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**HAS COMMON SHAREHOLDING BECOME
COMMONPLACE IN CCI'S ASSESSMENT: UNVEILING
THE DEVELOPMENT OF COMMON SHAREHOLDING IN
INDIA**

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ABSTRACT

In any part of the world, businesses observe evolution. The competition law strives to assure a level playing field for businesses and therefore, must evolve alongside. With the development of businesses, originates new tactics to impair competition in their favour. One of the most prevalent means to get incentivized from impairment of competition is cartelization. With businesses, cartelization has also evolved and now includes a mechanism wherein companies invest in each other and establish a shareholding relationship. As a result, they can meet or share information without raising suspicion of cartelization. It is essential for any competition authority to integrate such a mechanism into its examination. The paper analyses the development of common shareholding as a concept under the competition regime of India. As opposed to the common belief, it is found that the Competition Commission of India has led to significant development of

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common shareholding through its ex-post as well as ex-ante examinations. The paper further argues that referring to the Meru Case as the only point of reference for assessing the development of common shareholding is based on indifference. The paper highlights how the concept has developed in a veiled fashion. With regards to ex-post examination, the paper shall be deliberating on multiple cases wherein the Commission has applied the concept without even referring to the formal terminology. As for ex-ante examination, the paper shall be analyzing what relevance the Combination Regulation and the CCI attribute to the concept of common shareholding. The paper also deliberates on the challenges forthcoming in these examinations. The paper shall conclude that the competition law of India is witnessing the development of common shareholding in a veiled fashion.

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I. INTRODUCTION

Competition law in India is witnessing an age of evolution. At this stage, the Competition Commission of India (“**CCI**”) stands in a precarious as well as advantageous position. It has the advantage of taking cues from the matured jurisdictions but at the same time, the CCI must be cautious of its decisions. Any decision that the CCI adopts today would hold fundamental significance and become the primary source of reference for years to come.

The competition regime of India is remarked as being less mature when compared with its counterparts of the European Union (“**EU**”) and the United States (“**US**”).¹ The regime has been subject to candid criticism as scholars tend to draw comparisons with the so-called matured jurisdictions.² The critics fail to realize that like any other competition law in history, the Indian competition regime is developing at its own pace.

Although it is advisable to draw references from other jurisdictions, such references must not become a primary source of law. Competition law is formulated as per the peculiar needs and wants of a particular nation’s markets and more importantly, economy. The regimes of the EU and the US are substantially different yet are considered equally mature.³ It is

¹ Vikas Kathuria, *Vertical restraints under Indian Competition Law: whither law and economics*, 10 JOURNAL OF ANTITRUST ENFORCEMENT, 194–215 (2022).

² Aditya Bhattacharjya, *India’s New Competition Law: A Comparative Assessment*, 4 JOURNAL OF COMPETITION LAW & ECONOMICS, 609 – 638 (2008).

³ Ioannis Apostolakis, *Book Review: Resale Price Maintenance and Vertical Territorial Restrictions: Theory and Practice in EU Competition Law and US Antitrust Law (New Horizons in Competition Law and Economics)*, WORLD COMPETITION LAW AND ECONOMICS, 517-519 (Wolters Kluwer 2016).

reckoning why the Indian regime is advised to imitate other regimes whilst it can become of its own and mature at the same time.

The paper highlights a key development that the Indian competition regime is observing without drawing reference from international jurisdictions – the development of the concept of common shareholding. The concept of common shareholding refers to a shareholding relationship that broadly includes two scenarios: (a) When one entity holds shares of its competitor belonging to the same market and (b) When one entity holds shares of two competitors making itself a common shareholder.⁴ These scenarios are also referred to as horizontal shareholding and cross-ownership respectively.⁵ A common shareholder may facilitate an anti-competitive agreement between the companies it has invested in i.e., portfolio companies.⁶ Therefore, the presence of common shareholding is to be duly considered in determining an anti-competitive agreement.

The Indian competition regime can be categorized as *ex-post* regulation and *ex-ante* regulation. The difference between these regulations is the timeline of intervention of the CCI. In *ex-post*, the CCI intervenes after the anti-competitive activity is alleged to have been completed. Such an activity could be in a form of an anti-competitive agreement or abuse of dominant position. In *ex-ante*, the CCI previews the notifiable transaction or combinations with the primary aim to prevent the occurrence of any

⁴ Alec J. Burnside & Adam Kidane, *Common ownership: an EU perspective*, 8 JOURNAL OF ANTITRUST ENFORCEMENT, 456 - 510 (2020) (*hereinafter* “**Burnside & Kidane**”).

⁵ Einer R Elhauge, *Horizontal Shareholding*, 129 HARVARD LAW REVIEW, 1267 (2016).

⁶ José Azar, Sahil Raina & Martin C. Schmalz, *Ultimate Ownership and Bank Competition*, (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710252.

anti-competitive effect that could arise out of such combination.⁷ Given the built-in categorization, the paper is bifurcated to categorically explore the development of common shareholding in both of these regulations.

Part I of the paper argues that the CCI is applying the concept in a veiled fashion. The CCI seems to be applying the concept subconsciously while examining cartels. Through cartel cases, the paper traces the origination of the application of the concept. It will be demonstrated that in examining cartels, the CCI follows a general practice of analyzing the relationship between cartel members. This practice has steered the CCI to take cognizance of common shareholding as the same is no less than a relationship that exists between the parties. The paper concludes that as a result of such practice, common shareholding has made its place as circumstantial evidence in the determination of anti-competitive agreements. In the latter section of this part, the current challenge in the *ex-post* examination is highlighted.

