
DEAL VALUE THRESHOLDS IN INDIA AND THE EUROPEAN UNION: A COMPARATIVE LEGAL ANALYSIS OF MERGER CONTROL IN DIGITAL MARKETS

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ABSTRACT

Merger control systems decide which deals to review by looking at the parties' turnover or assets. Digital acquisitions expose the weakness of that test, because a target with almost no revenue can still hold the users, data or technology that matter for competition. Facebook's purchase of WhatsApp is the usual illustration, and commentators call such deals killer acquisitions. India has responded through the Competition (Amendment) Act, 2023, which added a deal value threshold to section 5 of the Competition Act, 2002. Since 10 September 2024 a transaction is notifiable to the Competition Commission of India if its value exceeds ₹2,000 crore and the target has substantial business operations in India, a term that Regulation 4(2) of the 2024 Combinations Regulations defines through numerical tests. The European Union has no such threshold. It relied instead on referrals under Article 22 of the Merger Regulation, until the Court of Justice curtailed that route in Illumina/GRAIL in September 2024. Germany and Austria adopted transaction value thresholds in 2017, with a local nexus test that weighs several factors. Using a doctrinal and comparative method, this article sets the three approaches side by side and tests the hypothesis that a codified ex ante threshold serves digital markets better than an ex post referral mechanism. It finds support on predictability. It also shows that the Indian nexus test leaves three gaps: platforms with no measurable transaction value, the unit and entity whose figures are measured, and the valuation of contingent consideration. Because the penalty under section 43A can reach one per cent of the value of the transaction, these gaps carry real cost. The article proposes five narrow rules to close them, grounded in the mischief rule of Indian statutory interpretation and in German and Austrian practice, and recommends that the Commission adopt the first two through guidance.

Keywords: Merger Control, Deal Value Threshold, Digital Markets, Killer Acquisitions, Competition Commission of India

I. INTRODUCTION

Merger control begins with a filter. No authority can review every acquisition, so each system draws a line, usually based on the turnover or assets of the parties, and only deals above the line have to be notified. The filter rests on a simple assumption: a transaction that matters for competition will involve businesses large enough to show up in the numbers. For most of the twentieth century that was a fair assumption.

Digital markets have weakened it. A platform can buy a start-up with almost no revenue and still obtain a large user base, a valuable dataset or a technology that might grow into a rival. Facebook's acquisition of WhatsApp in 2014 is the usual illustration. The deal was reported at about USD 19 billion, yet WhatsApp's turnover was too low to meet the notification thresholds in most jurisdictions, and the transaction reached the European Commission only through a referral request under Article 4(5) of the Merger Regulation.¹ Commentators now call deals of this kind "killer acquisitions", in which an incumbent absorbs a possible rival before it can compete, and empirical work suggests that the largest platforms buy many targets with low turnover and high strategic value.²

India has answered the problem by legislation. The Competition (Amendment) Act, 2023 inserted clause (d) into section 5 of the Competition Act, 2002. Since 10 September 2024 a transaction has been notifiable to the Competition Commission of India (CCI) if its value exceeds ₹2,000 crore and the target has "substantial business operations in India", whatever its turnover or assets.³ The European Union has no equivalent threshold. It tried instead to reach below-threshold deals through the referral mechanism in Article 22 of the Merger Regulation, a route the Court of Justice sharply restricted in *Illumina/GRAIL* in September 2024.⁴ Germany and Austria introduced transaction value thresholds in 2017, paired with a requirement of local nexus.⁵

This article compares these responses. Its question is which design identifies the digital acquisitions that deserve review more reliably and more predictably, and what India can learn

¹*Facebook/WhatsApp*, Case No. COMP/M.7217 (European Commission Decision, 3 October 2014).

²Axel Gautier and Joe Lamesch, "Mergers in the Digital Economy" 54 *Info. Econ. & Pol'y* 100890 (2021).

³The Competition Act, 2002 (Act 12 of 2003), s. 5(d).

⁴*Illumina Inc. and Grail LLC v. Commission*, Joined Cases C-611/22 P and C-625/22 P [2024] (Judgment of the Grand Chamber, 3 September 2024).

⁵*Gesetz gegen Wettbewerbsbeschränkungen* (German Act Against Restraints of Competition), s. 35(1a); *Kartellgesetz* (Austrian Cartel Act), s. 9(4).

from European and German-Austrian experience as the CCI begins to apply its own test. It tests one hypothesis: that a codified deal value threshold serves merger control in digital markets better than an ex post referral mechanism, but only if the test of local presence is applied through more than user and sales figures alone. The article makes three contributions. It sets the Indian threshold, as supplemented by the 2024 Regulations, beside the post-*Illumina* position in the European Union and the German-Austrian local nexus model, which, to the author's knowledge, the existing commentary has not done in this form. It identifies three gaps in the text of the Indian test. And it proposes an interpretive framework to close them.

