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New Delhi
First Floor, 4598/12-B, 1st Floor,
Padam Chand Marg, Daryaganj,
New Delhi, Delhi 110002
Phone: +91 98 11 66 62 16 (M)
Phone: +91 70 11 60 56 18 (M)

Bengaluru
Jallahalli East
Bengaluru, Karnataka. India.
Phone: +91 98 11 66 62 16 (M)
Email: publisher.integrity@gmail.com

USA
New Jersey
14 Grandview Ave, Upper Saddle River,
NJ-07458, USA
Phone: +14805226504 (M)

London
37 Degree Media
64, Hodder Drive, Perivale, London UB68LL.
United Kingdom.
Phone: +44 7950 78 18 17 (M)
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Merger Control and Public M&A in India: An Analysis of the Competition Act, 2002 and the SEBI (SAST) Regulations, 2011

Author
Anushka Chaher

Merger Control and Public M&A in India: An Analysis of the Competition Act, 2002 and the SEBI (SAST) Regulations, 2011

Anushka Chaher
Amity University Noida

Abstract

The regulation of mergers and acquisitions (M&A) in India operates through a dual framework involving competition law and securities regulation, aimed at ensuring market efficiency, investor protection, and fair corporate practices. This paper examines the interplay between merger control under the Competition Act, 2002 and public M&A regulation under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011. It critically analyses how these two regimes function both independently and in coordination to regulate corporate combinations and takeover transactions in India.

The study begins by exploring the statutory and institutional framework governing merger control, particularly the role of the Competition Commission of India in assessing combinations based on the test of Appreciable Adverse Effect on Competition (AAEC). It then evaluates the objectives and mechanisms of the takeover code administered by the Securities and Exchange Board of India, focusing on disclosure requirements, open offer obligations, and protection of minority shareholders in public acquisitions.

The paper highlights areas of convergence and divergence between the two frameworks, including differences in thresholds, timelines, and regulatory objectives. It further identifies practical challenges such as overlapping jurisdiction, regulatory delays, and compliance burdens faced by companies in complex M&A transactions. Through doctrinal analysis and examination of regulatory practices, the study assesses whether the current framework effectively balances competition concerns with market efficiency and investor protection.

The paper concludes by proposing reforms to enhance regulatory coordination, streamline approval processes, and reduce procedural redundancies. It advocates for a more harmonized and predictable legal regime that facilitates ease of doing business while safeguarding competitive markets and shareholder interests.

Keywords

Merger Control; Public M&A; Competition Act, 2002; SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011; Competition Commission of India; Securities and Exchange Board of India; AAEC; Corporate Combinations; Takeover Code; Minority Shareholder Protection; India.

The Regulation of Mergers and Acquisitions under the Competition Act 2002 are a cornerstone of the Indian competition law regime that aim at maintaining market efficiency and preventing anti-competitive outcomes. Together with the supporting laws, such as the Companies Act 2013 and SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011, the Competition Act forms a complete framework of corporate restructuring which ensures such activities do not distort competition in the market. The Competition Commission of India (CCI) is the statutory institution which upholds these regulations by performing the role of the primary authority responsible for reviewing and approving combinations.[1]

The Competition Act require merger and acquisitions, amalgamation to be notified if their size meets the certain thresholds, and also likely to cause an appreciable adverse effect on competition in India. The merger control mechanism of the Competition Act of India, which follows an ex-ante approach, has a very fundamental rationale behind it, and that is to enable the CCI to evaluate proposed combinations' potential competitive effects before consummation, thus preventing potential harm to consumer welfare and market structure, which is a shift from the prior regime under the Monopolies and Restrictive Trade Practices Act 1969, not just curbing monopolies but enhancing competition.

In terms of implementation, however, there are still some concerns with the merger control regime under the Competition Act. These include ambiguities in notification thresholds and procedures which often lead to a lot of uncertainty for businesses. Traditional methods of analysis may also not be appropriate in the light of the development of new and digital markets. There are also perceived issues in regard to consistency in the CCI's review process, including timelines of review and the extent to which it uses economic analysis. It appears that reforms are needed to the merger control regime, to address these concerns. These may include clarity in threshold criteria, a tier system of notification based on the potential competitive effects of the transaction, increased utilization of sophisticated economic tools such as the Herfindahl-Hirschman Index (HHI) in the review, improved transparency, stakeholder engagement and alignment with international best practices followed by countries like the U.S and E.U. The interpretation of the CCI's decisions in significant cases further brings out a balance between efficiency and fairness in the merger control framework.

Evolution and Regulatory Architecture of M&A in India

The regulatory architecture for M&A has seen significant transformation to ensure the healthy development of corporate business growth on a level playing field. Today, mergers and acquisitions are vital strategic mechanisms that allow firms to reap the benefits of economies of scale and operational efficiency and gain market presence. However, M&A transactions also carry the risk of anti-competitive consequences such as increased market concentration and abuse of dominance. As such, regulatory oversight is crucial to maintain allocative and productive efficiencies alongside consumer welfare.

