A 'MATERIAL' SOLUTION: MATERIAL INFLUENCE AS A STANDARD TO COMBAT COMMON OWNERSHIP CONCERNS

Archita Satish[*]

ABSTRACT

The 2023 Amendment to the Competition Act, 2002 codifies the "material influence" standard developed by the Competition Commission of India to allow for broader ex-ante merger control review. The standard is the lowest level of control or influence granted by a proposed combination which triggers a requirement to notify the Commission. While the introduction of the material influence standard is an important step, its open-texture must be confined in order to walk the fine line of regulation. This paper is premised on the basis that a test case for the potential of this standard is seen against the growing concern of common ownership. Common ownership refers to the practice where an entity holds investments in multiple rival firms in a market purely for non-strategic purposes. In the age of investment firms and private equity, this type of investment is becoming increasingly prevalent. Microeconomics argues that common

[*]Archita is a fourth-year B.A. LLB. (Hons.) student at the NALSAR University of Law, Hyderabad. The author may be reached at archita.satish@nalsar.ac.in.

ownership can reduce the incentive to compete among rivals and allow for tacit collusion. This paper proposes that with suitable modifications and notifications of delegated legislation under the new provision of the 2023 Amendment Act, the material influence standard can address concerns about common ownership in India. For this purpose, the paper is presented in three main sections. While the first section lays down the development of the material influence standard in Indian jurisprudence, the second section analyses the issue of common ownership. While highlighting the nature of the concern as case specific, it also presents solutions which have been proposed for the issue. On this basis, the last section posits that through a better definition of situations which would amount to "material influence" provided through delegated legislation under the 2023 Amendment Act, common ownership can be tackled. In defining the same, due care must be given to industry concerns and minority investor rights to create an appropriate regime.

Keywords: *The Competition Act, 2002, The Competition (Amendment) Act, 2023, Control, Material Influence, ex-ante Merger Control Review, Common Ownership*

I. INTRODUCTION

In 2023, the Competition Act, 2002 (“**Act**”) witnessed major reshaping, with the introduction of many new concepts such as settlement and commitments and deal value thresholds. It also led to the refinement of existing provisions.[1] Accordingly, an amendment was made to the explanation to Section 5 which defines “control.” Crucially, the amendment codifies the “material influence” standard of determining the ability of an investing enterprise or group to control the management, affairs, or strategic commercial decisions of the invested entity.[2]

The understanding of “control” determines the trigger on the basis of which entities are obligated to notify the Competition Commission of India (“**CCI**”) of a proposed combination under Section 6 of the Act.[3] However, over the years, the vague and open-ended nature of the provision combined with the shifting jurisprudence of the CCI has left it in an uneasy state.[4] This is especially crucial since failure to notify the CCI and proceeding with a proposed combination has severe consequences for entities. This practice, called “gun-jumping,” not only invites inquiry into the transaction under Section 20[5] read with Regulation 8 of the CCI (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (“**Combination**

[1]‘News Details: The Competition (Amendment) Act, 2023’ (*Nishith Desai Associates*, 5 May 2023) <https://nishithdesai.com/NewsDetails/9599> accessed 20 December 2023.
[2]The Competition (Amendment) Act, 2023 (9 of 2023) s 6.
[3]The Competition Act, 2002 (12 of 2003) s 6.
[4]Prateek Bhattacharya, ‘Competition Commission of India’s “control” conundrum – practice, precedent, and proposals’ (2021) 17(2) European Competition Journal 473, 478.
[5]The Competition Act, 2002 (12 of 2003) s 20.

Regulations"),[6] but also a penalty under Section 43A of the Act. This penalty extends to the higher of one percent of the total assets or turnover of the infringing entity.[7]

Having a clear-cut understanding of this regime is particularly important for institutional investors, for whom acquisitions encompass the bread and butter of their trade. There is a growing debate and concern regarding the question of common ownership, which particularly affects this group of investors. Also called "horizontal shareholding," this refers to the practice of holding investments in numerous horizontally competitive entities in a given market.[8] With the increasing investment of funds and other institutional investors in the stock market, the practice has become a concern from a microeconomic perspective.

