Mergers, Acquisitions and Corporate Restructuring
Prof. Chandra Sekhar Mishra
Vinod Gupta School of Management
Indian Institute of Technology - Kharagpur

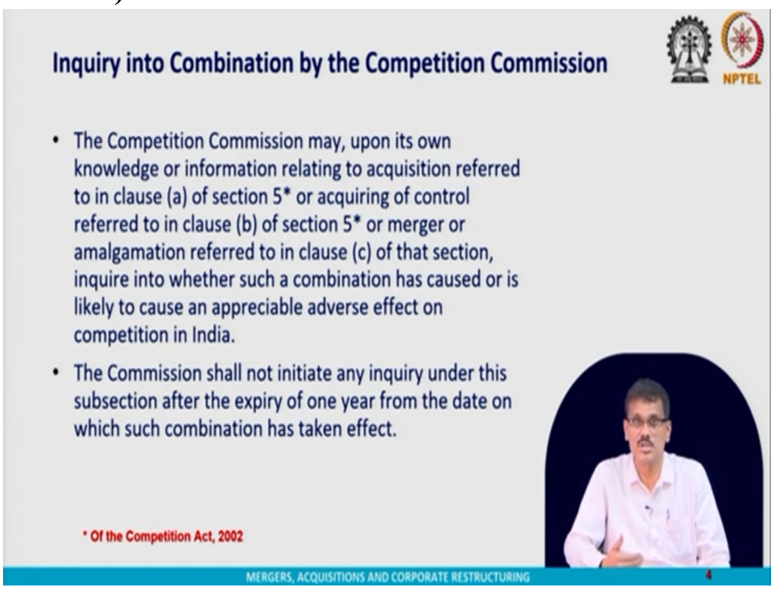
Lecture - 33
Legal Aspects of M&A - 3

Hello friends, welcome to another session on mergers accusations corporate restructuring in this particular model we are talking about the legal aspects of mergers and acquisition. In the previous session we discussed about the provisions related to competition commission or competition regulation will continue this that competition commission regulations. And then also, talk about the takeover, core guidelines of this securities and exchange board of India let us say SEBI.

So this is our concepts that you will discuss competition act 2002 the select provisions and when the inquiry into the combination by competition commission can take place. And what the competition commission looks at when they do the inquiry and also talk about substantial acquisition of shares. And takeover regulation that, is popular known as SEBI takeover code as in 2011 but which is also amended from time to time.

So the keywords these are the keywords competition act, takeover code, disclosure as per takeover code as well as threshold limits for open offer. Then we talk about mandatory offer as well as voluntary open offer.

(Refer Slide Time: 01:35)



So continuing with the previous session where we talked about the competition commission, guidelines or provisions a marginal acquisition can be inquired by the competition commission either on its own. When they get the information suo moto they can do it or if they are notified by the acquiring company as per those threshold limit discussed in the previous session.

The competition commission can inquiry to find out whether it is this particular combination the business combination has any appreciable adverse effect on the competition in India or not. So they can make an inquiry and but at the same time if the M and A has taken place and there is no need for notification by the company to the competition commission. As per the existing law because they are possibly not breaching the threshold limit.

In that case if the 1 year has passed since the combination has taken effect, in that case competition commission cannot inquire into that means there is a upper limit by up to which the competition commission can inquire. That means suppose because certain laws in certain other contexts may have retrospective effect that means one can always look into investigate into the aspects after.

So many days of that event taking place but here there is upper limit that within, 1 year if the competition commission has not inquired. Then it cannot inquire further about that particular mergers and acquisition that way it is an enabler it is not something which is going to control. Or then find out the loopholes later about the particular merger acquisition and object to that so that a particular scope is not there with the competition commission.

(Refer Slide Time: 03:32)

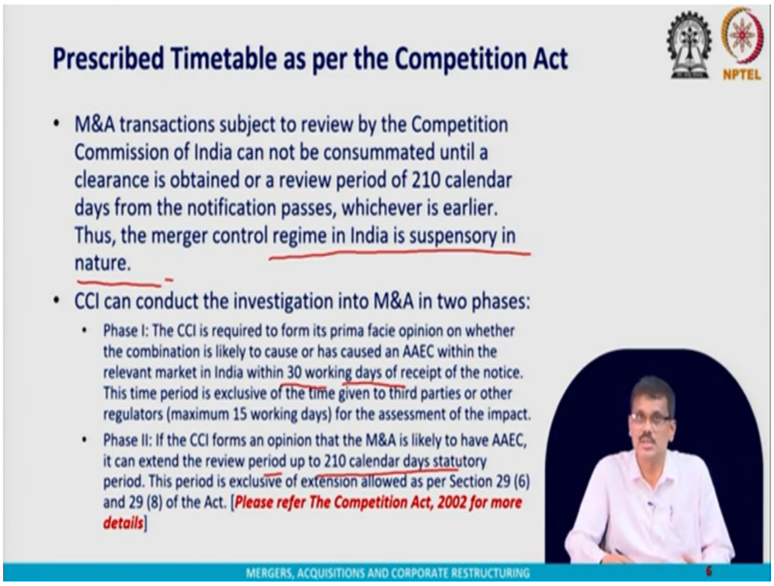
Then when what type of, things the company is a competition commission can look into that is to determine whether that has an adverse or applicable adverse effect on communication. AAEC on the relevant market which you talked about in relay market to relevant geography market, relevant product market also. So the competition commission looks at multiple things like it looks at what the actual level of competition.

And as a potential level competition with either suppose there are possible imports that is also is not a problem that means the scope for import. So that the competition can be there now what type of barriers they are in entering the market then that also affects the competition level a more barriers are there. Then hard type of combination already there in the market and is there any countervailing, power in the market so all those things besides that.

