DECONSTRUCTING "CONTROL" UNDER COMPETITION ACT, 2002: NEED FOR RE-LOOK?

- *Ayush Vijayvargiya**

Control, as a concept, has drawn a lot of discussion in the last few years, not particularly limited to the domain of Securities Law but also spreading across other areas of law like Competition Law. This paper thus sets out to discuss the significance of control to the competition regime and outline the problems associated with its uncertain understanding, followed by reinforcement of the need for change. An attempt has been made towards clearing the mist as regards the aspects which are misunderstood to have problems i.e., inconsistent interpretation of CCI vis-à- vis SEBI, and instead focus the attention towards the real issue of uncertainty strictly within the domain of competition law. After thorough identification of problems in the initial segments, an elaborate discussion is undertaken on the various difficulties that the current regime poses, and repercussions that follow by design. Having discussed the domestic landscape comprehensively, the author then analyzes this concept as practiced across major mature competition law jurisdictions and cues, if any, which can be taken for further development in the domestic regime. Finally as decisions by CCI has turned out to be an insufficient interpretative tool, author has proposed issuance of a guidance note, drawing from a mix of avenues, in order to bring certainty in the regime.

I. *JURISPRUDENTIAL CONCEPT OF CONTROL- RELEVANCE TO COMPETITION LAW*

Black's Law dictionary defines Control as '*the ability to exercise a restraining or directing influence over something*'.[1]In conventional corporate parlance, it has been used in the context of parent-subsidiary Company, where it signifies the power that the former holds over the latter.[2]Over the course of years, however, this concept has come a long way from its traditional definition and now connotes a different meaning for different regulators, depending upon the context it is set in. As a result of its detached development amongst regulators, there is considerable definitional ambiguity that exists from the perspective of an investor.[3]

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1 Black's law dictionary, 335 (10th ed. 2014).

2 Kosturi Ghosh, *'Control' – an Investor's Quandary*, LexisNexis Mergers & Acquisitions Law Guide, 61 (2015).

3 *Ibid*

There are a number of statutes, which entail enquiry into the domain of 'control'. Companies Act, 2013[4], SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011[5] ['Takeover Code'], Competition Act, 2002[6] ['Act'] and Foreign Direct Investment policy[7] ['FDI Policy'] are a few significant ones. Under the said statutes, acquisition or shift in control triggers certain requirements, and depending upon the statute concerned, this can range from provision of an exit option to existing shareholder through an open offer[8] to notifying the regulator of the merger/acquisition.[9]With the concept having undergone significant judicial debate and differential interpretation by courts/tribunals in the context of each regulation, bringing cross-regulatory equivalence stands as a highly undesirable prospect, and rightly so. This is because interpretation happens in the context of objectives sought to be achieved by the respective regulator, and would be discussed comprehensively in subsequent segments of this paper. However, streamlining the understanding within the native domain of each regulator, Competition Commission of India ['CCI'] in this case, seems rather imperative.

A re-look at CCI's understanding of control becomes even more important in light of the recent attempt by Securities and Exchange Board of India ['SEBI']to define control in an objective way, where in a discussion paper was floated in order to invite public opinion on the proposed change.[10]SEBI succeeded in taking cognizance of the inconsistency in its regime which is primarily attributable to contrasting past interpretations of control by SEBI and Securities Appellate Tribunal ['SAT'].[11]CCI has however, failed to do the same despite widespread presence of a similar issue in the competition domain. With global organizations like Organization for Economic Co-operation and Development ['OECD'] campaigning for international parity in the understanding of terms like 'control' and 'decisive influence',[12]the failure of CCI to recognize and redress this inconsistency and uncertainty within the domestic regime itself is a major setback. In such circumstances, cross-country parity only remains a utopian hope.

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[4] Section 2(27), Companies Act 2013, Act No. 18 of 2013.
[5] Regulation 2(e), SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011, Notification No. LAD-NRO/GN/2011-12/24/30181.
[6] Section 5, Competition Act 2002, Act No. 12 of 2003.
[7] Consolidated Policy on Foreign Direct Investment 2016, D/o IPP F. No. 5(1)/2016-FC-1, dated 7th June, 2016.
[8]*Supra* note 5, Reg. 4.
[9]*Supra* note 6, S. 6.
[10] Discussion Paper on "Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations", http://www.sebi.gov.in/cms/sebi_data/attachdocs/1457945258522.pdf.
[11]SEBI v. Subhkam Ventures, AIR 2012 SC 1587.
[12] OECD, *Policy Round table on Definition of Transaction for the Purpose of Merger Control Review,* DAF/COMP (2013) 25 [2013], http://www.oecd.org/daf/competition/Merger-control-review-2013.pdf.

Moving ahead to the relevance of this concept to competition regime, 'Control' is defined under the explanation clause of Section 5 of the Act and reads "*Controlling the affairs or management*" by *one or more 'enterprises' or 'groups', either jointly or singly, over another enterprise or group.*[13]This concept becomes relevant especially because acquisition of control, amongst others like *shares*, *voting rights* and *assets*, acts as an automatic trigger to the mandatory notification requirement of the CCI.[14] A majority of transactions involves acquisition of either shares or assets by a party to transaction, and consequently directly lie within the CCI's jurisdiction.[15]However, a number of transactions that do not involve acquisition of either of the two or fall under any of the exemptions[16]still hold the potential to create an appreciable adverse effect on competition ['AAEC'] owing to a change in control. As Section 6(1) of the Act bars any combination that causes or is likely to cause AAEC within the relevant market in India, therefore this concept aims to bring such transactions within the jurisdiction of CCI.

A meticulous review of the relevant provisions helps one identify a few circumstances wherein the analysis of 'control' becomes relevant, namely:

- When the transaction involving acquisition of shares or voting rights falls within one of the '*statutory*'[17] or '*governmental*'[18] exemptions, but owing to certain external considerations like entrustment of additional rights, alteration in 'control' takes place and consequently leads to it falling within the ambit of combination; or
- When the acquirer and target enterprises enter into an agreement, whereby certain special rights are entrusted with the former without any actual buying/selling of shares or assets taking place, which effectively translates into assignment of control; or
- When there is "*acquisition 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 service.*"[19]

It is important to note that analysis of 'Control' is not merely limited to acquisition and very well extends to even mergers and amalgamations.[20] But in the Indian context, unlike the position in European Union ['EU'] or United States ['US'], the analysis of what amounts to control becomes

[13]*Supra* note 6, Explanation (1) to S. 5.
[14]*Supra* note 6, S. 5, 6.
[15] Umakanth Varotill, *Convertible Instruments and "Control" Under the Competition Act*, INDIAN CORPORATE LAW BLOG, (May 31, 2012), http://indiacorplaw.blogspot.in/2012/05/convertible-instruments-and-control.html.
[16] Schedule I, CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011.
[17]*Supra* note 6, S. 6(4).
[18]*Supra* note 16 & "De Minimis" exemption.
[19]*Supra* note 6, S. 5 (b).
[20]*Supra* note 6, S. 5 (c).

less significant in cases of mergers and amalgamations owing to the language of the relevant provisions.[21]In addition to the absence of term 'control' under clause (c) of Section 5, clause (a) of the same section defines combination by acquisition which is rather broad in its scope and reads '*acquisition of control, shares, voting rights or assets*'. Therefore most of the mergers and amalgamations, which would otherwise involve control analysis under Section 5(c), already gets statutorily covered by other clauses like '*shares*', '*voting rights'* or '*assets'* under Section 5(a), thereby leaving the former practically un-invoked. However, this intermingling does not have larger practical implication, as the practice evolved by CCI is such that filing has to be done under (a) or (c) depending upon the way a transaction is structured and worded in the transactional documents.