Economic theory suggests that the practice of common ownership gives rise to antitrust concerns such as coordination and lessening of competition in the market. In India, overall institutional investment has risen to about 34% in publicly traded entities.[9] In light of these concerns, the CCI has also undertaken to study the extent of common ownership by private equity firms in India.[10] While formal inclusion of

[6]The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (3 of 2011) reg 8.
[7]The Competition Act, 2002 (12 of 2003) s 43A.
[8]George S Dallas, 'Common Ownership: Do Institutional Investors Really Promote Anti-Competitive Behavior?' (*Harvard Law School Forum on Corporate Governance,* 2 December 2018) <https://corpgov.law.harvard.edu/2018/12/02/common-ownership-do-institutional-investors-really-promote-anti-competitive-behavior/> accessed 19 December 2023; Akanksha Agarwal and Anupriya Dhonchak, 'Relevance of Common Ownership in Competition Analysis in India' (2020) 6(1) National Law School Business Law Review 61, 62.
[9]OECD, 'Ownership structure of listed companies in India' (*OECD*, 2020) 19 <www.oecd.org/corporate/ownership-structure-listed-companies-india.pdf> accessed 18 December 2023.
[10]ENS Economic Bureau 'CCI to launch study into impact of multiple investments by PE firms in same sector' *The Indian Express* (New Delhi, 5 December 2020) <https://indianexpress.com/article/business/business-others/cci-to-launch-study-

"material influence" within the text of the Act is a welcome step towards clarity on the standard, this paper posits that this standard can prove to be a viable solution to deal with the issue of common ownership.

Part II of the paper provides a brief outline of the Act, standards of control and traces the evolution of the material influence standard in India so far. Part III explains the issues with common ownership as a growing phenomenon and how other jurisdictions have assessed the same, including assessing solutions proposed to address the issue. Part IV argues that the material influence standard, as currently developed in India and likely to be developed in the future under the Amendment, can be a fruitful approach. Additionally, the paper makes suggestions on how the standard must be defined to allow greater predictability and compliance.

II. MERGER CONTROL IN INDIA

A. Understanding the provisions and the Amendment Act

The Indian merger control regime is a mandatory, *ex-ante* mechanism. Entities forming proposed combinations which meet the specific asset or turnover threshold values in Section 5 of the Act are obliged to notify the CCI.[11] Sections 5 and 6 of the Act deal with the regulation of combinations in India. While Section 5 defines the thresholds for various mergers and acquisitions to amount to "combinations" for the purpose of regulation and notification, Section 6 prohibits and renders void any combination which results in appreciable adverse effects on competition ("**AAEC**") in India in the relevant product market. It also

into-impact-of-multiple-investments-by-pe-firms-in-same-sector-7092183/> accessed 15 December 2023.

[11]Nikhil Bedi et al, 'Rationale for proposed inclusion of material influence standard in the Indian Merger Control Regime–an expansive approach for determination of "control"' (*Deloitte*, 2020) 2 <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-fa-material-influence-standard-noexp.pdf> accessed 10 December 2023.

provides for notification of combinations to the CCI within thirty days of the approval of the merger or acquisition by the relevant enterprises' Board of Directors.

The process of notification is itself governed by the Combination Regulations. Regulation 4 is particularly relevant since it carves out an exception for certain combinations that are deemed to not cause an AAEC in India and hence would *not normally* need to be notified. These scenarios are provided in Schedule I of the Regulations. Crucially however, most of these scenarios, including the acquisition of shares, voting rights, or assets "*solely as an investment*" or "*in the ordinary course of business*" are only exempt so long as control in the target entity is not acquired. This makes the understanding of control even more important.[12] This is significant because there has been a steady increase in the involvement of institutional investors in India,[13] for whom such an exemption would be relevant.