The method is doctrinal and comparative. The primary materials are legislation, regulations, Commission decisions and judgments from India, the European Union, Germany and Austria. The comparison is functional: it asks how each system solves the same problem, not whether their texts look alike. Germany and Austria are treated as part of the European comparison because they are member states that chose a different route from the Union. The United States is left out, since the Indian and European regimes are the ones in direct conversation here. One limit should be stated at the outset. The Indian threshold is just over two years old, and the author is not aware of a published CCI order that has interpreted its nexus test in a contested transaction. Parts of the analysis are therefore reasoned from text, purpose and comparative practice and not from Indian decisions.

Part II reviews the literature and states the gap. Part III explains why turnover thresholds fail in digital markets. Parts IV to VI set out the Indian, European and German-Austrian regimes, and Part VII compares them. Part VIII identifies gaps in the Indian test and proposes a framework to close them. Part IX concludes.

II. LITERATURE AND THE RESEARCH GAP

Existing work falls into three groups. The first explains why turnover-based thresholds miss digital acquisitions. Shapiro argues that enforcement has to look beyond price and output effects to harms such as suppressed innovation and control of data, and he criticises the failure to catch acquisitions of nascent competitors by dominant technology firms.⁶ Gautier and Lamesch show that many acquisitions by the largest digital platforms involve targets with low turnover and high strategic value.⁷ Srivastava and Yadav extend the concern to India, arguing

⁶Carl Shapiro, "Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets" 33 JEP 69 (2019).

⁷Gautier and Lamesch, *supra* note 2.

that data aggregation acts as an entry barrier in two-sided markets that Indian theories of harm do not fully capture.⁸

The second group studies the Indian threshold. Before the amendment, Hussain and Parashar found India's notification thresholds to be among the highest of the twelve jurisdictions they compared and its regulator among the most under-resourced.⁹ The Competition Law Review Committee recommended a size-of-transaction threshold in 2019.¹⁰ Since the amendment, Chauhan and Mehta have given the most detailed doctrinal account of section 5(d),¹¹ Kathuria has placed it among wider changes in digital merger control,¹² Gupta criticised the drafting before the threshold took effect,¹³ Kakkar and Srinivas have examined how the value of a transaction may be computed for earn-outs and staged investments,¹⁴ and Aryan and Kapoor argue that most early-stage platform deals will still fall below ₹2,000 crore and propose a definition of local presence based on active users.¹⁵

The third group looks at the European response. Lorenz explains why merger control is a preventive, ex ante tool,¹⁶ Fulgenci asks whether Article 22 referrals can substitute for a codified transaction value threshold,¹⁷ and Levy, Mostyn and Buzatu warn that widening jurisdictional tests risks compliance costs and a chilling effect on early-stage investment without proof of systemic harm.¹⁸

Three gaps remain. Much of the Indian commentary was written before the 2024 Regulations

⁸Ankit Srivastava and Abhyuday Yadav, "Regulating Combinations in Platform Markets: An Indian Perspective" 3 CCI JCLP 21 (2022).

⁹Abdullah Hussain and Perna Parashar, "Merger Thresholds and Merger Thresholds in the Digital Economy" 7 NLS Bus. L. Rev. 5 (2021).

¹⁰Competition Law Review Committee, *Report of the Competition Law Review Committee* 98 (Ministry of Corporate Affairs, Government of India, July 2019).

¹¹Sidharth Chauhan and Dhruv Mehta, "Deal Value Threshold and M&A: A Competition Law Analysis" Antitrust Bull. (2024), available at: <https://doi.org/10.1177/0003603X241285055> (Visited on 16 Sep, 2026).

¹²Tanya Kathuria, "Merger Control in Digital Economy: Challenges and Evolving Regulatory Paradigms Under Competition Law" 7 IJLLR 1 (2024).

¹³Ashutosh Gupta, "Deal Value Threshold: A Critique of India's Latest Competition Regime" IRCCL 45 (2023).

¹⁴Avaantika Kakkar and Kirthi Srinivas, "2023 Amendments to Indian Competition Law: Implications for M&A (Part 1)" Kluwer Competition Law Blog (18 April 2023), available at: <https://legalblogs.wolterskluwer.com/competition-blog/2023-amendments-to-indian-competition-law-implications-for-ma-part-1/> (Visited on 16 Sep, 2026).

