Part II: Deal Value Trigger and CCI Approval – How does it affect dealmaking?

Key Takeaways

- CCI has notified a new filing trigger linked to deal value – a numerical threshold of over INR 2000 crore + substantial business operations in India test
- If breached, a CCI filing will be required even if the de-minimis exemption is applicable. Other exemptions continue to apply
- DVT provisions have thrown up a fresh set of questions for deal makers. We examine:
  - If offline businesses with digital presence are likely to get caught
  - Fate of covenants like non-competes to determine the value of the transaction
  - Relevance of 'Gross Merchandise Value' for non-digital sectors – a metric to determine substantial business operations
  - What will be viewed as 'inter-connected' transactions in the context of DVT
  - Impact on global deals/indirect acquisitions with India nexus
  - Mandatory lookback and lookahead aggregation of consideration – impact on real estate and infra platforms
  - Applicability of DVT and 'inter-connected' transactions for gradual on-market share acquisitions

Consider this – an investor is acquiring 15% for INR 3000 crore (~USD 360 million) in an unlisted company in India whose turnover is less than INR 1250 crore (~USD 156 million). Prior to 09 September 2024, the investor would not have required an approval from the Competition Commission of India. Now, it very well might.

This is to say that effective 09 September, even if the target company meets the de-minimis threshold – assets are below INR 450 crore (~USD 56 million) OR turnover is less than INR 1250 crore (~USD 156 million) (***de-minimis exemption***) – but the value of the transaction is over INR 2000 crore (~USD 250 million) and the substantial business operations test is met, prior CCI approval will be required.

Acquirers will, however, continue to have the benefit of other exemptions as prescribed under the Exemption Rules[1] including the 'solely as an investment' exemption. We've discussed that in detail here – 'Part 1: CCI approval for minority PIPE deals – to file or not to file?'.

Why did India need a DVT?

Regulatory concerns began when several transactions in the digital space, namely acquisition of Myntra by Flipkart, TaxiforSure by Ola, Whatsapp by Facebook, and Freecharge by Snapdeal, escaped CCI scrutiny. These transactions, often referred to as killer acquisitions (incumbents acquiring younger rivals), qualified for the de-minimis exemption. This led the Competition Law Review Committee, which submitted its report[2] in 2019, to suggest that a value-based threshold is required since digital businesses often do not generate any significant revenue for a number of years, focusing initially on user growth.

CCI's notification on 09 September is an outcome of this recommendation. To be clear, the deal value test (***DVT***) in its final form does not just apply to the digital sector but also to all other sectors.

In notifying this additional criterion for a CCI filing, India has joined countries like Germany, U.S., Austria and the U.K. to ensure that killer acquisitions do not fly under the radar of merger control.

A closer look at DVT

CCI filing will be triggered if 2 parameters are met, i.e.,

a. Parameter 1 – value of transaction is more than INR 2000 crore (~USD 250 million); AND

b. Parameter 2 – target has substantial business operations in India (gross merchandise value/turnover/user-based test - discussed in detail below)

[1] Competition (Criteria for Exemption of Combinations) Rules, 2024.
[2] https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf.

Parameter 1 - How does one determine the 'value of a transaction'?

The Regulations[3] contemplate a catchall provision to determine the 'value of a transaction' and will include the entirety of consideration paid for a transaction – be it direct or indirect, immediate or deferred, cash or otherwise. The regulator has spelled out an indicative, and not exhaustive, list of ingredients to calculate the 'value of the transaction'. For instance, consideration payable for any of the following will have to be included:

a. Any covenant, undertaking, obligation or restriction imposed on the seller or any other person if it has been agreed separately
b. Exercise of a call option (assuming the option is fully exercised) to acquire shares. If the option exercise price is based on a future outcome specified in the transaction documents, then best estimate[4] shall be considered
c. Interconnected steps to a transaction
d. Look-back provision of 2 years for follow-on acquisitions by existing acquirer/ its group entities preceding the date of the transaction. Look-ahead provision of 2 years for arrangements entered as part of (or incidental to) the transaction from the date of completion of the transaction
e. Consideration payable, on a best estimate basis, based on a future outcome specified in the transaction documents

Parameter 2 - What amounts to 'substantial business operations in India'?