India's M&A regime hinges on the Competition Act, 2002 (the Act), the primary legislation governing the competition aspect of transactions. The Act specifically aims to curb combinations that can have an appreciable adverse effect on competition (AAEC), and therefore control the concentration of economic power in various markets. Its objective is to control monopolistic practices and to foster a competitive market, the ultimate beneficiaries of which are consumers and businesses.[2]

[1] G.K. Kapoor and Sanjay Dhamija, Company Law and Practice (Taxmann, New Delhi, 27th edn, 2024) 1170.

[2] Komal Sandhu, Law Relating to Mergers and Acquisitions (Thomson Reuters, Mumbai, 1st edn, 2021) 684.

In addition to the Competition Act, two other important pieces of legislation complete India's M&A regime: the Companies Act, 2013 (Companies Act), governing the structural and procedural aspect of merger, amalgamation and restructuring of companies and ensuring good corporate governance; and the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (Takeover Code) governing takeovers of listed entities if the acquisition exceeds the given thresholds.
The Competition Commission of India (CCI), an autonomous statutory body established under the Competition Act, is the central agency regulating mergers and acquisitions. Section 6 of the Act mandates that the parties to a combination whose asset and turnover sizes cross the prescribed thresholds must notify the CCI and obtain prior approval. The CCI then scrutinises the combination to determine if it causes an AAEC in the relevant market, by looking at various factors such as concentration in the market, barriers to entry and existence of potential competitors.

The CCI then decides to either allow or block or approve the transaction subject to modifications. This procedure ensures that efficient business consolidations proceed, while transactions that are likely to result in anti-competitive consequences are either cleared subject to modifications or blocked. In India's approach towards regulating mergers, it balances a liberal view on consolidation with robust enforcement procedures in relation to anti-competitive trends, thereby protecting competition in markets and ensuring that this principle continues to develop in the best interests of all stakeholders.
The following section analyses the statutory provisions relating to M&A under the Competition Act and the role of the CCI. The section provides an insight into the application of these provisions, with cases presented as examples of M&A in practice, as well as a reflection of how the M&A regime is evolving and adapting to the challenges in today's economic world.

Understanding Mergers and Acquisitions

Mergers and acquisitions (M&A) represents one of the basic modes of corporate reorganisation. These provide firms with alternative ways of entering the market, expanding their reach and gaining an operational advantage over others. Through the process of M&A, organizations attempt to increase their market size, enhance their ability to profit from economies of scale, and optimize the use of their resources. Essentially, M&A transactions are a process in which control of, ownership of, or assets and liabilities of a business are acquired or consolidated by another business.

There exists a general distinction between the two forms of transactions, namely mergers and acquisitions. Mergers usually occur when two or more companies amalgamate their legal status into a single entity. This usually results in the winding up of the separate identity of one or more of the merging entities, the acquisition of all the assets and liabilities by the surviving entity and the subsequent dissolution of the other identities. Acquisitions are different to a merger because here the legal identities do not merge or collapse but simply, one firm purchases control over the assets of another business. Both kinds of transactions are subjected to scrutiny so as to ensure they do not hinder competition.
In India the legal provisions governing both these kinds of transactions were initially scattered but now exist primarily within two distinct legislative frameworks, the Competition Act, 2002 and the Companies Act, 2013. Together these acts govern aspects of both competition and corporate law relevant to M&A in India. The idea behind these regulations is to strike a balance between promoting growth through M&A activity and preventing adverse effects of such mergers on competition in a market.

Mergers are often classified on the basis of the relationship between the constituent firms. Horizontal mergers involve two businesses of similar stature operating at the same level of the marketing structure. Although the aim behind such mergers is efficiency, it often causes significant concern for reasons of competition as these mergers tend to decrease the level of rivalry in a given market, and hence lead to increase in the share of one entity. Vertical mergers occur when a business combines with either its supplier or customer. These have been formed to streamline the transaction and reduce costs, however they can often hinder competition for other businesses in the market.
The other kinds of mergers are Conglomerate mergers where a business entity combines with an unrelated business operating in an altogether different sector; the usual goal here is diversification. The fifth type of merger is Concentric merger. Though this again involves businesses operating in separate markets, it does involve industries that are related and is intended to achieve greater product lines or access markets. Both these kinds of mergers too pose considerable competition concerns.

An acquisition (more commonly called a take over) is the purchase of a majority holding in, or control of an interest in, an enterprise, firm, business undertaking, company etc., by a corporate organization with the ability to control its management and operation. Unlike a merger which consolidates the organization into one company, an acquisition doesn't necessarily change the legal structure of the target organization. Acquisitions are frequently made as part of an overall business strategy to extend operations, acquire assets and capabilities, gain access to new markets or as a result of technological innovation.

