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DEFINING CONTROL: A STUDY OF THE JET-ETIHAD CASE

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I. INTRODUCTION

The concept of control is key to several significant Indian legislations.

"Control" over corporate bodies appears in various forms: single control, joint control, control by virtue of shareholding, rights or custom. Further, control may have different meanings in the context of different legislations, depending upon the objective of the legislation in question. The consequences of a finding of control also vary under different legislations.

In this article, we explore the concept of "control" under certain Indian laws, focusing on the Jet-Etihad case as dealt with by the Foreign Investment Promotion Board ("**FIPB**"), the Securities and Exchange Board of India ("**SEBI**") and the Competition Commission of India ("**CCI**") to illustrate the key issues in this regard.

II. THE CONCEPT OF "CONTROL"

Control is defined differently in different legislations, depending upon the particular understanding of control relevant for the legislation, and the level of control appropriate to such understanding.

The definitions of control in four key corporate legislations are set out below:

Legislation	Definition
Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("**Takeover Code**")	"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 [*Regulation 2(1)(e)*]

Legislation	Definition
Competition Act, 2012 ("**Competition Act**")	"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 [*Explanation (a) to Section 5(c)*]
Companies Act, 2013 ("**Companies Act**")	"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 [*Section 2(27)*]
Consolidated FDI Policy of 2015	'Control' shall include the right to appoint a majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements [*Paragraph 2.1.6*]

A. Definition of Control under the Takeover Code

The definition of control under the Takeover Code is identical to the definition of "control" under the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, which it replaced. The primary context in which "control" is used in the Takeover Code is to determine whether an acquirer has acquired "control" over a target company, so that the other investors in the company should be provided an option to exit their investment in the company given such change in control. The consequence of a finding of control in this context would ordinarily be that the relevant acquirer would have to make an offer to purchase the shares of the target company from the shareholders that choose to exit the company upon such change in control.

The definition of control under the Takeover Code has been litigated upon before various authorities and courts, including the Supreme Court of India, without achieving significant clarity on its interpretation. A crucial ruling in this matter was expected in the appeal filed by SEBI before the Supreme Court against the ruling of Securities Appellate Tribunal ("**SAT**") in *Subhkam Ventures (I) (P)Ltd.* v. *SEBI*. The SAT, in its ruling[1], had disagreed with SEBI's finding that Subhkam Ventures (I) Private Limited ("**Subhkam**") had acquired "control" over a target company pursuant to acquisition of certain rights in the target company. The rights acquired by Subhkam included the right to appoint a nominee director of the target company who would be required to constitute quorum for board meetings. Further, Subhkam had acquired affirmative rights in respect of certain actions of the target company including the right to approve the annual business plan of the target company, the appointment of key officers of the target company

[1] *Subhkam Ventures (I) (P) Ltd.* v. *SEBI*, 2010 SCC OnLine SAT 35, *available at* http://www.sebi.gov.in/satorders/subhkamventures.pdf.

(including the CEO and CFO), and the entry into strategic investments and joint ventures by the target company.

The SAT opined that the rights acquired by Subhkam were 'protective' in nature, and did not extend to the day-to-day control over the target company. Further, the SAT held that negative rights do not amount to "effective control" over a company. The Supreme Court did not rule on this matter since it accepted an out of court settlement between the parties in this matter. Further, in its order disposing of the matter, the Supreme Court clarified that the ruling of the SAT in this matter would not constitute a precedent[2].

Accordingly, the scope of the definition of "control" under the Takeover Code particularly where it concerns negative or veto rights over actions of companies, is not entirely clear.

B. Definition of Control under the Companies Act

The definition of control under the Companies Act is identical to the definition of control under the Takeover Code. The concept of "control" under the Companies Act is used in several contexts, such as determination of relationships of "promoter" of companies, and "subsidiaries" of companies. Since the Companies Act is a relatively new legislation, there has not been much development of the concept of control in this context.

C. Definition of Control under the Foreign Direct Investment Policy

The Foreign Direct Investment ("**FDI**") Policy is an executive policy of the Government of India which determines the level of foreign investment permitted in Indian companies in certain sectors. The definition of control in the FDI Policy is used to determine whether a company is controlled by Indian nationals or foreign entities in accordance with the relevant sectoral policy set out in the FDI Policy. The consequence of a finding of foreign control over a company that is required to be controlled by Indians under the FDI Policy would be that the relevant investment proposal would not be in compliance with the FDI Policy, and if it requires the prior approval of the FIPB, would be rejected by the FIPB.

