KILLER ACQUISITIONS IN INDIA'S STARTUP ECOSYSTEM: REIMAGINING MERGER CONTROL FOR INNOVATION AND FAIR COMPETITION

ABSTRACT

The rise of "killer acquisitions," where incumbents acquire startups primarily to neutralise emerging competition, poses a critical threat to innovation and consumer welfare. India's startup ecosystem among the largest globally is especially exposed, yet many such deals evade scrutiny under merger thresholds designed for asset-heavy industries. Facebook's acquisition of WhatsApp, cleared under India's de minimis exemption, remains a striking illustration.

This paper critically analyses India's merger control regime under the Competition Act, 2002, focusing on its reliance on asset and turnover thresholds. It evaluates the Competition (Amendment) Act, 2023 and the introduction of a Deal Value Threshold (DVT), situating these reforms within global developments in the EU, Germany, and Austria. Using recent Indian examples, including Zomato–Uber Eats and Walmart–Flipkart, the paper highlights how integration choices post-acquisition can either entrench dominance or preserve competitive dynamism.

The analysis adopts a doctrinal and comparative approach, examining statutory provisions, case studies, and international regulatory practices. It argues that while the DVT is a step forward, it is insufficient to curb acquisitions aimed at eliminating strategically significant startups. A more nuanced regime is needed one that filters innocuous deals through the DVT but requires dominant enterprises to notify acquisitions of nascent competitors. Complementary safeguards like rigorous due diligence, effective data governance under the Digital Personal Data Protection Act, 2023, and clearer FDI oversight are also necessary to ensure competitive markets without stifling genuine investment.

By situating India's merger control in comparative perspective, the paper underscores the urgency of a flexible, innovation-sensitive framework that can keep pace with the realities of digital markets and prevent the silent erosion of competition.

Keywords: killer acquisitions; merger control; Competition Act; startups; India; deal value threshold; innovation markets; Digital Personal Data Protection Act.

I. INTRODUCTION

India's startup ecosystem has, in recent years, emerged as one of the most vibrant and promising in the world, firmly establishing the country as a leading hub for technological advancement and entrepreneurial growth. Ranked among the top three startup destinations globally, India today is home to more than a hundred unicorns, besides a vast pool of early-stage startups operating across diverse sectors such as fintech, health-tech, edtech and other disruptive domains. These ventures are now widely recognised as key engines driving economic development, employment generation, and the larger digital transformation reshaping everyday life.

However, alongside this impressive growth story runs a less conspicuous but no less significant concern: the growing threat of killer acquisitions. Such acquisitions arise when a dominant incumbent company acquires a smaller, innovative startup not so much to build on its strengths but primarily to eliminate it as a potential future competitor.[1] This phenomenon first gained scholarly attention through Cunningham, Ederer, and Ma's influential 2018 study focusing on the pharmaceutical industry.[2] Since then, its relevance has only widened, particularly in digital markets where startups, though they may post modest revenues initially, often possess disruptive capabilities that can unsettle entrenched market players.

Globally, well-known instances such as Facebook's acquisitions of WhatsApp and Instagram, or Google's purchase of Waze, have demonstrated how such deals can alter market structures and, over time, limit consumer choice and innovation. India, too, has witnessed similar developments. A case in point is Zomato's acquisition of Uber Eats India,[3] which raises pertinent questions regarding the adequacy of the existing competition law framework to detect and deal with such transactions in a timely manner.[4]

This regulatory dilemma is particularly acute in India. The Competition Commission of India (*CCI*) is empowered to scrutinise mergers under the *Competition Act, 2002*, yet its reliance on traditional asset and turnover thresholds combined with the De Minimis exemption means that many strategically significant deals escape review.[5] The classic example here is Facebook's global acquisition of WhatsApp. Though monumental worldwide, the deal did not trigger India's notification requirements at the time, given WhatsApp's negligible local assets and turnover.

In this context, the present paper critically examines this regulatory blind spot by assessing how startup mergers and acquisitions intersect with India's competition law and innovation policies. While the *Competition (Amendment) Act, 2023* has introduced the Deal Value Threshold (DVT) to expand the scope of scrutiny,[6] concerns remain that this mechanism alone may not be adequate in digital markets where intangible assets such as data, network effects, and 'scale without scale' increasingly shape competitive dynamics.[7] Using statutory interpretation, Indian case examples such as Zomato's acquisition of Uber Eats, and comparative insights from the European Union's merger control framework,[8] the analysis demonstrates why existing thresholds often fail to capture strategically significant transactions. It further interrogates practical challenges such as lapses in due diligence, valuation complexities in startup acquisitions, the treatment of data as a competitive

[1] John M Cunningham, Florian Ederer and Song Ma, 'Killer Acquisitions' (2018) 129(3) *Journal of Political Economy* 649.
[2] Ibid.
[3] Competition Commission of India, *Zomato Media Pvt Ltd/Uber Eats India Combination Order* (2020).
[4] Organisation for Economic Cooperation and Development (OECD), 'Start-ups, Killer Acquisitions and Merger Control – Note by the Secretariat' (DAF/COMP(2020)5, 2020) para 12.
[5] De Minimis Exemption Notification, Ministry of Corporate Affairs, SO 674(E) (2011).
[6] Competition (Amendment) Act 2023, s 5a.
[7] OECD, 'Start-ups, Killer Acquisitions and Merger Control' (OECD Competition Committee Discussion Paper, 2020).
[8] European Commission, *Guidance on Referral Mechanism under EUMR* (2021).

asset, and complications surrounding employee stock options in cross-border deals. The paper concludes by proposing targeted reforms to India's merger control regime aimed at equipping the *Competition Commission* with sharper tools to curb anti-competitive acquisitions, while ensuring that regulatory interventions do not stifle the entrepreneurial risk-taking and innovation central to India's startup ecosystem.

