166] The Companies Act, 2006 (United Kingdom), Schedule 1A.

[167] *Id.*; *See* Womble Bond Dickinson, *Department for Business, Innovation and Skills guidance on the meaning of 'significant influence or control'*, January 28, 2016, available at https://www.lexology.com/library/detail.aspx?g=45c5f233-66f8-404c-abd3-1689c0ad491c (Last visited on May 10, 2018).

[168] *Id.*

the board of the company would be always be bound to take into account the interests of the acquirer as its creditor and a potential promoter of the company in the future.[169] This was further interpreted as the ability of the acquirer to greatly influence the management and policy decisions of the company.[170]

A director owning certain imperative assets of the company, for instance intellectual property rights, may have considerable say while making the business decisions of the company. However, mere consultation cannot be said to be significant influence. To put it in simple words, a situation where the board or the other shareholders are bound to take into account the interests of the person holding significant influence, otherwise it may have a detrimental effect on the interests of the company. Thus, to differentiate between significant influence and control, it may be said that while control may allow a person to direct activities or policies of the company, significant influence may allow the person to ensure that activities and policies desirable to it, are executed. However, the Takeover Regulations, 2011, while mandating the release of an open offer does not take into account significant influence. The conceptualisation of MTBs was to provide the minority shareholders with an exit option, if the company, after them purchasing the shares, has to change its activities or policies. This was clearly not taken into consideration by the legislative drafters or the tribunals while deciding on such cases.

Often, a partial equity ownership allows the shareholder, who may not have control, to nominate a BOD to protect his own interests.[171] Such partial ownership may also allow for influencing the policy decisions of a company.[172] If the merger involves companies in the same line of business, vertically or horizontally, they can coordinate their prices or set the business practices that may favour both the companies. Partial equity ownerships by companies in the same line of businesses may raise greater concerns for the company as compared to a complete merger.[173] It cannot be totally presumed that the companies in Coasian joint control[174] may always cooperate for the company to benefit. They may have or there is a possibility that may arise where the joint controller may swerve from the tacit agreement for unilateral benefits of gaining profits.[175] For instance, the acquiring company may increase the price to the extent it had agreed to but may later cut the

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169 Stora/Swedish Match/Gillette, Cm. 1473 (March, 1991).

170 *Id.*

171 *Tailwinds Ltd. In re, (Acquisition of Shares of Jet (India) Ltd.)*, 2014 SCC OnLine SEBI 283, Mr Naresh Goyal, Ms Anita Naresh Goyal and *Etihad*, *In re*, (*Control over the Management*), 2014 SCC OnLine SEBI 57; *Clearwater Capital Partners (Cyprus) Ltd., In re*, 2017 SCC OnLine SEBI 332.

172 U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines 33 (August 19, 2010).

173 *Id.*

174 Steven C. Salop & Daniel P. O'Brien, *Competitive Effects of Partial Ownership: Financial Interest and Corporate Control*, 67 Antitrust L.J. 559-614 (2000).

175 *Id.*

prices to clandestinely gain profits, without caring for the interests of the firm.[176] Such a practice may be clearly against the interests of the minority shareholders.

Thus, in a case like that of Jet and Etihad when the original contracts provided Etihad with a partial control over the affairs of Jet,[177] but had to remove the same to avoid from the mandate of an open offer, can it actually be assumed that Etihad, which initially had all the intentions of having some functional control, agreed to abide by the conditions of the regulators so that it does not have any control then? While it may obviously be incorrect and groundless to consider something like a tacit consent here, one should not overlook the fact that Etihad will gain atleast some say in the functioning of Jet Airways, that the board may not be able to ignore simply because Etihad does not have twenty-five percent of the voting rights or the proactive rights to control. In light of the fact that, both the companies agreed to share services with Etihad purchasing twenty-four percent shares in Jet, an ignorance of Etihad's interest can lead to its withdrawal from the agreement – something that may have adverse effects on Jet Airways in the long-term. However, in a genuine circumstance where the shareholder may actually not intend to control the company, but may be compelled by SEBI in light of its discretion to decide on a case to case basis to release an open offer, would it be fair? It thus becomes an unfathomable task for the regulators to decipher the actual intentions of their acquisitions. Thus, it can either ask the companies to avoid such border-line acquisitions in companies being in the same line of business or require an open offer.