Acquisitions can be broadly categorized into 'friendly' and 'hostile' taking into consideration whether the acquisition is supported by the management of the target organization or not. A friendly acquisition implies that the board of directors of the target company has agreed to support the takeover and the acquisition has been implemented without contest. The terms have been negotiated and a mutual agreement arrived between the two organizations for an acquisition. Hostile acquisitions on the contrary mean that the management of the target company hasn't been able to reach an agreement with the management of the acquiring organization. An acquirer can initiate a hostile take over by either making a direct takeover offer to shareholders or buying majority shares in the market. Target organizations can defend a hostile acquisition bid with strategies such as a "poison pill" defense where new shares are issued at a very low cost for all existing shareholders excluding the acquirer and "greenmail" defense.

From a structural standpoint, acquisitions are also categorized on three different types: 'share acquisition', 'asset acquisition' and 'management acquisition'. In case of a share acquisition the acquirer takes control over the target company by buying over the majority of its shares with the necessary voting rights. Publically traded companies are very frequently acquired through share acquisition due to the liquid share market. An asset acquisition implies purchasing a part or entire business from an organization without necessarily buying out its entire stake and liability associated with that business unit. This acquisition option makes it possible to only invest in profitable business areas thereby minimizing the risk. Management acquisition as compared to the above is when the existing management buys over the majority stake of the company typically with external finances from private equity firms. In these deals the managers take over responsibilities to ensure proper running of the company.
Each kind of acquisition involves distinct legal, financial and strategic implications. In order to regulate the same and prevent undue advantage to any organization by the competitive law authorities the acquisition processes are monitored very carefully.

The legal regime in India with regard to merger and acquisition transactions spans across a multiplicity of legislations, each governing a specific aspect of the deal including corporate procedure, competition concerns and protection of investors, ensuring both ease of corporate restructuring and maintenance of market transparency and fairness.
The Companies Act, 2013 governs the procedure and structure requirements of mergers, amalgamations, compromises and arrangements as detailed under sections 230-240. The Act outlines the process, which requires, inter alia, the drafting of schemes of arrangement, shareholders' and creditors' approval of schemes and sanction by the National Company Law Tribunal. The Act mandates the adoption of appropriate accounting standards and disclosure requirements to promote transparency and safeguard the interests of all stakeholders in M&A. Supplementing the above law and governs the competition aspect of mergers and acquisition transactions is the Competition Act, 2002 in which section 6 strictly prohibits acquisition if the resultant combination is likely to cause or causes an AAEC within a relevant market. In evaluating AAEC, the competition commission of India considers parameters such as post merger market share, market concentration, barriers to entry and impact on the consumers and any combination of the threshold value would require the acquirer to notify such combination to the Competition Commission of India. If after assessing the combination the commission is of opinion that it is not likely to cause or causes AAEC within the relevant market then it may approve, modify or reject the merger depending on the analysis. A practical example of the use of this Act is in the case of CCI v. Thomas Cook (India) Ltd. where CCI imposed a set of conditions for the approval of the merger of Sterling Holiday resorts in order to prevent AAEC in the business of tourism and travel.

Lastly, the regulations to protect investors under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 shall also be relevant, inter alia where substantial shares are acquired, disclosure requirements and obligations are imposed, including making open offers in cases exceeding specified share acquisition thresholds, in order to provide an equal opportunity for public shareholders to exit from their investment.
The Competition Act of 2002 is the governing law in India for competition in the present day. This Act provides a mechanism to regulate mergers and acquisitions as well as anti-competitive behavior in general. The law aims to prohibit and prevent anti-competitive practices, encourage consumer welfare, and promote the efficient functioning of markets and in the wake of the liberalization and globalization of the economy and it moves away from simply restricting monopolies to fostering a competitive economy. The Indian competition law can be traced to the Monopolies and Restrictive Trade Practices Act of 1969, primarily targeting monopolistic practices which had concentration of economic power, but post liberalization in the 1990s, the limitations of the MRTP regime became obvious, in response to modern business practices and market structures. The Competition Act 2002 subsequently replaced the MRTP Act and with the setting up of the CCI in 2009 became operational. A paradigm shift was brought in by the new legislation by embracing economic principles of competition. The objectives of the competition Act can be categorised into three groups. First is to prohibit anti-competitive agreements and practices which create distortions in the market. Second is to safeguard the interests of consumers providing them with competitive prices, improved quality and the advantage of wider choices. Third is to promote and maintain competition in the market as competition fosters productivity and the increase in the size and number of markets leads to improvements, and as mergers and acquisitions bring about economic combination, these factors play an important part in evaluating combinations. A special mention should be made about the review of "combinations" that comprise mergers, acquisitions, amalgamations, etc under the Act which are to be examined by the CCI to see whether these combinations have an

appreciable adverse effect on competition (AAEC) which essentially leads to analysis of market size, potential to enter the market, etc. In relation to the market in question. This may result in the combinations being allowed by the CCI, with or without modifications, or they may be prohibited to prevent any negative repercussions on competition. In conclusion, the competition Act of 2002 creates a framework which, allows corporations to expand, through mergers and acquisitions, while also ensuring that competition is kept alive.

