

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 8 | Issue 2

2025

© 2025 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact support@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

Redefining Merger Control in India: The Impact of the Deal Value Threshold in the 2023 Competition Reforms

DHEERAJ BUDARAJU¹

ABSTRACT

The Competition (Amendment) Act, 2023, introduces significant changes to India's competition law framework, signaling a new era for merger and acquisition (M&A) regulation. These amendments, particularly concerning the legislative framework for combinations, are expected to expand the Competition Commission of India's (CCI) role while potentially increasing transaction costs for parties involved. Aimed at balancing competition, innovation, and market concentration, these changes reflect an evolving approach to merger control in India. This paper examines the implications of the Amendment Act on India's competition framework, with a focus on the newly introduced deal value threshold (DVT) in the notifiability assessment. The DVT enables the CCI to consider the broader economic impact of mergers, including non-price factors that may influence competition. However, practical challenges remain, particularly regarding the effective implementation of DVT and the added administrative burden on the CCI.

Through a multi-jurisdictional analysis, this paper compares India's amended approach with global antitrust standards, highlighting where it aligns and diverges from international norms. By examining recent CCI decisions and the provisions of the Draft Regulations on Combinations, 2023, this paper identifies existing ambiguities within the merger control regime and offers targeted recommendations to enhance the effectiveness of DVT. These suggestions aim to align India's competition law with the unique needs of its market while incorporating best practices from international antitrust frameworks to foster fair competition and support ease of business.

Keywords: Deal Value Threshold (DVT), Merger Control, Competition Commission of India (CCI), Killer Acquisitions, Digital Market Mergers, Draft Combination Regulations. Deal Value Threshold, Merger Control, Killer Acquisitions, Big Data Mergers, Draft Combination Regulations.

I. INTRODUCTION

Competition law is fundamentally based on market regulation and consumer welfare. In today's

¹ Author is a student at CHRIST (Deemed to be University), Pune, Lavasa Campus, India.

rapidly evolving business landscape, it is essential to continuously monitor these two principles to ensure effective competition. The Competition (Amendment) Act, which revamps the existing Competition Act of 2002², is the result of extensive consultations by the Competition Law Review Committee (CLRC)³ and the Standing Committee on Finance (Finance Committee)⁴. Some amendments to the Act have already been implemented, while others await clarification and will take effect once the final Regulations are issued by the Competition Commission of India (CCI).

Competition law is premised on the notion that businesses must provide equal opportunities to all market participants, thereby restricting actions that may harm fair competition. While the Act outlines criteria for assessing transactions that could undermine these principles, the changing nature of the market necessitates a revaluation of these parameters, as existing ones have proven inadequate. The amendments aim to equip the market regulator with the necessary tools to combat anti-competitive practices effectively.

This paper takes a holistic approach to the Regulation of Combinations under the Amendment Act, detailing the implications of DVT in the current market conditions. It begins by outlining the concept of DVT and its relevance today and also conducts a multi-jurisdictional comparative analysis of the laws governing combinations to propose a comprehensive framework for India. Additionally, the paper emphasizes the need for the Commission to proceed cautiously to ensure that overregulation of DVT does not stifle innovation or impede funding for startups.

The paper adopts a two-fold approach to identify concerns regarding the efficacy of DVT as an efficient merger control tool, while also addressing these concerns with pro-DVT arguments. Lastly, it examines the Draft Regulations to contend that the success of DVT will depend on the nuanced provisions within these Regulations and the CCI's decisional practices. The concluding remarks will highlight a way forward for the Commission.

II. DEAL VALUE THRESHOLD: A STEP FORWARD OR BACKWARD?

The inclusion of the Deal Value Threshold (DVT) in the Competition (Amendment) Act, 2023⁵, represents a significant shift in India's merger control framework. The Combination Regulations 2024, now open for public consultation, provide initial insights into the calculation and

²The Competition Act, 2002 (12 of 2003)

³Committee Reports, PRS Legislative Research, <https://prsindia.org/policy/report-summaries/report-competition-law-review-committee> (last visited Nov 8, 2024).

⁴Committee on Finance, *Fifty-Second Report of the Standing Committee on Finance (17th Lok Sabha) on "The Competition (Amendment) Bill, 2022"* (2022), <http://10.246.16.188:80/handle/123456789/1464480> (last visited Nov 8, 2024).