Part II of the paper analyses the relevance of common shareholding in the assessment of combinations. In examining combinations, the prime concern of the CCI is to assess whether the combination would be likely to cause anti-competitive effects in the market. The paper argues that the laws governing combination afford a preemptive opportunity to the CCI for preventing anti-competitive effects arising out of shareholding relationships including common shareholding. In this regard, the CCI ascertains whether the notifying parties have any horizontal overlap i.e., producing identical or substitutable products. This leads the CCI to

⁷ KK Sharma, '*Ex-ante and Ex-post Regulation*', (Competition Commission of India) <http://164.100.58.95/ex-ante-and-ex-post-regulation>.

conclude whether they belong to the same market. The paper shall establish that in arriving at such a conclusion, the CCI implicitly determines whether the combination would create a relationship of common shareholding between the notifying parties. Once such a determination is made, the CCI diminishes any assistance that common shareholding could provide for forming an anti-competitive agreement. The paper concludes that in any stage of assessment of combinations, the laws governing combinations and the CCI in its decisional practice have observed due consideration to common shareholding. In the last segment, the key development forthcoming in *ex-ante* regulation is deliberated. Part IV concludes the paper.

II. TRACING THE DEVELOPMENT OF COMMON SHAREHOLDING FROM *EX-POST* PROVISIONS

The CCI undertakes *ex-post* examination when anti-competitive conduct is alleged to have been committed. The objective is to determine the existence of alleged conduct and order its cessation. Under *ex-post* examination, case laws can be categorized as Section 3⁸ and Section 4⁹ cases. In this part, the origination and development of the concept of common shareholding are traced from these cases. Further, a new challenge that poses to cause a halt in the development is highlighted in the latter section.

A. UNTRACEABLE DEVELOPMENT FROM SECTION 4 CASES

⁸ The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India) §3.

⁹ The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India) §4.

Section 4 cases appear to have scarcely contributed to the development of the concept of common shareholding. Section 4 proscribes unilateral conduct by an enterprise, which constitutes an abuse of dominant position. A dominant position refers to the market power which enables an enterprise to act independently of consumers and competitors.¹⁰ Abuse of dominant position is committed when an enterprise practice conducts such as predatory pricing, deep discounting, leveraging, etc. It is important to note that only those anti-competitive conducts that are committed unilaterally are prohibited. For abuse to be characterized as unilateral conduct, only a single enterprise is required to undertake an anti-competitive activity.

The major reason behind Section 4 cases failing to contribute to the development of common shareholding is its inapplicability in cases where two entities have committed abuse. Section 4 does not apply to those scenarios wherein two dominant entities are practising anti-competitive conduct because the provision does not inculcate collective dominance. Collective dominance refers to a scenario where two or more enterprises collectively hold dominant positions.¹¹ As the concept of common shareholding requires the presence of at least two enterprises to have shares in common and since Section 4 is restricted to cases of single dominant firms, it is consequential that Section 4 cases have not contributed to the development of the concept of common shareholding in India.

¹⁰ United Brands Company and United Brands Continental BV v. Commission of the European Communities [1978] ECR II- 207.

¹¹ Boris Etter, 'The Assessment of Mergers in the EC under the Concept of Collective Dominance: An Analysis of the Recent Decisions and Judgments—by an Economic Approach', 23 JOURNAL OF WORLD COMPETITION, 103-139 (2000).

In *In Re: Delhi Vyapar Mahasangh and Flipkart Internet Private Limited*,¹² abuse of dominant position was alleged in light of common shareholders. In this case, the informant alleged that the opposite parties were practising deep-discounting through their common investors and thereby abusing dominant positions which they collectively hold in the market. The CCI reiterated its stance that collective dominance cases are untenable under Section 4. Thus, in Section 4 cases, the CCI has not entertained the arguments based on common shareholding since the CCI dismisses the cases of collective dominance (or where two dominant parties are involved) at face value.

B. TRACEABLE DEVELOPMENT FROM SECTION 3 CASES

Conversely, Section 3 cases have immensely contributed to the development of the concept of common shareholding. Section 3 appertains to two types of agreement, namely horizontal agreement and vertical agreement. A horizontal agreement whereby the competitors agree to determine prices, control supplies or engage in collusive bidding is prohibited.¹³ A vertical agreement whereby the enterprises forming part of the same supply chain, tie their products, engage in exclusive agreements, and refuse to deal or maintain a resale price is also prohibited.¹⁴ Evidently, the concept of common shareholding has been mostly applied in cases of bid-rigging. As defined in the explanation, ‘bid-rigging’ refers to any agreement between enterprises engaged in identical or similar production,

¹² *In Re: Delhi Vyapar Mahasangh And Flipkart Internet Private Limited*, Case No. 40 of 2019 (*hereinafter* “**Flipkart**”).

¹³ Abir Roy, *COMPETITION LAW IN INDIA: A PRACTICAL GUIDE*, 43-156 (Kluwer Law International 2016).

¹⁴ *Id.*

whereby they have colluded to bypass competition in the bidding or selection process.¹⁵

Sections	Number of cases wherein common shareholding/management was deliberated by the CCI <i>(at least)</i>
3(3)(d) Bid-rigging	7 ¹⁶
3(4)(e) Resale Price Maintenance	1 ¹⁷
3(4) R/W 3(1) and 4(2) R/W 4(1) Deep discounting through Agreement	2 ¹⁸

¹⁵ The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India) §3.