In its original form, the Explanation to Section 5 defined "control" as simply "c*ontrolling the affairs or management*." This gave rise to essentially a circular understanding of the term. The amendment changes this in a number of ways. *Firstly*, it replaces the above circular definition with the material influence standard. *Secondly*, this is made very broad with the inclusion of the phrase "*in any manner whatsoever*" contemplating a large range of acts, rights, and other mechanisms through which material influence may be granted. *Thirdly*, it adds "*strategic commercial decisions*" as another category of events over which control may be acquired.

All of these amendments are in that sense in line with the jurisprudence

[12]Avaantika Kakkar and Vijay Pratap Singh Chauhan, 'India: Merger Control' (*Global Competition Review,* 25 March 2022) <https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2022/article/india-merger-control> accessed 12 December 2023.
[13]OECD, 'Ownership structure of listed companies in India' (*OECD*, 2020) 19 <www.oecd.org/corporate/ownership-structure-listed-companies-india.pdf> accessed 18 December 2023.

of the CCI which has in practice taken an expansive approach to control, more than other regulators like the Securities and Exchange Board of India[14] and under the Insolvency and Bankruptcy Code.[15] Both of these latter regulators have confined control to mean "positive control" over the actions of the target rather than negative actions which may only be able to reject, block, or veto any act. Questions such as what are the different kinds of control? and how does this lead to the emergence of the material influence standard? are answered in the following section.

B. Understanding 'control' and developing 'material influence'

There are primarily four kinds of control or influence within the Indian jurisprudence. The first is controlling interest or sole control where the investing company or holder owns more than 50% stake in the company. This means they can take all the decisions with respect to the day-to-day management of the target entity. Further, due to majority interest, they are able to veto any business decisions in director or shareholders' meetings.[16] As such, this form of influence or control is also called *de jure* control.

This is as opposed to *de facto* control where although the investor has less than 50% of the shares or voting rights, other special rights allow them to take decisions and be involved in the management of the company. This can often take the shape of negative control rights,

[14]*Securities and Exchange Board of India v Subhkam Ventures (I) Private Limited* AIR 2018 SC 5646.
[15]*Arcelor Mittal India Private Limited v Satish Kumar Gupta* (2018) SCC OnLine SC 1733 [48].
[16]Nandish Vyas and Geet Sawhney, 'Key concepts of GROUP and CONTROL under the Competition Act, 2002' (*Concurrences*, 12 July 2019) <https://awards.concurrences.com/IMG/pdf/11._key_concepts_of_group_and_control_under_the_competition_act_2002.pdf?56247/cd7744c6c3f2cab38ded999fc47f9d899569d0417ba042e9a6d1b6bf0f755052> accessed 12 December 2023; Prateek Bhattacharya, 'Competition Commission of India's "control" conundrum – practice, precedent, and proposals' (2021) 17(2) European Competition Journal 473, 478.

especially since any entity holding over 25% is conferred veto rights.[17] Related terms used by the CCI in the above cases include the concept of sole and joint control. While a scenario of controlling interest of 75% or more would confer sole control as an elevated form of *de jure* control,[18] when two or more entities together hold such control, although not equally, such a scenario amounts to one of joint control.[19]

These forms of control are also interlinked with the concept of "influence." Thirdly, is the standard of "decisional influence," as is also followed by the European Union (hereinafter, "EU").[20] In European jurisprudence, this forms the lowest threshold of control, where the mere *possibility* of control itself is considered.[21] Therefore, such control does not require the actual exercise of powers or rights over the management and other affairs. The CCI adopted this standard in the *Independent Media Trust* case.[22] It held that acquisition through Zero Coupon Optionally Convertible Debentures, which on conversion would give the acquirer a 99.9% stake over the entity on a fully diluted basis, would lead to such decisive control over the management and

