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The question of "Control" under the Competition Act with special emphasis on the amended definition under The Draft Competition (Amendment) Bill, 2020

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The Ministry of Corporate Affairs had constituted a Competition Law Review Committee (CLRC) in 2018 to review the competition law framework in the country, in order to ensure that the Act was "in sync with the need for strong economic fundamentals". The CLRC submitted its report in July 2019 and recommended multiple changes in the Act, to keep it abreast with the ever-changing and developing economic realities and to iron out implementation issues. Taking these recommendations into account, the Ministry of Corporate Affairs had come out with a Draft Competition Law (Amendment) Bill, 2020,[1] laying out the proposed changes, for a wider discussion on the same. Amongst other changes, the draft law proposes to change the definition of 'control' with respect to 'combinations' in the Act. This paper is a study of this proposed change. The authors have made an attempt to evaluate and study the current definition, and the decisional practices of the Competition Commission of India (CCI) as regards applying the extant definition. Further, the new proposed definition and the reasoning behind it (as given by the CLRC) will be discussed. While concluding the authors will give their suggestions as to whether the 'decisive influence' or 'material influence' standard should be adopted while assessing as to what actions/practices relating to a

[1] Draft Competition Law (Amendment) Bill 2020

combination bestow control.[2] *The authors would like to acknowledge the invaluable guidance of Mr. Anand Kumar Singh, Assistant Professor at National Law University, Jodhpur throughout the course of research and writing this paper.*

Keywords: *competition, amendment, control.*

INTRODUCTION

The financial and economic policies of India went through noteworthy changes post liberalisation of the Indian economy in the year 1991.[3] A series of legal reforms that were introduced then,[4] were directed towards deregulation of various industries and giving a boost to private businesses in our country.[5] Against this backdrop, a High-level Committee on Competition Policy and Law ("*Raghavan Committee*")[6] was given the task to restructure the competition law that was in operation during that time i.e. The Monopolies and Restrictive Trade Practices Act, 1969 ("*MRTP Act*").[7]

The Raghavan Committee after noting that the MRTP Act, 1969 was inadequate for fostering competition in the markets and curbing the anti-competitive practices,[8] recommended large-scale reforms to align the competition law with the new domestic economic policies and global best practices.[9] Based on these recommendations, in 2002, the Parliament of India enacted the Competition Act, 2002 ("*Competition Act/Act*") replacing the archaic MRTP Act, 1969. The primary goal of the Act is "*to prevent practices having an adverse effect on competition,*[10] *to promote*

[2] *Ibid*

[3] 'The statement of new economic policy or the IPR of 1991' (*Government of India*, 24 July 1991) <https://dpiit.gov.in/sites/default/files/IndustrialPolicyStatement_1991_15July2019.pdf> accessed 20 April 2021

[4] *Ibid*

[5] Charan D Wadhwa, 'Political Economy of post 1991 reforms in India South Asia' (2000) 23 Journal of South Asian Studies 207-220

[6] *Ibid*

[7] Monopolies and Restrictive Trade Practices Act 1969

[8] *Ibid*

[9] 'Report of High-Level Committee on Competition Law under the chairmanship of SVS Raghavan' (*Indian Competition Law*) <https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf> accessed 21 April 2021

[10] *Ibid*

and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India"[11]

The Act intends to restrain any activity that could harm or potentially harm consumer welfare or freedom of any individual (or individuals) to freely and fairly compete in the market. The rubric of the Competition Act has four broad compartments: (a) cartelizing behaviour of the firms, (b) abuse of dominant position, (c) mergers and acquisition, and (d) competition advocacy.[12] In the years since the Act came into operation[13], it has substantially contributed to the development of competition jurisprudence and fair play practices in the Indian markets. However, over the last decade, markets have grown at a tremendous pace and there has been a paradigm transition in the way businesses operate and interact. Keeping this development in mind, the Ministry of Corporate Affairs ("*MCA*") had constituted a Competition Law Review Committee ("*CLRC*")[14] in 2018 to ensure that the Act *"is in sync with the need for strong economic fundamentals"[15].*