The Competition Act, 2002 deals with mergers and acquisitions under sections 5 and 6 of the Act, both of which comprise of the substantive body of law of the merger control regime. Section 5 defines "combinations" which refers to acquisition or merging or amalgamation of enterprises beyond certain thresholds of assets and turnover in India and also if beyond certain thresholds globally, so long as the globally determined transaction has a considerable nexus with the Indian market. Such thresholds are the jurisdictional filters used to ensure that only those transactions likely to cause a significant effect on the structure of the market and the levels of competition come under scrutiny. The provision goes far enough to cover acquisition of shares, voting rights, assets and control of enterprises to ensure that a broader range of transactions that are likely to have a significant affect are within the ambit of the law.

Section 6 goes on to govern such combinations and prohibits the parties to a combination of two or more enterprises which have caused or are likely to cause an appreciable adverse effect on competition (AAEC) within the relevant market. Under this provision the parties to such a combination which have crossed the Section 5 thresholds are mandated to notify the CCI before it takes effect thereby allowing an ex-ante determination of competitive impact before the same may occur. The CCI, post notification will then determine if an AAEC will result by looking into the factors specified under section 20(4) of the Act, like concentration of market, barriers to entry, competition and many others and either approve the combination, approve the combination with modifications or reject the combination entirely.

The threshold-based system not only increases administrative efficiency by exempting those transactions that are small and unlikely to impact competition but also creates an equilibrium between the interests of businesses and that of competitive markets.

The institutional enforcement mechanism rests in the hands of the Competition Commission of India, which plays a crucial role in regulating the M&A sphere. The CCI is established as an expert statutory body with the power to probe, assess and decide upon such combinations which have the potential to adversely affect competition. Among the tasks allocated to the CCI under section 5 are determining the thresholds in Section 5 and assessing if a merger is likely to have a detrimental effect on the market. The powers of the CCI under section 19 and section 31 are wide ranging. The powers conferred under section 19 include that of calling for information and directing parties involved to submit necessary documents. Such directions may also be made mandatory. Powers conferred under section 31 deal with the general power of the CCI, inter alia to order cessation of combinations or imposition of modifications before approval. The CCI is empowered to involve other experts as well as issue directions. The CCI is also bestowed with the power of penalties in case a person fails to give the required information to the commission or supplies false information. Further the Commission, through its decisions, have also developed a rich body of competition jurisprudence and this can be clearly seen from the recent judgment in Mistry & O'Gorman v. CCI \[2011\] Comp LR 1 (HC-Del), the judgment in Grasim Industries v. CCI (2011) \[Comp LR\] (HC-All) and several others which indicate reliance upon economic analysis and an equilibrium between corporate growth and competitive market integrity.

Challenges and Gaps in the Existing Regime

Mergers and Acquisitions are regulated by the Competition Act, 2002 (Act). The regime in relation to merger and acquisitions is aimed to strike a balance between the two objectives of maintaining a healthy competition and ensuring economic development and growth. Though the framework has seen considerable evolution and the mergers under the Act has helped in the maintenance of competition in the Indian markets, there exist a number of gaps and challenges which has impeded in the effective enforcement of the Act. These gaps have caused lack of certainty to businesses, and have had detrimental effects on the Competition Commission of India (CCI) to effectively deal with emerging issues of competition.

One of the biggest challenge is with the interpretation of notification requirement and threshold limits. As per section 5 of the Act a merger/combination has to be notified to the CCI if the thresholds pertaining to asset and turnover values are crossed. The prescribed thresholds are aimed to identify and cover only those combinations, which is most likely to affect competition. However, it is difficult to apply such thresholds for the purpose of notification in the current Indian context. There are practical complications in determining the valuation of assets, in particular, intangible assets and the distinction between domestic and global turnover. In relation to cross-border transactions with multinational corporations, issues become much more complex. All these complicated factors pose uncertainties for businesses.

Secondly, application of exemptions under section 5 such as the de minimis exemption- aimed to protect small combinations from the notification burden- has faced uncertainties on its applicability. The lack of proper guideline, made it very uncertain for parties, whether or not they fall under the exemption or not, thus exposing the entities to the risk of both over-notification or unintentional under-notification. This is equally burdensome for business entities and for CCI.

