ACQUISITION OF MINORITY SHAREHOLDING AND MERGER CONTROL IN INDIA

INTERNERSHIP PROJECT REPORT

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- Swati Bajaj
Intern (July 2013)
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- Swati Bajaj
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CHAPTER 1
MERGER CONTROL REGIME IN INDIA

Introduction

Merger control regime in India is in emerging stage but it is a good beginning for betterment of the economy and society at large. It is an international regulatory process designed to prevent anti-competitive effects of mergers and acquisitions. Merger Control is based on the preventive theory and generally operates *ex ante* i.e. to prevent a transaction adversely affecting competition, before it is put into practice. Corporate India has also seen this regime as in larger interest of society. It has been nearly 25 months that merger control regime has been in force in India. During this time period more than 123 cases (filed in Form I and II) have been approved by the Commission and on an average time taken by Commission to approve the cases is only 15-17 days approximately excluding the period in which clock was stopped. This is in addition to three Form III filling cases noted by the commission. Thus, the Commission has lived up to the expectations of all stakeholders.

Presently, in India the mergers are controlled under the Competition Act of 2002 (Act). Before this Act it had been regulated by the MRTP Act of 1969 but only till 1991, because in 1991 the MRTP Act was amended and the merger control provisions were repealed from the MRTP Act. Then, in 1999 the Government of India set up a High Level Committee under the chairmanship of SVS Raghavan which submitted its report\(^1\) in 2000 and on the basis of those recommendations the Competition Act, 2002 (Act) has been enacted.

The Raghavan Committee strongly recommended for a strong competition law to deal with every aspect of anti-competitive Activities. According to the Committee’s recommendations, a need was felt to also control the combinations in the form of mergers, acquisitions and amalgamations, to check the anti-competitive practices and abuse of dominant position in the economy.

Why enterprises enter into combinations? And, why the combinations need to be regulated? The answers to these questions are given in the picture format in next page.

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\(^1\) Raghavan Committee Report, 1999
**Reasons for Merger:**

- To achieve economies of scale and scope
- To expand business capacity
- To operate in different markets
- To produce at lowest marginal cost and various others.

**Reasons for objections to Merger:**

- Merger may result in reduction of share value or share effectiveness or transactions.
- Merger might result in higher market prices, decrease in quantity or quality of goods and other analogous practices.
- It could lead to monopoly or could create barriers to entry and similar anti-competitive practices.
- Merger may be against the industrial or foreign policy, or a transaction which could lead to production of illegal quality or quantity of a particular product.
Enactment of MRTP Act, 1969

The Monopolies and Restrictive Trade Practices Act came into existence on 27th December, 1969. The preamble to this enactment provided it to be:

“An Act to provide that the operation of the economic system does not result in the concentration of the economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices and for matters connected therewith or incidental thereto”.

Therefore, in common parlance, the MRTP Act, 1969 aimed at preventing economic power concentration in a few hands, the intention behind this was to avoid damage to the overall economic development with the end result of protecting consumer’s interest and the economy at large.

Mergers and Acquisitions under MRTP Act, 1969

Part A of Chapter III of the MRTP Act, 1969, consisting of Sections 20 to 26, dealing with Mergers and Acquisitions, providing for the ‘Concentration of Economic Power’ was omitted by the MRTP (Amendment) Act, 1991, w.e.f. 27-9-1991. However, prior to such omission the most prominent provision under the MRTP Act, 1969 as regards Mergers, Amalgamations and Takeovers was provided under Section 23 of the MRTP Act. Section 23 of the MRTP Act laid down strict criteria in regard to formation of any of the aforementioned combinations where the foremost being that no such scheme was to take effect unless it was sanctioned by the Central Government.

Section 23 of the MRTP Act provided for both the Statutory as well as the Procedural requirements where for getting sanction from the Central Government an application in the prescribed form was mandatorily required to be made along with the copy of the scheme annexed to such application. Section 23 was read with section 2(d) which defined a ‘Dominant undertaking’ as:

i. An undertaking which, by itself or along with other inter-connected undertakings, produces, supplies, distributes or otherwise controls not less than one-fourth of the total goods that are produced, supplied or distributed in India or any substantial part thereof; or
An undertaking which provides or otherwise controls not less than one-fourth of any services that are rendered in India or any substantial part thereof.

Section 23 of the MRTP Act, 1969 provided that none of these provisions would apply to any scheme of takeover by the owner of an undertaking where the acquired undertaking was not a ‘dominant undertaking’. Finally, the Central Government was required to call upon the applicant to satisfy that the scheme in no way led to ‘concentration of economic power’ and where the Central Government was of the opinion that the criteria laid down was fulfilled, it after consulting the MRTP Commission, pass the requisite orders. Section 24 of the Act provided that where the Central Government was of the opinion that any violation of Section 23 of the MRTP Act had been committed, it was to in consultation with the MRTP Commission direct the owner, to cease or desist from such contravention in addition to ordering ‘penalty’.

Therefore, these provisions of the MRTP Act gave absolute powers to the Central Government in matters relating to the Mergers and Amalgamations in relation to MRTP Companies. However, the ill-effect of this absolute power was that all Mergers and Amalgamations became the exclusive jurisdiction of the Central Government and it was not bound to follow the recommendations made by the MRTP Commission.

These provisions were into play until the economic liberalization measures in the early nineties, the prominent exception; however, being in 1985 that, the minimum asset limit for referring a company to the MRTP Commission was raised from rupees 20 crores to rupees 100 crores, impliedly relaxing the stringent requirements for companies having assets valued at less than rupees 100 crores.

**HLL-TOMCO CASE**

One of the most controversial transaction regarding post 1991 merger was seen in the HLL-TOMCO case, where Hindustan Lever Limited and Tata Oil Mills Company Limited were not under a statutory duty to get a green flag from the Government to move ahead with the merger, the sole reason being that post 1991 amendments there was no law under the MRTP Act which required a merger to be sanctioned by the MRTP Commission.

