



## Definitions as prescribed in SEBI Takeover Regulations

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

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

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

The term acquirer can be divided into following :

#### I. Any person

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

#### II. Who directly or indirectly

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

#### III. Acquires or agrees to acquire

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

#### IV. Shares, voting rights or control over target company

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

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

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

the decision making powers of the company.

**Control** : The term control has been defined under regulation 2(1)(c) of the SEBI Takeover Regulations which states that “Control” shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.

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

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

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

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

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

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

“Control” shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.

#### Explanation :

- (i) Where there are two or more persons in control over the target company, the cesser of any one of such persons from such control shall not be deemed to be a change in control of management nor shall any change in the nature and quantum of control amongst them constitute change in control of management - Provided that the transfer from joint control to sole control is effected in accordance with clause (e) of sub-regulation (1) of regulation 3.
- (ii) If consequent upon change in control of the target company in accordance with regulation 3, the control acquired is equal to or less than the control exercised by person(s) prior to such acquisition of control, such control shall not be deemed to be a change in control.

#### Analysis

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

“Control” shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.

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

#### a. The word “includes”

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

#### b. Right to appoint the majority of directors

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

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

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

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





**or in concert, directly or indirectly**

The control is also defined to include the exercise of power to control the management or policy decisions. This power to exercise control can be exercised individually or along with any person, directly or indirectly. The acquirer can acquire the control on its own or along with the persons who share the common objective of acquisition of share or voting rights or control over the target company.

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

**d. By virtue of :**

- i) Shareholding;
- ii) Management rights
- iii) Shareholders agreement
- iv) Voting agreement, or
- v) Any other manner

The power to appoint the majority of directors or to control the management or policy decisions can be vested through majority shareholding or the management rights or voting agreement or any shareholders agreement or any other manner.

**e. In the following circumstances, it shall not be deemed to be change in control of management :**

- i. The cesser of any one person from the group of person exercising the control over the company.
- ii. Change in the nature and quantum of control amongst the persons exercising the control over the company.
- iii. Change in control in accordance with regulation 3 where the control acquired is equal to or less than the control exercised by person(s) prior to such acquisition of control.

However, the transfer from the joint control to sole control shall be deemed to be change in control except where such transfer takes place in accordance with regulation 3 of the SEBI Takeover Regulations.

**3. PROMOTER – [REGULATION 2(h)]**

The term promoter and promoter group has been specifically defined under SEBI Takeover Regulations. However, there is not one definition of promoter or promoters. The term has been defined at three places which have their application in different circumstances. Through this section, we have endeavored to analyze and explain the scope of each definition and its application. At the outset, the term promoter and promoter group has been defined under regulation 2 (h). As per this regulation, the term promoter means-

**I. any person who is in control of the target company.**

Any person, who is in control over the Target Company, is considered as the promoter of the Company. Now, the term control has been defined under regulation 2 (1) (c) of the regulations, which says that "control" shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons

acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner. The factors constituting control has been further defined in the matter of **Ashwin K Doshi (25/10/2002-SAT)**, which states that the expression „control. in regulation 12 mean effective control, in other words control must be taken to mean de facto control also and not de jure control alone. Therefore, merely holding of shares cannot be the sole criteria to determine control. A person may be in control of the company even if he does not hold any shares.

**II. Any person named as promoter in any offer document of the target company or any shareholding pattern filed by the target company with the stock exchanges pursuant to the Listing Agreement, whichever is later.**

This regulation seeks to include those persons in the category of the promoters who are shown by the companies as the promoter in the document filed by the company itself. The relevant documents for defining the promoters are offer document and shareholding pattern, whichever is later.

**III. And includes any person belonging to the promoter group as mentioned in Explanation I.**

Further, the definition also treats the person falling under the promoter group as promoters. Thus, it can be said that there is no differentiation between the promoters and promoters group.

*Provided that a director or officer of the target company or any other person shall not be a Promoter, if he is acting as such merely in his professional capacity.*

The definition specifically excludes professional directors e.g. those appointed by Banks/FIs from its scope.

**Explanation I :** For the purpose of this clause, 'promoter group' shall include :

- a) in case promoter is a body corporate -
  - i) a subsidiary or holding company of that body corporate;
  - ii) any company in which the promoter holds 10% or more of the equity capital or which holds 10% or more of the equity capital of the promoter;
  - iii) any company in which a group of individuals or companies or combinations thereof who holds 20% or more of the equity capital in that company also holds 20% or more of the equity capital of the target company; and
- b) in case the promoter is an individual -
  - i) the spouse of that person, or any parent, brother, sister or child of that person or of his spouse;
  - ii) any company in which 10% or more of the share capital is held by the promoter or an immediate relative of the promoter or a firm or HUF in which the promoter or any one or more of his immediate relative is a member;
  - iii) any company in which a company specified in (i) above, holds 10% or more, of the share capital; and
  - iv) any HUF or firm in which the aggregate share of the promoter and his immediate relatives is equal to or more than 10% of the total.

