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CHANGING CONTOURS OF MERGER CONTROL: EXPLORING THE ENFORCEMENT GAP IN REGULATING NASCENT ACQUISITIONS

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ABSTRACT

This paper deals with the anticompetitive effects of nascent acquisitions. The traditional approach in merger control is based on the turnover of the merging entities, assets, and other notifiable requirements. More often than not, acquisition involving nascent competitors do not meet the required thresholds, and hence evade antitrust scrutiny. At other times, though the threshold of the acquisition invokes the jurisdiction of the regulator, it escapes the liability due to existing loopholes in the enforcement framework. The authors analyse the peculiarity of major jurisdictions (US, EU, UK and India) in tackling the issues involving nascent acquisitions, and attempt to locate the existing enforcement gap within the larger debate of regulating nascent acquisitions. Recent research and empirical data have shown the evolution of various theories of harm with respect to nascent acquisitions. This paper specifically deals with the Killer Acquisition theory and the Nascent Potential Acquisition theory.

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The apprehension of harm caused by such acquisitions is prevalent in dynamic markets, such as pharmaceutical markets and new-age digital markets. The authors argue in this paper that the potential for harm in cases of nascent acquisitions should be duly addressed and dealt with in order to ensure continuous innovation in dynamic future markets.

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I. INTRODUCTION

Nascent firms and start-ups are integral to every competitive market. In fact, nascent firms encourage innovation, steer economic growth, increase competition, reduce market inequality, and shun stagnancy in the market.[1] Saying this, they are more vulnerable to exclusionary and abusive conduct by dominant firms in the market.[2] The primary duty of an antitrust regulator is to provide a level playing field and to ensure the continuing presence of nascent firms in the market.[3]

In this paper, we will deal with two different approaches to merger control in the antitrust regime. The current approach, which we term as the traditional approach, mandates antitrust scrutiny only on the fulfilment of a certain threshold. The threshold can be based on the turnover of the merging entities, assets and other notifiable requirements. More often than not, acquisition involving nascent competitors do not meet the required thresholds, and hence evade antitrust scrutiny.[4] At other times, though the threshold of the acquisition invokes the jurisdiction of the regulator, it escapes the liability due to existing loopholes in the enforcement framework. Such loopholes in the framework are a result of multiple factors

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1 C Scott Hemphill and Tim Wu, 'Nascent Competitors' (2020) 168 University of Pennsylvania Law Review 1879 <https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3665&context=faculty_scholarship> accessed 8 March 2021.

2 ibid.

3 Tim Wu, 'Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most' (2012) 78 Antitrust Law 313 <https://scholarship.law.columbia.e du/cgi/viewcontent.cgi?article=2768&context=faculty_scholarship> accessed 8 March 2021.

4 Policy Statement 225/730 ICC Recommendations on Pre-Merger Notification Regimes (2015).

such as inaccurate assessment of counterfactual, no authority for ex-post review of merger control decisions, etc. For instance, mergers such as *Google/Waze*, *Facebook/Instagram* evaded antitrust scrutiny for not meeting the required threshold, or for the assumption of having an inconsequential impact.[5] We discuss such missed opportunities in detail later in the paper.

The term 'nascent competitor' mainly denotes a particular category of product or technology that is relatively new, and has the ability to be a notable competitor in the future.[6] It is often confused with the term 'potential competitor', but it differs in meaning. Broadly speaking, a nascent competitor is one that exists in the market but still has not matured or reached its potential. Whereas the term potential competitor refers to a product or service that does not exist currently but is likely to be a competitor in the near future.[7] The traditional approach in merger control and antitrust regulation has limited the role of these nascent firms to only forecasting barriers to entry or providing an estimate of competitive constraint in a relevant market.[8] This approach coupled with their rare presence as a merger entity (due to low turnover) has created a perception of them having an inconsequential impact on competition.

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[5] Jessica Bowring and Louise Tolley, 'The Lear Report on Digital Mergers' (2019) Thomas Reuters 27 June 2019 <https://uk.practicallaw.thomsonreuters.com/w-020-9330?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 8 March 2021.

[6] John M Yun, 'Potential Competition and Nascent Competitors' (2019) 4 The Criterion Journal on Innovation 625, 629.

[7] ibid.

[8] OECD Secretariat, 'Start-ups, Killer Acquisition and Merger Control Thresholds' (2020) OECD 12 May 2020 <https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf> accessed 4 November 2020.

The contests to such a traditional approach started when Cunningham et al (2018) identified the trend of dominant market players acquiring a large number of newly formed nascent firms.[9] They studied a sample of more than 16,000 projects initiated by nearly 4,000 pharmaceutical companies over a period of two years. In an attempt to prevent future competition, these incumbents acquired nascent targets in the horizontal market to discontinue – or 'kill' – their ongoing projects. The researchers named such acquisitions as 'Killer Acquisitions' for their ability to pre-empt potential competition and get rid of a promising and innovative project. This analysis gave perspective to an apparent loophole in antitrust scrutiny and merger control in major jurisdictions around the world.

The apprehension of harm caused by such acquisitions is accentuated in the context of new-age digital markets. Elena Argentesi et al (2020), taking a cue from the existing narrative, argues that the trend of acquiring nascent firms is more pervasive in the digital economy.[10] The tech giants in recent years have been aggressively involved in acquisitions of start-ups that might pose a future competition constraint. In between 2008 to 2018, Google acquired 168 companies, Facebook acquired 71 companies and Amazon acquired 60 companies.[11] These nascent firms, if not acquired, might have continued to possess a competitive threat to the incumbents.

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[9] Cunningham and others, 'Killer Acquisitions' (2020) Journal of Political Economy 19 April 2020 <http://dx.doi.org/10.2139/ssrn.3241707> accessed 21 October 2020 (forthcoming).

[10] Elena Argentesi and others, 'Mergers and Merger Policy in Digital Markets' (2020) Vox CEPR 4 March 2020 <https://voxeu.org/article/mergers-and-merger-policy-digital-markets> accessed 3 November 2020.

[11] ibid.

The end result might have been more innovation, low entry barriers and streamlined market behaviour.[12] On the contrary, however, allowing for the acquisition of these nascent firms without proper scrutiny would curb the rate of innovation, increase market concentration and further tip the market in favour of the incumbents.[13] Saying this, we are not arguing that all of such acquisitions have had a negative impact on innovation in the market, but at the same time, we cannot ignore the fact that many acquisitions have evaded antitrust scrutiny irrespective of their impact.

