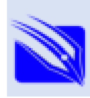

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NAVIGATING COMMON SHAREHOLDING: COMPETITION LAW IMPLICATIONS OF THE NEW AMENDMENT AND REGULATORY CHALLENGES IN INDIA'S EVOLVING MARKET LANDSCAPE

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Abstract

*A lot of recent legal literature has been dedicated to exploring the possible harmful effects stemming from overlapping minority shareholdings in companies. This stems frominstitutional investors ('**II's**'), who tend to create diverse portfolios by investing in competing firms. The overlaps in shareholding create incentives for firms to collude with their rivals and compete less aggressively with each other. Different jurisdictions have attempted to illustrate the possible anti-competitive threats posed by such shareholding patterns. Legal scholars across jurisdictions have sought to map how the existing legal frameworks currently engage with the issue and how it may be accommodated within the existing language of the statutes. The jurisprudence of the European Union ('**EU**') and the United States of America ('**US**' or '**America**') offer insights into how the broad-sweeping language of their antitrust statutes may accommodate the changing market dynamics.*

*While anti-competitive agreements have always been covered under the Indian Competition Act, they were earlier restricted to agreements between either horizontally or vertically related parties. The newly amended Competition Amendment Act 2023[1] ('**Amendment**') opens the door for the ex-post regulation and penalisation of institutional shareholders who create such anti-competitive threats, as outlined in the proviso supplied to S.3(3). While conducting a comparative analysis with the recent scholarship surrounding common shareholding and their regulation in other jurisdictions (namely EU and America), we seek to establish whether such investors should be regulated within the scope of the proviso in the Indian market.*

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[1]The Competition (Amendment) Act 2023, §3.

I. CARTELS UNDER THE AMENDMENT

In hub-and-spoke cartels, as opposed to other forms of cartelisation, horizontally competing firms enter into anti-competitive agreements without any direct communication.[2] The firms (spokes) cartelise through a common agent at a different level economic chain level (hub).[3] All collusion and information exchange occur only indirectly through these common hubs. The most common examples of such cartels include competing firms coordinating horizontally through vertically related players, such as a common distributor or a common supplier.

Earlier, the Act did not explicitly include such cartels within the scope S.3(3).[4] The Competition Commission of India ('**CCI**') had addressed allegations of hub-and-spoke cartelisation in the *Hyundai Motors Case*[5]and the *Uber Case*[6]. In the latter scenario, the CCI further examined the nature of hub-and-spoke cartels. It clarified that for a hub-and-spoke cartel to function, the spokes would necessitate a third-party platform.[7] This would be a hub for the exchange of sensitive information. This information may include details on prices which can enable price fixing. Moreover, the presence of a price-fixing conspiracy necessitates collusion among the spokes.

One primary objective of the Amendment was to expand the CCI's scope for scrutinizing anti-competitive conduct in the market by modifying the existing statute to align with the evolving traditional market structures.[8] S.3(3) of the Competition Act provides for a *per se* rule against anti-competitive agreements, including cartelisation. Such agreements carry an assumption of appreciable adverse effect on competition ('**AAEC**').They also are assumed to have a negative effect on competition, unless rebutted. However, the older framework of the act analysed anti-competitive agreements in two distinct categories: horizontal and vertical. This precluded hub-and-spoke arrangements which included elements of both.

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[2]Manika Brar, 'Hub-and-spoke cartels: The next "big thing"?' Shardul Amarchand Mangaldas (3 April 2023) <https://www.amsshardul.com/insight/hub-and-spoke-cartels-the-next-big-thing/> accessed 20 December 2023.
[3]ibid.
[4]The Competition Act 2002 (Act 12 of 2003), §3(3).
[5]*Fx Enterprise Solutions India Pvt. Ltd.* v. *Hyundai Motor India Limited (36/2014) St. Antony's Cars Pvt. Ltd.* v. *Hyundai Motor India Limited (82/2014)*, CCI Order dated 14.06.2017.
[6]*In Re; Samir Agrawal (37/2018)*, CCI order dated 06.11.2018.
[7]ibid.
[8]Ministry of Corporate Affairs '*Report of Competition Law Review Committee*' (MCA 2019).

