Ambiguity in the Definition of Control: An Analysis through Jet Etihad Deal

Kritika Singh
Assistant Professor, Symbiosis Law School, Pune, India (411014)

Abstract

The Indian regulatory regime is a complex system with multiple regulators actively implementing parallel regulatory practices. The overlapping jurisdictions of these regulators carries the risk of transactions being needlessly stalled due to the multiple (and in some cases, contradictory) regulatory requirements that need to be met to get a transaction approved. In light of the above, it is critical that the various parallel regulatory approval processes are aligned to ensure that the merger and acquisition ("M&A") activity is not hindered due to lack of co - ordination between the various regulators or cumbersome procedural formalities and also the law applied by one does not hinder the working of other regulatory authority. This working paper analyses the potential area of overlap between the CCI, SEBI, FDI and the takeover code in definition of effective control whilst analyzing the Jet Etihad Deal for reviewing transactions which require merger control approval as well as trigger open offer obligations.

The aim of the study is to critically analyses the provisions defining Effective Control in various regulatory laws and through the case analysis determine the problems created in reaching to a conclusion because of overlapping of rules and regulations of various regulatory authorities. Also a study on the judgment given by the competition commission in the JET ETIHAD deal would be taken over.

KEYWORDS: Control, Overlapping jurisdictions, Jet Etihad Deal. Effective Control

INTRODUCTION

In the parallel working of the multi-regulator rule of India, coordination amongst the regulators is indispensable to ensure certainty and transparency in the law, to provide a certain degree of comfort , reliability and certainty to investors and market players in matters of outcome of transactions and extent of liability for their day-to-day business conduct. The necessity for coordination comes from the overlap in the governing legislations of such controllers and contrasting legislation in the enactments. To guarantee that such absence of coordination between various controllers does not bring about superfluous and unnecessary delay, it is imperative to organize parallel regulatory approval process. Corporate legal advisors and venture financiers who are included in transnational or we can say cross outskirt mergers and acquisitions (M&A) bargains say absence of consistency in the meaning of control in Indian regulations and markets make outside speculators terrified and somewhat watchful. It likewise hails issues around corporate governance practices at the board level, say intermediary counseling firms.

With respect to M&A, there are various similarities amongst the governing legislations of the SEBI and the CCI, i.e. the "SEBI Act, 1992 and the accompanying SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("Takeover Code") on the one hand" and the " Competition Act, 2002 ("Act") and the accompanying Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (as amended) ("Combination Regulations") on the other."

Under these two legal administrations, there are corresponding triggers for the requirement to make an open offer, as well as the requirement to file a merger notification with the CCI.[1]

"Difference in definition of EFFECTIVE CONTROL under CCI and SEBI and their analysis through the case will be discussed in the project in context of acquisitions ofshares and acquisitions of control over the Jet Etihad deal. Also the concept of relevant market and appreciable adverse effect in competition law will be discussed."

Research Methodology:

The proposed research study will be carried out with the help doctrinal research methodology and the following resources will be taken into consideration:

1. Studying Primary and Secondary Sources (Books, Articles)
2. Library Research

Treatment of Acquisitions of Control

The Takeover Code and Merger Regulatory laws are at the same time are activated in situations where there is "**acquisition[2] of control**". Nonetheless, the exact extension and threshold for the meaning of "control" under the Code and the Act is the subject of close examination and legal actions and reviewed by both controllers and is resolved on a case to case premise.

"The limit for control under the Act is much lower than under other regulatory regimes". Under the Act, 'control' has been defined under Section 5 of the competition ACT[3] which says **"control in the matters of affairs or management of one or more**

[1]Sindhu Bhattacharya,*Decoding the Jet-Etihad seat entitlement controversy, Firstpost*, December 20, 2014https://www.firstpost.com/business/decoding-the-jet-etihad-seat-entitlement-controversy-921277.html (last visited Oct 11, 2018).

[2]The statutory definition of 'acquisition' as given in Section 2(a) of the Competition Act reads:
"'acquisition' means, directly or indirectly, acquiring or agreeing to acquire—shares, voting rights or assets of any enterprise; or
control over management or control over assets of any enterprise."