¹⁶ *Emami Power Limited v. NTPC Limited*, 2018 SCC OnLine Del 6525 (India) (*hereinafter* “**Emami**”); *In Re: Alleged bid-rigging in tenders invited by department of printing for printing, packaging, and dispatch of confidential documents Chandra Prabhu Offset Printing Works Pvt. Ltd. and Ors.*, 2021 SCC OnLine CCI 9 (India) (*hereinafter* “**Chandraprabhu**”); *Delhi Jal Board v. Grasim Industries Ltd*, 2017 SCC OnLine CCI 48 (India) (*hereinafter* “**Grasim**”); *Jindal Steel & Power Ltd. v. Steel Authority of India Limited*, 2011 SCC OnLine CCI 8 (India) (*hereinafter* “**SAIL**”); *Rajasthan Cylinders & Containers Ltd. v. Union of India*, (2020) 16 SCC 615 (India) (*hereinafter* “**Rajasthan Cylinders**”); *In Re: Sugar Mills*, 2011 SCC OnLine CCI 105 (India); *In Re: Cartelization by public sector insurance companies in rigging the bids v. National Insurance Co. Ltd. and Ors.*, 2015 SCC OnLine CCI 192 (India).

¹⁷ *Shri Shamsher Kataria v. Honda Siel Cars India Ltd.*, (2014) SCC OnLine CCI 95 (India).

¹⁸ *See Flipkart*, *supra* note 12, at 12; *Meru Travel Solutions Pvt Ltd v. Uber India Systems Pvt Ltd.*, 2016 SCC OnLine CCI 12 (India) (*hereinafter* “**Meru**”).

The said agreements are entered into behind closed doors and hence, are difficult to chase through direct evidence. Therefore, reliance is placed on circumstantial evidence.

1) ***Relevance of Circumstantial Evidence in Determination of Anti-competitive Agreements***

The circumstances favoring or opposing the existence of the cartel are known as circumstantial evidence. In other words, circumstantial evidence as the name suggests refers to pieces of evidence derived from circumstances that exist in the market and includes the conduct of market participants.¹⁹ In *Rajasthan Cylinders v UOI*,²⁰ the Supreme Court observed that as cartels are formed surreptitiously, direct evidence may not be present and thus, the standard of proof for determining agreement is of the preponderance of probability. In weighing up probabilities, the CCI compares relevant circumstances that indicate the existence of a cartel with those that suggest otherwise.²¹

A circumstance becomes relevant in the finding of an anti-competitive agreement when it constitutes a 'plus factor'. The term 'plus factors' is referred to those circumstances or aspects that indicate the existence of a cartel.²² Pertinently, these factors are indicators and not determinants of anti-competitive agreement. Essentially, the plus factors include parallel behaviour, meeting of the parties, and exchange of price-

¹⁹ In Re: All India Tyre Dealers' Federation And Tyre Manufacturers, 2012 SCC OnLine CCI 65 (India).

²⁰ *Rajasthan Cylinders*, *supra* note 16, at 16.

²¹ *Id.*

²² *Id.*

sensitive information.²³ It is apparent that common shareholding would become part of the CCI's *ex-post* examination when it constitutes a plus factor.

2) *Does the Circumstance of Common Shareholding Constitute a Plus Factor?*

Common shareholding being a kind of circumstance would be a plus factor for the CCI when it indicates the presence of an anti-competitive agreement. In this segment, it will be demonstrated that as per its decisional practice, the CCI has regarded common shareholding as a plus factor when it somehow provides an opportunity for the entities to share commercially sensitive information. As stated earlier, common shareholding can be an outcome of (a) the entities being horizontally or vertically connected, holding shares of one another or (b) one entity owning shares in two entities which are horizontally or vertically connected.²⁴ The CCI has paid due regard to such scenarios in its assessment of the anti-competitive agreement.

It is derivable from *Meru Travel Solutions Pvt. Ltd v. M/S ANI Technologies & Ors.*²⁵ (“**Meru Case**”) that the CCI regards the presence of common shareholding or common ownership as a plus factor. In this case, two horizontal competitors were alleged of forming an anti-competitive agreement through their common investor. In the aforementioned case, the CCI stated that “*common ownership of firms with related and competing commercial*

²³ Stefan Thomas, *Harmful Signals: Cartel Prohibition and Oligopoly Theory In The Age Of Machine Learning*, 15 JOURNAL OF COMPETITION LAW & ECONOMICS, 159-203 (2019).

²⁴ Burnside & Kidane, *supra* note 4.

²⁵ Meru, *supra* note 18.

interests may increase the risk of exchange of sensitive information which may facilitate price-collusion or restrain capacity and volumes.” It can be construed from the statement that as per the CCI, in the presence of a common owner, there is a higher risk that the horizontal competitors may share price-sensitive information and facilitate an anti-competitive agreement.

This observation signifies that common ownership is relevant to the CCI insofar as it may facilitate sharing of information and stem price collusion as a result thereof. After framing such observation, the CCI went on to scrutinize whether the common owner had facilitated an anti-competitive agreement. However, when the CCI found no evidence on record to suggest the presence of an anti-competitive agreement, it dismissed the case.²⁶ In determining the presence of an anti-competitive agreement, the CCI's assessment was considerably based on the presence of a common owner. The *Meru Case* demonstrates that the CCI regards common shareholding as a plus factor.