The Competition Law Review Committee felt a need for other forms of agreements. These were not to be strictly classified as horizontal or vertical agreements under S.3. The Committee justified such an amendment, specifically in the context of digital markets, expressing concerns about potential 'unanticipated linkages' among the participants of a cartel and involvement of 'arrangements that may not fall strictly within the existing classification of agreements envisaged under S.3 of the Competition Act'.[9]

The Act was accordingly amended as per the recommendations of the Competition Law Review Committee to include hub-and-spoke cartels within the purview of S.3(3); the Amendment Act introduced a proviso to S.3(3) to include agreements between those "not engaged in identical or similar trade"[10]if they participate or intend to participate in the furtherance of such prohibited agreements. The Committee had further suggested that in penalizing the hubs and spokes involved in the cartels, there should be no requirement of knowledge or intent owing to generally damaging effects of cartels. The Committee suggested that the hubs may be presumed to have caused AAEC under S.3(3) of the Act without proof of knowledge or intent.

However, the broadened scope of the provision creates the possibility of including parties beyond just vertical partners in the economic value chain. Specifically, overlaps in shareholding (and, oftentimes, the consequent interlocking directorates through nominee directors) result in the investors having a platform to facilitate the transfer of sensitive information and the enforcement of cartels. In this scenario, investors may provide the horizontal competitors with a platform for collusion. Investors possess the motivation to maximize profits across their portfolio through the coordination of the firms in which they have a vested interest. They frequently have the right to appoint representatives to the Boards of such enterprises. They also consequently also possess the necessary influence to enforce cartelisation.

Cartels, unlike other forms of agreements, are sustained through deterrence mechanisms that enforce conformity. Deterrence mechanisms are necessitated to counter the incentive for firms to cheat others in the cartel. Thus, to survive, a cartel regime requires mechanisms for an agreement over prices in the market and a mechanism to deter cheating from such an agreement.

[9]ibid 63.

[10]The Competition (Amendment) Act 2023, §3(3).

In this context, a common investor would act as the "cartel ringmaster," facilitating the exchange of information between firms and monitoring behaviours.[11] The new proviso broadens the scope of S.3(3) to hold such investors liable for cartelisation despite them "not [being] engaged in identical or similar trade".[12]

II. COMMON OWNERSHIP

Common ownership is witnessed in three forms. First, is a complete merger where a complete overlap of shareholders occurs. Here, the merged entity is owned and controlled by the same shareholder. Such an amalgamation of firms might raise anti-competitive concerns, which are addressed by the competition law authorities across jurisdictions through *ex-ante* measures. Second, the shareholder controls one firm but holds a passive interest in another. Here the control exercised by the shareholder is uneven. The third form of common ownership presents itself as a shareholder having minority ownership and partial control in two competing firms. The third scenario is central to competition law.[13]

The common ownership theory of harm provides that common shareholders with non-controlling minority stakes in competing firms reduce competition. This is especially evident in oligopolistic markets where multiple II's hold shares in rival firms. The issue of common ownership finds its roots in portfolio diversification.[14] Portfolio diversification is motivated by considerations of profit maximization which translates into the common shareholders being concerned with industry profits as opposed to firm profits.[15] This acts as an incentive to influence firms' decisions that are not pro-competitive.

It is argued that II's hold the capacity to influence the decision-making process of the firms through direct and indirect incentives. A direct way of exercising control is by exercising voting rights in fundamental decisions such as the appointment of directors, making strategy decisions,

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[11]Rock, E. B. and D. Rubinfeld, 'Antitrust for Institutional Investors' (2017) Law & Economics Research Paper Series, Working Paper No. 17-23, New York University School of Law <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2998296> accessed 26 December 2023.

[12]The Competition (Amendment) Act 2023, §3(3).

[13]Anna Tzanaki, 'Varieties and Mechanisms of Common Ownership: A Calibration Exercise for Competition Policy' (2021) 18(1) Journal of Competition Law and Economics 168.

[14]José Azar, 'The Common Ownership Trilemma' (2020) 87(2) The University of Chicago Law Review 263.

