

**MERGER CONTROL & COMPETITION
(AMENDMENT) ACT, 2023: ANALYSING THE
AMENDMENT & ADVANCING POST-
AMENDMENT CONSIDERATIONS FOR THE
COMMISSION FOR AN IMMACULATE
COMBINATION REGIME**

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ABSTRACT

The Competition (Amendment) Act, 2023 (“Amendment Act”) brings prominent changes to the competition law regime in India; however, from a merger and acquisition (“M&A”) viewpoint, it appears that the changes introduced are the beginning of a new dawn. Prima facie, amendments to the legislative framework of combinations will increase the role of the regulator as well as the transaction costs for the parties. This is aimed towards maintaining a balance between competition, innovation and concentration. This article discusses the possible implications of these amendments on the competition framework and suggests ways to further refine these changes for a nuanced combination framework. Introducing the deal value

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threshold (“DVT”) in the notifiability assessment procedure shall bestow the opportunity on the Competition Commission of India (“Commission/CCI”) to consider the monetary impact of non-price considerations in M&A. However, a close inspection of the amendment also highlights practical hurdles in its implementation, including the efficacy of DVT and the administrative burden on the CCI. In this paper, the author argues that overhauling the merger control regime is indeed a welcome move; although, there are many ambiguities regarding the implementation of the new definitions and provisions. This paper provides a multi-jurisdictional analysis along with examining the decisional practice of the CCI to suggest the future roadmap for regulating combinations. It also identifies certain loopholes of DVT and provides critical suggestions to improve the efficacy of the same in the Indian market. Moreover, the paper also emphasizes on the relevant provisions of the Draft Regulations on Combinations, 2023 (“Draft Regulations”) to gauge the final combination framework. Lastly, the author suggests that it is imperative to capture the needs of the Indian market and accommodate the best international antitrust measures to satisfy the legislative objectives that would promote fair competition and ease of doing business.

Keywords: *The Competition (Amendment) Act, 2023, Deal Value Threshold, Merger Control, Killer Acquisitions, Big Data Mergers, Draft Combination Regulations*

I. INTRODUCTION

Competition law is premised on market regulation and consumer welfare. In the present times when businesses are evolving and transitioning, it becomes paramount to keep a continuous check on the above two mottos of competition law. The Amendment Act that revamps the existing Competition Act, 2002 (“**the Act**”)¹ is a filtered product of the extensive exercise done by the Competition Law Review Committee (“**CLRC**”)² and the Standing Committee on Finance (“**Finance Committee**”).³ Some of the amendments made to the Act are already effectuated,⁴ while some provisions require clarifications and will be brought into force once the final Regulations are issued by the CCI.

Against this backdrop, in this article, the author discusses the changes in the combination regime with the introduction of DVT. Competition law rests on the principle that businesses must provide equal opportunities to every entity⁵ in the market and thus, it restricts those actions or behaviour that cause or are likely to cause any harm to fair

¹The Competition Act, 2002 (12 of 2003).

²Ministry of Corporate Affairs, ‘Report of the Competition Law Review Committee’ (July 2023).

³Standing Committee on Finance, ‘Fifty Second Report on the Competition (Amendment) Bill 2022’ (2022).

⁴‘Ministry of Corporate Affairs Notifies Some Provisions of the Competition (Amendment) Act, 2023’ (*AZB & Partners*, 22 May 2023) <<https://www.azbpartners.com/bank/ministry-of-corporate-affairs-partially-notifies-some-provisions-of-the-competition-amendment-act-2023/>> accessed 3 November 2023.

⁵SM Duggar, *Guide to Competition Law 2002* (8th edn, Lexis Nexis 2020).

competition in the market. In India, the Act provides some criteria to scan those transactions that attack the basic premise of competition law. However, with the changing nature of the market, there was a need to re-evaluate these parameters as the existing ones proved to be inadequate and substandard. Therefore, these changes brought by the legislature seek to equip the market regulator with the necessary tools to combat any anti-competitive measure adopted by the companies.

This paper adapts a holistic approach while dealing with the *Regulation of Combinations* provisions of the Amendment Act and describes the implications of the same. Primarily, it outlines the concept of DVT and its requirement in the prevailing market conditions. The author undertakes a multi-jurisdictional comparative analysis of the laws governing combinations in order to propose a comprehensive structure for India. The author further emphasizes that the Commission needs to step in quite carefully so as to ensure that overregulation for DVT does not hurt innovation and does not become detrimental to the funding of startups. In subsequent subsections, the paper also highlights that while foreign jurisdictions provide very useful directions for India to define the intricacies of DVT, adopting such measures must conform to the Indian market requirements and aid the legal landscape without overburdening the CCI. Going ahead, the author delves into the discussion of killer acquisitions and data-driven mergers. Pertinently, they weigh the conflicting arguments concerning DVT in India, that is the need to implement DVT versus whether DVT is needed. Based on the cross-jurisdictional analysis and increasing number of acquisitions by big tech, the author proposes to argue that although not perfect, DVT with certain modifications, as suggested, would empower the CCI to look at the questionable transactions before any harm is done. Therefore, it might prevent the occurrence of harm rather than providing relief after the harm occurs. The former would be an obvious choice for any developing economy that would want businesses to thrive, and would also give multiple alternatives to consumers.

In the next part, the paper adopts a two-fold approach wherein it identifies some concerns regarding the efficacy of DVT as an efficient merger control tool and also rebuts those concerns by way of additional pro-DVT arguments. Lastly, the paper examines the Draft Regulations to contend that the success of DVT essentially depends on the nuanced ingredients of the Regulations and the decisional practice of the CCI. Therefore, the concluding remarks of the paper highlight the way forward for the Commission.

II. DECRYPTING THE DEAL VALUE THRESHOLD: A WELL-PLACED PROVISION OR A MISFIT?

A peculiar amendment made in the Act is the inclusion of the ‘deal value’ threshold under Combinations.⁶ DVT is likely to be implemented when the final Combination Regulations (“**the Regulations**”) are issued by the CCI. The publication of Draft Regulations for public consultations is the first step that roughly gives an idea of DVT and its calculation. At present, the merger control thresholds in India are based on the value of the assets and turnover of the parties involved in the transaction. These merger control provisions were notified in 2011 and have been in effect for more than a decade.⁷ Given the dynamic nature of the digital markets which have transitioned very fast from *emerging* to *established*, there was a serious need to re-examine the effectiveness of these provisions. As most of the digital players have very few assets, they easily managed to escape the competition scrutiny and due to statutory incapability, the CCI was left with no option to tackle these data-rich entities. There have been multiple mergers and acquisitions in the past in this area that has raised questions on the appropriateness of the Indian competition law.