Under competition law, it is imperative to decipher the ulterior motive of the acquirer. If the acquirer has obtained the shareholding via secondary transactions, it is rather improbable that any other rights may be given on to him, if he has interests in a competitor firm, directly or indirectly. However, if there is an accord between the current promoters and the new acquirer who controls a firm that is a competitor in the market, it cannot go without making a presumption that the merger may be to share the market collectively or to share the technology. Leaving aside the question on anti-trust laws, the question here is to see if the investor has any motive of running, directing or taking over the business, in any manner that the minority investors had not consented to. The CCI defines such intention as a 'strategic investment'.[178] Any investment made in a company with the intention to partake in the determination of the basic business decision

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176 *Id*.

177 *Tailwinds Ltd., In re*, *(Acquisition of Shares of Jet (India) Ltd.)*, 2014 SCC OnLine SEBI 283, Mr. Naresh Goyal, Ms. Anita Naresh Goyal and *Etihad, In re*, *(Control over the Management)*, 2014 SCC OnLine SEBI 57.

178 *Zuari Fertilisers & Chemicals Ltd*. v. *Zuari Agro Chemicals Ltd*., 2015 SCC OnLine CCI 239; *Etihad Airways PJSC* v. *Jet Airways (India) Ltd*., 2013 SCC OnLine CCI 132; *Thomas Cook (India) Ltd*. v. *Sterling Holiday Resorts (India) Ltd*., 2014 SCC OnLine CCI 181; *SCM Soilfert Ltd*. v. *Deepak Fertilizers and Petrochemicals Corpon. Ltd*., 2015 SCC OnLine CCI 210.

making of the company is generally referred to as a strategic investment.[179] On the other hand, if the investment is made solely in light of financial interests with no intention to gain any control or the ability to influence the decisions, it is termed as passive investment.[180]

Clearly, the situations referred above involving significant influence allow the investors to greatly influence and affect the business decisions of the company, at least to the extent of blocking them that is considered as change in control by the regulators. However, the same has not been taken into account by the regulators while considering the change in control under the regulations. Considering the motive behind the MTBs, it is argued that the same shall be taken into account in prima facie cases and the minority shareholders should be given the rights to decide if a MTB is required or not, by a vote only by them.

2. Impact of Corporate Governance and its influence on the decision making

The phenomenon of Agency II problem is not unusual in India.[181] In the presence of the large number of family-owned companies in the country, the interests of the minority shareholders are often subject to misappropriation by the controlling shareholders.[182] The Naresh Chandra Committee noted that while the controlling shareholders may not act against the profitability of the company, their acts may deprive the minority shareholders of certain *de jure* ownership rights.[183] Hence, it becomes imperative for the law makers to fortify the corporate governance mechanisms to ensure fairness as well as accountability and to offer a low-cost exit to the minority shareholders. This becomes crucial, especially in light of the passivity of the institutional and retail shareholders.[184]

To curb the agency problems in India, the Companies Act, 2013, imposes a fiduciary responsibility on the controlling shareholders and the management (that is generally controlled by them) to the company and the minority

179 *Zuari Fertilisers & Chemicals Ltd.* v. *Zuari Agro Chemicals Ltd.*, 2015 SCC OnLine CCI 239; Marian R. Bruno, *Hart-Scott-Rodino at 25,* June 13, 2002, available at https://www.ftc.gov/public-statements/2002/06/hart-scott-rodino-25 (Last visited on January 13, 2018).

180 *Cairnhill CIPEF Ltd.* v. *Cairnhill CGPE Ltd.*, 2015 SCC OnLine CCI 252, ¶5; Federal Trade Commission, PNO Informal Interpretation No. 1203011.

181 Jayati Sarkar, *Ownership and Corporate Governance in Indian Firms*, 234,available at https://www.nseindia.com/research/content/CG_9.pdf (Last visited on January 2, 2018); J. Sarkar & S. Sarkar, Corporate Governance in India 133-134 (2012).