II. UNDERSTANDING KILLER ACQUISITIONS

Killer acquisitions refer to transactions where an established firm acquires a nascent competitor not to expand innovation but to neutralise a potential threat. In practice, this often involves shelving the acquired firm's promising projects, redirecting its resources, or constraining its growth trajectory. The consequence is a dampening of technological progress, diminished consumer choice, and the consolidation of incumbent dominance.[9]

While the phenomenon was first studied in the pharmaceutical sector, its relevance has become more pronounced in digital markets where startups, though initially modest in revenue terms, frequently possess disruptive potential. Technology giants have repeatedly used acquisitions of this kind to entrench market power. Meta's takeovers of Instagram (2012) and WhatsApp (2014) illustrate how early-stage acquisitions can later reshape competition across entire platform ecosystems. These transactions, largely unchallenged at the time due to the limited turnover of the targets, are now revisited in antitrust debates for their long-term exclusionary impact.[10] Google's purchases of YouTube and Waze reflect a similar strategy, demonstrating how incumbents secure control over innovative services before they can mature into credible rivals.[11]

India's fast-growing digital economy presents parallel concerns. The *Zomato–Uber Eats India* deal (2020) consolidated two significant players in online food delivery, raising questions about market concentration and the weight of data-driven advantages. Although cleared by the *Competition Commission of India (CCI)*, the case highlighted how conventional antitrust tools may underplay the competitive significance of such transactions, particularly in markets where value stems more from user bases and network effects than from traditional financial indicators.[12]

A critical difficulty for regulators lies in the nature of startups themselves: they often fall outside merger notification thresholds because of their limited assets or turnover, yet they may control

[9] Colleen Cunningham, Florian Ederer and Song Ma, 'Killer Acquisitions' (2018) 129 *Journal of Political Economy* 649.
[10] US Federal Trade Commission, 'FTC Sues Facebook for Illegal Monopolization' (Press Release, 9 December 2020) https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization accessed 09 July 2025.
[11] S Kamepalli, R Rajan and L Zingales, 'Kill Zone' (2020) NBER Working Paper 27146.
[12] CCI, 2020; P Malik and A Jha, 'Digital Mergers and India's Antitrust Regime: A Way Forward' (2022) *Journal of Antitrust Policy and Practice* 45.

data, technologies, or consumer networks that could shape the competitive landscape. This gap underscores why killer acquisitions cannot be assessed merely through static financial criteria and must instead be understood in terms of their strategic purpose and long-term market impact.[13]

III. LEGAL AND REGULATORY FRAMEWORK GOVERNING STARTUP M&A IN INDIA

Mergers and acquisitions (M&A) involving startups in India are governed by a multi-layered legal regime that draws from corporate law, securities regulations, foreign exchange rules, competition law, and data protection obligations. Navigating this intricate landscape is essential because gaps in regulatory oversight can sometimes allow "killer acquisitions" to go unnoticed.

A. The Companies Act, 2013

At the heart of the legal framework is the *Companies Act, 2013*, which continues to be the principal legislation for mergers, demergers, amalgamations, and asset transfers. Sections 230 to 232 of the Act prescribe a detailed procedure that requires prior approval from the National Company Law Tribunal (NCLT) and incorporates safeguards for creditors as well as minority shareholders.[14] While these provisions uphold procedural fairness and protect stakeholders, they do not engage with the broader question of how such transactions affect market competition, an area overseen instead by the Competition Commission of India (CCI).

B. SEBI Takeover Regulations

When startups achieve listing on stock exchanges, an increasingly common trend in fintech and edtech, the Securities and Exchange Board of India (*Substantial Acquisition of Shares and Takeovers* Regulations, 2011) (*SEBI Takeover Code*) apply.[15] These regulations mandate disclosures and trigger an open offer when an acquirer's shareholding crosses thresholds, usually 25% or more. Although this framework provides important protections for minority shareholders, it is not designed to assess whether takeovers eliminate potential competition or entrench digital monopolies.

C. FEMA and FDI Policy

[13] Arghya Bhattacharya and Rishi Tewari, 'Antitrust Challenges in India's Digital Economy' (2023) 10 *Indian Competition Law Review* 45.
[14] Companies Act 2013, ss 230–232.
[15] Securities and Exchange Board of India (SEBI), *Master Circular for Takeover Regulations*, (SEBI/HO/CFD/DCR-1/CIR/P/2023/29, 31 March 2023) https://www.sebi.gov.in accessed 10 July 2025.

Cross-border transactions invoke the *Foreign Exchange Management Act, 1999* (FEMA)[16] and the Consolidated Foreign Direct Investment (FDI) Policy.[17] These regulate sectoral caps, approval routes, valuation norms, and reporting requirements, overseen primarily by the Department for Promotion of Industry and Internal Trade (DPIIT). Startups in sensitive sectors such as digital commerce or telecommunications must pay special attention to these rules, particularly when global technology firms use complex offshore structures to acquire local players.

D. Competition Act, 2002

The *Competition Act, 2002* is the primary instrument for safeguarding competition. Sections 5 and 6[18] empower the CCI to review combinations that cross specified asset or turnover thresholds. However, the *de minimis* exemption excludes deals where the target's Indian assets or turnover are below INR 350 crore or INR 1,000 crore respectively.[19] This approach has proven inadequate in digital markets where value often derives from user data, algorithms, or network effects rather than tangible assets. The *Competition (Amendment) Act, 2023*[20] attempts to address this lacuna by introducing a Deal Value Threshold (DVT) of INR 2,000 crore for transactions involving targets with "substantial business operations in India." While a welcome development, questions remain about how effectively the DVT will capture strategically significant acquisitions, especially where valuation is opaque or routed through layered offshore entities.