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

⁷The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, No. 3/2011.

A. *Deciphering the statutory concept of DVT*

As included in the Amendment Act, DVT is a standalone parameter that will trigger a notification to the CCI. It stands on the size of the transaction, that is, the monetary consideration of the deal. In simpler words, DVT obligates the transacting parties to notify the Commission of the deal value, that is, the amount that the proposed acquirer is willing to pay for the deal when it exceeds the limits prescribed by the Commission or the government, as the case may be. In this regard, the Amendment Act provides that a notification to the CCI shall be a must “if the value of any transaction, in connection with the acquisition of any control, shares, voting rights, or assets of an enterprise, merger, or amalgamation exceeds rupees two thousand crores.”⁸ Furthermore, the provisions of the DVT shall override the *de minimis* exemption⁹ which is granted to such deals where their value of assets and their revenue in India do not exceed 350 crores and 1000 crores respectively.¹⁰

Be that as it may, digital platforms invite shared concern among antitrust regulators across jurisdictions; this concern stems from the insufficiency of existing merger control provisions¹¹ and it is leading to consensus among the regulators to come up with DVT. By including DVT in the legislation, India has followed the steps of some of the more mature competition legislations of the world. The insertion of DVT is aimed to protect *nascent competition* and check *killer acquisitions* and currently it is capped at INR 2000 crore.¹² However, there are several concerns attached to the application of DVT and its effective implementation is not free from encumbrances. It is to be noted that the

⁸The Competition (Amendment) Act, 2023 (9 of 2023) s 6(B)(d).

⁹Notification regarding (a) de minimis exemption; (b) relevant assets and turnover in case a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, 2017, Competition Commission of India, No. 881/2017.

¹⁰*ibid.*

¹¹International Competition Network, ‘Recommended Procedure for Merger Notification and Review Procedures, Working Group Comments’ (2017).

¹²In consultation with the CCI, the Government may revise it every 2 years.

Ministry of Corporate Affairs submitted before the Standing Committee that DVT is majorly intended for digital and tech players,¹³ however, the Amendment Act does not denote any specific applicability for the DVT and there is no sectorial restriction on its application.

B. From conceptualisation to implementation of DVT: Lessons from other jurisdictions

The Regulations covering DVT must address whether, in case of a multi-national transaction, will the global deal value be considered. Additionally, the method of calculating the amount of the deal should also be clarified keeping the intricacies of mergers and acquisitions (“**M&A**”) into consideration. These calculations might replicate or show similarities with the principles adopted in Germany¹⁴ and Austria.¹⁵ Another key aspect that needs to be properly dealt with in the Regulations is the statutory mechanism of dealing with transactions having post-closing obligations, cash-free transactions, and the like. The Joint Guidance Paper issued jointly by Austria and Germany has explained the contours of the deal value¹⁶ which the Commission must take into cognizance while defining the nitty-gritty of DVT. Moreover, the Commission must also determine whether the global transaction value is to be taken into consideration, or, only the domestic transaction value will be relevant. At this juncture, it is to be noted that the Amendment Act mandates taking the global turnover of the entity to impose penalties under Section 27 of the Act.¹⁷ Curiously, merger control provisions are quite distinct from the laws prohibiting anti-competitive practices and abuse of dominance, yet it will be interesting

¹³Standing Committee on Finance, ‘Fifty Second Report on the Competition (Amendment) Bill 2022’ (2022) para 3.3.

¹⁴Competition Act, 2013 (Germany) Ch 7.

¹⁵Federal Cartel Act, 2005 (Austria) Ch 3.

¹⁶Bundeskartellamt, ‘Guidance on Transaction Value Thresholds for Mandatory Pre-Merger Notification (s 35(1a) GWB and s 9(4) KartG)’ (2018).

¹⁷The Competition Act, 2002 (12 of 2003) s 27.

to see whether the CCI chooses to attack the global deal amount or restricts itself to India. Again, it is equally important to mention that preferring global turnover instead of Indian turnover under Section 27 itself contradicts the settled jurisprudence that penalties are levied for the violation of the Act and against any appreciable adverse effect on competition in India. The Supreme Court has also clarified that CCI must be cognizant of the doctrine of proportionality.¹⁸ Hence, it should be reasonable to limit the deal value evaluation to the domestic level since any M&A activity and turnover should be examined at the domestic level.

Other countries contain similar provisions in their competition law. The USA also has a similar but expanded version of DVT known as the *size of the transaction*¹⁹ threshold that contains twin provisions, that is, evaluation of the transaction value coupled with the size of the parties. The European Union's ("EU") competition law though does not contain an express mention of DVT in competition law; nevertheless, the European Commission ("EC") is empowered to scrutinize non-notifiable mergers.²⁰ In addition to the EU, the UK also follows this trend of investigating specific non-notifiable mergers. It is guided by the *share of supply test* wherein a merger can be investigated by the Competition and Markets Authority ("CMA") as one-fourth of the supply of goods or services is controlled by the merged entity.²¹ Likewise, France has specific Regulations on ex-ante and ex-post-merger control.²² Lastly, South Korea has also enforced the transaction value threshold by bringing amendments to the existing law.²³ The

¹⁸*Excel Crop Care Limited v Competition Commission of India and Another* (2017) 8 SCC 47.

¹⁹Clayton Antitrust Act, 1914 (United States of America) s 7A.

²⁰Council Regulation (EC) 139/2004 on the control of concentrations between undertakings, OJ L24/1 (29 January 2004) art 22.

²¹The Enterprise Act, 2002 (United Kingdom) s 23(3) and s 23(4).

²²OECD Secretariat, 'Start-ups, Killer Acquisitions and Merger Control - Background Note' (2020) Ch 3.

²³Hong Ki Kim and Kee Won Shin, 'South Korea: KFTC boosts antitrust laws with stronger laws and pivotal amendments' (*Global Competition Review*, 10 March 2023)

purpose of introducing these jurisdictions in the course of the discussion is to highlight that regardless of whether DVT is in practice or not, several antitrust regulators have the power to check non-notifiable mergers, however, the Indian competition watchdog lacks such equivalent power.