[3] Explanation.— For the purposes of this section,— (a) "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;

enterprises or group, one or the other either jointly or singly."The meaning of control under other administrative administrations: for occasion, the RBI's updated meaning of control as for outside direct speculation ("FDI") decides states"**that 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."**[4], this definition came to be in line with companies act and SEBI view. Takeover Regulations of 2011 defined the word **'control' in regulation 2(1)© as the "right to appoint majority of 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"**.[5]This definition is a vexed one on the grounds that an acquirer could gain not exactly the compulsory offer limit of 25% and still be required to make an offer on the off chance that it is said to be in control of the objective organization. Control is characterized in a comprehensive way and could bring about some measure of subjectivity in its determination. The meaning of "control" under the Takeover Code and new Companies Act is similar however not in parimateria with the meaning of control under the Act.[6]

Interpretation of definition of CONTROL according to cases

The translation of control construct idea in light of case law varies from the elucidation under different enactments. The concept of **Negative Controli.e. "right to hold back a company from carrying out certain decisions) controls"**and **Positive Control i.e. "ability to push through or initiate certain actions". [7]**

Under the Takeover Code was tested in the **SEBI v. Subhkam Ventures(I) Pvt. Ltd.[8]**The facts were like that "MSK Project (India) Limited ("MSK") made a special designation of value shares to Subhkam Ventures (I) Private Limited ("Subhkam") which constituted 17.90% of the shareholding in MSK." Subhkam made an open declaration for

[4] As per paragraph 2.1.7 of "Circular 1 of 2013-Consolidated FDI Policy'- effective from. April 5, 2018, the term "control" is defined as :
"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".

[5]SECURITIES AND EXCHANGE BOARD OF INDIA https://www.sebi.gov.in/acts/act15a.pdf (last visited Apr 30, 2018).
"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;

[6] Bajaj Finserv Report 14-15, Scribd, https://fr.scribd.com/doc/315997810/Bajaj-Finserv-Report-14-15 (last visited Apr 30, 2018).

[7]Sudipto Dey, *Legal quirks: When control overtakes ownership, Business Standard*, June 25, 2013 http://www.business-standard.com/article/companies/legal-quirks-when-control-overtakes-ownership-1130625000381.html (last accessed on 7th March 2018)

[8] MANU/SC/1587/2011.

an open offer to secure shares of MSK from its shareholders. The legitimate issue for the situation was "**whether the right to nominate a director on the board of the company, the right to be present to constitute quorum and the affirmative voting rights all of which is essentially "negative control rights" constituted "control" for the purposes of the Regulations**"[9].

SEBI held that the "securing ought to be dealt with as a procurement of control". On claim, the Securities Appellate Tribunal ("SAT") held that **"control is a proactive and not a receptive force"**. The force by which an acquirer can just keep an organization from doing what the last expects to do, i.e. negative control is without anyone else's input not control. SEBI bid the SAT's choice to the Supreme Court. In spite of the fact that SEBI and Subhkam determined the matter by method for an out-of-court settlement, the Supreme Court passed a request discarding the claim and did not manage on the issue. Accordingly, the point of reference estimation of the SEBI and SAT decisions in the Subhkam case is dubious and there is no genuine clarity as far as the SEBI meaning of "control".[10]

Key features of SEBI definition:

SEBI

- 25% share acquisition will lead to automatic open offer
- Control over the management and the policy decisions are the main thrust areas
- Veto rights does not lead to control
- Definition of control gives force on the fact that the control should be over management, board and policy decisions

According to author instead of using the word right it should ability, hence the definition would become less ambiguous and it would come more in line with the Competition Act definition.