The *Meru Case* is not the single case wherein the CCI deliberated on the circumstance of common shareholding, rather it is the only case where the CCI explicitly made such deliberation. Further, though the *Meru Case* is regarded as a landmark case for a common shareholding in competition law of India, the CCI never determined an anti-competitive agreement on basis of common shareholding in the said case. To consider the *Meru Case* as the point of reference for the development of common shareholding would be a consideration based on indifference. Apparently, the cases wherein the CCI did determine anti-competitive agreements based on

²⁶ *Id.*

common shareholding are overlooked. The paper argues that the CCI integrates scenarios of common shareholding whenever required and thereby, has led to the development of common shareholding.

3) ***The CCI's Integration of Common Shareholding into the Assessment of Anti-competitive Agreements***

In the case of *Delhi Jal Board v Grasim Industries Ltd.*²⁷ (“**Grasim Case**”), two entities belonging to the same group had a common shareholder. Along with common shareholding, the CCI also took account of the presence of common management by group entities. The CCI found that the group entity was responsible for deciding tender prices. This further led to the conclusion that the group entity set prices on behalf of the concerned entities to manipulate the bidding process. Seemingly, the group entity acted as common management and facilitated collusive bidding. The CCI held these entities liable under Section 3(3)(d) which prohibits collusive bid-rigging.

Interestingly, the opposite parties are becoming wary of what relevance do factors such as common shareholding and common management hold before the CCI. In *Jindal Steel and Power Ltd v Steel Authority of India*²⁸ (“**SAIL Case**”), the opposite parties alleged of forming an anti-competitive agreement were found to have been under the common control of the Government of India. Anticipating that being in common control would not help their case, the opposite parties argued that they operated independently. Seemingly, the parties tried to establish that they

²⁷ *Grasim*, *supra* note 16.

²⁸ *SAIL*, *supra* note 16.

did not operate under the common management to dodge the suspicion that the government department might have facilitated an agreement between them. The *Meru Case* has further spelt out the relevance of control or influence of a common shareholder. This will be discussed in the latter section of this part.

Apart from the *Grasim Case* and the *SAIL Case*, in *In Re: Chandraprabhu Offset Printing Works Pvt. Ltd*²⁹ (“**Chandraprabhu Case**”) as well, the CCI took notice of the presence of common shareholding without referring to the term “common shareholding”. In this case, the CCI used the term “*inter-se shareholding*” which is one of the facets of the concept of common shareholding.³⁰ The *inter-se shareholding* means a scenario wherein entities hold shares of each other. While commenting on such a shareholding pattern, the CCI found that the shareholding or linkage between the entities explains why they had been transacting with each other. However, the CCI dismissed this case when it found no evidence tracing to manipulation of the bidding process.

In the *Chandraprabhu Case* or the *Meru Case*, the CCI never determined an anti-competitive agreement even though there was common shareholding.³¹ In this regard, as stated earlier, the presence of a plus factor is merely an indicator and does not necessarily determine the existence of an anti-competitive agreement. Like other plus factors, common shareholding is not considered as a determinant of an anti-competitive agreement but is treated as an indicator.

²⁹ Chandraprabhu, *supra* note 16.

³⁰ Burnside & Kidane, *supra* note 4.

³¹ Chandraprabhu, *supra* note 16; Meru, *supra* note 18.

Pertinently, the concept of common shareholding seemed to have reached the sight of Indian courts as well. The Delhi High Court in *Emami Power Ltd v. NTPC Ltd*³² (“**Emami Case**”), gave due consideration to the scenario of common shareholding while ascertaining the violation of the Act. In the said case, Emami and OSAPL were bidding in the selection process of solar power developments. Emami was found to have been holding 49.99% shares in OSAPL. The Court gave categorical consideration to the question – whether the shareholding structure can be categorised as that of common ownership. The Court held that although some common shareholding was present, the anti-competitive agreement was not derivable from the evidence on record.³³

In all the aforementioned cases, the concept of common shareholding was applied without referring to the terminology “common ownership” or “common shareholding”. This has led to the misconception that the *Meru Case* is the only case covering the concept. The only reason that the *Meru Case* is better known for common shareholding is because of the overt usage of the terms “common shareholding” and “common ownership” which was absent in the *Grasim Case*, *SAIL Case* and *Chandraprabhu Case*.³⁴

It is evident from the aforementioned cases that without referring to the term, the CCI subconsciously applies the concept of common shareholding.

³² *Emami*, *supra* note 16.

³³ *Id.*

³⁴ *Grasim*, *supra* note 16; *SAIL*, *supra* note 16; *Chandraprabhu*, *supra* note 16.

4) ***The Rationale behind the Subconscious Application of the Concept of Common Shareholding***

The CCI's subconscious application of the concept could be owing to its general practice of assessing the relationship between the opposite parties alleged of engaging in an anti-competitive agreement. In particular, the CCI takes into account whether parties have a principal-agent relationship³⁵, parent-subsidiary relationship³⁶ or whether they constitute a single economic entity³⁷, etc.

Moreover, in *In Re: M/s Sheth & Co.*³⁸ (“**Sheth Case**”), the CCI paid due consideration to the familial relationship between the competing entities. It was found that the members of the same family were holding managerial positions at the helm of affairs of the horizontal corporations. Thus, the CCI applied the ‘*principle of mutual understanding and benefit*’. Based on the principle, the CCI concluded that price parallelism coupled with the presence of family members indicates the existence of an anti-competitive agreement to manipulate the bidding process.