Furthermore it is well established that not every acquisition by an enterprise which meets the given asset or turnover threshold needs to be notified, and certain categories stand exempted.[22]However these exemptions laid down under Schedule I of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ['Combination Regulations'], are only available for transactions "*not leading to acquisition of the target enterprise/group's control*", or "*not causing a shift from joint to sole control*".[23] This essentially implies that even though some acquisitions get exempted on paper, CCI might still require their notification if it is of the opinion that the concerned transaction entails change in control. This discretionary leeway given to the CCI in obviously exempted transactions, on account of the loose definition of control, strengthens a realm of uncertainty and holds potential of resulting in a spate of notifications.[24]

In addition to delaying transactions and deterring the flow of investment, the uncertain nature of the extant control regime also leads to undue imposition of penalty and compromises with interpretational consistency. This paper is thus an attempt to highlight these existing problems and guide the regulators towards possible avenues of solutions and alternatives. Bearing in mind that this is a policy decision taken by a regulator after considering a range of variable factors, the paper will step short of suggesting a concrete set of guidelines that can be adopted and will instead provide suggestions that can be fine-tuned towards the same. It entails a multi-jurisdictional analysis with the aim of identifying the best practices followed in major jurisdictions, and examines the feasibility of borrowing the said concepts in Indian context. More importantly, this paper also

[21] G R Bhatia, *Merger Regulations Needs Fine Tuning By The Competition Commission Of India*, MONDAQ, (March 21, 2016), http://www.mondaq.com/india/x/475792/Antitrust+Competition/Merger+Regulations+Needs+Fine+Tuning+By+The+Competition+Commission+Of+India.
[22]*Supra* note 17, 18.
[23]*Supra* note 16.
[24] Nandish Vyas & Pranati Ishwar, *The Viewpoint – The Anatomy of Control*, BAR & BENCH, (July 12, 2012), http://barandbench.com/viewpoint-anatomy-control/.

attempts to clear the mist with respect to the aspects which are misunderstood to have problems i.e., inconsistent interpretation of CCI vis-à-vis SEBI, and instead redirect the attention towards the real issues at hand.

Besides the current segment, where the significance of 'control' to the competition regime has already been discussed and scenarios pertinent to control enquiry highlighted, the paper is sub-divided into five other segments. The second segment traces the judicial development over the course of five years and breaks down the understanding of this concept by CCI. It is followed by an elaborate account, in the next segment, on SEBI's understanding of control and a comparative analysis on the fronts where disparity exist vis-à-vis CCI. The fourth segment flags out the disadvantages that the current regime poses and reinforces the need for initiating changes. Having discussed the domestic landscape comprehensively, fifth segment analyzes the way other jurisdictions understand the said concept and what cues, if any, can be taken for further development in the domestic regime. Finally, the last segment conclusively specifies the actual points of contentions and categorically recommends a few avenues which can act as a guiding light for initiating changes.

II. *DECODING CCI'S UNDERSTANDING AND TRACING THE JUDICIAL TREND*

Having established the relevance of 'control' to Competition Law regime in the previous segment, this part seeks to elaborate upon the manner in which control is understood under the said regime. It has been five years since the enforcement of the combination regime, and the question 'What amounts to control?' still remains open to interpretation. As will be seen in this segment, even though the recent CCI orders have brought some echelon of clarity to an otherwise circular and inclusive definition given in the Act, uncertainty continues to linger, pending substantive guidance from the CCI. The term control has been imputed with a broad meaning for the purpose of this act and a wide range of events, like 'Contractual veto rights' and 'minority shareholdings with affirmative control', are viewed as leading to its acquisition.[25]

An inquiry into the legislative intent behind incorporation of an inclusive and uncertain definition does give some clarity and shows that the broad definition is instead a deliberate legislative attempt.[26]Legislature was of the opinion that comprehensive factual determination is the sole

[25] Avirup Bose, *The Concept of Control under the Indian Competition Act: an analysis*, INDIAN CORPORATE LAW BLOG, (June 6, 2012), available at http://indiacorplaw.blogspot.in/2012/06/concept-of-control-under-indian.html.

[26] REPORT OF THE HIGH LEVEL COMMITTEE ON COMPETITION POLICY AND LAW, Chairman S.V.S. Raghavan, 2000. ¶4.1.1.

criterion for determining change in 'control'.[27]However, this well intentioned scheme seems to have failed, as will be elaborated in the latter part, with no clarity till date even at broad and non-specific level. It is therefore important to break down the definition literally in order to cull out its important elements. Section 5 provides that for decisive control to exist, it needs to be either over a) '*management*' orb) '*affairs of an enterprise*'.[28]

Determining decisive control over 'management' hardly poses any challenge and merely entails a few straightforward calculations in order to establish whether a person has the right to appoint a majority of directors on the board or not.[29]This notion of control, also known as 'Legal control', is principally understood to have changed hands when one entity acquires majority voting rights of another.[30]However it is not merely limited to transfer of majority voting rights and gets triggered even when minority shareholders are entrusted with extraordinary rights like power to appoint majority/substantial number of directors; as it gives them the power to potentially influence tactical decisions of the acquired entity.[31]

Queries pertaining to decisive control over 'affairs of an enterprise', on the contrary, require complicated factual and circumstantial investigation to reach a particular conclusion.[32]Analysis in such circumstances doesn't stand limited to board and policy decisions and even extends to aspects like production, distribution, services et al.[33] This notion is termed as 'Factual control' and is a more indirect exercise of influence with powers like 'Veto right', amongst others, included within its ambit. Veto rights entrusted with the minority shareholders might be ineffective for the purposes of imposing a decision, but it holds the ability to strategically influence decisions by way of blocking them.[34]

Tribunals and Courts have attempted to maintain some consistency and interpreted' control over affairs' particularly as an exercise of '*decisive influence*' over the affairs of another enterprise.[35] It will become rather clear from the cases discussed under this segment that mode of exercising the said