[17] *FIH Mauritius Investments/ Fairfax* Case No. C-2015/07/296 (19 Aug, 2015) [5]; *Proceedings under Section 43A of the Competition Act, 2002 against Telenor ASA, Telenor (India) Communications Private Limited and Telenor South Asia Investments Pte Limited* (3 July, 2018) [15].
[18] Prateek Bhattacharya, 'Competition Commission of India's "control" conundrum – practice, precedent, and proposals' (2021) 17(2) European Competition Journal 473, 484-485.
[19] Prateek Bhattacharya, 'Competition Commission of India's "control" conundrum – practice, precedent, and proposals' (2021) 17(2) European Competition Journal 473, 485.
[20] Nikhil Bedi et al, 'Rationale for proposed inclusion of material influence standard in the Indian Merger Control Regime–an expansive approach for determination of "control"' (*Deloitte*, 2020) 2 <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-fa-material-influence-standard-noexp.pdf> accessed 10 December 2023.
[21] Consolidated Jurisdictional Notice under Council Regulation (EC) 139/2004 on the control of concentrations between undertakings, 2008/C 95/01 (2008) [20].
[22] *RB Mediasoft Private Limited/ RRB Mediasoft Private Limited/ RB Media Holdings Private Limited/Adventure Marketing Private Limited/ Watermark Infratech Water Limited/ Colorful Media Private Limited/ Independent Media Trust* Combination Registration No. C-2012/03/47 (28 May 2012) [15].

affairs of the target. Similar to *de facto* control, even holding less than 50% of the stake in the company, can amount to decisive influence.[23]

The last of these and the focus of this paper is the "material influence" standard. There is no clear definition of what exactly constitutes material influence. Case laws have shed light on what circumstances the standard entails. The first such case was the *Ultra Tech/ Jaiprakash Associates Limited* ("***JAL***") decision.[24] The case concerned the transfer of two cement plants from JAL to Ultra Tech. While inquiring into the transaction under gun-jumping provisions, the CCI discovered that Ultra Tech had not disclosed the shareholding of Mr. Kumar Mangalam Birla and his family, who also had shareholdings in Century and Kesoram, two of Ultra Tech's competitors in the cement industry. Instead, when filing the initial notification, Ultra Tech had only disclosed the shareholding of its immediate parent company, Grasim. On this finding, the CCI dived into the various standards applicable, pronouncing: "*Material influence, the lowest level of control, implies presence of factors which give an enterprise ability to influence affairs and management of the other enterprise including factors such as shareholding, special rights, status and expertise of an enterprise or person, Board representation, structural/financial arrangements etc*."[25]

Citing the United Kingdom ("**UK**") guidance on standards, the Commission found that Mr. Birla would have such material influence on account of his Board seat across these entities combined with his expertise in the field, which is likely to give his word more weight than that of other directors on the respective Board. Confusingly, however, the CCI observes that even if there was no "material influence," the ability to be privy to sensitive information could facilitate tacit

[23] *UltraTech/ Jaiprakash* Combination Registration No. C-2015/02/246, Order under Section 44 (12 March 2018) [12.11 and 12.17(i)].
[24] ibid.
[25] *UltraTech/ Jaiprakash* Combination Registration No. C-2015/02/246, Order under Section 44 (12 March 2018) [12.10].

collusion between these entities. This is problematic because it seems to suggest an even lower standard than material influence in which the CCI might be interested. Further, it seems to confuse the *ex-ante* jurisprudence in merger control, with the standards of interference in *ex-post* analysis under cartelization provisions under Section 3 of the Act. Therefore, what appears from this judgment is that even a single Board seat across entities with competing or substitutable products is likely to raise competition concerns and must be notified to the CCI for it to assess if this would lead to an AAEC under the Act.