**Explanation II :** Financial Institutions, Scheduled Banks, Foreign Institutional Investors (FIs) and Mutual Funds shall not be deemed to be a promoter or promoter group merely by virtue of their shareholding. Provided that the Financial Institutions,

Scheduled Banks and Foreign Institutional Investors (FIs) shall be treated as promoters or promoter group for the subsidiaries or companies promoted by them or mutual funds sponsored by them."

This is the general definition of promoter and promoter group, which is applicable on all provisions of SEBI Takeover Regulations unless specifically defined otherwise. Further, under regulation 3 (1) (e) (iii) which deals with inter-se transfer amongst promoters, the term qualifying promoters has been used and it has been defined specifically therein. Therefore, for the purpose of regulation 3 (1) (e) (iii), this definition shall be resorted to.

Furthermore, as per the newly inserted regulation 8A vide amendment dated 28.01.2009, which deals with disclosure of pledge shares, for the purpose of regulation 8A, the term promoters and promoter group shall have the same meaning as is assigned to them under Clause 40A of the Listing Agreement.

**4. PERSON ACTING IN CONCERT – [REGULATION 2(1)(e)]**

The term Person Acting in Concert has been defined in two parts. In the first part, the term has been defined in the general terms.

**• Commonality of objective**

The persons who are acting in concert on the basis of commonality of objective of acquisition of shares or voting rights or gaining control over the target company are considered as PAC. The commonality can be achieved pursuant to any agreement or any understanding entered by such person. The agreement or understanding can be formal or may be informal. There must be an element of co-operation. This cooperation could be extended in several ways, directly or indirectly, or through an agreement, formal or informal. Further, the term common objective has been restricted by the subsequent words in the sense that the common objective shall be the substantial acquisition of shares or voting rights or gaining control over the target Company.

Therefore, it becomes clear that the two persons must share a common intention of substantial acquisition of shares or voting rights to be treated as persons acting in concert.

**• Business Relations**

Further, the code identifies persons who virtue of their business relations is presumed to be person acting in concert. The responsibility has been cast on these persons to show that the fact is otherwise in given situation.

The second part of the definition lists out certain instances where two persons will be deemed to be persons acting in concert. Therefore, where first part is general, second part is specific in nature. The section part of the definition lists out certain instances where two persons will be deemed to be .person acting in concert..

**EXAMPLES**

- A company has been defined to be in concert with its directors, likewise a merchant banker with his clients who are acquirers, banks, financial advisors, etc.
- If the acquirer is a holding company, then subsidiary company shall be deemed to be acting in concert with it.
- A Sponsor of mutual fund could be presumed to be acting in concert with the Trustee Company or asset Management Company of the same mutual fund.
- Venture capital with its sponsors is deemed to



be acting in concert.

- Portfolio managers with their clients and so many other instances.

**PAC VS. DEEMED PAC**

The term “Person Acting in Concert” has been defined in two parts. In the first part, the term has been defined in the general terms whereas in the second part certain instances have been specifically listed out where the two persons will be deemed as PAC, unless contrary is established. These are called **Deemed PAC**.

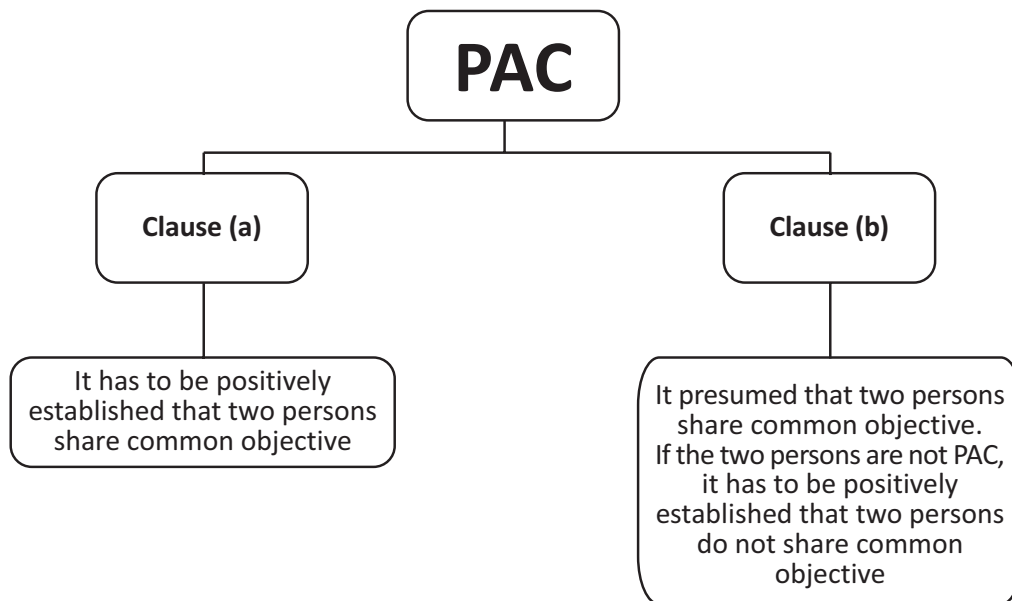
However, it is of utmost importance to mention here that second part starts with the words “without