Therefore, in the given context, the CCI must take care of the concerns of the stakeholders otherwise the confusion on computing DVT shall lead to a slew of unnecessary combinations being notified to the Commission, thereby increasing the burden of the parties and hampering the spirit of India's efforts towards ease of doing business.

III. ANALYSING THE UTILITY OF DVT IN TACKLING KILLER ACQUISITIONS AND BIG DATA MERGERS

One illustration exhibiting the pressing need to implement DVT provisions in the Act is to control killer acquisitions. The issue which the Commission grapples with is that though these digital platforms do not breach the asset and turnover limit, the consideration for the deal speaks volumes of their market presence and deep penetration in the relevant market. Despite these deals encouraging monopolistic behaviour, the Commission has not been able to regulate such transactions due to the absence of any such legal mechanism, for example, the acquisition of WhatsApp by Facebook which was valued at around US \$19 Billion. This was a clear exhibition of the inadequacy of competition laws across most jurisdictions.²⁴ There have been many

<<https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2023/article/south-korea-kftc-boosts-antitrust-laws-stronger-regulation-and-pivotal-amendments#:~:text=Under%20the%20amended%20MRFTA%20and,local%20next%20is%20deemed%20sufficient>> accessed 3 November 2023.

²⁴Avirup Bose, 'Why India's antitrust body should scrutinise the WhatsApp buy' *Business Standard* (2 March 2014) <https://www.business-standard.com/article/opinion/avirup-bose-why-india-s-antitrust-body-should-scrutinise-the-whatsapp-buy-114030200719_1.html> accessed 3 November 2023.

other instances of mergers between tech players that escaped antitrust scrutiny: the acquisition of LinkedIn by Microsoft²⁵ and Myntra by Flipkart, to name a few. Interestingly, most of the so-called killer acquisitions in the recent past have involved big tech and data-heavy entities.²⁶ It can be said that data banks possessed by smaller and new firms are quite rewarding for big tech companies as it serves multiple purposes for them, *firstly*, they get the data which adds to their already existing data wealth and helps them to create a data monopoly; *secondly*, they eliminate competition and acquire control of the potential competitor; and *thirdly*, they get the advantage of the innovation that the startup or a new entrant brings with itself.²⁷ Hence, in this section, the author discusses how DVT can be employed to tackle the problems advanced by big data mergers and killer acquisitions and examines the suitability of DVT in combating the same.

A. Killer acquisitions and DVT: Can DVT kill killer acquisitions?

Killer acquisition denotes a situation where an established entity acquires a relatively newer entity in its nascent stage with a desire to eliminate competition and capture the innovation that the latter carries.²⁸ It is a theory of harm wherein a firm acquires the target to “discontinue the development of the target’s innovative projects and pre-empt future competition.”²⁹ These early-stage startups usually

²⁵Case M. 8124 Microsoft/LinkedIn (2016) EC.

²⁶Akhil Bhardwaj, ‘If Data is the New Oil, Indian Competition Law Needs an Urgent Update’ *The Wire* (25 June 2020) <<https://thewire.in/tech/data-oil-competition-commission-india-facebook-whatsapp>> accessed 3 November 2023.

²⁷Shreya Mukherjee and Damodar Hake, ‘Big Data Mergers: An Analysis of European and Indian Competition Law Regime’ (2001) 24 *Cardiometry*, Moscow 762, 767.

²⁸Richard Whish, ‘Killer Acquisitions and Competition Law: Is there a gap and how should it be filled?’ (2022) 34(1) *NLSLR* 1-4.

²⁹Cunningham, Ederer and Ma, ‘Killer Acquisitions’ (2021) 129(3) *JPE Chicago* 649-702.

escape the regulatory radar because there is no breach of traditional jurisdictional thresholds.³⁰ These killer acquisitions result in concentration of market power and by the very nature of killer acquisitions, they are intended to eliminate potential competition.³¹ The major problem that these killer acquisitions pose is that often they remain below the radar and therefore, do not invite any kind of regulatory oversight.³²

The problem killer acquisitions demonstrate however to antitrust regulators is that it is significantly difficult to evaluate whether the entity that is being acquired is significant enough to create a competition issue in the market.³³ The evidence and reasons warranting that the proposed combination should be rejected must be sound enough to be protected in any court of law that is tasked to review the regulator's decision. With the emergence and thereafter the rapid expansion of digital markets, it seems prudent to question whether the underlying objective behind the large number of acquisitions³⁴ made by big tech is to wash out credible competition from the market. There have been numerous examples wherein competition regulators failed to identify a potential threat to competition, similarly, there are also recent examples where the regulators appeared more vigilant and their

³⁰Amy C Madl, 'Killing Innovation?: Antitrust Implications of Killer Acquisitions' (2020) 38(28) Yale LR 1,6.

³¹Furman Review, 'Report of the Digital Competition Expert Panel on Unlocking digital competition' (2019) para 3.43.

³²Adarsh Vijayakumaran and H Anantha Sankar, 'Putting a Knot on Killer Acquisitions in India: Lessons from EU New Merger Control Policy 2021' (*Jurist*, 27 August 2021) <<https://www.jurist.org/commentary/2021/08/vijayakumaran-sankar-merger-control/>> accessed 5 November 2023.

³³Tânia Luísa Faria, Margot Lopes Martins and Raquel Marques Nunes, 'New trends in merger control: capturing the so-called killer acquisitions... and everything else' (*Uria Menéndez*, 2021) <<https://www.uria.com/documentos/publicaciones/7846/documento/art02.pdf?id=12771&forceDownload=tru>> accessed 11 November 2023.

³⁴Cunningham, Ederer and Ma, 'Killer Acquisitions' (2021) 129(3) JPE Chicago 649-702.

timely intervention led to the termination of the proposed acquisition.³⁵ One popular example is the Facebook-Giphy deal³⁶ wherein Facebook was ordered to sell Giphy to an approved purchaser. The CMA identified dual issues in this deal, *firstly*, a merged Facebook/Giphy could deny access to GIFs to other social platforms, and this would drive even more traffic to the Meta-controlled entities which would also lead to unilateral terms of agreement between Meta and other platforms willing to use the Giphy services and therefore, undeniably, data would be the consideration of those agreements. *Secondly*, the CMA interestingly tried to delve into the question of whether it can be termed a killer acquisition aiming to eliminate competition. Resultantly, CMA denied the acquisition and ordered the divestiture of Giphy by Facebook, a landmark decision in EU merger control jurisprudence.