According to CCI"**negative control will amount to control for the purpose of the competition Act**." In the particular case of **MSM India/SPE Holdings/SPE Mauritius**,[11] the CCI effectively concluded that the"particular right to stop the special resolutions (by the way of a more than 26% equity stake) will amount to 'negative control', which is regarded as 'control' for the purposes of this Act". Further, in **Century Tokyo Leasing Corporation/Tata Capital Financial Services Limited**[12], the CCI held that affirmative rights relating to the following items would be considered "control" for the purposes of the Act:

[9] Ibid 6

[10] The Supreme Court's order clearly states that the "impugned order passed by SAT will not be treated as a precedent".

[11] C-2012-06-63 available at: http://www.cci.gov.in/sites/default/files/C-2012-06-63.pdf

[12] C-2012-09-78 available at: http://www.cci.gov.in/sites/default/files/C-2012-09-78.pdf

(i) annual budget;

(ii) annual business plan;

(iii) exit and entry into lines of business;

(iv) appointment of management and determination of their remuneration;
or

(v) strategic business decisions (no materiality threshold specified).

Key features of CCI definition of control:

CCI

- 25% of acquisition will not necessarily lead to control
- Decisive control over management is of key importance
- Having veto right will lead towards control
- Distribution, trading, services, production assume importance in defining control

Most recently, in the**Etihad/Jet**[13]**,** the CCI held that:

"**the Parties entered into a composite combination constituting the IA(investors agreement), SHA(shareholders agreement) and the CCA (commercial co-operation agreement), with the common objective of enhancing their airline business through joint initiatives. 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."**

The CCI's observations in the Etihad/Jet order potentially lower its threshold for the acquisition of control under the Act. The CCI's ruling is particularly surprising, given that in this case, Etihad was acquiring a 24% stake and did not have any veto rights or quorum rights. Further, Etihad only had the right to appoint 2 out of a board of 12 directors with no casting vote. Furthermore, the "Foreign Investment Promotion Board ("**FIPB**") had already cleared the transaction and had taken the view that Etihad was not acquiring "effective control" of Jet, in compliance with FDI requirements." [14] Interestingly, after the CCI's observation on control, "SEBI reinvestigated the Etihad/Jet case in order to determine if the requirement to make an open offer had been triggered by the transaction." In this regard, SEBI passed an order[15], holding that:

[13]See the CCI decision C-2013/05/122 available at http://www.sebi.gov.in/cms/sebi_data/attachdocs/1399545948533.pdf(last accessed on 7th march 2018)

[14] The parties had modified the original transaction documents so many times to bring them in the line of FIPB, particularly to ensure that the documents were in compliance with FDI regulations

[15] Ibid 9

Etihad has not acquired control over Jet under Regulation 2(1)(e) read with Regulation 4 of the Takeover Code. While coming to this conclusion, "SEBI inter alia observed that the definition of 'control' under Section 5 of the Act, is different from that in Regulation 2(1)(c) of the Takeover Code, in meaning, scope, and purpose." SEBI further observed that "one regulatory agency may be guided by the findings of other regulatory agency on a particular issue only if the two laws are parimateria in their substance and are being applied on the same set of facts and circumstance."

Jet Etihad Case Analysis

In September 2012, the Indian government relaxed the FDI rules for permitting foreign airlines to own up to 49% of any Indian carrier, paving the way for Jet, working as one of the biggest scheduled air passenger and air cargo transportation services in India, to report its proposed offer of 24% equity to Abu Dhabi-based Etihad. Etihad was a wholly owned organization of the Government of Abu Dhabi and was for the most part occupied with the line of business of international air passenger transportation services.

Let us now proceed to the discussion of the Jet-Etihad 'combination' review by the CCI. In this 'combination' Jet Airways (India) Ltd. proposed a sale of 24% of its equity to Abu-Dhabi based Eithad Airways PJSC for US Dollars (USD) 379 million [price per share of Indian Rupees (INR) 754.74] along with some other rights. Pursuant to entering the three transaction documents viz., Investment Agreement ('IA'), a Shareholder's Agreement ('SHA') and a Commercial Cooperation Agreement ('CCA'), all executed on April 24, 2013 the notice under Section 6(2) was given by the parties to the CCI on 1 May, 2013. The review of this combination resulted in two orders. The majority order granted approval under Section 31(1), and the minority order under Section 29(1) by the sole member, MrAnurag Goel, found prima facie that the proposed combination is likely to cause appreciable adverse effect on competition (AAEC), and thus suggested further investigation .[16]