⁵The Competition (Amendment) Act, 2023 (9 of 2023) s 6(B)(d).

application of DVT. Historically, India's merger control thresholds have been based on asset and turnover values, as stipulated in the 2011 merger control provisions⁶. However, in the context of digital markets, where companies often operate with minimal tangible assets but wield significant influence due to vast data holdings, these thresholds have proven insufficient. This limitation has allowed numerous high-impact mergers and acquisitions in the tech and data-driven sectors to evade scrutiny, leaving the CCI with limited tools to address potentially anti-competitive behavior in these rapidly evolving markets.

The introduction of DVT is aimed at addressing this gap, particularly as digital markets have matured and consolidated at a rapid pace. By allowing the CCI to assess the economic impact of a transaction beyond traditional financial metrics, DVT seeks to bring data-rich entities within regulatory purview. Yet, the implementation of DVT raises important questions regarding both its effectiveness and its potential to impose additional burdens on merging parties.

(A) Understanding the Deal Value Threshold (DVT)

The Amendment Act introduces the Deal Value Threshold (DVT) as a standalone trigger for notifying the CCI, based solely on the monetary value of a transaction. As per the Combination Regulations, parties must notify the CCI if the transaction value exceeds ₹2,000 crore⁷, regardless of whether it meets traditional asset or turnover thresholds. This threshold applies to any acquisition of control, shares, voting rights, or assets of an enterprise, as well as mergers or amalgamations. Importantly, the DVT overrides the *de minimis* exemption, which previously exempted deals where the parties' assets and revenue in India were below ₹350 crore and ₹1,000 crore, respectively⁸.

The addition of DVT aligns India with international competition frameworks, particularly in addressing challenges posed by digital platforms and "killer acquisitions." Although the Ministry of Corporate Affairs has indicated that DVT primarily targets digital and tech sectors, the Amendment Act and Draft Regulations impose no specific sectoral limits, making the DVT applicable across industries. However, implementing DVT effectively may present challenges, particularly in establishing clear valuation methods and avoiding undue compliance burdens on businesses.

⁶Umakanth Varottil, *Combination Regulations Under Indian Competition Law*, IndiaCorpLaw (May 16, 2011), <https://indiacorplaw.in/2011/05/combination-regulations-under-indian.html> (last visited Nov 8, 2024).

⁷The Competition (Amendment) Act, 2023 (9 of 2023) s 6(B)(d).

⁸ Competition Commission of India, Government of India, Cci.gov.in (2024), <https://cci.gov.in/legal-framework/regulations/63/> (last visited Nov 8, 2024).

(B) How Other Countries Handle Deal Value Thresholds

The regulations governing the Deal Value Threshold (DVT) must clarify whether the global deal value will be considered for multinational transactions and specify the method for calculating the deal amount, considering the complexities of mergers and acquisitions (M&A). Aligning these calculations with principles established in Germany and Austria could be beneficial⁹¹⁰.

Another crucial issue is how to handle transactions with post-closing obligations and cash-free transactions. The Joint Guidance Paper from Austria and Germany outlines key elements of deal value that the Competition Commission of India (CCI) should consider¹¹. The CCI must also determine whether to include the global transaction value or focus solely on domestic values. It is significant that the Amendment Act mandates considering global turnover when imposing penalties under Section 27, raising the question of whether the CCI will base penalties on global deal amounts or restrict its focus to domestic figures. This approach could contradict established principles that penalties should reflect violations of the Act and their impact on competition in India. The Supreme Court has emphasized the need for the CCI to adhere to the doctrine of proportionality, suggesting that deal value assessments should be limited to the domestic level¹².

Globally, similar provisions exist: the United States uses a size of the transaction threshold, while the European Commission can scrutinize non-notifiable mergers, and the UK investigates certain mergers based on a share of supply test. These examples show that various antitrust regulators have the power to examine non-notifiable mergers, a capacity currently lacking in India. To avoid confusion and unnecessary notifications, the CCI must address stakeholder concerns regarding DVT computation. Failure to do so may burden parties and undermine efforts to improve the ease of doing business in India.

(C) Evaluating Dvt's Role In Addressing Killer Acquisitions And Big Data Mergers

One pressing illustration of the need to implement Deal Value Threshold (DVT) provisions in the Act is the regulation of killer acquisitions. The Competition Commission faces challenges in addressing these transactions because many digital platforms do not exceed traditional asset and turnover limits, yet their deal values indicate significant market presence and influence.

⁹Competition Act, 2013 (Germany) Ch 7.

¹⁰Federal Cartel Act, 2005 (Austria) Ch 3.

¹¹Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionswertschwelle_2022.pdf?__blob=publicationFile&v=2 (last visited Nov 8, 2024).

¹²Excel Crop Care Limited v Competition Commission of India and Another (2017) 8 SCC 47.