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2 Hindustan Lever Limited and Tata Oil Mills Company Limited Merger Case (1993)
The Hon’ble Supreme Court in this case ruled that, since the 1991 amendment deleted the provisions regarding approval by the Central Government, no scheme had to go through the test of sanction and the merger or any other scheme could only be questioned under the relevant provisions of the Companies Act, 1956 (Section 391 to Section 396A) or where it was proved that such a scheme was effected by reason of fraud or was prima-facie illegal.

MRTP Act, 1969 created greatest hindrance in the way of corporate mergers in India. Till the enactment of the MRTP (Amendment) Act, 1991, Sections 23 and 24 of the MRTP Act had remained operative requiring the corporate undertakings to be subjected to MRTP Act and seek Government approval before contemplating mergers.

**Enactment of Competition Act, 2002 and Regulation of combinations under it.**

As already stated, in 1999 the Government of India set up a ‘High Level Committee on Competition Law and Policy’ under the chairmanship of SVS Raghavan. The purpose of this Committee was to recommend on the need for an effective competition law regime as the earlier law i.e. the MRTP Act, 1969 was insufficient to promote effective competition in the market. In 2000, the Committee submitted its report while recommending that there was a strong requirement of an effective competition law to prevent various anti-competitive practices and abuse of dominant position and also to promote free and fair competition in the market. Thus, the Competition Act, 2002 was accordingly enacted.

The provisions related to the combinations of the Competition Act, 2002, were, however, came into effect w.e.f. 1st June, 2011. On this date, the Competition Commission of India (Commission)\(^3\) issued ‘The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011\(^4\). These regulations were amended two times, one on 23rd Feb. 2012 and second on 4th April, 2013 by the Commission.

The Competition Act, 2002 seeks, inter alia, to regulate combinations consisting of acquisition, merger or amalgamation. The law is not against every acquisition, mergers or amalgamation, but it refers only to those acquisitions, mergers and amalgamations within its purview and, which are sufficiently of high thresholds in terms of assets or turnover. It is neither feasible nor advisable to review all the acquisitions, mergers and amalgamations happening in the economy. *As it may be presumed that in case of small size combinations*

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\(^3\) Competition Commission of India (CCI)

\(^4\) Combinations Regulations, 2011
there is less likelihood of any appreciable adverse effect on competition in market. Moreover, mergers are legitimate means for growth of the companies as well as the economy. But it is bad only if it creates dominant enterprises which abuse its dominance. It should be challenged only if it reduces or harms competition in the economy. The threshold limits in the terms of assets/turndown laid down in the Competition Act, 2002 (Act) are as follows:

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<tr>
<th>APPLICABLE TO</th>
<th>ASSETS</th>
<th>TURNOVER</th>
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<td>IN INDIA</td>
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<tr>
<td>Individual Parties</td>
<td>INR. 1,500 cr.</td>
<td>INR. 4,500 cr.</td>
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<td>Group</td>
<td>INR. 6,000 cr.</td>
<td>INR. 18,000 cr.</td>
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<td>IN INDIA AND OUTSIDE INDIA</td>
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<td>Individual Parties</td>
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<td>Group</td>
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1 crore = 10 millions

The Competition Act provides for the revision of the aforesaid threshold limits every two years by the Central Government, in consultation with the Competition Commission of India, on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies⁵. Accordingly, the Central Government has enhanced, on the basis of the wholesale price index, the value of assets and the value of turnover, by fifty per cent.⁶

As per the provision of the Competition Act, 2002 (Act), any combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India shall be void. The Act provides for prior notification to the Competition Commission of India (Commission) by the enterprises crossing the laid down threshold limits for the combinations. The Act also prescribes the time limit of two hundred and ten days from the date of notice given to the Commission for approval of such combination by the Commission. If no such action is taken by the Commission within the stipulated time period, the combination may come into effect. However, the Competition Commission of India shall form its prima facie opinion under sub-section (1) of section 29 of the Competition Act, 2002, as to whether the combination is likely to cause or has caused an appreciable adverse

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⁵ Section 20 (3) of the Competition Act, 2002
⁶ Vide Notification S. O. 480(E) dated 4th March, 2011
effect on competition within the relevant market in India, within thirty days of receipt of the said notice.7

Section 6 of the Competition Act

Section 6 of the Competition Act, 2002 lays down the provisions dealing with regulation of combinations. Any combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India is void.

As per the provision of Section 6 (2) of the Competition Act, 2002 any person or enterprise proposing to enter into a combination shall give notice to the commission within thirty days of –

(a) approval of the proposal relating to merger or amalgamation referred to in clause (c) of Section 5, by the board of directors of the enterprises concerned;
(b) execution of any agreement or other document for acquisition, referred to in clause (a) of section 5, or acquiring control refer to in clause (b) of Section 5 of the Act.

If the Commission does not pass an order during the said period of 210 days, the combination shall be deemed to have been approved as per the provisions of the Act.

However, the provisions of Section 6 of the Act shall not apply to share subscription or financing facility or any acquisition, by a public financial institution (PFI), foreign institutional investors (FII), bank or venture capital fund (VCF), pursuant to any covenant of a loan agreement or investment agreement. Any such PFI, FII, bank, VCF, shall within seven days from the date of the acquisition, file with the commission the details of the acquisition

Transactions under Schedule I of the Combinations Regulations, 2011 (as amended up to 2013) for which the notification need not necessarily be filled:

The Combination Regulations also specifies certain transactions in respect of which combination notice under the provision of Section 6 of the Act need not necessarily be filed.

Regulation 4 of the Combination Regulations states that:-

“In view of the duty cast upon the Commission under Section 18 and powers conferred under Section 36 of the Act, and having regard to the mandate given to the Commission to, interalia, regulate combinations which have caused or are likely to cause appreciable adverse

7 Regulation 19(1) of the Combinations Regulations, 2011 (as amended up to 2013).
effect on competition in terms of Section 6(2) of the Act, it is clarified that since the
categories of combinations mentioned in Schedule I are ordinarily not likely to cause an
appreciable adverse effect on competition in India, notice under Section 6(2) of the Act need
not normally be filed.”

