

# RELEVANCE OF COMMON OWNERSHIP IN COMPETITION ANALYSIS IN INDIA

*Akanshha Agrawal and Anupriya Dhonchak\**

*Concerns around the anti-competitive effects of common ownership by institutional investors in competing firms have previously been raised by scholars. Recent empirical evidence has further fueled the debate, causing the European Commission to use common ownership as an ‘element of context’ in two high profile combination assessments. An allegation concerning the anti-competitive impact of substantial common ownership in Ola and Uber was recently raised before the Competition Commission of India (CCI). Through this paper, we highlight the relevance of common ownership in competition analysis in India, arguing for increasing its significance in both ex ante and ex post review. We locate the CCI’s findings within the larger debate on the anti-competitive effects arising out of common ownership and argue that it generates anti-competitive market structures, allowing firms to potentially evade competition scrutiny for lack of direct evidence. With respect to abuse of dominance, we examine recent dilutions of the definition of control across Indian and international jurisprudence to argue that common ownership could potentially allow firms to be considered part of a ‘group’ within the Act. For anti-competitive agreements, we look at the possibility of collusion facilitated by common investors, and finally, in the context of ex ante review, we discuss the possible role of common ownership in triggering merger notifications. In light of this, we emphasise that competition policy in India must engage with the anti-competitive effects of common ownership in different industries more comprehensively and urgently.*

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## INTRODUCTION

The general assumption behind the application of competition policy is that competitors in the market are independent of each other and that the goal of shareholders in any company is to maximise the profits earned by the company that they have invested in.<sup>1</sup> Common ownership threatens to unsettle this very presumption. Common ownership or horizontal shareholdings exist when common investors simultaneously own significant stakes in corporations that are horizontal competitors in a product market.<sup>2</sup> Due to such ownership, the management of rival companies might indulge in practices that would ultimately lead to the joint maximisation of profits earned by the institutional investors of both companies.<sup>3</sup> This end goal discourages rigorous competition between competing firms. The competition concerns increase with the increasing control of the investor on the company. This theory is placed on a similar ground as cross holding where a company directly holds shares in a competing company.<sup>4</sup> It is important to note that the anti-competitive impacts of cross holding have already been widely recognised.<sup>5</sup>

The debate surrounding anti-competitive impacts of common ownership recently resurfaced and gained traction with the publication of empirical studies focused on airline,<sup>6</sup> retail banking,<sup>7</sup> and pharma<sup>8</sup> industries, concluding that common ownership leads to anti-competitive effects such as price

<sup>1</sup> Margrethe Vestager, 'Competition in Changing Times' (FIW Symposium, Innsbruck, 16 February 2018) <[https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-changing-times-0\\_en](https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/competition-changing-times-0_en)> accessed 31 October 2019.

<sup>2</sup> Einer R Elhauge, 'The Causal Mechanisms of Horizontal Shareholding' (2019) 82(2) Ohio State Law Journal <<https://ssrn.com/abstract=3370675>> accessed 31 October 2019.

<sup>3</sup> Vestager (n 1).

<sup>4</sup> *Dow/DuPont* (Case COMP/M.7932) Commission Decision 27 March 2017 (2017/C 353/05) Annex 5, para 45.

<sup>5</sup> European Commission, 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' (2004/C 31/03); Robert Reynolds and Bruce Snapp, 'The Competitive Effects of Partial Equity Interests and Joint Ventures' (1986) 4(2) *International Journal of Industrial Organization* 141.

<sup>6</sup> José Azar, Martin C Schmalz and Isabel Tecu, 'Anti-Competitive Effects of Common Ownership' (2018) 73(4) *Journal of Finance*.

<sup>7</sup> José Azar, Sahil Raina and Martin C Schmalz, 'Ultimate Ownership and Bank Competition' [2019] <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2710252](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710252)> accessed 31 October 2019.

<sup>8</sup> Miguel Antón, Florian Ederer, Mireia Giné, Martin C Schmalz, 'Common Ownership, Competition, and Top Management Incentives' [2018] ECGI Finance Working Paper

increases and lack of innovation in the market. A significant development post this is the increasing vigilance of competition regulators towards this issue. In early 2018, the European Commission's Competition Commissioner Margrethe Vestager announced that with companies getting more and more linked, the Commission has launched an investigation into the extent of common ownership and the anti-competitive impacts it might have.<sup>9</sup>

The EU Competition Commission for the first time took notice of the gravity of concerns raised by common ownership in the Dow/DuPont merger proceedings.<sup>10</sup> The two major factors that the Commission considered were the concentrated market structure and the extent of common ownership in the relevant industry.<sup>11</sup> The Commission was of the view that significant common shareholding between competing firms in a concentrated market is likely to have negative impacts on competition.<sup>12</sup> Notably, the Commission concluded that common ownership is required to be an 'element of context' while assessing the competition concerns in the market.<sup>13</sup> This reasoning of the Commission was again reflected in the Bayer/Monsanto merger proceedings.<sup>14</sup>

The competition concerns arising from common ownership have also come to the notice of the US Department of Justice (DOJ). Andrew Finch from the Antitrust Department of the DOJ noted that significant antitrust concerns can arise if a common shareholder is in a position to influence decisions taken by competing firms such that it leads to coordinated effects.<sup>15</sup> This was following the allegation against Value Act for using its voting shares to influence the merger of Baker Hughes and Halliburton, two of the largest providers of oilfield products, which finally ended with Value Act entering into a settlement agreement.<sup>16</sup>

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511/2017 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2802332](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2802332)> accessed 31 October 2019.

<sup>9</sup> Vestager (n 1).

<sup>10</sup> *Dow/DuPont* (n 4).

<sup>11</sup> *Dow/DuPont* (n 4) Annex 5, para 2.

<sup>12</sup> *Dow/DuPont* (n 4) Annex 5.

<sup>13</sup> *Dow/DuPont* (n 4) Annex 5.