[27] Neeraj Tiwari, *Merger under The Regime of Competition Law: A Comparative Study of Indian Legal Framework With EC and UK*, 23(1) BOND LAW REVIEW(2011).
[28]*Supra* note 6, Explanation (1) to S. 5.
[29] D.P. MITTAL, COMPETITION LAW AND PRACTICE 309 (3rd ed. 2011).
[30] Arshad (Paku) Khan, *A few things you should know about Indian merger control*, 20 (4) INT.TRADE.LAW AND REGULATIONS 65, 74 [2014].
[31] RICHARD WHISH AND DAVID BAILEY, COMPETITION LAW 880 (7th ed. 2011).
[32]*Supra* note 29, P. 311.
[33] Jayshree P Upadhyay, *The elusive concept of Control,* August 9 2016, BUSINESS STANDARD, http://www.business-standard.com/article/opinion/the-elusive-concept-of-control-115080900762_1.html.
[34]*Century Tokyo Easing Corp.*, Combination registration no. C. 2012/09/78, dated 4th October, 2012, http://www.cci.gov.in/sites/default/files/C-2012-09-78.pdf.
[35] Naval Satarawala Chopra & John Handoll, *India: Merger Control*, ASIA-PACIFIC ANTITRUST REVIEW [2016].

influence by minority shareholders i.e., via affirmative rights or other contractual covenants, has been held immaterial. The jurisprudence developed under Act not only includes positive or proactive control within its ambit, but also extends to affirmative and negative rights. One of the early pioneering decisions by CCI in this regard came in a matter involving shares acquisition of *Multi screen media private limited.*[36]The CCI held that entrustment of negative rights amount to control and even enlisted a few probable negative rights which, in the CCI's opinion, are likely to result in change of control.[37]

In a subsequent case[38]CCI affirmed the said enlisting and by design significantly consolidated the legal position. Besides, both these cases also briefly observed that contractual agreements between shareholders are a sufficiently significant factor for translating sole control over an enterprise into joint control. However, it refrained from making a blanket statement in this regard and distinguished the said agreements from instances involving mere entrustment of 'investment protection' rights.

Later the CCI further lowered its control acquisition threshold, and its decision in Reliance Network's subscription of convertible ZOCDs (Zero-coupon optionally convertible debentures) issued by TV18acts as an apt exemplification of the same.[39] CCI held that acquisition of these ZOCDs even without any voting rights, conferred the ability to exercise decisive influence over the affairs, and by implication the 'control' thereof. Owner of ZOCDs were given an option to convert these debentures into equity shares at any future date, and therefore in the CCI's opinion they qualify as shares within the meaning of Act.[40]In simple words, it was held that *Firstly,* the mere possibility of a convertible security holder exercising its right to convert is enough to constitute control; and *secondly*, control stands acquired from the time investment is made into the convertible security, and not deferred till the actual exercise of the conversion right.

The decision of CCI in the case of *Jet-Etihad* lowered control acquisition threshold even more drastically.[41] It held the joint initiative of the parties to enter into an Investment Agreement ['IA'],

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[36]*Multi Screen Media Pvt. Ltd.,* Combination Registration no. C-2012/06/63, dated 9th August, 2012, http://www.cci.gov.in/sites/default/files/C-2012-06-63.pdf.

[37] An inclusive list of instances where veto rights entrustment would amount to change in control: (a) Business plans; (b) Appointment, termination and compensation of Key managerial persons; (c) Budget allocation; or (d) Key investment decisions.

[38]*Supra* note 34.

[39]*Independent Media Trust*, Combination Registration no. C-2012/03/47, dated 28th May, 2012, http://www.cci.gov.in/sites/default/files/C-2012-03-47.pdf.

[40]*Supra* note 6, S 2(V)(i).

[41]*Etihad-Jet*, Combination Registration no. C-2013/05/122, dated 26th November 2013, http://www.cci.gov.in/sites/default/files/C-2012-05-122%20261113.pdf.

Shareholders' Agreement['SA'] and Commercial Cooperation Agreement['CCA'] as amounting to establishment of Etihad's joint control over Jet. These agreements and the governance structure provided under the CCA, in the CCI's opinion, established Etihad's control over the assets and operation of Jet airlines. This is a classic case of threshold lowering as only 24% stake was being acquired by Etihad and that too with no veto or quorum rights. In addition, Etihad was given a right to appoint just 2 out of the 12 directors present on the Board. This case categorically brings forth the approach often adopted by CCI, wherein it extends beyond its mandate of analysing the post-transaction structure for any appreciable adverse effect that it might have on the competition.[42] Ratherit delvesinto examining the dynamics of relationships between the parties, and grounding the decisions on such contextual understanding.

As a result of these confusing decisions, the tribunal has muddied its waters and completely disregarded genuine minority protection rights. Collective analysis of the past CCI decisions thus helps immensely in not only breaking down the concept of 'Control' into different levels but also in answering some key questions;' what are the different levels of control' and 'what level of control breeds ambiguity in the regime' being few such. In order to abridge this source of uncertainty, control can be catalogued into the following four levels:

1) **Participatory power**: It covers within its ambit scenarios where the entity concerned has an influential voice in the process of decision making, but lacks the ability to direct the management's decision in a particular way or block it.
2) **Decisions blocking power**: Encapsulates circumstances where even though day-to-day management is being undertaken by a different person or group of persons, the concerned entity holds the ability to block decision by exercise of negative or affirmative control. The tools employed for this exercise of negative control are, 'veto rights', 'specific quantum of shareholding' or 'significant proportion of directors'.
3) ***De facto* control**: Ability to effectively exercise control by virtue of factors like majority shareholding, management of day-to-day affairs and majority in the board.
4) **Clear or absolute control**: Exercise of control without any fetters and usually covers instances with above 75% ownership of shares without any obstacle in terms of negative control etc.

It is easy to conclude that CCI considers the last two levels as a clear signifier of effective control, whereas level one is deemed to signify exercise of no control. Level two however continues to be

[42] Avirup Bose, *Lessons to Be Learned from India's Latest High Profile Merger Review: The Jet-Etihad Deal*, 35 (4) EUROPEAN COMPETITION LAW REVIEW (2014).

the bone of contention and the breeding ground of all the ambiguities. There are arguments from both factions. Proponents claim that such level of control allows for 'decisive influence' in matters related to budgetary allocation, business plan etc. and therefore is sufficient for the purpose of exercising control.[43] Claims from the other side however assert that such influence even if it exists, rarely confers the ability to control competitive behavior as it is limited to certain aspects, which are more often than not incapable of causing AAEC.[44]

Despite opposition from the other faction, CCI has opted for an expansive view wherein the ability to negatively affect commercial operation is considered sufficient to confer control. This unusual interpretation has led to a blurring of the quintessential distinction between '*genuine minority protection rights*' and '*negative rights*'.[45]A standard practice followed by investors across the globe is to demand entrustment of affirmative rights in order to protect investments, and with no intention of tinkering with control.[46] However, past decisions have made it an intrinsic part of change in control rather than keeping it outside the ambit. In a handful of cases, the CCI has even declared a transaction as amounting to change in control by placing reliance solely on the dynamic relationship shared by the parties concerned.[47]As a consequence, a range of pure financial investment and private equity transactions, otherwise not falling within the review jurisdiction of the CCI, have become reviewable. Hence, the extant regime demands an extensive relook and requires change on multiple fronts.