Despite the monopolistic tendencies these acquisitions encourage, the Commission lacks a legal mechanism to regulate them effectively. A notable example is Facebook's acquisition of WhatsApp, valued at approximately \$19 billion, which highlighted the shortcomings of competition laws across various jurisdictions¹³.

Other tech mergers have also evaded antitrust scrutiny, including Microsoft's acquisition of LinkedIn¹⁴ and Flipkart's purchase of Myntra. Many recent killer acquisitions have involved major tech firms and data-centric companies. These acquisitions provide substantial benefits to big tech, allowing them to enhance their data resources, eliminate competition, and gain access to innovative solutions from startups. **In this section, the author explores how DVT can be utilized to address the challenges posed by big data mergers and killer acquisitions, evaluating its effectiveness in combating these issues.**

a. Killer acquisitions and DVT

Killer acquisitions refer to situations where an established company acquires a nascent startup with the intent to eliminate competition and capture its innovation¹⁵. This theory of harm arises when a firm purchases a target to halt the development of its innovative projects and preempt future competition¹⁶. These early-stage startups often escape regulatory scrutiny because they do not exceed traditional jurisdictional thresholds¹⁷. However, killer acquisitions lead to a concentration of market power and are inherently designed to eliminate potential rivals¹⁸.

The challenge for antitrust regulators is evaluating whether the acquired entity is significant enough to pose a competition concern. The evidence needed to justify blocking an acquisition must be robust enough to withstand legal scrutiny in the event of a court review. Given the rapid expansion of digital markets, it is essential to question whether the motives behind many acquisitions by big tech firms are aimed at eradicating viable competition.¹⁹

¹³Avirup Bose, *Avirup Bose: Why India's antitrust body should scrutinise the WhatsApp buy*, @bsindia (2014), https://www.business-standard.com/article/opinion/avirup-bose-why-india-s-antitrust-body-should-scrutinise-the-whatsapp-buy-114030200719_1.html (last visited Nov 8, 2024).

¹⁴EUROPEAN COMMISSION DG Competition, https://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf.

¹⁵ Richard Whish, *Killer Acquisitions And Competition Law: Is There A Gap And How Should It Be Filled?*, 34 National Law School of India Review (2022), <https://repository.nls.ac.in/nlsir/vol34/iss1/1>.

¹⁶Cunningham, Ederer and Ma, 'Killer Acquisitions' (2021) 129(3) JPE Chicago 649- 702 (last visited Nov 8, 2024).

¹⁷Amy C. Madl, *Killing Innovation?: Antitrust Implications of Killer Acquisitions*, Yale Journal on Regulation Online Bulletin (2020), <https://openyls.law.yale.edu/handle/20.500.13051/5442> (last visited Nov 8, 2024).

¹⁸Unlocking digital competition, Report of the Digital Competition Expert Panel, GOV.UK, <https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel> (last visited Nov 8, 2024).

¹⁹Reeya Rakchhandha, 'The Digital Economy and Killer Acquisitions: A Comparative Analysis of the CCI's Merger Thresholds for Digital Markets' (2022) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4193065>

There have been several instances where competition regulators have failed to identify potential threats, as well as cases where timely intervention successfully halted problematic acquisitions²⁰. A notable example is the Facebook-Giphy deal, in which the Competition and Markets Authority (CMA) ordered Facebook to divest Giphy. The CMA identified two main concerns: first, the merged entity could deny other social platforms access to GIFs, thereby driving traffic to Meta-controlled services and leading to unilateral terms for using Giphy. Second, the CMA considered whether the acquisition was a killer acquisition aimed at eliminating competition, ultimately denying the merger—a landmark decision in EU merger control jurisprudence.

To effectively regulate killer acquisitions and address existing gaps, a clear legislative framework is necessary. In this context, the DVT presents a potential solution for regulators. The EU has discussed adopting DVT as an alternative to current thresholds, although concerns about additional administrative burdens have led to its exclusion from their jurisdiction.

In India, the implementation of DVT offers a new mechanism for the Competition Commission of India (CCI) to scrutinize killer acquisitions that previously went unchecked. Despite the challenges associated with DVT, it represents a significant step forward in addressing anti-competitive practices in the digital marketplace.

b. Role of DVT in Regulating Big Data Mergers

Big Data refers to digital information sourced from various platforms, encompassing texts, images, videos, geometries, sounds, and their combinations²¹. This data generates value through its utilization. A primary competition concern with big data mergers is their ability to evade regulatory scrutiny, as big tech firms prioritize consumer data over traditional assets and turnover metrics²². Consequently, these mergers often fall within the jurisdictional thresholds, particularly when larger companies acquire nascent entities that seem unlikely to pose an appreciable adverse effect on competition (AAEC) at the time of the acquisition.

