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Beyond Shareholding: Rethinking “Control” under the SEBI Takeover Regulations and Its Implications for Indian M&A

~TATHAGAT MEHTA

ABSTRACT

The concept of “control” under Indian the takeover law extends beyond to the percentage of shares held by an acquirer. Regulation 2(1)(e) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 recognises control through management rights, shareholders’ agreements, voting arrangements and other means. This broad approach is increasingly significant in modern M&A, whereby minority investments may be accompanied by board representation, veto rights and other governance arrangements.

The central question examined in this paper is when contractual or governance influence becomes “control” sufficient to trigger an open-offer obligation. The paper adopts a doctrinal and analytical approach, examining the SAST Regulations, SEBI decisions, Securities Appellate Tribunal (“SAT”) jurisprudence and relevant regulatory materials, alongside academic commentary on takeover law.

The analysis demonstrates that neither shareholding nor individual contractual rights can, by themselves, provide a complete answer. *Subhkam Ventures* illustrates the difficulty of distinguishing protective rights from substantive control. The paper therefore argues for a structured, substance-based approach that considers the nature and cumulative effect of governance rights while preserving SEBI’s ability to address indirect forms of control. Greater clarity would provide investors and M&A parties with more predictable parameters without weakening protection for public shareholders.

1. INTRODUCTION

1.1. BACKGROUND

In a takeover of a listed company, the most obvious question that lies is that how many shares an acquirer is purchasing. The Indian takeover law, however, asks a

broader question: what power is actually being acquired? A transaction may involve only a minority shareholding and yet confer significant influence over the management or policies of the target. Shareholding, therefore, does not always tell the true whole story.

The Securities and Exchange Board of India (“SEBI”) (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (“SAST Regulations”) reflect this to wider understanding. Regulation 2(1)(e) defines “control” which includes the right to appoint majority of directors or the ability to control management or policy decisions, directly or indirectly, through shareholding, management rights, shareholders’ agreements, voting agreements, or otherwise. Regulation 4 further recognises acquisition of control as an independent basis for triggering an open offer obligation.¹ The breadth of this definition is deliberate. It seeks to prevent an acquirer from obtaining the substance of control without formally acquiring a controlling shareholding.

This has become increasingly relevant in the modern M&A transactions. Minority investments are often accompanied by board nomination rights, reserved matters, veto rights, affirmative rights and detailed shareholders’ agreements. Such arrangements may be commercially necessary. They may also raise an important regulatory question. At what point does protection of an investment become control over the company?

1.2. PROBLEM STATEMENT

The difficulty lies in drawing that line.

An investor may acquire a minority stake while may still obtain the right to nominate directors, approve certain strategic decisions, restrict changes to the company’s business or exercise vetoes over specified matters. Some of the rights merely protect the investor against any fundamental changes that could diminish its investment. Others may give the investor a meaningful ability to influence how the company is managed.

Indian takeover jurisprudence has struggled with this distinction. In *Subhkam Ventures (I) Pvt. Ltd. v. SEBI*, the Securities Appellate Tribunal (“SAT”) considered whether the contractual rights held by a minority investor amounted to control and distinguished between proactive control and reactive or protective rights.² The

¹ Sec. & Exch. Bd. of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, reg. 2(1)(e), 4, amended by Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) (Amendment) Regulations, 2025 (retaining the broad definition of “control” while continuing to treat acquisition of control as an independent takeover trigger)

² *Subhkam Ventures (I) Private Limited v. SEBI*, Appeal No. 8 of 2009, paras. 9–10 (Securities Appellate Trib. Jan. 15, 2010).

decision became an important reference point in the debate over “negative control.” But the question has not yet disappeared. SEBI has subsequently continued to examine control on a case-by-case basis, and its own regulatory materials have acknowledged the difficulty of identifying sufficiently clear boundaries for control.³

The issue is therefore more than a technical question of securities law as it directly affects M&A structuring. Uncertainty over whether a particular governance right constitute control can influence negotiations, transaction documentation, valuation, regulatory approvals and the timing of closing.

1.3. RESEARCH QUESTIONS

Against this background, this paper examines three main questions:

1. How should “control” under the SAST Regulations be understood beyond ownership of shares?
2. How have SEBI and SAT approached contractual and governance rights in determining whether control has been acquired?
3. Does the existing approach provide sufficient certainty for structuring Indian M&A transactions?

The paper particularly examines the boundary between protective rights and substantive control. This boundary is crucial. A definition that is too narrow may permit regulatory avoidance and the one that is too uncertain may make legitimate minority investments unnecessarily difficult.

1.4. METHODOLOGY AND SCOPE

The paper adopts a doctrinal and analytical methodology. It examines the SAST Regulations, SEBI orders, SAT decisions and relevant Supreme Court jurisprudence. It also draws upon SEBI’s Takeover Regulations Advisory Committee Report, SEBI consultation materials, academic literature and comparative takeover-law scholarship.

