EVALUATING THE DEAL VALUE THRESHOLD UNDER THE COMPETITION (AMENDMENT) ACT, 2023: A COMPARATIVE ANALYSIS AND RECOMMENDATIONS FOR INDIA'S MERGER CONTROL REGIME

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ABSTRACT

The Competition (Amendment) Act, 2023 introduces the Deal Value Threshold (DVT) as a novel mechanism to regulate mergers and acquisitions (M&A) in India, addressing limitations of traditional asset and turnover-based thresholds, particularly in the digital economy. This article explores the DVT's rationale, effectiveness, and challenges within the framework of the Competition Act, 2002, amended in 2023. Through a comparative analysis of merger control regimes in Brazil, the USA, the EU, the UK, Germany, and Austria, it evaluates global practices and their relevance to India. The study finds that while the DVT enhances the Competition Commission of India's (CCI) ability to scrutinize high-value transactions, it faces issues like subjective valuations, inadequate coverage of non-digital sectors, and increased compliance burdens. Recommendations include incorporating asset-based criteria, granting CCI discretionary powers, and balancing regulation with innovation to strengthen India's antitrust framework.

Introduction:

The rise of globalization has marked a transformative era for the Indian economy. The once-dominant public sector has increasingly ceded ground to the dynamic and expansive private sector. This shift has unleashed a wave of entrepreneurial energy, as businesses strive for growth and profitability.

Companies employ various strategies to achieve this growth, including mergers, acquisitions, and deals with other firms. While these strategies often foster rapid expansion, they can sometimes lead to anti-competitive behaviour, where dominant companies prevent smaller or newer entrants from competing effectively, akin to larger predators overwhelming smaller prey in the marketplace.

In India, Sections 5 and 6 of the Competition Act, 2002 mandated that mergers and acquisitions which crossed certain thresholds—based on assets and turnover—must be reported to the Competition Commission of India for review. This mechanism helped prevent anti-competitive practices. However, in recent years, relying solely on assets and turnover to assess the competitive impact of such deals proved insufficient, especially when newer business models and digital economies are taken into account.

To address this limitation, it was proposed that Deal Value, rather than just assets or turnover, could serve as a more relevant metric. Consequently, the concept of the Deal Value Threshold (DVT) was introduced in the Competition (Amendment) Act, 2023. Under this amendment, deals with a transaction value exceeding ₹2,000 crore must be notified to the CCI, which then assesses their potential anti-competitive effects.

This project aims to explore the concept of the Deal Value Threshold in India, as introduced by the Competition (Amendment) Act, 2023. It will examine the rationale behind its introduction, assess its effectiveness, highlight its shortcomings, and offer suggestions for improvement. Additionally, a comparative analysis will be conducted to study how similar thresholds are implemented in other countries, providing a broader context for understanding the impact of this legislative development.

Background of the Competition Act, 2002

The Competition Act, 2002[1] was introduced to promote competition in the Indian market and

[1] The Competition Act, 2002, No. 12 of 2003, India Code (2003),

prevent practices that have an adverse effect on competition. This legislation replaced the Monopolies and Restrictive Trade Practices (MRTP) Act of 1969, which was considered inadequate for addressing modern competition issues. The Act's primary objectives are to promote fair competition, protect consumer interests, and ensure freedom of trade in India's markets.

Key provisions of the Act focus on curbing anti-competitive agreements, abuse of dominant position, and regulating combinations such as mergers, acquisitions, and amalgamations to prevent concentration of market power that could harm competition.

Overview of Sections 5 and 6: Mergers and Acquisitions

Sections 5 and 6 of the Competition Act specifically deal with the regulation of mergers and acquisitions (referred to as "combinations").

- Section 5 defines the types of combinations that are subject to scrutiny by the Competition Commission of India (CCI). It outlines financial thresholds, based on the value of assets and turnover, above which mergers or acquisitions must be notified to the CCI[2] for approval.
- Section 6 [3]prohibits any combination that causes or is likely to cause an appreciable adverse effect on competition (AAEC) within the relevant market in India. It mandates that combinations exceeding the thresholds mentioned in Section 5 cannot be implemented without prior approval from the CCI. The assessment of combinations considers factors like market share, potential barriers to entry, and the impact on consumers.