E. Information Technology Act, 2000 and Digital Personal Data Protection Act, 2023

In the digital economy, data is often the core asset driving acquisitions. The Information Technology Act, 2000, along with the *Digital Personal Data Protection Act, 2023*[21], imposes obligations regarding lawful processing, security safeguards, cross-border transfers, and breach notifications. For startups, compliance with these requirements directly influences valuation and investor confidence. For acquirers, lapses in a target's data governance can translate into regulatory liability post-transaction. The competition law dimension becomes relevant here: acquisitions motivated by data accumulation may escape merger scrutiny if assessed only on financial thresholds, even though they can distort competitive dynamics by conferring outsized informational advantages.

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[16] Foreign Exchange Management Act, 1999 (FEMA).
[17] Department for Promotion of Industry and Internal Trade (DPIIT), *Consolidated FDI Policy* (2023).
[18] Competition Act 2002, ss 5–6.
[19] Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations 2011, reg 4.
[20] Competition (Amendment) Act 2023, No 20 of 2023, *Gazette of India Extraordinary*, 11 April 2023.
[21] Digital Personal Data Protection Act 2023 (No 22 of 2023).

F. Due Diligence and Regulatory Gaps

Due diligence is not merely a procedural exercise but a substantive filter for identifying anti-competitive risks in startup acquisitions. In the digital sector, this involves scrutinising the target's data assets, network effects, algorithmic models, and cross-border structuring rather than only financial metrics or shareholder agreements. Regulatory bodies such as SEBI and the Reserve Bank of India (RBI)[22] have begun examining complex ownership structures and ultimate beneficial ownership to ensure transparency. However, due diligence practices remain uneven, and the lack of formal guidance on assessing competition-relevant assets such as user databases or proprietary technologies creates space for killer acquisitions to proceed unchecked. This underscores the need for stronger regulatory alignment between competition law, data protection standards, and financial oversight.

G. Need for Integrated Regulatory Coordination

Taken together, India's regulatory architecture for startup M&A seeks to balance investor protection, foreign capital monitoring, and market competition. Yet gaps remain. Weak coordination among agencies often allows dominant players to acquire promising startups under the guise of strategic investment. A more integrated approach where merger control assessments meaningfully incorporate data governance, foreign investment structures, and sector-specific regulations is essential if India is to prevent anti-competitive consolidation while sustaining its vibrant startup ecosystem.

IV. MERGER CONTROL IN INDIA: GAPS AND CONTINUING CHALLENGES

Merger control is a cornerstone of competition law, aimed at preventing market concentration that undermines innovation and consumer welfare. Yet India's regime leaves critical blind spots, particularly in cases of "killer acquisitions," where dominant firms strategically buy emerging rivals to pre-empt future competition.

A. The De Minimis Exemption: A Mixed Blessing

Under the Competition Act, 2002[23] read with the Combination Regulations[24], mergers must cross specified asset and turnover thresholds to attract scrutiny by the Competition Commission of India

[22] World Intellectual Property Organization (WIPO), *IP Due Diligence: A Guide for Companies* (2022) https://www.wipo.int/wipo_magazine/en/2022/02/article_0005.html accessed 10 July 2025.
[23] Competition Act, 2002, ss. 5–6.
[24] Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011, reg. 4.

(CCI). A major carve-out is the *de minimis* exemption, which spares deals if the target's assets in India do not exceed INR 350 crore or its turnover is below INR 1,000 crore.

While designed to reduce compliance for non-material deals, this exemption has inadvertently created a regulatory blind spot, particularly in technology markets where startups hold minimal tangible assets but significant intangible value—algorithms, intellectual property, or strong user bases. The 2014 *Facebook–WhatsApp* deal[25] illustrates the issue. Valued globally at USD 19 billion, it escaped CCI review because WhatsApp's turnover in India was below threshold, despite its profound long-term impact on India's digital communications and payments ecosystem.

B. The Deal Value Threshold: An Attempt to Plug the Gap

To address this, the Competition (Amendment) Act, 2023[26] introduced a Deal Value Threshold (DVT). Now, any deal above INR 2,000 crore must be notified to the CCI, provided the target has "substantial business operations" in India. This aligns India with Germany and Austria[27], which rely on deal value rather than turnover or assets.

However, the DVT raises interpretive and enforcement challenges. "Substantial business operations" remains undefined, creating uncertainty across industries. More fundamentally, killer acquisitions often involve firms with negligible current revenues but strategic assets like datasets, code, or network effects. In such cases, static monetary thresholds may still fail to capture competitively significant deals.

C. Persistent Gaps in the Digital Sphere

Even with the DVT, loopholes persist in the digital economy. Acquisitions may be structured to avoid detection through staggered stakes, offshore vehicles, or non-cash considerations. The European Union's experience is instructive. Its initial reliance on financial thresholds failed to capture acquisitions in digital and pharmaceutical sectors[28], leading to *ex post* competition harms. The European Commission has since expanded referral mechanisms and relied on abuse of dominance provisions[29] to close gaps.

By contrast, India still lacks a proactive mechanism to revisit non-notified deals. The only recourse is a Section 4 abuse of dominance inquiry[30] as it's reactive, time-consuming, and ill-suited to the pace of digital markets.

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[25] *Facebook–WhatsApp Acquisition*, 2014.
[26] Competition (Amendment) Act, 2023, ss. 5–6.
[27] Bundeskartellamt (Federal Cartel Office, Germany), *Guidance on Transaction Value Threshold* (2018).
[28] OECD, *Competition Issues in the Digital Economy*, n. 7.
[29] Case C-142/19, *Facebook Ireland v Bundeskartellamt*, ECLI:EU:C:2021:888.
[30] Competition Act, 2002, s. 4.