[15]Alec J. Burnside and Adam Kidane, 'Common ownership: an EU perspective' (2020) 8 Journal of Antitrust Enforcement 456.

and determining the remuneration of directors. II's could contribute to board selection using votes. They could choose to select a board that has similar interests. Additionally, there are several other factors, such as limited involvement by non-institutional minority shareholders, or voting collectively as a bloc, that strengthen the influence of II's in decision making.[16]

II's also exercise indirect influence over the board by virtue of being investors with substantial minority shares and harmonized interests. Additionally, if the executive compensation provided to the management is tied to the overall growth of the market rather than firm profits, it would disincentive the management from making aggressive decisions that might be detrimental to other firms in the market.

The EU is acutely aware of the problem of common or joint shareholding by II's.A study, commissioned by the Committee on Economic and Monetary Affairs, analyzed the twenty-five of the largest European listed banks. The Policy Department for Economics, Scientific and Quality of Life Policies conducted this study. The results revealed that IIs such as BlackRock, Vanguard, and NBIM were common shareholders in the examined banks. Nevertheless, their collective shareholding is distributed among numerous shareholders with relatively small holdings.[17]

Specifically, BlackRock, which was the largest II's in the banks, exercised influence by raising issues and engaging directly with the management before an issue was put to vote. BlackRock also participated in public policy discussions and advocated for the interest of their portfolio clients in joint shareholder and company meetings to obtain desired outcomes by the firm. Similarly, NBIM is seen to employ the tool of extraordinary shareholders' meetings to press for corporate changes. Vanguard has also been known to voice their interests in roundtables and conferences. These firms exhibit influence that escapes liability under the current competition law regime.

[16]Hansen R. and J. Lott Jr. (1996), 'Externalities and Corporate Objectives in a World with Diversified Shareholder/Consumers' (1996) 31 Journal of Financial and Quantitative Analysis.

[17]Spark Legal Network and Queen Mary University of London, 'Support study for impact assessment concerning the review of Merger Regulation regarding minority shareholdings' (European Commission 2016).

III. COMPARATIVE ANALYSIS WITH THE EU

Concerns pertaining to common shareholding escape the EU regulatory framework owing to the threshold of "decisive influence" as followed in the EU Merger Regulations[18] ('**EUMR**'). This influence can be exercised individually or jointly with other shareholders. The EUMR also accounts for effective control that might be exercised in cases of minority acquisitions where less than 50% of voting shares are transferred. In cases where the acquirer holds the largest stake in an otherwise dispersed minority shareholding, the acquirer is positioned to have a lasting influence on the decision-making of the firm.[19] Various rights, such as equal voting rights, right to appoint a director, or strategic veto rights may indicate joint control. It can also be identified by joint exercise of voting rights or presence of collective interest and action. However, the EU Competition Law Commission has clarified that a common interest in the return on investment by financial investors does not constitute harmonization translating into the recognition of *de facto* joint control.[20]

Similarly, Schedule I exemptions under India's merger control, as per the CCI (Procedure regarding Transaction of Business Relating to Combinations) Regulations, 2011 ('**Merger Regulations**'), provide that acquisition of up to 10%, solely done as an investment and without granting the acquirer any special rights, such as nomination of directors, need not be notified to the CCI. Acquisitions up to 25%, that are done in the ordinary course of business where the acquirer does not control the target, are also exempted under the Schedule. Like the EU, the CCI recognises *de facto control* that can be acquired by holding a minority of voting rights that has the ability to account for majority votes in a meeting. The CCI recognizes material influence via

[18] Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings [2004] OJ L 24/1.

[19] Anna Tzanaki, "The Legal Treatment of Minority Shareholdings Under EU Competition Law: Present and Future" [2015] Essays in Honour of Professor Panayiotis I. Kanellopoulos, Sakkoulas, Athens.

[20] Commission Consolidated Jurisdictional Notice under Council Regulation 139/2004 on the control of concentrations between undertakings, [2008] OJ C 95/1.

investor actions like board representation or special voting rights. These rights allow influencing the company's activities.[21]

Thus, minority shareholdings without visible control exercised aren't regulated by EUMR or Merger Regulations. Alternatively, in the EU, the Treaty on the Functioning of the European Union[22] ('**TFEU**') offers some direction in the regulation of common shareholding. Article 101 of the TFEU, previously Article 81 of the Treaty, prohibits anti-competitive agreements. These involve decisions and practices hindering competition among member states. Notably, the broad wording of TFEU Article 101 explicitly mentions and prohibits "concerted practices" that have the effect of restraining competition. It can thus be argued that the influence that II's, holding minority common shareholding, exercise on the management is a coordinated activity leading to anti-competitive outcomes.