However, big data mergers can foster monopolistic behavior, as the gradual accumulation of consumer data creates significant barriers to market entry. Access to personal data enables big tech firms to analyze consumer preferences, providing them with insights that new entrants lack. This data advantage effectively forecloses competition, allowing these firms to operate as

²⁰Tânia Luísa Faria, Margot Lopes Martins and Raquel Marques Nunes, 'New trends in merger control: capturing the so-called killer acquisitions... and everything else' (Uría Menéndez, 2021)

²¹Yun Li et al., *Big Data and Cloud Computing*, 325 (2020), http://link.springer.com/10.1007/978-981-32-9915-3_9 (last visited Nov 8, 2024).

²²Putting a Knot on Killer Acquisitions in India: Lessons from EU New Merger Control Policy, 2021, (2021), <https://www.jurist.org/commentary/2021/08/vijayakumaran-sankar-merger-control/> (last visited Nov 8, 2024).

monopolists. A contemporary example is Facebook's acquisition of WhatsApp, especially pertinent as Meta faces antitrust investigations in multiple jurisdictions. Given their substantial market presence and extensive user bases, big data mergers often involve deal values in the millions or billions.

Effective enforcement of DVT can serve as a proactive tool for regulators to identify potential threats to competition, allowing them to modify or reject proposed mergers before they occur. In digital markets, traditional thresholds based on asset and turnover values often prove ineffective. These markets are driven by network effects and user data, which are not considered in standard assessments. Digital platforms frequently provide services at little or no cost—often termed "zero-price markets"—with a focus on expanding their user bases and collecting data, relying on economies of scale²³. Because these non-price resources do not translate well into traditional asset and turnover frameworks, competition authorities struggle to regulate transactions involving big tech, even though these resources significantly enhance the value of such deals.

In contrast to traditional thresholds, DVT employs a subjective assessment of monetary consideration while factoring in relevant non-price parameters. Acquisitions in the digital space often aim not just to acquire assets but to leverage the target's potential and user base²⁴. This suggests that higher deal values correlate with a greater likelihood of creating an AAEC post-acquisition. The primary objective of implementing DVT is to bring substantial mergers that strategically eliminate competition under the purview of regulatory oversight.

While DVT has the potential to address these challenges, its effectiveness largely depends on how well the regulations are drafted and the pragmatism of the Competition Commission of India (CCI) in evaluating mergers on a case-by-case basis.

(D) Effectiveness of DVT in Identifying Market Gaps

While Deal Value Thresholds (DVT) offer promising benefits, current evidence from jurisdictions enforcing DVT does not conclusively show enhanced market competition. For instance, Germany's report to the OECD notes limited cases of DVT-related notifications by parties who breached DVT requirements. Similarly, Austria has yet to encounter an anti-competitive case violating DVT²⁵. With these few examples, it is premature to definitively

²³Anoop George and Shreya Bambulkar, 'A Need to Relook the Merger Control in the Digital Economy – An Analysis' (2019) *Emerging Trends in Corporate and Commercial Laws of India* 3-23, 3 <<https://cbcl.nliu.ac.in/wp-content/uploads/2019/11/Emerging-Trends-in-Corporate-and-Commercial-Laws-of-India.pdf>>

²⁴Vikram Sinha & Sharmadha Srinivasan, *An Integrated Approach to Competition Regulation and Data Protection in India*, 9 CSIT 151 (2021), <https://doi.org/10.1007/s40012-021-00334-7> (last visited Nov 8, 2024).

²⁵AZB & Partners, 'Deal Value Threshold: Is it a deal broker' (Mondaq, 1 August 2023)

assess DVT's impact on fair competition. The U.S. experience further illustrates potential limitations: despite transaction size thresholds, the Federal Trade Commission (FTC) approved Facebook's acquisition of WhatsApp²⁶. This decision was later challenged but dismissed due to insufficient evidence of Facebook's monopoly in Personal Social Networking Services, raising questions about DVT's ability to regulate anti-competitive mergers effectively²⁷.

This leads us to consider how India's Competition Commission of India (CCI) might respond if DVT were in place. The recent PVR-INOX merger offers some insight. Despite merging two leading multiplex chains, CCI did not intervene, citing that the transaction was incomplete, so no combined entity existed to investigate²⁸. Additionally, the CCI stated that dominance alone does not warrant an inquiry unless it leads to anti-competitive behavior. This implies that, even under DVT, CCI might have taken a similar stance due to its focus on conduct-based assessments. DVT may thus appear redundant since a merger creating a dominant entity would still not be scrutinized unless anti-competitive conduct was demonstrated²⁹.