The CLRC submitted its report in July 2019 and advocated for multiple changes in the Act, to keep it in sync with the ever-changing and developing economic realities and to iron out implementation issues. Taking these considerations into account, the MCA had come out with a Draft Competition Law (Amendment) Bill, 2020 laying out the proposed changes.[16] The Draft law proposes to change the definition of '*control*' with respect to '*combinations*' in the Act, and this paper is a study of this proposed change. The authors have made an attempt to evaluate and study the current definition, and the decisional practices of the Competition Commission of India ("*CCI*"), the Competition regulatory body, applying the extant definition.[17] The new proposed definition and the reasoning behind it (as given by the CLRC) will also be studied. Finally, the authors will give their suggestions as to whether the *'decisive influence'* or *'material*

[11] Competition Act 2002, Preamble
[12] *Ibid*
[13] *Brahm Dutt v Union of India* AIR 2005 SC 730
[14] Ministry of Corporate Affairs of India, 'Report of The Competition Law Review Committee' (*Government of India,* 2019) <http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf> accessed 8 May 2021
[15] 'Government constitutes Competition Law Review Committee to review the Competition Act' (*Government of India*) <https://pib.gov.in/PressReleseDetail.aspx?PRID=1547975> accessed 28 April 2021
[16] Draft Competition (Amendment) Bill 2020
[17] Competition Law Review (n 15)

influence' standard should be adopted while assessing as to what actions/practices relating to a combination bestow control.[18]

MERGER CONTROL REGIME IN INDIA

Background

Competition law chiefly deals with ex-post regulation, which essentially means intervention by a competition authority after the abuse has taken place. However, while dealing with combinations, competition authorities in many jurisdictions also lay down ex-ante regulation, to prevent adverse effects on competition. The aim of this ex-ante regulation is to object to such mergers which may restrict the level of competition in, or are otherwise harmful to, domestic markets.[19] In this respect, the term 'merger' is not restricted to simply mergers of companies[20] but encompasses various forms of corporate restructuring like mergers, amalgamations, etc.[21]

The Indian merger control regime came into effect on June 1st, 2011 with Sections 5 and 6 of the Competition Act, 2002 being notified.[22] As per the broad scheme of Section 5[23] and 6[24] of the Competition Act, a combination (i.e., an acquisition, merger, or amalgamation) must be notified to and approved by the CCI,[25] in case it breaches the prescribed asset or turnover thresholds and does not qualify for any exemptions.[26] There are no specific standards for evaluating whether a combination causes or is likely to cause an appreciable adverse effect on competition ("*AAEC*") within the relevant market in India.[27] But the Competition Act has

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[18] *Ibid*

[19] Abir Roy & Jayant Kumar, *Competition Law in India* (2nd edn, Eastern Law House 2018)

[20] *Ibid*

[21] Davish Whish & Richard Bailey, *Competition Law* (9th edn, Oxford University Press 2018) 830

[22] Combination Regulations, 2011 expressly included what are commonly referred to as 'transitional provisions' These provisions state that the guidelines will only apply to combinations where binding documents are executed on or after June 1, 2011. All pending transactions prior to the stipulated dates are not notifiable, reducing 'uncertainty' and 'compliance burden' of the parties

[23] Competition Act 2002, s 5

[24] Competition Act 2002, s 6

[25] *Ibid*

[26] Competition Act 2002, s 6(2) read with notifications issued in the Gazette of India specifying exemptions

[27] *Ibid*

enumerated certain broad factors under Section 20(4) which guide the commission to assess the potential result after the combination comes into existence.[28]

Why is defining "control" important in Competition Law?

The definition of 'control' becomes important because of the 'combination regulation' mandate of the CCI.[29] This mandate ensures that a combination is not entered into, by any person or enterprise, "*which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.*"[30] What exactly is a 'combination' is not defined in the Competition Act. It merely states that: "*the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises/and persons or enterprises*" if certain conditions are satisfied.[31] Hence, a combination can be affected in either of three ways[32] –

- by way of an acquisition[33];
- by way of a merger[34]; or
- by way of an amalgamation[35].

[28] Competition Act 2002, s 20(4) specifically talks about certain factors which the commission will have to enquire into while determining 'AAEC' including actual and potential level of competition, extent of barriers to entry into the market level of combination in the market degree of countervailing power in the market extent of effective competition likely to sustain in a market etc. AAEC, is for the uninitiated, legalese for 'affecting competition' in the market and has negative connotations

[29] *Ibid*

[30] Competition Act 2002, s 6(1)

[31] Competition Act 2002, s 5. The CCI, as a regulatory body, cannot be expected to review all the combinations taking place in the economy and hence, these conditions set out monetary thresholds under different circumstances, in terms of asset/turnover values, which, if crossed, require a mandatory notification to the competition regulator. As per s 20(3), these thresholds are revised every two years. The different circumstances pertain to – cases of acquisition resulting in combinations (s 5(a)), cases in which control is acquired over an entity when one is already having direct/indirect control over an entity engaged in providing a similar or identical good/service (s 5(b)) and cases of mergers and amalgamations (s 5(c)). The monetary thresholds are on the basis of the combined asset or turnover value of the entities involved or on the basis of the asset or turnover value of the group to which the two entities would belong after the combination.