The European Court of Justice ruled that a passive minority stockholder's investment can violate TFEU Article 101.[23] This occurs if the share purchase intends to affect competition in the market.[24]

The exercise of influence by minority shareholders with common shareholding is covered in the court's interpretation. Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements ('**Guidelines**') recognise indirect data exchanges through a hub that is a third party or a common agency.[25] A collective reading of the court's understanding of TFEU Article 101 and the Guidelines presents an avenue where the II's who have common shareholding in competing firms and facilitate a cartel could be held liable.

The Indian counterpart to TFEU Article 101 is S.3, which covers any exclusive dealing arrangement or decisions taken by competing firms that substantially lessen competition in India. The Amendment expanded the scope of anti-competitive agreements to include a party

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[21]*UltraTech Cement Ltd.*, *In re*, Combination Registration C-2015/02/246, CCI Order dated 12.03.2018, 2018 SCC OnLine CCI 27.

[22]European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01.

[23]*British American Tobacco* v. *Commission* [1987] E.C.R. 4487, p 45.

[24]ibid.

[25]Communication from the Commission — Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements Text with EEA relevance [2011] OJ C11.

facilitating an anti-competitive horizontal agreement, which may not itself be vertically or horizontally in the same line of business. Here, an expansive reading of the provision could hold common shareholders liable when acting as a facilitator of business decisions that have anti-competitive effects.

The EU Competition Law Commission's approach to issues of common ownership is exhibited in recent cases of mergers. The 2017 Dow/DuPont merger concerned the oligopolistic market of agrochemicals. A small group of common shareholders collectively owned 29-36% of Dow, DuPont, and Monsanto.[26] These companies are major players in the market. The Commission observed that the merger witnessed common ownership involving diversified investors collectively holding small stakes in competing firms, resulting in an indirect *de facto* influence on firm governance and market output. The Commission also highlighted how common ownership could diminish the inclination of companies to invest in innovation because that would result in aggressive competition, harming the competing firms held by the same II's. The Commission noted that even passive investors impact individual firm behaviour and shift the perspective from a firm-level to an industry-wide focus. This influence is enhanced in dispersed ownership.

IV. COMPARATIVE ANALYSIS WITH THE US

The corporate landscape in late 1800s America was dominated by firms incorporating as trusts to buy and control multiple businesses, including market competitors. This pattern of shareholding created monopolistic control across many sectors. John D. Rockefeller, for instance, created a monopoly in the oil industry by organizing many rival refineries and pipelines under the Standard Oil Trust in 1882, which controlled 90% of America's refineries and pipelines.[27] J.P. Morgan further monopolized 1/6th of all railroad trackage in America by 1902[28] and also founded the

[26]Dow/DuPont (European Commission, Case M.7932).
[27]Encyclopaedia Britannica, 'Standard Oil' (*Britannica,* 25 May 2023) <https://www.britannica.com/topic/Standard-Oil> accessed 27 August 2023.
[28]Scott Mall, 'FreightWaves Classics/Leaders: J.P. Morgan controlled US railroads and industry policies' (FreightWaves, 21 October 2021) <https://www.freightwaves.com/news/freightwaves-classicsleaders-jp-morgan-greatly-influenced-us-railroads-in-the-late-19th-century> accessed 27 August 2023.

United States Steel through the reorganization of steel companies, which produced one-quarter of all the steel in the world.[29]

These market practices led to widespread discontentment in the American economy, resulting in the US revamping the market competition through the introduction of the Sherman Act in 1890. The Act was introduced by Senator John Sherman, who condemned the trusts in the Senate as a shareholding pattern that made competition impossible. The Sherman Antitrust Act ('**Sherman Act**')[30] initially sought to target 'loose combinations' i.e. cartels, but it was eventually extended to 'tight combinations' i.e. mergers through case law and later through the Clayton Antitrust Act in 1914 ('**Clayton Act**').[31] The legal framework for anti-competitive restraint of trade as it exists today prevents any restraint of trade under S.1 and S.7 of the Sherman Act. S.1 of the Sherman Act targets trusts, conspiracy, and contracts. S.7 of the Clayton Act targets stock acquisitions. S.7 of the Clayton Act prohibits any acquisition of stock that may create an anti-competitive market structure without requiring proof of collusion or anti-competitive conduct, so long as the post-merger structural effect on the market is anti-competitive.