³ Sec. & Exch. Bd. of India, *Discussion Paper on Review of Definition of Control under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011* (2016) (discussing the need for clearer boundaries and possible approaches to protective rights); see also Sec. & Exch. Bd. of India, *Report of the Takeover Regulations Advisory Committee* (July 19, 2010).

The analysis focuses principally on the minority investments, board rights, veto and reserved matters, shareholders' agreements and other contractual arrangements capable of conferring any significant influence. The paper does not treat every form of corporate influence as "control." Instead, it asks a narrower question: when do contractual or governance rights become sufficiently substantive to trigger the takeover consequences attached to a change of control?

The paper ultimately argues that shareholding percentages alone cannot provide an adequate test. At the same time, an expansive and uncertain concept of control can create genuine difficulties for M&A transactions. What is needed is not a weaker takeover regime, but a more predictable, substance-based framework for distinguishing the legitimate investor protections from rights that effectively confer control.

2. THE CONCEPTUAL AND LEGAL FRAMEWORK OF "CONTROL"

2.1. CONTROL UNDER THE SAST REGULATIONS

The concept of "control" occupies a central position in the Indian takeover regulation. It is also the regulation's most difficult concepts to apply in practice. Regulation 2(1)(e) of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("SAST Regulations") defines control to include the right to appoint majority of directors or the ability to control management or policy decisions, whether directly or indirectly. This definition expressly recognises several possible sources of control, including shareholding, management rights, shareholders' agreements, voting agreements and, significantly, control exercised "in any other manner."⁴

The wording is important. Control is not tied to a particular percentage of shares. Nor is it confined to a formal ownership. The provision is deliberately left open-ended because corporate control can be acquired through arrangements that do not fit neatly within a numerical threshold. SEBI itself had acknowledged this difficulty. In 2016, it considered introducing bright-line tests precisely because determining control on the facts of each case had generated differing views and regulatory uncertainty.⁵ Ultimately, however, in 2017, SEBI decided to retain the existing definition and continue with case-by-case assessment.⁶

⁴ Securities & Exch. Bd. of India (Substantial Acquisition of Shares & Takeovers) Regulations, 2011, reg. 2(1)(e), as amended through Dec. 5, 2025. SEBI's current regulations database records the SAST Regulations as last amended on December 5, 2025.

⁵ Securities & Exch. Bd. of India, *Discussion Paper on Brightline Tests for Acquisition of Control Under SEBI Takeover Regulations* (Mar. 14, 2016). SEBI stated that assessment of control required consideration of the facts and circumstances of each case and that this had resulted in differing views.

⁶ Securities & Exch. Bd. of India, *Press Release: Acquisition of "Control" Under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011* (Sept. 8, 2017). SEBI stated

The phrase “in any other manner” comes with a trade-off. It prevents the definition from becoming obsolete whenever parties devise a new contractual or governance mechanism for exercising influence. At the same time, it creates room for interpretation. Therefore, the phrase performs an important function.

The breadth of the definition is also considered consistent with the historical development of the Indian takeover regulation. The Takeover Regulations Advisory Committee recognised that control could not be easily reduced to a precise formula and recommended an inclusive approach that would be capable of addressing different forms of corporate control.⁷ The objective is straightforward: an acquirer should not be able to obtain the substance of control merely by avoiding a conventional majority in shareholding.

2.2. CONTROL AND THE OPEN-OFFER OBLIGATION

The importance of the definition becomes clearer when Regulation 4 is considered. Regulation 4 provides that no acquirer shall acquire control over a target company unless such acquirer makes a public announcement of an open offer in accordance with the SAST Regulations.⁸

This makes acquisition of control an independent regulatory trigger. An open offer may therefore become necessary even where the acquisition does not cross the ordinary shareholding threshold limit under Regulation 3. The distinction matters in modern M&A transactions, particularly where a minority investment is accompanied by substantial governance rights.

The underlying rationale here is shareholder protection. A change in control can alter the way a listed company is managed and the commercial environment in which its public shareholders hold their investment. The open-offer mechanism gives those shareholders an opportunity to exit rather than simply remain invested under a differently controlled organisation.⁹

Control, therefore, is not merely an internal corporate-law concept. Under the SAST Regulations, it also carries a direct market consequence.

that, following stakeholder consultation, it would retain the existing definition and continue determining control on a case-by-case basis.

⁷ Securities & Exch. Bd. of India, *Report of the Takeover Regulations Advisory Committee* (July 19, 2010); see also *Rhodia S.A. v. SEBI*, Appeal No. 28 of 2001, Order (Securities App. Trib. 2002) (discussing the broad and inclusive nature of the concept of control under the takeover regime).

⁸ Securities & Exch. Bd. of India (Substantial Acquisition of Shares & Takeovers) Regulations, 2011, reg. 4.

⁹ Securities & Exch. Bd. of India, *Report of the Takeover Regulations Advisory Committee* (July 19, 2010) (explaining the relationship between a change in control and the protection afforded to public shareholders).