(Refer Slide Time: 04:28)

The competition commission looks at these are the aspects that will look at that is from as we discussed 4 things that in this previous slide. And these are the list that competition commission look at when they find out whether there is any applicable adverse effect on the competition in the relevant market or not.

(Refer Slide Time: 04:54)



Then there, are certain time table as per the competition act that is the best part of the company there is just the limit given by the competition act within which this inquiry. And order has to be completed so statutory limit is that 210 calendar days from the notification. So the subject suppose x company notifies to competition commission that we are going for this particular merger in that case within 210 days.

These things have to be completed of course this 210 calendar does not include any note anything notice given to some regulatory authorities. The competition commission has also notified to them to give their comments where they can be given they can reply within 15 days. Those things are not there similar at certain times the competition commission may ask for some more information from the affected parties if there is a notice period also.

There is a period given those things are also not considered so otherwise within 210 calendar days the order has to be passed. And during these 210 days the merger will not take effect that will be merger in suspensory. So that is why in merger control regime in India is known as suspensory in nature. So it is a suspensory in nature and competition commission can investigate also in 2 phases.

One is that the competition commission required to form a prime effective opinion, on whether the combination is likely to cause any appreciable adverse effect on competition or not within the relevant market in India within 30 working days of receipt to this notice. Suppose on January 1st the company notifies to the computation commission that, this merger is going to take place by January 31st.

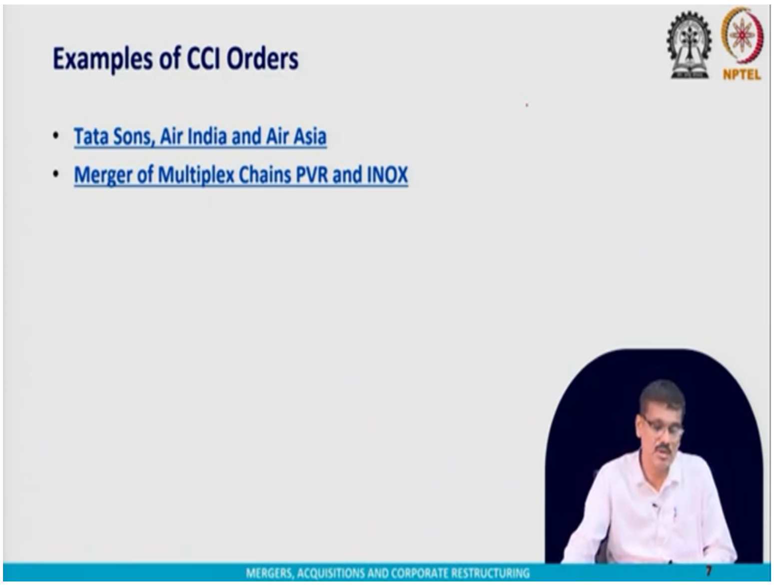
The competition commission has to give a prime phase opinion yes this may be leading to appreciable adverse effect on the competition that they have to form an opinion. And they may then if there is a notice period given to different securities authorities or the third parties 15 periods 15 days can be relaxed in that case. So if, there is no notice period there is no notification given to securities authorities then within 30 days 30 working days has to be done.

So, when since January 1st January 31st that we presume that all the days are working days but that it may not be. Because there may be holidays weekends are there the exclusive of that 30 working days has to be there. Then once this form opinion that yes there, is a appreciable adverse effect on the company or if there is no opinion then that case the competition order will follow.

Then the review period can be extended 210 calendar days the securities counter one no circumstances total period allows securities period allowed to competition commission cannot exceed beyond 210 calendar days. Exclusive of any extension; that is allowed as per section 29, 6 and section 29, 8 of the act. So, one can refer to the computation act detail to know about this competition act 2002 can know to learn more about it.

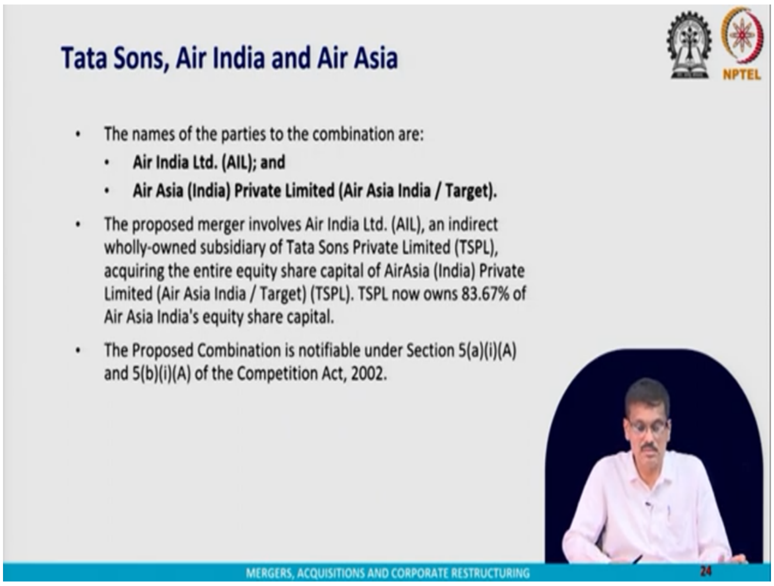
Because this is not in the scope of this subject where, you discuss in detailed all the legal aspects of mergers and accusation in India for that matter.

(Refer Slide Time: 08:17)



So we have 2 recent competition commission orders because competition commission order can be in the, form of rejecting the merger acquisition. Or it can be accepting a merger acquisition as it is or it can also modify suggest some modification to the merger acquisition. So, 3 possible outcomes are there so in this case we have got 2 examples here.