[32] *Ibid*

[33] Competition Act 2002, s 5(a)

[34] Competition Act 2002, s 5(b)

[35] Competition Act 2002, s 5(c)

The Act, however, does define other terms, which can give us a fair idea as to why the definition of 'control' would achieve primacy in the discussion surrounding Section 5 and 6 of the Act. Under the scheme of the Act, 'acquisition' is defined as "*…directly or indirectly, acquiring or agreeing to acquire*[36] –

- *shares, voting rights or assets of any enterprise; or*
- *control over management or control over assets of any enterprise.*"[37]

Thus, by virtue of the above, it is discernible that, if there is an acquisition of control over the management of any enterprise or acquisition of control over assets of any enterprise, such an instance would be classified as an 'acquisition' under the Act.[38] And, on such classification, such instances would be falling under the definition of a 'combination' under the Act. Discerning an acquisition is relatively straightforward if there is an acquiring of shares, voting rights, or assets by a person or an enterprise. These involve objective determinations based on facts. These facts are share purchase agreements, which lead to voting rights, or perhaps preference shares which start carrying voting rights due to non-payment of dividends[39]. The objectivity arises from the fact that these are quantifiable transactions. The same goes for the acquisition of an asset. This can be objectively determined by ownership resulting from a sale agreement.[40] However, a quandary arises as to the interpretation of Section 2(a)(ii) of the Act,[41] wherein it is stated that acquisition also comprises of "*acquiring or agreeing to acquire*[42] *control over management or control over assets of any enterprise*". Such adjudications are difficult. A

[36] *Ibid*

[37] Competition Act 2002, s 2(a)

[38] *Ibid*

[39] Companies Act 2013, s 47

[40] *Ibid*

[41] Competition Act 2002, s 2(a)(ii)

[42] "*Agreeing to acquire*" is a reference to the fact that the transaction cannot actually be given the go ahead or cannot be said to be concluded, till such time the CCI clears the proposed combination. A notice has to be given to the CCI and there is a standstill provision laid out under s 6(2A) of the Act. This time period gives the CCI a reasonable opportunity to study the combination and take a view as to whether it may or may not lead to an appreciable adverse effect on competition. The standstill provision states that the parties must not give effect to a combination or any part thereof, before an order under s 31 of the Act has been passed by the CCI or until expiry of 210 days from the date of giving notice to CCI, whichever is earlier

difficulty would arise in determining what exactly constitutes 'control over management'. What exactly would come under the realm of 'management'?[43]

Finally, under Section 5(b) of the Act,[44] it is explicitly mandated that if a combination transaction, results in the acquisition of control by a person over an enterprise and such a person already has direct or indirect control over another enterprise engaged in production, distribution or trading of similar or identical or substitutable goods or provision of a similar or identical or substitutable service, the CCI's jurisdiction to test the combination for any possible 'appreciable effects on competition' would be activated (provided the asset and turnover thresholds are met).[45] Simply put, two enterprises engaged in the same domain would not be ineffective competition if their affairs are being directed from the same control center. Such a scenario would need the CCI's examining to determine whether there exists AAEC in the whole of the relevant market or not, due to such control. Hence, as a precursor to this evaluation, it becomes imperative to determine as to when 'control' over an enterprise begins to be exercised.[46]

Ambiguous definition of control

Explanation (a) to Section 5 of the Act,[47] clearly states that for the purpose of that very Section, *"control" includes controlling the affairs or management by-*

(i) one or more enterprises, either jointly or singly, over another enterprise or group;

(ii) *one or more groups, either jointly or singly, over another group or enterprise*."[48]

What we do not get is an exhaustive definition. Focusing on the phrase '*control includes controlling the affairs or management*' one realizes the ambiguous nature of the definition. On contrasting this with the objective determinations that were possible to *'test'* acquisition of

[43] *Ibid*
[44] Competition Act 2002, s 5(b)
[45] *Ibid*
[46] *Ibid*
[47] Competition Act 2002, s 5(a)
[48] *Ibid*

shares, voting rights, or assets by a person or an enterprise, one can conclude that the same is not possible within the confines of the definition of control as provided.