Historical Context of Asset and Turnover-Based Thresholds

Initially, the asset and turnover thresholds for notifying mergers and acquisitions were set to focus on large-scale transactions that might impact competition. These thresholds were designed to ensure that only combinations with significant market influence would be subject to regulatory scrutiny. Over time, amendments and reviews have adjusted these thresholds to keep pace with the growth of the Indian economy and global market trends.

[2] Competition Act, 2002, § 5
[3] Competition Act, 2002, § 6

As economic activity increased and industries diversified, the existing asset and turnover criteria were criticized for potentially overlooking deals that could have significant competitive implications, particularly in the digital economy and high-value technology transactions.

A significant threshold that has allowed many 'killer acquisitions'[4] to evade scrutiny is the *de minimis*[5] threshold, or target exemption.

The **de minimis exemption** refers to a provision that exempts certain transactions from mandatory notification to competition authorities if they fall below specified thresholds. This exemption is designed to reduce the administrative burden on both businesses and regulatory bodies by excluding transactions that are unlikely to significantly impact market competition.

However, in digital markets, acquisitions often gain value from innovations or the data of target companies, which may not have large asset bases. Furthermore, tech companies usually focus on growing a large user base instead immediate revenue maximisation. As a result, asset and turnover thresholds may not accurately capture the competitive importance of combinations in the digital sector.

Because of this regulatory gap, several acquisitions have avoided scrutiny from the CCI, including Myntra by Flipkart, TaxiforSure by Ola[6], Freecharge by Snapdeal[7]. WhatsApp by Facebook.

This critique played a crucial role in the development of new mechanisms, such as the Deal Value Threshold (DVT), which was introduced later through the Competition (Amendment) Act, 2023.

Timeline: Key Developments in the Evolution of the Competition (Amendment) Act, 2023

2018: Competition Law Review Committee (CLRC)[8] constituted to suggest updates to the Competition Act, 2002.

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[4] Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 J. Pol. Econ. 649 (2021).
[5] Competition Commission of India, *Filing of Combination Notices*, https://www.cci.gov.in/combination/filing-notice (last visited Oct. 2, 2024)
[6] ET Bureau, *Ola Buys TaxiForSure for Rs 1,237 Crore in a Cash-and-Stock Deal*, The Econ. Times (Mar. 3, 2015), https://economictimes.indiatimes.com/ola-buys-taxiforsure-for-rs-1237-crore-in-a-cash-and-stock-deal/articleshow/46441392.cms.
[7] AZB & Partners, *India: Regulators Must Balance Growth and Innovation with User Protection*, (June 4, 2024), https://www.azbpartners.com.
[8] Ministry of Corporate Affairs, Government of India, *Report of the Competition Law Review Committee* (2019), https://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf.

2019: CLRC submits recommendations to address changes in the market and business practices.

2019-2022: Public consultations and review of CLRC proposals.

2023: Competition (Amendment) Act, 2023 introduced:

- Deal Value Threshold (DVT): Transactions exceeding INR 2000 crore must notify CCI
- De-Minimis Exemption: DVT-related combinations are no longer exempt from notification.

Understanding the DVT:

DVT requires CCI approval for transactions[9] where:

1. The total value of the transaction surpasses INR 2000 crore (approximately USD 240 million) and
2. The target company has "substantial business operations in India" (SBOI)

Clarifications:

Value of a transaction includes every valuable consideration

- direct or indirect, immediate or deferred, in cash or otherwise;
- for any covenants imposed on the seller;
- for interconnected transactions, call options;
- for licensing of intellectual property or technological assistance etc.

[9] The Competition (Amendment) Act, 2023, No. 9 of 2023, India Code (2023), https://www.indiacode.nic.in.