Thirdly, infrequent revision of threshold limits is a problem of concern for businesses. Given the fast paced growth and high rate of inflation in India, static thresholds cannot adequately serve their purpose. Small combinations would fall within the static thresholds, however they may cause an adverse effect on competition. This is in particular, relevant in innovative markets and for sectors with rapid consolidation trend where relatively smaller acquisitions have the power to change the competition dynamics of a sector.

The current regime has a lack of flexibility in dealing with digital and other new age markets. The norms of assets and turnover are obsolete and do not effectively determine the market power of the companies which can have significant impact on competition. Such companies do not show much revenue but possess dominance. Therefore there is need to develop a more nuanced and dynamic standard.

Fourthly, the high incidence of notification, though helps the CCI to identify potentially problematic transactions, leads to administrative burden on the CCI, and such unnecessary work of scrutinizing potentially non-problematic transactions, consumes its resources and could affect the efficiency of the CCI's review.

In summary, while Competition Act 2002 has a robust merger control framework, such challenge should be adequately addressed, to enhance efficiency and effectively deal with future issues of competition and to build the confidence of business entities in the regulatory framework.[3]

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[3] Satyam Sharat, "Mergers & Acquisitions Under the Competition Act, 2002" available at:https://articles.manupatra.com/article-details/MergersAcquisitions-Under-the-Competition-Act-2002

Drawbacks of the CCI's review process

Although the CCI has adopted a robust and statutory basis for review of mergers, it does have limitations. One of the significant issues in the CCI's review of mergers is that the process takes long especially during the Phase II investigation process. Despite statutory time limits given by the Competition Act, 2002 for disposal of combination cases, most complicated mergers or acquisitions require detailed market analysis and consultation with stakeholders and experts. As a result, the process becomes lengthy, which makes it uncertain for the transaction parties involved.

These delays can have an adverse commercial impact as the M&A transaction may require time-sensitive integration strategy due to a strategic reason such as to enter the market, merge, amalgamate, financial restructurings etc. Any such delays may also adversely affect the business plans, increase the costs of the transaction and sometimes also make the entire transaction non-viable. Additionally, if the CCI requires additional information or clarification, it adds further to the time period, thereby increasing the compliance burden of the enterprises. The transparency and predictability of the CCI's review process are other issues of concern. Though the CCI orders are well-articulated, it may lack consistency in applying analytical techniques like market definition, market concentration and impact on competition. There can be a deviation from one decision to another in similar transactions which may raise ambiguity and concerns for the market players and the lawyers. To ensure predictability, further development of guidelines and standardized approaches may be necessary.[4]

Hurdles in addressing anti-competitive concerns

In the present day, analyzing anti-competitive effects has become more challenging in developing sectors such as digital, e-commerce and pharmaceuticals. Factors such as market share and turnover may not be as relevant in such sectors and companies having low market share in terms of turnover might possess an extreme potential of disrupting the market through innovation, network effects and data accumulation. Identifying anti-competitive impact, therefore, remains an issue.

Another concern is about the efficacy of remedies used by the CCI in its orders. Behavioural remedies such as undertaking price caps or conduct limitations are unlikely to be sufficient in such fast-changing markets where business models constantly evolve. Structural remedies, such as disposal of business assets, may prove more effective but are not always feasible or proportionate to the transaction's scale. The task is to draft such remedies that balance flexibility and sturdiness in order to prevent the adverse impact on competition in the long term, without impeding market development.

To facilitate better market analysis, it is imperative to leverage modern economic models and data analytics to the optimum. Tools such as the HHI and forward-looking market analysis should be used efficiently by the CCI to gauge the competitive effects.

The merger control regime of India, governed by the Competition Act, 2002, is crucial for ensuring a competitive market whilst allowing for growth of businesses. In synergy with the Companies Act, 2013 and SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, the entire legal framework provides for regulation and control of M&A transactions. The CCI has played a significant role in reviewing combinations that would cause appreciable adverse effect on competition and preventing such transactions through the imposition of structural and behavioural remedies. While its role is invaluable, complexities

[4] Avaantika Kakkar and Vijay Pratap Singh Chauhan, "Evolving Character of the Indian Merger Control Regime" (2022) 3 Journal on Competition Law and Policy 1.

such as time delays, ambiguities in notification procedures, and challenges in market analysis of fast-growing sectors remain issues to be addressed. Adopting lessons from international precedents in the US and EU in terms of the usage of economic modeling, clarity in notification thresholds, and procedural efficiency could help further refine India's competition law framework and make it more predictable and efficient. Continuous evolution and adaptation are key to keep the Competition Act, 2002 relevant while securing consumer interests.[5]

Public M&A and the Takeover Code – SEBI (SAST) Regulations, 2011

The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, popularly known as the Takeover Code is the foremost legislation governing public mergers and acquisitions of listed companies in India. The primary purpose of the regulations is to ensure fair, transparent and equitable transactions involving acquisition of shares and/or control of listed companies and thereby maintain investor confidence in the Indian capital market.