The acquisition of a nascent firm does not necessarily mean that its projects will be discontinued. Many times, the proposed aim of an acquisition is to remove a competitor which would allow the incumbent to further strengthen its foothold in the market. Such type of acquisition can be categorized as 'Nascent Potential Acquisition'. In any case, such an acquisition always has chilling effects on competition in the market.[14] Nascent acquisitions also include a range of other probabilities based on the situation in the present and future market. But the discussion in this paper is only limited to killer acquisition and nascent potential acquisition. It is imperative to note that these terms are only indicative of the rationale behind an acquisition that is derived from an observed trend and does not constitute a different category of acquisition in itself. The terms only highlight a probable theory of harm that is relevant in the assessment of an acquisition.

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[12] Hemphill and Wu (n 1).
[13] OECD Secretariat (n 8).
[14] ibid.

The debate surrounding nascent acquisitions has recently gained traction with the increase in empirical evidence,[15] and with the publication of peer review by OECD (2020) on start-ups, killer acquisitions and merger control.[16] The recent trends coupled with evolving research attracted the vigilance of competition regulators to this issue.[17] Enforcement agencies across jurisdictions have taken the effort to address the nuances of the anticompetitive impact of nascent acquisitions, and the scope of improvement in antitrust policy. Through this paper, we argue that nascent potential acquisitions and killer acquisitions possess an imminent threat to innovation, and dynamism in new age markets, and hence greater emphasis needs to be given to identify, investigate and regulate these acquisitions.

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15 Cunningham (n 9); Argentesi (n 10).

16 OECD Secretariat (n 8).

17 Stigler Committee, 'Stigler Committee on Digital Platforms, Final Report' (2019) Chicago Booth September 2019 <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf> accessed 2 November 2020; Report of the Digital Competition Expert Panel, 'Unlocking digital competition' (2019) UK Government March 2019 <_https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 8 March 2021; Lear, 'Ex-post Assessment of Merger Control Decisions in Digital Markets' (2019) Competition and Market Authority 9 May 2019 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf> accessed 19 October 2020; Ministry of Corporate Affairs 'Report of the Competition Law Review Committee' Ministry of Corporate Affairs July 2019 <http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf> accessed 3 November 2020; Jacques Crémer and others, 'Competition policy for the digital era, Final Report' (2019) European Commission 2019 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 4 November 2020.

This paper is divided into three parts. Part I surfaces our primary argument on the need to regulate nascent acquisitions, particularly killer acquisitions and nascent potential acquisitions. We conflict our ideas with that of the scholars who argue for a lenient merger control regime in order to curb the possibility of over regulation. In doing so, we base our argument on the traditional understanding of consumer welfare in antitrust. Part II of the paper deals with the procedural and jurisdictional aspects of merger control in the United States (US), the European Union (EU), the United Kingdom (UK) and India. This part analyses the peculiarity of each jurisdiction in tackling the issues involving nascent acquisitions and attempts to locate the existing enforcement gap. By enforcement gap, we mean the prevailing uncertainty as to the treatment of nascent acquisitions in each of those jurisdictions. Part III of the paper elaborates on the possible remedies and focuses on the investigation and assessment part of merger control. In light of this, we emphasize that the merger control regime across jurisdiction needs to evolve in policy and action to better tackle the issues of market concentration, and loss of innovation in dynamic future markets.

II. PART I: THE NEED TO REGULATE NASCENT ACQUISITIONS

To better understand the need to regulate nascent acquisitions, it is important to discuss the strategy behind such acquisitions. Though not an exhaustive examination, an incumbent might acquire a nascent firm for the following possible reasons: (1) to provide investment aid to the nascent firm, (2) to shun future competition by acquiring a firm before it matures, or (3) to continue the nascent firm's projects without the risk of harming its own sales. The first type of acquisition highlights that not all nascent acquisitions are anti-competitive in nature as they might help in providing necessary funding to the nascent firms.[18] The second kind of acquisition can be termed as a 'killer acquisition', wherein the intention is to discontinue the existing projects of the firm upon acquisition. It has been seen to be the most prevalent in the pharmaceutical sector.[19] The third type of acquisition can be termed as a 'nascent potential acquisition', the aim of which is only to kill the existing competition and not the product itself. This is more prevalent in digital markets, wherein an incumbent leverages and builds on the network effects created by the nascent firm.[20] In this paper, we are primarily concerned with the second and third type of acquisitions, namely killer acquisitions and nascent potential acquisitions.

A post-acquisition scenario can have infinite possible outcomes, but can be broadly distributed into three categories based on the impact on its consumers: (1) an acquisition can be good for the consumers in the market, (2) an acquisition can be bad for the consumers in the market, and (3) an acquisition can have no particular impact on the consumers.[21] The measurement of good and bad in antitrust is based on the consumer welfare

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[18] Jay Ezrielev, 'Shifting the Burden in Acquisitions of Nascent and Potential Competitors: Not so Simple' (2020) Competition Policy International 4 November 2020 <https://www.competitionpolicyinternational.com/shifting-the-burden-in-acquisitions-of-nascent-and-potential-competitors-not-so-simple/> accessed 6 January 2021.

[19] Cunningham (n 9).

[20] Unlocking Digital Competition (n 17).

[21] Amy C Madl, 'Killing Innovation?: Antitrust Implications of Killer Acquisitions' (2020) Yale Journal on Regulation Online Bulletin, 5 <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1002&context=jregonline> accessed 7 March 2021.

standard.[22] That means that the market is always assessed from the perspective of benefit accrued to the consumers without delving into the specific performance of the firms.

The consumer welfare standard is usually assessed based on price, quantity, range of products and the quality of the products available to the consumers.[23] Though the consumer welfare standard as the basis for antitrust scrutiny has been contested by the proponents of the Structure-Conduct-Performance Paradigm for being narrowly focused on short-term price changes, it remains to be the most accepted benchmark for competition policy.[24] This paper does not delve into the consumer welfare debate but accepts it as an essential benchmark in merger control. Saying this, the question still remains, whether regulating nascent acquisitions is the right approach to advance consumer welfare?

Some scholars argue that an increase in regulation of nascent acquisitions is contrary to the understanding of consumer welfare.[25] To substantiate this, they give the example of the *Facebook/Instagram* acquisition to argue that Instagram has almost tripled its user base while Facebook has doubled its reach in the period following the acquisition.[26] Such an

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22 Yun (n 6).