2.3. CONTROL VS SHAREHOLDING

It is important to distinguish between ownership, voting power, governance rights, management influence and control. They may overlap but do not necessarily coincide.

A shareholder may own a substantial percentage of shares without possessing any meaningful control over the management or policy. Conversely, a minority investor may obtain contractual rights that may give them significant influence over strategic decisions. Board nomination rights, veto rights, reserved matters and shareholders' agreements can all become relevant.

Indian jurisprudence has recognised this broader understanding. In *Subhkam Ventures (I) Pvt. Ltd. v. SEBI*, SAT considered whether contractual rights held by a minority investor amounted to control and treated the ability to control the management or policy decisions as distinct from mere investment protection.¹⁰ Earlier decisions had similarly recognised that control could arise even through means other than shareholding and that the concept was not confined to legal ownership.¹¹

This distinction is particularly relevant to M&A. Modern transactions often separate economic ownership from governance power. A 20% investor with extensive contractual rights may raise a more difficult control question than a passive shareholder holding a larger stake. The percentage is only the starting point.

2.4. DE JURE AND DE FACTO CONTROL

The distinction between de jure and de facto control provides another useful lens.

De jure control refers to the legally conferred rights—for example, the contractual right to appoint a majority of directors. De facto control, by contrast, concerns the practical ability to influence management or policy decisions even without the formal legal authority. The latter is more difficult to identify because it depends heavily on the facts of the transaction and the structure of the target's ownership and governance.

¹⁰ *Subhkam Ventures (I) Pvt. Ltd. v. SEBI*, Appeal No. 8 of 2009, Order (Securities App. Trib. Jan. 15, 2010). The SAT considered whether the rights contained in the relevant share subscription and shareholders' agreement amounted to control.

¹¹ *Rhodia S.A. v. SEBI*, Appeal No. 28 of 2001, Order (Securities App. Trib. 2002); see also *Modipon Ltd. v. SEBI*, Appeal No. 34 of 2001, Order (Securities App. Trib. July 31, 2001). The SAT has recognised that control is not confined to the extent of shareholding and may be exercised through different means.

The historical approach of Indian takeover regulation supports looking beyond the formal legal rights. The Bhagwati Committee had observed that control could be exercised in different ways and that a rigid definition could narrow the effectiveness of the takeover regulation.¹² SEBI's later decision to retain the existing definition similarly reflects the preference for examining control on a case-by-case basis rather than adopting a purely numerical test.¹³

Yet this flexibility comes with a cost. A broad concept can capture genuine attempts to acquire control indirectly, but it can also create uncertainty for legitimate minority investments. That tension lies at the heart of the present debate.

Ultimately, the SAST Regulations adopt a substance-oriented conception of control. Shareholding matters, but it is not a decisive factor. What matters is the bundle of rights and the practical power attached to them. The difficult question and the one that later jurisprudence must answer is where legitimate investor protection ends and substantive control begins.

3. CONTROL THROUGH CONTRACTUAL AND GOVERNANCE RIGHTS

The modern M&A transaction does not always transfer control through shares alone. Increasingly, control is negotiated through the means of contracts. Board rights, vetoes, reserved matters and shareholder agreements can shape how a listed company is governed even where the investor remains a minority shareholder. This makes contractual and governance rights central to the meaning of “control” under the SAST Regulations. The difficulty is equally clear: not every investor protection is control. The challenge is knowing where the line falls.

3.1. BOARD APPOINTMENT RIGHTS

The right to appoint directors is one of the clearest indicators of potential control. Regulation 2(1)(e) expressly refers to the right of appointing majority directors.¹⁴ Where an investor can appoint or remove majority of the board, the case for control is relatively straightforward because board composition directly affects the management and policy decisions of the company.

The position is different where an investor has only one or two nominee directors. A minority board seat does not automatically confer control. In *Subhkam Ventures*

¹² Securities & Exch. Bd. of India, *Report of the Committee on Takeovers* (1997) (Bhagwati Committee Report).

¹³ Securities & Exch. Bd. of India, *Press Release: Acquisition of “Control” Under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011* (Sept. 8, 2017).

¹⁴ Securities & Exch. Bd. of India (Substantial Acquisition of Shares & Takeovers) Regulations, 2011, reg. 2(1)(e), as amended through Dec. 5, 2025.

(I) *Pvt. Ltd. v. SEBI*, SAT considered a situation in which the investor could nominate only one director to a ten-member board. It held that such a position, without any veto power or broader managerial authority, does not by itself amounts to control.¹⁵

This distinction is important. Board representation is not the same as board control. An investor may seek a nominee merely to monitor its investment and participate in governance. Majority appointment rights, however, are qualitatively different. They can place a investor in a position to determine the composition of the governing body itself.

3.2. AFFIRMATIVE AND NEGATIVE RIGHTS

The more difficult question concerns with veto and affirmative rights. These rights allow an investor to say “no” to particular decisions without necessarily allowing it to say “yes” to the decisions it prefers.