Within a year, another case knocked on CCI's doors enabling it to apply this newfound standard. In the case of *Agrium and Potash Corporation of Saskatchewan, Inc.* ("***PotashCorp***"),[26] the two entities were planning to create a jointly held third entity as a parent company for some subsidiaries, which would impact the shareholding of their subsidiaries in the potash market in India as well. The CCI observed that this would lead to further concentration in the market because the strengthening of structural ties would enable material influence and lead to coordinated effects in the market.[27] Therefore, here it appears that the CCI has extended the logic of *JAL* from the ability of an individual to influence the Board of the targets or subsidiaries, to the ability of a leading enterprise in the market to do the same.

The last of these cases highlights the major concern that this paper tries to address: the competition effects of common ownership by institutional investors like funds. This question arose *in re Meru Travels Solutions* ("***Meru***"), where it was alleged that common investment by the investment company, SoftBank in the mobile apps, Ola and Uber, amounted to control under a material influence standard. This raised competition concerns in the radio taxi service market. While the investments in this case were passive, being undertaken

[26]*Agrium Inc./ Potash Corporation of Saskatchewan, Inc.* Combination Registration No. C-2016/10/443 (27 October 2017).
[27]ibid [24-25].

purely for investment purposes by institutional investors, the CCI nevertheless noted that competition concerns such as horizontal effects may arise. Yet, due to a failure of any real evidence to prove such effects as occurring and a lack of global consensus on the effect common ownership has, the Commission did not find a *prima facie* case under Sections 3 or 4 of the Act in relation to anti-competitive agreements or abuse of dominant position. The *Meru* case thus raises an interesting question of whether material influence as a standard would be capable of capturing any such risks due to common ownership, especially when it might fall in a grey zone between active and passive investment.

Although what would fall under "material influence" under the amendment is yet to be notified, the Competition Law Review Committee's Report, which formed the basis for the 2023 Amendment provides some guidance. Drawing on CCI jurisprudence, it specifies some indicative factors for determining whether material influence exists including Board representation, special rights, status and expertise of an enterprise or person, and structural/financial arrangements.[28] The Report also noted why the *material influence standard* was chosen to be codified rather than the *decisive influence* one.[29]

It observed that the former captures a larger range of scenarios including acquisition not in the ordinary course of business, like in the case of SoftBank which, though primarily passive, seems to have some *active influence* over its investee companies, acquiring international rights, negative rights, etc. In particular, it observed that even the EU, which uses a decisive influence standard, has now taken cognizance of the gap the decisive influence standard creates, and is attempting to remedy the same. Thus, the adoption of a material influence standard

---

[28]'Report of the Competition Law Review Committee' (2019) <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf> accessed 10 December 2023.

[29]Ibid [117-119].

provides some contours to "control" but still leaves it open enough to capture a wide range of behaviours, perhaps including common ownership. The next part provides a brief introduction to the question of common ownership and how this has been globally tackled.

III. COMMON OWNERSHIP- A 'MATERIAL' CONCERN?

A. The Concerns of common ownership

Traditionally, the rationale behind common ownership as an investing strategy is to reduce the risk of fund investors by spreading it over multiple entities.[30] There is much academic debate on whether competition fears from this practice are justified. Economic theory suggests that if there is a group of overlapping shareholders between Firm X and Firm Y, even a minority interest in terms of shares or voting rights might influence Firm X to either raise their prices or reduce their output. This is because the net outcome from the increased sales to Firm Y by gaining Firm X's lost customers would benefit these investors. Thus, these horizontal effects make firms that provide substitutable goods less competitive, raising clear competition risks.[31] The other possibility is of coordinated effects, since a common shareholder may be privy to sensitive information of these rival firms and use the same to facilitate some form of tacit collusion in the market.[32]

However, this theoretical model needs to be tempered by the structural features and factors of the particular case and industry for analysis. As noted by the OECD in its report, factors like concentration in the market, entry conditions, degree of substitutability and homogeneity of