¹⁵U. Aryan and Sidhant Kapoor, "Critical Analysis of the Inadequacy of Deal Value Threshold in Regulating Digital Markets" SSRN Working Paper (2023), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4427580 (Visited on 16 Sep, 2026).

¹⁶Moritz Lorenz, *An Introduction to EU Competition Law* 242 (Cambridge University Press, Cambridge, 2013).

¹⁷Aline Alves Fulgenci, "Killer Acquisitions and European Merger Control in the Digital Era" Harvard Antitrust Research Network Working Paper (2021).

¹⁸Nicholas Levy, Henry Mostyn and Bianca Buzatu, "Reforming EU Merger Control to Capture Killer Acquisitions: The Case Against Haste" 19 Comp. L.J. 51 (2020).

defined “substantial business operations in India” and so treats the nexus test as open-ended. It does not examine the numerical test as it now stands. Most European work on Article 22 pre-dates *Illumina/GRAIL* and has not asked what the Union is left with, or what India can take from it. And studies that draw on German and Austrian practice use it mainly to argue that India should adopt a threshold, not to set the Indian test against the local nexus method itself. This article addresses all three.

III. WHY TURNOVER THRESHOLDS FAIL IN DIGITAL MARKETS

A. The logic of the filter

A threshold is a screening device. Merger control is preventive: once two competitors combine, the effect on the market is hard to undo, so review has to come before closing.¹⁹ Turnover served as a screen because, in manufacturing and retail, revenue tends to reflect market position. A firm with more market power usually sells more, or charges more, than its rivals.

Both systems studied here built on that logic. The European Community had no merger regulation until Regulation 4064/89 came into force in 1990, and the current Merger Regulation replaced it in 2004.²⁰ Jurisdiction under both is tied to turnover, calculated at Union and member-state level. India’s first competition statute, the Monopolies and Restrictive Trade Practices Act, 1969, treated size itself as suspect.²¹ After liberalisation the Raghavan Committee recommended a statute built around competition, with pre-merger notification,²² and the Competition Act, 2002 followed, although its combination provisions entered into force only in 2011.²³

B. The break in the link

Digital markets break the link between revenue and importance. A platform can hold great influence over how people find content or reach one another while charging nothing, so its turnover says little about its position. A start-up with a growing user base and no income can

¹⁹Lorenz, *supra* note 16 at 242.

²⁰Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L395/1; Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L24/1.

²¹The Monopolies and Restrictive Trade Practices Act, 1969 (Act 54 of 1969).

²²Report of the High Level Committee on Competition Policy and Law (Raghavan Committee, Government of India, May 2000).

²³The Competition Act, 2002, ss. 5-6.

sit far below every turnover threshold. The thresholds were not badly drafted. They were drafted for a different economy.

India's own figures show the point. As enacted, section 5 made an enterprise-level acquisition notifiable where combined assets exceeded ₹1,000 crore or combined turnover exceeded ₹3,000 crore. The Central Government doubled the figures in 2016 and raised them again in March 2024, and it set a small-target exemption at ₹450 crore in assets or ₹1,250 crore in turnover (Table 1).²⁴ A digital target can sit under that exemption and still be strategically important.

Table 1: Revision of combination thresholds in India

Threshold (India)	As enacted	2016 to March 2024	From 7 March 2024
Enterprise assets	₹1,000 crore	₹2,000 crore	₹2,500 crore
Enterprise turnover	₹3,000 crore	₹6,000 crore	₹7,500 crore
Group assets	₹4,000 crore	₹8,000 crore	₹10,000 crore
Group turnover	₹12,000 crore	₹24,000 crore	₹30,000 crore
Small-target exemption, assets	not applicable	₹350 crore	₹450 crore
Small-target exemption, turnover	not applicable	₹1,000 crore	₹1,250 crore

Note: figures are for India-level thresholds. Source: Competition Act, 2002, s. 5(a)-(c), and Ministry of Corporate Affairs notifications of 2016 and 7 March 2024.

²⁴The Competition Act, 2002, s. 5(a)-(c); Government of India, Ministry of Corporate Affairs, Notification S.O. 1130(E) (7 March 2024); Government of India, Ministry of Corporate Affairs, Notification S.O. 1131(E) (7 March 2024).