Prof. Elhauge has suggested that the existing American framework can and should be used to address the issue of common shareholding in the market. S.7 of the Clayton Act does make an exception for passive investors since it does "not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition."[32] However, much like the Indian framework, to be exempt from the statutory filing requirements, the proposed combination must have both solely investment purposes and no negative impact on the competition in the market.

The American Supreme Court accordingly stressed in *United States v. E.I. du Pont de Nemours & Co.* that "even when the purchase is solely for investment, the plain language of S.7 contemplates an action at any time the stock is used to bring about, or in attempting to bring

[29]Charles Molesworth, 'J.P. Morgan, The Pujo Committee, and the "Money Trust"' (University of Texas Press, 3 March 2016) <http://utpressnews.blogspot.com/2016/03/jp-morgan-pujo-committee-and-money-trust.html> accessed 27 August 2023.

[30]The Sherman Antitrust Act 1890.

[31]The Clayton Antitrust Act 1914.

[32]The Clayton Antitrust Act 1914, §18.

about, the substantial lessening of competition."[33] Thus, shareholding of institutional funds may contravene the law due to structural anti-competitive effects.[34] Despite being "solely for investment purposes," institutional funds may still face scrutiny.

In the context of India, Schedule 1 of the combination regulations outlines specific transactions that are typically unlikely to result in an AAEC in India.[35] Such transactions ordinarily do not require notification to the CCI. The most common exemption availed is for acquisitions in the ordinary course of business. It also applies to acquisitions made solely for investment purposes. Here, the acquirer must hold less than 25% of the target enterprise's shares.[36] Similarly, their voting rights should also be below the specified threshold.[37] It also should not lead to the acquisition or change of control of the firm.[38] The CCI here grants an exemption to 'certain transactions that are ordinarily not likely to cause an AAEC in India and need not normally be notified to CCI.' However, if the market structure or the combination is such that the transaction is extraordinary in nature in a manner that may likely cause AAEC, the filing requirements would still apply. The CCI has further clarified exemptions under Schedule 1.[39] They cannot be taken if the acquirer possesses any veto or affirmative rights.Exemptions do not apply in situations involving board representation possession. They also exclude any horizontal or vertical overlap with the target enterprise. Additionally, exemptions don't apply when there's an affirmative or veto right. This right must not ordinarily be exercised by shareholders. Even, acquisitions made for strategic reasons are not exempt. This is because they indicate an intention to engage in management.[40] The merger regulations thus provide channels of assessment for institutional investment, including any minority shareholding which may, in effect, result in substantive control.

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[33]353 U.S. 586, 597–98 (1957).

[34]The Clayton Antitrust Act 1914, §7.

[35]Schedule I, Competition Commission of India (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011.

[36]ibid.

[37]ibid.

[38]ibid.

[39]Order under Section 43A of the Act dated 10 February 2015 in Combination Registration No. C-2014/06/181 (Notice given by Zuari) and Combination Registration No. C-2014/06/175 (Notice given by SCM).

[40]ibid.

While these *ex-ante* measures seem to provide a sufficient level of scrutiny for even minority acquisitions, Anna Tzanaki finds such avenues for inspection insufficient due to *ex-ante* uncertainty on how the shareholder power could actually be exercised in practice. Tzanaki argues regulatory bodies cannot predict minority shareholding effects accurately. Uncertainty in market and shareholder dynamics contributes to this challenge. Take, for instance, Trian Fund Management, L.P.'s proxy contest with DuPont; Trian held 2.7% of DuPont's shares and criticised the management for not aggressively competing in the market or investing in research and development. Trian argued that DuPont's share price only rose due to industry profits, and the business fundamentals of the firm had remained more or less the same. DuPont, rather than competing with Monsanto, paid for a license to use their patent. This was after they paid Monsanto $1 billion due to patent infringement. Interestingly, the top DuPont shareholders (BlackRock, Vanguard, State Street, Capital Research) mirror Monsanto's investors. They collectively own nearly 20% of both companies, creating an interconnected ownership. However, the leading four shareholders of DuPont, namely BlackRock, Vanguard, State Street, and Capital Research, coincide with the top four shareholders in Monsanto. The four investors collectively own just under 20% of both firms. It is then no surprise that none of these firms supported Trian's proxy contest, especially since the loss of profits and market capitalisation to Monsanto was their main contention. The proxy contest was narrowly rejected by the shareholders, making the cumulative 20% shareholding of four of these investors instrumental in the given case.[41]