23 Christine S Wilson, 'Luncheon Keynote Address' George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? 15 February 2019 <https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf> accessed 3 November 2020.

24 ibid.

25 Yun (n 6); Madl (n 21).

26 Ben Sperry, 'Killer Acquisition or Successful Integration: The Case of the Facebook/Instagram Merger' *The Hill* (10 August 2020) <https://thehill.co

expansion is contrary to the understanding of an anticompetitive outcome. An anti-competitive outcome is typically characterised by decreasing innovation, productivity, quality and output.[27] Facebook's acquisition of Instagram does not fit this profile and has in fact increased the interaction of consumers with the product. A prevalent norm of nascent acquisitions implies a continuous influx of new players in the market. The low barriers to entry highlight that the element of market power in such a market is not certain and is subject to challenge from nascent competitors, thereby sustaining competition in the market.

Their second argument being that even if there is a slight possibility of harm, a nascent acquisition in most cases provides a great deal of consumer value.[28] Such an acquisition provides much-needed steam to the nascent firm to further develop its product and in turn, increases consumer access to innovation. The crux of the argument is that the increase in resources and accessibility due to nascent acquisitions results in improvement in quality of the product, lower prices and increase in supply. The focus is more on the potential for consumer benefits than the potential of harm.

While their arguments do reflect a perspective, we believe that it is only one side of the coin. We argue that nascent acquisition is against the

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m/blogs/congress-blog/politics/520211-killer-acquisition-or-successful-integration-the-case-of-the> accessed 3 November 2020.

[27] Hassan Qaqaya and George Lipimile, 'The Effects of Anti-Competitive Business Practices on Developing Countries and their Development Prospects' (2008) UNCTAD July 2008 <https://unctad.org/system/files/official-document/ditcclp20082_en.pdf> accessed 3 November 2020.

[28] Yun (n 6).

consumer welfare standard. We base our argument on two limbs, *firstly*, a nascent acquisition can have a widespread impact on the future market, and *secondly*, allowing nascent acquisitions without proper scrutiny increases market concentration and kills innovation.

Pertinently, in 2012, the Federal Trade Commission (FTC) approved the acquisition of *Newport Medical Instruments/Covidien*.[29] Covidien with a turnover of USD 12 billion had an established line of business of selling ventilators to treat patients suffering from flu and other viral diseases. On the other hand, Newport was a relatively new firm, which won the US government contract in 2010, to provide low-cost ventilators to the government. The government intended to stockpile ventilators to deal with a future pandemic like situation. After the acquisition, Covidien assumed the charge of Newport's running projects. While filing for the approval for the supply of ventilators, Covidien asked for a higher price, contrary to the one quoted by Newport. The government, upon considering the new terms to be unprofitable, withdrew from the deal and contracted with another party for delivery of 70,000 ventilators. By early 2020, only 12,700 ventilators of the total order were delivered. The stockpile that was intended was never created, while the country faced an acute ventilator shortage due to the onslaught of the COVID-19 pandemic.[30] This

[29] Reuters Staff, 'Covidien to Buy Ventilator Maker Newport for $108 million' *Reuters* (23 March 2012) <https://in.reuters.com/article/us-covidien/covidien-to-buy-ventilator-maker-newport-for-108-million-idUSBRE82L16N20120322> accessed 3 November 2020.

[30] Nicholas Kulish and others, 'The US Tried to Build a New Fleet of Ventilators. The Mission Failed.' *The New York Times* (29 March 2020) <https://www.ny

acquisition is a prime example of the impact of harm that can be caused by a nascent acquisition. The harm in this case not only resulted in an alteration in market functionality but also led to an irreplaceable loss to life, economy, and the public at large.

The issue of under-enforcement in the case of nascent acquisitions has been gaining steam as the big tech companies, and conglomerates in various sectors have involved themselves in a series of acquisitions to gain a substantial edge over their competitors, and in many cases to foreclose competition. It is essential to note that productivity slowdown in a market is a result of reduced dynamism resulting from an increase in market concentration.[31] In the period of 2007-2019, Facebook was involved in as many as 90 acquisitions of nascent firms. Most of the projects of these firms were either discontinued or simply side-lined.[32]

Through the *Facebook/Instagram* transaction, Facebook eliminated one of its most dreaded competitors. Prior to the acquisition, Instagram had not evolved as a platform that was capable of generating revenue through advertisements. The antitrust agencies ignored the prospect of

times.com/2020/03/29/business/coronavirus-us-ventilator-shortage.html> accessed 3 November 2020.

[31] Jason Furman and Peter Orszag, 'A Firm-Level Perspective on the Role of Rents in the Rise in Inequality' (2015) Obama White House Archives 16 October 2015 <https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf> accessed 7 March 2021.

[32] Mark Glick and Catherine Ruetschlin, 'Big Tech Acquisitions and the Potential Competition Doctrine: The Case of Facebook' (2019) Institute for New Economic Thinking Working Paper No 104 October 2019 <https://www.ineteconomics.org/uploads/papers/WP-104-Glick-and-Reut-Oct-10.pdf> accessed 3 November 2020.

Instagram developing on the lines of Facebook. Post such acquisition, Instagram emerged as a proxy for Facebook and was developed as a social media platform, and not necessarily as a photo-sharing platform. The balance of consumer welfare through this transaction is still questionable, but what is certain is that Facebook not only eliminated its competitor but also has leveraged the target platform to attract consumers to its own platform.

The result of an increase in unregulated nascent acquisitions and a lenient merger control gave way to the creation of '*superstar*' firms (like Facebook, Google, etc.) that dominated specific sectors and garnered supra-normal profits.[33] Jason Furman's testimony before OECD (2020) provides more perspective to this understanding of under-enforcement and weakening of merger control.[34] In his testament, he provides evidence of market concentration by highlighting that a few large players in specific markets have gained substantial market share in recent years. This selective increase in market share is a result of declining competition and a reducing incentive to innovate in the market.[35] One of the reasons for such an impact, as highlighted by him, is the deliberate policy choices made by competition regulators across the world. Thus, the solution as argued by

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[33] Jason and Orszag (n 31).

[34] Jason Furman, 'Hearing on Market Concentration' (2018) DAF/COMP/WD(2018)67 OECD 7 June 2018 <https://one.oecd.org/document/DAF/COMP/WD(2018)67/en/pdf> accessed 3 November 2020.

