



Definitions as prescribed in SEBI Takeover Regulations

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SEBI Takeover Regulations begins with defining various terms such as “Acquirer”, “Promoter”, “Control”, “Person Acting in Concert” which have been used innumerable in the entire Takeover Regulations and play a significant role in the interpretation of the provisions of these Regulations. An analysis of various terms as used in the regulations is given below

1. ACQUIRER [REGULATION 2(1)(b)]

“Acquirer” means any person who, directly or indirectly, acquires or agrees to acquire shares or voting rights in the target company, or acquires or agrees to acquire control over the target company, either by himself or with any person acting in concert with the acquirer;

The term acquirer can be divided into following :

I. Any person

The term person includes both individuals as well as juristic persons like company, partnership firm etc, who either directly or indirectly acquire shares, voting rights or control over the target company.

II. Who directly or indirectly

The acquisition extends to both direct & indirect acquisition. Indirect acquisition means the acquisition of shares or control of a Listed Company by virtue of acquisition of shares or control of any unlisted company/listed company, whether in India or abroad. This similar interpretation was also given in the matter of **Eaton Corporation (SAT-18.07.2001)** wherein the Tribunal held that SEBI Takeover Regulations takes care of direct and indirect acquisition and thus, indirect acquisition of control, including acquisitions through chain of subsidiaries would attract provisions of SEBI Takeover Regulations.

III. Acquires or agrees to acquire

The acquisition includes both completed acquisition as well as agreement to acquire. In the matter of **B. P. Amoco Plc (SAT-27.04.2001)**, it was decided that the scope of SEBI Takeover Regulations takes in its ambit not only a person directly or indirectly acquiring the shares or voting rights in the target company or acquiring control over the target company, but one agreeing to acquire shares/voting rights or control is also an acquirer and it is not necessary that one should actually acquire shares/voting rights or control to consider him as an acquirer. It would suffice if a person agrees to acquire shares or voting rights or control over the target company.

IV. Shares, voting rights or control over target company

Shares : In terms of Regulation 2(1)(k) of SEBI Takeover Regulations, “Shares” means shares in the share capital of a company carrying voting rights and includes any security which would entitle the holder to receive shares with voting rights but shall not include preference shares.

The definition of shares makes it amply clear that the shares mean shares carrying voting rights. Therefore, acquisition of shares without voting rights e.g. Preference shares will not trigger the provisions of SEBI Takeover Regulations.

Voting rights : The term voting rights have not been defined anywhere in the SEBI Takeover Regulations, however, it can be construed as the right to vote in

the decision making powers of the company.

Control : The term control has been defined under regulation 2(1)(c) of the SEBI Takeover Regulations which states that “Control” shall include 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.

V. Either by himself or with any person acting in concert with the acquirer

The acquisition can be on the behalf of acquirer himself or it may be with the other persons acting in concert which are further defined under regulation 2(1)(e) of the SEBI Takeover Regulations. The acquirer can take the shares on its own or along with the persons who share the common objective of acquisition of share or voting rights or control over the target company.

The most important to be noted here is that wherever the term acquirer has been used in the SEBI Takeover Regulations, it is to be understood inclusive of person acting in concert irrespective of the fact whether it has been specifically mention or not. For instance, in regulation 7 of SEBI Takeover Regulations requiring the disclosure of shareholding to the Target Company as well as to the stock exchange, the term acquirer alone has been mentioned. However, in the matter of **Radheshyam Tulsian (SAT-26.04.2006)**, the Tribunal held that the shares held by all the persons, who act in concert with the acquirer, are to be taken into account for determining the applicability of regulation 7 of SEBI Takeover Regulations.

Further, there must be commonality of objective between the acquirer and person acting in concert with him.

The touchstone of determining the relationship of person acting in concert is the commonality of objective to acquire shares or control over a Company. Even the person deemed to be acting in concert is required to go through this test. Therefore, where a promoter does not share common objective or purpose of acquirers in as much as it is not interested in acquiring further shares but, on the contrary, is interested in selling off its shareholding in Target Company with a view to meet its financial obligations, it must be held that such promoter was not acting in concert with acquirers. This interpretation has been substantiated in the matter of **K.K. Modi Vs. SAT(05/11/2001)**

2. CONTROL - [REGULATION 2(1)(c)]

“Control” shall include 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.

Explanation :

(i) Where there are two or more persons in control over the target company, the cesser of any one of such persons from such control shall not be deemed to be a change in control of management nor shall any change in the nature and quantum of control amongst them constitute change in control of management - Provided that the transfer from joint control to sole control is effected in accordance with clause (e) of sub-regulation (1) of regulation 3.

(ii) If consequent upon change in control of the target company in accordance with regulation 3, the control acquired is equal to or less than the control exercised by person(s) prior to such acquisition of control, such control shall not be deemed to be a change in control.

Analysis

The Takeover Code recognizes both voting rights as well as control irrespective of acquisition of shares.

“Control” shall include 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.

The term „control „can be divided into the following:

a. The word “includes”

Regulation 2(1)(c) which defines the term control provides an inclusive definition of control which means that the criteria.s as provided in the definition for the determination of control are not the only decisive factor. There may also be some other circumstances other than those specified in regulation 2(1)(c) which may lead to the acquisition of control.

b. Right to appoint the majority of directors

The definition of control includes the right to appoint majority of directors. For this, it would be sufficient if such a right of appointment vested in him. It is not necessary that actual appointment should be made by the person vested with the right to appoint the directors to consider him as having the control over the company.

Further, such right should be to appoint the **majority of directors**. In the matter of **Ram Prasad Somani (24/04/2006) - SAT**, it was held that where the acquirer had appointed 5 directors on the Board consisting of 14 directors, the acquirer cannot be said to have acquire the control.

Similarly, in the matter of **Subhkam Ventures (I) Pvt. Ltd. (15/01/2010) - SAT**, it was held that where the board of the Target Company consisting of ten directors includes the one nominee director of the acquirer, then the acquirer cannot be said to have acquire the control. The single nominee would be in a microscopic minority and he has no veto powers.

c. To control the management or policy decisions exercisable by a person or persons, acting individually