In the said case, the CCI did not delve into the shareholding relationship between the opposite parties and derived such a conclusion from the presence of family members in the management. The *Sheth Case* might not be relevant for the concept of common shareholding but it exhibits the vigilance of the CCI towards peculiar facts and circumstances

³⁵ Justickets Pvt. Ltd. v. Big Tree Entertainment Pvt. Ltd., 2017 SCC OnLine CCI 14 (India).

³⁶ UltraTech Cement Limited v. Jaiprakash Associates Limited, 2018 SCC OnLine CCI 20 (India).

³⁷ Exclusive Motors Pvt Limited v. Automobili Lamborghini, 2012 SCC OnLine CCI 69 (India).

³⁸ In Re: M/s Sheth & Co. & Ors., 2015 SCC OnLine CCI 93 (India).

of a case. The presence of family members in the management can be construed as a plus factor since such a fact assisted the CCI in reaching the determination of an anti-competitive agreement.³⁹

The CCI refrained from using the terms “common shareholding” and “common ownership” for the simple reason that such usage was not required. Without referring to these terms, the CCI subconsciously applied the concept as a result of its general practice of looking out for a nexus between the parties. Consequently, through Section 3 cases, the concept of common shareholding has developed in a veiled fashion i.e., without explicit application.

Currently, the concept is taking newer turns. As will be demonstrated in the subsequent segment, through the *Meru Case*, the CCI seems to have restricted the application of the concept to only those cases wherein there is the highest level of control. This has led to a conundrum in *ex-post* cases.

C. THE CONTROL CONUNDRUM: A NEW CHALLENGE BEFORE THE CCI TO PONDER

In the *Meru Case*, the CCI ascertained whether the common shareholder had the potential to facilitate an anti-competitive agreement. This potential was estimated based on certain yardsticks. Relying on international jurisprudence of common shareholding, the CCI stated that “Control can be in the form of *de facto* control, *controlling interest* (*de jure* control) as

³⁹ *Id.*

well as material influence'.⁴⁰ In the *In Re: Ultratech Cement Limited*, the CCI explained that *de jure* control is present when the common shareholder has a majority stake in the portfolio companies.⁴¹ As opposed to this, *de facto* control is considered to be present when the common shareholder does not have the majority of voting rights but exercises control over half of the votes that are cast.⁴² Material influence stands at the lowest in the hierarchy of control and as the name suggests, implies the presence of 'materials' or 'factors' that enables a common shareholder to influence the affairs of the portfolio companies' business. With respect to *de facto* control and material influence, the CCI observed that their presence does not significantly contribute to the competition assessment. This stance of the CCI reduces the relevance of common shareholding to only those circumstances wherein *de jure* control or controlling interest is present.

Analyzing the level of control based on these yardsticks might be relevant for assessing whether the common shareholder had control over the management of affairs; however, the absence of a higher level of control must not be taken to mean that the common shareholder could not have facilitated an agreement. The common shareholder is not the only party who would benefit from cartelization and it could be the case that the affiliated companies or horizontal competitors are also inclined towards forming an anti-competitive agreement. In other words, the proposal to form an anti-competitive agreement can come from the companies (or horizontal competitors) of which the common shareholder has bought

⁴⁰ Meru, *supra* note 18.

⁴¹ UltraTech Cement Limited, In re, 2018 SCC OnLine CCI 27 (India).

⁴² *Id.*

shares. In such a scenario, the common shareholder does not need to convince or exercise its influence over the horizontal competitors.

By subjecting the relevance of common shareholding to the level of control, the CCI has limited the application of the concept. Consequently, the cases wherein the potential of a common shareholder is not required to form an anti-competitive agreement would be given leeway. Even in the absence of potential, the common shareholder can become a medium of sharing sensitive information between the parties and thereby, cause an agreement. Thus, the CCI must revert to its former stance wherein it used to examine whether a common shareholder has assisted in facilitating an anti-competitive agreement, rather than examining whether he had the potential to form the agreement.

III. RELEVANCE OF COMMON SHAREHOLDING IN EX-ANTE COMPETITION REGIME

The ex-ante examination is undertaken by the CCI to assess whether a notifiable transaction is likely to cause an Appreciable Adverse Effect on Competition (“**AAEC Case**”). A transaction is considered to be ‘notifiable’ when it breaches the thresholds stipulated under Section 5⁴³ and thereby, qualifies for becoming a combination. These thresholds are based on the number of assets and turnovers of the resultant entity (an entity created as a result of the merger) and that of the notifying parties jointly or singly, as the case may be. Sections 5 and 6 have synchronized application.

⁴³ The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India) §5.

Whenever a transaction qualifies for becoming a combination as per thresholds under Section 5, it will have to be notified under Section 6.⁴⁴ Further, Section 6 has no application to transactions that do not constitute combinations. Such transactions are free from the CCI's intervention.

This part is divided into four segments. The first segment highlights that the *ex-ante* regulation affords the CCI a preemptive opportunity to prevent the formation of anti-competitive agreements through common shareholding. The *ex-ante* regulation can be broadly bifurcated into two stages: Filing of Notification and Assessment of the CCI. Hence, the second segment evaluates what relevance the law governing the combinations attributes to common shareholding. And, the third segment evaluates the relevance that the CCI attributes to common shareholding in combination assessment. In the last segment, the paper deliberates on the new development in *ex-ante* regulation.

A. PRE-EMPTIVE PREVENTION OF FORMATION OF ANTI-COMPETITIVE AGREEMENT THROUGH COMMON SHAREHOLDING

Interestingly, the objective of Sections 3, 5 and 6 is similar i.e., to cease or prevent AAEC. Under Section 3, the CCI aims at ceasing the continuation of the agreement that caused or was likely to cause AAEC.⁴⁵ The CCI undertakes such cessation after the formation of an anti-competitive agreement and thus, the provision falls under *ex-post* examination.