Those transactions⁸ are as follows:

(1) An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of
clause (a) of Section 5 of the Act, solely as an investment or in the ordinary course of
business in so far as the total shares or voting rights held by the acquirer directly or indirectly,
does not entitle the acquirer to hold twenty five per cent (25%) or more of the total shares or
voting rights of the company, of which shares or voting rights are being acquired, directly or
indirectly or in accordance with the execution of any document including a share holders’
agreement or articles of association, not leading to acquisition of control of the enterprise
whose shares or voting rights are being acquired.

(1A) An acquisition of additional shares or voting rights of an enterprise by the acquirer or
its group, not resulting in gross acquisition of more than five per cent (5%) of the shares or
voting rights of such enterprise in a financial year, where the acquirer or its group, prior to
acquisition, already holds twenty five per cent (25%) or more shares or voting rights of the
enterprise, but does not hold fifty per cent (50%) or more of the shares or voting rights of the
enterprise, either prior to or after such acquisition:

Provided that such acquisition does not result in acquisition of sole or joint control of such
enterprise by the acquirer or its group.

(2) An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of
clause (a) of Section 5 of the Act, where the acquirer, prior to acquisition, has fifty percent
(50%) or more shares or voting rights in the enterprise whose shares or voting rights are
being acquired, except in the cases where the transaction results in transfer from joint control
to sole control.

(3) An acquisition of assets, referred to in sub- clause (i) or sub-clause (ii) of clause (a) of
Section 5 of the Act, not directly related to the business activity of the party acquiring the
asset or made solely as an investment or in the ordinary course of business, not leading to

⁸ Given under Schedule 1 of Combination Regulations as amended till 4th April, 2013
control of the enterprise whose assets are being acquired except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organized as a separate legal entity or not.

(4) An amended or renewed tender offer where a notice to the Commission has been filed by the party making the offer, prior to such amendment or renewal of the offer:

Provided that the compliance with regulation 16 relating to intimation of any change is duly made.

(5) An acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business.

(6) An acquisition of shares or voting rights pursuant to a bonus issue or stock splits or consolidation of face value of shares or buy back of shares or subscription to rights issue of shares, not leading to acquisition of control.

(7) Any acquisition of shares or voting rights by a person Acting as a securities underwriter or a registered stock broker of a stock exchange on behalf of its clients, in the ordinary course of its business and in the process of underwriting or stock broking, as the case may be.

(8) An acquisition of shares or voting rights or assets, by one person or enterprise, of another person or enterprise within the same group, except in cases where the acquired enterprise is jointly controlled by enterprises that are not part of the same group.

(9) A merger or amalgamation of two enterprises where one of the enterprises has more than fifty per cent (50%) shares or voting rights of the other enterprise, and/or merger or amalgamation of enterprises in which more than fifty per cent (50%) shares or voting rights in each of such enterprises are held by enterprise(s) within the same group:

Provided that the transaction does not result in transfer from joint control to sole control.

(10) A combination referred to in section 5 of the Act taking place entirely outside India with insignificant local nexus and effect on markets in India.

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Chapter 2

Understanding the Concept of ‘Control’

“Control” under the Competition Act, 2002

‘Control’, in a layman’s language means ‘the power to influence or direct people’s behaviour or the course of events’.

The definition of ‘control’ under the Competition Act, 2002 is wide including ‘control over the management or affairs of the enterprise’.

“Control” is defined in explanation (a) of Section 5 of the Act. It states that “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.

The Competition Act, 2002 provides for that whenever there is a combination, the Commission has the jurisdiction to look into it. And as per Section 5 of the Act, the ‘combination’ occurs when:

a) there is acquisition of
  - shares;
  - assets;
  - voting rights; or
  - control.

by the acquiring enterprise or person in the acquired enterprise; or

b) there is acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provisions of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service; or

c) there is any merger or amalgamation.

Provided that all these acquisitions or mergers or amalgamations must exceed the threshold limits given in Section 5 of the Act.
The Competition Commission of India (CCI) in one of its order\(^9\) while approving a transaction involving Network 18 and the TV18 group of companies, gave an interpretation to the term ‘control’. The Commission held that the subscription of convertible securities with an option to convert such convertible securities into equity shares of the company confers upon such holder ‘the ability to exercise decisive influence over the management and affairs’ of the acquired company and, therefore amounts to control for the purpose of the Act.

In this case, on 27\(^{th}\) March, 2012, the CCI received a notice under Section 6(2) of the Competition Act, 2002 relating to the proposed subscription to the Zero Coupon Optionally Convertible Debentures (ZOCDS) by Independent Media Trust (IMT)\(^10\) of RB Media soft Private Limited, RRB Media soft Private Limited, RB Media Holdings Private Limited, Adventure Marketing Private Limited, Watermark Infratech Private Limited and Colourful Media Private Limited.

The Competition Commission of India (CCI) held that ‘in the event of conversion of all the ZOCDS, IMT would hold more than 99.99 per cent of the fully diluted equity share capital of each of the target companies. Acquisition of such a right to convert the ZOCDS into equity shares, at any time before the expiry of ten years from the date of subscription, confers on IMT the ability to exercise decisive influence over the management and affairs of each of the target companies and the same amounts to ‘control’ for the purpose of the Act’.

Therefore, in the facts and circumstances of the instant case, the subscription to the ZOCDS amounts to acquisition of control over the target companies for the purpose of the Act.

**Why ‘control’ is necessary for analysing the competitive effects of a merger under any competition law regime?**

This is primarily because, through a merger, previously independent competitors can coordinate their price and output decisions to the possible detriment of the consumer’s if such decisions are not sufficiently constrained by competition from rivals in the market. In the context of merger analysis, a noted authority on anti-trust law sums up stating that: “for anti-trust purposes, all that matters is that what used to be separate businesses pursing

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\(^9\) CCI order No. C-2012/03/47; dated May 28, 2012.

\(^10\) IMT (Independent Media Trust) is a trust established for the exclusive benefit of Reliance Industries Limited (RIL) for the purpose of holding the trust fund on trust exclusively on behalf of and for the benefit of RIL.
independent profit motives have now been combined into one common ownership structure that gives the businesses a joint profit motive”.