However, to cement the provisions of merger control relating to killer acquisitions and to address the regulatory gaps, there needs to be an unambiguous legislative framework. At this juncture, DVT presents a possible alternative to ease the situation of regulators. The adoption of DVT was also discussed by the EU where they noted that this may be an alternative to the existing thresholds but at the same time, this would cause extra administrative burden on the CMA.³⁷ Therefore, the EU has not included the value-based threshold in its jurisdiction.³⁸ The problems that DVT can create have already been discussed in detail in this article. In India's context, it will be interesting to see how DVT unfolds in its objective of combating killer acquisitions; however, it is

³⁵Reeya 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> accessed 12 November 2023.

³⁶*Meta Platforms, Inc./Giphy, Inc. Final Order*, CMA, 18 November 2022.

³⁷Martin Gassler, 'Why the introduction of a new transaction-value jurisdictional threshold for EUMR has been postponed, atleast for now' (*Oxford Competition Law*, 28 June 2019) <<https://oxcat.ouplaw.com/page/775>> accessed 7 November 2023.

³⁸*ibid.*

safe to say that despite the challenges that it brings, it will at least provide a mechanism for the CCI to look into killer acquisitions which were not present until the latest amendment.

B. The big becoming bigger: Role of DVT in regulating big data mergers

Big Data means digital data from any digital source. The types of big data include texts, images, videos, geometries, sounds and their combinations.³⁹ It usually entails value creation through use of such collected data. The primary competition concern with big data mergers is its unique ability to escape competition scrutiny by the regulators because big tech firms do not play with assets and turnover; rather consumer data becomes a huge asset for them.⁴⁰ This leads to a path that facilitates combinations as they remain well within the jurisdictional thresholds of assets and turnovers especially when any big entity acquires another entity at a relatively nascent stage that consequently appears to pose no AAEC to the market at that time. However, these big data mergers germinate monopolistic behaviour and the gradual accumulation of consumer data helps them to create entry barriers in the market. This is because access to personal data assists big tech firms to analyse the same and respond to consumer needs and preferences- a hurdle specific to potential entrants which entities without data access find quite difficult to tackle. This essentially leads to foreclosure of competition and allows big tech to act as a monopolist. Facebook's acquisition of WhatsApp can be cited as a contemporary example at a time when Meta is facing antitrust investigations from multiple jurisdictions. Due to their powerful

³⁹Yun Li, 'Big Data and Cloud Computing' in Huadong Guo, Michael F. Goodchild and Alessandro Annoni (ed), *Manual of Digital Earth* (1st edn, Springer 2020).

⁴⁰Adarsh Vijayakumaran and H Anantha Sankar, 'Putting a Knot on Killer Acquisitions in India: Lessons from EU New Merger Control Policy 2021' (*Jurist*, 27 August 2021) <<https://www.jurist.org/commentary/2021/08/vijayakumaran-sankar-merger-control/>> accessed 5 November 2023.

market presence, huge user base, and encashment of data, these big data mergers run into millions and billions. Hence, effective enforcement of DVT can act as an effective ex-ante tool to envision the potential threats to competition and to accordingly, modify or reject the scheme of the proposed combination.

In digital markets, minimal assets and turnover lead to inefficacy in the traditional thresholds which are assessed quite objectively. The digital market is fuelled by network effects and user data and these parameters are not included in the traditional thresholds. Primarily, digital markets offer their services at a very minimal cost or free of cost, thus, they are also called zero-price markets.⁴¹ They prioritize increasing their user base and data collection, thereby banking upon economies of scale.⁴² As these non-price resources do not appropriately translate into the traditional asset and turnover framework, competition authorities find it difficult to get a hold of such transactions involving big tech irrespective of the fact that the non-price resources make them highly valuable and the consideration for such a proposed transaction shoots up.

As opposed to the traditional thresholds,⁴³ DVT is based on the subjective assessment of monetary consideration taking into account

⁴¹Anoop 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>> accessed 8 November 2023.

⁴²Bhargavi G Iyer and Ojaswi Bhagat, 'Data Concentration as an Invisible Fosse: A Comprehensive Analysis of the Role of Data in Facilitating Anti-Competitive Practices' (2022) *Contemporary Developments in Corporate and Commercial Laws in India* 1-18 <<https://cbcl.nliu.ac.in/wp-content/uploads/2023/02/7th-NLIU-Trilegal-Summit-Book.pdf>> accessed 6 November 2023.

⁴³Rahul Bajaj, 'Towards a Framework for Scrutinizing Combinations in the Digital Market - A Roadmap for Reform' (*Vidhi Centre for Legal Policy*, 2022) <<https://vidhilegalpolicy.in/research/towards-a-framework-for-scrutinizing-combinations-in-the-digital-market-a-roadmap-for-reform/>> accessed 3 November 2023.

the relevant non-price parameters. Apart from the above factor, acquisitions in digital space are not always carried out to acquire the assets of the target, on the contrary, they are often done to exploit the target's potential and capture their user base.⁴⁴ These factors influence the deal value and it can be inferred that the higher the deal value, the more will be the chances for the acquirer to create AAEC in the market, post-combination. The objective behind enacting DVT is to bring all those notorious and mammoth deals under the purview of the Commission that strategically eliminates competition and strengthens market position. DVT has the potential to do away with all these concerns, however, much depends on how the Regulations are drafted and how pragmatic the CCI remains while dealing with combinations on a case-to-case basis.

IV. ADEQUACY OF DVT: IDENTIFYING THE GAPS

Despite all the promising aspects of DVT, the jurisdictions where DVT is in force cannot help us infer that it has increased fair competition in the market. Germany's contribution to an OECD paper⁴⁵ reveals that there have been only a few examples wherein the parties notified their regulator for breaching DVT.⁴⁶ Likewise, Austria is also yet to find an anti-competitive combination breaching DVT. Given the small sample size, it is premature to comment on the efficacy of DVT.⁴⁷ Another glaring example that casts some doubt on the efficacy of DVT is the approval of WhatsApp acquisition in the USA. Despite the USA having

⁴⁴Akshat Pande, Mahima Cholera and Dipak Verma, 'Big Data Mergers in India: Changing Landscape and the Way Forward' (*Bar & Bench*, 5 August 2023) <<https://www.barandbench.com/law-firms/view-point/big-data-mergers-in-india-changing-landscape-and-the-way-forward>> accessed 3 November 2023.

