

ISSN: 2582-6433



# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed 6th Edition

**VOLUME 2 ISSUE 7**

## **DISCLAIMER**

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of IJLRA. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of IJLRA.

Though every effort has been made to ensure that the information in Volume 2 Issue 7 is accurate and appropriately cited/referenced, neither the Editorial Board nor IJLRA shall be held liable or responsible in any manner whatsoever for any consequences for any action taken by anyone on the basis of information in the Journal.

Copyright © International Journal for Legal Research & Analysis



IJLRA

## EDITORIAL TEAM

### EDITORS

#### **Megha Middha**



*Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar*

*Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can*

*bring a change to the society*

#### **Dr. Samrat Datta**

*Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board*



## Dr. Namita Jain



Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC - NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India. India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi. (2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020). Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March

14th, 2019

## Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi. Formerly Assistant professor of Law, Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr. Ambedkar Law College, Pudupakkam. Published one book. Published 8 Articles in various reputed Law Journals. Conducted 1 Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration. 10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.



## Avinash Kumar



Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship. He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi. Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi. He has qualified UGC - NET examination and has been awarded ICSSR - Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research

methodology and teaching and learning.

## **ABOUT US**

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS  
ISSN

2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

# The Takeover Code-A comparison with the Past

*Authored By- Saahen Sharma*

A Takeover also referred to as an acquisition is the process of a company, playing the role of an acquirer buying or bidding for a significant amount of shares of the targeted or seller company. A takeover is when the acquisition of shares takes place from the shareholders of a company at a specified price to the extent of at least controlling interest to gain majority control over the acquired company. Thus, when the acquirer takes control of the target company, it is termed a successful takeover. To protect the rights of the stakeholders, the public, and others affected by it, the existence of a takeover code is necessary. The code safeguards the rights of the target company and shields them from being oppressed by the buyer company<sup>1</sup>.

## **Types of Takeovers**

In terms of the 'legal context' there are two main types of takeovers:

**Friendly Takeover:** It refers to a take-over in which one company agrees to be acquired and taken over by change in its management and control via negotiations between the existing promoters and the prospective investors in a friendly manner. Here the board of directors of both companies approves of the said transaction and both companies have a common motive and reasoning to affect the transaction. Also referred to as a Negotiated Takeover, this takeover tends to fulfill and benefit both the companies involved in the transaction. Usually, friendly takeovers take place as per the provisions of section 395 of the Companies Act, of 1956.<sup>2</sup>

**Hostile Takeover:** Hostile takeover is when one company unilaterally pushes for the acquisition of shares of another company without it being in the knowledge of the so-targeted company. An acquisition is also considered hostile when the acquisition pursues the targeted

---

<sup>1</sup> *Takeovers in India – An overview, by Vijay Sambamurthi & Siddharth Shah*

<sup>2</sup> *Gupta, Yogesh. "SEBI Takeover Code- Detailed Analysis."*

company even after the target company's board rejects the offer or the bidder makes the offer directly after announcing its firm's intentions to make an offer.<sup>3</sup> In such cases, the acquiring company collects a majority stake in the target company for an automatic acquisition where the target company does not approve of the acquisition. This is done generally, via tender offers, where a company purchase shares from the existing/outstanding shareholders of the target company at a premium over and above the current market.<sup>4</sup>

In terms of the 'business context', the takeover is of three main types:

**Horizontal Takeover:** A horizontal takeover is when one company takes over another company in the same industry. The objective behind such an acquisition is usually to achieve the economics of scale or increase their market share by acquiring other players.

**Vertical Takeover:** A vertical takeover refers to the takeover by one company of its suppliers or customers. The company acquiring the suppliers undergoes a backward integration whereas the suppliers/customers being acquired undergo forward integration<sup>5</sup>. Such a merger is effected to increase the synergies and gain more control of the supply chain process, ramping up the entire business. A vertical takeover often results in reducing costs and increasing the productivity and efficiency of the entire business<sup>6</sup>.