'Substantial Business Operation Test:

Digital sector	
User threshold	The number of business users or end users in India constitutes 10% or more of the total global count of such users.
Or	
GMV threshold	The gross merchandise value for the 12-month period leading up to the execution date of the transaction document must be 10% or more of its total global merchandise value
Or	
Turnover threshold	The turnover in India for the previous financial year must be 10% or more of its total global turnover from all products and services.
Other Sectors	
GMV threshold	The gross merchandise value for the 12-month period leading up to the execution date of the transaction document is: 1. 10% or more of its total global merchandise value; and 2. Exceeds INR 500 Crores (~ USD 55 million).
Or	
Turnover threshold	The turnover in India for the previous financial year is: **1.** At least 10% of its total global turnover derived from all products and services; **and** 2. Exceeds INR 500 Crores (~ USD 55 million).'

DVT and De Minimis Exemptions:

Even deals that would otherwise fall under the de minimis exemption (which excludes targets with turnover under INR 1,250 crore or assets under INR 450 crore) require CCI approval if the DVT is met[10].Simply put , transactions exceeding INR 2,000 crore must be notified to the CCI, regardless of the asset or turnover criteria.

[10]Competition Commission of India, *Filing of Combination Notices*, https://www.cci.gov.in/combination/filing-notice (last visited Oct. 2, 2024).

Legislative mechanisms for comprehensive merger regulation in different jurisdictions

Brazil: Under the Brazilian Competition Law (Law No. 12,529/2011), the Administrative Council for Economic Defense (CADE) can review transactions for their competitive impact, even if they fall below financial thresholds. This allows CADE to assess potential anti-competitive effects of seemingly benign mergers.

United States: The Federal Trade Commission (FTC) and the Department of Justice (DOJ) can review mergers for anti-competitive practices even if they do not meet the Hart-Scott-Rodino Antitrust Improvements Act thresholds. This power ensures that potentially harmful transactions are not overlooked simply because they don't meet financial criteria.

European Union- Referral Mechanism

In the European Union, the EU Merger Regulation includes a referral mechanism that allows member states to refer cases to the European Commission for review, even if they do not meet EU notification thresholds. Member states can request this if the merger affects trade between them and threatens competition in the common market.

United Kingdom -Share of Supply Test : The Share of Supply Test in the UK, under the Enterprise Act 2002, permits the Competition and Markets Authority (CMA) to review mergers if the parties supply or acquire at least 25% of goods or services in the UK, with an increase in share resulting from the merger.

Germany and Austria -DVT

In Germany, under the Act against Restraints of Competition (ARC), mergers with a deal value over €400 million must be reported to the Federal Cartel Office (FCO), regardless of revenues or assets. In Austria, mergers must be notified if the deal value exceeds €200 million, with combined global turnover of at least €300 million and €15 million generated in Austria, and significant domestic activities.

Illustration of Anti-Competitive Risks in the Tech Sector and Regulatory Gap addressed by DVT

Scenario: Tech Companies Merger

Background:
In the tech industry, companies often rely on intangible assets like intellectual property (IP), user data, and market reach rather than physical assets.

Example:

Company A: Has innovative software and a large user base, generating significant revenue through subscriptions but minimal physical assets.

Company B: Holds valuable patents and extensive user data, with revenue from licensing deals, but also operates with low tangible assets**.**

The combined entity could significantly influence market competition due to:

Market Power: Their IP and user data may create a dominant position.

Innovation Stifling: This merger might reduce competition, leading to less innovation.

Consumer Impact: Users may face fewer choices or higher prices as a result of reduced competition.

Merger Context under traditional asset or turnover thresholds
If these two companies merge, the transaction might not meet the traditional asset or turnover thresholds set by competition laws.

Merger Context under the new Deal Value Threshold (DVT)[11]

If these two companies merge, the transaction value exceeds ₹2,000 crores due to their combined intellectual property and user data value. Under DVT, it must be notified to the CCI for review.

[11] The Competition (Amendment) Act, 2023, No. 9 of 2023, India Code (2023), https://www.indiacode.nic.in

Deal Value Threshold -Advantages

DVT closes the enforcement gap by allowing the CCI to monitor high-value transactions that previously escaped scrutiny, similar to the US Antitrust regime and the EU referral mechanism.