⁴⁵OECD Secretariat, 'Start-ups, Killer Acquisitions and Merger Control - Background Note' (2020) Ch 3.

⁴⁶AZB & Partners, 'Deal Value Threshold: Is it a deal broker' (*Mondaq*, 1 August 2023) <<https://www.mondaq.com/india/antitrust-eu-competition-/1271608/deal-value-threshold-is-it-a-deal-breaker>> accessed 15 November 2023.

⁴⁷OECD Secretariat, 'Start-ups, Killer Acquisitions and Merger Control - Background Note' (2020) Ch 3.

the provision *size of the transaction*, the Federal Trade Commission (“FTC”) approved the merger.⁴⁸ Additionally, an antitrust suit brought by the FTC was dismissed by the District Court of California because Facebook’s monopoly in *Personal Social Networking Services* could not be proved.⁴⁹ This gives the impression that the above-discussed merger apparently has no anti-competitive concerns and raises questions on the potency of DVT to challenge similar combinations.

Now, another question for our consideration is how the CCI would have responded if it was equipped with DVT. Looking at the Indian stance, CCI’s approach in the PVR-INOX merger fairly answers our question. Despite being the combination of two of the largest multiplex chains, it remained outside the purview of the CCI. In a suit initiated by Consumer Unity and Trust Society, the CCI made dual observations, *firstly*, since the transaction had not been consummated at that time, there was no combined entity against which it could initiate an investigation and *secondly*, even if it is presumed that the combined entity is dominant, it is a settled law that dominance per se is not questionable.⁵⁰ When we decipher CCI’s observations on dominance, it can be easily inferred that even though DVT would have been in force, CCI would have reached a similar conclusion. This is because even though the merger breached DVT, *ex-ante* provisions would have been of little avail, as the CCI highlighted the significance of conduct to attract any investigation. This essentially makes DVT appear redundant because even if *ex-ante* provisions apprehend that a proposed merger is likely to result in a dominant entity, the

⁴⁸Federal 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>> accessed 15 November 2023.

⁴⁹*Federal Trade Commission v Facebook Inc.*, Civil Action No. 20-3590 (JEB), United States District Court for the District of Columbia.

⁵⁰*Consumer Unity and Trust Society v PVR Limited & INOX Leisure Limited* 29/2012 (CCI).

fundamental principle that mere dominance without any questionable conduct is not prohibited shall still hold good.⁵¹ This stance is further strengthened by a statutory provision that has already given *suo moto* powers to the CCI to examine whether a notifiable combination has caused or is likely to cause AAEC.⁵² Indeed, the CCI does not have residuary powers to investigate non-notifiable mergers, however, going by the provisions of Section 20(1) of the Act, every combination that appears to indulge in anti-competitive behaviour is not outside the scope of the Act, which attacks the basic premise of introducing DVT.⁵³ This is because the CCI is already equipped with the conduct-based ex-post investigation that raises significant concerns regarding the utility of DVT. The mere triggering of notifications to the CCI without entering into an objective assessment of the proposed merger would do no good to the competition although it may overburden the Commission.

Without commotion, the author can identify other hurdles in the implementation of DVT. *Firstly*, as it has already been elaborated, deal value is an acquirer-specific subject and hence, it fails to contemplate the actual value of the target for the simple reason that the monetary consideration that each potential acquirer might be willing to pay is liable to fluctuate depending on the latter's analysis of risk and reward involved after the consideration.⁵⁴ *Secondly*, it is the cardinal principle of merger control to keep DVT plain and clear and derive the same

⁵¹Alaina 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>> accessed 21 November 2023.

⁵²The Competition Act, 2002 (12 of 2003) s 20(1).

⁵³*Consumer Unity and Trust Society v PVR Limited & INOX Leisure Limited* 29/2012 (CCI).

⁵⁴Alexei Orescovic, 'Facebook closes WhatsApp acquisition at a new price tag of USD 22 billion' *Business Today* (San Francisco, 7 October 2014) <<https://www.businesstoday.in/latest/deals/story/facebook-acquires-whatsapp-for-usd-22-billion-141173-2014-10-07>> accessed 12 November 2023.

from an objective quantifiable parameter.⁵⁵ It is only time that will reveal what criterion the CCI will employ to frame such Regulations. Further, at the present stage, the Amendment Act provides that the Central Government may revise DVT in consultation with the CCI.⁵⁶ Now, the dilemma that arises is as to what will be the effective DVT in cases where the transaction witnesses a change in DVT. It will only get complex if the transaction involves deferred consideration after there has been a change in DVT. Lastly, DVT also creates an India-specific issue that relates to the funding of startups.⁵⁷ As India progresses rapidly towards more evolved digital markets, budding startups need more funds that come in the form of strategic investments by established players and private equity firms. With the definition of control being diluted and the inclusion of DVT, these investments will be prone to CCI's scrutiny and entangle them in lengthy procedural compliances that will affect the developing startup ecosystem of the country.⁵⁸

⁵⁵Avaantika Kakkar and Kirthi Srinivas, '2023 Amendments to Indian Competition Law: Implications for M&A' (*Kluwer Competition Law Blog*, 18 April 2023) <<https://competitionlawblog.kluwercompetitionlaw.com/2023/04/18/2023-amendments-to-indian-competition-law-implications-for-ma-part-1/>> accessed 25 November 2023.

⁵⁶Standing Committee on Finance, 'Fifty Second Report on the Competition (Amendment) Bill 2022' (2022).

⁵⁷Surbhi 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/>> accessed 25 November 2020,

⁵⁸Gauri Gupta, 'An Indian Perspective on Merger Control in Digital Markets: Looking Ahead by Looking Across' (*Kluwer Competition Law Blog*, 1 June 2023) <<https://competitionlawblog.kluwercompetitionlaw.com/2023/06/01/an-indian-perspective-on-merger-control-in-digital-markets-looking-ahead-by-looking-across/>> accessed 9 December 2023.