IV. INDIA: THE DEAL VALUE THRESHOLD

A. Section 5(d) and its history

Section 5 of the Competition Act, 2002 defines the “combinations” that must be notified to the CCI before they take effect. As enacted, the test looked only at the turnover or assets of the parties. The 2023 amendment added clause (d), under which an acquisition, merger or amalgamation is also a combination where the value of the transaction exceeds ₹2,000 crore and the target enterprise has substantial business operations in India.²⁵ The two conditions are cumulative. A ₹5,000 crore deal for a target with no real Indian footprint falls outside the clause, and so does a target with a large Indian business that is bought for less than ₹2,000 crore. The clause also works independently of the older tests. A deal can be notifiable under section 5(d) while falling far below every figure in section 5(a) to (c).

The reform had a clear lineage. In 2019 the Competition Law Review Committee recommended a size-of-transaction threshold to deal with the enforcement gap in technology and new-age markets.²⁶ The Competition (Amendment) Bill 2022 was introduced in August 2022, examined by the Standing Committee on Finance,²⁷ passed by Parliament in March and April 2023 and enacted on 11 April 2023.²⁸ Section 5(d) took effect only on 10 September 2024, together with the Competition Commission of India (Combinations) Regulations, 2024.²⁹

B. The nexus test: Regulation 4(2)

The Act leaves “substantial business operations in India” to subordinate legislation. Regulation 4(2) supplies numerical tests, summarised in Table 2. For digital services, a target is deemed to have substantial business operations in India if the number of its business users or end users in India is 10 per cent or more of its total global number of such users, or if its gross merchandise value (GMV) in India for the twelve months before the relevant date, or its turnover in India for the preceding financial year, is 10 per cent or more of the global figure. Outside digital services only the GMV and turnover limbs apply, and the Indian figure must

²⁵The Competition Act, 2002, s. 5(d).

²⁶Competition Law Review Committee, *supra* note 10.

²⁷Standing Committee on Finance, *Fifty-Second Report on the Competition (Amendment) Bill, 2022* (Lok Sabha Secretariat, 13 December 2022).

²⁸The Competition (Amendment) Act, 2023 (Act 9 of 2023).

²⁹The Competition Commission of India (Combinations) Regulations, 2024.

also exceed ₹500 crore.³⁰ Each limb is measured against the target's own global figure, not against the acquirer's.

Table 2: Tests for substantial business operations in India (Regulation 4(2))

Sector	Limb	Test
Digital services	Users	Business users or end users in India are 10% or more of total global users
Digital services	GMV	GMV in India for the twelve months before the relevant date is 10% or more of global GMV
Digital services	Turnover	Turnover in India in the preceding financial year is 10% or more of global turnover
Other sectors	GMV	As above, and Indian GMV exceeds ₹500 crore
Other sectors	Turnover	As above, and Indian turnover exceeds ₹500 crore

Source: Competition Commission of India (Combinations) Regulations, 2024, reg. 4(2).

The design is a rule and not a standard. Once the figures are known the answer follows, and the CCI is not asked to judge whether a target's presence in India feels substantial. That choice matters for the comparison in Part VII.

The Regulations were not drafted without consultation. The CCI published a draft of Regulation 4(2) and revised it after stakeholder comments, adding clearer explanations of terms such as digital service, business user and end user.³¹ The consultation shows that the CCI saw the definitional difficulty early, even though the final text does not resolve it.

C. The value of the transaction: Regulation 4(1)

Regulation 4(1) defines the value of the transaction widely. It covers every valuable

³⁰Ibid., reg. 4(2).

³¹Competition Commission of India, *General Statement on the Combinations Regulations, 2024* (stakeholder consultation) (2024).

consideration, direct or indirect, immediate or deferred, in cash or otherwise, together with consideration for related arrangements and debt of the target that the acquirer takes on.³² Amounts payable on future outcomes specified in the transaction documents are to be included on the basis of best estimates, and commentators read the Regulations as treating a value that cannot be determined at signing as meeting the threshold.³³ The breadth looks designed to stop parties keeping the headline price below ₹2,000 crore by moving part of the payment into a separate agreement or by leaving a liability out of the price.

D. Filing and consequences

A transaction caught by section 5(d) follows the ordinary process. It must be notified before closing and cannot take effect until the CCI approves it or the statutory period, now 150 days, runs out.³⁴ Section 6(2A) prohibits the parties from giving effect to any part of it in the meantime.³⁵ A deal with no horizontal, vertical or complementary overlap may use the Green Channel and receive deemed approval on filing,³⁶ so a large digital acquisition without overlap can be notifiable and cleared at once. The small-target exemption does not help, because it does not apply to a transaction that meets the deal value threshold.³⁷

The sanction for a wrong assessment is substantial. Section 43A allows a penalty of up to one per cent of the total turnover or assets of the combination, or of the value of the transaction under section 5(d), whichever is higher, on any person or enterprise that fails to give notice or contravenes section 6(2A).³⁸ On a transaction valued at ₹2,400 crore the ceiling is therefore at least ₹24 crore, and the text of the section contains no requirement of intent.