Protection of minority shareholders has been one of the key objectives underlying the Takeover Code. It has been effectively achieved through the "open offer" mechanism under which an acquirer, upon breaching certain predetermined thresholds in terms of shareholding and/or control of a company, is mandatorily required to extend an open offer to the public shareholders for acquiring their shares at a fair price. Thus, minority shareholders are provided an exit opportunity whenever there is a change of ownership or control of a company.

These regulations are applicable to all listed companies in India and its provisions hold significant implications for promoters, institutional investors and retail investors. This aspect assumes great importance in the context of the Indian corporate scene, where promoter shareholding is high and ownership is often closely held.

Takeover regulation in India had an evolutionary development. Initial framework in the form of SEBI Takeover Regulations, 1994 was replaced by a more comprehensive 1997 code developed on the basis of the report and recommendations of Bhagwati committee. However, market developments and complexities in transactions made a modern regulatory framework inevitable.

The Takeover Code, 2011 formulated on the basis of recommendations made by the Achuthan Committee brought forth major reforms, by raising the open offer trigger threshold from 15% to 25% and minimum open offer size to 26%. Also "control" has been defined as an independent trigger in terms of acquisition. Non-compete fee being removed reinforces the fair treatment to all shareholders, thus aligning the Indian takeover regulation to global practices.

The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, commonly known as the Takeover Code, forms the basis of the regulation of public M&A in India. This regulation is supervised by the Securities and Exchange Board of India (SEBI) and it governs acquisitions in the form of shares or voting rights, and of control, over the share capital of listed companies. The Code aims to protect minority shareholders from any adverse consequences resulting from the changes in control of companies and it also seeks to enhance transparency in these transactions.

Before the enactment of this, India's regulation in takeover transactions followed the SEBI Takeover Regulations, 1994, which, due to the growing nature of Indian securities market, proved to be inadequate for the market and were relatively rudimentary. Based on the recommendations of the Bhagwati Committee, SEBI brought out new takeover regulations in 1997, the Takeover Code, 1997, which again was later replaced by the 2011 code after several issues had been observed as Indian securities markets evolved at an incredible rate and a more

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[5] Siddharth Kawadia and Khushi Bansal, "Evolution of Competition Law Regime – Prospects and Implications in the Realm of Mergers and Acquisitions" (2024) 4(1) Vishwakarma University Law Journal 15.

adequate, fair, and sophisticated take over regime was necessary. So the SEBI had appointed a committee to reform the takeover regulations, under C. Achuthan, based whose recommendations, the Takeover Code, 2011 came into effect with strengthened provisions on protection to investors, keeping in tandem with the practices abroad.
The Takeover Code, 2011 contains certain cardinal changes with respect to the older take over codes. Under Regulation 3, acquisition of 25% or more of shares or voting rights, or both, of a target company, triggers mandatory open offer requirements to the public shareholders to enable them an exit at an appropriate price when a control is taken over the company. Regulation 4 makes "control" a trigger for open offer irrespective of shareholding or voting rights and the mandatory offer size is fixed at 26% to maximize minority shareholder protection.

Under the 2011 code there are also mandatory disclosures under Regulation 29. Any acquisition of 5% or more shares must be disclosed within 2 working days. Furthermore, for any subsequent incremental changes of 2% or more, it should also be disclosed. Besides this, promoters are also required under Regulation 30, to disclose on encumbrances like pledges, which should give investors a fair idea about the promoter's position and if a control has to be taken over; how likely would it be to get over the encumbrances.
With regards to the pricing of the open offer, Regulation 8 requires that the offer price shall be the higher of following price calculation methods: the highest price paid by the acquirer for the acquisition of shares during the last 26 weeks, and the volume-weighted average market price of the shares of the target company for a period of 60 trading days.
There are exceptions prescribed under Regulation 10 like inter-se transfers between promoters, transfers due to inheritance etc., which don't really lead to a substantive change in the control of the company or are beneficial for shareholders, thereby avoiding mandatory open offers. The regulator may also pass exemptions on case-to-case basis.