D. Learning from the *Facebook–WhatsApp* Episode

The *Facebook–WhatsApp* deal highlights the perils of a threshold-driven, backward-looking system. By ignoring potential future market effects, CCI missed an opportunity to pre-empt entrenched network effects and large-scale data concentration. The case underscores the need for merger rules that capture not just present turnover, but also intangible assets and the competitive potential of digital firms.

E. The Way Ahead: Strengthening the Regime

The introduction of the DVT undoubtedly represents progress, but it remains insufficient in isolation. For the framework to be effective, India must first provide clear guidance on what constitutes "substantial business operations," so that companies and regulators alike have a consistent benchmark. In addition, the CCI should be vested with discretionary powers to call in transactions that, while falling outside the thresholds, may still have significant anti-competitive effects. Equally important is the establishment of a faster and more efficient *ex post* review mechanism to address acquisitions that manage to escape notification but later reveal themselves to be harmful to competition. Without these complementary measures, India risks repeating the EU's early mistakes, undermining both the integrity of its merger control system and the future of its innovation-driven startup economy.

V. GLOBAL EXPERIENCE: LEARNING FROM THE DEAL VALUE THRESHOLD (DVT)

As India begins to operationalise the Deal Value Threshold (DVT) introduced under the Competition (Amendment) Act, 2023, it is crucial to examine how other jurisdictions have approached similar tools. Countries such as Germany and Austria adopted DVTs to address the challenge of killer acquisitions, particularly in fast-evolving sectors like technology and pharmaceuticals. Their experience offers valuable lessons and cautionary insights for shaping India's merger control regime.

A. Europe's Experience with DVT

In 2017, Germany and Austria restructured their merger control frameworks to capture acquisitions of young, innovative start-ups that attracted high valuations despite negligible turnover or tangible assets. Germany mandated notification where deal value exceeded EUR 400 million (with substantial domestic activity)[31], while Austria set the threshold at EUR 200 million[32]. These reforms were largely prompted by transactions like *Facebook–WhatsApp* and Google's acquisitions in AI, where the competitive stakes lay in future market control rather than immediate revenues.

B. OECD Observations: Limited Gains, Higher Burdens

OECD reviews show that the standalone impact of DVTs has been modest.[33] While they marginally increased the number of notifiable deals, few interventions could be directly traced to them. At the same time, compliance and administrative burdens grew, with frequent disputes over valuing complex deal structures such as earn-outs, deferred payments, or non-cash considerations like intellectual property.[34] In some cases, parties even litigated over whether notification obligations applied.

C. The European Commission's Referral Mechanism

To overcome these gaps, the European Commission revived *Article 22 of the EU Merger Regulation (EUMR)*[35]*,* which allows national authorities to refer sub-threshold deals for EU-level scrutiny. A key case was *Illumina–Grail,* an USD 8 billion acquisition with limited EU turnover but major implications for cancer detection technologies.[36] In 2023, the European Court of Justice upheld this approach, confirming that competition law may intervene even when filing thresholds are not technically met.[37] This illustrates how flexible oversight tools can complement static monetary thresholds.

D. Abuse of Dominance as a Fall-back Option

European regulators have also used *Article 102 TFEU* to challenge acquisitions of potential competitors as exclusionary conduct when undertaken by dominant firms.[38] However, reliance on ex-post abuse of dominance cases is problematic: proceedings are slow, often outpaced by technological change, and remedies may arrive too late to restore lost competition.

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31 Federal Cartel Office (Germany) and Bundeswettbewerbsbehörde (Austria), *Joint Guidance on Transaction Value Thresholds* (2017).
32 Ibid.
33 OECD, 'Start-ups, Killer Acquisitions and Merger Control – Background Note' DAF/COMP(2020)5.
34 OECD, 'Merger Control in the Digital Age' DAF/COMP(2019)5.
35 Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2004] OJ L24/1).
36 European Commission, *Illumina/Grail (Case M.10188) Commission Decision C(2021) 2847 final.*
37 Case C-611/22 P *Illumina, Inc. v European Commission* ECLI:EU:C:2024:677.
38 *Treaty on the Functioning of the European Union*, art 102).

E. Key Takeaways for India

Europe's experience underscores that a static DVT alone cannot address killer acquisitions. In digital markets, where intangible assets, user data, and first-mover advantages matter more than turnover, monetary thresholds often miss the competitive harm. For India, the DVT should be a first filter, not a standalone solution. Supporting safeguards are essential:

1. Clear valuation rules for non-cash considerations, share swaps, and deferred payments[39];
2. Strong 'call-in' powers for the Competition Commission of India (CCI) to examine potentially harmful deals that escape thresholds;
3. A referral mechanism, akin to *Article 22 EUMR,* enabling state-level or sectoral regulators to flag suspicious transactions.[40]

While ex-post enforcement under the Competition Act, 2002 remains a useful backstop, it should not be the primary safeguard. Without layered protections, India risks replicating Europe's early blind spots, where dynamic markets were consolidated before regulators could act.