V. THE EUROPEAN UNION: ARTICLE 22 AND ITS LIMITS

A. Article 22 and its original purpose

The Merger Regulation has never contained a transaction value threshold. Jurisdiction depends on turnover, calculated at Union and national level, and a deal that crosses no threshold

³²The Competition Commission of India (Combinations) Regulations, 2024, reg. 4(1).

³³Majmudar & Partners, “M&A and PE Impact Due to the Changes to India’s Competition Law Regime” *Legal 500* (17 October 2024).

³⁴The Competition Act, 2002, s. 6(2).

³⁵*Ibid.*, s. 6(2A).

³⁶The Competition (Criteria of Combination) Rules, 2024.

³⁷The Competition (Minimum Value of Assets or Turnover) Rules, 2024.

³⁸The Competition Act, 2002, s. 43A.

anywhere is outside review.³⁹ Article 22 offers one way round the gap by allowing member states to ask the Commission to examine a concentration. For most of the Regulation's life the provision was understood as a transfer of power. A member state that could review a deal under its own law could ask the Commission to do it instead, for reasons of efficiency or because several states were affected.⁴⁰

B. The Commission's expansion of Article 22

In March 2021 the Commission published guidance that changed this reading. It said that it would accept Article 22 referrals even from member states with no power to review the transaction under national law, as a way of catching deals whose competitive significance was not reflected in their turnover.⁴¹ *Facebook/Kustomer* was the first case. Several member states referred to the transaction although none could have reviewed it under national thresholds, and the Commission cleared it subject to conditions.⁴²

C. Illumina/GRAIL

Illumina agreed in 2020 to acquire GRAIL, a company developing early cancer-detection tests. The deal met no national or Union threshold. France referred it to the Commission under Article 22, and other states joined, although none of them had jurisdiction under national law.⁴³ The Commission accepted the referral in April 2021 and prohibited the acquisition in September 2022. Illumina challenged the jurisdictional decision first. The General Court dismissed the challenge on 13 July 2022, reading Article 22 on its wording and holding that it did not require the referring state to have its own jurisdiction.⁴⁴

The Court of Justice reversed that on 3 September 2024. Sitting as a Grand Chamber, it held that Article 22 cannot give the Commission jurisdiction where the referring member state lacks the power to review the concentration under its own law, and it annulled the Commission's decisions.⁴⁵ Two reasons stand out. First, the Court read the provision in light of the scheme of the Merger Regulation, which is built around fixed thresholds with referral as a narrow,

³⁹Council Regulation (EC) 139/2004, art. 1.

⁴⁰*Ibid.*, art. 22.

⁴¹European Commission, *Guidance on the Application of the Referral Mechanism Set Out in Article 22 of the Merger Regulation to Certain Categories of Cases*, C(2021) 1959 final (26 March 2021).

⁴²*Facebook/Kustomer*, Case No. COMP/M.10262 (European Commission Decision, 12 May 2021).

⁴³*Illumina/GRAIL*, Case No. COMP/M.10188 (European Commission).

⁴⁴*Illumina, Inc. v. Commission*, Case T-227/21 (Judgment of the General Court, 13 July 2022).

⁴⁵*Illumina Inc. and Grail LLC v. Commission*, *supra* note 4.

subsidiary mechanism. Second, it stressed legal certainty: parties must be able to judge at signing whether Union-level review may follow. The practical result is that a transaction below every national and Union threshold is again outside the Commission's reach, unless a member state can review it under its own law and chooses to refer it. At the time of writing the Union has not replaced the expanded use of Article 22 with a threshold of its own.

D. The New Competition Tool and the Digital Markets Act

Article 22 was not the Commission's only attempt. In June 2020 it consulted on a New Competition Tool that would have allowed market investigations across the economy without proof of an infringement.⁴⁶ The economy-wide tool was dropped, and its digital elements were folded into what became the Digital Markets Act, proposed in December 2020, adopted in 2022 and in force since November 2022.⁴⁷ That Act regulates the conduct of designated gatekeepers. It does require a gatekeeper to inform the Commission of an intended acquisition of another digital-sector business, even where the deal falls below every merger threshold.⁴⁸ This gives early sight of such deals but no power to review them, and after *Illumina/GRAIL* that visibility has no jurisdictional route behind it unless a member state can act.