182 *Id.*, 254.

183 Naresh Chandra Committee on Audit and Governance observed in the context of Indian companies (DCA, 2002), available at http://www.nfcg.in/pdf/cgitp.pdf (Last visited on January 30, 2018).

184 Sarkar, *supra* note 181, 259; Apu Manna, Tarak Nath Sahu & Arindam Gupta, *Impact of Ownership Structure and Board Composition on Corporate Performance in Indian Companies*, 9 Indian journal of Corporate Governance 1 (2016), available at http://journals.sagepub.com/doi/pdf/10.1177/0974686216635787 (Last visited on January 2, 2018).

shareholders.[185] Despite this, there have been several instances of expropriation of the interests of the minority shareholders by the promoters.[186]

The motives of institutional shareholders and retail shareholders in investing in companies can be incontrovertibly said to be akin. They generally do not intend to consolidate and exercise control over the company.[187] While the institutional investors are naturally expected to carry out an in-depth research of – the company's expected performance before investing in it,[188] the money of the persons who trusted them, amongst others, the factors taken into account by the retail shareholders are indeterminate. They could be simply on the basis of hearsay from a friend who would probably have done some random calculations, or by relying on the word of their broker.[189] Their ultimate intention is to sell the stocks when the share price increases. The duration of such holding may generally depend on the person's urgency for money and the share prices of the company during that period. Goes without saying, most of these shareholders are reluctant to indulge themselves in the decision making of the company.[190] The investments made by them are generally made after convincing themselves with the proficiency of the majority shareholders and the company's past performance.[191] Thus, while they undoubtedly make their decisions on the basis of the people controlling the company, it would be too much to assume for them to be abreast of the daily affairs of the company.[192] Due to this obtuseness towards the affairs of the company, they generally abstain voting in the company or vote with the institutional shareholders if there is a clear disregard of their interests.[193] It is seen that many institutional shareholders share their decisions with reasons much before the voting, for the better understanding of the issues, by the retail investors, in light of their similar expectations from their investments.[194] Otherwise, they may vote in line with the management's decisions depending on the practices of proxy solicitation.

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185 *See* the Companies Act, 2013, §166.

186 SEBI, *Consultative Paper on Review of Corporate Governance Norms in India*, January 4, 2013, 30, available at https://www.sebi.gov.in/sebi_data/attachdocs/1357290354602.pdf (Last visited on January 2, 2018).

187 Pitabas Mohanty, *Institutional Investors and Corporate Governance in India*, available at https://nseindia.com/content/research/Paper42.pdf (Last visited on December 24, 2017); *See* Mukherjee, *supra* note 16.

188 *Id*.

189 *See* Alok Kumar & Charles M.C. Lee, *Retail Investor Sentiment and Return Comovements*, 61 The Journal of Finance 5 (September 19, 2006); Malcolm Baker & Jeffrey Wurgler, *Investor sentiment in the stock market*, 21 Journal of Economic Perspectives 2 (2007).

190 *Id*.

191 Abhijeet Chandra & Ravinder Kumar, *Factors Influencing Indian Individual Investor Behaviour: Survey Evidence*, October 17, 2011, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2029642 (Last visited on May 11, 2018).

192 *See M.S.D.C. Radharamanan* v. *M.S.D. Chandrasekara Raja*, (2008) 6 SCC 750 : AIR 2008 SC 1738.

193 Institutional Investor Advisory Services, *Raymond Limited: The Complete Rip-Off*, May 24, 2017, available at https://www.iiasadvisory.com/single-post/2017/05/24/Raymond-Limited-The-Complete-Sale (Last visited on January 30, 2018).

194 *Id*.