⁴⁴ The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India) §6.

⁴⁵ Alleged anti-competitive conduct in the Beer Market in India v. United Breweries Limited and Others, 2021 SCC OnLine CCI 53 (India).

On the other hand, Sections 5 and 6 constitute part of *ex-ante* examination because they aim at preventing the occurrence of AAEC even before an anti-competitive agreement is formed. Apparently, Section 3 can be taken as a cure for AAEC; whereas, Sections 5 and 6 implicate the prevention of AAEC. In other words, the role of Section 3 comes after an anti-competitive agreement is formed and that of Sections 5 and 6 before its formation.

Under *ex-ante* examination, the CCI ascertains the likeliness of AAEC as an outcome of the combination. Primarily, the CCI contemplates whether, upon approval, the transacting parties would be engaging in an anti-competitive agreement that is likely to cause AAEC. For instance, if the acquirer holds shares in the target's competitor; then, the prime concern of the CCI would be whether, after the approval, the acquirer would be in a position to facilitate an anti-competitive agreement between the target and its competitor. In another instance, if the acquirer is a horizontal competitor of the target, then upon approval, they can engage themselves in forming an anti-competitive agreement. These instances are no different from the ones discussed earlier i.e., cross-ownership and horizontal shareholding respectively.

Pertinently, such transacting entities can manage to form an anti-competitive agreement even without entering into a transaction or acquisition; however, the decisional practice of the CCI demonstrates that the entities with common shareholding are more likely to form such agreements. The decisional practice will be deliberated on in the latter section. As stated earlier, common shareholding can aid parties in forming anti-competitive agreements and thus, constitutes a plus factor. It was also

observed that a common shareholder can act as a common route for sharing information between the entities. The relationship of common shareholding is known to aid entities in forming anti-competitive agreements.⁴⁶

However, notifying parties of the combination will get aid from common shareholding or common shareholders only if the CCI approves of such shareholding in its combination assessment. If the CCI estimates that the transacting parties could cause AAEC by forming an agreement, then the CCI will not approve the transaction or acquisition. Alternatively, the CCI can lessen the aid from common shareholding. This will be analyzed along with the decisional practice in the latter section. Therefore, the *ex-ante* examination gives the CCI an opportunity to pre-emptively prevent the formation of the anti-competitive agreement through common shareholding and AAEC resulting thereof.

Furthermore, for the CCI to effectively contemplate AAEC as an outcome of common shareholding, it would require certain details, significantly being whether the transacting parties operate in the same market. Thereafter, the CCI would be able to determine whether the parties are horizontally or vertically connected. Additionally, if such a connection is established, then the parties could enter into a horizontal or vertical anti-competitive agreement likely to cause AAEC. In order to analyze whether the parties are bound to disclose the said detail, the law governing the combinations requires to be evaluated.

⁴⁶ Azar, Raina & Schmalz, *supra* note 6.

B. EVALUATION OF THE RELEVANCE THAT THE REGULATION ATTRIBUTES TO COMMON SHAREHOLDING IN FILING OF NOTIFICATION

In India, the combinations are governed by the CCI (Procedure In Regard To The Transaction of Business Relating to Combinations), Regulations 2011 (Regulation).⁴⁷ As per the Regulation, reviewing notifiable transactions can be bifurcated into two phases. In Phase I, the CCI delves into forming a *prima facie* opinion as to whether the combination is likely to AAEC. In this regard, the CCI ascertains the market landscape to apprehend whether the AAEC has been resulted and if not, the CCI assesses the likeliness of such a result as an outcome of the Combination.⁴⁸ If the CCI forms such an opinion, the case transmits to Phase II wherein the CCI may ask notifying parties to file additional information.⁴⁹ Further, in Phase II, if the CCI concludes that the transaction is likely to cause AAEC then it either imposes conditions or accepts the commitments offered by the parties.⁵⁰ The CCI can also dismiss the transaction when it is not appeased by the commitments offered by the parties. The CCI approves the combination only upon satisfaction that the concerned transaction is not likely to cause AAEC.

⁴⁷ The Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 No. 1-1/Combination Regulations/2011-12/CD/CCI (India) (*hereinafter* “**Regulation**”).

⁴⁸ Abir Roy, *supra* note 13.

⁴⁹ The Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 Reg. 19. No. 1-1/Combination Regulations/2011-12/CD/CCI.

⁵⁰ *Id.* Reg. 25.

Combinations being notifiable transactions, are required to be notified to the CCI by filing forms as specified in Schedule II of the Regulation.⁵¹ Schedule II includes four types of forms in which, parties can file a notice in either Form I or Form II.⁵² Further, if the acquirer is a financial institution, then notification has to be made in Form III.⁵³ Last of all, Form IV is solicited from the parties by the CCI when it makes a *prima facie* observation that a formerly sanctioned combination has caused or is likely to cause AAEC.⁵⁴

Between Forms I and II, the choice of form is at the discretion of the parties. However, the Regulation advises parties dealing in similar goods or working at different levels of the supply chain to file the notice in Form II because it is more detailed.⁵⁵ The provision applies to those entities who are or upon approval, will be horizontally or vertically connected. It stipulates two scenarios: (a) when the notifying parties are engaged in production, distribution, or trade of similar or identical or substitutable goods or services and combined market shares of the combination are more than 15% and (b) when the parties are engaged in different level of supply chain and the resultant market shares of combination is more than 25%.⁵⁶

Pertinently, the Regulation only exhibits the preference of the CCI towards the filing of the notice in Form II in the aforementioned scenarios. However, even if parties do not act upon advice expressed under the regulation and choose to file a notice in Form I, the parties will be required

⁵¹ *Id.* Schedule II.