It enables CCI to assess the anti-competitive impact of transactions more effectively, especially when traditional asset or turnover thresholds do not reflect market influence.

The deal value provides a clearer indication of a transaction's significance to both the acquirer and the market, capturing the true impact even if the target company's current financials are modest.

DVT helps identify deals involving companies with the potential to change market dynamics, ensuring that high-impact transactions undergo review.

It protects consumer welfare by allowing the CCI to prevent harmful mergers or acquisitions that could reduce competition, choices, or lead to higher prices.

Deal Value Threshold - Challenges

Subjective Valuations: Valuations in the digital economy can vary significantly, complicating consistent application of the DVT.

Market Volatility: The DVT does not account for market volatility[12], which can impact the valuation of deals. (Eg, Value of shares may change during pre-merger planning and merger duration)

Higher Filing Requirements: With the new regulations, more transactions may fall under the purview of the CCI, leading to an increase in filings[13]. This could overwhelm the regulatory process and lead to delays

Lack of Judicial Precedents: As a new concept, the DVT lacks clear judicial precedents, leading to uncertainty for businesses regarding regulatory interpretations.

[12] Ruchika Chitravanshi, *Navigating Austria's Transaction Value Merger Filing Threshold*, Business Standard (Oct. 26, 2024), https://www.business-standard.com.
[13] Parikshit Luthra & Amrita Das, *India Now Requires All M&As Above ₹2,000 Crore to Get CCI Approval*, CNBC TV18 (Sept. 10, 2024), https://www.cnbctv18.com.

- **Burden on Startups**: High compliance costs associated with the DVT may impede startup growth, CCI needs to balance regulation with innovation.

Issues with Current DVT Application

- **Focus on Digital Sectors:**

  The DVT primarily captures transactions in digital sectors, potentially neglecting critical non-digital sectors.

- **Inadequate Coverage of Non-Digital Sectors:**

  The DVT may fail to address long-term investments in sectors like infrastructure and life sciences, where immediate revenue is not generated but market power is significant.

Illustration- potential gaps in DVT Application

1. **Case -Infrastructure Transactions**:

   An infrastructure company acquiring assets like ports or power plants might impact the market long-term, yet escape scrutiny if the target's revenue does not meet DVT threshold[14].

2. **Case - Pharmaceutical Acquisitions**:

   A pharmaceutical company acquiring uncommercialized patents may not trigger CCI review if revenue-based criteria are unmet, despite their strategic importance.

CONCLUSION AND SUGGESTIONS:

To address the existing gaps in the Deal Value Threshold, India could consider expanding the DVT by incorporating an asset-based criterion. This would better capture high-impact deals in sectors that rely on long-term infrastructure or R&D investments.

The DVT empowers the Competition Commission of India (CCI) to address potential long-term anti-competitive practices. While its impact remains uncertain, it has the potential to

[14] Anisha Chand & Tanveer Verma, *New M&A Rules: The Hits and Misses of the Deal Value Threshold*, VCCircle (Sept. 24, 2024), https://www.vccircle.com.

reshape digital competition regulation or reinforce India's existing regulatory framework. With discussions surrounding a possible Digital Competition Act[15], predicting its interaction with other regulatory frameworks remains premature. However, in the absence of broad enforcement powers like those in the US and EU, the DVT provides the CCI a crucial tool to address deals below traditional thresholds that may still pose risks to competition.

Given the CCI's expertise, it should not be limited by rigid legislative thresholds. Instead, it should have the discretion to assess mergers based on factors like market entry barriers, existing competition, and market maturity. This autonomy would build a more responsive and effective antitrust framework.

As the CCI addresses challenges and opportunities with the DVT, it has the chance to create a more competitive and innovative marketplace. By implementing necessary adjustments, the DVT can become an effective tool for promoting fair competition, driving growth, and enhancing consumer welfare in India's evolving digital economy.

[15] Ministry of Corporate Affairs, Government of India, *Report of the Committee on Digital Competition Law* (2024),https://www.mca.gov.in/bin/dms/getdocument?mds=gzGtvSkE3zIVhAuBe2pbow%3D%3D&type=open