**Conglomerate Takeover:** refers to the takeover of one company by another company operating in a different industry. The main purpose of such a takeover tends to be the diversification of the business functions. Two firms would enter such a merger to increase market shares, diversify their businesses, cross-sell their products and take advantage of the synergies that exist between the two companies.<sup>7</sup>

---

<sup>3</sup> *Ibid*

<sup>4</sup> *Takeovers in India – An overview, by Vijay Sambamurthi & Siddharth Shah*

<sup>5</sup> *Takeovers in India – An overview, by Vijay Sambamurthi & Siddharth Shah*

<sup>6</sup> *Kenton, Will. "Vertical Merger." Investopedia, Investopedia, 22 July 2022, [www.investopedia.com/terms/v/verticalmerger.asp](http://www.investopedia.com/terms/v/verticalmerger.asp).*

<sup>7</sup> *Kenton, Will. "Conglomerate Merger." Investopedia, Investopedia, 19 May 2021, [www.investopedia.com/terms/c/conglomeratemerger.asp](http://www.investopedia.com/terms/c/conglomeratemerger.asp).*

## Why is a Takeover Code Necessary?

The twentieth century began with the Indian economy opening itself up to the world. With globalization, India had opened its doors to overseas investors. The multinational conglomerates rushed into India, and for the Indian players to compete with outside powers, the scale of business had to be increased<sup>8</sup>. Mergers and Acquisitions offered the best solution to corporates offering them the ability to multiply their business in a small amount of time. This wave of M&A proved beneficial but soon the outside powers with their ability to shed huge amounts of wealth made it very easy for them to exploit the opportunity to the prejudice of the retail investors. This created the need for regulation to protect the interest of investors while developing the securities markets and not sabotaging them<sup>9</sup>. Thus, with this mindset, in 1992, with the enactment of the SEBI Act, SEBI was established as the regulatory body to promote the development of the securities market in India while protecting the interests of the investors.

SEBI laid down the following grounds reflecting the necessity of a Takeover Code<sup>10</sup>:

- Full and truthful disclosures are to be made of all material information relating to the open offer.
- Keeping the interest of retail investors in the capital is a top priority since they are the driving force responsible for the development of the securities market.
- Giving investors an exit opportunity if they wish to not continue with the new management.
- The process of acquisition shall be completed in a time-bound manner, and it should be ensured that the acquirer has sufficient financial resources for the payment of the acquisition price to the investors.

---

<sup>8</sup> Gupta, Yogesh. "SEBI Takeover Code- Detailed Analysis."

<sup>9</sup> Takeovers in India – An overview, by Vijay Sambamurthi & Siddharth Shah

<sup>10</sup> Report of The Committee On Unemployment, May 1973, Govt. Of India Min.Of Labour & Rehabilitation (Deptt. Of Labour & Employment)

Subsequently in 1994 SEBI came out with SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 1994. Then after undergoing several amendments the Takeover Regulations Advisory Committee was constituted by SEBI to review the older takeover regulations and suggest amendments keeping the growing economy and the future in mind<sup>11</sup>. The committee further laid down the main objectives that a new takeover regulation shall fulfill in addition to the grounds laid down by SEBI in 1992, which were:

- To protect the interest of investors in the securities market, considering that both the acquirer and the investor need a fair, equitable, and transparent framework to protect their interests.
- To balance the conflicting objectives and interests of various shareholders during a substantial acquisition of shares in listed companies.
- To provide the shareholders the opportunity to exit their investment when a takeover of a target company takes place.
- Ensure that the affairs of the target company are conducted in the normal fashion of things when a target company is the subject matter of an open offer.
- To ensure that transparent discloses of all material information is made available to prospective investors.
- To provide for fair and effective competition among acquirers desiring of taking over the same target company. And,
- To ensure that the acquirers fulfill their obligations under the Take-over Regulations by making open offers.

---

<sup>11</sup> *Ibid*

After considering the public opinion the report has been modified to form the SEBI(SAST) Regulations, 2011.<sup>12</sup>

Now via the medium of the paper, we shall compare the New Takeover Code with the Old Code and analyze the said changes.

