



## REASSESSING THE 'MATERIAL INFLUENCE' STANDARD UNDER THE COMPETITION (AMENDMENT) ACT 2023 AND ITS M&A IMPLICATIONS

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### ABSTRACT

*The Competition (Amendment) Act 2023 is arguably the most significant alteration to India's merger regulations in more than 20 years. However, of all the changes brought about by the Competition (Amendment) Act, 2023, the codification of 'material influence' as a criterion for determining 'control' under the Competition Act 2002 is arguably one of the most ambiguous, yet undoubtedly most significant, for M&A practitioners. The Amendment Act has undoubtedly changed the situation for minority investors, PE, and VC funds by acknowledging the lowest form of control as a foundation for mandatory notice. The 'material influence' test, its development in accordance with the Competition Commission of India's ("CCI") decisional practice, and its ramifications for M&A market players regarding compliance and ambiguity. I argue that in the absence of codified and non-exhaustive material, which qualifies as the test of material influence, the test would essentially turn out to be a tool of regulatory overreach as opposed to a tool of protection of competition and outlines a framework for the CCI regulation, which might address the above-mentioned ambiguity most appropriately.*

**Keywords:** Material Influence, Merger Control, Competition (Amendment) Act 2023, Minority Investment, Private Equity, Regulatory Overreach, Competition Commission of India.

### INTRODUCTION

The landscape of mergers and acquisitions (M&A) in India has witnessed a structural transformation following the Competition (Amendment) Act 2023 (Amendment Act), which received Presidential assent on 11 April 2023 and whose merger control provisions came into effect on 10 September 2024, alongside the Competition (Combinations) Regulations, 2024

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(Combination Regulations).<sup>1</sup> For decades, the concept of ‘control’ under the Competition Act 2002 (Act) was both foundational and frustratingly<sup>1</sup> vague, a term that the statute defined circularly, as controlling the ‘affairs or management’ of an enterprise, without specifying the nature or degree of rights that could constitute such control.<sup>2</sup> In practice, the CCI had long operated on the basis that control exists on a spectrum, and that the lowest degree of control, ‘material influence’, could be established through a constellation of factors including shareholding, board representation, veto rights, and financial arrangements. What was once a principle of decisional practice has now been elevated by the Amendment Act into a statutory standard.<sup>3</sup> The definition of ‘control’ now formally encompasses the ability to exercise material influence over the management, affairs, or strategic commercial decisions of an entity or a group of entities. This codification may seem to be a limited harmonisation of legislative language with CCI practice. In truth, this is a seismic shift which carries significant implications for the deal-making community, which has yet to be fully grasped, particularly in terms of minority investments, private equity structures, and start-up financings. This article aims to outline these implications, highlight the doctrinal conflicts which the Amendment Act leaves us to grapple with, and propose a normative approach to resolving these conflicts.

## THE DOCTRINAL EVOLUTION OF "CONTROL" UNDER INDIAN COMPETITION LAW

Before the Amendment Act, the definition of control in Section 5 of the Competition Act was circular and largely definitional rather than substantive. The CCI's own FAQs acknowledged that control "may be inferred from the extent of shareholding and/or statutory rights associated with the shareholding and/or contractual rights such as veto rights, consultation rights, participation in management and affairs."<sup>4</sup> However, these were not exhaustive criteria; the CCI could, and did, go further.

The CCI articulated the concept of material influence most clearly in *Ultra Tech Cement Ltd v Competition Commission of India*, where it defined material influence as the ‘lowest level of control’, implying the presence of factors that give an enterprise an ability to influence the affairs and management of another enterprise, including shareholding, special rights, status and

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<sup>1</sup> Competition (Amendment) Act 2023; Competition (Combinations) Regulations 2024.

<sup>2</sup> Competition Act 2002 (India), s 5 (prior to amendment).

<sup>3</sup> Competition Law Review Committee, *Report of the Competition Law Review Committee* (Ministry of Corporate Affairs, Government of India, 2019) ch 4.

<sup>4</sup> Competition Commission of India, *Frequently Asked Questions on Combination Regulations* (CCI, 2016).

expertise, board representation, and structural or financial arrangements.<sup>5</sup> This expansive and deliberately non-exhaustive enumeration set the tone for subsequent CCI assessments. Further, what is also noteworthy is the ruling by the CCI in the case of Meru Travel Solutions Private Limited v ANI Technologies Private Limited, wherein it was noted by the CCI that common shareholders, for instance, such as SoftBank holding shares in Ola as well as Uber, could potentially be treated as ‘active investors’ who, despite being minority shareholders, had the potential to influence both Ola and Uber. This jurisprudence has now been codified in the form of the Amendment Act. More particularly, the amendment is in Section 5 of the SCA, which defines ‘control’ as the capacity to exert material influence of any manner whatsoever over the management or affairs or strategic commercial decisions of an entity or group of entities. The phrase ‘in any manner whatsoever’ is indicative of the legislative intent to use the broadest possible definition of control.

### **IMPLICATIONS FOR MINORITY INVESTORS AND M&A DEAL STRUCTURING**

The statutory codification of material influence as the control threshold has direct, practical consequences across several categories of transactions.