prejudice to the generality of this definition, the following persons will be deemed to be persons acting in concert with other persons in the same category, unless the contrary is established”. It means that the first part will prevail over the second part. Therefore, at the first instance, the persons mentioned thereafter will be deemed to be person acting in concert as suggested by the words “unless the contrary is established”. However, notwithstanding the fact that two persons fall in one or other category of second part of the definition, it has nevertheless to be established that they share common objective. This intention of the law-makers has been made clear by the starting words of second part i.e. “without

prejudice to the generality of this definition”.

*Therefore, if the two persons does not share common objective of substantial acquisition of shares or voting rights or acquisition of control, they will not be treated as persons acting in concert even if they fall in one or the other category of the second part of the definition.*

Therefore, the main difference between the persons not falling in the second part of the definition and person falling in the second part of the definition is that in the former case it is to be positively established that two persons share common objective whereas in the latter case this presumption is already there and it has to be rebutted that the two persons does not share common objective.



**Query : Whether to be a person acting in concert one need to be a relative?**

**Answer :** No, to be a person acting in concert one need not be a relative; even strangers can act in concert. The main test of determining Persons Acting in Concert is as to whether there is a commonality of objective and community of interest. This interpretation has been substantiated in the matter of **Kishore Rajaram Chhabria (01/08/2003) - SAT**.

**Query : Whether there is no hard and fast rule that a promoter could never be an acquirer or person acting in concert?**

**Answer :** It was decided in **Modi Spg. & Wvg. Mills Co. Ltd. v. SEBI (SAT - 09/11/2001)** that if a promoter acquires or agrees to acquire shares or voting rights or gains control over Target Company, he can be considered as an acquirer who in turn would be subject to provisions of regulation 11. A promoter need not be an acquirer automatically and it is conduct of party, which decides its identity.

**5. OFFER PERIOD - [REGULATION 2(1)(f)]**

“Offer period” means the period between the date of entering into Memorandum of Understanding or the public announcement, as the case may be and the date of completion of offer formalities relating

to the offer made under these regulations.

**Analysis**

In general, Offer Period means the time interval between the date of opening of offer and the date of closing of offer. In other words, Offer Period means the period for which the Offer remains open for the acceptance by those to whom it is made.

However, the term Offer Period has been assigned a different meaning in SEBI Takeover Regulations and assumed a greater importance for the correct interpretation of the provisions of regulation 20(7), 22(7), 22(8) and 23(1) of SEBI Takeover Regulations. In accordance with SEBI Takeover Regulations, the term can be analyzed in the following manner:

**i. Where the open offer has been made consequent to the acquisition of shares pursuant to entering into memorandum of understanding**

The Offer Period in case where the Open Offer has been made consequent to entering into Memorandum of understanding means the time period between the date of entering into the understanding and completion of all the formalities relating to the open offer under SEBI Takeover Regulations i.e. on the issue of final report by the Manager to the Offer to SEBI in terms of regulation

24(7) of SEBI Takeover Regulations.

The similar interpretation was also given in the matter of **Winsome International Limited (14/08/2009) - Adjudicating Officer** wherein Adjudicating Officer held that the Offer Period where the Open Offer has been made consequent to the acquisition of shares under the Share Purchase Agreement would start from the date of Share Purchase Agreement and closes on the date of completion of all relating formalities relating to open offer as envisaged under the said regulations and accordingly in terms of regulation 22(7) of SEBI Takeover Regulations, the acquirer is prohibited from being appointed on the Board of the Target Company from the date of entering into the Share Purchase Agreement.

**ii. Where the open offer has been made consequent to the acquisition of shares not through the Memorandum of understanding**

In such a circumstance, the Offer Period will start from the date of public announcement made in accordance with regulation 15 of SEBI Takeover Regulations till the completion of all the formalities relating to open offer i.e. on the issue of final report by the Manager to the Offer to SEBI in terms of regulation 24(7) of SEBI Takeover Regulations.

