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THE DEFINITION VACUUM OF 'CONTROL' UNDER THE SEBI TAKEOVER CODE, 2011: A CASE FOR LEGISLATIVE CLARITY

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ABSTRACT

The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (hereinafter 'Takeover Code' or 'the Code') constitutes one of the most consequential instruments in India's securities law architecture. It governs the manner in which substantial acquisitions of shares and the control of listed companies must be conducted, primarily to ensure that public shareholders are accorded an equitable exit opportunity upon a change in corporate control. Central to the entire regulatory scheme is the concept of 'control' a term whose precise delineation determines whether the mandatory open offer obligations under the Code are triggered. Yet, despite its pivotal role, the definition of 'control' enshrined in Regulation 2(1)(e) of the Code has remained jurisprudentially contested and legislatively imprecise for over a decade. The definition's deliberately inclusive language extending to rights exercisable 'in any other manner' while intended to capture a broad range of control mechanisms, has paradoxically generated a definitional vacuum that courts, tribunals, and market participants continue to navigate with discomfort. This article critically examines this vacuum, traces its historical genesis through the evolution of the Takeover Code, and analyses landmark judicial and regulatory interpretations including the Securities Appellate Tribunal's seminal decision in *Subhkam Ventures v. SEBI*. Drawing upon comparative frameworks in the United Kingdom and the United States, the article argues that the existing definitional architecture premised on subjective and open-ended criteria creates regulatory uncertainty and impedes legitimate market transactions. It ultimately advocates for a calibrated legislative intervention to impart definitional clarity, proposing a purpose-driven, graduated control framework to serve the twin objectives of investor protection and capital market efficiency.

Keywords: *SEBI, Takeover Code, Control, Regulation 2(1)(e), Mandatory Open Offer, Corporate Governance, M&A Regulation*

I. INTRODUCTION

The regulation of corporate takeovers occupies a unique intersection between securities law, corporate governance, and economic policy. In India, this regulatory space is primarily governed by the Takeover Code, which imposes mandatory obligations most notably, the mandatory open offer requirement on any acquirer who crosses specified thresholds of shareholding or acquires 'control' over a listed target company. The underlying rationale is grounded in shareholder democracy: when control of a company changes hands, public shareholders must be given a fair and equitable opportunity to exit at the acquisition price, thereby preventing the concentration of benefits solely among the promoters and the incoming acquirer.

The architecture of these obligations, however, hinges precariously upon the definition of a single term: 'control.' Whether a particular transaction be it a private equity investment with negotiated veto rights, a shareholders' agreement conferring governance protections, or a strategic partnership involving board representation constitutes an acquisition of 'control' for the purposes of the Takeover Code is a question of enormous transactional significance. The answer determines whether a full-blown mandatory open offer is required, with its attendant costs, timing constraints, and regulatory scrutiny.

It is, therefore, a matter of profound concern that the definition of 'control' as it presently stands under Regulation 2(1)(e) of the Takeover Code has failed to provide this clarity. The definition's expansive language which extends 'control' to rights exercisable 'in any other manner' has effectively rendered the concept a moving target, open to contextual interpretation in each case. This interpretive flexibility, while theoretically advantageous in accommodating novel commercial arrangements, has in practice generated a definitional vacuum.

II. HISTORICAL EVOLUTION OF THE SEBI TAKEOVER CODE

India's journey towards a comprehensive takeover regulatory regime began in the early 1990s, coinciding with the liberalisation of the Indian economy and the emergence of an active capital market. Prior to the establishment of the Securities and Exchange Board of India (SEBI) in 1992, takeover activity was largely unregulated, governed only by the broad and inadequate provisions of the Companies Act, 1956. The absence of a dedicated regime meant that acquisitions of controlling stakes in listed companies could occur without any corresponding

obligation to public shareholders a situation incompatible with the principles of investor protection that an efficient capital market requires.

The first formal attempt at regulation came with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1994, which introduced a basic framework requiring public announcements upon the acquisition of specified shareholding thresholds. These regulations, however, were rudimentary. The concept of 'control' was neither precisely defined nor given central regulatory significance; the focus was predominantly on quantitative shareholding thresholds rather than the qualitative question of who controlled the management and policy of the company.

Recognising the inadequacies of the 1994 Regulations, SEBI constituted the Bhagwati Committee in 1997, whose recommendations led to the enactment of the more comprehensive SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997. The 1997 Regulations introduced the concept of 'control' as a distinct trigger for mandatory open offer obligations, alongside shareholding thresholds. However, the definition remained broad and imprecise, setting a pattern of ambiguity that would persist into the subsequent codification.