<sup>14</sup> *Bayer/Monsanto* (Case COMP M.8084) Commission Decision 21 March 2018.

<sup>15</sup> Andrew Finch, 'Concentrating on Competition: An Antitrust Perspective on Platforms and Industry Consolidation' (Fifth Annual Tech, Media and Telecom Competition Conference, Washington DC, 14 December 2018) <<https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-finch-delivers-keynote-address-capitol>> accessed 31 October 2019.

<sup>16</sup> United States Department of Justice, 'Justice Department Obtains Record Fine and Injunctive Relief against Activist Investor for Violating Premerger Notification Requirements' (12 July 2016) <<https://www.justice.gov/opa/pr/justice-department-obtains-record-fine-and-injunctive-relief-against-activist-investor>> accessed 31 October 2019.

The Indian industrial landscape has witnessed extensive common ownership, particularly in the online economy. A few examples include, Tiger Global's investment in both Flipkart and Shopclues, which are competitors in the online fashion retail segment.<sup>17</sup> It also holds a large stake in the online fashion industry, wherein its portfolio includes five of the most funded start-ups in the industry.<sup>18</sup> Nexus Venture Partners had invested in competing firms Snapdeal and Shopclues, Norwest Venture Partners in Sulekha and Quikr, engaged in the business of online classifieds, Sequoia invested in the following competing firms in different industries: Zaakpay and Citrus (online payment gateways), Peppertap and Grofers (online grocery delivery), TinyOwl and Zomato (online food delivery) and Practo and 1mg (online doctor search).<sup>19</sup> Further, global players have also invested in start-up ventures engaged in the same line of business.<sup>20</sup> eBay's investment in Snapdeal<sup>21</sup> and Alibaba's investment in Paytm and Snapdeal<sup>22</sup> also evidence this trend.

### CCI'S STANCE ON COMMON OWNERSHIP

The allegation against softening of competition due to substantial common ownership by institutional investors in Ola and Uber was recently raised before the Competition Commission of India (CCI).<sup>23</sup> The CCI dismissed the allegation due to lack of available evidence of anti-competitive effects arising from common ownership. However, it is still important to study this case for it brings to light the Indian competition watchdog's stance on competition concerns arising out of common ownership.

It was alleged in this regard that multiple common investors i.e. Tiger Global Management LLC, Didi Chuxing, Sequoia Capital and more recently,

<sup>17</sup> IS Punit, 'Tiger Global is Now the Biggest Investor in Online Fashion Retail in India' (*Quartz*, 27 July 2016) <<https://qz.com/india/741924/tiger-global-is-now-the-biggest-investor-in-online-fashion-retail-in-india/>> accessed 26 December 2019.

<sup>18</sup> *Ibid.*

<sup>19</sup> M Dalal and S Verma, 'Sequoia Capital Bets Big on Hyperlocal Start-ups in India.' *Livemint* (Bengaluru, 14 August 2015) <<https://www.livemint.com/Companies/L6dVNpTc4PhbadvXeCDY5H/Sequoia-Capital-bets-big-on-hyperlocal-startups-in-India.html>> accessed 26 December 2019.

<sup>20</sup> Smriti Parsheera, Ajay Shah and Avirup Bose, 'Competition Issues in India's Online Economy' (2017) NIPFP Working Paper 194/2017, 21 <[https://www.nipfp.org.in/media/medialibrary/2017/04/WP\\_2017\\_194.pdf](https://www.nipfp.org.in/media/medialibrary/2017/04/WP_2017_194.pdf)> accessed 26 December 2019.

<sup>21</sup> M Dalal and S Verma, 'Does eBay have a Sweetheart Deal with Snapdeal?' *Livemint* (Bengaluru/New Delhi, 21 March 2015) <<https://www.livemint.com/Companies/7sYyArLcfy2CLmluhKDUOL/Does-eBay-have-a-sweetheart-deal-with-Snapdeal.html>> accessed 26 December 2019.

<sup>22</sup> Parsheera (n 20) 21.

<sup>23</sup> *In Re: Meru Travel Solutions (P) Ltd. v ANI Technologies (P) Ltd.*, CCI Case No 25-28/2017: 2018 SCC OnLine CCI 46.

Soft Bank hold substantial shares in both Ola and Uber.<sup>24</sup> Further, the presence of nominee directors by such investors on the Boards of both the entities would strengthen the combined market position and adversely impact competition in the relevant markets.<sup>25</sup> Meru argued that such common ownership allowed Uber and Ola to function as a dominant group in the market. The abuse of such dominance was sought to be established via predatory practices of the entities providing costly driver incentives and incurring sustained losses because of pricing their services below variable costs.<sup>26</sup>

Pertinently, with respect to common ownership, the CCI sought further information regarding the shareholding pattern of major shareholders; details of any cross-shareholding as well as funds raised in the form of share capital and/or loans/bonds etc. from the major investors along with their names, terms of investment, rights in management *etc.* along with copies of the agreement(s), if any; details of board composition, nominee directors (if any) including details of investors who have the right to nominate such director(s); copies of the agreement(s) with the drivers stating separately the terms and conditions relating to Minimum Business Guarantee (MBG) *etc.*<sup>27</sup> Even though the CCI did not adjudicate upon the anti-competitive impacts of common ownership, it noted that by virtue of such ownership, it will keep a close watch on Ola and Uber. The breadth of information sought by the CCI evidences the regulator's vigilance towards control and influence of common investors in both entities, which may not always be apparent.

Through this paper, we locate the CCI's findings within the larger debate on the anti-competitive effects arising out of common ownership. We argue that since common ownership gives rise to anti-competitive market structures and evades competition scrutiny for lack of direct evidence, it must be accorded greater relevance in *ex ante* and *ex post* competition analysis by the CCI. Since the *Meru* case dealt with an *ex post* violation, Part I of the paper examines the relevance of common ownership in such a case. We acknowledge that *ex post* review requires evidence of violation and discuss the possibility of *firstly*, a lower standard of control, allowing firms with common ownership to be considered part of a group if one can exercise control over the other, for an accusation of abuse of dominance, and *secondly*, a broad understanding of collusion which can be facilitated through common ownership. Part II of the paper deals with *ex ante* merger regulation where we note that common investors holding shares in rival companies should trigger a merger notification, relying on the definition of control and

<sup>24</sup> *Meru Travel* (n 23) para 17.

