EXIT WITHOUT VOICE: EVALUATING WHETHER SEBI'S TAKEOVER REGULATIONS GENUINELY PROTECT MINORITY SHAREHOLDERS

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ABSTRACT

The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("SAST Regulations") are designed as a protection mechanism for the minority shareholders. However, the primary pillar of the SAST Regulations is exit, not a voice for the minority shareholders. This paper elucidates how this is instead a design decision, which is taken from the mandatory bid model that was adopted in the UK but not the fiduciary-duty approach adopted in the US. It contends that the Indian takeover law is deficient because of doctrinal and comparative analysis of the SAST Regulations, judicial decisions, and UK/US takeovers law in that regard and even a purposive interpretation of the SAST Regulations cannot overcome the gaps. It finds that the SAST Regulations afford true protection to minority shareholders, but that this protection is not adequate, and that increased shareholder voice would carry important regulatory considerations.

Introduction

The "takeover" is where an acquirer takes ownership and control, directly or indirectly, and remaining public investors, or "minority shareholders," are not large enough to affect the outcome. The Takeover Code deals with this in the concept of 'open offer': Upon reaching a specified threshold of ownership/control, the acquirer is required to make an open offer to acquire additional shares from the public, at a regulated price, on terms identical to the terms on which the offeror relinquishes ownership/control.[1]

A change in control of a listed Indian company does not involve negotiation of its price, selection of the acquirer or even a vote on the change. At best, they are given the right to leave and a more attenuated right to be heard via the mandatory open offer in the SAST Regulations 2011. The main concerns are whether the exit really serves their economic interests, the fact that SEBI selected exit instead of voice, and how much it will cost to close the remaining gaps.

Legal Framework

The basic trigger in **Regulation 3(1)** is that an acquirer, or any persons acting with the acquirer, who acquires more than 25% of the target's voting rights must make an open offer.[2] That offer is to be for at least an additional 26% of the target's shares offered to the public.[3] In turn, all minority shareholders have the same opportunity to sell up as the party losing control had.

There are four exceptions to this general principle.

Regulation 3(2) permits "creeping acquisition", the ability of the promoter who has between 25% and 75% to add up to 5% of its holdings every financial year without having to launch a new open offer.[4] An existing large stakeholder can continue to accrue his stake incrementally year after year without having to offer to the minority.

Regulation 8 sets the offer price at the highest level available among a number of price benchmarks, primarily the negotiated price and the 60-day volume-weighted average market

[1] Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, reg. 3, 7 (India).
[2] SAST Regulations, Reg. 3.
[3] SAST Regulations, Reg. 7.
[4] SAST Regulations, Reg. 3(2).

price, which assumes that the stock is reasonably liquid.[5] It is, in essence, as reliable as the market's price for the stock, and this is a weak method for when trading is low.

The open offer obligation is extended to indirect acquisitions, such as acquisitions of a company which has control over the target company, in **Regulation 5.**[6] Basically, an acquirer will not be protected from the open offer obligation by structuring the transaction through a holding company.

Regulation 26 imposes a duty on the target's independent directors to prepare a reasoned recommendation in respect of the offer prior to the votes of the shareholders.[7] The result is that minorities are supposed to be given a second opinion before they should decide to sell, which is only as fair as the independence of the directors that deliver that opinion.

These provisions provide the "mechanism" by which the Regulations work in practice.[8]

Evidence that the Framework Works

Enforcement has tended to favour the minority, where the Regulations provide a clear hook in the text for SEBI and the tribunals. The courts have ruled that, when the acquirer and an affiliated person are "persons acting in concert," an acquirer can use a price already paid by an affiliate for the target's shares in its open offer, and that there is a price ceiling that control cannot be acquired for at below the price the group has already paid elsewhere.[9]

In *Akshya Infrastructure (2014)*[10], the Court refused to let an acquirer withdraw a voluntary open offer merely because it had become commercially unattractive, treating shareholder reliance on the public announcement as paramount, reaffirming *Nirma Industries Ltd. v. SEBI (2013).*[11] SAT has similarly policed disclosure timing used to manipulate the offer price.[12]