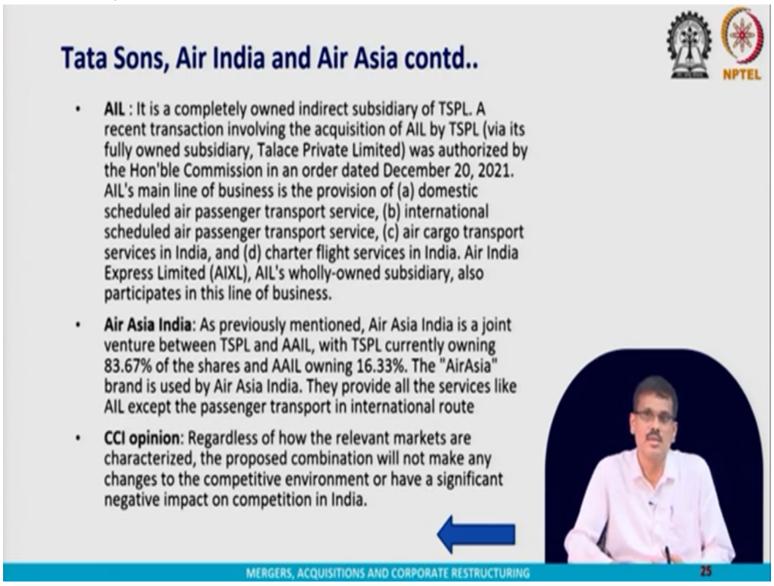
(Refer Slide Time: 08:46)



The 1 example is related to the Air India Air Asia private limited where because now Air India belongs to Tata group. And now the Tata group is, proposing a merger between Air India and Air Asia and so competition commission has enquired. Now Tata sons private limited which is now the holding company for these 2 companies it has now at 83.67% Air Asia's India's equity share capital.

And the proposed combination notifiable under section 5 a, of the competition act 2002, as well as section 5 b.

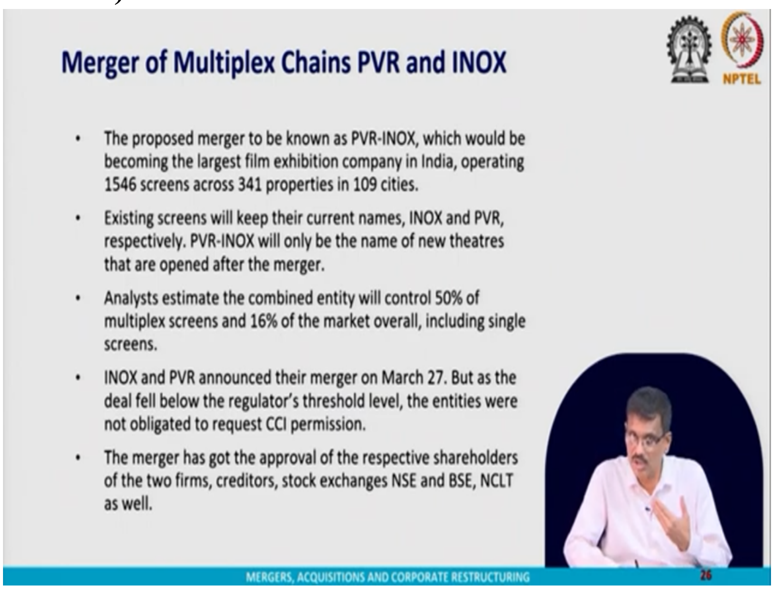
(Refer Slide Time: 09:25)



And so they, made an enquiry and found out what are the things being affected. And CCI finally opened that regardless of how the relevant markets are characterized this proposed combination is not going to make any changes to the competitive environment. Or have a significant negative impact on competition in India that means they looked at other players other airlines they are there operating in India looking, at the competition among them.

They found that this combination anyway this combination is a group combination also. It is 2 companies in the same group as such. So that way it is not going to have an adverse effect so that particular merger was approved.

(Refer Slide Time: 10:17)

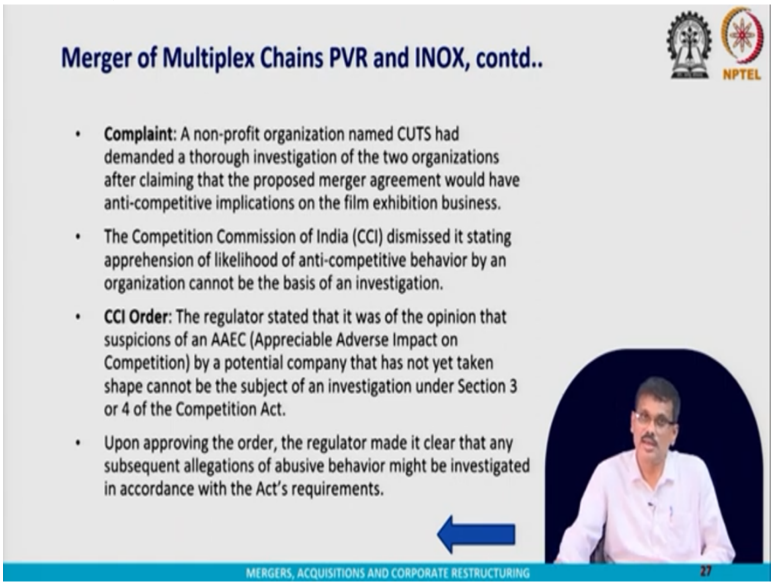


Then we have another interesting case where the multiplex chains the cinema all chains the PVR and INOX the merger took place. So there if you, look at they are having total 1546 screens across 341 properties in 109 cities on the combined company. And they will have the name they will say INOX PVR name will because that may be to recall the brand in the minds of the viewer.