Thus, who controls the decision making of such common ownership structure is an important element for analysing the probable anti-competitive behaviour of the post-merger entity.

**Degree of control**

When a firm acquires full ownership of its rival firm, the acquiring firm’s unilateral pricing incentives are affected by the fact that it now controls its erstwhile competitor. However, when a firm acquires only partial ownership of its rival firm, its rival incentive to compete may remain unaffected thereby effectively constraining any anti-competitive pricing or output decisions of the acquiring firm, or the rival firm may tacitly cooperate to create a market concentration that leads to oligopolistic co-ordination. In this latter case, the degree of control or influence that the acquiring firm has over the managers of the acquired firm, *how such partial ownership may translate into control or influence, and how this influence may translate into competitive effects is the most vital aspect of the merger analysis.*

“Control” under the SEBI Takeover Code of 1997.

The Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulation, 1997, as amended (Takeover Code) defines ‘control’ under Regulation 2(1)(c) as:

“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:

Provided that a director or officer of a target company shall not be considered to be in control over such target company, merely by virtue of holding such position”

The definition of control in the Takeover Code is an inclusive one. In 2002, the Securities Appellate Tribunal (SAT) observed in case of *Ashwin K. Doshi vs. Securities and Exchange Board of India*[^12] that the definition of control in the Takeover Code ‘gives illustrative


[^12]: [(2002) 40 SCL 545]
instances of exercise of control’ and that the term ‘control’ by its very nature is incapable of any standard definition and its determination would vary from case to case. The Tribunal also held that the expression ‘control’ would necessarily mean effective control, in other words, de facto control and not mere de jure control. Whether a certain right amounts to de facto control or not requires a fact-intensive analysis.

Interpretation of concept of ‘Control’ under the Competition Act, 2002 and SEBI Takeover Code.

The Competition Commission of India’s interpretation of what amounts to ‘control’ under the Competition Act, 2002 has been described to be at odds to the interpretation of the term ‘control’ under the Takeover Code. As per the CCI, beyond a certain threshold the mere acquisition of convertible instruments could trigger a merger analysis under Section 5 of the Competition Act, 2002, while obligations under the Takeover Code arises only when such convertible instruments are actually converted to voting rights beyond the prescribed thresholds.

The primary aim of Takeover Code is fair and equal treatment to all shareholders in an acquisition or merger transaction. The triggering of the obligations under the Takeover Code is dependent on the acquisition of voting rights because the basis of these obligations is to provide the minority shareholders with a quantifiable exit option.

Impact of Control

(a) Unilateral or Non-coordinated effects: Unilateral effects occur where merger of A with B and the merged entity, AB, will be able to, as the result of the merger, exercise market power. The most obvious manifestation of the exercise of market power is the ability to increase price, but there are other possibilities: for example, a reduction of output, quality, variety, or innovation. The ability to exercise market power is particularly likely if, prior to the merger, an increase in price on the part of A would have been likely to cause a substantial number of the consumers to divert their demand to B and post-merger AB would not lose any profits as a result of such a shift, since AB would benefit from the increased sales of B’s products.

It may also be that, after the merger, C, a competitor of AB, will also be able to exercise market power because, if AB was to raise its prices, some customers would

13 Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.
divert to C, which in turn could raise its own prices. C may be able to do this without co-ordinating its behaviour with that of AB, in which case C’s behaviour can itself be characterised as unilateral or non-coordinated. This phenomenon is sometimes also known as ‘non collusive oligopoly’

(b) Coordinated Effects: Coordinated effects occur where A merges with B and this results in a situation where AB will be able, or more able than when A and B were independent, to coordinate their competitive behaviour on the market with other firms, for example with C and D, and thereby exercise collective market power. As per the various studies carried out on the subject, three conditions must be met for coordination to be successful. First, it must be possible for AB, C and D to coordinate their behaviour in some way, for example by charging the same prices, or perhaps, by aligning their behaviour on output and capacity expansion. Second, it must be costly for those firms to deviate from coordination. Third, AB, C and D must be free from competitive constraint from other participants in the market, for example E and F.

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Chapter 3

Acquisition of minority shareholding

General understanding of the concept of ‘Minority Shareholding’

Minority Shareholding means holding of such amount of shares that would not give ownership to the shareholder or holding such amount of shares which render the shareholder with having a non-controlling interest in the company. It connotes that holding of any amount of shares that per se do not confer control over the concerned enterprise.

The term ‘minority shareholding’ has not been defined under any law in India not even in the Companies Act, 1956 or the Competition Act, 2002. However, in practice the tag of minority shareholder has always been given to those shareholders who have non-controlling interest in any company. It includes even that shareholder which may have only one per cent (1%) shareholding in a company.

Minority shareholding or minority interest refers to other investors and is reported on the consolidated balance sheet of the owning company to reflect the claim on assets belonging to other, non-controlling shareholders.

The Companies Act, 1956 under the provisions of Section 397 and 398 provides for protection to these minority shareholders from being oppressed due to any act of the majority shareholders because the voting power of the latter and their power to take important decisions regarding the management of the company generally vested in the hands of the majority shareholders. In these circumstances, there are chances that the majority can oppress the minority. But, there are also various instances where the minority could be buying out the majority. One of the landmark case on this subject is the case of Needle Industries (India) vs. Needle Industries Newey (India) Holding Ltd.\(^\text{14}\) The Supreme Court’s decision in this case continues to be an authority on the subject. In this case the foreign majority alleged oppression by the Indian minority shareholders as the minority appointed additional directors and issued further shares. The Company Law Board (CLB) and the High Court held such Acts of the minority shareholders as oppressive. In appeal, however, the Supreme Court observed that even if a case of oppression fails, the court has power to do substantial justice in the matter and therefore on the facts and circumstances of the case, the Supreme Court

\(^{14}\) AIR 1981 SC 1298
while rejecting the plea of oppression, directed the minority Indian shareholders to purchase shares held by the majority foreign holders.