VI. DUE DILIGENCE AND DATA COMPLIANCE IN STARTUP M&A: LEGAL, FINANCIAL, IP, AND PRIVACY ISSUES

In the context of killer acquisitions, due diligence serves a dual purpose: not merely verifying compliance but also detecting red flags that may indicate an acquisition is aimed at stifling innovation or eliminating competition. In India, where startups often scale rapidly on the strength of intellectual property and user data rather than tangible assets, the depth and orientation of due diligence can decisively shape competition outcomes. Traditional approaches that focus narrowly on financial liabilities or corporate governance structures risk missing how such acquisitions affect market dynamics, data monopolisation, and consumer welfare.[41]

A. Corporate and Legal Due Diligence

Legal due diligence under the *Companies Act, 2013* and *SEBI* regulations is necessary but insufficient in isolation.[42] In killer acquisitions, acquirers frequently exploit shareholder agreements and preferential rights (e.g., drag-along, tag-along, or liquidation preferences) to consolidate control and silence minority investors who may otherwise resist anti-competitive buyouts. For example, in the *Zomato–Uber Eats* transaction (2020), analysts observed that deal structuring and shareholder

[39] OECD, 'Merger Control in the Digital Age' DAF/COMP(2019)5);
[40] Ibid.
[41] Digital Personal Data Protection Act 2023 (No 22 of 2023).
[42] Companies Act 2013, ss 2(20), 173–195; Securities and Exchange Board of India (Share Based Employee Benefits and Sweat Equity) Regulations 2021.

alignment ensured a smooth exit for Uber but simultaneously removed a rival in India's food delivery market. Thus, legal due diligence must probe not only compliance but also how contractual arrangements may facilitate market exit strategies with adverse effects on competition.

B. Financial and Tax Due Diligence

Financial diligence is often portrayed as neutral number-crunching, yet in the context of killer acquisitions it assumes a strategic dimension. By scrutinising revenue dependency, customer concentration, and funding structures (convertible notes, preference shares, etc.), acquirers often identify startups whose financial vulnerabilities make them susceptible to buyouts at valuations below their innovation potential.[43] The *Walmart–Flipkart* deal illustrates how layered investor structures complicate valuation; in killer acquisitions, such complexity can obscure whether an acquisition genuinely enhances efficiency or simply neutralises a future rival.[44] A critical approach demands distinguishing between acquisitions motivated by efficiency gains and those exploiting financial fragility for competitive foreclosure.

C. Intellectual Property Rights Audit

IP diligence is especially revealing in startup acquisitions. Where the target's value lies in proprietary algorithms, trade secrets, or patents, the question is not merely ownership but whether the acquisition transfers critical technology from a potential challenger to an incumbent. Killer acquisitions often involve acquiring startups at the early innovation stage before IP is fully commercialised, with the effect of shelving competing technologies. This phenomenon has been documented in the pharmaceutical sector globally, where incumbents acquire R&D pipelines only to discontinue them. India's technology and fintech ecosystems are increasingly vulnerable to similar risks, making IP audits a competition tool as much as a legal necessity.

D. Data Privacy and Cybersecurity Assessment

Data has emerged as both an asset and a weapon in digital markets. Under the *DPDP Act, 2023*, compliance with privacy obligations is mandatory; yet in killer acquisitions, the concern extends further: consolidation of user datasets by dominant firms can entrench market power and foreclose new entrants.[45] For instance, in sectors such as healthtech and edtech, acquiring access to granular consumer data can provide incumbents with competitive advantages unrelated to efficiency but

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[43] EY India, '*Startup Due Diligence Checklist*' (2023) https://www.ey.com/en_in/startups accessed 12 July 2025.
[44] 'Walmart Completes $16 Billion Flipkart Deal' Reuters (9 August 2018) https://www.reuters.com/article/us-flipkart-m-a-walmart-idUSKBN1KU0YK accessed 12 July 2025.
[45] DPDP Act 2023, ss 5–7; Ministry of Electronics and Information Technology, *Guidelines for Data Protection* (2024).

detrimental to market contestability. Due diligence, therefore, must assess not only whether user consent is valid but whether the transfer of data raises risks of data monopolisation that should trigger heightened scrutiny under merger control.

E. Cross-Border Data Transfers and Localisation

Cross-border data transfers complicate due diligence in acquisitions involving global players. A foreign acquirer using offshore data storage may not only raise compliance concerns under localisation requirements but also alter competitive dynamics by moving sensitive datasets outside India's jurisdiction. This issue has implications for both regulatory sovereignty and competitive fairness. In an ecosystem where Indian startups increasingly partner with foreign cloud providers, overlooking such risks could allow incumbents to consolidate control over data-driven markets while regulators struggle to enforce oversight.

VII. VALUATION, DEAL STRUCTURING, AND FOUNDER PROTECTIONS IN STARTUP M&A

Mergers and acquisitions (M&A) involving startups pose challenges distinct from those in traditional industries. In India, the interplay between complex regulations and the difficulty of valuing early-stage ventures makes careful legal structuring indispensable. Since founders often embody the identity of these enterprises, transactions must balance stakeholder interests with statutory compliance.

A. Assessing the Worth of Early-Stage Startups

Conventional valuation models relying on EBITDA multiples or stable revenue streams are largely irrelevant for young startups. Instead, valuations hinge on forward-looking indicators such as scalability, user traction, and defensible intellectual property. For instance, Zomato's acquisition of Uber Eats India in 2020 was driven more by customer base expansion than profitability.[46]

Investors typically rely on:

1. *Growth and User Metrics* – acquisition costs, churn rates, and user growth trajectories;
2. *Intellectual Property Strength* – patents or proprietary technology securing competitive advantage;
3. *Market Scalability* – realistic projections of future market size and revenues.

[46] Zomato–Uber Eats India Acquisition, 2020.

Additionally, India's layered shareholding structures like seed investors, venture capital, convertible instruments can complicate exits. Poorly drafted liquidation waterfalls often trigger disputes, as seen in the *Snapdeal–Jasper Infotech* case.[47]

B. Structuring the Deal: Balancing Risk and Control

Given high uncertainty, deal terms frequently employ earn-outs, tying part of the price to milestones like revenue or technology roll-outs. Conditional payments, escrows, and lock-in clauses for founders or key personnel protect acquirers from overvaluation and knowledge drain. Choice of acquisition method carries legal and tax implications. Share purchases may import hidden liabilities under the Companies Act, 2013,[48] while asset purchases trigger higher stamp duties and GST. Cross-border deals face FEMA restrictions on pricing and share swaps,[49] underscoring the regulatory tightrope startups must navigate.