III. ASCERTAININGSEBI'S POSITION ON CONTROL VIS-À-VIS CCI

Complexity of the Indian regulatory regime, coupled with overlapping jurisdictions, has led to needless stalling of multiple transactions in the past. One such area of overlap is the divergent definition of 'control' under the Takeover Code and the Act. Even though CCI and SEBI are not the only regulators delving into control analysis, most other regulators like Foreign Investment Promotion Board ['FIPB'] et al. by and large rely on the definition provided under the Takeover Code and consequently the interpretation done by SEBI.[48] The definition under the Takeover

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[43]*Supra* note 2.
[44]*Supra* note 24.
[45]*Supra* note 35.
[46]*Supra* note 12.
[47]*Supra* note 41.
[48] Cyril shroff, Nisha Uberoi, *Battle for Regulatory Supremacy: Ambiguity in the Definition of "Control" between SEBI and CCI*, CIRC WORKING PAPER(June 2014), available at http://circ.in/pdf/Battle_for_Regulatory_Supremacy_Ambiguity_in_the_Definition_between_SEBI_and_CCI.pdf

Code, although slightly more detailed and elaborately worded than the Act, encounters similar interpretational issues.[49]

Although attempts have been made by SEBI to bring some stratum of certainty and consistency in its understanding over the course of the last few years, but little success has been achieved so far. Even if some level of consistency can be claimed to have been brought in, certainty remains a distant thought. In order to redress this lingering uncertainty, SEBI released a discussion paper proposing two alternatives.[50]One is a subjective criteria wherein a negative list is published specifying the circumstances which wouldn't qualify as control. The second alternative pertains to an objective criterion providing for a threshold sharing percentage, which stands at 25%.It is however important to note that until the discussion paper by SEBI is converted into a concrete set of guidelines, the current regime based on the past decisions of SEBI and SAT will continue to subsist. In this context, what constitutes 'control' under Takeover code becomes an important enquiry.

SAT has held control to mean only effective control, a judicial position that still persists.[51]It essentially translates into saying that control means *de facto* control, and mere *de jure* control is insufficient.[52] On comparing SEBI's understanding of control under the Takeover Code with that of CCI's under the Act, incongruence between both is an easy conclusion to draw. In addition to having different central objectives, there are a few other significant fronts where disparity seems to exist between the regulations.

The inter-regulatory analysis under this segment seeks to recognize and thereby redress a common misconception that prevails amongst the uninitiated i.e., contrasting interpretation of the same term by different regulators is essentially flawed. One needs to understand the analysis done by respective regulators in light of the ultimate objective they seek to achieve.[53]A problem doesn't exist in *per se* differential understanding of the term 'control' by CCI and SEBI, but instead in the uncertainty and inconsistency with which each regulator has interpreted the term even within its own domain. From an investor's perspective, the disparity in regulatory approach might be a cause of concern, but this is something inevitable and unavoidable. The trickier part for an investor is

[49]*Supra* note 5, S. 2(e).
[50]*Supra* note 11.
[51] Ashwin Doshi v. SEBI, [2002] 40 SCL 545 (SAT - Mum).
[52] Umakanth Varottil, *Defining 'Control' in Takeover Regulations*, INDIAN CORPORATE LAW BLOG, (May 29, 2013), http://indiacorplaw.blogspot.in/2013/05/defining-control-in-takeover-regulations.html.
[53]*Supra* note 48.

the uncertainty associated with what each regulator means by 'control' within its own domain, especially because this changes to the whims of the concerned regulator.

This segment therefore involves discussion on SEBI's understanding of a few significant factors where disparity exists vis-à-vis the control regime of CCI, and is followed by a comparative analysis on these fronts. It will help provide an overall scheme in which the control determination works, along with elaborating on facets like why disparity prevails in the said aspects and not others; and how some level of divergence is not only rationally justified but indeed desirable.

Affirmative rights:

Ambiguity pertaining to affirmative and veto rights[54] under the Takeover Code cannot be attributed solely to the past conflicting decisions of the tribunals; instead the Supreme Court's decision in the case of *Subhkam Industries*[55] stands equally culpable. In the said case, the inquiry pertained to whether affirmative voting rights and right to nominate few directors constitutes control under the Takeover Regulations or not. SEBI[56] decreed it to be 'control', whereas SAT[57] reversed the order and held otherwise. When appealed before the SC, it was disposed off without a judgment and was left open to interpretation. It has since put the extant status in a complete flux, and there exists no clarity with respect to status of affirmative or veto rights amounting to control or not.

One way of appreciating the vagueness and past inconsistencies on the question of affirmative and veto rights can be the analysis of decisional chaos which preceded SC's decision. In the case of *Re NRB Bearings*[58], SEBI decreed the affirmative rights acquired in relation to alteration of Memorandum of Association ['MOA'], dividend declarations etc. as not constituting control. Whereas SAT, on the contrary, in the case of *Rhodia SA v. SEBI*[59]held such similar affirmative rights as constituting control. In SAT's opinion, negative rights in these respects puts the acquirer in a predominant position akin to exercising control over the affairs of the company. However, this stance of SAT stands in contrast with its own decision in the case of *Sandip Save v. SEBI*[60],

[54] Although in theory and form affirmative rights might be different from each other. But for the purpose of this paper no such distinction needs to be made, as the end objective being sought remains the same i.e., negative control. It is in this context that both the words are used interchangeably.
[55]*Supra* note 11.
[56]*Acquisition of shares of Subhkam Ventures*, SEBI, dated 15th December, 2008.
[57] Subhkam Ventures v. SEBI, 2010 Indlaw SAT 12.
[58]*Re: NRB Bearings India Ltd, Securities and Exchange Board of India*, dated 29th May, 2003, Order no. CO/33/TO/05/2003.
[59] (2001) 34 SCL 597.
[60] [2003] 41 SCL 47(SAT).

wherein acquisition of veto right by IDBI was held as not amounting to control. Only way to rationalize these contrasts is to perceive them as an attempt by SAT to keep *de jure* control outside the merger control analysis and limiting the analysis to *de facto* control.[61]