[35] Ryan Decker and others, 'Where has all the skewness gone? The decline in high-growth (young) firms in the US' (2015) NBER Working Paper Series 21776 <https://www.nber.org/system/files/working_papers/w21776/w21776.pdf> accessed 8 March 2021.

Furman, lies in increasing regulation and formulating a more exhaustive antitrust policy.

III. PART II: PROCEDURAL AND JURISDICTIONAL ASPECT OF MERGER CONTROL

Competition agencies around the world are now giving increased attention to mergers for their ability to impact future markets.[36] Large firms often engage in merger activity involving high valued nascent firms. These firms generally have a low turnover as a result of which their acquisitions might not attract the attention of the competition authorities despite the potential harm to the competition. We argue in this paper that the potential for harm in cases of nascent acquisitions should be duly addressed and dealt with in order to ensure continuous innovation in dynamic future markets. In this part, we discuss the flexibility of merger control provisions in various jurisdictions, and also attempt to highlight the enforcement gap in regulating nascent acquisitions.

A. UNITED STATES

The two primary antitrust enforcement agencies in the US are the Antitrust Division of the US Department of Justice (DOJ) and the FTC. Their primary work in merger control is to keep a check on the increase in market power (due to elimination of present or potential competitors),

[36] Cristina Caffarra and others, 'How Tech Rolls: Potential Competition and Reverse Killer Acquisitions' (2020) Vox EU 11 May 2020 <https://voxeu.org/content/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions> accessed 28 October 2020.

ensure consumer welfare and cease anti-competitive behaviour.[37] The Hart-Scott-Rodino Act of 1976 ("HSR Act") provides for a mandatory pre-merger review notification system.[38] It mandates the parties in a merger to notify the agencies before entering into the transaction. The statutory threshold for notification is subject to the size of the transaction, assets held and the available exemption.[39] These thresholds are adjusted periodically and are aimed to identify and prevent anti-competitive mergers.

The HSR Act is ably supported by the Clayton Act 1914 and the Sherman Act 1890, the two major antitrust regulations.[40] Section 7 of the Clayton Act 1914 is the backbone of merger control in the US, as it intends to prohibit any transaction that may adversely affect the competition in the relevant market. In addition to this, any transaction can be challenged if it violates or can violate Section 1 and 2 of the Sherman Act 1890.[41] Section 1 of the Sherman Act illustrates that any combination in restraint of trade is deemed to be declared illegal; whereas Section 2 makes it illegal for any

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[37] US Department of Justice and the Federal Trade Commission, 'Horizontal merger guidelines' (2010) The United States Department of Justice 19 August 2010 <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010> accessed 3 November 2020.

[38] The Hart-Scott-Rodino Antitrust Improvements Act 1976, s 18a.

[39] Federal Trade Commission, 'Steps for Determining Whether HSR Filing is Required' <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/steps-determining-whether-hsr-filing> accessed 3 November 2020.

[40] Federal Trade Commission, 'The Antitrust Laws' <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> accessed 2 November 2020.

[41] Douglas H Ginsburg & Koren W Wong-Ervin, 'Challenging Consummated Mergers Under Section 2' (2020) Competition Policy International 25 May 2020 <https://www.competitionpolicyinternational.com/challenging-consummated-mergers-under-section-2-2/> accessed 3 November 2020.

kind of discrimination in price, services, or facilities. The difference between both the approaches is that the former does not require any certainty on a specific anticompetitive harm to block a transaction, but only a general notion of a mere possibility of harm; whereas a challenge through the latter should necessarily prove an arrangement in restraint of trade or abuse of one's dominant position. Such arrangement /acquisition should prove that the acquisition is reasonably capable of contributing significantly to the position of dominance.[42]

The aspect of a threshold as a limitation to investigate mergers has been contentious in recent times as the mergers that fall below the threshold, do not necessarily require the approval of the agencies. However, the US merger control regime has shown to possess the flexibility for ex-post assessment of mergers while dealing with issues arising out of nascent acquisitions.[43] This means that the agencies can call for an investigation into transactions that do not meet the required notification threshold but have posed a significant competitive constraint post its approval. For instance, in 2017, the FTC challenged the low value and non-reportable transaction *of Questcor/Synacthen*.[44] In that case, Questcor, a monopolist and subsidiary

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42 ibid.

43 Clayton Act 1914, s 7; Scott Sher, 'Closed But Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act' (2004) 45 Santa Clara L Rev 41 <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1212&context=lawreview> accessed 7 March 2021.

44 Federal Trade Commission, 'Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants' (2017) FTC 18 January 2017 <https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it> accessed 1 November 2020.

of Mallinckrodt acquired the development rights of a competing drug, Synacthen Depot from its potential competitor (Novartis). Soon after the acquisition, Questcor stopped the development of the said drug, a situation that is now termed as killer acquisition. The transaction was challenged by the FTC under Section 2 of the Sherman Act 1890 stating that the acquisition prevented its competitors from developing another synthetic Adrenocorticotropic Hormone ("ACTH"). Subsequently, the Federal District Court ordered the company to sublicense its right to develop the drug, Syncathen, to another US pharmaceutical company. Questcor also agreed to pay an amount of $100 million to settle FTC charges.

Similarly, another nascent acquisition that was challenged as a part of the ex-post assessment was the *Bazaarvoice/Power Reviews* merger.[45] Bazaarvoice, an established product rating and review platform acquired Power Reviews, which was only seven years old at the time of acquisition. This transaction had earlier evaded the HSR scrutiny as it did not meet the threshold requirements. Upon noticing that Bazaarvoice had not catered to the projects of the target company, the DOJ brought an action under Section 7 of the Clayton Act 1914, highlighting that the acquisition substantially hampers competition in the market. The District Court accepted DOJ's contentions and asked Bazaarvoice to get rid of all the assets acquired as a part of the acquisition.

The power of ex-post enforcement makes the US merger control regime more flexible as compared to few other jurisdictions. Although ex-

[45] *United States v Bazaarvoice Inc* [2014] ND Cal 13-cv-00133-WHO, [2014].

post assessment is not a solution to all the problems posed by nascent acquisitions, it has been seen as a possible solution in some straightforward cases. We discuss ex-post enforcement in detail in the next chapter and recommend it as one of the possible measures in tackling the anticompetitive impact of a nascent acquisition, especially in evolving economies.