Furthermore, the CCI's statutory authority already allows it to assess combinations that may cause Appreciable Adverse Effects on Competition (AAEC), even if they are non-notifiable. According to Section 20(1) of the Competition Act, combinations posing anti-competitive risks remain within the Act's scope, diminishing the need for additional ex-ante provisions like DVT³⁰.

Implementing DVT also poses additional challenges. Firstly, deal value varies significantly with each acquirer's valuation and risk analysis, which complicates accurate assessments of the target's worth. Secondly, the clarity of DVT is essential in merger control, necessitating objective, quantifiable criteria³¹. The Competition Amendment Act allows the government to modify DVT criteria in consultation with the CCI³², adding complexity in cases where transaction values shift post-regulation. Additionally, in India, DVT could impact startup

<<https://www.mondaq.com/india/antitrust-eu-competition-/1271608/deal-value-threshold-is-it-a-deal-breaker>>

²⁶Federal Trade Commission, 'FTC Notifies Facebook, WhatsApp on Privacy Obligations in Light of Proposed Acquisition' (FTC, 10 April 2014) <<https://www.ftc.gov/news-events/news/press-releases/2014/04/ftc-notifies-facebook-whatsapp-privacy-obligations-light-proposed-acquisition>>

²⁷OECD Secretariat, 'Start-ups, Killer Acquisitions and Merger Control - Background Note' (2020) Ch 3

²⁸*Consumer Unity and Trust Society v PVR Limited & INOX Leisure Limited* 29/2012 (CCI).

²⁹Alaina Fatima, 'DVT: A Panacea or a Pandora's Box? Exploring Alternatives to a Deal Value Threshold' (CBFL NLU Delhi, 19 June 2023) <<https://www.cbflnlu-delhi.in/post/dvt-a-panacea-or-a-pandora-s-box-exploring-alternatives-to-a-deal-value-threshold>>

³⁰*Consumer Unity and Trust Society v PVR Limited & INOX Leisure Limited* 29/2012 (CCI).

³¹Alexei Oreskovic, *Facebook's WhatsApp Acquisition Now Has Price Tag of \$22 Billion*, Yahoo Finance (2014), <https://ca.finance.yahoo.com/news/facebooks-whatsapp-acquisition-now-price-tag-22-billion-173551255--finance.html> (last visited Nov 8, 2024).

³²Committee on Finance, *Fifty-Second Report of the Standing Committee on Finance (17th Lok Sabha) on "The Competition (Amendment) Bill, 2022"* (2022), <http://10.246.16.188:80/handle/123456789/1464480> (last visited Nov 8, 2024).

funding by subjecting strategic investments from established players or private equity firms to CCI's scrutiny, potentially slowing down the growth of the country's startup ecosystem³³.

(E) Why Dvt Matters: Strong Case, Smart Fixes

Following the discussion of DVT's current limitations, this section addresses potential regulatory gaps and proposes refinements to enhance DVT's effectiveness in the Indian context.

Consider the recent example of Meta's (formerly Facebook) acquisition of a 9.99% stake in Reliance Jio³⁴. This merger between two dominant players in their respective markets³⁵ gained unconditional approval from the Competition Commission of India (CCI), even though data transfer was ostensibly excluded from their agreement³⁶. However, data remains a common interest for both entities³⁷. Such mergers, driven by non-price factors, pose unique challenges due to their valuation dependence on factors like data volume and quality, network effects, and the target's potential for innovation—all elements not captured by traditional thresholds based solely on assets and turnover.

The WhatsApp acquisition case further underscores the need for DVT³⁸. Although existing thresholds were not met, this merger justified DVT to examine the deal's details due to its horizontal nature. As both companies operated within the same market, this merger reduced competitive pressures, creating potential anti-competitive risks by consolidating WhatsApp and Facebook's extensive user bases under a single entity, which could harm consumer interests. This merger also heightened barriers for startups already struggling to challenge these platforms, both of which are zero-price and feature-rich, making it hard for new entrants to attract users.

Unlike jurisdictions such as the EU and Brazil³⁹, the CCI lacks the authority to assess

³³Surbhi Lahoti, 'Deal Value Threshold: Filling an Enforcement Gap or Overburdening the Enforcers' (Jurist, 7 May 2020) <<https://www.jurist.org/commentary/2020/05/surbhi-lahoti-deal-value-threshold/>>

³⁴CCI okays Facebook's investment of Rs 43,574 crore in Jio Platforms, The Economic Times, Jun. 25, 2020, <https://economictimes.indiatimes.com/tech/internet/cci-okays-facebooks-investment-in-jio-platforms/articleshow/76561345.cms> (last visited Nov 8, 2024).