**Merger Control in India**

The Competition Commission of India (CCI), a regulatory body which regulates and promotes competition in the Indian market, assesses only those mergers and acquisitions which are ‘combinations’ as per Section 5 of the Competition Act, 2002 (“Act”). Section 5 of the Act describes a ‘combination’ as:

a. any acquisition of control, shares, voting rights or assets of the acquired enterprise by the acquiring enterprise; or
b. acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable services; or
c. any merger or amalgamation.

Provided that all these acquisitions, mergers or amalgamation must have jointly the assets or turnover more than what is given in the threshold limits under Section 5 of the Act.

The definition of ‘combination’ given in the Act results into following conclusions:

a. Firstly, it denotes that the threshold limits given under Section 5 of the Act prescribes whether any merger or acquisition is a combination under the Act or not. The Competition Commission of India (“Commission”) can exercise its jurisdiction to assess any merger, acquisition or amalgamation only when it is combination otherwise not.

b. Secondly, even if there is no acquisition of control by the acquiring enterprise over the acquired enterprise, still there can be a combination under the Act, if there is only acquisition of shares or voting rights or assets by the acquiring enterprise over the acquired enterprise. Similarly, there can also be a combination when there is an acquisition of control or assets by the acquiring enterprise over the acquired enterprise without having any acquisition of shares or voting rights.
Acquisition of shares and Acquisition of control under the Competition Act, 2002

Each and every enterprise who wishes to enter into any combination has to give pre-merger notification to the Competition Commission of India under section 6(2) of the Competition Act, 2002 (“Act”). The Combinations Regulations, 2011\(^{15}\) (as amended upto 2013) in its Regulation 4, however, specifies that:

“In view of the duty cast upon the Commission under section 18 and powers conferred under section 36 of the Act, and having regard to the mandate given to the Commission to, interalia, regulate combinations which have caused or are likely to cause appreciable adverse effect on competition in terms of sub-section (1) of section 6 of the Act, it is clarified that since the categories of combinations mentioned in Schedule I are ordinarily not likely to cause an appreciable adverse effect on competition in India, notice under sub-section(2) of section 6 of the Act need not normally be filed”

It implies that there is an ‘option’ given to the parties that if they have entered into any combination which comes under any category mentioned in Schedule I of the Combination Regulations and which does not ordinarily likely to cause any appreciable adverse effect on the competition in India, then there may not be any mandatorily requirement to file a pre-merger notification to the Commission.

Category (1) of the Schedule\(^{16}\) provides that:

“An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of Section 5 of the Act, solely as an investment or in the ordinary course of business in so far as the total shares or voting rights held by the acquirer directly or indirectly, does not entitle the acquirer to hold twenty-five per cent (25%) or more of the total shares or voting rights of the company, of which shares or voting rights are being acquired, directly or indirectly or in accordance with the execution of any document including a shareholder’s agreement or articles of association, not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired”.

\(^{15}\) The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (as amended upto 2013)

\(^{16}\) Schedule I of the Combinations Regulations, 2011 (as amended upto 2013).
In terms of Category (1) of Schedule I of the Combination Regulations, to a transaction to fall within the per view of Category (1) exemption, the following requirements must be fulfilled:

a. Acquisition must be made ‘solely as an investment or in the ordinary course of business’;
b. Acquisition of shares or voting rights must be below twenty five per cent (25%) of the total shares or voting rights of the acquired company; and
c. Acquisition of shares or voting rights, whether directly or indirectly, does not lead to the acquisition of control.

In terms of Category (1) of Schedule I, read with Regulation 4 of the Combinations Regulations, therefore, ‘any acquisition of shares or voting rights by the acquiree, directly or indirectly or in accordance with the execution of any document including a shareholder’s agreement or articles of association made solely as an investment or in the ordinary course of business not allowing the acquiree to hold twenty five percent or more of the total shares or voting rights of the acquired enterprise, which also do not led to the acquisition of control’, notice under Section 6(2) of the Act, need not mandatorily be given.

The term ‘directly or indirectly’ implies that the acquisition can also be made in accordance to any other contract among the parties or due to any other reason. That is why, there can be an acquisition of control even when there is not any acquisition of shares or voting rights.

Thus, the Category (1)\textsuperscript{19} may imply to refer to an ‘acquisition of minority stake’, i.e. the acquisition of non-controlling stake, by the acquiree in the acquired enterprise, which does not raise the probabilities to harm the competitive environment in India i.e. which does not causes any appreciable adverse effect on the competition in India.

*Why the acquisition of twenty five per cent (25%) or more of the shares or voting rights is not covered under Category (1) of the Schedule I of the Combinations Regulations?*

The complete reading of the above Category (1) of Schedule I suggests that the Commission may not have given this ‘option of not filling the pre-merger notification’ to those transactions where there is acquisition of shares or voting rights which entitle the acquiree to

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\textsuperscript{17} A shareholder's agreement is a contract between the shareholders of a company in which they agree how the company will be run.

\textsuperscript{18} A document which, along with the memorandum of association (in cases where the memorandum exists) form the company's constitution, defines the responsibilities of the directors, the kind of business to be undertaken, and the means by which the shareholders exert control over the board of directors.

\textsuperscript{19} Schedule I of the Combinations Regulations, 2011 (as amended up to 2013).
hold 25% or more of the total shares or voting rights or the acquisition of control because the acquisition of twenty six per cent (26%) of shares could give a negative control over the acquired enterprise by the acquiring enterprise. A ‘negative control’ implies ‘the ability to restrain certain actions of the target enterprise and thus may provide a significant ability to influence the business of the target enterprise’.

**If a transaction is ‘solely for investment purpose’ or otherwise?**

The term ‘investment’ has not been defined under the Competition Act, 2002, however, under the US Antitrust Law, the Hard-Scott-Rodino Antitrust Improvements Act, 1976 provides that an investment made ‘solely for an investment purpose’ is when the acquirer has no intention of participating in the formulation, determination or direction of the basic business decisions of the issuer.

**Sole control and Joint control**

Sole control by a person means that that such person could exercise decisive influence over the company including the ability to pass special resolution. It also implies that no other person has negative control over the company.