C. Handling ESOPs in M&A

Employee Stock Option Plans (ESOPs) are vital in retaining talent but complicate negotiations. Key issues include:

1. Treatment of unvested options on change of control;
2. Compliance with *SEBI's 2021 ESOP Regulations* for listed entities;[50]
3. Fair payouts to prevent attrition.

In the Flipkart–Walmart deal, a dedicated ESOP bonus pool ensured continuity, demonstrating how poor handling of incentives can undermine competitive advantage.[51]

D. Safeguarding Founders' Rights and Stakes

Since founders often embody the startup's vision, their alignment post-acquisition is crucial. Common protections include:

1. *Non-compete/Non-solicit Clauses* – though subject to *Section 27 of the Contract Act, 1872*,[52] which limits enforceability of overly restrictive terms;
2. *Vesting Acceleration* – ensuring unvested shares/options vest upon a qualifying 'change of control';
3. *Defined Transition Roles* – advisory or executive responsibilities during integration.

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47 Snapdeal–Jasper Infotech Case Analysis, 2018.
48 Companies Act, 2013, ss. 230–234.
49 Reserve Bank of India, *Master Direction – Foreign Investment in India*, updated 2022.
50 SEBI (Share Based Employee Benefits and Sweat Equity) Regulations, 2021.
51 Flipkart–Walmart Deal Press Release, 2018.
52 Contract Act, 1872, s. 27.

Yet, excessive founder entrenchment can inflate costs or deter buyers. Thus, protections must balance enforceability with commercial practicality.

VIII. CROSS-BORDER M&A AND SPACs: LEGAL NUANCES AND THE ROAD AHEAD

Cross-border mergers and acquisitions (M&A) have emerged as a strategic avenue for Indian startups to attract global investors, expand overseas, and offer exit routes for early-stage investors. Unlike domestic deals, however, cross-border transactions inevitably involve heightened legal, regulatory, and tax complexities that shape both feasibility and competitiveness.

A. FEMA Regulations and Foreign Investment Conditions

At the heart of India's foreign investment regime lie the *Foreign Exchange Management Act, 1999 (FEMA)*,[53] and the Consolidated FDI Policy framed by the DPIIT.[54]. Startups exploring such deals often face recurring hurdles: sectoral caps restricting investment in sensitive industries such as multi-brand retail, defence, and insurance; RBI-imposed pricing and valuation norms ensuring transactions occur at fair market value;[55] and the prohibition of round-tripping structures that route domestic funds abroad only to re-enter India indirectly.
These restrictions directly affect Indian startups exploring global listings or mergers with *Special Purpose Acquisition Companies (SPACs).* Further, cross-border mergers require approval from the NCLT under Sections 230–234 of the Companies Act, 2013,[56] a process that adds significant delays and compliance costs.

B. Tax Implications in Cross-Border Deals

Taxation remains another critical bottleneck. Resident Indian shareholders face heavy capital gains liabilities on cross-border share transfers, while overseas acquirers risk creating a taxable presence (Permanent Establishment) in India if operations meet domestic thresholds.[57]
Structuring becomes decisive: choosing between share vs. asset sales, and leveraging favourable treaty jurisdictions,[58] can substantially alter tax incidence and net investor returns. The absence of clarity often raises the cost of cross-border deals, discouraging early-stage startups from considering global tie-ups.

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53 Foreign Exchange Management Act, 1999.
54 DPIIT, '*Consolidated FDI Policy*, 2020'.
55 Reserve Bank of India, *Master Direction – Foreign Investment in India*, updated 2022.
56 Companies Act 2013, ss 230–234.
57 Income Tax Act 1961, s 9(1)(i); OECD Model Tax Convention on Income and Capital 2017, Art 5.
58 India–Singapore Double Taxation Avoidance Agreement 1994.

C. SPACs: An Emerging Avenue with Unresolved Challenges

SPACs have become attractive for Indian startups as a faster alternative to conventional IPOs.[59] Firms like ReNew Power and Grofers (Blinkit) accessed US SPACs between 2020 and 2022, signalling interest in the model.[60] Yet, India's legal ecosystem lags behind this innovation. Although SEBI released a consultation paper in 2023 on domestic SPACs,[61] regulations remain pending. Startups pursuing the SPAC route must still navigate FEMA's round-tripping restrictions, strict valuation norms, and unclear tax treatment of SPAC gains as factors that currently limit wider adoption.

D. Case in Point: ReNew Power's SPAC Merger

ReNew Power's $8 billion merger with *RMG Acquisition Corporation II* remains one of India's largest SPAC exits,[62] demonstrating the potential of SPACs to channel global capital into capital-intensive sectors like renewable energy. Yet, it simultaneously exposed India's grey areas like FEMA compliance, remittance restrictions, and taxation of repatriated profits that continue to cloud investor confidence.[63]

E. The Road Ahead

Cross-border M&A and SPACs hold undeniable promise, but regulatory inertia risks undercutting India's startup ambitions. Faster NCLT approvals, clearer FEMA guidelines on round-tripping and valuation, and SEBI's long-awaited SPAC framework are essential to unlock this potential. Until such reforms materialise, Indian startups must rely on meticulous legal structuring, robust tax planning, and proactive regulatory engagement to navigate these challenges. Absent reform, India risks ceding ground to jurisdictions with more agile regulatory frameworks, limiting both competitiveness and capital inflows.