Snd so PVR INOX will be the name of the new theaters now and the analyst they expected that this is going to control 50% of the multiplex screens. And, 16% overall the cinema screens for that matter there could be some single screens also, single studio code is also there the films studios could be there where people can go and watch there and in that case 16% market. But if you look at the multiplex screens they are going to combine 50% so they announced the merger.

But it does not within the threshold, it is within the threshold limit of the M and A competition, M and A guidelines or competition commissions it was not notified. So it has got the approval of the shareholders of the firms stock exchange, NSE, BSE, NCLT, all those things they have a notification to the competition combination was not required because it was not breaching the threshold limit as per the competition act 2002.

(Refer Slide Time: 11:43)

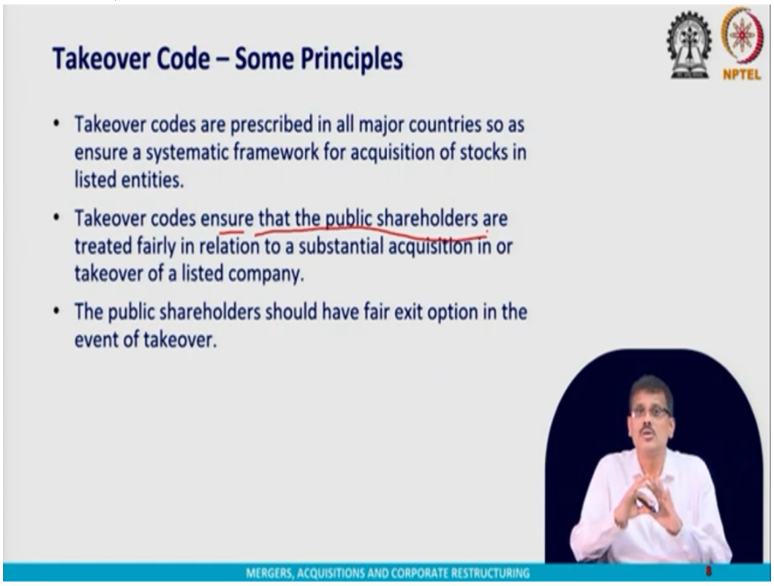


So what had happened a, third party organization called CUTS take complaint so that should be investigation. Because this is going to have an appreciable adverse effect on the competition but a competition commission dismissed this particular thing. Then no it is not going to have any effect on the competition it is not having anti-competitive behaviour. So just because somebody is, apprehend some third party competition commission cannot agree to that they will also investigate.

They investigated and the amount was allowed that means we have discussed that companies will notify to the accommodation commission for any. If they find that it should be approved by the competition commission they can always notify the competition commission. Competition commission can also suo moto, take the cognitions of this and inquire into M and A by any company at the same time a third party also can make a complaint.

And then the competition commission can also look at and find out, whether it has an adverse effect on the competition or not that is appreciable adverse effect on the competition or not.

(Refer Slide Time: 13:04)



So now what we will do we talked about the competition commission regulations in a select, manner. Now we will go to the next important aspect of merger acquisition regulations called takeover code by the SEBI and the other regulatory authorities in other countries SEBI is applicable in case of India. So the takeover code if you look at takeover code is applicable in different countries most of the countries have takeover code.

And the takeover code is to ensure that the public shareholders, are treated fairly in relation to a substantial acquisition they not takeover listed company. So what happens suppose there is a particular promoter group which has let us say 40% stake in a company. And there is another person comes and takes entire stake from the promoter let us say 40% for that matter so shareholding is changing in favor of some other party.

So they, may get a the promoters may get a better price from them whereas the non-promoting shareholders or the public shareholders. They do not get anything else so to protect their interest the SEBI has a guideline that yes you it has to be also the acquiring company. Or acquiring shareholder they have to give an offer to the existing non-promoter shareholders or the public shareholders also.

So that they also have a fair exit option they should not be taken for a ride because otherwise 2 people can come together and decide about the change in control. And the other non-controlling shareholders the minorities are also the public shareholders can be taken for a ride. So that has to be protected so that they have a fair exit of that is the general philosophy of takeover code in across the globe further that is, the principle asset.

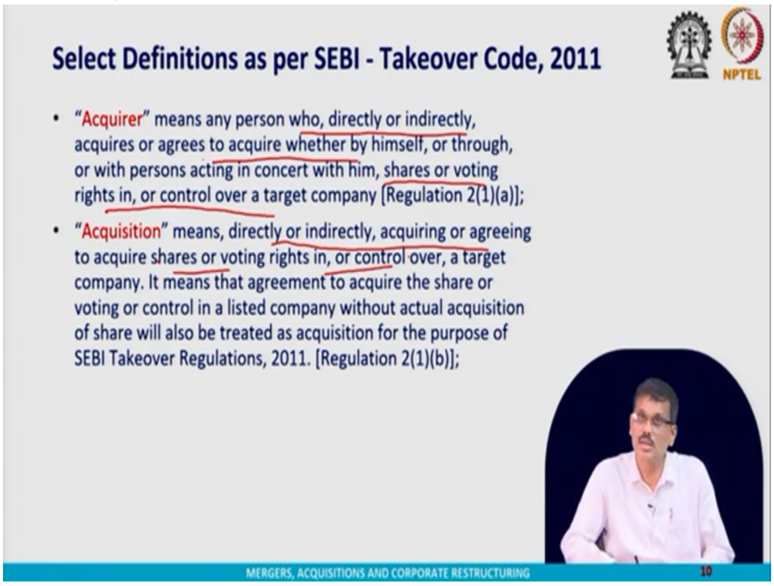
(Refer Slide Time: 14:41)

So in India we have SEBI takeover code 2011 it has a changed version in fact and so the companies have to go for particularly this takeover code is applicable listed company. So, listed companies have to add here to the takeover guidelines as per takeover 2011. Besides that if a particular takeover can trigger something a listing of shares or new shares or company shares being issued, suppose new companies being formed.