Saying this, we do not entirely believe that the US merger control regime is able to tackle nascent acquisitions effectively. We base our argument on the observation that a number of nascent acquisitions have not only evaded the antitrust scrutiny on not meeting threshold requirements but also that the identification of post-merger impact remains minimal, to say the least. For instance, Facebook has been involved in more than a hundred acquisitions, whereas the antitrust agencies have investigated only one of its acquisitions, i.e., the 2012 acquisition of Instagram by Facebook.[46] In its other acquisitions, the investigative agencies did not even ask for additional material or information.

Similarly, as widely reported, Apple buys a new company every two to three weeks to acquaint itself with innovation and acquire intellectual property.[47] In 2020, Apple has acquired multiple start-ups in the virtual

[46] Subcommittee on Antitrust Commercial and Administrative Law of the Committee on the Judiciary, 'Investigation of Competition in Digital Markets' (2020) US House of Representatives 2020 <https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519> accessed 8 March 2021.
[47] Lauren Feiner, 'Apple Buys a Company Every Few Weeks Says CEO Tim Cook' *CNBC* (6 May 2019) <https://www.cnbc.com/2019/05/06/apple-buys-a-company-every-few-weeks-says-ceo-tim-cook.html> accessed 25 October 2020.

reality and artificial intelligence industry.[48] In a typical example of killer acquisition, Apple has shut down the weather application DarkSky upon acquisition in order to integrate it with the weather widgets provided in iPhones.[49] DarkSky earlier used to provide local weather information to multiple third parties. Due to the acquisition, these third parties have to now move to more expensive alternatives to collect information at the risk of making their services more expensive for the consumers. This is only one such instance, and similar treatment has also been meted out to various other startups like Swell, Texture and Beats Electronic.[50]

As it is now evident from the above instances, ex-post-merger assessment cannot be the only tool to assess the anti-competitive impact of nascent acquisitions as big firms involve themselves in the routine acquisition of low valued startups, and nascent ventures. It is increasingly difficult for the investigative agencies to look into every such transaction, and needless to say, many of these transactions will evade scrutiny. This has also been recognised in the recent Congressional Report on Big Tech,

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[48] Jordan Novet and Kif Leswing, 'Apple Buys an AI Start-up that Came from Microsoft co-founder Paul Allen's Research Lab' *CNBC* (15 January 2020) <https://www.cnbc.com/2020/01/15/apple-acquires-xnor-ai-startup-that-spun-out-of-alleninstitute.html> accessed 21 October 2020.

[49] Hannah Klein, 'The Dark Sky Android App is Officially Kaput' *Slate* (4 August 2020) <https://slate.com/technology/2020/08/dark-sky-app-android-shuts-down.html>accessed 23 October 2020.

[50] Rob Marvin, 'The Biggest Tech Mergers and Acquisitions of all the Time' (2019) PCMag 9 July 2019 <https://in.pcmag.com/gallery/126270/the-biggest-tech-mergers-and-acquisitions-of-all-time> accessed 3 November 2020.

wherein the report suggests more intuitive measures to tackle the issue of rampant nascent acquisitions, including killer and potential acquisition.[51]

B. EUROPEAN UNION

The European Union has a mandatory notification system that is based on turnover thresholds.[52] The only purpose of turnover based threshold in EU merger control is to deduce the jurisdiction and not to assess the market concentration, or the impact of the transaction.[53] If a transaction does not fulfil the threshold requirements as established by the European Commission (EC), then it may be scrutinized by the agencies in the respective member state. Under certain conditions, national competition authorities in the EU can also refer a merger to the EC.[54] The EC can review a transaction if it is notifiable under the national competition law of minimum of three member states.[55] This has provided much-needed flexibility to assess any acquisition that might have an adverse effect on the market within the European economy.

The flexibility of the EU merger control regime can also be inferred from the conditional approach in the case of *Facebook/WhatsApp*.[56] At the time of Facebook's acquisition of Whatsapp, Facebook already had a formidable market presence with high turnover, whereas WhatsApp had a

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[51] Investigation of Competition in Digital Markets (n 46).

[52] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) art 1 [2004] O J L 24.

[53] Council Regulation (EC) No 139/2004 Commission Consolidated Jurisdictional Notice on the control of concentrations between undertakings [2008] O J C 95.

[54] Council Regulation (n 52) art 4(5).

[55] Council Regulation (n 52) art 22.

[56] Facebook/WhatsApp [2014] EC Case COMP/M.7217, [2014].

low turnover with more than 600 million users worldwide. The EC reviewed the merger under the referral mechanism when it was notified by three of its member states. After much investigation, the EC allowed for the acquisition after considering that both the entities are in different relevant markets. The EC duly cautioned Facebook to not leverage the target platform to build on its own product. A similar approach was followed in the case of *Dow/Dupont*,[57] wherein the EC investigated into the transaction and found some evidence of decrease in innovation. Though the EC allowed the transaction, it laid out certain conditions for the parties, to ensure that the transaction does not lead to higher prices or less innovation for consumers in the market.

It is well recognised that regulating nascent acquisitions needs an improved approach. The over-dependence on transaction value threshold to regulate mergers will not provide effective results in dynamic markets.[58] Recently, France has announced that due to high thresholds of mandatory notifications, there have been many unexamined mergers which could be detrimental to the competition.[59] Similarly, recognizing the inherent problems with the threshold-based system, Germany and Austria recently

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[57] Dow/DuPont [2004] EC Case M 7932 [2004].

[58] Directorate for Financial and Enterprise Affairs Competition Committee 'Start-Ups, Killer Acquisitions and merger control- Note by European Union' (2020) OECD 25 May 2020 <https://one.oecd.org/document/DAF/COMP/WD(2020)24/en/pdf> accessed 3 November 2020.

[59] Senat, 'Proposition de loi visant à garantir le libre choix du consommateur dans le cyberespace' (2020) SENAT 24 February 2020 <http://www.senat.fr/espace_presse/actualites/202002/libre_choix_du_consommateur_dans_le_cyberespace.html> accessed 6 March 2021.

introduced additional value-based thresholds.[60] We explore this as a remedy in the next chapter.

The EC has also made an attempt to review its merger control procedures through a public consultation process.[61] In the process, it was noted that investigation into low or high turnover mergers would depend upon the existence of non-turnover based threshold standards of the member nations. This suggests that national agencies need to have a proactive role in referring mergers to the EC as well as in adopting non-turnover based thresholds to detect low turnover mergers to tackle the vices of killer acquisitions or nascent potential acquisition.