VI. GERMANY AND AUSTRIA: TRANSACTION VALUE AND LOCAL NEXUS

Germany and Austria acted earlier and by legislation. Both amended their competition statutes in 2017 to add a transaction value threshold alongside the turnover tests. In Germany a deal is notifiable if the consideration exceeds €400 million, and in Austria if it exceeds €200 million, provided the other conditions are met.⁴⁹ Value alone is not enough. The target must also have significant activity in the country. The joint guidance of the German and Austrian authorities treats that as a question of several factors weighed together, including research and development carried out in the country, local sales, and whether assets are genuinely used for domestic business. A registered office or other nominal presence does not suffice.⁵⁰ The revised guidance also treats a local market share above 10 per cent in a relevant segment as enough on

⁴⁶European Commission, *Inception Impact Assessment for a Possible New Competition Tool* (2 June 2020).

⁴⁷Regulation (EU) 2022/1925 of 14 September 2022 on contestable and fair markets in the digital sector (Digital Markets Act), OJ L265/1.

⁴⁸*Ibid.*, art. 14.

⁴⁹Gesetz gegen Wettbewerbsbeschränkungen, s. 35(1a); Kartellgesetz, s. 9(4).

⁵⁰Bundeskartellamt and Bundeswettbewerbsbehörde, *Joint Guidance Paper on Transaction Value Thresholds* (20 August 2018, revised 2022).

its own.⁵¹

The test has been applied. In *Salesforce/Tableau* the Cartel Court in Vienna fined Salesforce €100,000 for failing to notify its acquisition of Tableau, a business intelligence software company, and found a local nexus although Tableau's revenue in Austria was modest.⁵² The court looked at Tableau's position in its market segment and did not treat the revenue figure as decisive. The lesson for present purposes is that the German and Austrian test asks what presence means for the business concerned, instead of applying a single number.

VII. COMPARATIVE ANALYSIS

Table 3 sets the three regimes side by side.

Table 3: The three regimes compared

Feature	India	European Union	Germany and Austria
Instrument	Competition Act, 2002, s. 5(d); Combinations Regulations, 2024	Merger Regulation, art. 22 (referral)	GWB s. 35(1a); KartG s. 9(4)
Type	Codified, ex ante	Discretionary, ex post referral	Codified, ex ante
Value test	More than ₹2,000 crore	None	More than €400 million (Germany); more than €200 million (Austria)
Nexus test	Numerical: 10% of users, GMV or turnover	None; depends on the referring state's national power	Multi-factor local nexus; Austrian 10% market share indicator
Applied decisions	None published in a contested case known to the author	<i>Facebook/Kustomer</i> ; <i>Illumina/GRAIL</i>	<i>Salesforce/Tableau</i>
Position	In force since 10 September 2024	Expanded use 2021 to 2024; curtailed on 3 September 2024	In force since 2017

⁵¹Ibid.

⁵²*Salesforce/Tableau*, Case No. 27 Kt 9/21g (Cartel Court of Vienna, 22 April 2021).

Source: author's analysis of the instruments and decisions discussed in Parts IV to VI.

Three points stand out. The first concerns timing and predictability. India's threshold is ex ante, and a party can check the figures before signing. Article 22 in its expanded form was less predictable, because a deal that cleared every threshold could still be pulled in by referral. The Court of Justice removed that uncertainty, but by narrowing the Union's reach and not by replacing the mechanism. Germany and Austria sit close to India here. The value threshold is fixed by statute, although the nexus element needs a factual assessment.

The second concerns the design of the nexus test. India's test is numerical, which is its main strength and its main limit. A party knows what to count, and the CCI does not have to weigh evidence in every filing, but a number cannot adjust to business models that the drafters did not have in mind. The German and Austrian test is multi-factor. That suits varied business models, but it leaves regulators and courts more to decide in each case.

The third concerns applied experience. Germany and Austria have had their thresholds since 2017 and a decided case that tests the nexus requirement. India's has been in force since September 2024, and the author knows of no published CCI order interpreting its nexus test in a contested transaction. The comparison therefore cannot show which design performs better in practice. It can show which questions each design leaves open. On predictability at signing, the hypothesis is supported. On the quality of the nexus test, it remains to be tested, and Part VIII turns to that.

Each model offers India something and warns against something. The European experience warns against relying on a discretionary referral power to supply jurisdiction that the statute does not confer. The Court of Justice's insistence on thresholds and certainty is also the best argument for India's codified approach, since it shows what happens when the line is drawn after the deal and not before. The German and Austrian experience offers a richer account of what presence can mean, with its attention to research, sales, assets and market position, and it shows that a nexus requirement settles only as decisions accumulate. India has the clearer rule and the thinner record. The task for the next few years is to build that record without losing the clarity.

