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Rationale for proposed inclusion of material influence standard in the Indian Merger Control Regime–an expansive approach for determination of "control"

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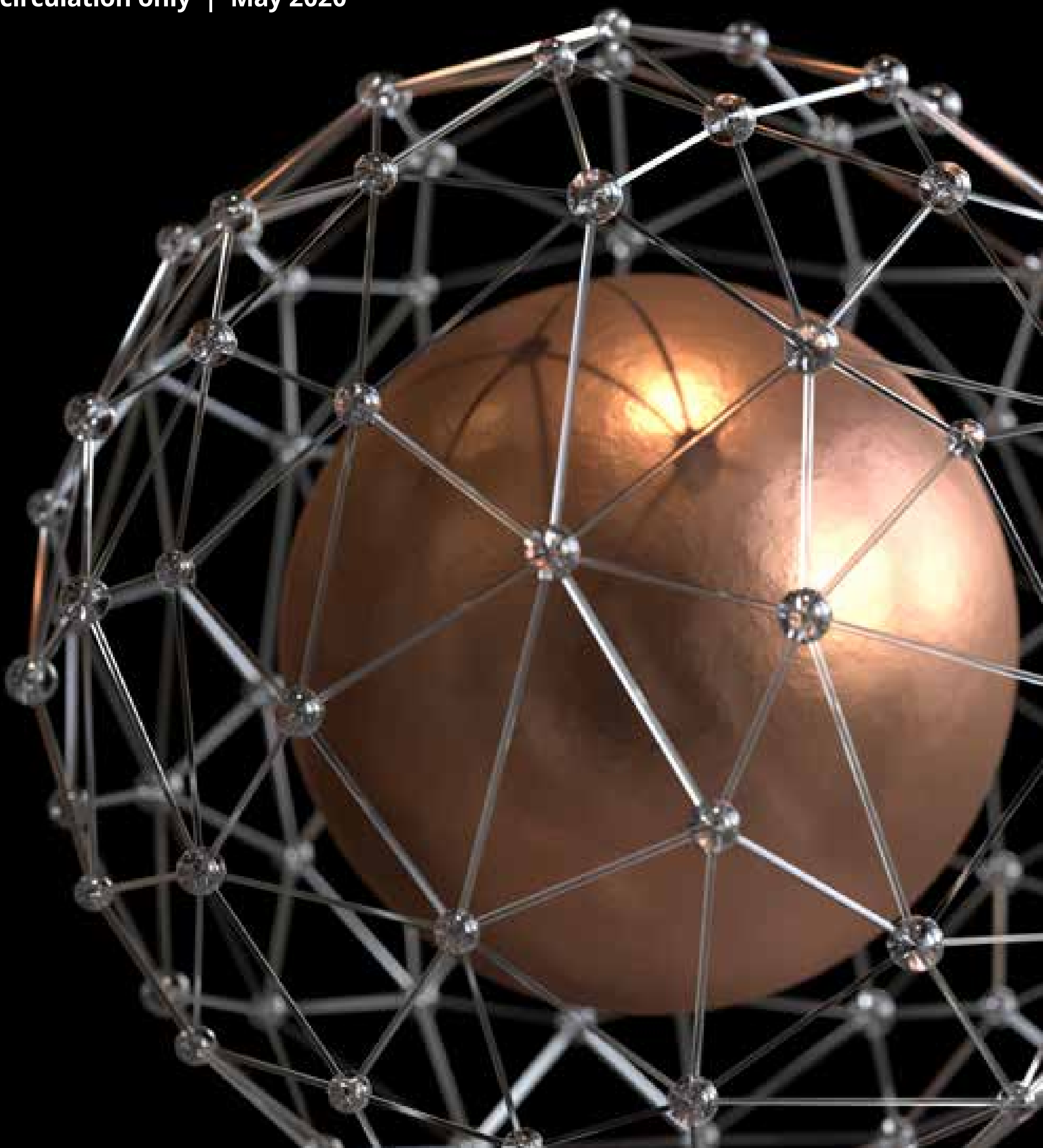

The Indian merger control regime is a mandatory notification regime wherein a combination[1] meeting the specified asset or turnover-based threshold criteria is to be notified to the competition regulator, the Competition Commission of India (CCI). Sections 5 and 6 of the Competition Act, 2002 (Act), along with regulations and guidance notes, prescribes the provisions in detail to determine the transactions that fall within the ambit of combination regulation by the CCI to assess if they would have an appreciable adverse effect on competition[2].