<sup>25</sup> *Meru Travel* (n 23) para 17.

<sup>26</sup> *Meru Travel* (n 23) para 18.

<sup>27</sup> *Meru Travel* (n 23) para 23.

review thresholds in the Competition Act as well as the exemptions under the Combination Regulations. In light of this, we emphasize that competition policy in India must engage with the anticompetitive effects of common ownership in different industries more comprehensively and urgently.

## PART I: EX POST ANALYSIS

### A. Abuse of Dominance

A possible way of targeting common ownership is the application of rules of abuse of dominance. A lower standard for determining control is instrumental for common ownership to emerge as a means through which firms can exercise control over each other and even be considered a ‘group’ for the purposes of section 4. Interestingly, in the case of *British American Tobacco*, the European Court of Justice held that common ownership can be covered within abuse of dominance if the shareholding resulted in effective control or some influence in the strategy of the competitors.<sup>28</sup>

For finding an abuse of dominance in the present case, Meru had alleged that *firstly*, Uber and Ola are individually and collectively dominant in the relevant market and *secondly*, on account of common ownership, the two companies form part of a group within the definition of Section 5 and were thereby dominant as a group.<sup>29</sup> The CCI dismissed the first allegation arguing that the firms are not individually dominant as they pose a competitive threat to each other<sup>30</sup> and they cannot be collectively dominant as the Act does not allow the same.<sup>31</sup> A discussion of this is beyond the scope of this paper and it will only focus on the allegation pertaining to common ownership.

Ola and Uber had objected to Meru’s allegation by noting that the standard of applying the definition of ‘group’ under section 5 for the purposes of section 4 was different from that applicable for Section 6.<sup>32</sup> It is notable that this has no statutory basis as the Act prescribes the same definition of group to be used for the purposes of Sections 4, 5 and 6.<sup>33</sup> Neither did the OPs cite any case law to substantiate their claim in this regard. Further, it is pertinent to note that ‘group’ was inserted into s. 4(1) by the Competition

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<sup>28</sup> *British American Tobacco Co. Ltd. v Commission of the European Communities* (142 & 156/84) [1987] ECR 4487; [1988] 4 CMLR 24 at [37]-[40] and [65].

<sup>29</sup> *Meru Travel* (n 23) para 40.

<sup>30</sup> *Meru Travel* (n 23) para 41.

<sup>31</sup> *Meru Travel* (n 23) paras 42, 43.

<sup>32</sup> *Meru Travel* (n 23) para 30.

<sup>33</sup> The Competition Act 2002, s 4 Explanation (c).

(Amendment) Act 2007, which must be considered as a clear expression of legislative intent to scrutinize the activities of firms forming a ‘group’ for the purposes of assessing abuse of dominance. As per the Competition (Amendment) Act 2007, ‘group’ is not defined narrowly so as to include only equity ownership, but also includes control over the management or affairs of an enterprise.<sup>34</sup>

As per the Act, a common investor will have to exercise control over the firms to constitute a group.<sup>35</sup> Ola and Uber argued that the shareholding and right to appoint directors by common investors fell outside the definition of “control” under Explanation (b)(i) to Section 5 of the Competition Act.<sup>36</sup> However, this is highly debatable in light of SoftBank then holding a 15% share in Uber, with 2 of 17 directors on the board<sup>37</sup> and 26% share in Ola<sup>38</sup> with 1 director on a board of 7<sup>39</sup> and the power to appoint 1 more.<sup>40</sup>

In the present case, the CCI did not return a definitive finding on this issue and merely noted that even if Meru’s allegation, that Ola and Uber formed part of one group on account of common ownership, were to be accepted, it could not form the basis of investigation without evidence of abuse as per section 4(2) of the Act.<sup>41</sup> Given the evolving competition jurisprudence, we argue that common ownership can potentially amount to control within the meaning of Section 5, allowing the firms concerned to be considered a group for the purpose of an allegation of abuse of dominance under Section 4.

## 1. Expanding the Definition of Control

In the present case, CCI discussed gradations in different standards of control and noted that even material influence falling short of control is relevant

<sup>34</sup> The Competition Act 2002, s 4 Explanation (c).

<sup>35</sup> The Competition Act 2002, s 5.

<sup>36</sup> *Meru Travel* (n 23) para 32.

<sup>37</sup> *Meru Travel* (n 23) para 32; Heather Somerville, ‘SoftBank is Now Uber’s Largest Shareholder as Deal Closes’ *Livemint* (San Francisco, 19 January 2018) <<https://www.livemint.com/Companies/2mmSo6tJoN7UNkmrtJHJ4O/SoftBank-is-now-Ubers-largest-shareholder-as-deal-closes.html>> accessed 31 October 2019.

<sup>38</sup> ‘Why is Ola Balking at SoftBank’s Offer of Another \$1 Billion Investment?’ *Business Today* (4 December 2018) <<https://www.businesstoday.in/top-story/why-is-ola-balking-at-softbank-offer-of-another-1-billion-investment/story/297103.html>> accessed 31 October 2019.

<sup>39</sup> ANI Technologies Private Limited, <<https://www.tofler.in/ani-technologies-private-limited/company/U72900KA2010PTC086596>> accessed 31 October 2019.

<sup>40</sup> Mihir Dalal and Shrutika Verma, ‘Ola Boardroom Row Pits SoftBank against Bhavish Aggarwal’ *Livemint* (Bengaluru/New Delhi, 3 May 2018) <<https://www.livemint.com/Companies/xBREbzT0x6b0ighbICzMij/Ola-boardroom-row-pits-SoftBank-against-Bhavish-Aggarwal.html>> accessed 31 October 2019.