³⁵Pankhudi Khandelwal, *the big gets bigger: the need to closely monitor the facebook-jio deal through competition law*, <https://pure.jgu.edu.in/id/eprint/1350/1/RSRR2020.pdf>.

³⁶The RMLNLU Law Review Blog, *The Reliance-Facebook Deal: A Case for Data-Driven Mergers*, The RMLNLU Law Review Blog (Jun. 5, 2020), <https://rmlnlulawreview.com/2020/06/06/the-reliance-facebook-deal-a-case-for-data-driven-mergers/> (last visited Nov 8, 2024).

³⁷Guest, *Facebook-Jio Deal: Big Data, Competition and Privacy*, IndiaCorpLaw (May 8, 2020), <https://indiaincorporplaw.in/2020/05/facebook-jio-deal-big-data-competition-and-privacy.html> (last visited Nov 8, 2024).

³⁸*Facebook/WhatsApp Case COMP/M.7217*.

³⁹OECD, 'OECD Competition Assessment Reviews: Brazil' (2022), Bing, [https://www.bing.com/search?q=OECD%2C+OECD+Competition+Assessment+Reviews%3A+Brazil'+\(2022\).&cvid=f0b5c03775b34c55b7e0717ba37593ac&gs_lcrp=EgRIZGdlKgYIABBFGDkyBggAEEUYOdIBBzUxMmowajSoAgiwAgE&FORM=ANAB01](https://www.bing.com/search?q=OECD%2C+OECD+Competition+Assessment+Reviews%3A+Brazil'+(2022).&cvid=f0b5c03775b34c55b7e0717ba37593ac&gs_lcrp=EgRIZGdlKgYIABBFGDkyBggAEEUYOdIBBzUxMmowajSoAgiwAgE&FORM=ANAB01)

transactions if notification thresholds are not met, as India's Act restricts CCI's reach in such cases. By contrast, the European Commission can review mergers through a referral process when three of its member states meet the threshold⁴⁰.

Several factors are essential for the CCI to consider when calculating a transaction's value, including earn-out clauses and non-competition payments. In particular, the CCI should incorporate any promised earn-out payments if the target meets stipulated conditions⁴¹. Additionally, any payment from the acquirer to the target for a non-competition agreement should be factored in. Lastly, future payments tied to the transaction should prompt the CCI to revisit the merger investigation as necessary. Including these provisions in the regulations would increase transparency, streamline processes for the industry, and support the CCI's decisional consistency.

Common critiques of DVT include concerns about overburdening the Commission, stifling innovation through a chilling effect on investments, and redundancy due to conduct-based ex-post assessments⁴². However, these arguments can be mitigated. For instance, Germany's empirical data shows no significant increase in pre-merger filings under DVT, suggesting that strategic investments are typically more influenced by factors like tax structures, ROI, and control acquisition, rather than regulatory notifications to the CCI⁴³. Lastly, the argument that conduct-based assessments render DVT unnecessary is flawed. DVT is based on a preventive principle, emphasizing "prevention is better than cure." By identifying potential antitrust risks early, DVT allows the CCI to address competition threats before harm occurs, supporting a proactive regulatory approach.

III. ENHANCING DVT AND MERGER CONTROL LAWS

Effective merger regulation in an emerging economy like India requires a flexible, context-specific approach rather than a uniform, "one size fits all" model. The impact of transaction value (DVT) varies across sectors; therefore, a single threshold can affect industries differently⁴⁴. To design an effective DVT framework, it is critical to account

&PC=U531 (last visited Nov 8, 2024).

⁴⁰Council Regulation (EC) 139/2004 on the control of concentrations between undertakings, OJ L24/1 (29 January 2004) art 4(5) r/w art 22.

⁴¹Deal value thresholds, <https://www.mondaq.com/india/antitrust-eu-competition/1223600/deal-value-thresholds> (last visited Nov 8, 2024).

⁴²Merger Threshold and Merger Thresholds in the Digital Economy, NLS BLR, <https://www.nlsblr.com/merger-threshold-and-merger-thresholds-in-the-digital-economy> (last visited Nov 8, 2024).

⁴³Start-ups, Killer Acquisitions and Merger Control, OECD (2020), https://www.oecd.org/en/publications/start-ups-killer-acquisitions-and-merger-control_dac52a99-en.html (last visited Nov 8, 2024).