Some of the changes made are as below: -

1. **Increase the Initial Threshold Limit from 15% to 25%:** The Initial Threshold limit provided for Open Offer obligations was increased from 15% to 25% of the voting rights of the target company.
2. **Creeping Acquisition Limit raised from 15%-55% to 25%-75%:** Due to these new regulations, there exists a single and clear creeping acquisition bracket. This acquisition limit was made to be available to all persons holding 25% or more but up to 75%, that is the maximum permissible limit a non-public holding shall be eligible to creeping acquisition of 5% each FY.<sup>13</sup>
3. **Increasing the Offer Size from 20% to 26%:** The new regulations increased the offered size to just 26% from 20%. The TRAC recommends that such a limit be increased to 100% but it has been a better move to keep it at 26% keeping in mind the domestic acquirers on account of the lack of proper bank funding options available in India.
4. **Open Offer Trigger Point now based on Individual Holding:** After the 2011 regulation, the individual acquirer shareholding shall also be considered for determining the Open Offer Trigger Points apart from only the consolidated promoter shareholding. *Refer to Sec.3(3) of the SEBI (SAST) Regulations, 2011.*<sup>14</sup>

---

<sup>12</sup> SEBI. "Report of the Takeover Regulations Advisory Committee." SEBI, n.d.

<sup>13</sup> Corporate Governance Structure, Mergers and Takeovers in India in the Post Liberalization Regime-Proposals and Policies, by Nandita Das Gupta

<sup>14</sup> SEBI. "Discussion Paper on 'Brightline Tests for Acquisition of 'Control ...'" Accessed November 2, 2022. [https://www.sebi.gov.in/sebi\\_data/attachdocs/1457945258522.pdf](https://www.sebi.gov.in/sebi_data/attachdocs/1457945258522.pdf).

5. **Abolition of Non-compete fees:** TRAC's recommendation was accepted in the new regulations due to which now, any amount paid to the Promoters/Sellers whether as non-compete fees or control premium shall be added to the Offer Price. Thus, the new law aims to provide public shareholders with offers at the highest prices.<sup>15</sup>
6. **The new definition of Control introduced:** The new law brings about a new definition of Control, where 'Control' now includes 'the right to appoint a majority of the directors or to control the management or policy decision exercisable by a person or persons acting individually or in concert, directly or indirectly, including by their shareholding, or management rights or shareholders agreements or voting agreements; provided that a director shall not be considered to in control over such target company merely by holding such position'.<sup>16</sup>
7. **No Exemption in case of acquisition from other competing acquirers in the New Takeover Code.**
8. **Frequently Traded Shares:** The trading turnover during the last 12 months preceding the month in which the Public Announcement is made will now be considered for determining the frequency of trading in shares. Additionally, the volume of trading for the frequently traded companies has been increased from 5% to 10% for a more realistic depiction.
9. **Change in Control:** Any change in control of the listed company shall only be done after the Open Offer. After the new regulation, the only route available for a change in management and control is via the Open Offer to the shareholders of the Target Company and the previous exemption of a change in control w/o the acquisition of substantial shares by using a special resolution by the postal ballot process has been withdrawn<sup>17</sup>.

These are only some of the important provisions that were added via the 2011 regulation. These regulations are quintessential in changing the landscape of the corporate landscape in India.

---

<sup>15</sup> *ibid*

<sup>16</sup> *ibid*

<sup>17</sup> Gupta, Yogesh. "SEBI Takeover Code- Detailed Analysis."

The increase in threshold level is bound to increase the level of activity in listed companies by private equities and strategic investors and will move towards more material stakes. This will further increase the room for foreign collaborators and partners to increase their shareholding without indulging in inefficient and expensive takeover regulations and companies will be able to raise capital more cost-effectively.

This regulation has and will continue to increase the PE/foreign partners coming to India resulting in a much-needed boost to the FDI.<sup>18</sup>

Further, the 24.99% threshold allows acquirers to block a special resolution in target companies and the possibility of acquiring almost 25% without triggering an open offer would allow acquirers to get a board position in target campaigns leading to a greater say in the company's operations. Minority public shareholders holding significant stakes in target companies will also gain more power and prominence. This would allow the long-term acquirers to acquire up to 24.99% and then have the option to negotiate with these significant minority shareholders to join hands or trigger an open offer for the takeover of the target company<sup>19</sup>. Thus, such off-market transactions at the higher-than-normal market valuation for these kinds of strategic buyouts have been encouraged and are bound to increase.