In *Subhkam Ventures*, the SAT treated several protective provisions including restrictions that concerned changes to the business plan, amendments to constitutional documents and appointment of key officers as safeguards for the investor rather than evidence of control.¹⁶ The Tribunal emphasised that the investor could prevent certain actions but could not make the company to adopt its preferred course of action.

That reasoning has made the distinction between positive control and negative control central to the debate. SEBI’s Takeover Regulations Advisory Committee, however, deliberately avoided adopting a blanket rule. It recognised that the same affirmative right could have very different implications depending upon the target company and surrounding circumstances. Whether such rights constitute control was therefore left to case-by-case assessment.¹⁷

This approach makes much more practical sense. A veto over a fundamental alteration of the company’s capital structure may be a legitimate protective measure. A right to approve annual business plans, senior management appointments, major borrowings or ordinary strategic decisions may go further. Context matters and so does the cumulative effect of the rights.

3.3. SHAREHOLDER’S AGREEMENTS

¹⁵ *Subhkam Ventures (I) Pvt. Ltd. v. SEBI*, Appeal No. 8 of 2009, Order ¶ 8 (Securities App. Trib. Jan. 15, 2010).

¹⁶ *Id.* ¶¶ 8–9.

¹⁷ Securities & Exch. Bd. of India, *Report of the Takeover Regulations Advisory Committee* 29 (July 19, 2010). The Committee expressly observed that whether affirmative rights amounted to control should be determined from the facts and circumstances of each case.

Shareholders' agreements are particularly important because they can reorganise corporate power without transferring a corresponding percentage of shares. Voting arrangements, board nomination rights, reserved matters and management provisions may collectively give an investor substantial influence over the target.

The SAST Regulations expressly recognise shareholders' and voting agreements as possible sources of control.¹⁸ This prevents parties from avoiding takeover regulation simply by placing control arrangements in a contract rather than in the shareholding structure.

At the same time, contractual protection is a normal feature of investment transactions. Financial investors may reasonably demand information rights, board representation and protection against fundamental corporate changes. Treating every contractual restriction as "control" would therefore be considered too broad.

The better question is what the agreement actually enables the investor to do. Does it merely protect the investment against exceptional events? Or does it give the investor continuing influence over management and policy? The distinction can be subtle.

3.4. MINORITY SHAREHOLDING AND STRATEGIC INFLUENCE

Minority ownership should therefore not be equated automatically with absence of control. A shareholder holding 15% or 20% may possess considerable practical influence where the remaining shareholding is fragmented, other shareholders rarely coordinate, and the investor has significant board or contractual rights.

This is particularly relevant in widely held listed companies. Voting power is not meaningful only in the abstract. Its practical value depends on how other shareholders may behave. An investor with a minority stake may, in certain circumstances, exercise influence disproportionate to its economic ownership.

SEBI has recognised the broader problem. Its 2016 discussion paper noted that several jurisdictions approach control through voting rights or the ability to influence board composition and company policy, while also considering whether India should adopt clearer "bright-line" tests.¹⁹ SEBI ultimately retained the existing case-by-case approach.²⁰

¹⁸ Securities & Exch. Bd. of India (Substantial Acquisition of Shares & Takeovers) Regulations, 2011, reg. 2(1)(e).

¹⁹ Securities & Exch. Bd. of India, *Discussion Paper on Brightline Tests for Acquisition of Control Under SEBI Takeover Regulations* ¶ 22 (Mar. 14, 2016).

²⁰ Securities & Exch. Bd. of India, *Press Release: Acquisition of "Control" Under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011* (Sept. 8, 2017). SEBI decided to retain the existing definition and continue with a case-by-case assessment of control.

The result is a framework that is flexible but also fact intensive. That flexibility can capture genuine forms of de facto control that a purely numerical test would miss. But it also leaves transactional parties with difficult questions during deal negotiations.

The better approach is therefore not to ask whether a single right constitutes control in isolation. The inquiry should consider the entire bundle of rights: board representation, veto powers, voting arrangements, management participation and the actual structure of the target's ownership. In M&A, control is often found not in one clause, but rather than in the combination.

4. JUDICIAL AND REGULATORY EVOLUTION OF “CONTROL”

The meaning of “control” under Indian takeover law has developed gradually. Earlier approaches often focused on identifiable ownership, voting rights and formal board control. Modern transactions, however, increasingly separate share ownership from governance power. The jurisprudence has therefore moved towards examining the nature and effect of the rights acquired, rather than relying only on shareholding percentages.

4.1. EARLY APPROACH TO CONTROL

The broader approach can be traced to the recognition that control may be exercised through means other than ownership. Regulation 2(1)(e) of the SAST Regulations consequently includes management rights, shareholders' agreements, voting agreements and control exercised “in any other manner.”²¹ The Takeover Regulations Advisory Committee similarly preferred a flexible, fact-specific approach rather than a purely numerical test.²²

This approach became particularly significant as Indian M&A transactions began using complex shareholder agreements and governance arrangements.