To test substantial business operations, the Regulations have come up with the following parameters, namely, (a) gross merchandise value (***GMV***); (b) turnover; or (c) user base. If the thresholds under either one of the 3 parameters is breached, then the entity is said to have substantial business operations in India.

a. GMV - cash, receivables, or other consideration either for or facilitating, sale of goods and/ or provision of services, by an enterprise, on its own or as an agent or otherwise (discussed in detail below).

b. Turnover - value of sale of goods/ services and excludes all intra-group sales, indirect taxes, trade discounts and all amounts generated through assets/ businesses from customers outside India.

Digital services v. Other sectors. The Regulations also make a distinction between "digital services" and other sectors. The definition of "digital service" encompasses a broad range of activities involving the delivery of services or digital content or any other activity over the internet.

[3] Competition Commission of India (Combinations) Regulations, 2024.
[4] The 'best estimate' for determining DVT's applicability will be the board's (acquirer's) estimate. In its absence, the maximum amount payable will be considered as the 'best estimate'.

The following table summarizes the thresholds for determining substantial business operations.

Parameter	Digital services	Other sectors
GMV in India for the 12 months prior to when the deal is executed/ board approved **OR**	GMV in India is ≥ 10% of total global GMV	GMV in India is ≥ 10% of total global GMV **and** > INR 500 crore
Turnover in India from all products and services during the preceding financial year **OR**	Turnover in India is ≥ 10% of total global turnover	Turnover in India is ≥ 10% of total global turnover **and** > INR 500 crore
Number of business users[5] or end users[6] in India	≥ 10% of its total global number of such users	N/A

[5] Any person (natural or legal) supplying or providing goods or services, including through the use of digital services.
[6] Any person (natural or legal) using digital services other than as a business user, for informational or transactional purpose.

DVT: Commercial Check

The DVT provision was notified on September 9 and covers transactions which may have been executed but not consummated, in part or whole. This led to a flurry of client queries, some of which are captured below, with views from experts.

Impact of contingent/ uncertain consideration

In scenarios where deal value cannot be computed with reasonable certainty (eg. earnouts, future drawdowns etc.), the parties must proceed under the assumption that the DVT is breached and notify CCI. The Regulations say:

"*... if value of transaction cannot be established with reasonable certainty, by the board of directors or any other approving authority of the person obligated to file notice under these regulations, the value of the transaction may be considered as exceeding the amount (Rs 2000 crore)*."

This means that the presumption is that a CCI filing is required. It is on the parties to evidence that it is not.

'Digital service': An all-encompassing definition?

The Regulations define 'digital service' to mean:

- provision of a service or one or more pieces of digital content
- or any other activity by means of an internet whether for consideration or otherwise
- to the end user or business user

A potential concern here is for offline businesses with digital presence, say, a domestic FMCG company that manufactures and sells its products via regular retail/wholesale brick-and-mortar route and also its website. Since 10% of such a company's global users are likely to be in India + it's involved in an activity on the internet, potentially any combination involving such an entity can trigger DVT.

In pre-filing consultations, the regulator has addressed concerns regarding the provision of 'digital service', ***Rahul Rai, Co-founder at Axiom5 Law Chambers***, pointed out.

> *"The CCI has suggested that when a product manufactured by a firm is sold through its website, it is not a provision of service but rather a channel of sale. Therefore, it will not be treated as a digital service. This clarification is significant as 'any activity' must be read in conjunction with the opening language, which refers to the provision of service*
>
> *- **Rahul Rai***
> *Co-founder, Axiom5 Law Chambers*

GMV: Relevance for offline businesses

To reiterate, DVT is triggered if the deal value crosses INR 2000 crore and the target has substantial business operations in India. To ascertain the latter, one of the tests is that of GMV, both for digital and non-digital businesses.

GMV is a metric typically used by e-commerce businesses. The Indian Accounting Standards do not have a definition for it, but e-commerce businesses have used this term to indicate growth. Simply put, GMV means the total value of goods or services sold by a platform/entity.

For digital platforms like Flipkart, Swiggy, Myntra, Zomato etc., it would mean the total value of goods sold through them.