And new shares are they are so listed then automatically there is a listing obligations and disclosure requirement that is LODR guidance 2015 also becomes applicable. So SEBI LODR mandates that listed company has to comply with minimum public shareholding requirements specified in the rules 19 2 and 19A. Generally you can say that 25% of the share has to be for the public or retail shareholders for that matter that means up to 74, 75% the non-public that means major shareholder can be there as such.

So those guidelines have to be followed by the companies if that any acquisition leads to issue of shares those things. So but in this particular session we will talk more about we will talk about the takeover guidelines 2011 we will not discuss more about, we will not discuss about LODR guidelines as far as this particular course is concerned.

(Refer Slide Time: 16:10)

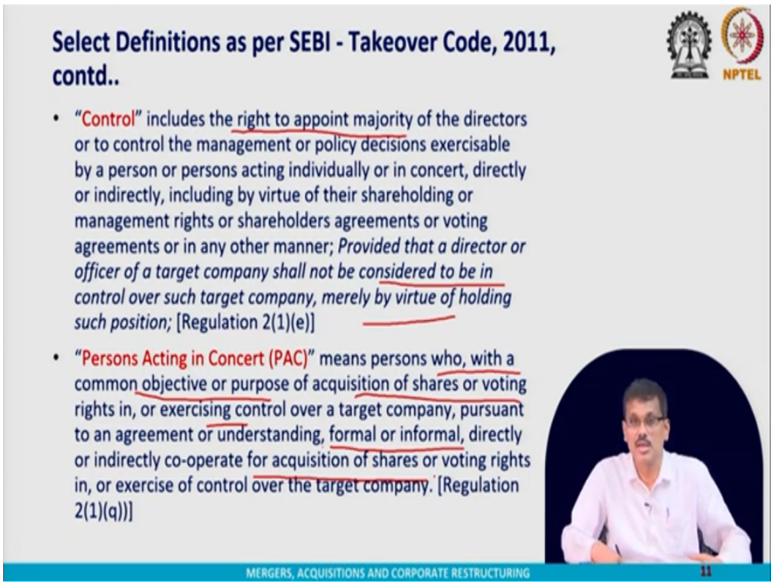


So SEBI takeover defines certainly like in as we discussed in the companies act they have a definition of transformer transferee or acquirer acquiree for that matter. So they say that acquirer means any person who directly or indirectly agrees to acquire whether by himself or through persons, acting in concert that means 3, 4 people. Let us say for that matter can come together and can have a control over the company that will also come within the purview of acquirer.

So that they control the shares or the voting rights or control the target company then that group is called acquirer as per SEBI takeover code. Acquisition means directly or indirectly one acquires the shares, or the voting rights or the control over a target company that is called the acquisition. That means control is definite here its need not be that somebody has to have a%age take 51 or something like this not like that not specifically mentioned.

So if they are able to control mean they can take a decision like a promoter for that matter. Then they take over code gets triggered and so that will be coming within the purview of the acquisition as per the SEBI takeover code.

(Refer Slide Time: 17:26)



And this in control is what the control means the right to append the majority of the directors or control the management of the policy decision exercisable by a person or persons or individual. Or in concert means together 3, 4 people can come together and they can take the decision strategic decisions, directly indirectly for that matter. Because of their shareholding changes then it can be taken as the control.

But if somebody has just got a position in a company director position for that matter that is not going to be taken as a control. Just because here she has a position in the company called director that will not be considered as a control further but that means they should be control should be in the form that in the shareholding. So that they can control the decision making process of the company.

Now persons acting in concern means it is the person who with a they have a common objective or purpose of acquisition of shares or voting or exercise control they have a common objective. So that they can control the target company and they have an agreement of understanding among, themselves it may be formal it can be also informal and they can cooperate among them.

So directly or indirectly for the purpose acquisition shares or voting rights. So then these 3 people 4 people or 5 people whatever that may be number they come together. And they exercise the control that will be taken as call persons acting in concert that is as the regulation.

(Refer Slide Time: 18:52)

Now what happens there are certain provisions is to be takeover code that one has to notify to the target company that when there is a change in the substantial shareholding. So as per the regulation 29 there are certain event based disclosures any person who along with other person. Or the person acting in concert if they cross hold 5% shares in our voting rights they have to disclose the aggregates shareholding, to the target company also.

At its registered office as well as the stock exchange where the target company is listed and within 2 working days of acquisitions that means suppose a person or person together. Therefore 4% stake in a company and they acquired another 1% then and let us say 1 point let us 1.5% or something like that. So it becomes 5% or 5.5%, stake in the company so within 2 days of this particular acquisition of the extra where the threshold limit breached that is 5% breached.

They have to notify to the stock exchange where the target is listed as well as the target company that we have got this mistake in this particular company. Similarly another thing is that somebody who has 5% stake if they buy or sell some, shares which is up to 2% or more. They also have to disclose such transactions to the target company as well as the stock exchange whether listed within 2 working that means 2 things.

One is that they cross first time 5% after 5% there is 2% change is there they have to also. So that the target company knows that there is somebody who has got certain stake. So there will be alert that is some big investor has got some 5% stake in my company and the 5% stake is also increasing maybe 2% better than me. So they are an alert it cannot be that without notifying if that is not notified to the stock exchange as well as the company it will be taken as violation of takeover code by SEBI for that matter.