⁴⁴Cyril Amarchand Mangaldas, 'The Competition (Amendment) Bill, 2023: An analysis of key amendments and some unanswered questions' (*Lexology*, 10 April 2023) <<https://www.lexology.com/library/detail.aspx?g=a9260741-e7ba-4f82-9916-aa6ec00aaf18>>

for the unique characteristics of various sectors, including the intensity of competition, the number of competing players, and the ease with which customers can switch providers. A tailored, industry-specific DVT approach would better support fair competition by allowing the Competition Commission of India (CCI) to establish sectoral thresholds based on business activity. This flexibility would enable the CCI to define DVT boundaries more precisely, reflecting the needs of specific industries⁴⁵.

Additionally, broadening the DVT framework could help address existing regulatory gaps. The U.S. approach to competition in the digital space, which relies on a transaction-size threshold under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, offers a practical model. This framework assesses the acquirer's post-merger control by analyzing factors like assets, voting rights, and membership interests, providing a clearer picture of potential competitive impact⁴⁶. A similar, well-defined approach could help the CCI assess whether a given merger or acquisition should fall within the purview of competition law. Canada's merger control regulations offer another useful perspective by including asset and revenue thresholds while also considering the level of interest to determine jurisdictional relevance. Incorporating such parameters into India's regulatory framework could help clarify the newly introduced "material influence" standard, which currently lacks statutory definition⁴⁷.

The CCI should also focus specifically on data-intensive mergers and acquisitions, given data's rising economic significance. Data is now considered a valuable asset⁴⁸—often likened to "the new oil"⁴⁹—and therefore holds substantial competitive weight. As India has enacted a comprehensive data protection law, assessing data's value in M&A transactions has become even more pertinent⁵⁰. The CCI could develop guidelines to assess the economic implications of data-related transactions, particularly in cases of extreme data accumulation or monopolization. By addressing data protection and privacy within merger control⁵¹, the CCI can play a pivotal role in preventing undue concentration

⁴⁵Aryan Naagar, 'Deal Value Thresholds: Lessons from foreign jurisdictions' (CBFL NLUD, 7 July 2023) <<https://www.cbflnludelihi.in/post/deal-value-thresholds-lessons-from-foreign-jurisdictions>>

⁴⁶FTC Premerger Notification Office, 'Introductory Guide II - To File or Not to File When You Must File a Premerger Notification Report Form' (September 2008).

⁴⁷Competition Bureau Canada, 'Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act' (2022).

⁴⁸Urshila Pandit and Sanah Javed, 'Antitrust and Privacy Concerns: A Dilemma Across Jurisdictions' (2022) 8(2) RFMLR 207-246.

⁴⁹Vishal Rajvansh, 'The Interplay between Data Privacy and Competition Law in India' (2022) 13(4) Journal of European Competition Law & Practice 291-295.

⁵⁰Anubhav Sinha and Nipun Kumar, 'Deal-Value Threshold: Revisiting Traditional Thresholds for Merger Control' (2022) 7(1) ICLR 69-80.

⁵¹Digital Personal Data Protection Act 2023 | Ministry of Electronics and Information Technology, Government

of data assets, thereby safeguarding both competitive dynamics and consumer interests.

(A) Combination Regulations: Addressing Gaps in the Amendment Act

In Part II, we discussed the need for the Competition Commission of India (CCI) to clarify the Deal Value Threshold (DVT) through explicit regulations. While the Draft Combination Regulations have addressed some issues, significant gaps remain that require further refinement to ensure the new regulations align effectively with the Amendment Act. This section evaluates the DVT-related provisions in the Draft Regulations and examines their effectiveness in addressing concerns previously discussed.

a. Decoding DVT in the Draft Regulations

The Draft Combination Regulations aim to replace the Combination Regulations of 2011 and support the Amendment Act by setting parameters for calculating DVT. They propose that DVT should cover every transaction, whether direct or indirect, immediate or deferred, in cash or otherwise. Notably, Regulation 4 provides that parties must include potential future payments in the transaction value calculation, even where uncertainties exist regarding these amounts. Further, Clause 4(2) outlines proposed criteria for assessing an entity's substantial business operations.

Although the Draft Regulations capture the Amendment Act's intent to regulate digital markets, certain provisions remain ambiguous⁵². For example, while the Draft Regulations' list for calculating transaction value is broad, it lacks detail on handling uncertain future events. In addition, provisions such as those covering non-compete clauses could be widely interpreted; yet, without specific guidelines, this could lead to excessive notifications and additional burdens for both parties and the CCI. The Joint Guidance Note suggests including payments for non-compete clauses if they impact the transaction's valuation, regardless of when they occur. However, the Draft Regulations should address these aspects more precisely, allowing parties to assess transaction values accurately without overestimating compliance obligations.