V. THE INDIAN CONTEXT

Tzanaki suggests the possibility of an '*ex-post* safety valve' to impute future liability upon the firms involved, which use seemingly passive financial investments to create future competitive harm through '*ex-post* opportunism.' [42] In India this can be achieved through the newly amended S.3(3); The earlier section could not penalize the II's who facilitated cartelisation since it only addressed those 'engaged in identical or similar trade of goods or provision of services'. However, the newly included proviso expands the scope of penalisation to include even a firm

[41]Einer Elhauge, 'Tackling Horizontal Shareholding: An Update and Extension to the Sherman Act and EU Competition Law' (2017) <https://one.oecd.org/document/DAF/COMP/WD(2017)95/en/pdf> accessed 26 December 2020.

[42]Anna Tzanaki, 'Common Ownership and Minority Shareholding at the Intersection of Competition and Corporate Law' in Marco Corradi and Julian Nowag (eds), *Intersections Between Corporate and Antitrust Law* (Cambridge University Press 2023).

not engaged in a similar trade 'if it participates or intends to participate in the furtherance of such agreement'. Thus, we suggest that while the newly added proviso was targeted at hub-and-spoke cartels, it should also be extended to include these forms of collisions across common shareholdings and impute liability upon II's.

What further remains to be ascertained is how these provisions will be applied in practice since there is no liability standard for the newly enacted proviso. Typically, proving the existence of anti-competitive agreements is frequently based upon circumstantial evidence, such as managerial decisions coinciding with meetings of parties suspected of cartelisation, which is difficult to prove.[43] When there exist overlaps in horizontal shareholding, the routine nature of the interaction between the investor (or its agents) and the target firms through board meetings or business discussions can make an already difficult task nearly impossible. As a result, the earlier *ex-post* mechanisms were probably not sufficient to prevent the possible anti-competitive risks arising out of such investments since they evade competition scrutiny due to a lack of direct evidence.

The CCI tackled the issue of common shareholding in the case of *Meru Travel Solutions vs. ANI Technologies and Ors.*[44] The CCI noted that Uber and Ola shared four common investors (namely, Softbank, Tiger LLC, Sequoia Capital, Didi Chuxing). It recognised the role of Softbank as an "active investor" in both firms as the investor had board representation rights in both firms, allowing Ola and Uber to exercise collective dominance in the market.

The CCI noted that common shareholding may directly result in anti-competitive risk, even though the omission of preventative measures such as Chinese Walls, rather than direct collusion.Investors and directors' horizontal interlocks limit market risks through unspoken influence. This control is wielded through control over multiple firms. Thus, they strategically manage competitive dynamics.

Moreover, allegedly, such influence need not meet the relaxed standard of CCI's "material influence". Instead, II's can prompt the managers of their portfolio companies to generate anti-

[43]*Builders Association of India* v. *Cement Manufacturers* Case No. 29 of 2010 (CCI 2016).
[44]*Meru Travel Solutions* v. *ANI Technologies and Ors*MANU/CO/0036/2018.

competitive benefits in their favour simply through the manager's knowledge of their own investors having a vested interest in their competitors.