[5] SAST Regulations, Reg. 8.
[6] SAST Regulations, Reg. 5.
[7] SAST Regulations, Reg. 26(7).
[8] Rabindra Jhunjhunwala et al., *India Takeover Guide* 3–5 (Int'l Bar Ass'n 2023).
[9] *Daiichi Sankyo Co. v. Jayaram Chigurupati*, (2010) 157 Comp. Cas. 380 (India).
[10] *Sec. & Exch. Bd. of India v. Akshya Infrastructure Pvt. Ltd.*, (2014) 11 S.C.C. 112 (India).
[11] *Nirma Indus. Ltd. v. Sec. & Exch. Bd. of India*, (2013) 8 S.C.C. 20 (India).
[12] Ajinkya Rajput & Janhavi Joshi, *SEBI Takeover Code: Ambiguities, Exploitations and Reforms*, 5 Indian J. Legal Rev. 75, 77–78 (2025).

Where the Framework Fails

The most robust internal counter example is **Regulation 26(7).**[13] Its independent-director recommendation looks like the opportunity for an informed, second opinion before minorities decide whether to tender, and not just an exit door. However, the committee is appointed by, and is often identical to, the very promoter group whose provisions it scrutinises, and the question of the autonomy of "independent directors" in promoter-dominated companies has been repeatedly raised about corporate governance in India. But the "exit without voice" assertion is strengthened rather than undermined by the fact that the SAST Regulations do not solve a board-independence problem as per the intent of Regulation 26.

The second problem is the competition of offers. Under **Regulation 20,** a rival bidder can submit a competing open offer within about 15 working days of the public announcement, on a synchronised time frame with the original offer, allowing shareholders to make a choice.[14] Theoretically, it's real price discovery by competition, not by a single take-it-or-leave-it exit, but it's hard to find competing offers in practice.

There is no definitive control. In *Subhkam Ventures (I) Pvt. Ltd. v. SEBI (2009)*, SAT held that affirmative or veto rights over budgets, key appointments, structural changes are “negative control” and are not covered by Regulation 3.[15] Supreme Court has decided the appeal based on facts and expressly said that the reasoning of the SAT cannot be the precedent and the question remains open for around a decade.[16] The positive/negative control distinction was not clarified but solidified by subsequent decisions and sophisticated investors can still create veto rights that resemble control but don't result in an offer.[17]

Acquisition is a process that is compounded over time. A promoter with 65-70% of the control can, for several years, build towards nearly having full control, without ever making a premium

[13] SAST Regulations, reg. 26(7).
[14] Abhishek Dadoo & Shruti Kunisetty, *Competing Offers under the Indian Takeover Regime*, Int'l Bar Ass'n (2023), available at https://www.ibanet.org/competing-offers-under-the-Indian-takeover-regime .
[15] *Subhkam Ventures (I) Pvt. Ltd. v. Sec. & Exch. Bd. of India*, Appeal No. 8 of 2009 (Sec. Appellate Trib. Jan. 15, 2010) (India).
[16] *Sec. & Exch. Bd. of India v. Subhkam Ventures (I) Pvt. Ltd.*, Civil Appeal No. 3371 of 2010 (Sup. Ct. November 16, 2011) (India).
[17] *Rhodia S.A. v. Sec. & Exch. Bd. of India*, Appeal No. 36 of 2001 (Sec. Appellate Trib. Nov. 7, 2001) (India); *Vishvapradhan Commercial Pvt. Ltd. v. Sec. & Exch. Bd. of India*, Appeal No. 293 of 2018 (Sec. Appellate Trib. July 20, 2022) (India).

offer as the point of control becomes really tight.[18]

The formula assumes liquidity that it isn't always the case. The 60-day VWAP can be quite a bit lower than a rational notion of control value, particularly in thinly traded issues, and so the "fair" statutory exit price could be below the value transferred to the new controller.[19]

Additionally, enforcement is slow and difficult to measure. SEBI's annual report gives aggregate figures for appeals before the SAT, but not takeover-specific dispute rates or disposal times[20].