> *GMV for an e-commerce company that does not own the inventory will be value of merchandise that it sells*
>
> *- **Santhanakrishnan S***
> *Managing Partner, PKF Sridhar & Santhanam*

Measuring growth in GMV terms has allowed many e-commerce platforms to command significant valuations. From an anti-trust lens, things may get tricky for them from now on given that GMV itself has become an ingredient that can trigger DVT.

This is not just a challenge for digital businesses; offline businesses have also found themselves tangled in the GMV web.

It'll become relevant for entities which earn a commission for services, points out ***PR Ramesh, former Chairman, Deloitte India***, and now an independent professional. For instance, a moneychanger like Thomas Cook or an insurance broker like Marsh India or Aditya Birla Insurance Brokers.

> *The volume of currency that they exchange will be the GMV. It can also happen in businesses where you are a consignment agent like a distributor/ import-export business or a real estate brokerage. GMV, for such businesses is not the commission they earn, but the value of goods they have sold*
>
> *- **PR Ramesh***
> *Former Chairman, Deloitte India*

The same principle will apply to insurance brokers, ***Santhanakrishnan*** added. “The GMV will be the value of the policies sold, and not the commission earned”, he opined.

Do you aggregate GMV/ Turnover of acquirer and target?

Consider a transaction where company ‘A’ is acquiring company ‘B’. ‘B’s’ shareholders end up receiving shares in ‘A’ as consideration. The question is whether, to determine substantial business operations, values of ‘A’ and ‘B’ would have to be aggregated.

CCI’s guidance through non-binding pre-filing consultation suggests that the aggregation of GMV/turnover/users is not necessary for all steps in a transaction comprising multiple smaller steps/transaction, ***Rai*** said.

Inter-connected transactions and the aggregation question

Will the value of each interconnected step in a larger multi-step transaction be aggregated to identify if DVT has been triggered?

> *“*
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> *For example, if three independent investors contribute funds to the same target, are aware of each other’s funding, and agree to invest on the condition that all others must also invest, the investment amounts must be aggregated because the transactions qualify as ‘interconnected’*
>
> *- **Rahul Rai***
> *Co-founder, Axiom5 Law Chambers*

Similarly, if investor ‘A’ invests more than INR 2000 crore in target ‘B’ with the condition that the latter will use it to acquire ‘C’, then ‘B’s’ acquisition of ‘C’ using funds from ‘A’ will also require prior CCI filing, even if the transaction qualifies for the de-minimis exemption, ***Rai*** said.

The CCI is applying the same logic in DVT as it did in the CPPIB/ReNew matter[7]. In this case, the regulator penalized CPPIB for failing to include ReNew’s acquisition of Ostro Energy (which independently qualified for de-minimis exemption) in its filing. The CCI had stated that it was an interconnected step and that CPPIB’s investment in ReNew was contemplated and pursued to support funding for the Ostro acquisition.

[7] https://www.cci.gov.in/images/caseorders/en/1652781504.pdf.

Relief for on-market deals

A specific, helpful exemption has come in for on-market transactions that's relevant for DVT-based filings as well. The law places a standstill obligation on acquirers, i.e. no steps can be taken to consummate a transaction without CCI approval.

So far, CCI viewed on-market purchases as an 'inter-connected' step and would treat that as a trigger for filing. Failure to file has resulted in gun-jumping penalties[8]. This requirement practically hamstrung deals with a market-purchase component.

Now, acquirers will be able to make on-market purchases without gun-jumping fears, subject to:

a. A filing within 30 days;
b. No exercise of ownership or beneficial rights in the target

A specific exemption for on-market purchases has been a long-standing ask, especially after penalties were imposed in cases like Thomas Cook and Deepak Fertilizers, ***Shreyas Bhushan, Partner at Resolüt Partners***, said. The CLRC, back in 2019, had also recognised that mandating standstill obligations for stock exchange purchases hampers the viability of acquisitions via public bids, he added.

> *"*
>
> *The exemption will now allow acquirers, especially in takeover situations, to carry out genuine commercial transactions without attracting gun-jumping penalties*
>
> *- **Shreyas Bhushan***
> *Partner, Resolüt Partners*

The numerical threshold: Are covenants to be valued separately?

Covenants such as non-compete clauses and similar non-price factors are standard language in agreements. There is a concern amongst dealmakers whether they'll need to be valued separately.