Joint control implies that two or more persons jointly have decisive influence over the management and affairs of the company. In such case, it is also implied that no single person could independently take any decision with respect to all or certain actions of the company.

However, in case of ‘acquisition of minority shareholding’ the shareholding per se would not confer control. Mere non-controlling interest implies that the acquirer do not have the ability to control the affairs and management of the enterprise. However, mandatory pre-merger notice could be required even if there is acquisition of less than 25 % of the total shares or voting rights of the acquired enterprise, if such instances include acquisition of negative control through contractual arrangement or acquisition of lesser shareholding, where the shareholding of the company is highly dispersed and with the lesser shareholding, the acquirer is able to exert influence over the management and affairs of the target enterprise.

The acquisition of control can even be there even when there is no acquisition of shares or voting rights. It can happen if there is an agreement among the enterprises. For instance, in a notice received by the Commission under Section 6(2) of the Competition Act, 2002 by Paris Cement Investment Holding Limited (PCIHL) and Lafarge India Private Limited (LIPL), the
notice was filed pursuant to the execution of an investment agreement between Financiere Lafarge, LIPL and PCHIL on 14th May, 2013. The said agreement inter alia provided that certain actions of LIPL could not be taken without the prior written consent of PCIHL. The proposed combination therefore was considered to fall under Section 5 (a) of the Act. The notice was given by the parties despite the fact that acquisition was limited to 14.03 per cent of shares of the target.

Similarly, in the case of a proposed acquisition of ‘joint control’ by the Century Tokyo Leasing Corporation (CTLC) of the leasing division of Tata Capital Financial Services Limited (TCFSL), the notice, was filed in pursuant to the execution of a ‘Business Partnership Agreement’ between the parties to the proposed combination. Pursuant to the Business Partnership Agreement, the leasing division would have its own organisations, distinct from TCFSL, including a supervisory committee that was stated to be a governing body of the leasing division and had functions similar to those of a committee of directors of a company. The supervisory committee was to comprise of four members out of which three members were to be nominated for appointment by TCFSL and one member was to be nominated for appointment by CTLC. In terms of the Business Partnership Agreement, certain decisions pertaining to the Leasing Division could not be taken unless they had been approved by one TCFSL nominated and one CTLC nominated committee member.

Acquisition of Minority Shareholding/Interest in the competitors: From EU standpoint.

Minority Shareholdings may play an important role in the understanding of application of EC competition law, both in the field of merger control and in the context of the antitrust rules. The acquisition of minority shareholdings may be assessed directly under the merger control regulations (the EC Merger Regulations) to the extent that the acquirer’s holding confers decisive influence over the target business. The impact of minority shareholdings may furthermore be looked in the substantive competition assessment of a merger case, including the assessment of possible remedial measures to allay concerns that have been identified. The European Commission and the European Court of Justice (ECJ) have likewise recognised that the acquisition or existence of minority shareholdings may in some cases be of importance in determining whether the EC’s antitrust laws, Article 81 (on restrictive agreements and

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20 Order of CCI under section 31(1) of the Competition Act, 2002 in the case no. C-2013/06/125; dated 26/06/2013.
21 C-2012/09/78; Order dated 04/10/2012.
concerted practices) and Article 82 (on abuse of dominance) of the EC Treaty (Articles 101 and 102 of TFEU), have been infringed.\textsuperscript{22}

Under the ECMR, only those mergers and acquisitions (“concentration”), having community dimension (fulfilling certain turnover thresholds) are required to be notified to European Commission, provided, the transaction result in change in the control of the target business on a lasting basis. Consequently, the acquisition of a non-controlling minority shareholding does not constitute a concentration within the meaning of the ECMR. The change in control – usually via acquisition of a majority stake by one company in another – may take the form of sole or joint control. In both cases the control is defined as ‘the possibility of exercising decisive influence over the target business in question. As already discussed above, when such influence is exercised by a person unilaterally then it refers to the situation of sole control \textit{Sole control} on a de jure basis if specific rights are attached to the minority shareholding, or on a de facto basis (e.g. if the acquisition of the stake would enable the acquiring firm to form a majority at the shareholder’s meeting, given that the remaining shares are widely dispersed).

\textit{Minority Shareholding may in some circumstances produce adverse effect on competition. Like:}

- Structural links of this kind may facilitate collusion or the unilateral exercise of market power by serving as a means by which market-sensitive information can be passed between competing enterprises.
- The incentive of competing firms to compete vigorously – incentives which are generally assumed to be driven by the motive of profit maximisation – may be altered if one holds a significant stake in the other.
- The acquisition of a minority stake may be regarded as anti-competitive if it seems likely to have been made in pursuit of a strategy to deter entry to a market, or to have that effect.

However, where companies acquire minority interest in competitors, antitrust issues may, although not necessarily, arise. At EU level, merger control has been the primary tool used by the European Commission to review and regulate the acquisition of significant minority

\textsuperscript{22} Directorate for Financial and Enterprise affairs, Competition Committee; Working Party No. 3 on Co-operation and Enforcement; \textit{Antitrust Issues Involving Minority Shareholding and Interlocking Directorates.}
interests since the coming into force in 1990 of the EC Merger Regulation (ECMR)\(^{23}\). The Commission may have jurisdiction under the ECMR to review the acquisition of a wide range of large and small minority shareholdings by virtue of the definition of the ‘concentration’ (and where the turnover thresholds are also met).

Even those transactions that are not large enough to reach the ECMR thresholds tend to be reviewed under EU national merger regimes as most of them utilise the ECMR’s “concentration” test. The ECMR is a strong enforcement tool in the regulation of major transactions involving the acquisition of minority shareholdings because it potentially requires prior merger notification and pre clearance of a wide range of large and small minority interests. In fact, it is possible for limited shareholdings to be caught, since the Commission’s analysis under the ECMR focuses on the existence of a ‘concentration’ which involves the acquisition of ‘control’ which is in turn broadly defined as the “possibility of exercising decisive influence” on an undertaking\(^{24}\).