Limited by the contours of the existing statutory provisions, the CCI only went so far as to recognise the possible risk, stating that "the market dynamics post common investments is yet to fully effectuate". Hence, there is no evidence supporting actual anti-competitive effects stemming from common ownership.[45] Nevertheless, common ownership is gaining traction in the Indian market. For example, Tiger Global, an investment firm, invested in both Flipkart and Shopclues.[46] These companies are direct competitors in the Indian online retail fashion market. Tiger Global has also simultaneously made other significant investments in various start-ups in this industry. Similarly, Nexus Venture Partners, a USD 700 million fund, also invested in Snapdeal and Shopclues, which are competitors.[47] Sequoia, a venture capital firm, invested in competing sectors, like online payment (Zaakpay).[48] Investments were also made in online grocery (Peppertap, Grofers) and food delivery (TinyOwl, Zomato).[49]

VI. SUGGESTIONS

The divergence between corporate laws and antitrust laws that were created by specialised regulatory bodies (CCI and Securities Exchange Board of India ('**SEBI**') to address specific matters has led to regulatory gaps in the market.[50] The CCI and SEBI have been careful not to overregulate the market. However, the caution exercised to avoid judicial overreach and maintain the separation of enforcement powers by the authorities has led to the emergence of issues such as common ownership that no single body can regulate effectively.

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[45]ibid 56.

[46]Jon Russell, 'Indian E-Commerce Marketplace ShopClues Lands $100M Round Led By Tiger Global' Techcrunch (19 January 2015) <https://techcrunch.com/2015/01/19/shopclues-100-million/> accessed 20 November 2023.

[47]M. Sriram, 'Inside Nexus Venture Partners: How a top VC firm got it mojo back' MoneyControl (30 October 2023) <https://www.moneycontrol.com/news/business/inside-nexus-venture-partners-how-a-top-vc-firm-got-its-mojo-back-6040781.html> accessed 20 December 2023.

[48]Akanshha Agrawal and Anupriya Dhonchak, 'Relevance of Common Ownership in Competition Analysis in India '(2020) 6 NLS Business Law Review 61.

[49]ibid.

[50]Anna Tzanaki, 'Varieties and Mechanisms of Common Ownership: A Calibration Exercise for Competition Policy' (2021) 18(1) Journal of Competition Law and Economics 168.

Balancing the laws would avoid II's from exiting the market. It would also promote effective competition through heightened scrutiny. This fosters active competition, ensuring a dynamic market between II's. An II holding substantial horizontal holdings in unconcentrated and varied markets would not raise competition law concerns similar to those raised in oligopolies such as banking, airlines, or agrochemicals, as discussed above. Posner suggests that II must limit themselves to a small stake or hold greater shares in a single firm.[51] Small stake would mean, 1% of the total size of the industry.[52]

However, if II's prioritize market diversification, firms may commit to abstain from voting shares. This commitment arises when diversification outweighs corporate governance influence benefits.

VII. CONCLUSION

Competition law has often been slow to catch-up with the changes in the industry that harm competition. When regulators are always caught up in a game of catch up, firms tend to create novel financial arrangements that reduce competition without violating the prevalent law at the time.

When Berkshire Hathaway reported its acquisition of stakes in the airline industry, spanning across American Airlines, Delta Airlines, United Airlines, and Southwest Airlines, in 2016, a pattern of common ownership started to unravel. Large II's such as BlackRock, Vanguard, Fidelity, and State Street, have ritualistically held stakes in competing firms in markets identified by concentration. This pattern of shareholding by II's has displaced dispersed individual investors who now participate in the market indirectly through II's. II's like BlackRock, Fidelity, State Street, and Vanguard together own about two-thirds of all the shares of publicly traded companies in the US.[53] This is a dramatic surge from the earlier one-third in 1980.

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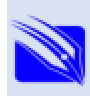
[51] Eric A. Posner, Fiona Scott Morton, and E. Glen Weyl, 'A Proposal to Limit the Anti-Competitive Power of Institutional Investors' (2017) 81(3) Antitrust Law Journal 669.

[52] ibid.

[53] Jacob Greenspan, 'How Big is it That a Few Shareholders Own Stock in So Many Competing Companies?' Harvard Business Review (19 February 2019) <https://hbr.org/2019/02/how-big-a-problem-is-it-that-a-few-shareholders-own-stock-in-so-many-competing-companies> accessed 20 December 2023.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It is acknowledged that American shareholding patterns and markets are not synonymous with the Indian landscape. Promoter shareholding and family-owned businesses do not create competition law concerns because they structure themselves in a way where firms compete aggressively. However, the concerns that arise from common ownership in America can be superimposed on the Indian markets, especially in the contemporary start-up market, necessitating examination by the CCI.