The Jet-Etihad bargain comprised of two parts:

- 24 per penny value venture by Etihad into Jet
- commercial co-operation agreement (CCA) amongst the parties, after which the parties would set up some co-operative procedures in regards to,
    - ✓ joint route and schedule coordination;
    - ✓ joint pricing;
    - ✓ joint marketing, distribution, sales representation and cooperation;

[16]Majority order under Section 31(1) of the Act, dated Nov. 12, 2013, supra note 5; and the Minority Order was passed on Oct. 14, 2013 under Section 29(1) of the Act, http://cci.gov.in/May2011/OrderOfCommission/CombinationOrders/FINAL%20Order%20M(AG)%20-%20141013.pdf (last visited March 18, 2016); a kind of supplemental order to this Oct. 14, 2013 order was again passed by the same CCI member on 5 Feb., 2014, taking note of the majority Section 31(1) order of Nov. 12, 2013, but still reiterating succinctly its said earlier minority order, http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2013-12-144%20M(AG)%20Minority.pdf. It is submitted that this later Feb. 2014 minority order was unnecessary in view of the prior majority order, and subsequent references to the minority order in this case refers only to the Oct. 14, 2013 order of dissent.

- ✓ joint/reciprocal airport representation and handling;
- ✓ Joint/reciprocal technical handling and belly-hold cargo and dedicated freight capacity on services (into and out of Abu Dhabi and India and beyond).

The Parties planned to build up center of excellence either in India or Abu Dhabi, and Jet would utilize Abu Dhabi as a restrictive center for scheduled services to and from Africa, North and South America and UAE. Jetwould likewise forgo going into any code sharing agreement[17]with any other airline that has the impact of, (i) bypassing Abu Dhabi as the center point for activity to and from the above areas; or (ii) is inconvenient to the co-operation examined by the CCA. At last, Etihad could prescribe contender for the senior administration of Jet.

Concept of control by a minority investor

Under the merger control regime of Indian[18] "all combinations (the term refers to transactions where "control, shares, voting rights or assets" of an enterprise is being acquired) that cross certain jurisdictional thresholds-based on assets and turnover, need to be pre-notified to the Commission for approval."[19] "The regime is suspensory and the transactions subject to merger control review by the Commission cannot be concluded until merger clearance from the Commission has been obtained or a review period of 210 calendar days has passed, whichever is earlier."[20]

"A simpliciter non-controlling equity investment of less than 25 per cent of a investee company's share capital is exempted under the merger control regime of India,[21] however, even though Etihad proposed to acquire only 24%of Jet's equity, the Commission still acquired jurisdiction to review the aforementioned deal by saying that

[17]Jet Airways website itself explains code sharing as: "A Codeshare is an arrangement between two airlines (Airline A & Airline B) whereby Airline A will market and sell the flights of Airline B as though they were the flights of Airline A and / or vice versa. This arrangement allows us to provide you with a greater choice of destinations with seamless connections.", see Codeshare Partners, Jet Airways, http://www.jetairways.com/EN/IN/AboutUs/CodeShare.aspx (last visited March 12th 2018).

[18] The Indian merger control regime is consisting of the following sections 5 and 6 of the Competition Act and the accompanying Competition Commission of India's Combination Rules 2011.

[19] Under the provisions of section 5 of the Competition Act, a combination will require notification if the acquirer and target enterprise jointly have either a transaction will be a 'combination' for the purposes of the Competition Act and attract Combination Regulations only if the size of the acquired enterprise is at least INR 250 Crores in terms of assets or INR 750 Crores in terms of turnover.[In other words, if the acquired enterprise has assets of less than INR 250 Crores or turnover of less than INR 750 Crores, based on the most recent audited financial statements of the entities involved, notification and approval requirements under the combination provisions of the Competition Act would not be attracted.

