

## 'Promoter' & 'Control' [Sec 2(69) read with Sec 2(27)] Part-1

### 1. Meaning of Promoter

The definition of 'promoter' is introduced for the first time in the Companies Act, 2013. However, the term promoter was explained under clause (a) of sub-section (6) of the section 62 companies Act, 1956 which is provided as under:

“the expression “promoter” means a promoter who was a party to the preparation of the prospectus or of the portion thereof containing the untrue statement, but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company”

Hence, this term was recognised only the persons in the prospectus as promoters. The Companies Act, 2013 provides that the following persons shall be treated as promoters:

- a) Whose name is appearing as a promoter in the prospectus or annual return or
- b) Who, directly or indirectly, has the control over affairs of the company either as a shareholder, director or otherwise or
- c) A person in accordance with whose advice, directions or instruction the board of directors of the company is accustomed to act.

However, it excludes a person whose is acting merely in the professional capacity. This definition is an exhaustive definition. However, it does not take into account the well recognised function of promoting the company.

Being a subscriber to the memorandum could be one of the criteria to consider a person as the Promoter. It has been held in the case Phosphate Sewage Co. v. Hartmount *[[1876] 5 Ch. D.394]*

Official Receiver and liquidator of Jubilee Cotton Mills Ltd. V. Lewis *[106 [1924] AC 958 (HL)]* the person, who, as a principal procures or aids in procuring the formation of the Company is a promoter of the Company.

### 2. Meaning under SEBI Regulations

Regulation 2 (1) (za) of SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009 defines promoters as follows:

“(za) “promoter” includes:

- (i) the person or persons who are in control of the issuer;
- (ii) the person or persons who are instrumental in the formulation of a plan or programme pursuant to which specified securities are offered to public;

(iii) the person or persons named in the offer document as promoters:

Provided that a director or officer of the issuer or a person, if acting as such merely in his professional capacity, shall not be deemed as a promoter:

Provided further that a financial institution, scheduled bank, foreign institutional investor and mutual fund shall not be deemed to be a promoter merely by virtue of the fact that ten per cent. Or more of the equity share capital of the issuer is held by such person;

Provided further that such financial institution, scheduled bank and foreign institutional investor shall be treated as promoter for the subsidiaries or companies promoted by them or for the mutual fund sponsored by them;

As per 2 (1) (s) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, the term 'Promoter' is also includes member of promoter group.

### 3. Position of the 'Promoter' under the Act

The Companies Act, 2013 places certain liabilities and gives certain rights to the promoters. They are as follows:

Sr. No.	Section	Provision
1.	Sub-section (6) of section 7	Liability for furnishing false or incorrect information for incorporation of the company
2.	Sub-section (8) of section 13 and sub-section (2) of section 27	Obligation to give exit opportunity to the dissenting shareholders
3.	Sub-section (1) of section 35	Liability to pay compensation for mis-statement or omission in prospectus
4.	Sub-section (10) of section 42	Penalty for accepting money in contravention of provisions of section 42
5.	Sub-section (4) of section 102	Liability to compensate for gain resulting from non-disclosure or insufficient disclosure of information in explanatory statement
6.	Sub-section (3) of section 167	Power to appoint directors in case of vacation of office of all directors
7.	Sub-section (3) of section 168	Power to appoint directors in case of resignation by all directors
8.	Sub-section (3) of section 257	Appearance before the meeting of committee of creditors upon instruction of interim administrator
9.	Sub-section (1) of section 284	Duty to extend full co-operation to Company Liquidator
10.	Sub-section (1) of section 300	Liability to be examined before Tribunal upon report of Company

		Liquidator
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It could be observed that barring section 167 and 168, the Act provides only for liabilities of the promoters.

## Control [Sec 2(27)]

### 1. Meaning of control under the Act

The Companies Act, 1956 does not define the term “control.” The definition of ‘control’ is introduced first time under the Act and it is an extensive definition.

The Act, provides a wide and inclusive definition to the term ‘control’, It is significantly wider as compared to the Accounting Standards (AS) as AS-18 considers only board control and control over voting rights whereas Act provides that a company may control other company through management rights or voting agreements.

As per the definition the Control may be exercised in any of the following manner:

Control may be direct or indirect either in the form or by virtue of:

- i. shareholding in the Company
- ii. management Rights in relation to the company
- iii. shareholders agreement
- iv. Voting agreement or in any other manner.

In Black’s Law Dictionary [9<sup>th</sup> Edition, Page 378], ‘control’ is defined as:

1. To exercise power or influence over <the judge controlled the proceedings>.
2. To regulate or govern <by law, the budget office controls expenditures>.
3. To have a controlling interest in <the five shareholders controlled the company>”

### 2. Meaning of control under Accounting Standards The term control was defined in the AS-21 of Accounting Standards for the purpose of consolidation of financial statements

Under Accounting Standard 21 (Consolidated Financial Statements) and Accounting Standard 23 (Accounting for Investments in Associates in Consolidated Financial Statements), the term “control” is defined as:

- (a) The ownership, directly or indirectly through subsidiary (ies), of more than one-half of the voting power of an enterprise, or
- (b) Control of the composition of the board of directors in the case of a company or of the composition of the corresponding governing body in case of any other enterprise so as to obtain economic benefits from its activities.”

### 3. Meaning of control under SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

Regulation 2 (1) (e) defines “control” as including –

- the right to appoint majority of the directors, or
- to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights, or
- shareholders’ agreements, or
- voting agreements, or in any other manner.

The main parameter of “control” is “controlling interest” in relation to the controlled company, although that is not the sole criterion. For example under Regulation 2(1) of SEBI takeover regulations if two or more individuals, associations of individuals, firms, trusts, trustee or bodies corporate have controlling interest in a Company, it would constitute a group within the meaning of sub-clause (e) of sub-clause (i), in relation to that Company.

In *Subhakam Ventures (I) Pvt. Ltd. v. SEBI* [Available on <http://www.sebi.gov.in/satorders/subhakamventures.pdf>, last accessed on 07.11.2016] (2010) SAT has held that “power by which acquirer can only prevent a company from doing what the latter want to do is by itself not control. It should be positive power and not negative power. SAT held that the acquisition of certain affirmative rights with the purpose only to protect the investment does not constitute the acquisition of control. According to SAT, ‘control’ is a proactive and not a reactive power”

### 4. Definition under Corporations Act, 2001 (Australia)

Section 50AA of the Act defines “control” as:

- (1) For the purposes of this Act, an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity’s financial and operating policies.
- (2) In determining whether the first entity has this capacity:
  - (a) the practical influence the first entity can exert (rather than the rights it can enforce) is the issue to be considered; and
  - (b) any practice or pattern of behaviour affecting the second entity’s financial or operating policies is to be taken into account (even if it involves a breach of an agreement or a breach of trust).
- (3) The first entity does not control the second entity merely because the first entity and a third entity jointly have the capacity to determine the outcome of decisions about the second entity’s financial and operating policies.
- (4) If the first entity:

- (a) has the capacity to influence decisions about the second entity's financial and operating policies; and
- (b) is under a legal obligation to exercise that capacity for the benefit of someone other than the first entity's members; the first entity is taken not to control the second entity.

*(to be continued...)*

*Contents of Geeta Saar, as extracted from ICSI Premier on Company Law, is as per notified law as on 30<sup>th</sup> September, 2016.*

Premier on Company Law