[30]ibid.
[31]Menesh S Patel, 'Common Ownership, Institutional Investors and Antitrust' (2018) 82 Antitrust Law Journal (Draft) 1, 9; Nikhil Bedi et al, 'Rationale for proposed inclusion of material influence standard in the Indian Merger Control Regime–an expansive approach for determination of "control"' (*Deloitte*, 2020) 3 <https://www2.deloitte.com/content/dam/Deloitte/in/Documents/finance/in-fa-material-influence-standard-noexp.pdf> accessed 10 December 2023.
[32]ibid.

the goods or services concerned, and number of companies as well as internal matters such as costs to the entity, their market share etc., also play a role. Crucial to this analysis is, of course, the *actual* ability of the common owner to influence management decisions and capture control in any sense.[33] In particular, one cannot discount the information gap in the real world which influences the way business decisions are taken as well as the potential for the management of the firm to have conflicting goals to that of the minority interest.[34]

Additionally, many assert that such concerns may only be relevant in the case of so called *active* investments, where the common owner takes a more active role in terms of the management of the company, with certain strategic goals also in mind, as opposed to *passive* investment which is purely for the monetary or financial purpose of the investment itself. However, others contest that these concerns are equally valid for passive investments.[35] This is because a higher proportion of passive investment in entities, in comparison to active investors may not encourage as much competition or taking of high-risk, high pay-off decisions which could otherwise take their goods and services to a new level of innovation and consumer welfare.[36]

This also suggests that the extent to which institutional investment is present in a geographical market or jurisdiction, as well as particular industries must be considered to understand what policy must be adopted to tackle the same. For instance, empirical studies in the United

[33]OECD Competition Committee, 'Antitrust Issues Involving Minority Shareholding and Interlocking Directorates' (23 June 2009) DAF/COMP (2008) 34-35.
[34]OECD Competition Committee, 'Antitrust Issues Involving Minority Shareholding and Interlocking Directorates' (23 June 2009) DAF/COMP (2008) 36-37.
[35]Daniel P O'Brien and Steven C. Salop, 'Competitive Effects of Partial Ownership: Financial Interest and Corporate Control' (2000) 67 Antitrust LJ 559, 577.
[36]OECD, 'Common Ownership by Institutional Investors and its Impact on Competition: Background Note by the Secretariat DAF/COMP' (2017) (*OECD*, 29 November 2017) 10, 27-28 <https://one.oecd.org/document/DAF/COMP(2017)10/en/pdf> accessed 18 December 2023.

States ("**US**") have shown that large institutional investors like State Street, BlackRock, and Vanguard constitute the single largest shareholder in about 40% of the listed entities in the country. Further, industry-wise studies have shown similarly staggering levels of common ownership in relation to airlines, mobile phones, soft drinks and cereals, banks, pharmacies, and even technology companies-covering a wide range of industries.[37] The EU began a similar analysis in 2019,[38] with the Telecom industry standing out in particular.[39] The UK has likewise found some level of common ownership in the banking industry.[40] This also indicates that common ownership is not an isolated phenomenon.

B. Strategies to counter common ownership concerns

Various policies have been proposed as to how antitrust or competition law can address these concerns. One solution seems to be to adopt a case-by-case approach to the issue. This would be prudent considering the market and jurisdiction specific consideration, apart from the specific rights and shares concerned in the impugned case.[41] However, this leaves the scenario somewhat uncertain, which makes enforcement

[37]Einer Elhauge, 'Horizontal Shareholding' (2016) 129 Harvard L Rev 1268; Eric A Posner, Fiona Scott Morton and E Glen Weyl, 'A Proposal to Limit the Anti-Competitive Power of Institutional Investors' (2017) 81 Antitrust LJ 669; José Azar et al, 'Anticompetitive Effects of Common Ownership' (2018) 73 J FIN <Papers.ssrn.com/sol3/papers.cfm?abstract_id=2427345> accessed 18 December 2023; José Azar et al, 'Ultimate Ownership and Bank Competition' (*SSRN*, 23 July 2016) <papers.ssrn.com/sol3/papers.cfm?abstract_id=2710252> accessed 18 December 2023.