(Refer Slide Time: 20:54)

Then also the companies have the, persons or person acting in concerts they have to also continually disclose about the aggregate shareholding within 7 days of the financial or that is a march 31st to the target company. So that the company knows what is the stake of these people in that company also every stock exchange where it is listed. And we will be discussing the shareholders the PAC's person, acting concerned holding shares or voting entirely them to exercise 25% they have to disclose that they have got 25% more.

Whatever they have to disclose this must take they have in the company at the same to the promoters also have to disclose to the stock exchange as well as the company for that matter. So these things are required that is called disclosure as a continuous basis every, year the disclosure has to be made by these investors the or the shareholders who have 25% or more in the voting of the company as well as the promoters for that matter.

(Refer Slide Time: 21:58)

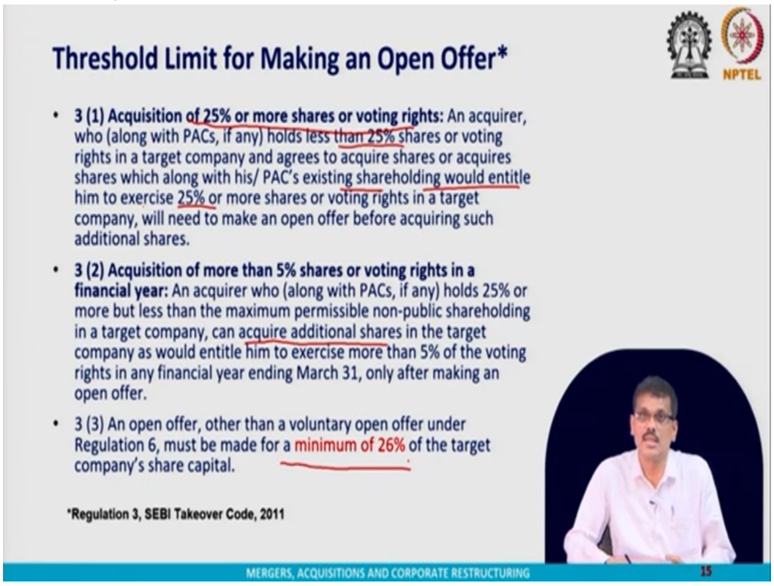
Now another guideline is called open offer is very important thing open offer that we discuss that the shareholders who are not promoters who are not controlling shareholders. They should have a fair exit option their public shareholders for that matter so for that matter they take over guidelines provides for a mandatory open offer to the public shareholders. Or the non-promotor shareholders or the minority shareholders for that matter so what is an open offer?

Open offer is offer made by the acquirer to this shareholders of the target company inviting them to tender their shares in the target company at a particular price. This price is fixed as per particular formula as per SEBI takeover code 2011 one can always go through that guideline find it out. And the primary purpose is what as you discussed to provide an exit option to the shareholders of the target company on account of change in control.

So they can exit because they may not like to continue with the company when the control is changing at the same time, with the new shareholders the controlling shareholders are getting is offering a price which is higher than the%age of the market price. The other servers would also have an option to exit at that particular at least at that particular price so that is the philosophy behind it so if an acquirer has agreed to acquire.

If an agreed to acquire or also acquired over a target company shareholders or voting, rights for that matter. And in excess of the threshold limit that will discuss subsequently in that case. And they have to make an open offer to sell the target they have to make an open offer if the threshold limit is breached.

(Refer Slide Time: 23:34)

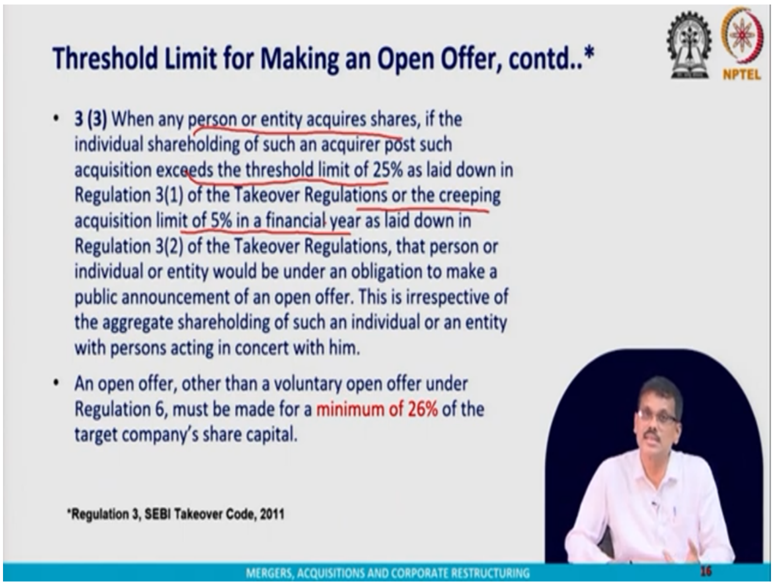


So what are the threshold limit for that matter threshold limit is that when somebody is acquiring 25% shares or more voting or more in the voting rights. They have to, either a person 1 person or person acting in concert in that case the PAC's existing shareholders would be entitled him, to exercise 25% more, shares or voting nets in a target company that makes them 25% or more voting rights by virtue of an acquisition of shares.

As well as if they already have 25% and if they acquire another 5% voting rights in this company those, shareholders also they can acquire additional shares in this target. That is why talking about the 5% extra they are suppose they are going to acquire. Only if they have made an open offer without that they cannot go for so 25% if I have if I have to acquire more then I have to first make an open offer.

Then I acquire more shares to that and there also we will discuss, these are called mandatory open offer. We also voluntary open offer except with those voluntary open offer the open offer size has to be 26% total shares of the target as. So that means they have to give offer to at least 26% to buy the 26% stake in the company 26% of minimum of the target company share capital.