⁵² *Id.* Reg. 5.

⁵³ *Id.* Reg. 6.

⁵⁴ *Id.* Reg. 22.

⁵⁵ *Id.* Reg. 5.

⁵⁶ *Id.* Schedule II.

to specify the existence or possibility of horizontal overlap and vertical overlap under Part VI of Form I. Form III also has a similar requirement for financial institutions. As for Form IV, since it is called upon by the CCI from parties who previously received approval and they must have filed notification in either of Forms I or II.

Therefore, irrespective of the type of forms the parties are filing, the Regulation ensures that they specify details pertaining to the production of similar, identical or substitutable products. Further, if the parties fail to notify a combination⁵⁷ or abstain from furnishing any material information⁵⁸, then they shall be inviting a penalty under the respective provisions of the Act.

Therefore, the Regulation is sufficiently efficient on its part to ensure that parties do not escape from providing the details pertaining to identical or substitutable products, if any.

After filing the forms, it is for the CCI to examine the relevant product markets and look for the possibility of common shareholding resulting in AAEC through an anti-competitive agreement. Knowledge with respect to identical products is of material to the CCI since only then it would be able to contemplate whether the case would be of horizontal shareholding or cross-ownership. As a result, the CCI would be able to take the required actions to ensure that the transaction will not be likely to cause AAEC. In this regard, the decisional practice of the CCI is required to be analysed.

⁵⁷ The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India) §43a. This provision penalizes upon failure to notify combinations under Section 6.

⁵⁸ The Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India) §44. This provision penalizes upon omitting to disclose material information.

**C. EVALUATION OF THE RELEVANCE THAT THE CCI ATTRIBUTES TO
COMMON SHAREHOLDING IN COMBINATION ASSESSMENT**

As stated earlier, while assessing a combination, the CCI foresees whether it has the potential to cause AAEC and if so, the CCI nullifies such possibilities by accepting commitments from the parties or imposing conditions. In *Canary Investments/Intas Pharmaceuticals*,⁵⁹ the CCI observed that the affiliated company of the acquirer, ChrysCapital had a stake in the target's competitor, Mankind. The Commission concluded that ChrysCapital's common interest in these companies will enable it to cause AAEC through bid-rigging, price arrangement or allocation of markets. In its assessment, the CCI perceived the possibility of violating Section 3 of the Act by facilitation of agreement through the common shareholder. In order to eliminate such possibilities, ChrysCapital offered multiple commitments such as limiting the exercise of veto rights and removal of its director in Mankind.

A similar course of circumstances occurred in *ZF Friedrichshafen AG/WABCO Holdings*⁶⁰ wherein the acquirer held a 49% stake in the target's competitor, Brakes India. Based on such stake, the CCI found that the combination is likely to cause AAEC in the market. Thus, the acquirer offered to divest its entire stake in Brakes India and a commitment to never re-acquire such shares. It is evident that the CCI's prime concern was the

⁵⁹ *Canary Investments Limited And Link Investment Trust II*, Combination Registration No. C-2020/04/741.

⁶⁰ *ZF Friedrichshafen AG And WABCO Holdings Inc*, Combination Registration No. C-2019/11/703.

acquirer becoming a common shareholder of two horizontal competitors and thus, it approved the combination only after the acquirer committed to divest the whole of its stake in Brakes India.

Further, in *Northern TK/FHL*,⁶¹ along with holding shares, the acquirer had a director in the target's competitor. The CCI was concerned that the acquirer could trigger sharing of commercially sensitive information between the horizontal competitors. In order to address such concerns, the acquirer committed to never sharing any commercially sensitive information and also, to adopt a punishment mechanism model in case any sharing is undertaken by its employees.

Interestingly, like *ex-post* cases, the presence of a common shareholder has turned out to be a plus factor in *ex-ante* cases as well. In the aforementioned cases, the CCI's assessment of the likeliness of causing AAEC was considerably based on the acquirer becoming a common shareholder of horizontal competitors. In all these cases, the CCI approved the combinations after accepting the commitments offered by the parties. In many other combination cases as well, the CCI has integrated the assessment of common shareholding in a similar fashion.⁶²

Therefore, the CCI's assessment of combinations ensures that the common shareholding resulting from the transaction does not aid the parties in forming an anti-competitive agreement. Pertinently, like the *ex-post* cases, in *ex-ante* cases, the CCI did not refer to the terminologies like

⁶¹ Northern TK Venture Pte. Ltd and Fortis Healthcare Limited, Combination Registration No. C-2018/09/601.

⁶² Outotec OYJ and Metso OYJ, Combination Regulation No.-2020/03/735; Claymore Investments (Mauritius) Pte. Ltd And IndiaIdeas.com Limited, Combination Registration No. C-2018/12/623; Etihad Airways PJSC, In Re, 2013 SCC OnLine CCI 92.

“common shareholding” and “common ownership” and observed the implicit application of the concept.