Another issue lies in the treatment of transactions contingent on uncertain future events. The Reliance/Bharti AXA Combination Order set a precedent by stating that if a transaction depends on a future event, notification is required only when that event occurs.

of India, <https://www.meity.gov.in/content/digital-personal-data-protection-act-2023> (last visited Nov 8, 2024).

⁵²A Mishra, B Agarwal and S Malik, 'Written Comments on Competition Commission of India's Draft Regulations on Combinations' (2023) *The Dialogue* 6- 7.

However, the Draft Regulations require parties to assume DVT compliance in cases of valuation uncertainty, which may lead to unnecessary filings that overburden both the CCI and the parties.

The Draft Regulations also introduce the concept of "incidental arrangements," stipulating that any such arrangements within two years of a transaction must be included in the transaction's value. However, they do not provide a clear definition of what constitutes an incidental arrangement, potentially complicating compliance for the parties. First, this could negatively impact commercial interests if the CCI interprets all incidental arrangements as integral to the transaction, leading to unnecessary procedural delays. Second, the two-year time limit may restrict the CCI's ability to review genuinely strategic arrangements that fall outside this period.

Greater clarity from the CCI on the scope of incidental arrangements would benefit all parties. Instead of a blanket approach, a case-by-case assessment of incidental arrangements would be more practical. The CCI could also provide a list of common arrangements excluded from DVT calculations, thereby reducing unnecessary filings and easing the regulatory burden on businesses.

b. Draft Regulations: The Way Forward

The CCI's proactive approach in addressing combinations and potential "killer acquisitions" is evident in the Draft Regulations, which reflect a commitment to assessing both historical and future transaction details. The Draft Regulations require that parties consider previous transactions within two years, as well as future contingencies, to determine a transaction's total value. This approach reflects the CCI's intent to prevent anti-competitive outcomes proactively.

However, these provisions may create challenges by bundling independent transactions that have no substantive connection. For instance, a venture capital investor making multiple, independent investments in a startup over time would have to notify the CCI if the total investment surpasses INR 2000 crores, even if each investment is standalone. Such an approach could deter venture capital and private equity investments, which are crucial for India's growing startup ecosystem, by adding unnecessary compliance obligations.

Therefore, while the Draft Regulations' expansive approach demonstrates the CCI's commitment to a competitive digital ecosystem, the regulations should avoid overreach. Excessive compliance requirements could stifle innovation and hamper business

activities. A more balanced, well-defined approach would allow the CCI to regulate effectively without overburdening the business community.

IV. CONCLUSION

It is clear that the current merger control regulations are outdated in the rapidly evolving digital market. While the Amendment Act represents progress, its success hinges on the Final Regulations issued by the Competition Commission of India (CCI)⁵³. Currently, there is uncertainty surrounding the combination regime, and the effectiveness of the Amendment Act depends on these regulations and the CCI's decision-making practices.

To effectively address the antitrust challenges posed by digital markets, the CCI must be better equipped. This includes closely examining antitrust enforcement patterns in other countries and thoroughly studying India's market structure and trends. The author suggests that it is in the best interest of both consumers and the industry for the CCI to develop a competition regime tailored specifically to India's needs, informed by international experiences⁵⁴.

Furthermore, the author emphasizes that the CCI should give significant attention to digital transaction value (DTV). The Commission must remain vigilant regarding the dynamic nature of e-commerce, sector-specific requirements, and overall competitive forces to align DTV with market standards. It is crucial to consider non-price factors and network effects when assessing transaction value.

As discussed, there is substantial opportunity to refine the DTV regime in India and address the industry's concerns. Given the antitrust complexities of digital markets, the arguments in favor of DTV are compelling. However, if potential issues are overlooked, the implementation of DTV could become ineffective.

In summary, the recent amendments to merger control laws have produced both positive and negative outcomes. It is essential for the CCI to take appropriate steps to create a balanced merger control regime that ensures fair competition and protects consumer welfare in India.

⁵³Anupam Sanghi and Sakshi Saran Agarwal, 'Assessing M&As Based on the New Deal Value Threshold: A Comparative Analysis' (2022) 7(2) ICLR 44, 48-59.

⁵⁴Competition Commission of India MARKET STUDY ON E-COMMERCE IN INDIA Key Findings and Observations, (2020), <https://cci.gov.in/images/marketstudie/en/market-study-on-e-commerce-in-india-key-findings-and-observations1653547672.pdf>.