As the assessment of acquisition of "control" is required prior to notification, it is important to understand how the term has been interpreted by the CCI. The guidance offered by Section 5 of the Act on the definition of control[3] is open to interpretation, and the decisional practice of the CCI demonstrates adoption of varying approaches. Traditionally, the CCI adopted the "decisive influence" standard; however, in recent decisions, the CCI has also applied the "material influence" standard[4].

- As per the decisive influence criteria, the objective is to determine the ability of a firm to exercise decisive influence over the management or affairs of a target enterprise through majority shareholding, veto rights, or contractual covenants.
- In contrast, material influence is a lower threshold to determine control wherein the objective is to assess an enterprise's ability to influence affairs and management of the other enterprise through factors such as shareholding, special rights, status and expertise of an enterprise/person, board representation, and structural/financial arrangements.

Several jurisdictions such as the UK, Canada, and South Africa use a material influence standard to determine control. The merger assessment guidelines[5] set out by the UK Competition Commission (CC) and the Competition Bureau of Canada[6], list factors that may allow an acquiring firm to exert material influence on the target company. These factors include holders and distribution of the remaining shares or interests (whether the target business is widely or closely held, and whether the acquirer will be the largest shareholder), patterns of attendance and voting at recent shareholders' meetings, existence of any special voting or veto rights, and terms of any shareholder or voting agreements. There have been cases decided by the CC wherein acquisition of minority control was found to be problematic. For instance, in the Ryanair/Air Lingus[7] case, the CC instructed Ryan Air to reduce its stake in Air Lingus (its main competitor) to 5 percent and give up board representation rights due to horizontal competition concerns arising from the merger.
With a view to provide certainty to the definition of control and also address the potential enforcement gap present with the decisive influence criteria (limits notifiable transactions), the Competition Law Review Committee (CLRC) set up by the Ministry of Corporate Affairs recommended the adoption of "material influence standard" for the determination of control. The adoption of the material influence threshold criteria is considered to be appropriate for competition assessment as there are distinct ways in which acquisition of minority control and/or other rights can adversely impact the state of competition (figure 1). These situations would likely fall outside the scope of a traditional decisive influence test[8].

[1]Combination is meant to include transactions dealing with acquisitions, mergers, or amalgamations.
[2]Source : The Competition Act, 2002
https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf
[3]As defined in Section 5 of the Act, the term "control" includes control by one or more enterprises, either jointly or singly, of the affairs or the management of another enterprise or group.
[4]The material influence standard has found an application by the CCI in Ultra Tech Cement case. Ultra Tech Cement Limited (Ultra Tech) was penalised by the CCI for failing to provide information on the details of the shareholdings of Kumar Mangalam Birla, along with his family members, in companies competing with Jaiprakash Associates Limited (whose cement manufacturing plants were being acquired by Ultra Tech). While determining the extent of Ultra Tech's obligation to materially disclose the information, CCI expanded the meaning of the term "control" to include "material influence" in addition to higher forms of control.Source : Case reference: Order - C (2015/02/246) dated 12 March 2018: https://www.cci.gov.in/sites/default/files/246_44_PublicV.pdf