<sup>41</sup> *Meru Travel* (n 23) para 54.

for competition analysis. Interestingly, the CCI held that investment by the common investors in Ola and Uber do not suggest possession of control by the investors in the entities. This standard of requiring *de jure* or *de facto* control,<sup>42</sup> is significantly higher than the standard of material influence, which implies the ‘presence of factors which give an investor the ability to influence affairs and management of the enterprise’.<sup>43</sup> The CCI acknowledged that as an active investor, SoftBank could exercise material influence over both entities even if it was only a minority shareholder in both.<sup>44</sup> The international jurisprudence reflects that the concept of material influence is crucial for competition analysis because operational realities do not always mirror formal agreements or equity structures.<sup>45</sup>

It is also important to note that while determining the presence of control in the past, the CCI has used the yardstick of ‘material influence’ over ‘decisive influence’.<sup>46</sup> The Commission then noted that even in the absence of material influence, merely being a member of the Board of Directors allows access to sensitive information which can facilitate tacit collusion and is highly relevant for competition assessment.<sup>47</sup> Further, the Competition Law Review Committee 2019, emphasised the need for broadening the definition of control with the introduction of material influence in the assessment.<sup>48</sup> Following this, the recently introduced Draft Competition (Amendment) Bill, 2020 seeks to broaden the definition of ‘control’ to ‘the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions’.<sup>49</sup> It is quite evident from the above

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<sup>42</sup> De facto control implies a situation “where an enterprise holds less than the majority of voting rights, but in practice exercises control over more than half of the votes actually cast at a meeting” *Meru Travel* (n 23) para 49.

<sup>43</sup> *Meru Travel* (n 23) para 49.

<sup>44</sup> *Meru Travel* (n 23) para 46.

<sup>45</sup> The Enterprise Act 2002, s 26(3); Competition and Markets Authority, ‘Mergers: Guidance on the CMA’s Jurisdiction and Procedure’ (January 2014) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/384055/CMA2\\_\\_\\_Mergers\\_\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2___Mergers__Guidance.pdf)> accessed 31 October 2019; South Africa Competition Act 1998, s 12(2)(g); Canada Merger Enforcement Guidelines 2011, para 1.5, <[https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html#s1\\_1](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html#s1_1)> accessed 31 October 2019.

<sup>46</sup> *UltraTech Cement Ltd., In re*, Combination Registration C-2015/02/246, CCI Order dated 12.03.2018, paras 12.10, 12.12, 12.13:2018 SCC OnLine CCI 27; *Agrium Inc., In re*, Combination Registration No. C-2016/10/443, order dated 27 October 2017, para 20: 2017 SCC OnLine CCI 80.

<sup>47</sup> *UltraTech Cement Ltd., In re*, Combination Registration C-2015/02/246, CCI Order dated 12.03.2018, para 12.13:2018 SCC OnLine CCI 27.

<sup>48</sup> Ministry of Corporate Affairs, *Report of the Competition Law Review Committee* (July 2019) paras 2.1-2.6 <[http://www.mca.gov.in/Ministry/pdf/ReportCLRC\\_14082019.pdf](http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf)> accessed 31 October 2019.

<sup>49</sup> Draft Competition (Amendment) Bill 2020 <<http://feedapp.mca.gov.in/pdf/Draft-Competition-Amendment-Bill-2020.pdf>> accessed 31 October 2019.

discussion that the definition of control should be construed broadly and even has the potential to include control exercised by minority shareholders.

Further, it is widely argued that direct control over managerial decisions is not required to affect the behavior of the firm and minority shareholdings can facilitate the exercise of effective control.<sup>50</sup> In fact, the theory of common ownership is based on investors that do not own majority shares yet exercise influence over decision making in firms.<sup>51</sup>

According to the existing literature, there are two primary mechanisms through which a minority shareholder can have direct influence over firm behaviour: voting and voice.<sup>52</sup> Firms have a voting for various reasons such as any fundamental shift in firm's strategy, selection of board of directors, change in ownership structures, etc.<sup>53</sup> Any investor with voting rights can vote in a manner that increases the value of her overall holdings, even if it leads to anti-competitive effects. Any outright majority of shares is not required for influencing decisions. Consider this for example, if an investor holds 25% of the shares, she will be in effective control if none of the other shareholders hold more than 1%.<sup>54</sup> Another possible way for investors to influence firm behaviour is by informal interaction. According to a survey, investors usually prefer to interact with management and board members outside of formal shareholders' meetings to influence managerial decisions.<sup>55</sup> Such meetings are easier than formal meetings and would not attract the attention of regulatory authorities. An example of voice being used is the gathering organised by the representatives of large mutual funds in the US for encouraging pharmaceutical firms to unite and maintain uniform price levels.<sup>56</sup>

Post the CCI's ruling in the Meru case, Softbank has only increased its already substantial investment in the rival entities and emerged as the largest shareholder in both Ola and Uber. SoftBank's very high stakes in both Uber and Ola potentially enable it to exercise control over both the firms. In fact,

<sup>50</sup> Organisation for Economic Cooperation and Development, 'Common Ownership by Institutional Investors and its Impact on Competition' DAF/COMP(2017)10.

<sup>51</sup> *Ibid.*

<sup>52</sup> Azar (n 6), 6.

<sup>53</sup> OECD (n 50) para 51.

<sup>54</sup> Daniel O'Brien and Steven Salop, 'Competitive Effects of Partial Ownership: Financial Interest and Corporate Control' (2000) 67(3) *Antitrust Law Journal* 559, 577.

<sup>55</sup> Joseph A McCahery, Zacharias Sautner and Laura T Starks, 'Behind the Scenes: The Corporate Governance Preferences of Institutional Investors' [2016] 71 *Journal of Finance* <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1571046](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1571046)> accessed 31 October 2019.