VIII. GAPS IN THE INDIAN TEST AND A PROPOSED FRAMEWORK

A. Three gaps

The first gap is the platform-type gap. The user and GMV limbs were drafted with consumer-facing transactional platforms in mind. For a social network or a professional networking service where nothing is sold, GMV has no natural meaning and the turnover of a free service says little, so only the user limb is workable.

The second is the measurement gap, which has two parts. The first is what the user limb counts. The GMV limb is tied to the twelve months before the relevant date and the turnover limb to the preceding financial year, but the user limb states no period and does not say whether a dormant registered account counts. Take a social platform bought for ₹2,400 crore with 12 million registered accounts in India out of 100 million worldwide, which is 12 per cent. Its monthly active users in India, averaged over the preceding twelve months, are 6 million out of 80 million worldwide, which is 7.5 per cent. The deal is notifiable on one basis and not on the other. The second part is whose figures are used when only part of an enterprise is acquired. Suppose a conglomerate sells a digital services division for ₹3,000 crore. The division has 4 million end users in India out of 30 million worldwide, about 13 per cent, while the conglomerate has 500 million end users worldwide, so the same users are under 1 per cent of its figure. Regulation 4(2) speaks of the enterprise referred to in section 5(d). It does not say whether that is the division bought or the seller as a whole.

The third is the valuation gap. Regulation 4(1) includes deferred and contingent amounts on a best-estimate basis but does not say how the estimate is made. A probability-weighted figure, an accounting fair value and the maximum payable under the agreement can differ widely for an earn-out, and the difference can decide whether the deal crosses ₹2,000 crore. Commentators have also flagged the valuation of earn-outs, staged investments and multi-investor rounds as an unresolved compliance question.⁵³

These gaps are not academic. Because section 43A ties the penalty to turnover, assets or the value of the transaction, a party that reasonably but wrongly concludes that a target lacks substantial business operations in India, or that a deal falls under ₹2,000 crore, faces a penalty

⁵³Kakkar and Srinivas, *supra* note 14.

calculated after the event on a decision it had to make in advance.

B. How an Indian tribunal should read the gaps

Indian courts read an ambiguous provision in light of the mischief it was enacted to remedy. In *Reserve Bank of India v Peerless General Finance and Investment Co Ltd* the Supreme Court asked what mischief the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 was passed to meet, identified it as the lure of prizes, and held that a scheme without that feature fell outside the definition of a prize chit.⁵⁴ The rule guides a choice between available readings. It does not allow a court to rewrite the text.

Applied to section 5(d), the mischief is stated in the policy material behind it. The Competition Law Review Committee recommended a size-of-transaction threshold to deal with the enforcement gap in technology and new-age markets, where the existing tests looked at turnover and assets.⁵⁵ The concern was with the target and what it is worth, not with the size of the party selling it. European practice offers a parallel method. In *Illumina/GRAIL* the Court of Justice read Article 22 in light of the structure of the Merger Regulation,⁵⁶ and in *Salesforce/Tableau* the Cartel Court asked what the nexus requirement was meant to capture.⁵⁷ Neither decision binds an Indian tribunal, but both show reasoning from purpose that an Indian tribunal would recognise.

C. The proposed framework

Five rules would close the gaps without discarding the numerical test. First, the user limb should be measured as the average number of monthly active users in India over the twelve months before the relevant date, against the same measure worldwide. That aligns it with the twelve-month period already used for GMV and ties the limb to real presence. Aryan and Kapoor propose active-user measures for a similar reason.⁵⁸ A platform that does not record active users would disclose the measure it does keep and the reasons, and the CCI could accept it on that footing.

⁵⁴*Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd.* (1987) 1 SCC 424.

⁵⁵Competition Law Review Committee, supra note 10.

⁵⁶*Illumina Inc. and Grail LLC v. Commission*, supra note 4.

⁵⁷*Salesforce/Tableau*, supra note 52.

⁵⁸Aryan and Kapoor, supra note 15.

Second, where only part of an enterprise is acquired, the ten per cent comparison should use the global figures of the business or division acquired, measured immediately before the transaction, and not those of the seller or the acquirer. The mischief rule supports this reading. Measuring the seller as a whole would hide a significant Indian business inside the scale of the group selling it, which repeats the invisibility the provision was meant to cure.