4.2. SUBHKAM VENTURES VS SEBI

Subhkam Ventures (I) Pvt. Ltd. v. SEBI remains central to the discussion. The investor held a minority stake but possessed several contractual rights, including rights concerning board representation and certain important corporate decisions. SAT examined whether these provisions amounted to control.

The Tribunal distinguished between protective rights and actual control. It observed that the ability to prevent certain actions does not necessarily mean that the investor

²¹ Securities & Exch. Bd. of India (Substantial Acquisition of Shares & Takeovers) Regulations, 2011, reg. 2(1)(e), as amended through Dec. 5, 2025.

²² Securities & Exch. Bd. of India, *Report of the Takeover Regulations Advisory Committee* 29 (July 19, 2010).

can control the company. On the facts, the rights were treated as protective rather than managerial.²³

The decision is important because it cautions against treating every veto as control. A minority investor needs some protection. Otherwise, ordinary investment structures could themselves become takeover triggers.

At the same time, *Subhkam* does not provide a universal formula. The effect of contractual rights must still be assessed in context.

4.3. SEBI AND THE FUTURE GROUP DECISIONS

SEBI's later decisions demonstrate a more fact-sensitive approach to contractual control. In matters involving the Future Group, SEBI examined whether contractual arrangements, governance rights and the surrounding transaction structure collectively created control rather than focusing only on the percentage of shares acquired.²⁴

This illustrates an important development. A right cannot always be assessed in isolation. A veto that appears protective when viewed separately may have a different significance when combined with board rights, management influence or other contractual arrangements.

SEBI has also recognised the uncertainty surrounding this area. Its 2016 discussion paper considered introducing bright-line tests for control, but after consultation SEBI decided to retain the existing definition and continue with a case-by-case approach.²⁵

4.4. ARCELORMITTAL INDIA PVT. LTD. VS SATISH KUMAR GUPTA: A COMPARATIVE CONCEPT

The Supreme Court's decision in *ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta* provides a useful conceptual comparison. Although the case arose under the Insolvency and Bankruptcy Code, 2016, rather than the SAST Regulations, the

²³ *Subhkam Ventures (I) Pvt. Ltd. v. SEBI*, Appeal No. 8 of 2009, Order ¶¶ 8–10 (Securities App. Trib. Jan. 15, 2010).

²⁴ *In re Future Corporate Resources Pvt. Ltd.*, SEBI Order (2021); *In re Amazon.com NV Investment Holdings LLC*, SEBI Order (Dec. 24, 2021).

²⁵ Securities & Exch. Bd. of India, *Discussion Paper on Brightline Tests for Acquisition of Control Under SEBI Takeover Regulations* (Mar. 14, 2016); Securities & Exch. Bd. of India, *Press Release: Acquisition of "Control" Under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011* (Sept. 8, 2017).

Court considered the distinction between formal legal rights and the practical ability to exercise management or decision-making influence.²⁶

The decision should not be directly transplanted into takeover law. The statutory purposes are different. Still, it reinforces a broader principle relevant to this paper: control is ultimately concerned with the substance of decision-making power, not merely its formal label.

4.5. EVOLUTION OF SEBI'S APPROACH

The jurisprudence therefore reflects a gradual movement:
legal rights → contractual rights → practical influence → effective control.

The present approach has an obvious advantage. It can capture sophisticated transaction structures that a simple shareholding threshold might miss. But flexibility comes with uncertainty.

The central difficulty remains distinguishing legitimate investor protection from substantive control. A board seat, veto right or reserved matter should not automatically trigger takeover obligations. But several such rights, operating together, may give an investor meaningful control over the company's affairs.

That is where Indian takeover jurisprudence remains unsettled. The answer cannot depend solely on the number of shares acquired. It must consider the bundle of rights and their practical effect.

5. THE M&A PROBLEM: WHERE DOES INFLUENCE BECOME CONTROL?

The difficulty with “control” becomes most visible when the transaction does not involve a straightforward acquisition of majority shares. Modern M&A often separates economic ownership from governance power. A minority investor may have substantial rights. A strategic investor may have relatively few shares but significant influence. Private-equity investors routinely negotiate protections that are commercially sensible but may, in combination, raise takeover concerns. The legal question is therefore not simply how much an investor owns. It is what the investor can actually do.

5.1. MINORITY INVESTMENTS

A minority investment does not necessarily mean an absence of control. Under Regulation 2(1)(e) of the SAST Regulations, control may arise through management rights, shareholders' agreements, voting agreements or other arrangements,

²⁶ *ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta*, (2019) 2 SCC 1, 48–50.

irrespective of the investor's percentage shareholding.²⁷ This becomes particularly relevant where the target has a dispersed ownership structure. A minority shareholder may exercise considerable influence if other shareholders are fragmented or rarely act together.