Comparison with CCI: While uncertainty might still persist with respect to interpretation under the Takeover Code, majority of the decisions don't consider negative right as amounting to control and believe positive rights to be the only signifiers of control.[62] CCI on the other hand, in furtherance of the objective that the CCI seeks to achieve, considers these affirmative rights also to be signifiers of control. However, as elaborated in the previous part, not all the affirmative rights are bestowed with the same status and only the rights in relation to significant and relevant transactions are considered good enough to tinker with the control equation.[63]

Triggering of control analysis:

For SEBI to initiate merger analysis, actual shift of control is a pre-requisite. Mere ability to control in future, be it with respect to sole control acquisition or shift from sole control to joint control, does not qualify as control. A fitting exemplification of this proposition would be the transaction involving Reliance industries' subscription of TV18 group's convertible debentures (ZOCDs), where SEBI decreed that merger control analysis would be invoked only when the conversion actually happens, and not when the convertible security is acquired.[64]

Comparison with CCI: Under the competition regime, mere ability to control an undertaking in future is enough for control to exist and actual control in that moment isn't a prerequisite. The TV18 case remains helpful even in highlighting this divergence between the regulatory interpretations.[65] Therefore, control under the Act is understood to be acquired from the time investment is made into the convertible security, and not deferred till the actual exercise of conversion right, whereas under SEBI it is understood to have shifted when the convertible instrument is actually converted to voting rights beyond the prescribed threshold, and not just when it is acquired.[66]

Other ancillary agreements:

[61] *Supra* note 5.
[62] *Supra* note 41.
[63] *Supra* note 34.
[64] *Supra* note 39.
[65] *Ibid.*
[66] *Supra* note 25.

Ancillary agreements are entered into by transacting parties over and above the primary agreement and may pertain to a wide array of aspects ranging from 'how to vote in a given scenario' to 'co-operation on prices and supplies'. From the perspective of SEBI, these agreements can help in determination of 'person acting in concert', if entered between the acquirer and the promoter, and thereby might signify a shift from sole control to joint control.[67]

Comparison with CCI: Yet again, examination of respective regulatory decisions in the case of Jet-Etihad is sufficient for bringing forth the contrasting approach adopted by CCI and SEBI. When Etihad entered into an agreement with Jet for co-operation on issues of pricing, schedule, route etc., SEBI didn't consider it to be relevant for establishment of control and reasoned that the principle of 'persons acting in concert' loses application when target company is also a party to the said agreement.[68] Whereas CCI, on the other hand, held this agreement as amounting to change in 'control', as it was entered with the joint initiative of enhancing their airline business and would undoubtedly have significant implications in the market.[69]

Finally, having gone through all major disparities in the approach adopted by CCI and SEBI, it is time to reconcile it by contextualizing the rationale behind such differences. One way of rationalizing the same would be to examine the objective that each regulator strives to achieve. SEBI aims to provide fair and equal treatment by providing quantifiable exit option to the minority[70], CCI on the other hand, seeks to prevent anti-competitive activities of an entity causing AAEC by influencing and controlling the decisions of a competitor.[71]This explains the difference in threshold employed by the respective regulators. SEBI keeps the threshold high owing to the gravity of the consequences that ensues, like making of an open offer to provide for quantifiable exit option whereas CCI keeps the threshold low owing to the less severe nature of the consequences involved i.e. notification to the CCI.

Besides, the regulators are also cognizant of these differences and SEBI in one of its orders even admitted the difference existing in meaning, scope and purpose of the definition of control under the respective acts.[72]However it is ironical that in the same case it opened the deal for re-investigation when CCI reached a different conclusion with regards to the existence of control.

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[67]*Jet- Etihad (Whole Time Member)*, WTM/RKA/CFD-DCR/17/2014, dated 8th May, 2014, available at http://www.sebi.gov.in/cms/sebi_data/attachdocs/1399545948533.pdf.
[68]*Ibid.*
[69]*Supra* note 41.
[70] Securities and Exchange Board of India, *Justice P.N. Bhagwati Committee Report on Takeovers*, (January 18, 1997), http://www.sebi.gov.in/commreport/bagawati-report.html.
[71]A.C. FERNANDO, BUSINESS ENVIRONMENT 412 (2011).
[72]*Supra* note 67.

Irrespective, it is now a settled position that regulating agencies should take guidance from the findings of other agencies only when the laws involved are in substance *pari materia* and application of the same is being made to a similar set of circumstances.[73] As the definitions of control under the concerned regulations are in substance not *pari materia*, guidance should not be sought from the same.

Nevertheless, this clarity brought by the regulators, with respect to application and meaning of the term, hasn't been helpful enough to offset the detrimental effect that multiple definitions bring to the parties to transaction i.e., the investors. The obvious detriment frequently faced is in the way one regulator influences another, thereby causing the latter to re-investigate.

IV. CONCERNS POSED BY THE CURRENT UNCERTAIN REGIME

Proponents of the extant regime support an inclusive definition of control by claiming this to be a measure of mere abundant caution, which causes little or no tangible harm. Further, falling within the ambit of 'transfer of control' is considered to be unproblematic as it calls for no more than a notification to the CCI; and stands in complete disjunction from the AAEC determination process which relies solely on factors laid down under Section 19(4) of the Act for reaching conclusions. However these assertions completely disregard the difficulties with functional status quo. A range of problems can be attributed to this over inclusive reading and faulty interpretation of the term 'control'. This segment therefore aims to flag off the various concerns that the status quo poses.

Firstly, it holds the potential of delaying an innocuous transaction for months.[74] Once a transaction is deemed notifiable, it stands suspended until the grant of merger clearance by the CCI or fulfilment of 210 calendar days upper limit, whichever is earlier.[75] The grant of clearance by the CCI is a dual phased process.[76] The first phase is a *prima facie* inquiry, which is to be concluded within 30 days from the date of filing notice; however in reality, this never gets concluded before 60-90 days.[77] This is an indication of the minimum delay any transaction has to undergo once it becomes notifiable. This delay only gets further amplified if, on the basis of *prima facie* review, the tribunal is of the slight opinion that the transaction might cause AAEC. An affirmative opinion in this regard initiates a second phase review, which makes a minimum delay of 210 days inevitable.

[73] *Ibid.*
[74] *Supra* note 48.
[75] *Supra* note 4, S. 6 (2A).
[76] *Ibid,* S. 29.
[77] *Supra* note 2.