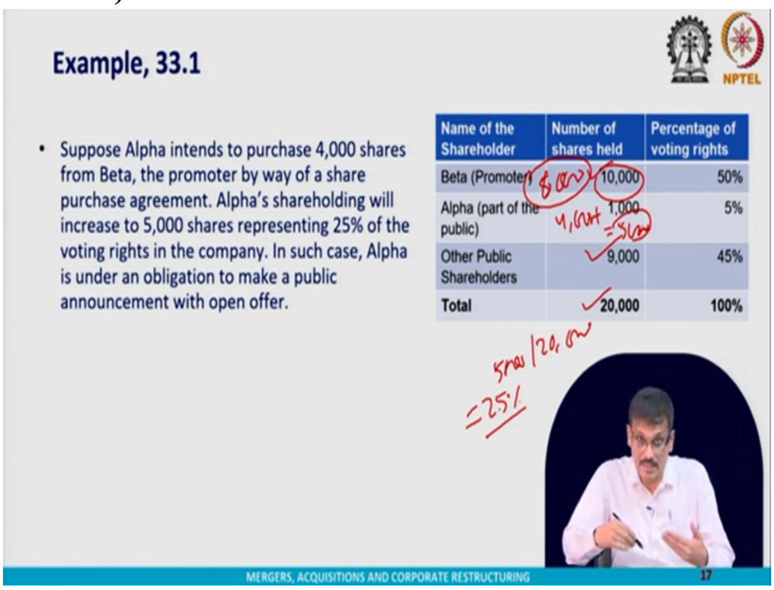
(Refer Slide Time: 24:56)



And similarly we have another is that when any person or entity acquire shares if the individual shareholders of such an acquirer post such acquisition exceeds the threshold limit 25. So person may be acting in concert but in when you are going together it is possible one particular promoter group shareholder may have breached a limit of 25% then in that case or they have to also.

That also trigger the open offer that means or, they go by keeping everything slowly acquire. And they got a 5% extra share so that also trigger anything that happens in these 2 cases it can also lead to a trigger of open offer. And open offer as you discussed it has to minimum 26% the targets share capital.

(Refer Slide Time: 25:47)

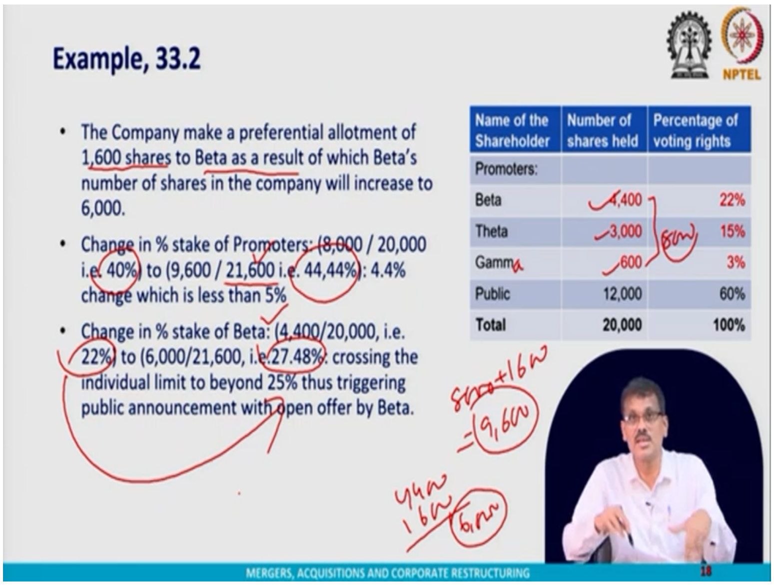


So we will have some example here like an example we have here in this company there is a promoter called beta, is there in this particular company. And the alpha is a part of the public so 10,000 shares are held by beta which is 50% total stake up 20,000 shares and other public shareholders are another 9000 that comes to around that counts 45%. What happens here suppose alpha intends to purchase 4000 shares from beta from the promoter what will happen, there case?

So 4 + 1 it becomes 4000 + 1 it becomes 5000 and this 10,000 becomes 6000 because 4000 shares are given from by beta to alpha. What will happen that case? Because it is 5000 now and 5000 is by 20,000 is now 25% so now what will happen alpha has to make an open offer it is an obligation. Now because it has reached 25% limit or up to 24.99% no problem the moment it reaches 25% the alpha has to now make an open offer to the other shareholder.

So that they can also exit they can get at least, they get an option to fair option to exit from this.

(Refer Slide Time: 27:00)



Then another example you have here there are 3 promoters beta, theta and gamma so 4400, 3600 these are the shares that means combinedly they have 8000 share that is 50% shares. They have in the company 40% share not 50%, 40% share and out of 20,000. So what happens suppose the company makes a preferential alert preferential allotment is subject to some other regulation of SEBI.