C. UNITED KINGDOM

The UK follows a voluntary pre-merger notification system. The Competition and Markets Authority (CMA) uses share-based tests in addition to turnover based thresholds.[62] The CMA reviews transactions if

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[60] Germany and Austria Guidance on Transactional Value Thresholds for Mandatory Pre-merger Notification, ss 35(1a) and 9(4) KartG (2018) Bundeskartellamt July 2018 <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2> accessed 7 March 2021.

[61] European Commission, 'Summary of replies to the Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control' (2017) European Commission July 2017 <https://ec.europa.eu/competition/consultations/2016_mergercontrol/summary_of_replies_en.pdf> accessed 4 November 2020.

[62] Competition Commission & Office of Fair Trading, 'Merger Assessment Guidelines' (2010) OFT1254 September 2010 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT1254.pdf>accessed 6 February 2021.

parties to the merger have a share of supply exceeding 25% or the transaction results in an increase in the supply share above 25% in the UK.[63]

Recently, the Report of the Digital Competition Expert Panel constituted by the Government of UK examined the lack of scrutiny by CMA in digital market mergers.[64] It noted that Amazon, Apple, Facebook, Google, and Microsoft made around 400 acquisitions in the last 10 years.[65] In 2017, these companies collectively spent USD 31.6 billion, and only few of them were examined by the CMA.[66] It can be inferred that the CMA has restrictive power and can only review a merger if it either meets the turnover test or the share of supply test. More legislative measures need to be undertaken to empower the agency in dealing with cases of nascent acquisitions in dynamic markets. The report recommended that dominant digital companies should be required to notify CMA of all intended acquisitions.[67]

In order to tackle the evolving issues, the CMA has recently been following a more flexible routine in assessing the impact of the mergers especially in cases of nascent acquisition as reflected in the recent case of *Roche/Spark*.[68] In this case, the CMA called in for investigation into the

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[63] Enterprise Act 2002, s 23.

[64] Unlocking Digital Competition (n 17).

[65] ibid.

[66] The Economist 'American Tech Giants are Making Life Tough for the Start-Ups' *The Economist* (San Francisco, 2 June 2018) <https://www.economist.com/business/2018/06/02/american-tech-giants-are-making-life-tough-for-startups> accessed 2 November 2020.

[67] Ex-post Assessment of Merger Control Decisions in Digital Markets (n 17).

[68] Competition & Markets Authority 'Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc.' [2019] Competition and Markets Authority Decision

transaction, which was earlier not notified by the parties. The transaction was not notified by the parties as they did not meet the requirement of the turnover based test or the share of supply test. Interestingly, the CMA sought intervention even though Spark, a US-based company, had not made any sales in the UK. The CMA looked into the collective impact of the merger and the procurement of resources from the UK to establish its argument that the merger comes under the share of supply test and hence is notifiable. The merger was eventually cleared by the CMA, but it highlighted the flexible and proactive approach of the CMA in dealing with transactions. A similar approach by the CMA has been taken in other cases such as *JustEat/Takeaway.com*[69] and *Amazon/Deliveroo*.[70] The effort has been to not be restricted by the notifiable requirements but to determine the validity of an acquisition based on its potential impact. Such an approach has been criticised to be erratic and time consuming but has reaped benefit for the agency in establishing its foothold post-Brexit.

D. INDIA

In India, Section 5 of the Competition Act 2002 provides for grounds of reviewing a merger. Currently, a merger has to be notified to

ME/6831/19<https://assets.publishing.service.gov.uk/media/5e3d7c0240f0b6090c63abc8/2020207_-_Roche_Spark_-_non-confidential_Redacted-.pdf> accessed 13 January 2021.

[69] Takeaway.com N.V. / Just Eat plc Completed Merger Inquiry [2020] Competition and Market Authority Decision ME/6881/20 <https://www.gov.uk/cma-cases/takeaway-com-n-v-just-eat-plc-merger-inquiry> accessed 6 January 2021.

[70] Amazon/Deliveroo Merger Inquiry [2020] Competition and Market Authority, Final Report on 4 August 2020 <https://assets.publishing.service.gov.uk/media/5f297aa18fa8f57ac287c118/Final_report_pdf_a_version_-----.pdf> accessed 6 January 2021.

the Competition Commission of India (CCI), only if the share, voting rights, control or assets are above the threshold limit as specified in the Act.[71] Usually, transactions related to nascent acquisitions are outside the purview of the prescribed threshold limits. This is because the business model of companies in digital markets focuses more on establishing a network in the initial years rather than revenue generation.[72] Unlike other jurisdictions, CCI does not have residuary power to review non-notifiable transactions.

Recognizing these inherent limitations, the Government of India set up the Competition Law Review Committee ("CLRC") to suggest amendments to the Competition Act 2002. The CLRC in its report observed that in the digital market, enterprises have lesser turnover and thus, they easily escape from the radar of the competition authorities.[73] The CLRC recommended the introduction of deal value thresholds for detecting acquisitions that do not meet the threshold requirement but have the potential of dampening the competition.[74] Subsequently, the Draft Competition Amendment Bill 2020 ("Amendment Bill") was introduced after considering the recommendations of the CLRC. The Amendment Bill proposes to grant powers to the central government to introduce necessary criteria for evaluation of combinations, after due consultation with the CCI.[75] The intention is to make a move from the traditional turnover-based

71 Competition Act 2002, s 5.
72 Unlocking Digital Competition (n 17).
73 Report of the Competition Law Review Committee (n 17).
74 ibid.
75 Draft Competition (Amendment) Bill 2020 <https://www.cci.gov.in/sites/default/files/whats_newdocument/bill.pdf> accessed 8 March 2021.

threshold to a more dynamic routine. Though the Amendment Bill empowers the government to alter the turnover requirements after due consultation with the CCI, we believe that more substantive efforts in this regard need to be undertaken to tackle the issue of nascent acquisitions and reduced dynamism in the market.

IV. PART III: INVESTIGATION AND ASSESSMENT

So far, we have highlighted the enforcement gaps in the merger control regimes of various jurisdictions. Now, the relevant question is how to resolve the harm posed by nascent acquisitions. Investigation and assessment of mergers play a pivotal role in determining the future course of the transaction, and its subsequent impact on the market. In this part, we will be reviewing the efficacy of plausible solutions for investigating and assessing nascent acquisitions. These suggestions include effective determination of relevant counterfactuals, ex-post analysis of mergers, inclusion of value-based thresholds in the legislative framework and the reversal of the burden of proof.