SEBI has itself recognised this changing ownership landscape. Its regulatory discussions have noted the increasing presence of institutional and private-equity investors and the emergence of listed companies without a clearly identifiable controlling shareholder.²⁸ The practical effect is important. A numerical test may identify ownership, but not necessarily actual influence.

This is why a 20% investment cannot automatically be treated as either control or no control. The surrounding rights matter. So does the structure of the target.

5.2. VETO RIGHTS AND RESERVED MATTERS

Veto rights present an even more difficult problem. An investor may require approval rights over major acquisitions, capital expenditure, borrowing, changes to business strategy or alterations to the company's constitutional documents. These rights can protect the value of an investment. They can also, in some circumstances, influence corporate policy.

The distinction should therefore be simple in principle:
Protection of investment $\neq$ control of the company.

In practice, however, the boundary is less clear.

The *Subhkam Ventures* decision illustrates the difficulty. SAT treated the relevant contractual restrictions as protective because the investor could prevent certain actions but could not direct the company to undertake a particular course of action.²⁹ SEBI's later consideration of "bright-line" tests shows that this distinction has not completely resolved the problem. In 2016, SEBI considered both a list of presumptively protective rights and numerical approaches to control, but ultimately retained the existing case-by-case framework.³⁰

²⁷ Securities & Exch. Bd. of India (Substantial Acquisition of Shares & Takeovers) Regulations, 2011, reg. 2(1)(e), as amended through Dec. 5, 2025.

²⁸ Securities & Exch. Bd. of India, *Discussion Paper on Brightline Tests for Acquisition of Control Under SEBI Takeover Regulations* (Mar. 14, 2016); Securities & Exch. Bd. of India, *Report on Review of the Regulatory Framework for Independent Directors and Related Matters* (discussing the changing ownership structure of listed companies).

²⁹ *Subhkam Ventures (I) Pvt. Ltd. v. SEBI*, Appeal No. 8 of 2009, Order ¶¶ 8–10 (Securities App. Trib. Jan. 15, 2010).

³⁰ Securities & Exch. Bd. of India, *Discussion Paper on Brightline Tests for Acquisition of Control Under SEBI Takeover Regulations* (Mar. 14, 2016). SEBI specifically considered an illustrative list of protective rights and numerical tests as possible alternatives to the existing case-by-case approach.

The better inquiry is therefore cumulative. A single veto over an extraordinary corporate event may be protective. A combination of vetoes over business plans, senior management, borrowing and ordinary strategic decisions may look very different. Context matters. The commercial substance of the rights matters more than their labels.

5.3. JOINT VENTURES AND CHANGE OF CONTROL

The problem becomes sharper in joint ventures. Two investors may initially exercise joint control through a shareholders' agreement, board rights and reserved matters. A later acquisition of one investor's interest may transfer that arrangement into sole control.

The SAST framework recognises control as capable of being exercised jointly. The question is therefore not merely whether an investor has acquired additional shares, but whether the transaction changes the nature of control. A shift from joint control to sole control can have consequences even where the underlying shareholding movement appears modest.³¹

This is particularly relevant when parties negotiate exit arrangements, call options, put options or rights to acquire additional governance powers. A transaction may begin as a minority investment and evolve into a control transaction through contractual mechanisms. The documentation matters from the beginning.

5.4. PRIVATE EQUITY TRANSACTIONS

Private-equity transactions illustrate the commercial tension especially well. A financial investor may reasonably seek board representation, information rights, exit rights and vetoes over fundamental decisions. These are normal investment protections. They are also precisely the types of rights that may attract scrutiny when considered collectively.

SEBI materials and transaction practice show that financial investors can distinguish between investment protection and management control.³² The problem arises when protective rights extend into operational or strategic decision-making. A right to prevent a fundamental change in the business may be defensible. A continuing right

³¹ Securities & Exch. Bd. of India (Substantial Acquisition of Shares & Takeovers) Regulations, 2011, reg. 2(1)(e); see also Securities & Exch. Bd. of India, *Report of the Takeover Regulations Advisory Committee* (July 19, 2010).

³² See Securities & Exch. Bd. of India, *Skanska Cementation India Ltd.*, Letter of Offer (discussing a private-equity investor's fundamental investor-protection rights and the distinction between such rights and management control).

to approve ordinary business plans or senior-management decisions is harder to characterise as merely protective.

Private equity investors therefore face a practical balancing exercise. Too few rights may leave the investment inadequately protected. Too many may create control risk.

5.5. DEAL STRUCTURING CONSEQUENCES

This uncertainty has direct consequences for M&A structuring. Parties must consider the control question while negotiating the transaction, not after the agreement has been signed.

The issue can affect the drafting of shareholders' agreements, board rights, reserved matters, closing conditions and regulatory approvals. It can also affect transaction timelines and the allocation of regulatory risk between the parties. If a proposed right may constitute control, the parties may need to restructure the right, seek regulatory advice, or factor the possibility of an open offer into the transaction economics.

The commercial consequence can be significant. An open offer may substantially increase the financial commitment associated with an acquisition. A party that initially intended to make a minority investment may therefore face a very different transaction if its contractual rights are treated as conferring control.