[38]Alec J Burnside and Adam Kidane, 'Common ownership: an EU perspective' (2020) 8 Journal of Antitrust Enforcement 456, 462.

[39]Rosati N et al, 'JRC Technical Reports: Common Shareholding in Europe' (2020) 212 <https://op.europa.eu/en/publication-detail/-/publication/eafd4226-02c9-11eb-8919-01aa75ed71a1/language-en> accessed 18 December 2023.

[40]Alec J Burnside and Adam Kidane, 'Common ownership: an EU perspective' (2020) 8 Journal of Antitrust Enforcement 456, 463.

[41]Menesh S Patel, 'Common Ownership, Institutional Investors and Antitrust' (2018) 82 Antitrust Law Journal (Draft) 1, 51.

difficult and unpredictable, as is the present case in India.

Posner et al instead propose creating a narrow safe harbour provision. This would be much more specific than what is provided in most jurisdictions today such as Schedule I in India and the US' exemption for investments made solely for investment purposes. The proposal is in the form of either allowing large institutional investors to only invest in one entity in a concentrated market or alternatively, by placing a 1% market-wide cap up to which they can invest in any number of entities they choose.[42]

Another alternative is to require a mechanism of *mirror voting* where the common institutional owner's votes are simply voted in a proportionate manner in favour of the decision already taken.[43] However, this does not address the concern regarding the effect of passive investments in reducing the incentive to compete and invent in general, as identified earlier.[44]

The Dutch Competition Law Authorities have also devised an interesting mechanism from an *ex-post* enforcement perspective by holding investment companies liable for their portfolio companies' antitrust violations through the parental liability principle.[45] The parental liability principle means that the parent company is held liable

---

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

[43]Edward B Rock and Daniel L Rubinfeld, 'Antitrust for Institutional Investors' (2017) New York University, School of Law Law & Economics Research Paper Series Working Paper No. 17-23, 37-3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2998296> accessed 19 December 2023.

[44]Dorothy Shapiro Lund, 'The Case Against Passive Shareholder Voting' (2018) 43 Journal of Corporate Law 493.

[45]Mariska van de Sanden, 'Private equity investors held liable for cartels in the Netherlands' (*Kluwer Competition law Blog*, 4 April 2019) <https://competitionlawblog.kluwercompetitionlaw.com/2019/04/04/private-equity-investors-held-liable-for-cartels-in-the-netherlands/> accessed 19 December 2023.

for the acts of the subsidiaries over which they have a level of control.[46] Therefore, typically its applicability is confined to traditional parent-subsidiary relationships. While this could be an interesting proposition, it falls short from a merger control angle, which aims for *ex-ante* regulations of any anticompetitive harm. Yet, borrowing from the idea of extending decisional influence as was done in this case, the next section argues that India can extend the material influence standard to combat *common ownership* concerns.

IV. AN INDIAN SOLUTION IN MATERIAL INFLUENCE

As noted in Part II, material influence, as currently defined in India, is broad enough to encompass a large number of factors, enabling a broader *ex-ante* review. This is an advantage since, unlike the *decisive influence* standard, it creates space for common ownership to be considered under the existing jurisprudence and now even under the Amended Act. However, this inclusive understanding must not be left undefined. Some inspiration can be taken from the US.