The Regulation brings any possibility of horizontal overlap to the attention of the CCI. The horizontal overlap is one element short of horizontal shareholding i.e., one party does not hold any stake in another. The notification is filed to acquire such stake and upon approval, transform the relationship into horizontal shareholding. The CCI is conscious of this phenomenon. As observed above, upon finding likeliness of AAEC resulting from horizontal overlap, the CCI aims at reducing the power of the acquirer to eliminate the possibility of the formation of an anti-competitive agreement. Such reduction is caused either through divestiture or removal of a director. Acceptance of commitments and imposition of conditions fulfil the purpose of *ex-ante* regulation by preemptively preventing the AAEC likely to arise out of combinations.

D. NO FURTHER LEEWAY TO INSTITUTIONAL INVESTMENTS: A NEW DEVELOPMENT IN THE PIPELINE.

The *ex-ante* examination is limited to those transactions that amount to combinations. Seemingly, the laws governing combinations are based on the assumption that the transactions that do not constitute combinations are not likely to hamper competition and therefore, are kept out of the CCI's scrutiny. The recent trends of institutional investments could disabuse this assumption. With the knowledge that passive investments need not be notified to the CCI, the institutional investors buy shares of the portfolio companies belonging to the same market. This investment

strategy has caused higher prices in the airline and the banking industries.⁶³ The passive investments by institutional investors have turned out to be a new challenge before the CCI.

Economic theories suggest that common shareholding has become all the more prevalent in institutional investments.⁶⁴ Financial institutions tend to buy a minority stake in multiple companies that belong to the same market. The minority stake might seem minor in respect of the number of shares but it could not be so in terms of the level of concentration. For instance, an institutional investor can hold as much as 8% shares in an entity but could still be the largest shareholder.

The Regulation states that passive investment wherein the acquirer buys less than 10% of shares solely for the purpose of investment need not be notified to the CCI.⁶⁵ This provision ends up giving leeway to institutional investors who can candidly invest in any number of competitors insofar as their investments are under 10%. Therefore, the CCI has launched a market study of the private equity sector specially dedicated towards common ownership resulting from institutional investments. The CCI aims at finding answers to two questions: whether an institutional investor can derive benefit from stifling competition between portfolio companies and whether institutional investors can influence the decision-

⁶³ Jacob Gramlich and Serafin Grundl, *Testing for Competitive Effects of Common Ownership*, FINANCE AND ECONOMICS DISCUSSION SERIES, 029 (2017).

⁶⁴ Eric A. Posner, Fiona M. Scott Morton & E. Glen Weyl, *A Proposal to Limit the Anti-Competitive Power of Institutional Investors*, 81(3) ANTITRUST LAW JOURNAL, 660 (2017).

⁶⁵ Regulation Schedule I

making process of such companies.⁶⁶ The study is one of a kind in India. It is to be seen whether the CCI would amend the Regulation or find the answers to these questions in the negative.

IV. CONCLUSION

Part I demonstrates that for both the provisions under *ex-post* regulation, the integration of common shareholding has been subject to their jurisprudence. Had Section 4 ingrained collective dominance, the CCI would have integrated the concept of common shareholding into the examination of the abuse of dominant position. On the other hand, under Section 3, had the CCI restricted itself to direct evidence, it would have never included or given evidentiary value to the circumstance of common shareholding.

The paper further established that since the CCI appreciates circumstantial evidence in the ascertainment of cartels, common shareholding has made a place as a circumstance in the CCI's assessment of anti-competitive agreements. Common shareholding as a circumstance constitutes a plus factor when it hints at the existence of an anti-competitive agreement. The application of the concept has become so prevalent that the parties seemed to have realized that common shareholding is a plus factor and thus, they tend to disassociate themselves from each other as observed in the *SAIL Case*.⁶⁷ Part I establishes that the development of the concept has stemmed out of the ordinary course that the CCI follows. The

⁶⁶ Deeksha Manchanda & Vishnu Suresh, 'Competition law and problems of common ownership,' INDIA BUSINESS LAW JOURNAL, <https://law.asia/competition-law-problems-common-ownership/> (Last accessed: March 21, 2023).

⁶⁷ SAIL, *supra* note 16.

CCI tends to look for any possible connection between the parties as an outcome, and consequently, it started taking cognizance of common shareholding. The concept has further developed to include *inter-se* shareholding and also, corroborates with the presence of common management as observed in the *Chandraprabhu Case* and the *Grasim Case* respectively.⁶⁸

In Part II, the paper revealed that for combinations, the origin of common shareholding is within the supervision of the CCI. This confers a pre-emptive opportunity for the CCI to prevent occurring of AAEC as a result of common shareholding. The governance of combinations is known to be suspensory and mandatory.⁶⁹ This means that a combination cannot come into existence without the former approval of the CCI. The paper established that the Regulation ensures that while seeking approval, the parties provide details pertaining to the products they produce and similarity if any. Thereupon, the CCI determines the possibility of any horizontal or vertical overlap leading to common shareholding. The CCI further examines whether the common shareholder holds sufficient control to cause an anti-competitive agreement. Lastly, if any such control is found, the CCI reduces it by accepting commitments or imposing conditions. Consequently, the likeness of AAEC rising from common shareholding is wiped out. Through the application of Regulation and acceptance or imposition of conditions, the CCI efficiently utilizes the pre-emptive

⁶⁸ Grasim, *supra* note 1; Chandraprabhu, *supra* note 16.

⁶⁹ Avaantika Kakkar & Vijay Pratap Singh Chauhan, *India: Merger Control*, Global Competition Review <https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2022/article/india-merger-control>.

opportunity of preventing the occurrence of anti-competitive agreements and AAEC resulting therefrom.

The paper concludes that the competition law of India is witnessing the development of common shareholding in a veiled fashion.