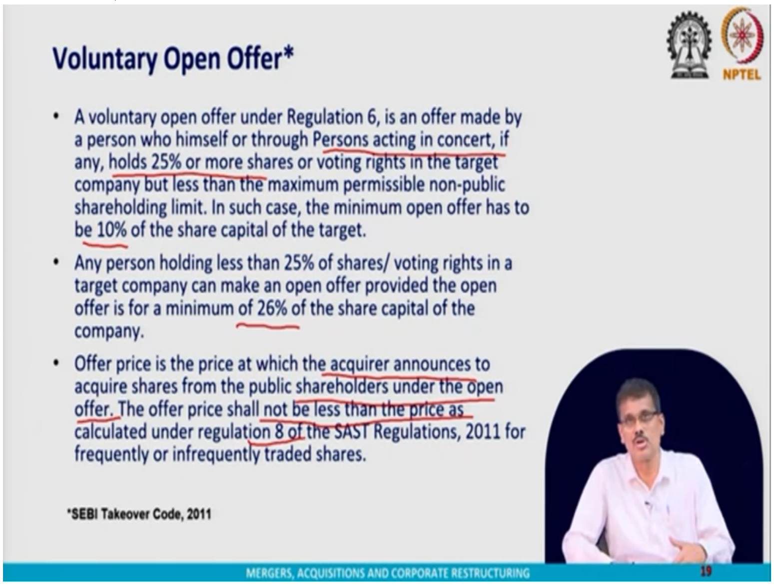
And companies act for that matter we are not discussing that but companies may have a right may have provision to preferentially alert certain shares to promoters. So let us say 1000 shares are alerted to beta which is one of the promoter and in that case what will happen? The top number of shares in the company now become 20,000 + 1 say 21,600 and overall where there is 8000 shares where they are preferential allotment.

Now 8000 becomes now 1600 extra so promoters have 9600 shares so 9600 / 21,600 comes to 44.44% earlier they had 40% stake. So the change is only 4.5%, 4.4% that means the change is less than 5% when they are acquiring 5% extra then that triggers open offers. As per that the promoter group which is acting in concert PAC for that matter they are having 4.4% extra shareholding in the company.

But since it is less than 5% it does not trigger an open offer but if you look at beta for that matter beta had 4400 / 20,000. They had he the person has 22% now 4400 + 600 preferential allotment to beta so that comes to 6000 shares. So 6000 shares and total is now 21600 20,000 + 1600 so that becomes 27.48% so beta stake has become from 22% to 27.48%, which is more than 25% trigger. So individually beta stake has gone beyond 25% or it has reached 25%.

Because more so then it has triggered open offer so as a group 4.4% change so there is no trigger open upper but individually. Because beta shareholding has gone up from 22% to 27.48%, which is more than 25% stake in the company now beta has to make an open offer to the other shareholders. So although promoters threshold limit has increase but individual threshold has increased so it can lead to open offer.

(Refer Slide Time: 29:44)



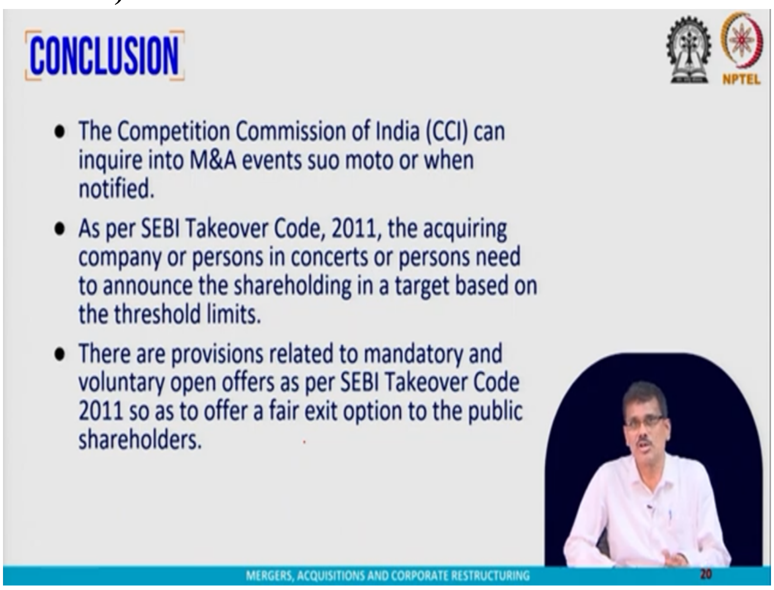
Then there is also provision of voluntary open offer is not its company some shareholders already they have less than 25% taken. The company if they reach the 25% limit then mandatory open offer comes but they may like to buy the shares in the company for that matter. So if they have some shares they like to make an open offer voluntary also they can do that and similarly up to 25%.

Also they have got 45% they also can still make an open offer in that case if persons are already having 25%. They can, make an open offer but open offer to other shareholders there will be minimum 10% they have to share capital. So 10% share they can acquire through open offer if they already have 25% if they have less than 25% in the company and they want to make an open offer either as individually or a person in concert.

In that case they have to make an at least 26% open 26% share capital company they have to make an open offer. So already 25% exist a crossed if they have to make a voluntary open offer they have the minimum 10%. But they are not crossed 25% now they want to make a voltage open offer its not that they can make an open offer 1%, 2% they have to make minimum 26% and offer price.

Whether a year or, in the mandatory open price it is under the open offer price is that an offer price cannot be less than the price as calculated regulation 8 of the SAST guidelines. Or takeover guidelines that gives the to the pricing formula for that matter which is typically based on, the past shares trading that has taken place for this frequently traded or infrequently traded that formulas are there. One can always refer to SEBI takeover code to find out those prices we are not discussing as a part of this particular course for that matter.

(Refer Slide Time: 31:39)



So in the conclusion the competition commission of India can inquiring to M and A events either suo moto or when notified. Or if it is there is a complaint from a third party and as per SEBI takeover code acquiring company person is concerns or persons they have to announce the shareholding. If they breach the threshold limit or they can also they also have provision there also provisions to related to mandatory as well as voluntary open offers as per SEBI takeover code 2011.

So, as to offer a fair exit option to the public shareholders particularly in the contest of the mandatory open offer concept. So in the next session we will discuss about the accounting select accounting, aspects. Or I mean what type accounting treatment is done for a when the merger acquisition takes place we will discuss about that. Thank you and happy learning.