The ability of partial equity owners to block the special resolutions without having twenty-five percent of control in a company, i.e., by means of 'working control', has been completely overlooked. This potential ability which may aptly be regarded as 'significant influence' has been erroneously excluded from the ambit of control by the regulators. Possessing working control may be termed as a quasi-political process where the partial equity owners but not controllers may maintain close relations with their appointed BOD to convince the proxies to vote in accordance with their votes.[195] It is unlikely that the minority shareholders will not follow them, considering the fact that both of them are non-controlling shareholders and have similar interests to a greater extent.[196] The retail shareholders, especially, do not generally have a thorough knowledge of the internal functioning of the company.[197] Hence, tip-toeing around the threshold with other tactics is often used to gain control, if one were to go by the interpretation of SEBI. To balance the interests of both the parties, and on the presumption that the acquirers do not intend to acquire control, if asked for, SEBI can allow for the suspension of their voting rights from twenty to twenty-five percent. This would serve the interests of all the parties by erasing any doubts of hidden control.

However, this should not be confused with the cases where the promoters have to consider the interests of the institutional investors. With the rise of shareholder activism,[198] there are several instances of deliberations between the institutional investors and the promoters. The promoters cannot ignore their interests to assure capital inflow. Nonetheless, the institutional investors cannot be assumed to have intentions of 'strategic investment'. Hence, they cannot be said to exercise significant influence. To draw distinctions between such investments, SEBI should carefully scrutinise background of the company and the promoters, and their possible intentions of investment. Further, to ensure greater protection of the minority shareholders, the directors should be required to take conscious efforts to reduce the information gap when required. Such a practice would especially further their interests in companies having dispersed ownerships.

3. Other instruments of exercising significant influence

Domestic or foreign investors may also hold convertible bonds that the holders can convert into equity shares. For instance, in the Kamat Hotels

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[195] Adolf A. Berle, *"Control" in Corporate Law*, 58 Columbia Law Review 8 (1958).

[196] This has been dealt in greater detail in part II of the paper; *See* Perlman v. Feldmann, 219 F.2d 173 (2d Cir. 1955).

[197] Chandra & Kumar, *supra* note 190; Testa, *supra* note 191. .

[198] PTI, *2017 tipping point of shareholder activism in India: InGovern Report*, MoneyControl, November 27, 2017, available at http://www.moneycontrol.com/news/business/2017-tipping-point-of-shareholder-activism-in-india-ingovern-report-2448629.html (Last visited on December 24, 2017); Rupali Mukherjee, *Shareholder activism up among promoter groups*, Times of India, November 29, 2017, available at https://timesofindia.indiatimes.com/business/india-business/shareholder-activism-up-among-promoter-groups/articleshow/61841684.cms (Last visited on December 12, 2017).

(India) case,[199] Clearwater Capital Partners had subscribed to foreign currency convertible bonds with other affirmative rights.[200] Since the agreement had been extinguished by the time the matter was brought before the regulator, the question of control in this case was also left open.[201] In any case, it is important to note that the approach taken by the CCI and SEBI is different in this regard. On one hand, the CCI has held that the promoters of the company will be bound to take into account the interests of the owners of the Global Depository Receipts ('GDRs'), as they can convert them into equity shares whenever they wish to.[202] In the eyes of the competition watchdog, GDRs allow the holders to exercise sufficient control over the company. On the other hand, SEBI has held that ownership of convertible GDRs are not equivalent to control, until they are converted.[203] The difference in the approach is argued to be justified by SEBI in light of the different objectives of the two statutes.[204] In principal, the objective of the Competition Act is to assess if the combination will have an appreciable adverse effect on competition or not. However, while determining if the acquisition by a firm amounts to combination under the Competition Act, the regulators are required to evaluate if there has been an acquisition of control or not.[205] However, the ratio of the CCI regarding the possibility of it affecting the business decisions of the company should also apply to the Takeover Regulations, 2011, as the same may be considered to be control beyond the consent of the minority shareholders. Even in cases where the companies have issued GDRs/American Depositary Receipts ('ADRs') or other similar instruments, the same needs to be seen along with any other financial interest that the subscriber may have. The percent of equity shares that the subscriber may get on exchange, along with the other already existing equity shares and contractual rights needs to be viewed cumulatively. This is because there may be a high possibility of a tacit agreement in such a structure. Despite the significant influence that may or may not tantamount to control later, the subscriber would enjoy enough control that would be against the objective of MTBs. Hence, there should not be an unconditional rule to overlook such financial instruments while evaluating control.