A. RELEVANT COUNTERFACTUAL

Relevant counterfactual is the assessment of competitive restraints by taking into account predictable future market changes.[76] The assessment of a counterfactual essentially establishes the basis for approval of a transaction and allows the agency to infer the future impact of a transaction. Determination of counterfactual is essential as it allows the agencies to

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[76] OECD 'Merger Control in the time of COVID-19' (2020) OECD 25 May 2020 <http://www.oecd.org/competition/Merger-control-in-the-time-of-COVID-19.pdf> accessed 21 October 2020.

arrive at more informed decisions, and in determining the impact of the transaction. While allowing or disallowing a merger, the relevant authority by imagining a post-merger scenario, examines whether the merging entities can abuse their position in the market.[77]

It is important to note that relevant counterfactuals can be determined by multiple ways like critical examination of the available evidence, cost-benefit analysis of the transaction on the market, possibility of the target producing substitutable products, studying the alteration in demand, etc.[78] Thus, by relevant counterfactual, we imply the most accurate deduction that the regulator can make at a given point in time considering the available information/evidence. For instance, to build a counterfactual, an agency may consider whether the nascent firm requires the assistance of a large firm to succeed or whether it is likely to succeed on its own.[79] The finding of this question will help the authority to consider both the situations, i.e., one where the nascent firm can pose significant competition in the future market and another where the nascent firm cannot succeed without its acquisition.

Determining ex-post counterfactual is a challenging task as it is essentially speculative. In cases of nascent acquisitions, there are several factors (as described above) that need to be evaluated in order to assess its potential impact. The uncertainty in these cases is accorded to the future

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77 Abayomi Al-Ameen, 'On the Value of Counterfactual Assessments in Merger Cases' (2017) 42(2) Journal for Juridical Science 15 December 2017 <https://journals.ufs.ac.za/index.php/jjs/article/view/3376/3232> accessed 19 October 2020.
78 OECD Secretariat (n 8).
79 ibid.

prospects of the target product or as its ability to evolve as a future competitor. The success of the firm is not a basis for the assessment of a counterfactual. At the same time just because uncertainties exist with regard to the effect of merger on the future market conditions, the agency cannot disregard the possibility of the competitive harms the transaction might create. Lear, in his report on 'Ex-Post Assessment of Merger Control Decisions in Digital Markets', assessed the merger of *Facebook/Instagram* and *Google/Waze* and concluded that the Competition Commission even after recognizing the potential growth of target firms allowed the mergers on the ground of uncertainty surrounding whether these firms would be able to achieve their potential.[80] The Lear Report (2019) describes these cases as "*missed opportunities for the emergence of challengers to the market incumbents*".[81]

The acquisition of a start-up might result in either a pro-competitive outcome leading to efficiency gains or an anti-competitive outcome leading to distortion of competition. The authorities should adopt a realistic assessment by not undermining the possibility of growth in the case of a nascent firm. Further, the counterfactuals should not only be based on status quo situations but also, on foreseeable future events. In the case of *PayPal/iZettle*, the CMA adopted a dynamic approach and assessed the transaction based on the status quo of the firms and the probable market trends.[82] A counterfactual is determined by the assessment of foreseeable

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[80] Ex-post Assessment of Merger Control Decisions in Digital Markets (n 17).
[81] ibid.
[82] David Brenneman and others, 'Killer Acquisitions – Antitrust Agencies Focus on Acquisitions of Nascent Competitors' (2020) Morgan Lewis 20 May 2020

events. The foreseeable time period taken by the agencies (usually 2-3 years) is very short. Because of this short time frame, the impact of nascent mergers is often overlooked by the authorities. This is demonstrated from the cases of *Facebook/WhatsApp* and *Facebook/Instagram* where the impact of the acquisitions started appearing after a period of 6 years and 8 years, respectively.[83] Therefore, it becomes essential to integrate a sufficient time frame to rightfully detect the harm posed by a nascent acquisition.

In conclusion, the assessment of counterfactuals is *unavoidable though inconvenient*[84] because of the existing element of speculation. It is unavoidable because it provides a more plausible scenario, where the mergers can be assessed based on the current market conditions as well the future changes in relation to entry or exit of firms if the merger did not take place. Though not the most error-free method, it enables competition regulators to make informed decisions on the future impact of the transactions.

B. Ex-Post Review of Merger Control Decisions

Authorities around the globe build counterfactuals to forecast possible outcomes of a merger to ensure that competition is not hampered. But sometimes ex-ante counterfactual fails to take into account the changes that take place after the merger. Any incorrect decision can affect competition in several ways including quality, prices, innovation, consumer

<https://www.morganlewis.com/-/media/01279288079944398f22e96c23a3ee44.ashx> accessed 3 November 2020.

[83] OECD Secretariat (n 8).

[84] ibid.

welfare and concentration of the market.[85] Merger control decisions can be unjustified in two different ways. *Firstly*, a decision may erroneously prohibit pro-competitive mergers, i.e., Type I error; and *secondly*, it may erroneously allow anticompetitive merger, i.e., Type 2 error.[86] Till now there have been no cases of Type 1 error as the competition regulators are more concerned about over-enforcement than under-enforcement. In this part, we will analyse whether ex-post analysis can fill the enforcement gap in merger enforcement due to significant under-enforcement in cases of nascent acquisitions.

Ex-post analysis of decisions allows the authorities to correct their possible errors, i.e., Type 1 or Type 2. Ex-post assessment is, thus, a review of a merger post its consummation. It is important as it allows the agencies to evaluate whether their decisions were accurate or not. The duty of the antitrust agencies is not only to adjudicate but also to evaluate the consequences of their decisions.[87] This becomes significant in the assessment of nascent acquisition as the outcome-based evaluation will remove the uncertainties owing to dynamic changes, technological advancements, and uncertainties at the time of the transaction. If the authorities find infirmity in their decision-making after a period of time, it

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[85] Luca Deplano, 'Ex Post Evaluation of EC Merger Decisions: Two Empirical Analysis of Prices and Patents' (2017) EFPIA <https://www.efpia.eu/media/219811/deplano_luca_master_thesis.pdf> accessed 7 March 2021.
[86] Oliver Budzinski, 'Impact Evaluation of Merger Control Decisions' (2012) Vol 17 No 75 Ilmenau Economics Discussion Paper August 2012 <https://www.econstor.eu/bitstream/10419/67109/1/722215983.pdf> accessed 2 November 2020.
[87] Robert Pitofsky and others, 'Roundtable Conference with Enforcement Officials' (2000) 68 Antitrust LJ 581, 593-595.