The current regime the Takeover Code of 2011 was the product of the Takeover Regulations Advisory Committee (TRAC) chaired by C. Achuthan. The TRAC Report, submitted in July 2010, undertook an extensive review of the 1997 Regulations and recommended significant structural changes, including the revision of shareholding thresholds and the introduction of a non-compete fee prohibition. On the definitional question of 'control,' however, the TRAC Report essentially retained the same broad and inclusive language that had characterised the earlier regime, acknowledging that it would be difficult to enumerate all possible forms of control exhaustively. This conservative approach, while pragmatically defensible, embedded the definitional vacuum into the very foundation of the 2011 Code.

III. STATUTORY FRAMEWORK: DISSECTING REGULATION 2(1)(E)

Regulation 2(1)(e) of the Takeover Code defines 'control' in the following terms:

"control" includes the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting

agreements or in any other manner.

Several features of this definition merit critical attention. First, the word 'includes' rather than 'means' signals that the definition is not exhaustive. This drafting choice, while constitutionally appropriate for giving purposive breadth to the provision, simultaneously opens the door to definitional indeterminacy. Courts and regulators have consistently held that an inclusive definition extends the ordinary meaning of a term rather than limiting it, which means that forms of control not expressly mentioned in the definition may still fall within its ambit.

Second, the definition identifies two primary limbs: (a) the right to appoint a majority of directors; and (b) the right to control management or policy decisions. The first limb appointment of a majority of the board is relatively determinate. The second limb control over management or policy decisions is inherently nebulous. The concept of a 'policy decision' is itself undefined, and its boundaries with ordinary operational management are unclear. Does the right to veto a material business decision constitute control over 'policy decisions'? Does the ability to appoint even one director without board majority amount to control? The statute provides no answer.

IV. THE DEFINITIONAL VACUUM: SOURCES AND MANIFESTATIONS

A. The Problem of Negative or Protective Control

Perhaps the most significant manifestation of the definitional vacuum concerns the question of 'negative' or 'protective' control. In contemporary private equity and strategic investment transactions, it is standard practice for investors to negotiate rights that enable them to protect the value of their investment: the right to veto a merger, the right to block the issuance of new shares, or the right to approve transactions above a specified threshold. These rights often termed 'investor protections' or 'protective provisions' are not designed to enable the investor to proactively dictate the management or affairs of the company. They are defensive in character, intended to prevent the erosion of shareholder value rather than to exercise dominion over the target.

The definitional framework under Regulation 2(1)(e) does not distinguish between this category of protective control and what may be termed 'positive' or 'affirmative' control the ability to proactively determine the management and policy of the company. This distinction

is of enormous practical significance. If protective veto rights are sufficient to constitute 'control,' then every significant private equity investment in a listed Indian company will trigger mandatory open offer obligations, rendering such investments commercially unviable. If, on the other hand, protective rights are excluded from the ambit of 'control,' then sophisticated acquirers may structure transactions to retain effective dominion over a company while formally avoiding the open offer obligation, thereby defeating the Code's investor protection objective.

B. The Ambiguity of Board Representation Without Majority

A second, related source of ambiguity concerns the significance of minority board representation. The definition, in its first limb, refers to the right to appoint a 'majority' of directors as a determinative indicator of control. But commercial reality presents a more complex picture. In a company with a five-member board, an investor with the right to appoint two directors while lacking a formal majority may exercise decisive influence through a combination of board-level participation and veto rights in the shareholders' agreement. Does such a combination constitute 'control'? The definition provides no clear answer.

SEBI has grappled with this question through its informal guidance mechanism, where it has attempted to contextualise control on a case-by-case basis. However, informal guidance is inherently non-binding and applies only to the specific facts presented. It cannot substitute for legislative clarity as a general rule, and in practice, different transactions with materially similar structures have received inconsistent treatment, generating justified complaints of regulatory arbitrariness.

C. The Role of Shareholders' Agreements and Voting Arrangements

The explicit reference in Regulation 2(1)(e) to 'shareholders agreements' and 'voting agreements' as potential triggers for control raises a distinct set of difficulties. Modern corporate transactions routinely employ sophisticated governance documentation that allocates rights and obligations among shareholders in nuanced ways. A shareholders' agreement may simultaneously confer protective veto rights (typically treated as non-control by practitioners), board representation rights (potentially control-conferring), drag-along rights, and tag-along rights (neutral in control terms). The holistic characterisation of such an agreement as conferring or not conferring 'control' requires a granular, provision-by-provision analysis.

SEBI's approach in several informal guidance responses has been to examine the 'totality of rights' conferred by such agreements, looking to whether, taken in their entirety, they enable the acquirer to exercise dominion over the company equivalent to control. While this purposive

approach has doctrinal merit, it lacks the predictability that a statutory definition should provide. Sophisticated legal teams may engineer arrangements that fall just below the control threshold under any given totality analysis, exploiting the definitional vacuum rather than operating within a clear regulatory framework.