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[199] *Clearwater Capital Partners (Cyprus) Ltd., In re*, 2017 SCC OnLine SEBI 332.

[200] *Id*.

[201] *Id*.

[202] *SCM Soilfert Ltd.* v. *Deepak Fertilizers and Petrochemicals Corpn. Ltd.*, 2015 SCC OnLine CCI 210.

[203] Request for Interpretative Letter by Bharti Airtel under the SEBI (Informal Guidance) Scheme, 2003, available at https://www.sebi.gov.in/sebi_data/commondocs/BhartiSEBIJune22_p.pdf (Last visited on January 30, 2018).

[204] *Tailwinds Ltd., In re*, *(Acquisition of Shares of Jet (India) Ltd.)*, 2014 SCC OnLine SEBI 283, Mr Naresh Goyal, Ms Anita Naresh Goyal and *Etihad*, *In re, (Control over the Management)*, 2014 SCC OnLine SEBI 57.

[205] The Competition Act, 2002, §5.

C. *'CHANGE OF CONTROL' UNDER CREEPING ACQUISITION*

Regulation 3(2) of the Takeover Regulations, 2011, requires a shareholder holding shares between twenty-five percent to seventy-five percent to come out with an open offer on a purchase of additional five percent shares within a year. This was enacted to fend off the acquirers from consolidating the shares of a company.[206] Increased ownership by the promoters reduces the cash outflow and the volume of transactions of the company in the secondary market.[207] Further, their voting rights may substantially increase, allowing them to make decisions prejudicial to the interests of the minority shareholders.[208]

Many promoters like Tata[209] and even multi-nationals like Nestle[210] have gradually increased their shareholdings by resorting to creeping acquisition. Nonetheless, SEBI has largely taken a strict approach, forbidding companies from purchasing anything over five percent in a year.[211] However, the test of control, on the basis of which the threshold of creeping acquisition has been formulated, is not entirely in consonance with the its objective. While a shift of ownership of shares from twenty-five percent to thirty-one percent may give the acquirer additional voting rights, the same does not give it any additional power, juxtaposing it to its previous degree of control, in presence of a shareholder holding higher shares than him. In another hypothetical where the shareholder is holding thirty-one percent of the shares and is the greatest shareholder, while acquiring another five percent of the shares may give it substantial influence over the decisions, the same is something that does not lead to a major change in the decision-making of the company. Further, the same could have been anticipated by the minority shareholders when the acquirer would have crossed the threshold of twenty-five percent, giving them an option to exit the company. Imposing incessant burden on the investors when

206 SEBI, *Justice P.N. Bhagwati Committee Report on Takeovers January 1997*, 6.12, available at http://www.takeovercode.com/committee_reports/pnbhagwatti.php (Last visited on December 22, 2017); Anand Srinivasan, Law Relating to New Takeover Code 2011 1.41 (2011).

207 Ohannes G. Paskelian, Stephen Bell & Chu V. Nguyen, *Corporate Governance and Cash Holdings: A Comparative Analysis of Chinese and Indian Firms*, 4 The International Journal of Business and Finance Research 4 (2010).

208 Srinivasan, *supra* note 206, 1.41.

209 Partha Sinha, *Tatas bid to fortify stake in Tata Motors for Mistry Exit*, Times of India, December 13, 2016, available at https://timesofindia.indiatimes.com/business/india-business/tatas-bid-to-fortify-stake-in-tata-motors-for-mistry-exit/articleshow/55951058.cms (Last visited on January 2, 2018); Thummuluri Siddaiah, Financial Services 364 (2011).

210 Rajas Kelkar & Ratna Bhushan, *Nestle SA makes creeping acquisition in Indian arm*, Economic Times (Mumbai/New Delhi) November 24, 2010, available at http://epaper.timesofindia.com/Repository/getFiles.asp?Style=OliveXLib:LowLevelEntityToPrint_ETNEW&Type=text/html&Path=ETD/2010/11/24&ID=Ar00801 (Last visited on January 2, 2018); *See also* Shobhana Subramaniam, *Creeping Acquisitions versus an open offer*, Reddiff, February 7, 2005, available at http://www.rediff.com/business/2005/feb/07sebi.htm (Last visited on January 2, 2018).