Secondly, regulatory uncertainty also breeds concerns related to security of investment, thereby deterring foreign entities from investing in the market. Absence of a definite control determination criterion even hampers free flow of investment within the domestic market. In addition, it furnishes CCI with excessive discretionary power to take *suo-moto* cognizance of any transaction, as and when deemed feasible.[78] Possibility of *suo moto* cognizance is not a mere speculation and is instead a reality with considerable past invocation. One such instance is the famous Jet-Etihad deal wherein a proposal was made by the latter to acquire 24% stake in Jet. The said investment fell well within the bounds of 25% exception provided under Schedule I of the Combination Regulations, and didn't even grant substantial directorial nomination rights or unwarranted privileges under CCA; but the CCI, through exercise of its *suo moto* powers still retained jurisdiction to review the deal.[79]

The problem is not limited to this, and a different definition of 'control' for each regulator only adds to the difficulty. Alongside causing complexity for the transacting parties, it brings a lot of uncertainty to the deal and holds potential of causing an adverse spiralling effect. As has been witnessed in the decision of SEBI in Jet-Etihad, regulators get influenced by decisions of their contemporaries and as a consequence, commence fresh investigation in a given case or reopen a predisposed one, depending upon the circumstances.

Thirdly, it compromises with interpretative consistency. Due to the lack of any strict guidelines or rules, the jurisprudence is developed on the basis of the interpretative discretion vested with the competition regulators.[80] However, in the absence of any clear precedential trail, even attempts towards maintenance of consistency are highly likely to go wayward and the recent history stands witness to the same. Therefore, in light of the failed attempts by CCI in the last five years to resolve uncertainty through interpretation, change at the primary level itself remains the most plausible resolution to the underlying issue.

Fourthly, it leads to imposition of hefty interest and penalties, owing to mismatch of timelines between the various market regulators.[81]CCI is particularly strict in terms of delay in filing requirements and numerous instances of fining corporate non-compliances can be noted in the

[78] *Supra* note 6, S. 20.
[79] *Supra* note 41.
[80] Charles A. Breer & Scot W. Anderson, *Regulation Without Rulemaking: The Force And Authority Of Informal Agency Action*, DAVIS GRAHAM & STUBB LLP, http://www.dgslaw.com/images/materials/379427.PDF.
[81] *Supra* note 48.

recent past. British retail giant Tesco[82] and travel site Thomas Cook[83] were recently fined Rs.3 Crore and Rs.1 Crore respectively for delay in combination filing. Interest payment to the affected parties is an even more problematic consideration.[84] The interest is accrued owing to contractual default on behalf of the notifying entity, which in effect is nothing but a consequence of regulatory timeline mismatch, especially between SEBI and CCI.

This is because even though processes under both the regulators start simultaneously, there have been instances in the past where acquirer had to pay penalties to SEBI or interest to the shareholders because of CCI's review taking longer than the due date of open offer under the Takeover Code.[85] Under the Takeover Code, an acquirer has to repay the shareholders within 15 days from the closure of open offer process and any delay in returning the money would invite payment of interest.[86] The shareholders who have tendered the shares cannot be paid, pending the regulatory approval of CCI, as otherwise it would amount to giving effect to combination. In the absence of any provision suspending the Takeover Code until the proceedings under CCI are concluded, interest has to be paid to the shareholders. *Lastly*, although not a substantial monetary burden but an unnecessary one irrespective for the otherwise exempted entities, the companies have to pay filing fees to the tune of Rs.15 Lakhs for Form I and Rs.50 Lakhs for Form II.[87] This amount is exclusive of the legal fees to be borne in the process of making such filings.

These are few of the many shortcomings posed by this vague regime which complicates doing business in India. Hence, in light of the aforementioned disadvantages, it is imperative that we explore possibilities which might help overcome these regulatory impediments and make our competition regulation framework more investor friendly and certain. In the concluding segment, an attempt will be made to flag off some of these viable alternatives which can be adopted by the competition regulator of India.

V. *OVERVIEW OF FOREIGN JURISDICTIONS: LESSONS TO BE LEARNT*

A. EUROPEAN UNION:

[82]*Tesco-Trent Acquisition*, Combination Registration No. C-2014/03/162, dated 27th May, 2014, available at http://www.cci.gov.in/sites/default/files/C-2014-03-162RO.pdf.
[83]*Thomas Cook-Sterling Resorts*, Combination Registration No. C-2014/02/153, dated 21st May 2014, available at http://www.cci.gov.in/sites/default/files/C-2014-02-153R.pdf.
[84] SEBI, *Frequently Asked Questions;* available athttp://www.sebi.gov.in/faq/takeover_faq.html.
[85]*Supra* note 48.
[86]*Supra* note 5, Reg. 16.
[87] Regulation 11, The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

In EU, notification of a transaction before the European Commission entails an extensive inquiry into the concept of concentration as provided under '*Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings*' ['Merger Regulations'].[88]The notification requirement stands triggered on satisfaction of two conditions[89];*firstly*, the concerned transaction should be a 'concentration' as per the definition provided under Article 3 of the Merger Regulations and *secondly*, it should meet the turnover threshold set out in Article 1 of the Merger Regulations. The assessment under Article 3 circles around the concept of 'control', and Article 3(1) at the outset identifies two kinds of concentrations; (a) Merger of independent undertakings and (b) Acquisition of control. The first kind is simple to understand and holds least relevance in context of the current analysis, whereas the second is highly relevant as it pertains to acquisition of control.

To aid interpretation of the concepts and nuances related to 'concentration', the EC released a Consolidated Jurisdictional Notice[90]('Jurisdictional Notice') in the year 2008. This notice is a comprehensive guidance tool for the purpose of interpretation, and derives heavily from the past experience of European Commission['EC'] in dealing with such similar issues.[91]Article 3(2) defines control to mean the '*possibility of exercising decisive influence on an undertaking*'. By implication it means that showing an effective decisive influence is the only requirement, and whether or not such influence is actually exercised becomes irrelevant.

A comprehensive look at the EU premerger notification policy makes it evident that the Indian regime is modelled on similar lines. Most control related nuances being similar in India to the EU, the disparity lies only with respect to the uncertainty that plagues the Indian competition practice. The Merger Regulations framed by the EC, supplemented with the Jurisdictional Notice, provide an elaborate understanding of control and give minimal leeway to the regulators in terms of interpretation of the concept. While the Jurisdictional Notice is not a legally binding document, it reflects the EC's decisional practice and views on key aspects like control, and therefore plays an important role in bringing certainty to the regime.[92]

India lacks any such elaborate legal framework, thereby making it imperative for the regulators to take cognizance of the same and attempt to redress it by taking cues from EC's framework. The

[88]Council Regulation on the Control of Concentrations between Undertakings, (EC) No. 139/2004, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN.
[89]Ibid, Article 1.
[90] European Commission, *Commission Consolidated Jurisdictional Notice*, OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES, OJ C 95/1, (16th April 2008), http://eur-lex.europa.eu/LexUriServ/Lex UriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF.
[91]VAN BAEL & BELLIS, COMPETITION LAW OF THE EUROPEAN COMMUNITY 645 (5th ed. 2009).
[92]*Ibid*, p. 647.