Why Exit, Not Voice: A Deliberate Trade-Off

India has adopted the Rule 9 of the UK City Code, owing to the Bhagwati Committee reforms, which is compulsory open offer.[21] That is a specific choice to not give minorities any voice, but rather a fair exit, because a voice (eg. veto, mandatory approval) would slow or block value creating control transfers. Some say that the rule prevents inefficient transfers, and that it is a filter to eliminate more efficient bidders.[22] Others say that it just makes all acquisitions more expensive, even those that are efficient, by forcing the transfer premium to be paid to all shareholders.[23]

India's creeping acquisition allowance is an implicit nod to this efficiency concern. Strikingly, there is no similar concession in the UK above 30% where the additional increase from 30% to 50% restarts Rule 9 without an annual allowance.[24] In comparison, the Indian exemption of 5% per year is an unusual policy decision in favour of deal fluidity rather than minority protection at the margin. But the exit model itself is not the obvious default either; there is no mandatory bid rule under the Exit (as defined by the Exchange Act) and no requirement to

[18] SAST Regulations, reg. 3(2).
[19] SAST Regulations, reg. 8.
[20] Sec. & Exch. Bd. of India, *Annual Report 2024–25.*
[21] Takeover Code: Comparative Analysis Between India and the UK, Legal Service India (2022), available at https://www.legalserviceindia.com/legal/article-6043-takeover-code-comparative-analysis-between-india-and-the-uk.html .
[22] Diana Pop, Anchoring in Takeovers Under Mandatory Bid Rule, Econ. of Transition & Institutional Change (2025) (discussing Wolf-Georg Schuster (2013)).
[23] Lucian A. Bebchuk, *Efficient and Inefficient Sales of Corporate Control*, 109 Q.J. Econ. 957 (1994); Yoon-Ho Kim, *Does the Mandatory Bid Rule Discourage Acquisitions above the Threshold?*, 39 Asian Rev. Fin. Res. 125.
[24] Effecting a Takeover: United Kingdom, in Global Public M&A Guide (Baker McKenzie 2024), available at https://resourcehub.bakermckenzie.com/en/resources/global-public-ma-guide/europe-middle-east-and-africa/united-kingdom/topics/effecting-a-takeover .

tender once an acquirer reaches any ownership threshold.[25] Minority protection is not through the sale path but through directors' fiduciary duties: when a sale is inevitable, they are required to seek the best price they can reasonably obtain.[26] That's voice with no absolute right to exit, shareholders depend upon their board to barter for them, not a statutory right to sell at a formula price. India's SAST Regulations fall somewhere in between the UK's stricter exit-only approach and the US's voice-only approach, and as such exit-over-voice is a reality on a continuum.

Recommendations and Conclusion

Two reforms will be tested against their respective possible failure points.

First, change the pure annual cap to a cumulative-threshold trigger: if the pace of creeping acquisitions reaches 60% or 70% total, the full open offer is triggered, irrespective of the pace of the transactions. The argument is self-evident, if the acquirers could buy over the aggregate limit by buying in through separately incorporated entities, they'd do it, or one level above, as done in the ***Subhkam*** case with “acting in concert.” The reform is only worth having if there is also a much wider, rebuttable, presumption of concerted action for affiliates, otherwise it's just a change of litigation from "control" to "aggregation".

Secondly, active valuation floor on top of VWAP price for illiquid stocks, so low trading cannot justify a below-value exit price.

Both reforms come at a price. The mandatory bid rule is already reducing the value of some value-creating takeovers by increasing the price to acquire the firm, and the creeping allowance and valuation floor further increases that price. If full protective obligations become cost prohibitive, the transaction that would have led a poorly run company to a good owner might be impossible. Protection is not a free good, each extra trigger also robs the takeovers minority shareholders of their takeovers.

Therefore, the SAST Regulations do provide protection for minority shareholders, but not as broadly as the purpose in the Regulations would imply and with a more active consideration of the fluidity of the deals. So, wherever the law gives them room to, SEBI and the courts interpret

[25] Edward F. Greene et al., *U.S. Regulation of the International Securities and Derivatives Markets* § 9 (2024).
[26] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

it in favour of minority shareholders. Regulations 26 and 20 do give minorities a form of "voice" as such, but a weak and mostly symbolic one.