**Private Equity and Alternative Investment Funds:** The most immediate impact falls on private equity (PE) funds and alternative investment funds (AIFs) that routinely acquire minority stakes accompanied by investor protection rights, board nomination rights, affirmative voting rights, anti-dilution clauses, and reserved matters requiring investee consent. Under the pre-Amendment framework, such rights were frequently characterised as purely protective and insufficient to establish control. Under the material influence standard, the same rights may now trigger a mandatory notification obligation.<sup>6</sup> This creates a structuring dilemma for the PE community. Funds acquiring stakes of fifteen to twenty-five per cent, accompanied by board nomination and veto rights over material decisions, must carefully assess whether their investment documentation places them within the statutory definition of control, and therefore within the mandatory notification regime. The practical risk of not so assessing is

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<sup>5</sup> Ultra Tech Cement Ltd v Competition Commission of India, Combination Registration No C-2013/10/139 (CCI, 2014).

<sup>6</sup> Economic Laws Practice, 'Impact of the Competition (Amendment) Act, 2023 on Alternative Investment Funds' (Lexology, November 2024).

significant: under the Amendment Act, penalties for gun jumping can reach one per cent of the total deal value.<sup>7</sup>

**Common Ownership and Portfolio Overlaps:** The Meru/SoftBank situation also points to a similar issue: common ownership. The situation where a PE fund or an investment organisation has a stake in a number of competing businesses, even where each stake is small, can imply a significant degree of control over a number of industry players. The PE and VC industry in India is dominated by a handful of large PE and VC funds, including the likes of SoftBank Vision Fund, Tiger Global, Sequoia India (now Peak XV), among a few, with several competing stakes in food delivery, fintech, logistics, edtech, among other sectors. The question of whether this amounts to a material influence, which would require a merger notification, is one that the CCI needs to address urgently.

**The Deal Value Threshold and Digital Markets:** The Amendment Act also introduces a 'deal value threshold' (DVT), which requires notification to the CCI where the 'total value of the transaction exceeds INR 2,000 crores' and the target has 'substantial business operations in India.' The DVT was primarily introduced to cover acquisitions of targets in the 'digital economy,' i.e., start-ups with large consumer bases and data assets but limited tangible assets and turnovers. This meeting of the DVT and the material influence test has created a new doctrine of "staged" or "creeping" control. It is now possible for a digital start-up company to be acquired in a series of minority investments, none of which individually crosses the conventional test, yet at the same time, the acquiring company can build up board rights, information rights, and veto rights, which in the aggregate amount to material influence. This build-up of control by way of material influence may still be caught by the Amendment Act, even if the individual steps fail to cross the DVT test.<sup>8</sup>

## **THE CENTRAL AMBIGUITY: THE ABSENCE OF A REGULATORY FRAMEWORK**

The greatest shortcoming in the Amendment Act's treatment of material influence is the lack of any codified criteria on which material influence is to be determined. In this regard, both the Competition Law Review Committee and the Parliamentary Standing Committee on Finance recommended that the CCI publish an indicative but not exhaustive list of rights which amount

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<sup>7</sup> Competition (Amendment) Act 2023, s 6A (gun-jumping penalty up to 1% of deal value).

<sup>8</sup> Nishith Desai Associates, 'The Competition (Amendment) Act, 2023' (NDA Research Paper, 2023)

to material influence. However, this recommendation was not implemented, and the Combination Regulations, 2024 came into force on 10 September 2024. The consequences of this approach are threefold. Firstly, transacting parties face a high degree of uncertainty in determining their notification obligations. Lacking a safe harbour or indicative list, legal advisors feel compelled to recommend notification on a precautionary basis for even small minority investments accompanied by standard investor protection rights. Such over-notification has the potential to swamp the CCI with notifications of innocuous transactions.<sup>9</sup>

Secondly, a lack of clarity on regulation is detrimental to smaller investors, including domestic angel investors and micro-VC funds, as they may not have the scale to access high-quality competition law advice before making investments. The cost of ambiguity is felt by the smaller players in the ecosystem, not the multinational corporations and large PE funds.

Third, and most importantly, uncertainty with regard to the definition of control impacts the enforcement of investment contracts. The parties cannot be assured *ex ante* that their transaction is compliant with the law until it is either approved by the CCI or until the prescribed period for approval lapses. This is a chilling effect, and it is undesirable for deal velocity, which is a stated objective of the streamlined timelines provided for in the Amendment Act.

### **A PROPOSED FRAMEWORK: RESOLVING THE DEFINITIONAL VACUUM**

The Author submits that the CCI should, at the earliest opportunity, promulgate regulations specifying an indicative list of rights that would, individually or in combination, constitute material influence. Such a framework should be modelled, with appropriate adaptations, on comparator jurisdictions.