The step of increasing the open offer threshold limit to 25% changes the landscape for promoters significantly. The new regulation facilitates consolidation of promoter shareholding to the maximum permissible level of 75% which would now incentivize promoters to increase their shareholding substantially<sup>20</sup>. Furthermore, with the increase in initial threshold and the increase in open offer size to 25% and 26%, the acquirer can gain a simple majority of 51%. This has been effective in welcoming M&A transactions since the option of having a simple majority is more attractive than depending on other shareholders to pass simple corporate law resolutions<sup>21</sup>.

---

<sup>18</sup> *Corporate Governance Structure, Mergers and Takeovers in India in the Post Liberalization Regime-Proposals and Policies*, by Nandita Das Gupta

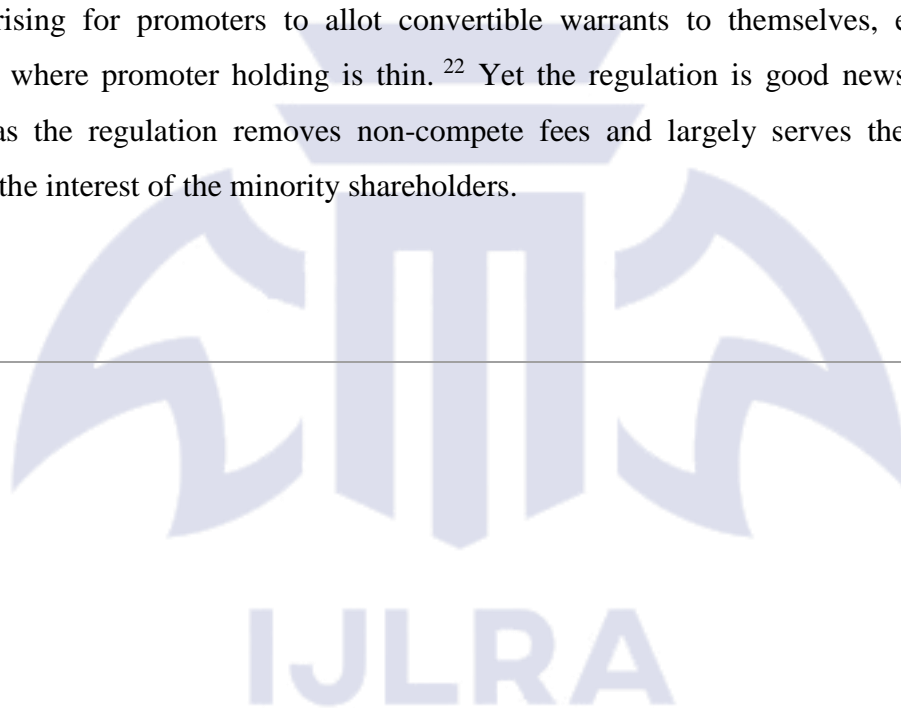
<sup>19</sup> Gupta, Yogesh. "SEBI Takeover Code- Detailed Analysis."

<sup>20</sup> *Ibid*

<sup>21</sup> *Ibid*

Additionally, the concept of voluntary offer for a 10% stake introduced by the regulation, which allows holding more than 5% by substantial shareholders provides flexibility to substantial shareholders holding 25% or more stakes to increase their shareholding w/o being in an obligation to make the offer for an additional 26% stake, thus reducing the overall outflow from the consolidation.

These revised norms will facilitate the change in the dynamics of M&A in India. However, these regulations also cause the cost of acquisitions to rise since earlier after the 15% trigger the acquirer would seek another 20% and hold 35% in total in the target company. Now, the cost would be higher since the acquirer needs to hold 51% after the open offer. Thus, it has not been surprising for promoters to allot convertible warrants to themselves, especially in companies where promoter holding is thin.<sup>22</sup> Yet the regulation is good news for smaller investors as the regulation removes non-compete fees and largely serves the purpose of protecting the interest of the minority shareholders.



---

<sup>22</sup> Gupta, Yogesh. "SEBI Takeover Code- Detailed Analysis."