While the governing Hart-Scott-Rodino Act 1976 provides a fairly open-ended exemption for acquisitions made "*solely for the purpose of investment*,"[47] the accompanying rules specify that the investor should have no intention of participating in the formulation, determination, or direction of the basic business.[48] Similarly, the CCI can specify certain kinds of rights and scenarios where influence may occur, under the amended definition of "control." Read along with the exceptions already provided in Schedule I of the Combination Regulations, this

[46]Yves Botteman and Agapi Patsa, 'The construct of parental company liability' (*LexisNexis*) <https://www.steptoe.com/a/web/5919/0714-046_The_construct_of_parental_company_liability_practice_note.pdf> accessed 20 December 2023.
[47]15 United States Code s 18a(c)(9).
[48]Debbie Feinstein, Ken Libby and Jennifer Lee, '"Investment-only" means just that' (*Federal Trade Commission*, 24 August 2015) <https://www.ftc.gov/enforcement/competition-matters/2015/08/investment-only-means-just> accessed 22 December 2023.

would prevent an overbroad and legally uncertain environment which might jeopardise India's ability to attract institutional investors, especially foreign ones.

Although the usefulness of Schedule I is acknowledged, the current exception under Schedule I, especially Item I, can be narrowed further in light of competition concerns arising even from the holding of passive investment, as highlighted in Part III. The approach that *non-strategic* investments would necessarily not require notification has influenced the CCI before as well. In the *ANI Technologies* case, the parent company of the acquirer had a minority, non-controlling stake in Zomato which provided identical or substitutable services to a subsidiary of the Target.[49] However, because the acquirer had no strategic rights and therefore was only a passive investor, the CCI did not see any likelihood of AAEC in the case. Such a blanket approach must be avoided to be able to assess cases like *Meru* in the future.

However, when looking at jurisprudential practice, we see that sometimes, decisions have been surprisingly stringent. For instance, in the *Etihad/ Jet Airways* decision, the CCI found that although the investment by Etihad into Jet Airways was less than 25% and did not confer any affirmative, veto or blocking rights, Board majority, quorum rights in the Board or general meetings, casting vote rights, or any pre-emptive or tag along rights, this would still amount to *material influence* because Etihad could nominate two out of the six directors to Jet's Board, including its Vice President.[50] Thus, having an indicative list of factors contributing to material influence would be extremely valuable for entities to self-assess and notify, creating more certainty.

Additionally, these factors must also clarify the distinction between rights that would allow for minority investor protection, an important

[49]*Lazarus Holdings/ ANI Technology* Case No. C-2018/08/598 (11 October 2018) [10-11].

[50]*Etihad Airways PJSC/ Jet Airways (India) Limited* Combination Registration No. C-2013/05/122 (12 November 2013).

aspect for many institutional investors, versus those which would amount to conferring material influence. This type of conundrum was witnessed in the *ChrysCapital* case.[51] In this case, the acquirer was a subsidiary of ChrysCapital who held portfolio investments in companies which were rivals to the target. The CCI found that the combination of Board representation, the right to seek information as well as veto powers in relation to certain strategic decisions such as deciding lines of business amounted to material influence. However, the CCI approved the acquisition since ChrysCapital voluntarily undertook to restrict these rights to avoid its influence on day-to-day management.[52] Therefore, greater clarity on where the line between protection and influence rights can be drawn would be an important step.

V. CONCLUSION

This paper has argued that the material influence standard, which has been recently codified in the Competition Act through the 2023 Amendment might prove to be a viable option through which the growing issue of *common ownership* can be addressed in the Indian competition law regime. In Part II, the paper traced the development of the material influence standard, highlighting its current pitfalls and advantages. Meanwhile, in Part III, the economic concerns of common ownership as well as possible approaches to it were highlighted. While Part IV posits the material influence standard as a solution in India, it also suggests modifications that can be made in the delegated legislation that is yet to be notified under the amended provision, namely: specifying the various factors which can amount to material influence; drawing a distinction between such factors and minority protection rights, and discarding automatic exemption for passive investments. Together, such a standard can achieve the balance of

[51] *Canary Investment Limited/ Link Investment Trust II/ Intas Pharmaceuticals Limited* Case No. C-2020/04/741 (30 April 2020) [16].
[52] ibid.

predictability and strictness to foster holistic competition and investment in India.