211 *See* LSI Imsights, *Noteworthy Rulings on SEBI Takeover Code* 9, available at http://lawstreetindia.com/sites/default/files/insights/LSI%20Insights-Noteworthy%20Rulings%20on%20SEBI%20Takeover%20Code.pdf (Last visited on May 26, 2018).

the minority shareholders were already given chance to exit before or had assented to the prior degree of control by the acquirer, might have a detrimental effect on the takeover market. Only when the acquirer, by virtue of his additional acquisition, gains substantial control over the company, should an open offer be justified.

Prof. Umakanth in his seminal paper on Comparative Takeover Regulations mentions the various 'shades of control' depending on the controller's shareholdings.[212] After the negative control that is acquired at twenty-five percent, the *de jure* control that enables a shareholder to appoint and remove the majority of directors is gained on acquisition of fifty percent of shares.[213] Considering that SEBI has interpreted the negative right at twenty-five percent to be constitutive of control and since it allows the shareholders to *veto* decisions that may pertain to the interests of minority shareholders, an acquisition above that may not give it any substantial power to direct the company below the fifty percent ownership. Thus, instead of requiring a mandatory bid on acquiring more than five percent of additional shares, the same can be mandated according to the change in the degree of control, the degree being the ability of the acquirer to have greater influence that could not have been foreseeable by the minority holders. For instance, Russia requires the release of an open offer for acquisitions of five percent or more only if the total acquisition of the acquirer is between fifty percent and seventy-five percent.[214] Further, considering that SEBI also takes into consideration indirect control on observing the management rights, such a strict approach is perhaps unnecessary. It should not be the percent of shares that the regulator needs to view, but whether there is a complete change of control, bearing in mind the concentration of shareholdings in the company.

One of the other reasons behind the lower threshold of creeping acquisition is to ensure cash-flow ownership in the secondary markets.[215] A debate still revolves around the influence of cash-flow ownership because of the nature of concentration of shareholdings in a company.[216] However, the consideration of cash-flow ownership may not be primary for a company; the amount of control that an acquirer would want would be his choice and can presumed to be acquired only to make greater profits for the company. While an argument can be made that this may promote the formation of companies with higher concentration of shareholdings allowing the majority shareholders to serve their individual interests, this has been or needs to be looked after by the provisions on corporate governance and on the protection of interests of minority shareholders. Protection of the smallest

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212 Varottil, *supra* note 62, 208.

213 *Id*., 211.

214 Vassily Rudomino, Russia Takeover Guide 9, International Bar Association (2016) (on file with author).

215 Luca Enriques & Matteo Gatti, *Creeping Acquisitions in Europe*, November 5, 2014, available at https://corpgov.law.harvard.edu/2014/11/05/creeping-acquisitions-in-europe/ (Last visited on May 17, 2018).

216 Rafael La Porta et al., *Investor Protection and Corporate Valuation*, 57 The Journal of Finance 3 (2002).

interests of minority shareholders cannot always be given precedence over the interests of the investors and the capital markets.[217] In any case, the dissenting shareholders in such situations consent to the acquirer having a certain amount of control over the company that could have substantially affected their interests, while they cross the limit of twenty-five percent. Hence, SEBI can increase the limit of creeping acquisition and simultaneously, make open offers compulsory at thresholds where it considers the shareholders would acquire a greater degree of control that would give it enough power to run the management of the company. In the alternative, in light of the varied concentration of shareholdings in the country, the regulations can be divided on the type of shareholdings in the company. If a company has a shareholder having voting rights greater than the acquirer using creeping acquisition, a higher threshold may be used and if the acquirer already has the highest shareholding then the threshold may be less. Simply having such a low threshold deters the majority shareholders from taking an active interest in the growth of the business. Making an offer of a takeover bid at every instance of acquisition may not be commercially viable for the investors and may unnecessarily impede the growth of the company.