Press Note 4 of 2013, published on August 22, 2013[3], changed the definition of "control" under the FDI Policy to a definition substantially similar to the definitions of control under the Takeover Code and the Companies Act. News reports suggested that the rationale for including a definition of "control" in the

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2 *SEBI* v. *Subhkam Ventures (I) (P) Ltd.*, Civil Appeal No. 3371 of 2010, decided on 16-11-2011 (SC).

3 Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, Government of India, Press Note No. 4, 2013 Series (22 August, 2013), *available at:* http://dipp.nic.in/English/acts_rules/Press_Notes/pn4_2013.pdf.

FDI Policy similar to that under the Takeover Code and Companies Bill was to "align" the definition of "control" across legislations, and provide clarity to investors.[4]

There are certain differences between the definition of "control" under the FDI Policy and that under the Takeover Code: first, while the definition of control under the FDI Policy is limited to rights acquired "*by virtue of their shareholding or management rights or shareholders agreements or voting agreements*", the definition of control under the Takeover Code also includes rights acquired "*by any other manner*". Second, the definition of control under the Takeover Code explicitly includes "*indirect*" control, which is not included in the definition of control under the FDI Policy.

The definition of control under the Competition Act is analysed in detail in the next section.

III. DEFINITION OF CONTROL UNDER THE COMPETITION ACT

Under the Competition Act, all "combinations" require the approval of the CCI. A combination is a merger or acquisition (including an acquisition of control) where the parties to the transaction satisfy certain asset and turnover thresholds.

Further, Schedule I of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**") sets out certain categories of combinations which do not "ordinarily" require the approval of the CCI, except where such transactions result in a change of control (either an acquisition of control, or a change from "joint control" to "sole control")[5]. In addition, the term control is used in the context of determining "group" companies of a company to be taken into

[4] *Cabinet eases foreign investment norms* Live Mint (August 1, 2013, *available at* http://www.livemint.com/Politics/hy7qJnJkTDxreleDjIdkNK/Govt-eases-investment-rules-for-foreign-retailers.html).

[5] Paragraph 1 to this Schedule reads: "*An acquisition of shares or voting rights... 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... not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired.*"

Paragraph 1A to this Schedule reads: "*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.*"

account when assessing the asset and turnover thresholds applicable to "groups" which qualify as combinations[6].

The object of the Competition Act is to protect competition in Indian markets for goods and services. Accordingly, the CCI would be concerned with transactions which involve an acquisition of control that could determine the strategic commercial behaviour of an enterprise, including changes in the quality of control (i.e., joint control to sole control or vice versa). Therefore, the consequence of a finding of "control" under the Competition Act is that such a transaction (which also satisfies the relevant asset and turnover thresholds) will require the prior approval of the CCI.

The Competition Act does not contain a qualitative definition of control (see Table above). The concept of "control" under the Competition Act has developed through certain orders of the CCI where it has expounded its understanding of control in the context of the Competition Act. Three key rulings of the CCI in this regard are analysed below.

A. Century Tokyo Leasing Corporation/Tata Capital Financial Services Limited

In this case[7], the parties had entered into a Business Partnership Agreement, which conferred certain rights relating to the 'leasing division' of Tata Capital Financial Services Limited ("**Tata Capital**") upon Century Tokyo Leasing Corporation ("**Century Tokyo**"). These included the right for Century Tokyo to nominate a person to the supervisory committee governing the leasing division, and that decisions on certain matters in relation to the leasing division required the consent of the Century Tokyo's nominee. The CCI, in its order, stated that such matters related to the strategic affairs of the leasing division, including (i) approval of business plans, (ii) approval of annual operating plans and budget, (iii) commencing a new line of activity or discontinuing an existing line of business, (iv) appointment of key managerial personnel of the leasing division and their compensation. In addition, Century Tokyo also acquired an option to transfer the leasing division to a joint venture company owned jointly by Century Tokyo and Tata Capital.