The Commission’s *Notice on the concept of concentration*\(^{25}\) clearly demonstrates that the acquisition of a significant minority interest can qualify as a concentration for the purpose of the ECMR, making it necessary for the transaction to be notified to, and examined by, the Commission. The notice also states that a ‘qualified minority’ can also be established on a de facto basis. The de facto control tool of looking at shareholder’s meetings is a somewhat imprecise tool for establishing jurisdiction as it assesses, in essence, future control on the basis of past attendance at shareholder meetings\(^{26}\). This analytical method continues to be used by the EC, to assess control of the acquirer. One of the cases of this kind is: *Aker/Kvaerner.*\(^{27}\) Aker and its bankers were confident that there was no way Aker would control a general meeting of Kvaerner with a 26.7% stake for several reasons. Aker had not paid a premium for control precisely because the selling shareholders knew that Aker could not control Kvaerner with only a 26.7% stake. The selling shareholders took this view largely because the remaining shareholders were typically large and sophisticated institutions and it was inconceivable that, going forward, they would let Aker control a general or extraordinary meeting in the contest of the takeover, however, by examining the

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\(^{23}\) Michael Reynolds & David G. Anderson; Allen & Overy, Brussels; *Acquisition of minority interests in competitors: The EU Perspective;* 31st March, 2005.

\(^{24}\) Ibid.

\(^{25}\) Commission’s *Notice on the concept of concentration* under Council Regulation (EEC) No. 4064/89, on the control of concentrations between undertakings; 98/C 66/02.

\(^{26}\) Ibid.

\(^{27}\) Case COMP/M.2117.
participation levels at the recent previous meetings, which were low as none involved major issues for shareholders, the Commission found control at 26.7%.

The ECMR assesses only those transactions where there is ‘change in control’. However, in some cases where the acquisition of minority stake becomes an acquisition of control, the ECMR tries to avoid its own jurisdiction over those cases by reducing the amount of minority stake. Like, in the case of Aker/Kvaerner, it was agreed that Aker could retain a stake of up to 17.8% in Kvaerner.

A similar case in point is Microsoft/ Liberty Media/Telewest. In that case, the Commission decided to open up a second phase investigation into Microsoft’s proposed joint acquisition of Telewest. The Commission was concerned about the impact the transaction would have in view of Microsoft’s proposed minority interest in Telewest and its existing links with NTL, the other main operator of cable television in the UK. Microsoft reduced its proposed stake in Telewest to one which would not provide it with decisive influence over the company and thus the Commission did not have jurisdiction over the modified transaction.

The two common situations where the substantive evaluation of the acquisition of a minority shareholding might fall within purview to be assessed in the context of a merger investigation are where:

(i) The acquisition of the minority shareholding may in itself constitute a concentration requiring notification. In this, factors such as the size and nature of the holding, including the level of equity participation and the rights attached, are only relevant in determining whether the transaction is caught by the ECMR.

(ii) The target company itself holds a minority interest in a competitor. In this, prima facie appears no different from the first. The Commission primarily examines whether the minority interest will give the acquirer control over the third party competitor and whether this control will adversely affect competition.

In AXA/GRE, AXA acquired the entire share capital of GRE. In the Luxembourg market for life insurance and non-life insurance there was no overlap between AXA and GRE. However, GRE owned a 34 per cent shareholding in a Luxembourg insurance company, Le Foyer. The commission took a two-step approach to analysing the effect of this minority

28 Case COMP/JV 27.
shareholding. First, it analysed whether post-merger AXA would be able to exercise control over Le Foyer and concluded that AXA would have joint control over Le Foyer. The Commission noted that AXA’s approach towards its stake in Le Foyer would differ from that of GRE because GRE was not present in the Luxembourg market. However, the Commission concluded that, even if it left the issue of control open, the acquisition of GRE’s minority shareholding would create “important structural links that weaken the incentives for the parties to compete” as AXA would be represented on the board of Le Foyer and involved in the strategic business decisions of the latter, resulting in strong incentives for AXA not to compete with Le Foyer. Once control or ‘important structural links” were established, the second step of the analysis required a consideration of the potential adverse effect on competition in the Luxembourg market. However, with regard to the market for life insurance, the Commission found that sufficient competitive pressure existed to prevent AXA and Le Foyer from operating independently of competitors and consumers. In other words, AXA’s control of Le Foyer would not give rise to competition problems.

Similarly, in Thyssen/Krupp\(^{30}\) the Commission found that structural links created by Krupp’s minority shareholding of 10 per cent in Kone, one of Thyssen’s competitors, could result in a lessening of competition between these undertakings. It was, therefore, also considered to be problematic that, following Thyssen’s merger with Krupp, the former would be able to access Kone’s confidential information. The Commission took into account factors such as the degree of concentration of the market and the high barriers to entry and allowed the retention of the interest subject to Krupp’s waiver in relation to certain contractual rights and the right to appoint a board director of Kone.

**Article 81 and Article 82 of EC Treaty (Treaty of Rome) [Now Articles 101 & 102 of TEFU]**

The Commission and the European Court of Justice (“ECJ”) acknowledged in the **Phillip Morris Case\(^{31}\)** that Articles 81 and 82 could be used to control the acquisition of a minority shareholding. This decision was taken prior to the introduction of the first merger regulation regime in EU and represents an attempt to use Articles 81 and 82 as a mechanism for the *ex-ante* control of competition. The ECJ held that the acquisition of minority shareholding in a competitor could infringe Article 81 if such an acquisition acted as an “instrument for

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\(^{30}\) Case IV/M.1080

influencing the commercial conduct of companies or to distort competition.” Article 82 could be abused by a dominant company that acquired a shareholding in another company giving the acquirer effective control of the acquiree (or, at least, some influence over its commercial policy). On the facts, however, the ECJ did not find that Articles 81 and 82 were breached as Phillip Morris had undertaken not to increase its voting rights in Rothmans, not to be represented in Rothman’s management and not receive competitively sensitive information from Rothmans.