Instead of an objective standard, it portrays a subjective standard. A standard that will vary and has to be formulated for each set of facts individually. A standard, that might be different as to the interpretation of a particular set of facts from person to person. Person 1 might interpret a certain set of facts to constitute control but Person 2 might interpret those very facts to do not. What exactly does '*controlling the affairs and the management*' entail? What is "affairs"? What is included in "management"? These terms are not defined in the Act. Hence, there are no guiding 'definitions' to interpret them. Also, Section 5 of the Competition Act,[49] by way of an 'explanation', defines control for the purpose of Section 5 only. Hence, we have to read 'control' wherever mentioned, as per the '*controlling the affairs and the management* standard. But, Section 5 also mentions the term 'acquisition' and as discussed before, one of the qualifications to be classified as an acquisition is- '*acquiring or agreeing to acquire control over management*'. Hence, within Section 5, we have two different standards.

'*Acquiring or agreeing to acquire control over management*' can be classified as an 'acquisition' [According to Section 2 (a)] and as 'control' [as per Explanation (a) to Section 5.] Meanwhile "*controlling the affairs*" can only be classified as 'control' (as per Explanation (a) to Section 5).[50]

DEFINITION OF CONTROL IN OTHER LAWS[51]

Competition Act is not the only statute that has defined 'control'. There are other frameworks where the term finds a mention as well. Firstly, it is defined in the Companies Act[52]:

"control" shall include the right to appoint a 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

[49] Competition Act 2002, s 5
[50] *Ibid*
[51] This part of the study only aims for a comparative analysis of the definition of control in the various laws of India. It does not aim to offer an exhaustive guide as to how these definitions have been interpreted by judicial bodies in their decisions while applying these definitions to the facts of individual cases
[52] *Ibid*

indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner".[53]

Thus, as per the definition of 'control' under the Companies Act, a threefold criterion is established. A person satisfying any one of these three criteria can be said to have/be in control. The three criteria are[54]:

- Right to appoint the majority of the directors or,
- Right to control the management or,
- Right to control the policy decisions.[55]

The Securities and Exchange Board of India (Substantial Acquisition of Shares And Takeovers) Regulations, 2011[56] has an identical definition of 'control'[57], setting the same standards as the Companies Act. The Insurance Act, 1938[58] and the Consolidated FDI Policy Circular of 2017[59] offer the same definition of control as well.[60] Thus, it is only the Competition Act that is an outlier with a different definition in the Indian legal framework. In these definitions of other laws, there are two types of determinations that can be made. One is objective, which is related to the appointment of the majority of directors. This is again, something we can quantify. A number that can be adjudicated/determined/established. But the other determinations are both subjective, i.e. the right to control the management and the right to control the policy decisions. Similar concerns as are already discussed in the foregoing parts of this study arise in these determinations.

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[53] Companies Act 2013, s 2(27)
[54] The right can accrue to a person through: i) Shareholding ii) Management rights iii) Shareholders agreements iv) Voting agreements v) In any other manner
[55] *Ibid*
[56] Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 2011
[57] Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 2011, Reg 2(e)
[58] Insurance Act 1938, explanation s 2(7A) (b)
[59] 'Consolidated FDI Policy' (*Government of India*, 28 August 2017) <https://dpiit.gov.in/sites/default/files/CFPC_2017_FINAL_RELEASED_28.8.17_1.pdf> accessed 01 May 2017
[60] *Ibid*

COMPARISON WITH COMPETITION LAW

When we compare the two distinct definitions of control i.e. the one given under competition law and the second given in other laws[61], we see that the definition given under the Competition Act is broader and hence, takes on a wider ambit. It is broader as the phrase '*controlling the affairs*' is of a wider connotation than "*… to control the management or policy decisions…*". This was noted by the SEBI as well in a discussion paper while discussing the definition of 'control'. The exact words being – "*The expression "affairs and management" may be of much wider connotation than the expression "management or policy decisions".*[62] *There could be a situation wherein by controlling "the affairs and management" in a company, a person may be in a position to control "management or policy decisions" but it may not always be the case.*"[63]