Paragraph 2 to this Schedule reads: "*An acquisition of shares or voting rights... 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.*"

6 Explanation (b) to Section 5(c), Competition Act, 2002.

7 CCI's order dated October 4, 2012, *available at* http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2012-09-78.pdf.

Based on the rights referred to above, the CCI held that the Business Partnership Agreement conferred joint control over the assets and operations of the leasing division to Century Tokyo.

B. Multi Screen Media Private Limited/SPE Mauritius Holdings Limited and SPE Mauritius Investments Limited

In this case[8], SPE Mauritius Holdings Limited and SPE Mauritius Investments Limited (together, "**SPE**") were acquiring 32.39% of the shares of Multi Screen Media Private Limited ("**MSM**") from Grandway Global Holdings Limited and Atlas Equifin Private Limited. SPE already held 62% of the equity shares of MSM.

Schedule I of the Combinations Regulations provides that acquisitions of equity shares of a company where the acquirer already holds 50% or more of the equity shares of the company would be exempt from the notification and approval requirements applicable to combinations, except where the transaction results in acquisition of "sole control" from "joint control".

In this case, while SPE (the acquirer) held more than 50% of the equity shares of MSM (the target), the CCI found that the combination resulted in a transition from joint control to sole control, and therefore required the approval of the CCI. The CCI's finding of joint control was based on the requirement that certain actions of MSM required the approval of at least seventy five percent of MSM's shareholders, including (i) entry into new lines of business or opening in new locations, and (ii) the hiring and termination of employment of key officers such as the CEO, CFO, and Head of Marketing of MSM.

C. Independent Media Trust/Network 18 Group

In this case[9], the Independent Media Trust ("**IMT**") subscribed to zero coupon optionally convertible debentures ("**ZOCDs**") in six target companies, and such ZOCDs could be converted into equity shares at IMT's option within a period of ten years from the date of subscription. Upon conversion of the ZOCDs, IMT would hold more than 99.9% of the equity share capital of each target company. The CCI found that such an option enabled IMT to decisively influence the management and affairs of the target companies and consequently amounted to an acquisition of control.

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[8] CCI's order dated August 9, 2012, *available at*http://cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2012-06-63.pdf.

[9] CCI's order dated May 28, 2012, *available at* http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2012-03-47.pdf.

Another key order of the CCI in relation to control was in the Jet-Etihad deal. This is analysed further in the next section, with particular reference to the interplay among the FIPB, SEBI and the CCI in respect of the definition of "control".

IV. THE JET-ETIHAD DEAL

The Government of India liberalised the FDI policy in relation to the civil aviation sector in 2013 and permitted foreign airlines to hold up to 49% of Indian airline companies[10]. Subsequently, UAE's Etihad Airways PJSC's ("**Etihad**") signed an investment agreement with of Jet Airways (India) Limited ("**Jet**"), a listed Indian company, on April 24, 2013, to purchase 24% of the equity shares of Jet (the "**Jet-Etihad Transaction**")[11]. The Jet-Etihad Transaction, the first foreign direct investment in the Indian civil aviation industry, finally completed on November 20, 2013[12] after navigating through the FIPB, SEBI and the CCI. The Jet-Etihad Transaction was also subject to a post-close review by SEBI, and the regulatory journey culminated with SEBI finally approving the Jet-Etihad Transaction, without requiring Etihad to make an open offer, on May 8, 2014[13].

A. What's the Deal?

As part of the Jet-Etihad Transaction, Etihad invested US$379 million in Jet and acquired 24% of the equity shares of Jet (by way of a preferential allotment)[14]. In addition, Etihad also agreed to invest US$150 million into JetPrivilege, Jet's frequent flyer program which was housed in its subsidiary, Jet Privilege Private Limited, and provide or arrange for a loan of US$150 million to Jet. Earlier that year, Etihad had purchased three landing/take-off slots owned by Jet at the Heathrow Airport, London for US$70 million; these slots were subsequently leased back to Jet[15].

Based on publicly available information, the following agreements were executed in connection with the Jet-Etihad Transaction: (a) Investment Agreement ("**IA**"), (b) Shareholder's Agreement ("**SHA**"), and (c) Corporate Governance

[10] NRIs are permitted to invest up to 100% of the paid up share capital of the Indian airlines.