V. WHY NEED DVT: ADVANCING PRO-DVT ARGUMENTS & FILLING THE GAPS

Having discussed the loopholes of DVT, this section attempts to address the regulatory gaps and rectify the errors that are associated with it to make DVT better suited in the Indian context. Let us take a recent example of Meta's (Then Facebook) acquisition of 9.99% in Reliance Jio.⁵⁹ This combination of two dominant players in their respective markets⁶⁰ managed to receive unconditional approval from the CCI.⁶¹ Though the scheme of their combination is said to exclude data transfers,⁶² it can be inferred as data comes as a common interest to both entities. Mergers driven by non-price parameters, in general, are problematic on many fronts because their valuation is contingent upon the quantity and quality of data that they hold, their contribution to network effects, and the potential of innovation that the target entity possesses.⁶³ However, none of these parameters are measurable under the traditional thresholds of assets and turnover.

⁵⁹ET Bureau, 'CCI okays Facebook's investment of Rs 43,574 crore in Jio Platforms' *The Economic Times* (25 June 2020) <<https://economictimes.indiatimes.com/tech/internet/cci-okays-facebook-investment-in-jio-platforms/articleshow/76561345.cms?from=mdr>> accessed 15 November 2023.

⁶⁰Pankhudi Khandelwal, 'The Big Gets Bigger: The Need to Closely Monitor the Facebook-Jio Deal Through Competition Law' (2021) 7(1) RSRR 1-10.

⁶¹*Jaadhu/Jio Platforms*, Combination Registration No. C-2020/06/747 (24 June 2020).

⁶²Angela Dua and Rashi Rawat, 'The Reliance-Facebook Deal: A Case for Data-Driven Mergers' (*RMLNLU LR Blog*, 6 June 2020) <<https://rmlnlulawreview.com/2020/06/06/the-reliance-facebook-deal-a-case-for-data-driven-mergers/>> accessed 9 December 2023.

⁶³Anupriya Dhonchak, 'Facebook-Jio Deal: Big Data, Competition and Privacy' (*IndiaCorpLaw*, 8 May 2020) <<https://indiacorplaw.in/2020/05/facebook-jio-deal-big-data-competition-and-privacy.html>> accessed 11 December 2023; OECD, 'Non-price effects of mergers' (*OECD*) <<https://www.oecd.org/competition/non-price-effects-of-mergers.htm>> accessed 3 November 2023.

Furthermore, in the WhatsApp acquisition case as well,⁶⁴ though the existing thresholds were not met, in the author's opinion, this acquisition warranted the need for DVT to delve into the nuances of the deal. This is because, by virtue of it being a merger of two entities operating in the same horizontal market, the presumption that it may display anti-competitive behaviour shall hold true. This presumption is backed by the argument that their merger reduces competitive constraints in the relevant market as both of these entities were heavy competitors of each other.⁶⁵ Additionally, the consolidation of such a huge user base of WhatsApp and Facebook in a single controlling entity is also detrimental to consumer benefits. Lastly, it also aggravates the plight of the startups in the country who were already struggling to create an alternative to these entities. With the acquisition, the entry barrier caused by these entities is more dominant as both of these entities are zero-price platforms and the associated services provided by these entities make it difficult for new entrants to make users switch.

Unlike foreign jurisdictions like the EU and Brazil,⁶⁶ CCI has no power to assess transactions unless the notification thresholds are met. Therefore, the Act tied the hands of the CCI in cases where the jurisdictional thresholds are not met. As opposed to this, the EC is empowered to review those mergers by way of referral procedure if the jurisdictional thresholds are triggered in three of its member states.⁶⁷

A few factors that the CCI must take into consideration in the computation of the value of a particular transaction are taking cognizance of earn-out clauses and payments made in lieu of non-

⁶⁴*Facebook/WhatsApp* Case COMP/M.7217.

⁶⁵Shilpi Bhattacharya and Mirium C Buiten, 'Privacy as a Competition Law Concern: Lessons from Facebook/WhatsApp' (2018) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3785134> accessed 25 November 2023.

⁶⁶OECD, 'OECD Competition Assessment Reviews: Brazil' (2022).

⁶⁷Council Regulation (EC) 139/2004 on the control of concentrations between undertakings, OJ L24/1 (29 January 2004) art 4(5) r/w art 22.

competition.⁶⁸ Simply put, the CCI should add the consideration amount promised to be made as an earn-out obligation if the target entity satisfies the conditions put forth in the clause. Furthermore, the CCI should also add up the consideration amount made by the acquiring entity to the target entity in the assurance of the latter not competing in the same relevant market for a specific period. Lastly, the CCI must be quite vigilant of any future payments promised as a part of the transaction and re-open the merger investigation accordingly.⁶⁹ In the author's opinion, the inclusion of these provisions in the Regulations will make the process transparent and streamlined for the industry and help the Commission to build its decisional practice.

The common problems often associated with DVT are overburdening of the Commission, halting innovations due to a chilling effect on investment, and also that conduct-based ex-post assessment makes it redundant.⁷⁰ However, these arguments can be nullified by citing the example of Germany where empirical evidence demonstrates that there was no significant rise in pre-merger filings.⁷¹ Further, it is a common business understanding that strategic investments are more responsive to tax structures, return on investment, and gaining control over the target enterprise and mere notification to the CCI will not be a deterrent

⁶⁸Yaman Verma, Ritwik Bhattacharya and Nicky Collins, 'Deal Value Thresholds: How Wide will the Net be Cast?' (*Mondaq*, 22 August 2022) <<https://www.mondaq.com/india/antitrust-eu-competition-/1223600/deal-value-thresholds->> accessed 11 December 2023.

⁶⁹Ishika Sharma and Ramasamy Santhakrishnan, 'Raising the Bar: Tightening the Thresholds of the Combination Regime of the Competition Commission of India' (*Mondaq*, 16 December 2022) <<https://www.mondaq.com/india/antitrust-eu-competition-/1260440/raising-the-bar-tightening-the-thresholds-of-the-combination-regime-of-the-competition-commission-of-india>> accessed 12 December 2023.

⁷⁰Abdullah Hussain and Prerna Parashar, 'Merger Thresholds and Merger Thresholds in the Digital Economy' (2021) 7(1), NLSBLR 5 – 19.

⁷¹OECD Secretariat, 'Start-ups, Killer Acquisitions and Merger Control - Background Note' (2020) Ch 3.

for investors.⁷² Lastly, the argument that a conduct-based assessment nullifies the need for having a transaction-based threshold suffers from a basic fallacy. DVT visualizes the concept of “prevention is better than cure,” as the purpose is to predict an antitrust threat beforehand rather than acting after the harm has been done.