The uncertainty also affects negotiation. Parties may deliberately narrow veto rights, limit board representation or make certain protections applicable only to exceptional circumstances. Sometimes, the objective is not to reduce investor protection. It is simply to avoid crossing an uncertain regulatory line.

SEBI's decision to retain a case-by-case approach preserves flexibility and allows the regulator to address novel transaction structures.³³ But flexibility comes with a price: predictability. For M&A parties, the central challenge is therefore not knowing that control extends beyond shareholding. That principle is relatively clear. The harder question is identifying the precise point at which legitimate influence becomes regulatory control.

That unresolved boundary is where much of the present M&A uncertainty lies.

6. CRITICAL ANALYSIS: RETHINKING "CONTROL"

³³ Securities & Exch. Bd. of India, *Press Release: Acquisition of "Control" Under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011* (Sept. 8, 2017). SEBI stated that, after stakeholder consultation, it would retain the existing definition of control and continue determining control on a case-by-case basis.

The difficulty with the present concept of control is not simply that it is broad. The real concern is predictability. Regulation 2(1)(e) covers control over management or policy decisions and extends to rights exercised “in any other manner.”³⁴ This flexibility helps SEBI address sophisticated M&A structures, but it can also make the regulatory boundary uncertain.

6.1. IS THE EXISTING DEFINITION TOO BROAD?

A narrow definition based only on shareholding would be easy to circumvent. Modern transactions can transfer influence through board rights, vetoes and shareholders’ agreements. SEBI recognised this problem when it considered introducing bright-line tests in 2016, noting that the case-by-case approach had produced differing interpretations.³⁵ SEBI ultimately retained the existing definition.³⁶

The approach has an obvious advantage: it allows the regulator to examine the substance of a transaction. But the phrase “in any other manner” should prevent regulatory avoidance, not make every important contractual right potentially equivalent to control.

6.2. SHOULD NEGATIVE CONTROL AMOUNT TO CONTROL?

Negative control is particularly difficult. There is an argument for treating certain veto rights as control because an investor capable of blocking major strategic decisions may exercise substantial influence over the company.

But investors also need protection. A minority investor may legitimately require consent rights over fundamental changes, major asset sales or significant alterations to the company's structure. Treating every veto as control could make ordinary minority investments unnecessarily difficult.

Subhkam Ventures illustrates this tension. SAT treated the relevant rights as protective because the investor could prevent certain actions but could not direct the

³⁴ Securities & Exch. Bd. of India (Substantial Acquisition of Shares & Takeovers) Regulations, 2011, reg. 2(1)(e), as amended through Dec. 5, 2025.

³⁵ Securities & Exch. Bd. of India, *Discussion Paper on Brightline Tests for Acquisition of Control Under SEBI Takeover Regulations 2* (Mar. 14, 2016).

³⁶ Securities & Exch. Bd. of India, *Press Release: Acquisition of “Control” Under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011* (Sept. 8, 2017).

company's affairs.³⁷ The Supreme Court later kept the broader legal question open and did not treat the SAT decision as precedent.³⁸

The better approach is therefore neither “every veto is control” nor “no veto is control.” Context matters.

6.3. SUBSTANCE OVER FORM

The analysis should focus on the actual effect of the rights, rather than their contractual labels. Calling a provision a “protective right” should not automatically make it one.

A veto over an extraordinary corporate transaction may genuinely protect an investment. A veto extending to ordinary business plans, senior-management appointments and day-to-day strategy may look very different.

The rights should therefore be examined collectively, alongside the target's ownership structure and governance arrangements.³⁹

6.4. NEED FOR A MORE PREDICTABLE TEST

SEBI should retain its case-by-case approach but supplement it with a structured inquiry:

1. What rights have been acquired?
2. Are they protective or managerial?
3. Can they influence ordinary business decisions?
4. Can they materially affect strategic policy?
5. Can the investor appoint or remove key decision-makers?
6. What is the combined practical effect of these rights?

This would avoid both extremes. A purely numerical test may miss genuine control, while an entirely open-ended test may capture legitimate investor protections.

Ultimately, the question should not be whether an investor can simply say “no.” It should be whether the overall arrangement gives the investor meaningful power over the company's management or policy decisions. That is where investment protection begins to resemble control.

³⁷ *Subhkam Ventures (I) Pvt. Ltd. v. SEBI*, Appeal No. 8 of 2009, Order ¶¶ 8–10 (Securities App. Trib. Jan. 15, 2010).

³⁸ *SEBI v. Subhkam Ventures (I) Pvt. Ltd.*, Civil Appeal No. 3371 of 2010, Order (S.C. Nov. 16, 2011).

³⁹ Securities & Exch. Bd. of India, *Discussion Paper on Brightline Tests for Acquisition of Control Under SEBI Takeover Regulations* 7–9 (Mar. 14, 2016).