[11] Press Release of Jet Airways, *Jet Airways and Etihad Airways Forge Stretegic Alliance Under FDI Policy of Government of India* (April 24, 2013) *available at* http://corporates.bseindia.com/xml-data/corpfiling/AttachHis/Jet_Airways_(India)_Ltd_250413.pdf.

[12] Press Release of Jet Airways, *Etihad Airways-JJET Airways Move Ahead With Staretegic Alliance Following Final Approvals* (November 20, 2013) *available at*: http://corporates.bseindia.com/xml-data/corpfiling/AttachHis/Jet_Airways_(India)_Ltd2_201113.pdf.

[13] SEBI's order dated May 8, 2014, *available at* http://www.sebi.gov.in/cms/sebi_data/attachdocs/1399545948533.pdf. ("*SEBI Order*").

[14] The post-issue shareholding of Jet is: Naresh Goyal (NRI promoter): 51%, Etihad: 24%; Public shareholding: 25%.

[15] *Supra* note 12. *See also*, *All you need to know about Jet-Etihad deal*, BUSINESS STANDARD (November 20, 2013, *available at* http://www.business-standard.com/article/companies/all-you-need-to-know-about-jet-etihad-deal-113112000302_1.html).

Code ("**CGC**"), a code agreed to be adopted pursuant to the SHA. As part of the Jet-Etihad Transaction, Jet and Etihad had also entered into a Commercial Cooperation Agreement ("**CCA**") under which the parties agreed to formulate joint policies in respect of matters such as pricing, routes, marketing distribution and sales. Further, Etihad could recommend persons for appointment to senior management positions at Jet. In order to satisfy the various regulators reviewing the Jet-Etihad Transaction, and most notably the FIPB, the parties had to modify these agreements on at least three occasions in the manner set out below, in order to assure such regulators that *inter alia* the effective control of Jet remained in India and was not transferred to Etihad:

i. On May 27, 2013, the parties made changes to the SHA, CCA and CGC. These changes were clarificatory in nature and the core nature of the transaction remained unchanged[16];

ii. On September 19, 2013, the parties entered into an amended and restated SHA, an amended and restated CCA and an amendment to the IA pursuant to the conditions imposed by the FIPB[17]; and

iii. In May 2014, the parties voluntarily modified the CCA to assure SEBI that effective control remained with Jet[18].

B. Regulatory Approvals for the Jet-Etihad Transaction

(a) FIPB approval

Under the FDI Policy, investments by foreign airlines in Indian airlines require the prior approval of the FIPB and are *inter alia* subject to the condition that "*the substantial ownership and effective control of which* (i.e., the Indian airline) *is vested in Indian nationals*"[19].

Pursuant to the requirement for approval referred to above, Jet had filed for the approval of the FIPB in connection with the Jet-Etihad Transaction. This was first considered by the FIPB at its meeting on June 14, 2013. However, Jet's FDI proposal was deferred due to apprehensions that effective control of Jet was being transferred to Etihad, in contravention of the FDI Policy. Subsequently, a revised proposal was submitted to the FIPB, which *inter alia*:

i. reduced the strength of Jet's board from 14 to 12, and reduced Etihad representation thereon from three to two;

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16 Paragraph 3 of the CCI's order dated November 12, 2013 *available at* http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2013-05-122%20Order%20121113.pdf] ("CCI Order").

17 Paragraph 7 of the CCI Order.

18 Paragraph 9(q) of the SEBI Order.

19 Paragraph 6.2.9.3.1(c)(iv)(c) of the FDI Policy of 2013.

ii. granted Jet's promoter, Naresh Goyal, the right to nominate four directors, including the Chairman who would have a casting vote; and

iii. retained Jet's revenue management function in India (earlier it was proposed to be shifted to Abu Dhabi)[20].

The FIPB considered the revised proposal at its next meeting on July 29, 2013[21], and recommended the Jet-Etihad Transaction for approval by the Cabinet Committee on Economic Affairs ("**CCEA**")[22], subject to the following conditions:

i. prior Government approval would be required for any changes in the SHA or for any change in Jet's shareholding structure;

ii. all shareholder disputes under the SHA would be adjudicated under Indian law (earlier it was proposed to be English law); and

iii. Jet would submit new Articles of Association before the matter is put before Finance Minister for approval and then to the CCEA[23].