[20] This threshold was prescribed by government notification which was dated March 4, 2011. Presently, this threshold is not restricted in the value of its express terms to assets/turnover in India.

[21] Schedule I(paragraph 1) of the Combination Regulations.

the 24% equity investment by Etihad and the right to nominate two directors out of the six shareholder-directors which included the vice chairman of Jet's board of directors, also along with the co-operative procedures envisaged by the CCA establishes Etihad's joint control over the assets and operations of Jet."

It is intriguing to note that the Commission's methodology on the issue of "control" seems to vary from the perspective taken by India's other business controllers, similar to the Securities and Exchange Board of India (SEBI) and the Indian Foreign Investment Promotion Board (FIPB). Both SEBI and FIPB had earlier conditionally approved the transaction after Jet and Etihad amended and modified the original transaction documents so many times to bring them in the line of FIPB, particularly to ensure that the documents were in compliance with FDI regulations and also to demonstrate that the "effective control" of Jet's assets and operations would remain with its major shareholder and promoter. However, the Commission on reviewing the transaction documents held:

> "It is observed that the Parties have entered into a composite combination comprising inter alia the IA (investment agreement), SHA (shareholders agreement) and the CCA, with the common/ultimate objective of enhancing their airline business through joint initiatives. 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."[22]

SEBI and FIPB's appraisal of absence of Etihad's compelling control was essentially based upon the proposed structure of Jet's board of directors. Under the first proposition, four directors were to be selected by Jet and three by Etihad, other than seven independent directors. Under the modified administration structure, of the six shareholder chosen one executives to Jet's board, Etihad would have the capacity to choose just two while Jet would select four, including the director who might have a casting vote.

The Commission treated the concept of control very differently – "**instead of remaining focused on structure of Jet's board, post-transaction it was more interested to examine the dynamics of the relationship between the parties. CCI came to a conclusion that the strategic rationale of the Jet-Etihad deal was to integrate their services to receive benefit from the economies of the potential wider airline network**." The idea of the alliance between the two airline carriers is to operate as a single commercial entity, in spite of being able to maintain their individual corporate identities.[23]The provisions of the CCA that they entered into allow them to undertake joint initiatives for the pricing, distribution and other commercial decisions of the combined operations of Jet-Etihad and this in the view of the CCI allowed Etihad to exercise its joint control over Jet's future operations.

---

[22] C-2012 Decision available at: http://www.cci.gov.in/May2011/OrderOfCommission/CombinationOrders/C-2012-03-47.pdf,

[23] Ibid

The decision was in line with the earlier decision of the CCI which treated the ability of a minority investor to exercise a great material influence on the affairs of the investee company as acquisition of control. Earlier in a decision approving the acquisitions by Independent Media Trust (IMT)[24]the CCI had held "that the acquirer of convertible instruments would have a significant influence over the affairs of the investee company because of its ability to convert such convertible instruments into a majority of equity shares in the future, thereby making the administration of the investee organization respectful to such acquirers sees about the undertakings and administration of the organization."

Treatment of Joint Ventures and Collaborative Agreements

Under the Competition Act, joint venture and other forms of collaborative agreements can be subjected to an antitrust investigation either under the procurements of the Competition Act managing horizontal anti- competitive agreements[25] (area 3(3)) or under the merger control regulations (segment 5 and 6), or under both.

Joint venture agreements, being agreements amongst enterprises which are contracted in identical or similar trade of goods and services are mostly assumed to be anti-competitive in nature under section 3(3) of the Competition Act unless such agreements builds proficiency underway, supply dissemination, obtaining and control of products and administrations. However, if a joint venture is ever formed through an acquisition, merger or amalgamation or if a collaborative agreement between two enterprises allow one of them to significantly influence or control the affairs of the other such a joint venture or collaborative agreement can trigger the requirement to notify the Commission under India's merger control laws, provided the asset/turnover thresholds are met.Unlike under European law, there is no concept of "full-function joint ventures"[26] under the Competition Act. Therefore, **since there is no guidance from the CCI regarding the above matter, the treatment of joint ventures remains a grey area**.