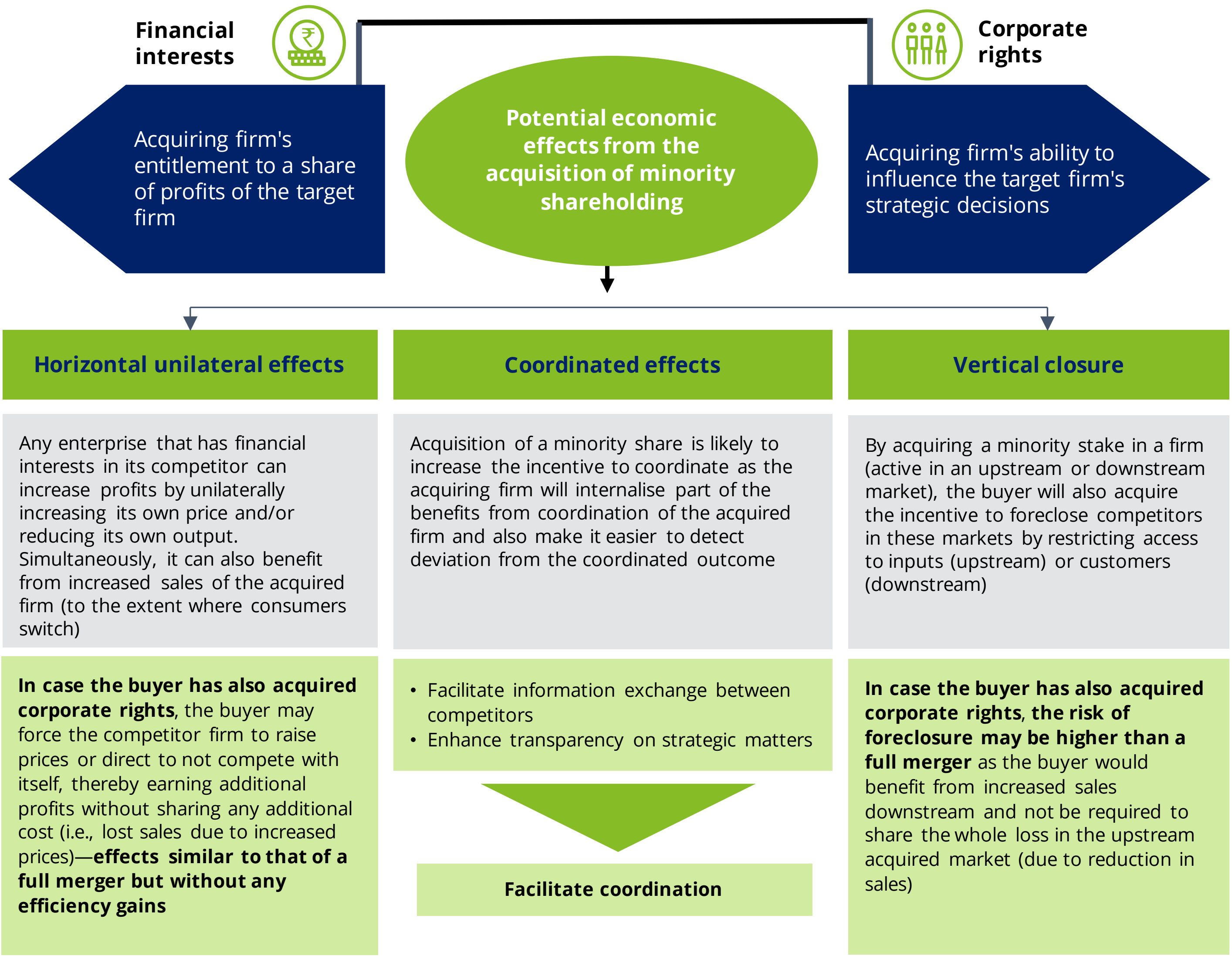

Figure 1: Potential competitive harm that may result from acquisition of minority shareholdings

It is apparent from the above discussion that the acquisition of minority shareholding and rights allowing the exercise of material influence may lead to competitive harm, and in some instances, more harm than expected in full-fledged mergers. However, at the same time, it is important to recognise that not all minority acquisitions would warrant an enquiry as that will be unduly burdensome for regulators and businesses alike.

As recommended by the CLRC, upon incorporation in the Act, the CCI should provide guidance on what would constitute material influence and also outline the types of minority rights acquisitions that will qualify for notification exemptions.

[5]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT1254.pdf

[6]https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html; Clause 1.5

[7]Ryan Air/Air Lingus case: Ryanair held 29.82 percent minority stake in Aer Lingus. The CC concluded that this stake gave Ryanair material influence over Aer Lingus and resulted in a substantial lessening of competition by limiting Aer Lingus's ability to manage its portfolio of London Heathrow slots and could impede it from combining with other airlines. Several factors were identified conferring material influence such as shareholding levels, board representation, and the holders and distribution of the remaining shares. Ryanair was instructed by the CC to reduce its stake in Aer Lingus to 5 percent, along with a ban from seeking or accepting board representation and acquiring further shares.
https://assets.publishing.service.gov.uk/media/5329ddc8ed915d0e60000189/130828_ryanair_final_report.pdf

[8]European Commission: Competition Policy Brief
https://ec.europa.eu/competition/publications/cpb/2014/015_en.pdf

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