7. RECOMMENDATIONS

The existing framework does not require a complete overhaul. Its broad definition of “control” serves an important purpose by preventing parties from avoiding takeover obligations through complex contractual arrangements. The real need is greater clarity and predictability. SEBI can achieve this without weakening shareholder protection.

7.1. REGULATORY GUIDANCE

SEBI should provide more detailed guidance on when contractual and governance rights are likely to constitute control. Its 2016 discussion paper acknowledged the uncertainty surrounding the existing case-by-case approach, but SEBI ultimately decided to retain the existing definition.⁴⁰ Further guidance could build on that framework by providing practical examples of rights that are ordinarily protective and those that are more likely to confer control.

This would allow parties to identify regulatory concerns before finalising the transaction.

7.2. CATEGORISATION OF RIGHTS

A useful framework could distinguish between four broad categories of rights:

- Protective rights — rights intended primarily to safeguard an investment, such as consent over fundamental structural changes;
- Strategic rights — rights affecting significant business or policy decisions;
- Management rights — rights relating to ordinary business operations or senior management; and
- Decisive control rights — rights enabling an investor to determine board composition, management or fundamental policy.

Such categories should serve as guidelines, not rigid rules. The same right may have different implications depending on the transaction and the target's governance structure.⁴¹

⁴⁰ Securities & Exch. Bd. of India, *Discussion Paper on Brightline Tests for Acquisition of Control Under SEBI Takeover Regulations* (Mar. 14, 2016); Securities & Exch. Bd. of India, *Press Release: Acquisition of “Control” Under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011* (Sept. 8, 2017).

⁴¹ Securities & Exch. Bd. of India, *Report of the Takeover Regulations Advisory Committee* 29 (July 19, 2010); *Subhkam Ventures (I) Pvt. Ltd. v. SEBI*, Appeal No. 8 of 2009, Order ¶¶ 8–10 (Securities App. Trib. Jan. 15, 2010).

7.3. TRANSACTION SPECIFIC ASSESMENT

Control should be determined by examining the aggregate effect of the rights rather than focusing on one contractual provision in isolation. A single veto may merely protect an investment. The same veto, combined with extensive board rights, management participation and strategic approval rights, may produce effective control.

SEBI should therefore consider the overall governance arrangement, the target's shareholding pattern and the investor's practical ability to influence management or policy. This would preserve the flexibility of the existing framework while making the reasoning more transparent.⁴²

7.4. GREATER CERTAINTY FOR M&A TRANSACTIONS

Greater clarity would benefit investors, promoters, listed companies, private-equity funds, strategic acquirers and legal advisers. It would make the negotiation of shareholders' agreements easier and reduce the risk of an open-offer obligation emerging unexpectedly after the transaction has been structured.

The objective should not be to narrow the definition of control. Nor should it be to dilute takeover protection. The objective should be predictability.

SEBI should retain the ability to identify new forms of effective control while providing clearer indicators of when regulatory scrutiny is likely. This balance is particularly important in modern M&A, where economic ownership and governance rights are increasingly separated.

Ultimately, the principle should be straightforward: not every investor right amounts to control, but a combination of rights may do so. A clearer framework would make that distinction easier to identify, negotiate and comply with.

8. CONCLUSION

"Control" under Indian takeover law cannot be reduced to a percentage of shareholding. The SAST Regulations deliberately adopt a broader approach, recognising that control may arise through management rights, shareholders' agreements, voting arrangements and other forms of influence.

⁴² Securities & Exch. Bd. of India (Substantial Acquisition of Shares & Takeovers) Regulations, 2011, reg. 2(1)(e), as amended through Dec. 5, 2025; Securities & Exch. Bd. of India, *Discussion Paper on Brightline Tests for Acquisition of Control Under SEBI Takeover Regulations* 7–9 (Mar. 14, 2016).

This is increasingly important in modern M&A. Economic ownership and governance power do not always move together. A minority investor may hold limited shares but possess significant board, veto or strategic rights. A joint venture may similarly move from shared control to sole control without a simple majority-share transfer.

The jurisprudence reflects this complexity. *Subhkam Ventures* demonstrated that not every veto or protective covenant amounts to control. At the same time, the substance and practical effect of contractual rights remain important. The question is not simply what the agreement calls a right, but what that right actually enables the investor to do.

A broad concept of control is necessary to prevent parties from obtaining effective control while avoiding takeover obligations. Regulation 4 therefore treats acquisition of control as an independent trigger for the open-offer requirement. Yet excessive uncertainty can make legitimate minority investments and M&A structuring more difficult.

The appropriate solution is neither a purely numerical test nor an entirely open-ended standard. SEBI should adopt a structured, predictable and substance-based assessment that considers the nature of the rights, their purpose, their effect on management and policy, and their combined practical impact.

Ultimately, the objective should be simple: protect public shareholders without making legitimate M&A transactions unnecessarily uncertain. Economic ownership and control may differ. Takeover regulation must recognise that difference while providing parties with a clearer boundary between investor protection and actual control.