VI. IMPROVING DVT AND MERGER CONTROL LAWS: SOME ADDITIONAL SUGGESTIONS

It is crucial to understand that regulation of mergers and acquisitions in an emerging economy like India cannot be done through a *one size fits all* formula. Transaction value is essentially a function of the market, implying that the same amount can impact different sectors differently. While devising DVT for merger control, it is essential to consider all the industry sectors having diverse players and different needs. The quantum of competition, competing rivals, and the ability of customers to switch from one entity to another are all relevant factors that should be made a parameter to compute DVT. Therefore, a tailored and industry-specific approach to DVT might be more beneficial for promoting fair competition. Basis this approach, the CCI can easily come up with *categorical thresholds* which would be based on industry sector and business activity. One added advantage of this system will be that it will provide flexibility to the Commission in defining the boundaries of DVT on an individual basis relying on the business activity of the enterprise.⁷³

Secondly, it seems more appropriate to broaden the concept of DVT so as to fill the loopholes that exist in the existing framework. The USA

⁷²Cyril 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>> accessed 12 December 2023.

⁷³Aryan Naagar, ‘Deal Value Thresholds: Lessons from foreign jurisdictions’ (*CBFL NLUD*, 7 July 2023) <<https://www.cbflnludelhi.in/post/deal-value-thresholds-lessons-from-foreign-jurisdictions>> accessed 20 December 2023.

approach to tackling competition threats in digital space through the *size of the transaction* threshold appears more pragmatic.⁷⁴ This mechanism was adopted in the USA through the Antitrust Improvements Act, 1976⁷⁵ and it provides a nuanced method to gauge the extent of control of the acquirer over the target after combination. It includes examining and evaluating the assets, voting interests, and membership rights of the acquirer to estimate the actual control that it would exercise post-acquisition. Hence, in the author's opinion, having a precise framework like the one adopted by the USA will make it easy for the CCI to analyse whether a concerned M&A activity would attract competition law or not. Likewise, in Canada, in addition to the asset and gross revenue threshold, the law stipulates the calculation of interest to decide whether any transaction comes under the ambit of merger control Regulations.⁷⁶ Therefore, it is suggested that these parameters be made applicable in the Indian regime to complement and narrow down the newly introduced concept of *material influence* which currently lacks any statutory definition or explanation.

Thirdly, the CCI should specifically delve into data-heavy M&A and consider gauging the value of the data being acquired or traded.⁷⁷ It is needless to mention that data is considered the new form of currency and is often referred to as "the new oil."⁷⁸ Therefore, it becomes quite important to evaluate the economic prospects of data and consider it as an asset for the purpose of merger control.⁷⁹ As India has also passed a

⁷⁴FTC Premerger Notification Office, 'Introductory Guide II - To File or Not to File When You Must File a Premerger Notification Report Form' (September 2008).

⁷⁵Hart-Sott-Radino Antitrust Improvements Act, 1976 (United States of America) s 18a.

⁷⁶Competition Bureau Canada, 'Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act' (2022).

⁷⁷Urshila Pandit and Sanah Javed, 'Antitrust and Privacy Concerns: A Dilemma Across Jurisdictions' (2022) 8(2) RFMLR 207-246.

⁷⁸Vishal Rajvansh, 'The Interplay between Data Privacy and Competition Law in India' (2022) 13(4) Journal of European Competition Law & Practice 291-295.

⁷⁹Anubhav Sinha and Nipun Kumar, 'Deal-Value Threshold: Revisiting Traditional Thresholds for Merger Control' (2022) 7(1) ICLR 69-80.

comprehensive data protection law,⁸⁰ it reflects how important it is to address data protection and privacy concerns. Therefore, the CCI should devise a method to deal with the economics of data and accordingly, it must combat extreme data harvesting and data concentration.

VII. DRAFT COMBINATION REGULATIONS: BRIDGING THE ENFORCEMENT GAPS UNDER THE AMENDMENT ACT?

In Part II of the paper, the author has discussed that the CCI should clarify DVT by way of Regulations. There are some issues that the Draft Regulations have addressed; nevertheless, there still exist a number of areas where suitable revisions or refinements are essential in order for the Draft Regulations to complement the amendments and to help the CCI build a strong jurisprudence on the new combination regime. In this section, the author evaluates the provisions concerning DVT in the Draft Regulations and examines their respective efficacies with respect to the concerns listed under the aforesaid sections.

A. Decoding DVT in the Draft Regulations

The Draft Regulations seek to repeal the Combination Regulations, 2011. These Draft Regulations substantiate the Amendment Act and contain provisions for calculating DVT. The Draft Regulations propose to provide that DVT shall include every transaction whether direct or indirect, immediate or deferred, cash or otherwise.⁸¹ Furthermore, the Explanation to Regulation 4 of the Draft Regulations stipulates that the notifying parties must be cognizant of any future considerations and deem the value of the transaction to be exceeding the threshold in case

⁸⁰The Digital Personal Data Protection Act, 2023 (22 of 2023).

⁸¹The Competition Commission of India (Combinations) Draft Regulations, 2023 cl 4(1).

of any uncertainties. Furthermore, Clause 4(2) of the Draft Regulations lists the proposed parameters for assessing the substantial business operations of any notifying entity.⁸²

It is indeed laudable that the Draft Regulations capture the intent of the amendment and attempt to regulate the digital markets, however, the list provided for computing the value of a transaction is inclusive, and there exists suspense on several notable aspects such as the determination of any uncertain future events. Additionally, some provisions on the determination of the value of the transaction are quite capable of receiving wide interpretations: for example, the provision covering the non-compete clause has not been adequately covered in the Draft Regulations.⁸³ It needs to be emphasized that the mere mention of such broader terms without any explanation or guidance note shall only be onerous for the parties as it may lead to a slew of unnecessary notifications to the Commission and increase its burden.

In this respect, the *Joint Guidance Note* provides that payments pursuant to non-compete clauses are considered for calculating deal value if the deal value would have differed, absent the clause.⁸⁴ It also discusses future and contingent considerations. It states that any listed future payment should be included in the deal value despite it being satisfied post the merger. Therefore, in the current form, the Draft Regulations must clarify these aspects and make them more granular and nuanced. Moreover, the inclusion of any uncertain future event in the computation of deal value shakes the well-settled decisional practice emerging from the Reliance/Bharti AXA Combination Order wherein the Commission held that if a transaction is contingent on a

⁸²The Competition Commission of India (Combinations) Draft Regulations, 2023 cl 4(2).