<sup>56</sup> Caroline Chen, 'Mutual Fund Industry to Drugmakers: Stand Up and Defend Yourself', *Bloomberg* (10 May 2016) <<https://www.bloomberg.com/news/articles/2016-05-09/top-funds-said-to-tell-pharma-leaders-to-defend-drug-pricing>> accessed 31 October 2019.

SoftBank's growing influence over Ola, increasing investments in Uber and encouragement to the rival entities to merge also caused Ola's founders to fear loss of control over the Company and turn down Softbank's offer to invest another 1.1 billion dollars into Ola, which would have increased its stake in the company to over 40%.<sup>57</sup> The founders of Ola also amended the Company's Articles of Association as per which no investor with more than 10% equity shares in the Company can increase its stake without the prior approval of the founders and the board of directors.<sup>58</sup>

In light of these changing regulatory and market landscapes, the CCI should increase scrutiny of firms with common ownership and consider its relevance while determining whether they constitute a 'group' to establish an allegation of abuse of dominance.

## B. Anti-Competitive Agreements

Meru also alleged that Uber and Ola have entered into anti-competitive agreements with their drivers and thereby violated Section 3 of the Act.<sup>59</sup> The CCI dismissed this on account of Meru's failure to provide evidence.<sup>60</sup> Additionally, Meru argued that common investors could facilitate collusive arrangement and exchange of sensitive information between competitors.<sup>61</sup> Interestingly, CCI has previously concluded that being on the Board of competitors allows scope for tacit collusion.<sup>62</sup> In light of this, an investigation into whether common ownership can have similar effects is merited.

There are several factors that motivate competing firms to collude in the market. However, any attempt to directly collude would draw the attention and scrutiny of competition authorities. Firms are thus, more likely to collude with common institutional investors which will avoid such scrutiny. This argument is further strengthened by the recent empirical study which

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<sup>57</sup> Saritha Rai, 'Why Bhavish Aggarwal Turned Down a \$1.1 Billion SoftBank Deal' *The Economic Times* (9 April 2019) <<https://economictimes.indiatimes.com/small-biz/startups/features/why-bhavish-aggarwal-turned-down-a-1-1-billion-softbank-deal/article-show/68788526.cms?from=mdr>> accessed 26 December 2019.

<sup>58</sup> Sayan Chakraborty and Mihir Dalal, 'Snapdeal Effect? Ola Restricts SoftBank Rights, Strengthens Those of Founders' *Livemint* (Bengaluru, 18 May 2017) <<https://www.livemint.com/Companies/hgo0yvhnvF4VnkCCchubUM/Snapdeal-effect-Ola-restricts-SoftBank-rights-strengthens.html>> accessed 26 December 2019.

<sup>59</sup> *Meru Travel* (n 23) para 37.

<sup>60</sup> *Meru Travel* (n 23) para 37.

<sup>61</sup> *Meru Travel* (n 23) para 44.

<sup>62</sup> *Ultra Tech Cement Ltd.*, In re, Combination Registration C-2015/02/246, CCI Order dated 12.03.2018, para12.13:2018 SCC OnLine CCI 27.

concluded that commonly owned firms are much more likely to enter into joint ventures, alliances and other explicit coordination.<sup>63</sup>

The acquisition of shares and seats in the management could potentially create a structure that can be used for cooperation and the same could allow the common investor to act as a “cartel ringmaster”.<sup>64</sup> This is based on the theory of coordinated effects, wherein a common institutional investor can facilitate coordination of market strategies between competing firms.<sup>65</sup> In this case, an investor owning shares in multiple firms can act as a cartel ringmaster, i.e., an initiator in charge of coordination,<sup>66</sup> and pass information between parties.<sup>67</sup> Sharing information and influencing decisions motivated by individual gains of the investor would essentially lead to tacit collusion in the market.<sup>68</sup>

This argument is strengthened by the broad definition of agreement under the Indian competition regime. This merely requires concert or meeting of minds between the parties. It is commonly acknowledged that no direct evidence would be available for establishing the presence of anti-competitive agreements and reliance needs to be placed on ‘fragmentary, sparse and circumstantial evidence’.<sup>69</sup> As noted above, the opening up of a channel for agreement by institutional investors creates a high likelihood of companies to collude in a manner which can evade the scrutiny of the CCI.

It has been openly acknowledged by large passive investment firms such as Vanguard<sup>70</sup> and Black Rock<sup>71</sup> that they are regularly and actively involved in discussions and managerial decisions of the firms they invest in. This exposes the weakness in Uber and Ola’s argument that active investment by SoftBank cannot be investigated under Section 3 as Softbank is neither

<sup>63</sup> Jie He and Jiekun Huang, ‘Product Market Competition in a World of Cross Ownership: Evidence from Institutional Blockholdings’ (2018) 30 Review of Financial Studies.

<sup>64</sup> Edward B Rock and Daniel L Rubinfeld, ‘Antitrust for Institutional Investors’ (2017) New York University School of Law, Law & Economics Research Paper Series, Paper 17-23, <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2998296](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2998296)> accessed 31 October 2019.

<sup>65</sup> *Ibid.*

<sup>66</sup> Andrea Günster, Martin Carree and Mathijs A van Dijk, ‘Do Cartels Undermine Economic Efficiency?’ (36th EARIE Annual Conference, Slovenia, 3-5 September 2009).

<sup>67</sup> Rock and Rubinfeld (n 64).

<sup>68</sup> OECD (n 50) para 92.

<sup>69</sup> *Director General (Supplies & Disposals), In re*, Ref Case No 01 of 2012 (CCI), para 26:2013 SCC OnLine CCI 55.

<sup>70</sup> Charles Stein, ‘Vanguard’s McNabb Says Firm is Not Passive on Governance’ *Bloomberg* (4 March 2015) <<https://www.bloomberg.com/news/articles/2015-03-04/vanguard-s-mc-nabb-says-firm-is-not-passive-on-governance>> accessed 31 October 2019.