IX. POST-MERGER INTEGRATION & GOVERNANCE: COMPETITION DIMENSIONS

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59 SEBI, *Consultation Paper on Special Purpose Acquisition Companies* (2023).
60 'ReNew Power Merger with RMG Acquisition Corp II', ReNew Power Press Release, 2021.
61 See n59
62 'ReNew Power to Go Public via $8 Billion SPAC Merger with RMG Acquisition Corporation II' (Business Standard, 24 February 2021) https://www.business-standard.com/article/companies/renew-power-to-go-public-via-8-billion-spac-merger-with-rmg-121022400151_1.html accessed 18 July 2025.
63 Ibid.

The success of a startup merger is measured not only by the signing of agreements but also by how post-merger integration (PMI) influences competitive dynamics in the market. Integration choices can determine whether such deals preserve innovation or instead entrench the acquirer's dominance, making PMI a crucial, though often overlooked, dimension of merger control.

A. Retaining Founders and Core Teams: Preventing Innovation Killers

For innovation-driven startups, the founders and technical teams embody critical intellectual capital. Retention mechanisms such as lock-in periods, earn-outs, and equity rollovers are widely used. However, from a competition perspective, these measures can operate in two directions. They may preserve continuity and incentivise innovation (as seen in *Byju's–WhiteHat Jr.*),[64] but they may also delay the entry of talent into new ventures, indirectly restricting future competition. Regulators must therefore consider whether such clauses serve legitimate transitional needs or amount to anti-competitive restraints on entrepreneurial mobility.

B. Cultural Compatibility and Market Dynamism

Cultural clashes often drive talent exits, undermining the startup's innovative capacity. While integration strategies like operational independence and cultural due diligence[65] can mitigate this risk, they also have competition implications. Preserving autonomy may enable the acquired entity to continue innovating, whereas heavy-handed assimilation may suppress potential market rivalry. This raises a regulatory question: should integration plans form part of merger review, particularly where cultural absorption is likely to neutralise a nascent competitor?

C. Operational Synergies and Consumer Welfare

Synergies in technology, product development, and market access are often cited as efficiencies justifying mergers. Yet, in digital markets, these efficiencies can mask exclusionary risks such as bundling services, leveraging combined data pools, or foreclosing smaller rivals through vendor exclusivity. Gradual integration, while operationally sound, also reduces regulatory visibility over how market power is consolidated. This suggests a need for competition authorities to adopt post-clearance monitoring tools to track whether promised efficiencies actually translate into consumer benefits.

D. Governance Structures and Dominance Risks

[64] LiveMint, 'Byju's Acquires WhiteHat Jr: Founder to Stay Onboard' (LiveMint, 2020) https://www.livemint.com accessed 20 July 2025.
[65] KPMG, *Cultural Due Diligence in Mergers* (2021) https://home.kpmg accessed 20 July 2025.

Post-merger governance is not merely about oversight; it affects how market power is exercised. Retaining founders on boards[66] or aligning with SEBI's LODR norms may ensure continuity, but in concentrated markets such governance may facilitate strategic collusion or coordinated conduct. For instance, overlapping directorships and investor representation can dampen competitive incentives across related entities. Competition law should therefore view governance structures as potential conduits for dominance rather than neutral corporate formalities.

E. Policy Lessons and Indian Context

Many Indian mergers falter not because of regulatory clearance but due to weak integration planning that inadvertently eliminates the startup's innovative edge. Policy responses could include:

1. Requiring disclosure of integration strategies during merger review, especially where data-intensive or innovation-driven sectors are involved.
2. Monitoring treatment of ESOPs[67] and founder contracts, since mishandling these often accelerates talent exits that reduce long-term competition.
3. Incorporating innovation impact assessments into CCI's merger analysis, ensuring that PMI does not undermine competitive potential under the guise of efficiency.

F. Flipkart–Walmart: A Case in Point

Walmart's acquisition of Flipkart[68] illustrates how integration choices shape competition. By retaining Flipkart's leadership and operational autonomy, Walmart avoided the immediate stifling of innovation. Yet, its gradual imposition of stronger governance and compliance frameworks consolidated Flipkart's dominance in e-commerce. While consumer benefits such as scale and efficiency were realised, the deal also raised concerns about market concentration and vendor dependence, demonstrating the thin line between healthy integration and anti-competitive consolidation.

X. POLICY RECOMMENDATIONS: TOWARDS A CALIBRATED FUTURE

India's flourishing startup ecosystem today demands a merger control framework that balances innovation promotion with vigilance against covert anti-competitive acquisitions. Currently,

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[66] EY, Post-Merger Integration in India's Startup Sector (2022) https://www.ey.com accessed 18 July 2025.
[67] Deloitte, Earn-Outs and Founder Lock-Ins: M&A Structuring (2023) https://www2.deloitte.com accessed 20 July 2025.
[68] Reuters, 'Walmart Completes Acquisition of Flipkart' (Reuters, 2018) https://www.reuters.com accessed 21 July 2025; Economic Times, 'How Flipkart Retained its Startup DNA Post-Walmart' (ET Tech, 2021) https://economictimes.indiatimes.com accessed 21 July 2025.

India's regime relies heavily on fixed asset and turnover thresholds, which often fail to capture the dynamic nature of digital-first markets. The *Facebook–WhatsApp acquisition* exemplifies this gap, having entirely evaded scrutiny due to the target not exceeding the de minimis thresholds.[69]
Recognising this blind spot, the Competition (Amendment) Act, 2023 introduced the Deal Value Threshold (DVT).[70] Nevertheless, international experience shows that DVTs alone are rarely sufficient. Applied mechanically, they may overextend regulatory resources and impose compliance burdens on low-risk transactions, offering minimal benefit to competition enforcement.

A. <u>DVT is Not a Silver Bullet</u>

Insights from Europe illustrate the limitations of DVTs. Germany and Austria adopted DVTs to capture subtle acquisitions overlooked by traditional thresholds.[71] Yet, in practice, few additional deals were effectively scrutinised, while reporting obligations increased compliance costs. These experiences underline the need for India to adopt DVTs judiciously rather than wholesale.