Comparison between of Indian Merger Analysis and European Commission Merger Regulation Analysis

1. In India, the acquisition of shares, voting rights, assets, control can be a combination if it exceeds the given threshold limits; while, in case of ECMR, the word ‘concentration’ has been used only where there is any ‘change in control’ on lasting basis. It implies that the jurisdiction of Competition Commission of India (CCI) is wide in comparison to the jurisdiction of the ECMR.

2. The ECMR cannot review any merger or acquisition until it results in ‘change in control’ or it meets the European threshold limits. While, the CCI can review any merger or acquisition even when there is acquisition of shares, voting rights or assets without acquisition of control. Provided they exceed the given threshold limits in Section 5 of the Act.

3. In ECMR, if the acquisition of minority interest has the ability to create decisive influence over the affairs and management of the rival company then ECMR consider that acquisition as an acquisition of control because it has resulted in ‘change of control’.

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Chapter 4

Conclusion

The concept of ‘merger control’ is based on a theory, *i.e. prevention is better than cure.* Mergers have never been said to be wrong. In fact it is one among the other key methods of growth of business in an inorganic manner. However, looking from the other side of the coin, any merger or acquisition, can also harm the competitive environment of the market and, therefore, a need is felt to regulate transactions related to merger or acquisitions.

In 1969, in India, the Monopolies and Restrictive Trade Practices Act (MRTP Act), was enacted to regulate the mergers and acquisitions in India. The MRTP Act was more or less a hindrance in the way of corporate mergers in India. It functioned, basically under a *license-raj scenario.* However, in 1991, the MRTP Act, 1969 was amended and the said amendment repealed the provisions related to mergers and acquisitions from the MRTP Act. After this amendment of MRTP Act in 1991, the mergers or acquisitions were not regulated anywhere in India from the angle of anti-competitive agreement or abuse of dominant position. In fact, after sometime, the Government also formed an opinion that there were many loopholes in the MRTP Act, and thus, in 1999 the Government set up a ‘High Level Committee’ under the Chairmanship of SVS Raghavan to give its recommendations on the need of an effective competition law and policy. The Committee strongly recommended that along with the prevention of monopolistic, restrictive or unfair trade practices, there was a need to promote and regulate the competition in the market. The Committee submitted its report in 2000, on the basis of which the Government enacted the Competition Act, 2002 (“Act”).

As already discussed above, the Competition Act, 2002 deals with ‘combinations’ in the form of mergers, acquisitions or amalgamations under Sections 5, 6, 20, 29, 31. However, these provisions of the Act had not come into effect till 1st June, 2011. On 1st June, 2011, the Competition Commission of India issued ‘The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. These regulations have now been amended twice, once on 23rd Feb. 2012 and second on 4th April, 2013,

The Commission has the jurisdiction, under these regulations as well as under the provisions of the Competition Act, 2002, over those mergers, acquisitions or amalgamations which
exceed the threshold limits\textsuperscript{32} given in Section 5 of the Competition Act, 2002, i.e. those mergers or acquisitions or amalgamations which come under the definition of ‘Combination’ given in Section 5 of the Competition Act, 2002 are under the jurisdiction of the Commission.

As per the Competition Act, 2002 (“Act”) the ‘combination’ includes:

a. any acquisition of control, shares, voting rights or assets of the acquired enterprise by the acquiring enterprise; or

b. acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable services; or

c. any merger or amalgamation.

It implies that even if there is no acquisition of control but only the acquisition of shares or voting rights, even then it can be a combination for the purpose of the Competition Act, 2002. Similarly, when there is acquisition of control but not any acquisition of shares or voting rights, then also it can be a combination for the purpose of the Act.

As per the provisions of Section 6(2), each and every person or enterprises which want to enter in to any combination has to give pre-merge notification to the Commission in the specified Form. However, the Combination Regulations, 2011 (as amended upto 2013) provides under Regulation 4 that, if there is any combination which does not have the tendency to cause or likely to cause the appreciable adverse effect on the competition (AAEC) and which is covered under the transactions given in Schedule I of the Combinations Regulations, 2011 (as amended upto 2013) in India, then there is an option given to the parties ‘to file or not to file the pre-merger notification’ before the Commission. It implies that the decision to file notice is in discretion of the parties, however, the Commission still holds the jurisdiction over such transactions.

\textsuperscript{32} The Competition Act, 2002 provides for the revision of the aforesaid threshold limits, under Section 20(3), every two years by the Central Government, in consultation with the Competition Commission of India, on the basis of the wholesale price index or fluctuations in exchange rate of rupee or foreign currencies. Accordingly, the Central Government has enhanced, on the basis of the wholesale price index, the value of assets and the value of turnover, by fifty per cent for the purpose of defining ‘combination’ under the provisions of Section 5 of the Act.
The Category 1 of the Schedule I provides for the ‘acquisition of minority stake’ i.e. only those transactions have been covered in this category, which could fulfil the following conditions:

a. Acquisition must be made ‘solely as an investment or in the ordinary course of business’;
b. Acquisition of shares or voting rights must be below twenty five per cent (25%) of the total shares or voting rights of the acquired company; and
c. Acquisition of shares or voting rights, whether directly or indirectly, does not lead to the acquisition of control.

As already stated, however, there can be such transactions in which there is acquisition of shares or voting rights less than 25 per cent but still there is an acquisition of control. It happens due to a contract entered into by the parties giving some type of control with the acquisition of below 25 per cent shares or voting rights. The Commission has referred certain acquisitions as ‘combination’ for the purpose of Competition Act, 2002, in which the acquisition is either below 25 per cent shares or there is acquisition of joint control because these acquisitions were proposed to be made in pursuant of certain agreements between the parties to the combination in which the acquired enterprise has given some controlling power in the hands of the acquiring enterprise.

Thus, it is not necessary that for the acquisition of control there must be an acquisition of shares or voting rights. The acquisition of control can also be exercised, if there is any other document in the form of an agreement which gives a person or an enterprise the voting control over the affairs and management of another enterprise. Similarly, even if there is the acquisition of minority interest, it can be presumed to be combination for the purpose of the Competition Act, 2002, if the parties to the combination have any agreement among themselves which give certain type of joint control to the party having the minority stake in another enterprise.

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