<sup>71</sup> Black Rock ‘Proxy Voting and Shareholder Engagement FAQ’ <<https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-faq-global.pdf>> accessed 31 October 2019.

a competitor nor a provider of goods or services at different levels of production of the supply chain.<sup>72</sup> It is noteworthy that while handing down this ruling, the CCI was mindful enough to note that, ‘anticompetitive effects of common ownership may arise more as an error of omission than as an error of commission’.<sup>73</sup> The CCI held that it would be vigilant and ensure the presence of Chinese walls or other safeguards to prevent any adverse effect on competition caused by common ownership in Ola and Uber.<sup>74</sup> It also expressed willingness to take action if an inquiry revealed ‘compelling evidence’ of the anti-competitive effects of common ownership in any concentrated industry.<sup>75</sup> We acknowledge that the finding on abuse of dominance or anti-competitive agreement, being ex post in nature, will require evidence of violation of the Act leading to anti-competitive effects. The CCI’s decision cannot be criticized in this regard for its ex post analysis of refusing to find fault on account of lack of evidence. However, it does pose some interesting questions regarding the future of investigations into common ownership based on thresholds for establishing control as discussed earlier. In the next part, we examine the possibility of according greater weightage to common ownership in the CCI’s ex ante analysis in merger regulation.

## PART II: EX ANTE ANALYSIS

Uber and Ola contended that as per precedent in other Asian jurisdictions, for instance Singapore, Malaysia and the Philippines, inquiries into their common ownership were premature and warranted only after an actual merger between the two entities.<sup>76</sup> However, Meru’s case did not require triggering of merger review and thus, the CCI did not elaborate on this prong. Since the Malaysian competition regulator does not have the power to review mergers,<sup>77</sup> and Singapore and Philippines have specific thresholds which trigger mandatory notifications to the relevant competition regulators, leading to a structure of *ex ante* merger review<sup>78</sup> similar to the Indian framework, the relevance of the OP’s argument here is limited. Even though the present case did not analyse the investment structure through the lens of merger review, we discuss it here since this is often the most commonly used mechanism

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<sup>72</sup> *Meru Travel* (n 23) para 34.

<sup>73</sup> *Meru Travel* (n 23) para 56.

<sup>74</sup> *Meru Travel* (n 23) para 57.

<sup>75</sup> *Meru Travel* (n 23) para 46.

<sup>76</sup> *Meru Travel* (n 23) para 32.

<sup>77</sup> ‘Merger Control 2019’ *Global Legal Insights* <<https://www.globallegalinsights.com/practice-areas/merger-control-laws-and-regulations/malaysia>> accessed 31 October 2019.

<sup>78</sup> Singapore Competition Act 2004, s 54; Philippine Competition Act 2014, s 16.

to target common ownership. We argue that common ownership allows a structure which can trigger merger review before the CCI.

Under the combination assessment framework, any proposed combination which meets the specified asset or turnover threshold mentioned in the Act is required to be notified before the CCI.<sup>79</sup> A possible concern with regards to triggering merger review in India is the high threshold whereby the merging firms may evade scrutiny under merger control rules if they either fail to meet the thresholds or fall under any exception. The CCI had also raised this concern in the present case.<sup>80</sup> However, we look at the present threshold requirements, minority investment exceptions and deemed approval guidelines of the CCI while relying on a broad definition of control (as discussed in Part I of the paper), to argue that common ownership can trigger merger review.

### A. Introduction of New Thresholds

The international debate on the need to introduce additional thresholds for merger review gained widespread attention after LinkedIn's acquisition by Microsoft for \$26.2 billion in an all cash deal failed to trigger existing thresholds.<sup>81</sup> This ultimately led to the introduction of deal/transaction value thresholds in Austria and Germany, wherein the high value of deals can trigger combination assessment before the competition regulator.<sup>82</sup> The concern has also been expressed in India wherein the Report of the Competition Law Review Committee noted a statutory lacuna in this regard. It was argued that digital markets with evolving business models have led to firms being asset light, thereby allowing them to escape competition assessment.<sup>83</sup> The Committee recommended introducing an enabling provision within the Act which will allow introduction of necessary thresholds to ensure that transactions which will have an appreciable adverse effect on competition do not escape scrutiny.<sup>84</sup> Following this, the recently introduced Draft Competition (Amendment) Bill, 2020 also acknowledged the need to broaden the scope of review of the CCI and thereby empowered the central government, in public interest and in consultation with the CCI, to prescribe any new criteria for

<sup>79</sup> The Competition Act 2002, ss 5, 6.

<sup>80</sup> *Meru Travel* (n 23) para 45.

<sup>81</sup> Richard Waters, 'Microsoft-LinkedIn Deal Raises New Competition Concerns' *Financial Times* (4 November 2016) <<https://www.ft.com/content/d5ceda60-a1e1-11e6-82c3-4351ce86813f>> accessed 31 October 2019.

<sup>82</sup> Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG) (July 2018) <[https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden\\_Transaktionsschwelle.pdf?\\_\\_blob=publicationFile&cv=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&cv=2)> accessed 31 October 2019.

<sup>83</sup> Report of Competition Law Review Committee(n 48) paras 5.1-5.14.

<sup>84</sup> Report of Competition Law Review Committee(n 48) paras 5.1-5.14.

combination assessment.<sup>85</sup> By doing this, the Bill is advocating for a broader threshold to include more transactions under its scanner. These developments, along with the expansion in the definition of control discussed in Part I, ease the CCI's ability to review the control exercised by common investors over competing firms, which in the present case would bring SoftBank's control over Uber and Ola under scrutiny prospectively.