Thus, the resultant effect of this disparity in definitions is that CCI gets a wider jurisdiction while trying to establish control for the exclusive purpose of combinations. Also, CCI as a regulator cum adjudicator functions on different standards as compared to other bodies tasked with interpreting control.[64] Coupled with this is the fact that terms like 'affairs', 'management' and 'policy decisions' are in their own right, personalized in interpretations. To understand the decisional practices of the CCI while dealing with 'control' we will have to take a look at the various orders passed by the Commission.[65]

DECISIONAL PRACTICES OF CCI ON 'CONTROL'

In a combination order[66] to approve an acquisition, the CCI considered the subscriptions of Zero Coupon Optionally Convertible Debentures ("*ZOCDs*"), which were optionally convertible into equity shares of the target companies[67], within a period of ten years from the

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[61] The definitions given under other laws are substantially the same, with a few minor changes. But, the three categories under one of which one must fall remain the same

[62] *Ibid*

[63] SEBI, 'Discussion Paper on "Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations' (SEBI) <https://www.sebi.gov.in/sebi_data/attachdocs/1457945258522.pdf> accessed 01 May 2021

[64] *Ibid*

[65] *Ibid*

[66] CCI order dated 28.05.2012 in Combination Registration No. C-2012/03/47, *Reliance Industries/TV 18*

[67] The ZOCDs were being issued for six companies. Collectively referred to as 'target companies', as the acquisition by the acquirer was targeted at them

date of subscription, as a condition that was enough to constitute control.[68] ZOCDs fell within the definition of shares[69] as provided under the Act, and hence this was an acquisition under Section 2(a)(i). The CCI stated that if all these ZOCDs were converted, then, the acquirer would hold more than 99.99 percent of the fully diluted equity share capital of each of the target companies. Hence, this would have led to "*decisive influence over the management and affairs*" of the targets.[70] And, in turn, would have constituted 'control' under the Act. The facts also showed that these targets had subsidiaries as well, and hence, over the subsidiaries, it would be indirect control.

Therefore, the CCI was adjudicated based on a scenario wherein all the ZOCDs were converted. This was not what existed at the time of the combination but, what could eventually be. And what would be the impact of that eventuality on the control dynamics of the entities involved? It is interesting to note that the verbiage used in the order is "*decisive influence over the management and affairs*" but the Act only uses the phrase "*controlling the affairs and the management*". In the Ultra Tech- JAL order[71], the Commission discussed the issue of control in-depth, but there were no determinative findings on the issue[72]. The observations of the Commission while trying to infer control through the test of being able to control and manage the affairs of an enterprise was:

"In competition law practice, control is considered as a matter of degree. However, all degrees and forms of control nonetheless constitute control. The international jurisprudence considers 'material influence' as the lowest form of control with other higher forms such as de facto control and controlling interest (de jure control) in that order."[73]

The Commission concluded that even a single Director could have '*material influence*' over the affairs of an enterprise and "*a single Board seat is also highly relevant to competition assessment and*

[68] *Ibid*

[69] *"Any security which entitles the holder to receive shares with voting rights"* is a share as defined under the Competition Act 2002, s 2(v)(i)

[70] *Ibid*

[71] CCI order dated 10.04.2015 in Combination Registration No. C-2015/02/246, *Ultra-Tech/JAL*

[72] This was because this particular order dealt with non-furnishing of material information and the combination had already been approved.

[73] *Ibid*

needs to be disclosed by the parties." This Board seat was on a disclosed competitors Board and hence, even though the Commission did not rule emphatically on the control aspects, it stated that '*material influence*' by the Board member, as he was involved in policy discussions oh high-level issues, and "*competition distortions from access to competitively sensitive information*", could not be ruled out. Hence, the lowest form of control – '*material influence*', was to be considered while adjudication involving competition matters.

In another order[74] approving a combination, joint control over an enterprise was determined by way of the shareholding pattern of the entity, the shareholder's agreements, and the right to appoint Directors to the board. Ability to block special resolutions, consent for strategic commercial decisions, and hiring/terminating key managerial personnel was markers delineated to constitute control.[75] The issue of joint control was addressed again in the Century Tokyo Leasing Corporation and Tata Capital Financial Services combination.[76] The way the Business Partnership Agreement was structured, was taken into account.[77] Strategic affairs, business plans, budgetary approvals, the appointment of Key Managerial Personnel, and getting into a new line of business were to be approved by a four-member supervisory committee, which would include nominated members by both parties in a 3:1 ratio. And, the consent of one of the nominated members of each party was necessary for a decision to pass as per the Business Partnership Agreement.[78] Hence, in both the decisions discussed herein pertaining to joint control, the precedence was given to the contractual documents which established the relationship between the parties and the rights flowing from the way they were structured.