An instructive example is the approach of the European Commission in the context of the European Union's Merger Regulation. In its assessment of "decisive influence", a standard which is clearly stricter than material influence but conceptually close to it, the Commission has adopted a practice of pinpointing specific veto powers in strategic decisions such as the appointment of senior management personnel, the annual budget, and business plans.<sup>10</sup> A

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<sup>9</sup> Lexology, 'Competition (Amendment) Act, 2023 Comes Into Effect Partially'

<sup>10</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1; European Commission, *Consolidated Jurisdictional Notice* (2008) OJ C95/1, paras 52–67.

similar, but by no means exhaustive, list of rights that can be seen as material influence in an Indian setting could include: (i) the right to nominate or veto the appointment of one or more directors, (ii) veto rights in relation to material transactions exceeding a particular threshold, (iii) access to competitively sensitive information through information rights, (iv) rights relating to the ability of the investee company to enter into significant commercial contracts, and (v) rights relating to exclusivity or non-compete obligations.

A comparable point of reference for such a safe harbour is already provided in Indian law itself. The exemption which existed before the amendment of the Combination Regulations for Venture Capital Funds registered with the Securities Exchange Board of India (SEBI) acknowledges that, owing to the nature of their business model, Venture Capital Funds acquire minority stakes for financial purposes only, without any intention of controlling the target company operationally. The lack of any such exemption under the Amendment Act for a larger category of "passive" investors implies that the same factors are not being taken into account. It is suggested that the CCI re-examines this and considers the same exemption based on quantifiable and verifiable factors like the lack of board representation, the lack of veto powers in operational decisions, and the maximum percentage of shareholding, for all types of financial investors and not just SEBI-registered venture capital funds.

Another dimension which the proposed framework would need to take into account is the temporal dimension. This is because, in the first place, the material influence does not necessarily happen immediately. It is a gradual process, where the material influence happens transaction by transaction, and none of the transactions, in and of themselves, is a material influence. It is a process where the investor might begin with a small equity stake with no voting or board rights, and over time, negotiate board observer rights, board nomination rights, and finally veto rights in successive funding rounds. None of these actions, in isolation, may amount to material influence. Therefore, the regulations framed by the CCI must specifically address the concept of "creeping control" and provide guidelines on what stage in the series of transactions the need to notify arises, whether any previous acquisition of rights must be kept in mind in addressing subsequent ones, etc. Without any temporal guidelines, sophisticated investors may enter into a series of connected transactions, which will defeat the very purpose of the Amendment Act.

It is also worth noting the information asymmetry dimension of the material influence question. In many cases of minority investment, especially in the early-stage venture capital context, the

investor's material influence over the investee company does not arise from any formal contractual right, but from informational advantages, involvement in board observer roles, and receipt of detailed financial reporting from the investee. These informational rights are not typically thought of as giving the investor any kind of controlling interest, but in reality, they can give the investor as much ability to determine the strategic direction of the investee as any other type of veto right. The CCI's framework should take this reality into account and consider whether, and under what circumstances, information rights, by themselves or in conjunction with other factors, may be considered a material influence. Failure to do so may create a doctrinal blind spot that sophisticated investors will exploit.

Finally, the procedural architecture in which the material influence determination itself is embedded also needs reform. At present, parties who are not sure whether the transaction is notifiable have the choice either to file a voluntary notification, incurring the attendant costs and delays, or not to file at all and risk incurring a penalty in the event the CCI takes a different view. There is no process of pre-filing consultation, which enables parties to get a binding, or even indicative, view from the CCI with respect to the notification of a particular transaction before finally entering into the same. Mature jurisdictions with a well-established competition law regime, such as the UK, Germany, and the European Union, offer informal consultation or pre-notification discussions to parties to clarify jurisdictional issues before the process begins. The introduction of a structured pre-notification guidance mechanism in India, with realistic timelines and a binding effect, would complement the substantive regulatory clarity proposed above and go a long way towards making the material influence standard workable in practice.

## CONCLUSION

The Competition (Amendment) Act 2023 is, in many respects, a landmark achievement in Indian competition law, streamlining procedural timelines, introducing a DVT fit for the digital economy, and formally codifying decades of CCI decisional practice. The statutory entrenchment of material influence as the operative control standard reflects a mature recognition that control is not a binary concept but a spectrum.

Yet the Amendment Act's greatest strength is also its greatest weakness. By articulating the lowest possible threshold of control in the broadest possible language, 'in any manner whatsoever', without accompanying regulatory guidance, the legislature has created a standard that is simultaneously expansive and unworkable. The phantom of control haunts every PE

term sheet, every venture capital side letter, and every cross-portfolio investment: present everywhere in theory, identifiable nowhere in practice.

Resolving this ambiguity is a prerequisite for India to realise the full potential of its M&A ecosystem. As India positions itself as a premier destination for global capital, with M&A activity surging sixty-six per cent in 2024 and the government's own investment targets requiring sustained deal-making, legal certainty in the foundational concept of control is not a luxury but a necessity.<sup>11</sup> The CCI has both the authority and the institutional competence to provide this certainty through well-calibrated regulation. It should do so without further delay.

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<sup>11</sup> Chambers & Partners, 'Corporate M&A 2025 – India' (Global Practice Guides, 2025); IFLR, 'M&A Guide 2025: India' (September 2025).