The language is – deal value must include consideration for any covenant, undertaking, obligation or restriction imposed on the seller or any other person, if it has been agreed separately.

[8] http://164.100.58.95/sites/default/files/Notice_order_document/order/OC-2014-05-%20175.pdf.

> *Since the language used is 'if it has been agreed to separately', it's safe to assume that the intention is not to get parties to start valuing non-competes or similar covenants independently. As long as these covenants are agreed to as part of a larger deal and the documents provide for one consolidated consideration, there should be no requirement to assess if the covenants carry separate additional value*
>
> *- **Shreyas Bhushan***
> *Partner, Resolüt Partners*

The principle is also reflected in guidance by Germany and Austria, jurisdictions which were the earliest adopters of the DVT. Their guidance says that the value of a non-compete is usually included in the purchase price. So, an independent assessment of non-compete clauses will be of little importance in practice. The test is to see if a different consideration value would have been agreed in the absence of a non-compete. It's therefore important to ensure that the transaction documents clearly record that the consideration is for the overall deal and not just for the operative segment (say share sale), added ***Bhushan***.

Look-back & look-ahead window – Impact on real estate and infra platforms

To determine the deal value, regulations require that any consideration from transactions with the target over the past two years, from the relevant date (i.e. the date on which the deal is approved formally). Similarly, the value should also include any consideration that has been agreed to for the next two years as part of the agreement.

> *This will impact real estate and infra platforms transactions where multiple project specific drawdowns are envisaged. Even if the exact drawdown amounts are unclear, the new law requires you to consider the maximum investment possible over a 2-year horizon and accordingly decide whether a filing is required or not. Since the onus is on the acquirer, most platforms that envisage an investment case of >2000cr over 2 years will likely err on the side of caution and obtain a CCI approval*
>
> *- **Shreyas Bhushan***
> *Partner, Resolüt Partners*

Indirect acquisitions: Will DVT get triggered?

Consider a holding company ‘A’ in the Netherlands that has a subsidiary in India. Let’s say investor ‘X’ is acquiring shares in ‘A’, and the consideration meets the DVT thresholds. The question is, will CCI approval be required?

The answer is, yes. The regulations say that an ‘acquisition of one or more enterprises...’ is a combination (thus requiring CCI approval) if the deal value is above INR 2000 crore + substantial business operation test is met.

Here, ‘enterprise’ as defined in the Competition Act, 2002 will be not just the offshore company ‘A’ but it’s subsidiary in India as well. To be clear, this is not a new addition to the law. This illustration is just to clarify that DVT check must be carried out even if the acquisition is overseas/ indirect.

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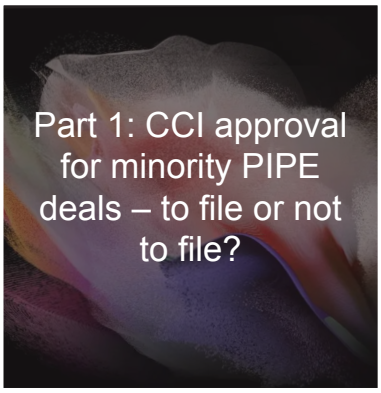





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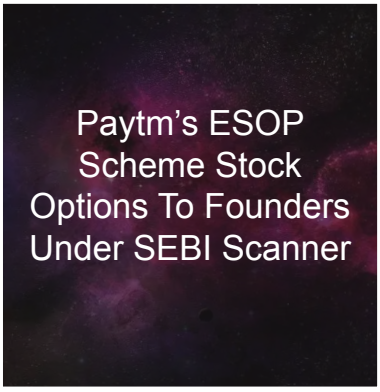



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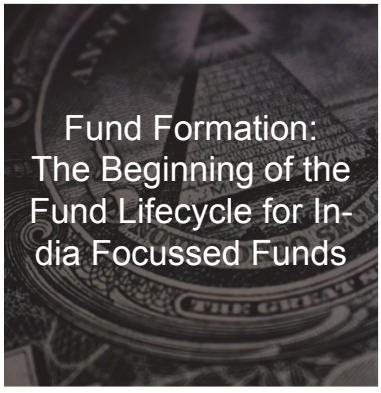




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