IV. APPROACH OF SEBI IN GRANTING EXEMPTIONS FROM RELEASING MTB(S)

SEBI has withheld the wide discretion to determine each case on its facts and circumstances in order to exempt companies from the open offer requirement, in transactions which it felt did not intend to transfer the control to the new acquirer.[218] Such an approach requires SEBI to determine the intentions of the investment of the party, their previous investments, if they are in the same line of business, if they merely have a financial interest, *inter alia*. Previously, SEBI had granted an exemption to IFCI Ltd. ('IFCI') from coming out with an open offer despite the fact that it had crossed the numerical threshold, since the rights granted to IFCI were only to protect its interests.[219] Further, it had held that IFCI did not have any intentions of acquiring control and the same was visible from previous instances.[220] This *ex-ante* analysis of the market regulator becomes problematic since any acquirer may always have the likelihood to control the company or its decisions. The acquirer, for instance in the above case, would always have the power to block special resolutions and could do so if its interests were at stake in the future. Allowing an exemption on something as vague as intention may be misused by the investors to gain the requisite control over companies that was beyond the consent of the minority shareholders.

[217] *See* SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Reg. 11(1) (It allows SEBI to grant an exemption to the acquirer from making an open offer if required in the interests of investors and the securities market).

[218] SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Reg. 11(1).

[219] *Govt. of India, In re (Acquisition of Shares)*, 2012 SCC OnLine SEBI 121.

[220] *Id.*

While SEBI has done a commendable task by exempting the companies taking over companies having stressed assets from an open offer,[221] determination of the acquisitions may benefit the company and the ones that may not is impracticable. Many countries consider suspension of voting rights when an acquirer is trying to tiptoe around the threshold, or grant exemption when someone else holds a greater shareholding than the acquirer, or if the acquirer becomes the highest shareholder because of the reduction of shares by another holder, etc. In the following table, I list out certain exemptions that are granted by other countries that can be enacted in India as well, if not an increased threshold. Please note the table does not have an exhaustive list of the exemptions in the country but is merely an illustrative list.

Table I

Country	**Exemptions[222] (Illustrative)**
Austria	The acquirer does not control majority of votes at general meetings.[223] Another shareholder acting in concert holds an equal amount of shares.[224]
Belgium	If the acquisition is the outcome of a capital increase with preferential subscription rights approved by the general meetings of shareholders[225] If another shareholder controls the target company
Bosnia and Herzegovina	Acquisition of shares by a broker on the basis of a brokerage, market making or underwriting agreement, provided that the shares are sold within one year[226]
Croatia	If the acquisition is the outcome of a capital increase approved by the general meeting of the shareholders[227]
Czech Republic	If the acquirer acquires shares from a person who has already made a mandatory offer[228]
Germany	May grant an exemption taking into consideration the purpose of the acquisition, the potential exercise of control by the bidder, the target's shareholder structure and the sale of shares below the threshold shortly after their acquisition[229]

221 Press Release, SEBI Board Meeting, June 21, 2017, available athttps://www.sebi.gov.in/media/press-releases/jun-2017/sebi-board-meeting_35147.html (Last visited on January 3, 2018).

222 *See generally* Thomas Meyding & Peter Huber, *CMS Guide to Mandatory Offers and Squeeze-Outs* (April, 2011).

223 The Austrian Takeover Code, §24(2)(1).

224 The Austrian Takeover Code, §24(2)(2).

225 Gisèle Rosselle, Laurent Verhavert and Jasmine Devenyn, Belgium Takeover Guide 18, International Bar Association (2014) (on file with author).

226 Meyding & Huber, *supra* note 222, 12.

227 *Id.*, 21.

228 *Id.*, 26.

229 *Id.*, 37.