Conditional & Competing Offers under the Takeover Code
The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 provides a nuanced regulatory regime for handling conditional and competing offers through Regulations 19 and 20 respectively. These provisions are a welcome addition, which adds flexibility into takeovers, while maintaining a balance between protecting the shareholder interest and ensuring procedural fairness.
Conditional Offer: Regulation 19 states that an acquirer may make an open offer subject to a minimum level of acceptance. Such a condition, however, shall not be in excess of 50% of the total size of the offer. For example if the open offer is for 26% of the shares of a target, the acquirer may stipulate for a condition that a minimum of 13% of the shares shall have to be tendered by the public shareholders for the offer to proceed. If, such a threshold is not attained, the acquirer shall be entitled to withdraw the offer and return the tendered shares back to the shareholders. Such provisions in conditional offer protect the acquirer from the risk of making an unsuccessful offer and ensures that shareholders are not obliged to sell shares at prices dictated by an offer which will finally fail.
Furthermore, Regulation 19 specifically prohibits any acquisition of shares by the acquirer outside the mechanism of an open offer during the offer period when such a condition is imposed. This provision further adds transparency to the process and also acts as a check against the acquirer influencing the extent of acceptance under the conditional offer. Conditional offers therefore strike a balance between enabling the acquirer to manage commercial risk and imposing regulatory discipline.
Competing Offer: Regulation 20 deals with competing offers. This implies that two or more entities come forward and express an interest to acquire the target company. Such

circumstances result in an organized and competitive bid environment, which ultimately benefits the shareholders of the target company. When a competing offer is made, the timelines for both offers are aligned and shareholders have enough time to make an informed decision with regard to participating in either offer. An added advantage of a competing offer is that it must offer a price that is at least equal to, and in the same currency, as the first offer. The sizes of all subsequent open offers shall be required to be equal to the first open offer. Such a provision not only brings value to the shareholders in terms of a higher acquisition price but also provides more exit opportunities.
A particularly noteworthy aspect of competing offers, as provided under Regulation 20 is that in such circumstances, the original acquirer is allowed to revise the terms of its open offer. This often leads to an auction or a 'bidding war' which directly translates to an increased price for the target shareholders. However, in order to avoid prolonged uncertainty over the transaction completion, competing offers are only allowed up to the 15th working day of the date of the Detailed Public Announcement, so that there are no unending offers to gain control.

Landmark Judicial Interpretations
Judicial and Tribunal decisions particularly of the Securities Appellate Tribunal, have been instrumental in providing clarity and an exhaustive interpretation of the Takeover Code.
In Sanofi-Aventis v. SEBI (2013)23 the Tribunal, while considering pricing in indirect acquisitions, held that when a controlling stake in an Indian entity is acquired indirectly through the foreign holding company of the target, the price must reflect an equitable distribution of the overall purchase consideration. It emphasized that Indian shareholders should not be worse off compared to other shareholders. This judicial interpretation helped align global M&A practices with the principles embedded within the Takeover Code.

In Zenotech Laboratories Shareholders v. SEBI (2010)24, the Tribunal reiterated that amounts paid to promoters as "non-compete fees" must be included in the open offer price. This was based on the underlying principle of equitable consideration being offered to all shareholders irrespective of their role in the target entity. This principle was later incorporated in the 2011 Takeover Code by the prohibition on payments of non-compete fees.
In Clearwater Capital Partners v. SEBI (2014)25 the Tribunal unequivocally clarified that even where shareholders pass a resolution approving preferential allotment (which would be an off-market purchase, potentially outside the Takeover Code), the requirement of a mandatory offer is not discharged, unless an exemption is granted by SEBI itself. This decision highlighted that shareholder consent does not absolve acquirers from regulatory obligations.
Another important judgment in Vishvapradhan Commercial v. SEBI (2019)26 expanded the interpretation of control beyond simple majority ownership to "de facto" or substantial influence over policy and decisions of the target entity. This wider interpretation of "control" is significant as it brings transactions structured to obtain such indirect control within the regulatory ambit of takeover rules.

Evolution from the 1997 Code to the 2011 Framework
The Takeover Code underwent a fundamental revision and transformation in 2011. A significant departure from the 1997 Code was the increase in the trigger threshold from 15% to 25% for mandatory open offers. This was considered necessary as 15% was seen as an insufficient trigger point in the context of Indian companies which are widely promoter driven. Consequently, the minimum open offer size was enhanced from 20% to 26%, providing public shareholders greater opportunity to exit with value. The concepts of 'creeping acquisition' was replaced by the more efficient 5% per annum on acquisitions beyond 25% without necessarily triggering an offer, provided that the acquirer does not obtain additional control.

The definition of control itself was broadened in the 2011 Code to encompass both direct and indirect control and also, payment of any special premium to promoters was prohibited in the name of 'non-compete fees', thus aligning with the principles of equitable treatment of shareholders. The pricing mechanism also got finer tuned ensuring higher price to shareholders in such transactions.

Impact on M&A Activity in India

The Takeover Code has significantly shaped the Indian M&A landscape. While raising the trigger threshold has led to increased institutional investments, as certain thresholds don't obligate an open offer, the requirement of a minimum 26% buy back ensures adequate exit opportunity and valuation.