Jurisdictional Notice expounds on the concept of control for almost twenty-five pages[93]and seeks to envisage all possible scenarios that can arise in any given situation, followed by the most plausible interpretation of law to suit the given context. Therefore it becomes important that CCI borrow from this pivotal document and publish similar guidelines that are adapted to the Indian context in order to streamline the regime in India.

B. UNITED STATES:

The US Competition Law regime began to take shape from 1890 onwards and consists of three core anti-trust legislations in the form of Sherman Act[94], Federal Trade Commission Act[95] ('FTC') and Clayton Act.[96] They are regularly altered by passing of amendments/improvements to the Act as and when deemed necessary. One such amendment to the Clayton act is the Hart-Scott-Rodino Antitrust Improvements Act 1976[97] ['HSR Act'], through which companies are now mandated to notify the government, on meeting of the 'size of transaction' and 'size of persons' tests, of their plans to effectuate a merger or acquisition of "voting securities" or "assets". It is exceedingly clear that, unlike India, alteration of 'control' or 'material influence' is not a necessary factor for notification under HSR Act. It is perhaps in this light that even the definition of control under HSR Act is highly disjointed from practical relevance, and does not even take into consideration *inter alia* the control that a minority shareholder can exercise owing to contractual covenants.[98]

However this otherwise extremely bizarre definition does not breed as much inadequacy in U.S.as it would in the Indian regime. A probable reason for this might be the framework of US antitrust laws that allow for a review of roughly all significant transactions, irrespective of them meeting the specified thresholds.[99]For a transaction to be challenged by the U.S. anti-trust agencies it need not necessarily be reportable under the HSR Act, and Section 7 of the Clayton Act facilitates challenging of any acquisition of stock or assets, notwithstanding fulfilment of the HSR Act

[93] Supra note 92.
[94] Sherman Act, 15 U.S.C. §§ 1–7 (1890).
[95] Federal Trade Commission Act, 15 U.S.C. §§ 1-45 (1914).
[96] Clayton Act 15 U.S.C. §§ 1-53 (1914).
[97] Hart-Scott-Rodino Antitrust Improvements Act, 90 Stat. 1394 title II, §202 (1976).
[98] Control is defined under the act to mean either of these conditions:
(a) holding 50% or more of the outstanding voting securities, or
(b) having rights to 50% or more of the profits, or
(c) having the right in the event of dissolution to 50 percent or more of the asset, or
(d) Power to designate 50% or more of the directors of an entity.
[99] Directorate For Financial And Enterprise Affairs Competition Committee, *Investigations Of Consummated And Non-Notifiable Mergers*, 5th February 2014, DAF/COMP/WP3/WD(2014)23.

reporting requirements. Besides, this challenge can be brought either before or after the transaction is consummated and numerous such instances in the past can be noted.[100]

In addition to the procedural scaffold, even at the fundamental level there are certain subsisting dissimilarities. Notification requirement in U.S. is limited to acquisition of *voting securities* and *assets*,[101]which by design exempts convertible securities' acquisition from its ambit, making the latter notifiable to FTC only on its conversion. This position is reasoned by putting across a bi-fold justification[102], wherein *firstly* it is asserted that even though acquisition of convertible securities might give some influence over the management, conversion price attached to the said security doesn't always make it an economically feasible prospect. And *secondly*, the voting rights entrusted through convertible security are highly speculative, depending highly upon conversion by fellow security owners.[103]However when the said rationales are juxtaposed with the ones acting as a basis for contrary position in India, the former seems quite absurd in the Indian context, for the reasons already discussed in the preceding segments.

The above discussion makes it exceedingly clear that U.S. pre-merger notification regime stands in complete contrast with its European and Indian counterparts. Whilst the latter two aim towards bringing certainty in the said regime through curbing of regulatory discretion, the former is modelled around the idea of giving complete regulatory independence. One possible rationalization can be the fact that U.S. is a comparatively mature jurisdiction, which sees an unparalleled judicial discipline being followed by its anti-trust agencies and hence can allow for regulatory independence, unlike other countries. Therefore, in light of the structural dissimilarity in the legal modelling of the laws in US and India, legal borrowing becomes highly restrictive and is limited to merely the inspiration and discipline with which FTC works towards maintaining a competitive market.

C. OTHER JURISDICTIONS:

Across the globe, notification to a competition regulator is approached in extremely diverse ways. Not all countries follow the notion of 'decisive influence' or 'control' and many like Ecuador, Egypt or Jordan require mandatory filing even for '*any level of minority shareholding*'.[104] Some countries like Pakistan, Ukraine and Mexico maintain '*percentage of voting right*' as the threshold, with figures varying from 10% in Pakistan to 35% in Mexico. Jurisdictions like Japan and South Korea however

[100]*FTC and State of Idaho v. St. Luke's Health Sys., Ltd.*, 1:12-cv-00560-BLW-REB.
[101] Hart-Scott Rodino Antitrust Improvements Act 1976, Chapter I, Sub-Chapter H,16 C.F.R. §§ 801.32 & 802.31.
[102]*Ibid*, Rules, Regulations, Statements and Interpretations.
[103]*Ibid.*
[104]*Supra* note 12, p. 207.

resort to more complex thresholds like '*ranking of the shares of acquirer in the target company*'.[105]Even configuration of the market has been adopted by a few jurisdictions like Moldova and Thailand as a triggering criterion. Finally some countries like New Zealand and Venezuela lie on the extreme end, wherein filing remains a voluntary activity and becomes essential only when anti-competitive practices might occur.[106]

In conclusion, high range of cross-country diversity in domestic implementation of the notification requirement illustrates the complexity that this matter entails. It is difficult to have a single criterion, which provides the certainty of a rigid threshold and also offer the flexibility needed to accommodate market realities. A balance needs to be struck way between rigid thresholds like shareholding/voting rights on one hand, and highly inclusive notions like 'control' and 'decisive influence' on the other. In order to identify transactions which in effect require the competition regulator's attention, India needs to restrict the ambit of its highly inclusive definition of 'control' and inculcate some stratum of certainty. Although developments of case laws do act as a form of guidance, release of a circular/guideline similar to the EU Jurisdictional notice might be a much needed step in the process of infusing the required level of certainty to reach this ideal mid position.