B. <u>A Combined Approach for Stronger Oversight</u>

A more effective strategy integrates the DVT with supplementary checks. The current INR 20 billion threshold should remain flexible, revised periodically based on inflation, market developments, and characteristics of digital-first enterprises. This ensures low-risk deals are excluded while capturing transactions with genuine potential to distort competition.
Additionally, any acquisition by a dominant player in the relevant market must trigger mandatory notification. This targets the key risk of incumbents absorbing emerging competitors, a concern highlighted by the OECD and under review by the European Commission for tech and pharmaceutical sectors.[72] In India, this measure is particularly relevant in consumer tech and life sciences, where market concentration is high.

C. <u>Practical Steps for Effective Implementation</u>

Implementation requires clear criteria for defining *"dominance"*, drawing on CCI precedents and market-share thresholds.[73] Fast-track approvals for clearly non-harmful transactions can provide regulatory certainty.

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[69] Competition Commission of India, *Annual Report* (2020–21); OECD, *Start-ups, Killer Acquisitions and Merger Control* (OECD, 2020) https://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf.
[70] Competition (Amendment) Act 2023, s. 5.
[71] Federal Cartel Office (Germany), *Annual Report* (2020).
[72] European Commission, *Merger Control in the Digital Age* (2021) https://ec.europa.eu/competition.
[73] *Google Inc v. CCI* (2022) Supreme Court of India.

Strengthening CCI's technical capacity is crucial, especially for assessing non-price harms such as innovation bottlenecks or competition risks in data-driven sectors. Coordination with SEBI, DPIIT, and sectoral regulators is essential, given overlaps between competition, data privacy, cross-border digital trade, and emerging technologies.

D. Long-Term Measures for a Resilient Framework

Future-proofing requires more than short-term tweaks. Periodic review of DVT and de minimis thresholds should be institutionalised to reflect startup valuations and evolving industry practices. CCI should provide clear guidance on non-price harms, including data monopolies and innovation bottlenecks. Regular dialogue with industry, VCs, and competition experts can keep the framework pragmatic and aligned with ground realities.

E. Striking the Right Balance

A well-calibrated merger control system shields young enterprises from premature acquisitions while avoiding unnecessary procedural hurdles for low-risk deals. This preserves incentives to innovate and compete on merit, ensures investment flows remain robust, and strengthens India's position as a leading destination for innovation-led growth.

XI. CONCLUSION

The phenomenon of "killer acquisitions" casts a subtle yet significant shadow over the competitive spirit of today's markets, a concern particularly relevant for a growing economy like India's, which depends on fresh ideas and the dynamism of its young startups. When dominant players quietly absorb promising new entrants before they mature into credible competitors, such transactions often stifle competition and weaken the incentives that drive entrepreneurship and technological progress.

India's merger control framework, rooted in the Competition Act, 2002 and strengthened by the 2023 Amendment, offers a solid legal foundation. However, its traditional reliance on financial thresholds does not always capture the nuances of digital markets and intangible assets. In this regard, the introduction of the Deal Value Threshold (DVT) is a step forward. Yet, experiences from Germany, Austria, and the European Union illustrate that relying solely on a DVT may be insufficient for addressing innovation-driven acquisitions.

A well-known instance is Facebook's acquisition of WhatsApp. Despite WhatsApp's massive global user base, the deal escaped India's merger scrutiny due to low domestic turnover at the time,[74] highlighting that static measures like turnover or asset size can fail to detect transactions with profound implications for competition and consumer welfare.[75]

At the same time, tightening rules requires careful balancing. India's startup ecosystem must not be burdened with unnecessary compliance hurdles that could discourage legitimate, growth-oriented mergers. Many transactions are essential for unlocking scale, advanced technologies, and vital capital inflows. The real challenge lies in striking a balance between protecting innovation and ensuring a conducive business environment.

One possible way forward is to complement a thoughtfully designed DVT with an additional filter that flags deals involving entities with significant market power in their sectors. This twin-layered approach could catch strategically structured transactions aimed at suppressing future competition without burdening routine, bona fide deals.

Moreover, enhancing the institutional capacity of the Competition Commission of India is critical. The CCI's tools must evolve to better account for non-price factors, the peculiarities of innovation-led markets, and the network effects defining data-centric sectors.[76] Close coordination with sector-specific regulators, such as the data protection authority under the DPDP Act, 2023, is equally important, especially where mergers involve sensitive consumer data.[77]

Robust checks of legal, financial, and intellectual property aspects at every stage of a merger or acquisition are essential. Such diligence ensures that transactions remain compliant with India's competition law, align with global best practices, and adapt to evolving data privacy norms.

In conclusion, India's competition law must evolve in step with modern markets without becoming a barrier to genuine entrepreneurial growth. A forward-looking, innovation-sensitive merger control system can safeguard emerging disruptors, strengthen consumer welfare, and reinforce India's standing as a fair and resilient innovation hub. With this approach, the country can move beyond merely nurturing startups to establishing itself as a global example of balanced, competition-friendly growth in the digital era.

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[74] See n70

[75] *The Economic Times*, 'CCI did not examine Facebook-WhatsApp deal due to low turnover' (New Delhi, 19 October 2014) https://economictimes.indiatimes.com/news/company/corporate-trends/cci-did-not-examine-facebook-whatsapp-deal-due-to-low-turnover/articleshow/44883102.cms accessed 21 July 2025.

[76] *European Commission v Facebook/WhatsApp* Case COMP/M.7217 [2014] OJ C417/03.

[77] *Digital Personal Data Protection Act 2023*, s 5.