The code also affects the manner of transaction structuring. In most cases, transactions are planned to be executed well below the trigger threshold to avoid the obligations of the Code. Furthermore, in case of promoter-controlled companies, the Code, while offering a protection against hostile takeover for the promoters, also sets up a mechanism for public shareholders when a sale does take place. Bidding wars that are now fairly common have always been beneficial to shareholders. Nevertheless, the rigorous disclosure requirements, detailed offer documents, as well as the fixed timeline may translate into increased compliance costs and complexity, particularly for foreign investors who are still getting acquainted with the regulatory regime in India.

Comparative Perspective with Global Regimes

India's Takeover Code has several similarities with international M&A regimes but differs with regards to certain key provisions that can be attributed to specific domestic contexts and objectives. For instance, the UK's Takeover Code, the primary set of regulations governing takeover bids in the UK, requires a mandatory open offer to be made when an investor acquires 30% of a company's shares. However, the UK's regime is much more restrictive towards defensive actions by the target company, compared to the Indian framework.

Unlike India's mandatory open offer regime, the U.S. Has an "investor-centric" takeover regulation which predominantly relies on the principles of disclosure rather than on a mandate to make a bid. This difference can largely be attributed to the nature of the U.S. Market which has a high degree of institutional shareholding, while India is a promoter-driven market. A key difference lies in the threshold required for an open offer under the EU Takeover Directive, which ranges from 30% to 33% of the voting rights in the various member states. Although it requires a mandatory bid when a substantial stake is acquired, the threshold itself is higher than India's threshold of 25% stake acquisition. India's threshold is lower with the objective of better protecting minority shareholders given its unique market characteristics.

Minority Shareholder Protection: An Assessment

The Takeover Code, fundamentally, serves the purpose of protecting the minority shareholders by ensuring adequate exit opportunities. The mandatory nature of open offers to public shareholders guarantees an exit for them when control changes hands. The transparent methodology followed, whereby shareholders are compensated for 100% of the shares based on the highest of a few predetermined price benchmarks, prevents the price from being compromised due to reasons such as lack of demand from institutional investors and so forth. Furthermore, the provisions of non-compete payments and enhanced transparency requirements are also to a certain extent safeguarding the interest of the public shareholders. Moreover, due to provisions relating to competing offers, shareholders stand to benefit in terms of a better valuation. Although certain loopholes and imperfections may still exist, such as in cases where acquirers gain over 50% by buying more shares from already participating

shareholders leaving a residual minority, yet, it can be argued that on a macro level, the Takeover Code provides a sound framework for investor protection.

Takeover Code: Challenges and the Path Forward

Even with the detailed and well-structured scheme of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("Takeover Code" or "Code"), a number of issues continue to affect its smooth implementation in the contemporary context of an evolving market and evolving business entities. Among the most enduring of such issues is the concept of "control." While the concept is defined as the triggering event for an open offer, its precise meaning (especially in relation to indirect control, contractual rights, and minority protection) is still debated. Efforts by the Securities and Exchange Board of India to refine the concept of control have led to much discussion, but there is still no agreed definition.

New types of entities-private equity funds, sovereign wealth funds, activist investors, among others-have emerged that exercise substantial influence over companies without technically satisfying the threshold acquisition of equity shares required to trigger a public offer under the Code. This situation raises concerns about whether the present framework adequately captures this influence as control. Additionally, new-age technology companies that adopt specific ownership models (like two-tier shares, and promoter/founder centricity) were never envisaged when the Code was formulated and this leads to a regulation gap in the context of effectively determining control, particularly where voting power differs from ownership.

Overlapping regulation with areas such as foreign investment rules, competition law, and sector-specific regulation also creates compliance hurdles for acquirers. In particular, cross-border transactions involving a change in control often trigger multiple clearances and the acquirer is required to navigate a complex regulatory regime where the Takeover Code intersects with other rules. A well-meaning concept of adequate pricing and a mandate for mandatory minimum offer price can also lead to offer prices higher than market values under volatile conditions and may discourage what would otherwise have been an efficient acquisition.

Going forward, a continued process of refinement of the Takeover Code may be expected to overcome such hurdles. Future changes could focus on providing a clear, practicable, and business-oriented definition of "control" as well as a more adaptable pricing methodology to respond to market dynamics. Tailored regulations for new-age entities that adopt non-traditional forms of ownership are likely to be on the cards as well. The SEBI's history of being responsive to market development, reflected in multiple amendments over the years, suggests a willingness to evolve the regime with global best practices.

In conclusion, the Takeover Code represents a key phase in the development of India's capital markets regulations. By seeking to balance diverse and often competing objectives-protection of minority shareholders, transparency, and the efficient facilitation of M&A-it has broadly achieved its goal of promoting fair play in acquisition transactions. Despite certain structural and interpretational challenges that are inevitable when a detailed regulatory regime evolves alongside market developments, it will continue to be instrumental in fostering investor confidence and a well-ordered market for corporate control in India's dynamic financial ecosystem.

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