The Jet-Etihad Decision gives some direction here by not subjecting the Jet-Etihad CCA, which falls short of a full-function joint venture, to a general competition appraisal under section 3 of the Competition Act. Subsequent to CCA which has actually been implemented as on the date of the Commission's decision, the Commission could have

[24]ibid

[25]The basic distinction between the two is, that a horizontal merger is between two competitors, and a vertical merger is 'between firms operating at successive stages of production process', A third category of merger is known as conglomerate merger which doesn't fit in the either description of relationship.

[26] Full-function joint ventures which act on the market independently from their parent companies are treated as concentrations under the European merger control regulations while other collaborative alliances are subjected to a general antitrust analysis under Article 102 of the Treaty on the Functioning of the European Union (TFEU). Available at Luis Silva Morais, *Joint Ventures and EU Competition Law* (Hart Publishing, 2013).

investigated it either under section 3 or under 5 and 6 of the Competition Act.[27] Be that as it may, the Commission regarded the CCA as a piece of Etihad's equity investment into Jet, the CCA being essential for the alliance to extract the efficiencies of a wider airline network. Therefore, "**the Commission's decision suggests that an share acquisition or a merger, which is accompanied with some form of collaborative agreements, where the latter is essential to fulfill the business objectives of the acquisition itself, will be treated as a 'composite combination' under the Indian merger control regime. The treatment of stand-alone collaborative agreements or joint ventures under the Competition Act remains a grey area**.[28]"

However, the Commission in its decision has provided a caveat. The approval of the transaction under the merger control provisions (i.e., under section 5 and 6 of the Competition Act) does not act as immunity from subsequent proceedings before the Commission under other provisions of the Competition Act. Therefore, in future, if the Commission is of the opinion that certain provisions of the CCA are anti-competitive in nature or allows Jet-Etihad to be a dominant entity in the Indian airline industry, it can initiate appropriate proceedings under the prohibition of anticompetitive agreements (section 3 of the Competition Act) and abuse of dominance provisions (section 4 of the Competition Act), respectively.

The appeal against the Commission's decision

An appeal against the Jet-Etihad case has been challenged before the COMPAT, by Mr. Jitendra Bhargava, a retired executive director of Air India. Air India competes with Jet and etihadwithin the domestic and international markets respectively. Mr. Bhargava submitted that the CCI had "failed to effectively carry out an independent assessment of the likely anti-competitive effect of the acquisition of the Indian aviation sector and in doing so, has placed all Indian air passengers and indeed the entire Indian airline industry in a great peril of suffering and hazardous irreparable damage by enduringly eliminating competition."[29] He has further alleged that the Commission has conducted an "incorrect analysis" of the relevant merger market and had not taken third-party concerns on board.[30] He has prayed that the Commission's decision be set aside and it be directed to carry out a detailed Phase II analysis [31] in accordance with the provisions of the Competition Act.[32]

[27] Since section 3 of the Competition Act applies *ex-post*, for a joint venture agreement to be reviewed under section 3 of the Act, the agreement must have been implemented. The merger control provisions of the Competition Act, *i.e.*, section 5 and 6 apply *ex-ante*.

[28] Article : 'Joint Venture under India's Competition Act', Mayer Brown and Khaitan&Co

[29] *Compat issues notices to CCI, Jet Airways*, Economic Times, December 19, 2013.

[30] *Former Air India exec Jitendra Bhargava appeals against Jet-Etihad deal*, Firstpost, December 12, 2013.

[31] See *supra* n.4.

[32] *Former Air India executive moves Appellate Tribunal over Jet-Etihad deal*, The Hindu: Business Line, December 12, 2013.

The COMPAT has refused to put a stay on the Commission's approval but has agreed to hear the appellant further.[33] "If the case is surrendered and a stay permitted on the Commission's decision, it could defer the satisfaction of the Jet-Etihad trade ,it could ground the course of action towards the fulfillment of the Jet-Etihad exchange uncertainly and could even ground the arrangement. Further, these headways will directly influence the potential of Indian arrangement creators to oblige to their arrangement courses of events and could be unfavorable for Indian M&A movement."