VI. CONCLUSION

International Competition Network,an informal virtual forum that hosts annual conventions, round table conferences and workshops to facilitate a dynamic dialogue on various competition policy issues amongst competition regulators from across the globe,after thorough analysis of practices adopted by countries, has formulated a set of guiding principles and best practices for merger notification and assessment process.[107] The broad themes advanced includes *inter alia* employment of regulating agency's resources in the most efficient manner, clear communication of pre-demarcated standard with reference to reporting obligations of the merging parties, and prevention of needless costs related with notification process -et al.[108] Analysis of India's combination notification framework in the previous segments highlights its inferior performance, vis-à-vis these broadprinciples, on almost every front. It is apparent that these objectives at times might act as competing interests thereby making their all-inclusive accomplishmenta complex

[105]*Ibid.*
[106]*Ibid*, p.208.
[107]*The Guiding Principles and Recommended Practices for Merger Notification and Review Procedures*, INTERNATIONAL COMPETITION NETWORK; available at http://www.internationalcompetitionnetwork.org/index.php/en/publication/294.
[108]*Defining "Merger" Transactions for Purposes of Merger Review*, INTERNATIONAL COMPETITION NETWORK; available at http://www.internationalcompetitionnetwork.org/uploads/library/doc327.pdf.

issue, but failure to perform on allthe fronts signifiesthe presence of fundamental flaws within the framework itself, and therefore requiring overhaul.

With SEBI having floated a discussion paper, advancing two alternatives to choose from, it is high time that the CCI also takes note of the existing ambiguity and attempts to remedy it. Although a numeric threshold based bright line testappears unsuitable in the Indian context,a list of protective and proactive rights, tailored according to the CCI's objectives, might act as a helpful cue. These lists acquire particular significancein light of the practicalunfeasibility that is associated witha concrete definition of 'control', which by design necessitates some level of discretion to be accorded to the regulator. A list of protective and proactive rights can work towards decreasing the level of discretion possessed by the CCI and can help bring certainty to the regime.

These lists aren't intended to be exhaustive, and rightly so. Their primary purpose is to act as broad guiding principles for identifying, from a regulatory perspective, the transactions that are anti-competitive and distinguish them from the ones which are not. It is however important to note that a thorough schematic assessment of these lists helps one realize the close resemblance it has with the underlying idea behind EU Jurisdictional Notice. On one hand where the Jurisdictional Notice elaborates on all the existing legal possibilities vis-à-vis acquisition of control, followed by recommendations to determine whether a given scenario qualifies as control or not; these lists, on the other, seeks to achieve the same purpose only by an alternative way of streamlining the scenarios in separate lists. Therefore opting either of the alternatives wouldn't result in any ground breaking difference, as both are based on analogous theoretical scheme and mandatorily require substantial modifications before successful implementation in Indian Competition context. However precedence should be given to Jurisdictional Notice owing to ancillary advantages it offers, as not only will it be an intra-discipline transplant but will also carry with itself the benefit of a decade long evolution it has undergone on account of its successful implementation in another jurisdiction.

The need for EU Jurisdictional Notice modelled guidelines becomes more pronounced in light of the regulatory landscape in India. The dearth of judicial discipline amongst the prime regulators in India is common knowledge. Time and again, tribunals and courts have chided the regulating authorities, be it CCI[109] or SEBI[110], for ignoring the ratios laid down in orders already passed by their counterparts and acting in an arbitrary manner according to their own whims and fancies.

[109]*Hiranandani Hospital v. CCI*, Appeal no. 19/2014; COMPAT order where CCI was chided for its failure to rely on the precedents in determination of appellant company's turnover.
[110] R.M. Shares Trading Private Limited. v. SEBI, Appeal No.204 of 2014.

This practice is not peculiar to the competition and securities regulator alone but is quite widespread. Supreme Court in one of its landmark cases noted a similar practice for tax regulators and held that there were no legitimate grounds for not following an already passed order, unless a competent court already suspended it.[111]

In spite of these constant rebukes from superior authorities, there hasn't been much change in the approach adopted by regulators and instances of judicial indiscipline are still quite rampant. Regulators, on having failed to determine the concrete reasons behind deviation in conduct, have not effected any change in policy and therefore it is safe to presume that similar behavior is likely to continue unless the status quo is changed. Introduction of EU modelled framework, hence, might act as this policy change; which need not necessarily be binding in nature and can rather act as guidance notes or interpretative tools. They are likely to be better interpretative tools because, unlike the decisions of tribunals, which vary depending upon the inclinations of the presiding authorities, these neutral guidance notes will demand constant abidance without any discrimination.

In terms of the content of the guidelines, an objective criterion of control determination will be self-defeating owing to reasons already discussed in the preceding segments. As a result, successful achievement of stated objectives necessitates a subjective criterion. Subjectivity here doesn't signify the functional status quo, wherein excessive discretionary powers are entrusted with the regulatory authorities or standards of conduct alignment are paralyzed. Instead it means delineating all legal possibilities and CCI's response to the same, in order to considerably limit the wide discretion that the regulators enjoy. To all intents and purposes it will overcome the existing incoherence and make decisional congruence more possible.

Past experiences how that these guiding notes, despite being non-binding in nature, acquire some reverence over a considerable period of time and are gradually even considered by courts when passing orders. One such instance is the recent judgment by SEBI where the adjudicating officers placed express reliance on the SEBIFAQs and acknowledged the need of using these interpretative notes in adjudication, as long as they are transparent and applied consistently without discrimination.[112] This reliance was shown in spite of the introductory paragraphs of these FAQs

[111] Union of India And Others v. Kamlakshi Finance Corporation, AIR 1992 SC 71.

[112]*Lorgan Lifestyle Limited*, CCI order no. WTM/PS/43/CFD/OCT/2014, dated 30th October, 2014; available at http://www.sebi.gov.in/cms/sebi_data/attachdocs/1414666366596.pdf.

explicitly stating that "it should not be regarded as an interpretation of law nor be treated as a binding opinion/guidance".

It needs to be understood that the current stance of the regulators in allowing slow evolution of the concept of 'control' through practice, as opposed to looking at other jurisdictions for lessons and making prompt modifications, is fundamentally flawed. Even though CCI's skepticism in looking at other jurisdictions does carry some merit, owing to certain inherent problems in the concept of legal transplant itself,[113] but the problems associated with transplant can easily be overcome through undertaking of necessary alterations during the actual implementation of law. Evolution as a process entails making mistakes and subsequently learning from them, however in this process, interests of innocent parties are highly likely to be prejudiced. Therefore, rather than making the same mistake, it is more prudent to learn from the mistakes already made in mature jurisdictions and transplant the laws after making essential alteration for its effective implementation in the Indian context. Not only will this save the time and resources of the regulator but also protect innocent parties from unnecessary prejudice, and facilitate the ease of doing business in the country.

In conclusion, it is reiterated that the current law provides for a broad principle governing the control regime and as per a widely accepted belief precise rules more consistently regulate transactions than broad principles.[114]Broad principles merely promote vagueness, which in effect hinders predictability and certainty, and serves a great injustice to investors. Redressing these thus becomes need of the hour in order to make the regime more investor friendly.

[113] A. Watson, Legal Transplants and European Private Law, 4 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (December 2000).
[114] Braithwaite, John Bradford, *Rules and Principles: A Theory of Legal Certainty*, AUSTRALIAN JOURNAL OF LEGAL PHILOSOPHY,Vol. 27, 47-82 (2002).