V. JUDICIAL AND REGULATORY INTERPRETATIONS

A. Subhkam Ventures (I) Pvt. Ltd. v. SEBI

The seminal judicial engagement with the definitional vacuum of 'control' occurred in *Subhkam Ventures (I) Pvt. Ltd. v. SEBI*, a landmark ruling of the Securities Appellate Tribunal (SAT) in 2010 that remains the most authoritative articulation of the concept in Indian securities law. The facts involved Subhkam Ventures' acquisition of equity shares in MSK Projects (India) Limited, coupled with the negotiation of extensive rights under a shareholders' agreement including the right to appoint directors, affirmative voting rights on specified matters, and protective veto rights.

The Supreme Court of India, in its brief order of 2010, declined to affirm the SAT's full reasoning and remitted the matter, observing that the question of 'control' requires case-specific determination. While this preserved the flexibility of the regulatory framework, it simultaneously denied the market the authoritative precedent it needed. The *Subhkam* saga thus illustrates the judicial reluctance to supply the legislative clarity that Parliament and SEBI have thus far withheld.

B. SEBI's Regulatory Approach: Informal Guidance and the 2016 Discussion Paper

In the absence of legislative or binding judicial clarity, SEBI has attempted to manage the definitional vacuum through two mechanisms: the informal guidance route and regulatory consultation papers. Through informal guidance, SEBI has entertained requests from market participants seeking clarification on whether proposed transactions trigger open offer obligations. This guidance, while useful for individual transactions, does not create binding precedent and contributes to regulatory asymmetry.

The most significant regulatory intervention was SEBI's Discussion Paper of March 2016 on 'Brightline Tests for Acquisition of Control.' The Paper candidly acknowledged that the existing definition 'lacks precision and creates ambiguity in application,' and proposed two principal approaches: a bright-line test based on specified voting right thresholds, and a graduated rebuttable presumption model. However, after extensive consultation, SEBI did not proceed with any formal amendment, citing the complexity of reconciling the diverse views

expressed by market participants. The Discussion Paper thus represents a high-water mark of regulatory candour about the definitional vacuum without translating into concrete reform.

C. Cross-Statutory Interpretations

The definitional vacuum has been compounded by divergent interpretations of 'control' across Indian statutes. In *Arcelor Mittal India Pvt. Ltd. v. Satish Kumar Gupta*, the Supreme Court examined the concept of control in the context of the Insolvency and Bankruptcy Code, 2016, but the reasoning of the Court emphasising substance over form and the importance of effective rather than formal control has found resonance in the Takeover Code context as well. The Competition Act, 2002 adopts an even broader concept of 'control,' which has been interpreted by the Competition Commission of India to include minority shareholdings that confer 'material influence' over a target. This multi-jurisdictional definitional divergence represents a significant compliance challenge for corporate actors and underscores the urgency of statutory harmonisation.

VI. COMPARATIVE ANALYSIS: LESSONS FROM THE UK AND THE USA

A. The United Kingdom: The Bright-Line Approach

The United Kingdom's City Code on Takeovers and Mergers, administered by the Panel on Takeovers and Mergers, provides a compelling contrast to India's definitional approach. The UK Code adopts a unambiguous bright-line threshold: any person who acquires 30% or more of the voting rights in a listed company is deemed to have acquired 'control' and is required to make a mandatory cash offer to all remaining shareholders at the highest price paid during the preceding twelve months.

The elegance of the UK approach lies in its combination of simplicity and certainty. The 30% threshold is not calibrated to a qualitative assessment of actual control in any given case.

Indian scholars and regulators have noted that the adoption of a similar bright-line test in India would require careful calibration to account for India's shareholding patterns, where promoter holdings are typically substantial, and where a 25-30% stake held by an outsider may not reflect the same level of influence as it would in a widely-held UK company. Nonetheless, the UK model demonstrates that definitional precision is achievable without sacrificing regulatory

effectiveness.

B. The United States: A Multi-Layered Framework

The United States takes a different approach, employing multiple overlapping regulatory frameworks to address corporate control transactions. Under the Williams Act of 1968, which amended the Securities Exchange Act of 1934, any acquisition of more than 5% of a class of equity securities by a person or group triggers disclosure obligations, with heightened requirements for tender offers. The concept of 'control' itself is not defined in a single bright-line manner but is operationalised through securities regulations, stock exchange listing standards, and state corporate law particularly Delaware law, which has developed a rich jurisprudence on controlling shareholders.