Like many competition law jurisdictions, the merger approval process under the Competition Act is designed in a most comprehensive manner to provide final timings in regarding the approval process. The CCI reviews potential transactions in two possible stages.

- ✓ In stage I, the Commission, based upon the information provided by the parties, forms a preliminary view about the probable anticompetitive effect of a proposed transaction. If the Commission is satisfied that the transaction would not cause any anti-competitive effect on the market, it approves the transaction. Otherwise, it recommends the transaction for a detailed investigation by the Director General (the investigative arm of the Commission) in Phase II of its merger assessment. stage I review is required to be completed within 30 calendar days of notifying the Commission and
- ✓ Stage II of the investigation, when initiated, will be required to be completed within 210 calendar days from the date of notifying the Commission.

"If the appeal challenging the decision of the Commission is admitted, since the Competition Act does not provide an upper time limit within which the COMPAT would be required to decide the appeal, it could take months before it passes a decision granting or denying Mr. Bhargava's appeal. If Mr. Bhargava's appeal is denied, he can under the provisions of the Competition Act, appeal to the Supreme Court of India, which could further significantly delay the approval process for the transaction."

"The uncertainty of the approval process is further heightened by the fact that under the present scheme of the Competition Act, almost any member of the public can appeal against a decision of the Commission approving a transaction. Section 53B of the Competition Act provides that "any person, aggrieved by any direction, decision or order" of the Commission can prefer an appeal to the COMPAT. A liberal interpretation of section 53B could open the door to frivolous appeals, derailing the merger approval timeline, in the interest of general consumer welfare. Mr. Bhargava has challenged the Commission's decision without suffering any legal injury to his person or office, reportedly on the grounds that he is "deeply concerned" by the impact of combination on the beleaguered domestic aviation industry.[34] If the COMPAT admits his appeal it could

[33] *Jitendra Bhargava v. Competition Commission of India and Others* ,Decision available at: http://compat.nic.in/upload/PDFs/decordersApp2013/19_12_13.pdf,(last accessed on March 18 ,2018)

[34] See: s*upra* n.25.

send a dangerous signal that almost any person who feels disappointed with the result of a merger review by the Commission, can demonstrate himself as a “person aggrieved” and can approach the COMPAT to stall such transactions.”

Conclusion

While the SEBI request has acquired some clarity connection to the application and importance of the definition "control" under the Act and Takeover Code, having numerous meanings of "control" under various enactments hosts hindering results for the parties to a transaction. This can influence deal assurance and certainty and wherever there is a market with uncertain conditions it will not attract investors from outside and India really needs it at this stage of economic development. As each regulator might be influenced and impacted by the other’s definition of control and either initiate or reopen investigations, as was the case in the Etihad/Jet transaction. Further, in complex transactions, involving more than one regulator, each regulator may be reluctant to take the first view, which in turn results in prolonging timelines. All these hindrances would only amount to reluctance in investors towards Indian market and hence there is an urgent need to come with some better and clearly defined regulations.

Acknowledgments:

This research was partially supported by Symbiosis Law school via their Library and online database access. We thank our colleagues from Symbiosis law school who provided insight and expertise that greatly helped the research, although they may not agree with all of the interpretations/conclusions of this paper.

References:

- http://www.firstpost.com/business/decoding-the-jet-etihad-seat-entitlement-controversy-921277.html
- http://www.livemint.com/Politics/ZBVbsyzITJlVED4ynmX8OK/IndiaAbu-Dhabi-agreement-may-have-clinched-JetEtihad-deal.html
- http://articles.economictimes.indiatimes.com/2013-12-07/news/44865551_1_jet-etihad-airways-deal-subramanian-swamy-aviation-sector].
- http://www.business-standard.com/article/companies/cci-failed-to-see-jet-etihad-deal-hits-competition-113121200703_1.html
- http://www.icmrindia.org/casestudies/catalogue/Business%20Strategy/BSTR436.htm