In the Jet-Eithad combination[79], the CCI interpreted the effect of the Shareholders Agreement, Investment Agreement, and the Commercial Cooperation Agreement between the parties to

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[74] CCI order dated 9.08.2012 in Combination Registration No. C-2012/06/63. *SPE Holdings/MSM India*
[75] *Ibid*
[76] CCI order dated 4.10.2012 in Combination Registration No. C-2012/09/78, *Century Tokyo Leasing Finance Corporation/Tata Capital Financial Services Ltd*
[77] *Ibid*
[78] *Ibid*
[79] CCI order dated 12.11.2013 in Combination Registration No. C-2013/05/122, *Etihad Airways PJSC/Jet Airways (India) Ltd*

mean 'joint control'. Etihad by way of the Investment Agreement had acquired a 24% equity stake in Jet and the right to nominate two out of six shareholder Directors. This included the right to nominate the Vice-Chairman to the Board of Directors. These rights were treated by the Commission "as significant in terms of Etihad's ability to participate in the managerial affairs of Jet". Also, the terms of the Commercial Cooperation Agreement meant that the parties would frame a cooperative framework as regards procedure to – joint pricing, joint marketing, joint route, and schedule coordination amongst others. Etihad could also suggest candidates for senior management to Jet as per the Agreement.[80]

The CCI ultimately concluded that by virtue of all the agreements entered into by the parties, and the *'governance structure'* envisaged therein, Etihad had established joint control over the *'assets and operations of Jet'*. Finally, in an ambiguous combination order[81] delivered by the CCI, the Acquirer had purchased an equity stake of a mere 4.99% as a financial investor, in the ordinary course of business. But, by virtue of an agreement, there were certain matters on which no decision could be taken, without the prior written consent of the Acquirer. Some of these matters being - entering into joint ventures, sale/liquidation of significant strategic investments, change in the nature of current business activities, etc. The consent requirement was hence, construed by CCI, as joint control, without explicitly delineating the reasons thereof. It also construed indirect joint control over the entity by the Acquirer by virtue of another agreement between the parties to the combination, without delving into the details of such an agreement and the clauses thereof.

Hence, contrasting this order with the Jet-Etihad order, we can see that the actual equity shareholding is of no concern to the CCI. But what takes precedence are the agreements between parties, their structuring, and the rights flowing from them. Also, there is no 'one size fits all approach of the CCI. Each determination can be seen to be made on the peculiar facts and circumstances of each case. This obviously results from the ambiguous definition of control itself in the Act. Vague definitions lead to uncertain applications.

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[80] *Ibid*

[81] CCI order dated 5.03.2015 in Combination Registration No. C-2015/01/243, *Caladium Investment PTE Ltd./Bandhan Financial Services Ltd*

There is no specific mention as to how 'control' is reached/acquired. Just a blanket usage of the term 'control' finds more usage. There is also no guidance as to whether control is being acquired over the 'affairs' or over the 'management or both. No distinction seems to be made out between the two in the orders. Various different terminologies have been referred to as well, like '*decisive influence*' and '*material influence*'- both vary in their degrees. While the former, is representative of the highest degree of control, the CCI has itself stated the latter to be the lowest level of control. But no attempt has also been made to actually define the two different terms. The discussion only pertains to the varying degrees and not interpretations.

The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 prescribe for "*Categories of transactions not likely to have an appreciable adverse effect on competition in India*" under Regulation 4. The said Regulation states that for certain categories of combinations (which are mentioned under Schedule I appended to the Regulations) are of a nature that they would ordinarily not cause an appreciable adverse effect on competition in India. Hence, a notice to the CCI need not normally be filed to effect such transactions.[82]

But, the CCI has through its decisional practices adjudicated upon control by examining the collective influence of a bundle of rights and not just one transaction in a vacuum.[83] At times an individual transaction or inter-connected transactions[84] leading to a combination might not warrant a notice to CCI under the Schedule I exemptions as stated above. But, collective rights may still lead to determinations of control.[85] If a notice is not filed with the CCI for any such transaction, the parties can be sanctioned with a heavy monetary penalty under the 'gun jumping' provision for not furnishing information on combinations.[86]