## B. Narrowing the Minority Investment Exception

The Combination Regulations exclude certain investments which lead to less than 25% of the total shares or voting rights by the acquirer in the target enterprise and are made 'solely for investment' or 'in the ordinary course of business'.<sup>86</sup> These are termed as minority investments. This business as usual nature of Softbank's activities to hedge its risks by spreading its investments was emphasized by the OPs in their objection against Softbank's alleged orchestration of control over the OPs by consolidations in the market.<sup>87</sup>

However, the CCI has been constantly narrowing the scope of such an exemption and looking at the impact of the acquisition in the market rather than mere change in the shareholding structure of the target enterprise. Perhaps the most notable assessment of the CCI in this regard was the proposed acquisition of a 0.12% stake in addition to a preexisting 8.75% stake in India Ideas by Claymore Investments Mauritius.<sup>88</sup> Interestingly, the additional investment did not even require a board seat.<sup>89</sup> However, this was still notified and subsequently cleared by the CCI.<sup>90</sup> Similarly, the CCI has also assessed a proposed investment of a 9.57% stake along with a right to nominate a director in the board of ANI Technologies by Copper Technology.<sup>91</sup> In another arguably minority investment where Eithad Airways proposed to acquire 24% share in Jet Airways, the CCI considered a range of factors and the effect of the proposed combination in the relevant market.<sup>92</sup> By doing this, the CCI has considerably narrowed the scope of the minority investment exception.

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<sup>85</sup> Draft Competition (Amendment) Bill 2020, s 5 <<http://feedapp.mca.gov.in/pdf/Draft-Competition-Amendment-Bill-2020.pdf>> accessed 31 October 2019.

<sup>86</sup> The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011, Item I, sch I.

<sup>87</sup> *Meru Travel* (n 23) para 31.

<sup>88</sup> *Claymore Investments (Mauritius) Pte. Ltd., In re*, Combination Registration No. C-2018/12/623, order dated 10 January 2019 (CCI).

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Copper Technology Pte. Ltd., In re*, 2017 SCC OnLine CCI 100:Combination Registration No. C-2017/08/525, order dated 1 September 2017.

<sup>92</sup> *Eithad Airways PJSC, In re*, 2013 SCC OnLine CCI 132:Combination Registration No. C-2013/05/122, order dated 12 November 2013.

Notably, the same now finds widespread acknowledgement in international jurisprudence whereby the competition regulators of European Union,<sup>93</sup> South Africa,<sup>94</sup> United Kingdom,<sup>95</sup> and United States<sup>96</sup> have increased scrutiny of minority investments and stressed upon the need for considering a broad range of factors and existing market dynamics to see the ability of a minority investor to exercise control over the investee. Again, advocacy for a broader definition of control (as noted in Part I) along with narrowing the minority investment exception have found footing in the Indian landscape where the Competition Law Review Committee took note of the international consensus in this regard and stressed upon the need to follow the same in India.<sup>97</sup>

### C. No Exception Under Green Channel Clearance

The CCI recently introduced an amendment to the Combination Regulations introducing Green Channel clearance whereby certain transactions which pass the notification thresholds will not have to be notified and will be deemed to be approved merely by submitting certain information before the CCI.<sup>98</sup> The criteria requires that the parties to the combination, their respective group entities and/or any entity in which they, directly or indirectly, hold shares and/or control do not produce/provide similar or identical or substitutable product(s) or service(s).<sup>99</sup> This will mean that an investor can avail the benefit of the Green Channel route if it can demonstrate that it does not have any shares in the investee's competitor. To illustrate by looking at the present case, if Soft Bank wishes to avail the Green Channel benefit while investing in Uber, it should not have any share in Ola. Therefore, an institutional investor which invests in competing firms cannot avail the benefit of this and will be required to notify the proposed transaction to the CCI in the event it meets the specified thresholds.

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<sup>93</sup> OECD Policy Roundtable – Definition of Transaction for the Purpose of Merger Control Review,85, <<http://www.oecd.org/daf/competition/Merger-control-review-2013.pdf> > accessed 4 April 2020.

<sup>94</sup> *Ibid* 162-163.

<sup>95</sup> CMA (n 45) paras 4.14-4.29.

<sup>96</sup> OECD Policy Roundtable (n 93) 198.

<sup>97</sup> Competition Law Review Committee Report (n 48) paras 6.3-6.7.

<sup>98</sup> The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations 2019, 13 August 2019 <<https://www.cci.gov.in/sites/default/files/notification/210553.pdf>> accessed 10 November 2019.

<sup>99</sup> *Ibid*, sch III.

## CONCLUSION

The debate surrounding common ownership has become so widespread that it has even caught the attention of popular media. As of March 2019, Berkshire Hathaway was the largest shareholder in the four largest US Airlines.<sup>100</sup> In an interview with Warren Buffet, CNBC's Becky Quick remarked, "You know, Warren, it does occur to me, though, if you're building up such a significant stake in all the major players, is that anything that's, like, monopolistic behavior? Is there any concern to think that you would say something to the airlines to make them make sure that they're not competing on price quite the same? What would keep somebody from worrying about that?"<sup>101</sup> When institutions have the ability to soften competition, it is likely that they will find a way.<sup>102</sup> It is quite clear that going forward common ownership is going to play a larger role in the competition analysis by regulators across the globe.<sup>103</sup>

Prof. Elaughe has argued that the law should not wait for clearer proof on causal mechanisms between common ownership and corporate conduct by citing empirical,<sup>104</sup> theoretical,<sup>105</sup> and mathematical<sup>106</sup> studies highlighting ample proof of such causal mechanisms.<sup>107</sup> These causal mechanisms do not require direct communication from horizontal shareholders to dampen competition but these communications do exist sometimes and where they do, the anticompetitive effects are amplified.<sup>108</sup> Scholars argue that competition enforcement, as is generally the case, must focus on anti-competitive market

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<sup>100</sup> Katherine Chiglinsky, 'Buffett's Course Reversal on Airlines Sparks Talk of Acquisition' *Bloomberg* (22 March 2019) <<https://www.bloomberg.com/news/articles/2019-03-22/buffett-s-course-reversal-on-airlines-sparks-talk-of-acquisition>> accessed 10 November 2019.