The CCEA approved the Jet-Etihad Transaction on October 3, 2013[24].

(b) SEBI's prima facie approval

In the course of the FIPB's consideration, the Ministry of Finance (which is represented on the FIPB) requested SEBI's views on the Jet-Etihad Transaction. SEBI responded to the Ministry of Finance on September 25, 2013, stating that the rights to be acquired by Etihad in Jet, pursuant to Jet's Articles of Association, the IA and the CGC "*do not, prima facie, appear to result in change in control*"[25] and therefore do not trigger an open offer requirement under the Takeover Code[26]. However, SEBI reserved its right to review the Jet-Etihad

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[20] *FIPB clears Jet-Etihad deal with riders*, THE HINDU, (July 30, 2013 *available at* http://www.thehindu.com/business/Industry/fipb-clears-jetetihad-deal-with-riders/article4966622.ece]; *FIPB clears Jet-Etihad deal subject to certain conditions* THE ECONOMIC TIMES, (July 29, 2013 *available at* http://articles.economictimes.indiatimes.com/2013-07-29/news/40872467_1_etihad-airways-jet-etihad-deal-fipb).

[21] Press release of FIPB (July 29, 2013) *available at* http:// http://fipb.gov.in/.

[22] An FDI proposal which results in a total equity inflow of more than INR 12 billion is required to be approved by the CCEA after it has been cleared by FIPB. *See*, Paragraph 5.2.2 of the FDI Policy of 2013.

[23] *Supra* note 20.

[24] Press release of CCEA (October 3, 2013) *available at* http://pib.nic.in/newsite/erelease.aspx?relid=99843.

[25] Paragraph 3 of the SEBI Order.

[26] Regulation 3(1) of the Takeover Code requires an acquirer, who together with persons acting in concert, acquires shares or voting rights in a target company which would entitle them to exercise 25% or more of voting rights in such company to make a public announcement of an open offer for the acquisition of shares from the public shareholders. Further, the open offer requirement is also triggered under Regulation 4 of the Takeover Code in the event the acquirer, directly or indirectly, acquires control over a target company.

Transaction in the event other regulators found that Etihad had acquired control of Jet pursuant to the CCA[27].

(c) CCI approval

Since the Jet-Etihad Transaction qualified as a combination under the Competition Act, Jet filed for the approval of the CCI under the Competition Act.

The CCI, in its order dated November 12, 2013, approved the Jet-Etihad Transaction as it was not likely to have an appreciable adverse effect on competition in India.

In the order, the CCI considered the question of whether Etihad had acquired "joint control" over Jet pursuant to the Jet-Etihad Transaction in order to determine the applicability of the exemption from notification requirements[28]. In relation to this matter, the CCI stated in its order that "*Etihad's acquisition of twenty-four (24) percent equity stake and the right to nominate two (2) directors, out of the six (6) shareholder directors, including the Vice-Chairman, in the Board of Directors of Jet, is considered as significant in terms of Etihad's ability to participate in the managerial affairs of Jet.... The effect of these agreements including the governance structure envisaged in the CCA* ***establishes Etihad's joint control over Jet****, more particularly over the assets and operations of Jet*"[29] (emphasis supplied).

Accordingly, the CCI found that the combination, combined with the governance structure set out in the CCA, gave Etihad "joint control" over Jet for the purposes of the Competition Act.

(d) SEBI review

Based on the CCI's observation on control, SEBI reviewed the Jet-Etihad Transaction in order to determine if the requirement to make an open offer had been triggered. In its order dated May 8, 2014, SEBI concluded that Etihad had not acquired "control" over Jet for the purposes of the Takeover Code.

In its order, SEBI *inter alia* observed that the definition of 'control' under Section 5 of the Competition Act is "much wider" than that under Regulation 2(1)(e) of the Takeover Code. Further, the SEBI order states that one regulatory agency may be guided by the findings of other regulatory agency on a particular issue only if the two laws are *pari materia* in their substance and are being applied on the same set of facts and circumstance. This finding was also

27 Paragraph 3 of the SEBI Order.
28 Under Paragraph 1 to Schedule I of the Combination Regulations.
29 Paragraphs 14 and 16 of the CCI Order.

supported by the other regulators who were corresponding with SEBI in this regard[30].