Combination Regulations' Schedule I, Entry 1 exempts from notice acquisitions of less than 25% of the shares or voting rights of an enterprise made *solely as an investment* or *in the ordinary*

[82] *Ibid*
[83] Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011, reg 9(4)
[84] *Ibid*
[85] *Ibid*
[86] Competition Act 2002, s 43A

course of business, provided that the acquisition does not lead to a change in control. The explanation to Entry 1 defines *'solely as an investment* to mean any acquisition of less than 10% of the total shares or voting rights of a target, where the acquirer has:

1. the ability to exercise only such rights as are exercisable by ordinary shareholders;
2. no board representation and no right or intention to nominate a director of the target; and
3. no intention to participate in the affairs or management of the target.

As stated above, in spite of these exemptions determinations of control can be made on the basis of the bundle of rights that the acquirer has.

In the Sun Life India-Birla Sun Life combination[87] the CCI observed "*It is noted that the Acquirer already holds 26% shareholding in the Target; As per the decisional practice of the Commission, it has joint control of the Target*". This decisional practice was neither delved into nor explained. Further, in the Sun Life India-Birla Sun Life combination, the requirement of an affirmative vote of the acquirer for matters such as any material change in the nature of business, approval of business plans, investment policy, appointment, and removal of the CEO amongst others were interpreted as constituting control. Hence, any "negative control" i.e requirement of an affirmative vote, can also be considered as control.[88]

A Disincentive For Private Equity Investors

A prospective investor could want certain mandatory affirmative votes in some situations so as to protect his investment without wanting to acquire 'control' over an entity. For example, any change in the nature of business might significantly jeopardize his investment. But, an affirmative vote which is essentially a protective right can be inferred to give control to the investor by the CCI. This might dissuade investors as they might not be inclined to follow the procedural and the standstill obligations that the legislation imposes on them. This impacts the ease of doing business in India as well. Investors do not get an "easy win" in an entity.

[87] CCI order dated 5.03.2015 in Combination Registration No. C-2015/12/362, *Sun Life Financial (India) Insurance Investments Inc./Birla Sun Life Insurance Company Limited*
[88] *Ibid*

CLRC AND THE NEW DEFINITION OF CONTROL[89]

The CLRC in its report has stated the different jurisdictions have taken under consideration/ relied upon both the decisive influence as well as the material influence standard to ascertain control.[90] In the Indian competition law regime, the Committee suggested that adopting a '*decisive influence*' standard, could restrict notifiability in certain cases which may potentially hinder the competition. For example, acquisition of joint or negative control, acquiring informational rights, acquisitions not done in the ordinary course of business, etc. may not be captured by the standard of decisive influence.[91] Addressing the aforementioned concern and noting that the recommended definition of control would not only impact the notifiability but also the substantive competition assessment, the committee has put forward the idea of introducing a '*material influence*' standard for ascertaining control. The Committee further discussed the twin benefits that this would serve - one, of bringing certainty to the meaning of control under Section 5 of the Act and two, of retaining the CCI's powers to assess a wide range of combinations that may impact the competition in India by causing AAEC.

The Draft Bill aims to settle the control conundrum in Indian competition jurisprudence by proposing a definite test for assessing control over an enterprise or group. [92] The proposed definition of control as per the latest amendment bill which has been added to Explanation (a) of Section 5 is as follows:

Explanation. — For the purposes of this section, —

"(a) "control" means the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions by —

(i) one or more enterprises, either jointly or singly, over another enterprise or group; or

[89] *Brahm Dutt* (n 8)
[90] *Ibid*
[91] Competition Law Review (n 9)
[92] *Ibid*

(ii) one or more groups, either jointly or singly, over another group or enterprise;"[93]

GUIDANCE ON MATERIAL INFLUENCE AS PER CLRC REPORT[94]

In the case of UltraTech-JAL[95], the CCI defines material influence as "the lowest level of control, implies presence of factors which give an enterprise ability to influence affairs and management of the other enterprise including factors such as shareholding, special rights, status and expertise of an enterprise or person, Board representation, structural/financial arrangements, etc." It was further submitted by the CLRC that the technicalities of what may be deemed as 'material influence' may be provided in subordinate legislation. Another important facet that came up after deliberations was that the subordinate legislation can enlist some minority rights, acquiring which would not confer material influence and hence no control would be made out. Certain indicative factors for ascertaining *'material influence'* that have been specified by the CCI are shareholding, special rights, status and expertise of an enterprise or person, board representation, etc.[96] This expansive approach adopted by the CCI is exclusively aimed at determining a broader yardstick to meet the notification requirement and thereby assess the AAEC post-transaction.