Italy	If another shareholder exists with a greater shareholding and the acquirer declares the absence of any intentions of joint control.[230]
Spain	If another shareholder exists with a greater shareholding and the acquirer does not appoint more than half of the directors.[231]
Turkey	The shares are acquired from a controlling shareholder and the joint control of the target corporation is maintained through an agreement executed with such controlling shareholder, provided that the acquiring shareholders holds less than fifty percent of the voting rights after such acquisition.[232] the control of management held before the transfer of shares is now shared equally by those who formerly had the control of management in the corporation.[233]

Many countries have also enacted the whitewash provision that allows the minority shareholders to vote on the acquisition of control.[234] The acquirer would be granted an exemption if a majority of the minority shareholders vote in favour of the takeover.[235] While the TRAC had acknowledged the utility of this provision, enforcement of the same was rejected on grounds such as absence of proper regulations on proxy solicitations and the interests of investors.[236] In refutation, *first*, for proxy solicitation, there are two possibilities – Either the minority shareholders are not active and abstain from voting or vote against the takeover, which may still mandate an open offer. Otherwise, they may vote for the takeover, which can be reasonably implied to have their active consent. If they vote, the shareholders cannot be expected to make an uninformed decision. *Second*, it is usually the investors who sell major shareholdings to the new acquirer. There is generally some kind of agreement between the acquirer and the majority shareholder, since the acquirer would not want to impulsively subject such substantial interests at the hands of another shareholder. Moreover, there exist anti-takeover mechanisms like buyback of shares, rights issue, reclassification of stocks, *inter alia*, to check the same. Hence, SEBI needs to review its stance on the granting of exemptions. Encumbering the investors with both, a low numerical threshold and a severe standpoint on exemptions and acquisitions is inequitable to the investors. Especially considering that the regulator has the discretion to require a MTB even in instances of indirect control, a higher numerical threshold with a few more exemptions, including the whitewash waiver, would be in interests of all the stakeholders.

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[230] *Id.*, 45.

[231] Spanish Securities Market Act, 1988, Art. 60.

[232] The Communiqué, Art. 6(2).

[233] Decision of the 11th Civil Chamber of the Turkish Court of Appeals, 923/1567 (February 2, 2006).

[234] *See* SEBI, *Report of the Takeover Regulations Advisory Committee dated July 19, 2010* 12.16-12.21, available at http://www.sebi.gov.in/sebi_data/attachdocs/1287826537018.pdf (Last visited on December 21, 2017).

[235] I*d*.

[236] *Id*.

V. CONCLUSION

In the course of this paper, I have attempted to show why the current threshold for MTBs is not tenable merely in consideration of the nature of shareholdings in companies. With the presence of companies having multifarious shareholding patterns in the country, to arrive at a uniform definition would be an unrealistic approach having deleterious ramifications on takeovers in the country. While SEBI and SAT have taken special efforts to arrive at a practical interpretation of what constitutes control, their contradiction in the past clearly indicates their inability to do so. I argue that the principal reason behind this inconsistency was their failure to understand the actual reason behind having MTBs. MTBs were enacted in different countries, primarily for two reasons. *First*, in light of the principle of equality, the minority shareholders were also required to be provided with an exit right with the same amount of premium that the majority shareholders would get. *Second*, while purchasing the shares, the minority shareholders had not consented to the new acquirer having control over the company that may impair their interests in future. Minority shareholders form the backbone of capital markets and it was thus necessary to protect their interests in this manner. It is only when greater interests of the investors or the securities market are concerned that the regulators can deflect from the rule.

However, the unsettled position of control coupled with the incoherent judgements of SEBI and SAT have made the investors cautious while investing. The adjudicators need to standardise their approach in interpreting what shall constitute control to avert uninterrupted complications in the contractual arrangements of parties. They need to comprehend the practices that may affect the functioning the company, and further, the share value of the company, and in view of this, mandate open offers. Hence, even a strategic investment that may give the acquirer the power to affect the business decisions should come under the purview of control. In furtherance of this, I argue that the ability to significantly influence the decisions of the company may also constitute control, something that has been overlooked by the adjudicators in India. Further, moving on to the quantitative test, I argue for an increase in the numerical threshold mandating the release of an open offer. I have shown how the power to block special resolutions and the existing shareholding pattern in the country does not necessitate the threshold to be set at twenty-five percent, considering its limited influence on the interests of minority shareholders. SEBI needs to take a balanced approach by allowing an increase in the numerical threshold and simultaneously, widen the ambit of its qualitative test by requiring an open offer on a change of control that the minority shareholders could not be said to have consent to.