⁸³A Mishra, B Agarwal and S Malik, 'Written Comments on Competition Commission of India's Draft Regulations on Combinations' (2023) *The Dialogue* 6-7.

⁸⁴Bundeskartellamt, 'Guidance on Transaction Value Thresholds for Mandatory Pre-Merger Notification (s 35(1a) GWB and s 9(4) KartG)' (2018) para 11.

future uncertain event, then the acquiring party has an obligation to examine whether the transaction is notifiable at the time the uncertain event indeed takes place, and not any time prior.⁸⁵ Moreover, the catch-all flavour of the Draft Regulations requires that the parties must assume that DVT has been met in case of any uncertainty in calculations.⁸⁶ This provision will unjustifiably overburden the parties and the Commission alike and also lead to unnecessary filings.

Another important part of the Draft Regulations that requires scrutiny is the concept of incidental arrangements. The Draft Regulations mention that incidental arrangements within two years of the transaction would also be used to calculate the value of the transaction.⁸⁷ At this juncture, it is important to note that the Draft Regulation misses on a definite definition of what would constitute an *incidental arrangement*. There are dual difficulties that the CCI may encounter with this broad meaning ascribed to incidental arrangements. *Firstly*, it will not be in the *best commercial interest* of the transacting parties if the CCI starts considering every incidental arrangement as a strategic arrangement for the merger, rather it will harm the parties and the transaction would suffer unnecessary delay.⁸⁸ *Secondly*, it appears that the time limit of two years shall restrict the Commission's ability to review any strategic incidental arrangement beyond the stipulated time period.

⁸⁵*Reliance/Bharti AXA*, Combination Registration No. C-2011/07/01 (26 July 2011).

⁸⁶The Competition Commission of India (Combinations) Draft Regulations, 2023 cl 4 exp (g).

⁸⁷The Competition Commission of India (Combinations) Draft Regulations, 2023 cl 4(1)(c).

⁸⁸Anshuman Sakle and Anisha Chand, 'Sweeping Changes to Indian Merger Control Regime Imminent: Draft Regulations Published' (*Kluwer Competition Law Blog*, 8 September 2023)

<<https://competitionlawblog.kluwercompetitionlaw.com/2023/09/08/sweeping-changes-to-indian-merger-control-regime-imminent-draft-regulations-published/>> accessed 21 December 2023.

The author suggests that the CCI should offer greater clarity on the scope of incidental arrangements. Furthermore, rather than having a generalized approach to such arrangements, it will be more beneficial if they are examined on a case-to-case basis. Additionally, to reduce the burden on the Commission and the Parties, a suggestive list of excluded arrangements would be helpful.

B. Draft regulations: The way ahead

It is undeniable that the CCI's proactive approach regarding Combinations and killer acquisitions is adequately represented in the Draft Regulations. To that effect, it is appreciable that the CCI is mindful of both, the past as well as the future events of the transaction. This holistic approach is reflected in the Draft Regulations as it proposes to mandate that the parties to the transaction must look back and collate the previous transactions that have occurred within the past two years to assign any value to the transaction. Similarly, the Draft Regulations provide that the parties must also consider future contingencies to arrive at the deal value.

However, the author argues that contrary to the intention of the provisions, they may offer some incongruous ambiguities to the notifying parties. This is because, it may lead to the bundling of independent transactions which may have no connection with the other transactions. This problematic condition may be more visible in startup funding as it can witness multiple investments made by a single investor wherein the new investment is completely independent of the older one. However, as per the Draft Regulations, all these investments are per se deemed to be connected with each other and the investor will have to notify the Commission if the cumulative value of the investments adds to become 2000 crores. This case can be particularly repelling for venture capital and private equity investors as they will

unnecessarily be trapped in the Commission's compliance procedures which, in turn, could affect the startup ecosystem.⁸⁹

Hence, it is pertinent to mention that the Draft Regulations require some refinements. The wide net cast for calculating the deal value shows the Commission's commitment to a competitive digital ecosystem, however, it is imperative to caution that in the quest to ensure fair competition, the Commission must not overstep and promote over-regulation that would do little good to the business community.

VIII. CONCLUSION

It is undeniable that the extant merger control regulations have proved to be outdated in the evolving digital market.⁹⁰ As discussed in this paper, although the Amendment Act seems to be a step in the right direction, much would depend on the Final Regulations promulgated by the CCI. At present, uncertainty surrounds the combination regime. The effectiveness of the Amendment Act and the satisfaction of the legislative intent are contingent upon the Regulations and the decisional practice of the CCI, hence, the CCI must be better equipped to handle the antitrust challenges posed by digital markets. It is imperative for the CCI to delve into the finer details of the pattern of antitrust enforcement engaged by foreign jurisdictions as well as to closely study the Indian market structure and dynamic market trends. The author submits that it is in the best interest of the customers and the industry that based on foreign experiences, the CCI devise its India-specific competition regime that is responsive to the needs of the Indian

⁸⁹'Draft CCI Regulations on Merger Control: A Summary' (*Axiom 5 Law Chambers*, 12 September 2023) <<https://drive.google.com/file/d/1XlIFZcfHfumgeY7XlWmFNCxx-kbjyLpj/view>> accessed 23 December 2023.

⁹⁰Anupam 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.

market.⁹¹ Lastly, the author argues that DVT requires the greatest extent of consideration by the Commission. The Commission needs to be continuously vigilant towards the dynamic nature of the e-market, sector-specific requirements, and the overall competitive forces in the market in order to keep DVT as per the market standards. It must be mindful of the non-price parameters and network effects to correctly gauge the transaction value. As discussed in the sections above, there is a lot of scope for refining the DVT regime in India and addressing the concerns that stand before the industry. Undoubtedly, taking the antitrust complications posed by the digital markets into consideration, the weight inclines toward pro-DVT arguments. Nonetheless, the CCI should be mindful that if the potential problems are not attended to, the whole exercise of incorporating DVT shall become futile. Ultimately, the gist of the amendments brought in the merger control laws can be stated as *some hits and some misses* and in light of the above discussion in the paper, it is crucial for the CCI to take appropriate measures to make the Indian merger control regime balanced to ensure fair competition and consumer welfare.

⁹¹Competition Commission of India, 'Market Study on E-Commerce in India: Key Findings and Observations' (2020).