The report recommends that the introduction of a 'material influence' standard for determination of control would be suitable rather than 'decisive influence' therefore *substantially lowering the thresholds for determining control*. But the report fails to elucidate an explanation of 'material influence' and leaves it at the discretion of the CCI to provide a subordinate legislative to explain the concept. It is to be noted that CCI is already using this standard without any explanatory subordinate legislation! Over the past few years, the CCI has specifically identified certain categories of rights that may be construed to confer 'control'. CCI's interpretation is quite wide (partly owing to the lack of clarity in the statute) and also captures certain standalone minority investor protection rights. For example, veto/affirmative rights which have been held to amount control typically do not confer control on their own

[93] *Brahm Dutt* (n 8)
[94] Competition Law Review (n 9)
[95] CCI order dated 10.04.2015 (n 71)
[96] *Ibid*

and are merely rights given to the investors to ensure that they remain aware of the company's operations.[97]

CONCLUSION AND SUGGESTIONS

As per the opinion of the authors, the standard of material influence will cause a lot more combinations to be notified to the CCI, also, the Commission will be able to cast a wider net, as far as jurisdictional aspects are concerned. These two points have been considered by the CLRC as well. The problem that arises with the 'material influence' standard is - that even if investment in an entity is made, purely in the nature of the financial investment, without intending to acquire control, the investment may be scrutinized by the CCI. This will again need a standstill in compliance and delay investment processes. An investment might not qualify as 'control' under other legal frameworks, it might be under the Competition Act. Hence, investment deals will have to take cognizance of this lower threshold of control.

Going by the reasoning in the Ultra Tech- JAL order, the Commission was of the opinion that even one board member was enough for there to be 'material influence', even though, there was no determinative finding on control. This might perturb investors. The one Board member they might be able to appoint by virtue of their investment in the company without being desirous of acquiring control might be construed as 'material influence'. The Board member's presence might only be there to keep an eye on the goings-on in the company and safeguard the investment. Investor protection rights have also been held by the CCI as amounting to control under the Act. Ease of doing business demands that investors have an 'easy-in and an 'easy-out. Any rights which are just protective of investment and should ideally not lead to a determination of 'control'. This would ease the regulatory compliances and the resultant delays in waiting for CCI clearance to consummate a deal.

The CCI has already stated that 'material influence' is the lowest standard/form of control that can be envisaged. Hence, if passed, the new definition of control would lead to multiple 'could be' inquiries i.e. there could be control, it would have to be checked. This again will lead to

[97] *Ibid*

delays in the investment procedures being completed. If the standstill provisions are not complied with in such circumstances, the parties might have to face gun-jumping penalties under Section 43A of the Act. What is needed is clarity. A list of investor protection rights, which would not amount to control, and an enumeration of a number of Board members an investor can have to be not construed as 'being in control'. We would suggest that having one Board member, purely as a watchdog on the conduct of the enterprise should not amount to control. Even if the affirmative vote of such a Director is needed for matters laid out in the investor protection rights, it should not be regarded as control. If such a Board member along with his Persons Acting in Concert[98] is not able to block special resolutions, i.e. hold more than 25% of the voting rights, then, the mere presence on the Board should not amount to control.

This would not have been required if a higher threshold of control was chosen. Since the bar is so low, in essence, the lowest, a lot of exemptions need to be carved out. The obvious problem that will result is that these exemptions will not be able to foresee all possible scenarios which may merit exemptions. Hence, this list of exemptions will need to be constantly updated.[99] With inherent vagueness without guiding factors, the term 'material influence', will enable subjective determinations on control. Hence, a determinative list of exemptions is imperative.

[98] As per s 2(1)(q) of Securities And Exchange Board Of India(Substantial Acquisition Of Shares And Takeovers) Regulations, 2011 Persons Acting in Concert means persons who, with a common objective or purpose of acquisition of shares or voting rights in, or exercising control over a target company, pursuant to an agreement or understanding, formal or informal, directly or indirectly co-operate for acquisition of shares or voting rights in, or exercise of control over the target company

[99] *Ibid*