<sup>101</sup> Here is the full transcript of billionaire investor Warren Buffett's interview with CNBC (CNBC, 27 February 2017) <<https://www.cnbc.com/2017/02/27/billionaire-investor-warren-buffett-speaks-with-cnbc-s-becky-quick-on-squawk-box.html>> accessed 10 November 2019.

<sup>102</sup> OECD (n 50) 21.

<sup>103</sup> Aditya Bhattacharjea has noted this in passing while discussing predatory pricing and platform competition in Aditya Bhattacharjea, 'Predatory Pricing in Platform Competition: Economic Theory and Indian Cases' in Ashish Bharadwaj and others (eds), *Multi-dimensional Approaches Towards New Technology* (Springer 2018) 228 <[https://link.springer.com/chapter/10.1007/978-981-13-1232-8\\_11](https://link.springer.com/chapter/10.1007/978-981-13-1232-8_11)> accessed 31 October 2019.

<sup>104</sup> Einer R Elhauge, 'How Horizontal Shareholding Harms Our Economy—And Why Antitrust Law Can Fix It' at Part I (August 2019) (reviewing major empirical studies).

<sup>105</sup> Posner, Scott Morton and Weyl, 'A Proposal to Limit the Anticompetitive Power of Institutional Investors' (2017) 81 *Antitrust Law Journal* 669; Scott Morton & Hovenkamp, 'Horizontal Shareholding and Antitrust Policy' (2018) 127 *Yale LJ*, 2034, 2035.

<sup>106</sup> Azar (n 6) 1522, 1525 (adopting the modified HHI which measures horizontal shareholding concentration).

<sup>107</sup> Elhauge (n 2).

<sup>108</sup> Elhauge (n 2).

structures instead of behavioral solutions that are hard to monitor and even harder to find evidence for in individual instances.<sup>109</sup> Through this paper, we established that there is a strong presumption that common ownership in firms can lead to anticompetitive conduct by these firms. However, since such a presumption is almost never actionable, we discuss the increasing relevance of common ownership in CCI's ex post and ex ante review.

The paper highlights that even though the CCI agreed to monitor the operations of Ola and Uber, it did not order an investigation into the matter because of lack of evidence of an ex post violation. This keenness by the CCI is indicative of its attempt to ensure that sensitive information is not shared between competitors. The same approach was also reflected in a combination registration in the marine transportation industry.<sup>110</sup> There, the CCI noted the submission of the parties that the proposed combination would not lead to any spillover effects. However, by way of caution, it accepted a voluntary commitment to introduce a 'rule of information control' which severely restricted the sharing of information between the parties and receiving information from third parties.<sup>111</sup> The order given by the CCI in the *Meru* case also recognizes the potential of softening competition through common ownership.<sup>112</sup> These recommendations highlight the CCI's eagerness in both appreciating the threats to competition posed by common ownership as well as in ensuring that appropriate safeguards are put in place to ensure further competition among firms in the market. In light of these recommendations, this paper addressed the gap in current literature regarding both the anticompetitive market structures that such ownership facilitates as well as a brief survey of the possibility of adding common ownership to the CCI's radar in a timely manner by exploring the options to examine it under both ex ante and ex post review. In the other cases and appeals filed by *Meru* alleging abuse of dominance via predatory pricing against Uber and Ola, the issue of common ownership has not received any attention.<sup>113</sup> Thus,

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<sup>109</sup> Elhauge (n 2).

<sup>110</sup> *Nippon Yusen Kabushiki Kaisha Ltd., In re*, Combination Registration No C-2016/11/459, CCI Order dated 29 June 2017: 2017 SCC OnLine CCI 152.

<sup>111</sup> *Ibid* para 25.

<sup>112</sup> *Meru Travel* (n 23) para 56.

<sup>113</sup> *Meru* had filed information against Uber alleging abuse of its dominant position via predatory pricing in Delhi NCR (*Meru Travel Solutions (P)Ltd.v Uber India Systems (P)Ltd.*, Case No 96 of 2015: 2016 SCC OnLine CCI 12) The CCI dismissed the information for its inability to find a prima facie case as there were doubts about the credibility of a report by Tech Sci relied upon by *Meru*. CCI adopted the view that the relevant market was Delhi and not Delhi NCR. *Meru* appealed the case to COMPAT, which held that the relevant market should have been Delhi NCR (*Meru Travels Solutions (P)Ltd. v Competition Commission of India*, Appeal No 31 of 2016:2016 SCC OnLine Comp AT 451). It also noted that the statistical findings in the Tech Sci Report were not substantively challenged before the CCI. Thus, COMPAT directed the Director General (DG) to conduct an investigation

it is important to accord common ownership the significance it merits in ex post review pertaining to allegations of abuse of dominance and anti-competitive agreements as well as ex ante review concerning merger control. This would require effective engagement of competition policy, particularly because of the evolving regulatory and market landscapes governing platform competition in the online economy. Finally, without appreciation of the dynamic harms that common ownership can cause and discussion of the various possibilities to incorporate its relevance in competition assessment, it would continue to evade the Indian regulator's scrutiny.

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against Uber, based on Meru's allegations of abuse of dominance. Uber appealed against COMPAT's order before the Supreme Court of India, which dismissed the appeal and held that there should be no interference with the investigation ordered (*Uber India Systems (P) Ltd. v Competition Commission of India*, (2019) 8 SCC 697. Previously in a similar case, the CCI had ordered the DG to investigate against Ola based on Meru's allegations of abuse of dominance via predatory pricing by Ola in Bengaluru. Post investigation, however, the CCI concluded based on the economics of network effects in two-sided platform markets that Ola was not dominant in the relevant market and its market share was ephemeral given the stiff competition it faced from Uber (*Fast Track Call Cab (P) Ltd. v ANI Technologies (P)Ltd.*, CCI Case No 21 of 2016, paras 89-92: 2017 SCC OnLine CCI 36).