The Hart-Scott-Rodino Act adds an antitrust dimension by requiring pre-merger notification for transactions above specified thresholds, and the concept of 'control' under the HSR rules is defined with greater precision, including numerical presumptions.

VII. IMPACT ON CORPORATE GOVERNANCE AND THE M&A LANDSCAPE

The definitional vacuum of 'control' under the Takeover Code has generated tangible and adverse consequences for India's corporate governance ecosystem and its mergers and acquisitions market. These consequences operate at multiple levels.

First, at the level of transactional structuring, the uncertainty has incentivised the elaborate engineering of transaction structures designed to remain just outside the control threshold while achieving the economic objectives of control-type transactions. Private equity investors in particular have developed complex arrangements combining layered shareholding structures, staggered board rights, and carefully worded governance provisions designed to maximise influence over portfolio companies while formally avoiding the open offer trigger.

Second, the vacuum has adversely affected India's attractiveness as a destination for inbound foreign investment in listed companies. International investors accustomed to operating under clear regulatory frameworks find India's opaque control definition a material deterrent. The risk of inadvertently triggering mandatory open offer obligations with their mandatory cash

consideration requirements and significant execution timelines represents a regulatory risk that many institutional investors price significantly into their investment calculus or seek to avoid entirely.

Third, the vacuum generates asymmetric regulatory treatment of economically similar transactions. Because the characterisation of 'control' depends on fact-specific analysis, two transactions with materially similar governance arrangements may receive different regulatory treatment depending on the manner in which SEBI exercises its discretion. This asymmetry is both commercially inequitable and, arguably, inconsistent with the rule of law principles that underpin effective securities regulation.

VIII. THE CASE FOR LEGISLATIVE CLARITY: SUGGESTIONS/FEEDBACK.

I: Adoption of a Bright-Line Shareholding Threshold

The most straightforward legislative intervention would be the adoption of a bright-line shareholding threshold modelled on the UK approach as the primary determinant of 'control.' SEBI's 2016 Discussion Paper itself considered this option, suggesting that a 25% voting rights threshold might operate as a rebuttable or irrebuttable presumption of control. Under this approach, any acquisition of voting rights above the specified threshold would trigger open offer obligations, irrespective of the qualitative governance arrangements in place.

The advantages of such an approach are manifest: it provides certainty, eliminates interpretive discretion, and aligns India's framework with international best practice. The principal objection that ownership does not invariably confer control, particularly in companies with concentrated promoter holdings can be addressed by calibrating the threshold to Indian shareholding realities and by retaining a narrowly defined residual category for qualitative control.

II: A Graduated Rebuttable Presumption Framework

An alternative, and arguably more sophisticated, approach would be a graduated rebuttable presumption matrix. Under this model, specified shareholding thresholds would create rebuttable presumptions of control at different levels for example, acquisition of 15% might create a weak presumption, 25% a strong presumption, and 50% an irrebuttable presumption.

Market participants and SEBI could rebut the presumption at lower levels by demonstrating that, despite the shareholding, no actual control-conferring rights have been acquired. This approach preserves regulatory flexibility while providing significantly greater certainty than the current framework.

IX. CONCLUSION

The definition of 'control' under the SEBI Takeover Code, 2011 represents one of the most consequential and yet most inadequately resolved questions in Indian securities law. Despite being a definitional foundation upon which the entire mandatory open offer edifice rests, Regulation 2(1)(e) provides a framework that is inclusive to the point of indeterminacy generating a vacuum that has persisted through two generations of the Takeover Code, survived multiple judicial engagements, and resisted the regulatory reform efforts initiated by SEBI in 2016.

The costs of this vacuum in terms of regulatory uncertainty, transactional inefficiency, market distortion, and asymmetric investor treatment are real and substantial. They fall disproportionately on foreign institutional investors, private equity participants, and market participants engaged in complex but entirely legitimate commercial transactions, all of whom deserve a regulatory environment that is both protective of investor interests and respectful of transactional certainty.

The comparative experience of the United Kingdom and the United States demonstrates that it is possible to regulate corporate control with greater precision and without sacrificing the flexibility necessary to accommodate diverse commercial arrangements. India's capital markets, which aspire to global standards of regulatory sophistication, deserve no less. Legislative intervention is not merely desirable it is, on the analysis presented in this article, a matter of regulatory imperative.

Whether the path chosen is a bright-line threshold, a graduated presumption matrix, or a purposive principle-based definition, the essential requirements are the same: clarity, consistency, predictability, and purposive coherence. The time for incremental consultation and deferred reform has passed. What is required now is decisive legislative action to fill the definition vacuum of 'control' under the Takeover Code action that honours both the investor protection mandate of the Code and the legitimate expectations of the market participants

whose transactions it governs.

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