Third, where GMV has no meaning for the platform and users cannot sensibly be compared across jurisdictions, substantial business operations could be shown by a share of more than 10 per cent of the relevant segment in India, defined through the CCI's existing market-definition practice.⁵⁹ The idea is borrowed from the Austrian indicator but confined to cases the numerical limbs cannot reach.

Fourth, where no relevant segment can be defined with confidence, the parties could show a real presence through several indicators taken together: research, engineering or product development in India; sales or contracts with Indian customers; assets and employees used for the Indian business; and a share of the relevant segment. No single indicator would be enough, and nominal presence would not count. The list adapts the German and Austrian guidance in a narrower form, applying only where the numerical limbs cannot be applied.⁶⁰

Fifth, a transaction with contingent or deferred consideration should be valued, for the purpose of the ₹2,000 crore threshold, at the maximum amount reasonably payable under the documents as signed, with earn-outs and performance-linked tranches counted at their maximum. Accounting fair value serves a different purpose, since it measures what a payment is worth to the financial statements. A notification threshold decides before closing whether approval is needed, a wrong answer attracts the section 43A penalty, and certainty at signing matters more than precision about expected value. The proposal is close to what commentators already advise, that parties should assume the threshold is met where the value cannot be determined.⁶¹ It would be paired with a short true-up filing confirming the amount actually paid, without a second review unless the final figure reveals something materially different from what the CCI assessed.

⁵⁹The Competition Act, 2002, ss. 19-20.

⁶⁰Joint Guidance Paper, *supra* note 50.

⁶¹Majmudar & Partners, *supra* note 33.

D. Objections and limits

Two objections deserve an answer. The first is that supplementary criteria bring back the uncertainty a numerical test was meant to remove, and widen compliance costs and chill early-stage investment without proof of harm, which is the concern Levy, Mostyn and Buzatu raise against broader jurisdictional tests.⁶² The framework answers this by staying narrow. The counting basis and the acquired-business rule apply to every case but fix the measure and the entity instead of leaving them open. The relevant-segment alternative and the local-activity indicators apply only where no numerical metric fits, so a party can tell in advance whether it is in that category. The risk is real if the CCI defines the segment or the activity expansively, which is why the alternative is tied to existing market-definition practice and the indicators must be shown together.

The second objection is capacity. Kathuria concludes that the CCI needs more technical capacity to enforce the threshold, and Hussain and Parashar found it under-resourced relative to peer regulators.⁶³ The point supports sequencing. The counting basis and the acquired-business rule need the least new capacity and settle the most consequential questions, so they can be adopted first through guidance. The valuation rule and the indicators can follow.

Limits remain. Defining the relevant segment is contestable in fast-moving markets, the boundaries of an acquired business can be disputed after a reorganisation, and a party with a remote earn-out may say that the maximum-payable rule over-notifies. The framework is a reasoned starting point for the CCI and Indian courts, not a prediction of how they will rule.

IX. CONCLUSION

This article asked how India and the European Union, with Germany and Austria as a second European model, deal with acquisitions that turnover thresholds cannot see. Three conclusions follow.

First, on predictability the codified threshold does better than the referral mechanism. A party can check India's figures before signing, whereas the expanded use of Article 22 could pull in a deal that had passed every threshold. The Court of Justice cured that uncertainty by narrowing

⁶²Levy, Mostyn and Buzatu, *supra* note 18.

⁶³Kathuria, *supra* note 12; Hussain and Parashar, *supra* note 9.

the Union's reach and not by replacing the tool, which leaves the Union with early sight of such deals through the Digital Markets Act but no clear power to review them. The first half of the hypothesis is supported.

Second, the second half of the hypothesis is supported in its reasoning but not yet tested. The Indian nexus test is clear in its numbers and silent on what is counted, for whom, and how contingent consideration is valued. German and Austrian practice shows that a nexus test needs decided cases before it settles, and India does not yet have them.

Third, the gaps can be closed with narrow, rule-like additions that a party can apply before signing. The CCI could adopt the counting basis and the acquired-business rule first, through guidance, and then publish guidance on how the best estimate under Regulation 4(1) is made. It could also publish anonymised data on informal pre-filing consultations, as a way of building a record before the first contested order. Legislative amendment to Regulation 4(2) would put the measurement questions beyond doubt.

The study has limits. It relies on public material, and its statements about the absence of Indian orders reflect the author's knowledge at the time of writing. Two lines of research follow. The first is doctrinal and depends on events: once the CCI issues contested orders under Regulation 4(2), they can be tested against the framework proposed here. The second is empirical and lies outside this article: a study of start-up acquisition activity in India before and after the threshold, which would need transaction-level data that is not yet systematically available.