In its order, SEBI noted that the FIPB had approved the Jet-Etihad Transaction as being in conformity with the FDI Policy, i.e., the 'effective control' of Jet was vested in Indian nationals and not with Etihad. SEBI also noted that:

i. Etihad had a right to nominate only two out of 12 directors on Jet's board, as compared to Jet's promoters' right to appoint four directors, including the chairman, who has a casting vote;

ii. Etihad did not have any veto or affirmative voting rights, or any quorum rights at the board or general meeting;

iii. Etihad did not have pre-emptive or tag along rights; and

iv. The parties to the Jet-Etihad Transaction had voluntarily modified/ deleted the provisions of the CCA, which were the subject of the CCI's observation on control, to reiterate that effective control of Jet vests in Indian nationals and that Etihad had not acquired control. These changes included (a) removal of Etihad's right to recommend candidates for senior management in Jet; (b) requiring approval from the board of Jet and Etihad for areas of co-operation listed in the agreement, and also any co-operative/collaborative arrangements; (c) removing Abu Dhabi as an exclusive hub for Jet flights to Africa, North America, South America and UAE; and (d) deleting the mechanism for Governance Procedure and Deadlock Procedure as set out in the CCA.

Based on the above, SEBI concluded that Etihad had not acquired control over Jet for the purposes of the Takeover Code, and Etihad was not required to make an open offer[31]. With this order, SEBI finally put an end to the regulatory uncertainty surrounding the Jet-Etihad Transaction since no further approvals were required.

V. CONCLUSION

Based on the above, it is clear that "control" can have different meanings under different legislations. This is illustrated by the Jet-Etihad Transaction, where the CCI found that Etihad had acquired joint control over Jet under the Competition Act, but SEBI found that the same transaction did not result in an acquisition of control under the Takeover Code (although the CCA was amended after the CCI's approval but before SEBI's review[32]).

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[30] Paragraphs 11 and 15 of the SEBI Order.

[31] The SEBI Order.

[32] Section D.2.d above.

The rulings of the CCI and SEBI in relation to the Jet-Etihad Transaction also demonstrate that the threshold for "control" under the Competition Act is lower than under the Takeover Code. This may be based on the different objectives of the legislations in question: while the Competition Act seeks to regulate transactions which could potentially affect the strategic commercial behaviour of an enterprise (or confer a particular degree of influence over such behaviour), the Takeover Code considers the acquisition of control as an event which would require that other shareholders of a listed company be provided an opportunity to sell their shares due to such change in control over their company.

Apart from the differing levels of control under the Competition Act and the Takeover Code, the orders referred to in this article also indicate certain differences between what may constitute control under the Competition Act and the Takeover Code: for example, the CCI's order in the Jet-Etihad Transaction order indicates that when considering rights to nominate directors it will consider this in the context of the total shareholder directors only; SEBI also took into account the independent directors[33]. Also, the CCI's jurisprudence generally accepts that affirmative/veto rights in relation to the strategic commercial decisions of a company indicate a level of control; the position on this point under the Takeover Code remains unsettled. Further rulings of the regulators in question as well as appellate authorities and courts may be expected to develop these ideas further.

In relation to the multiple regulatory loops the Jet-Etihad Transaction traversed with the FIPB, SEBI and the CCI, while such regulatory over-lap may initially raise red flags for foreign investors considering investments in India, the final resolution, although overdue, appears to be satisfactory. Based on the orders of the relevant regulators and publicly available information, the regulators involved in the Jet-Etihad Transaction approval process appeared to have co-ordinated with each other while considering the issues relevant to each. Further, they considered the views of other regulators when considering issues under their purview.

The regulators also took into account the different substantive connotations of 'control' that are relevant to the regulations that each regulator is responsible for, and in doing so, successfully steered away from the 'one-size-fits-all' approach.

Given that this Jet-Etihad Transaction was the first of its kind, one may entertain hopes for a more expeditious and stream-lined approach in the future. As regulators become increasingly aware of the jurisprudence of other regulators, perhaps more harmonious procedures could be implemented with a view to positively impact transaction timelines.

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[33] CCI's order under Section 38 of the Competition Act, 2002 in relation to the Jet-Etihad Transaction dated November 26, 2013, *available* at: http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2012-05-122%20261113.pdf.