can then attempt to correct its decisions. In order to identify the appropriateness of the decisions with respect to consumer welfare, authorities compare the market changes post their original decision with the plausible alternative decision.[88]

Countries like the US, Japan, the UK, Brazil, Canada, Hungary, Sweden, Ireland, Lithuania and France have adopted the ex-post review mechanism. Notably, different jurisdictions have different time frames under which ex-post assessment can be commenced. The US is the only country where there is no timeline, and hence, a merger can be reviewed any time after its approval. Recently, the FTC issued Special Orders to Alphabet (including Google), Amazon, Apple, Facebook and Microsoft requiring them to show information related to their past acquisitions (including nascent acquisitions of potential competitors which do not require reporting to antitrust agencies because of the threshold limit) consummated over the past 10 years.[89] This information collection will enable the FTC to examine whether acquisitions that were below the threshold limit of the HSR Act have affected the competition and whether the incumbents are strategizing to eliminate competition by acquiring small firms.[90] This study will help the FTC to scrutinize the competitive

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88 Paolo Buccirossi and others, 'A Short Overview of a Methodology for the Ex-Post Review of Merger Control Decisions' (2008) 156 De Economist 453.

89 'FTC to Examine Past Acquisitions by Large Technology Companies' (2020) FTC Press Release 11 February 2020 <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies> accessed 3 November 2020.

90 Tony Romm, 'FTC will review past mergers by Facebook, Google and other Big Tech companies' *The Washington Post* 11 February 2020 <https://www.washingtonpost.com/te

significance of nascent acquisitions and enable it to come up with fresh measures regulating them. On the other hand, in the UK a merger can only be reviewed within four months.[91] A shorter time period acts as a constraint and in most of the cases of nascent acquisitions, as discussed above, the effects seem to appear only after a period of 3-4 years. The authors recommend *firstly*, the adoption of ex-post assessment and *secondly*, the extension of time period for ex-post assessment of mergers.

The difficulty as Pires (2015) highlights is that the competition agencies do not often perform the ex-post analysis of a decision, without which it would not be possible for them to detect the effects of a nascent acquisition. The reason for this as also discussed above is that the effects of a nascent acquisition start appearing after a period of time. Ex-post evaluation of mergers can be with respect to the development of the target's product, the evaluation of the competitive constraints posed by the transaction or the potential of the target to emerge as a potential competitor sans the merger. A proper ex-post assessment can help the agencies to assess whether their ex-ante counterfactual or hypothesis with respect to the target's performance was sound or not.[92] Several studies indicate that result-oriented evaluation can be an effective tool for public

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chnology/2020/02/11/ftc-will-review-past-mergers-by-facebook-google-other-big-tech-companies/> accessed 3 November 2020.

[91] Joel Bamford, 'Ex-Post Review of Merger Control Decisions: Pros and Cons' (2019) Concurrences Conference 16 October 2019 <https://www.concurrences.com/en/conferences/ex-post-review-of-merger-control-decisions-pros-and-cons-en> accessed 28 October 2020.

[92] William E Kovacic, 'Using Ex Post Evaluations to Improve Competition Policy Authorities' (2006) 31 J Corp L 503, 510 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1983339> accessed 7 March 2021.

administration.[93] We recommend a rule of reason approach by assessing nascent mergers post their consummation, i.e., by doing a cost-benefit analysis of nascent acquisition or by taking into account the competitive constraints as well as the efficiency gains from a transaction. In case of more efficiency gains and less competitive harm, the authorities might consider imposing behavioural remedies to ensure a fair level of competition.

C. VALUE BASED THRESHOLDS

With the rapid technological advancements and the emergence of the digital market, the traditional turnover based threshold fails to recognize the possibility of competition harm associated with the transactions involving nascent firms having negligible turnover, but high corporate value.[94] Nascent firms though do not generate huge revenues but may have a great market value because of their technological efficiencies, number of users, data and degree of innovation.[95] The largest tech companies including

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[93] Jody Zall Kusek & Ray C Rist, 'Ten Steps to a Results-Based Monitoring and Evaluation System' (2004) The World Bank 2004 <https://www.oecd.org/dac/peer-reviews/World%20bank%202004%2010_Steps_to_a_Results_Based_ME_System.pdf> accessed 7 March 2021; Deborah Platt Majoras, 'A Dose of Our Own Medicine: Applying a Cost/Benefit Analysis to the FTC's Advocacy Program' (2005) FTC 8 February 2005 <http://www.ftc.gov/speeches/majoras/050208currebttopics.pdf> accessed 20 November 2020.

[94] Tim Schaper, 'Merger Control Reform: Capturing Transactions in the Digital Markets' (2016) Norton Rose Fulbright November 2016 <https://www.nortonrosefulbright.com/en/knowledge/publications/9eb81dda/merger-control-reformcapturingtransactions-in-the-digital-markets#:~:text=Background%2C%20purpose%20and%20aims%20of,their%20possible%20effects%20on%20competition> accessed 2 November 2020.

[95] 'Introduction of Alternative Merger Control Thresholds-Is it the Way Forward?' (2018) AZB & Partners 30 November 2018 <https://www.azbpartners.com/bank/introduction-of-alternative-merger-control-thresholds-is-it-the-way-forward/> accessed 2 November 2020.

Amazon, Apple, Google, Microsoft and Facebook acquired around 400 companies in the past 10 years and only a few of them were scrutinized by the regulators because of the current laws.[96] Particularly, data has become a significant asset and is seen as a huge entry barrier in the digital market. Some of the transactions that involved data as a factor were *Ola/Taxiforsure*, *Facebook/Whatsapp* and *Snapdeal/Freecharge*.[97]

These acquisitions demonstrated the prevalent enforcement gaps as the current legislative framework failed to investigate or assess these transactions. Other than the digital market, acquisitions related to the pharma industry and patent portfolio acquisitions are also majorly low turnover and high value based.[98]

The discussion regarding the introduction of additional methods alongside the turnover threshold fuelled after the all-cash deal of USD 26.2 billion involving the acquisition of LinkedIn by Microsoft could not be scrutinized because of existing thresholds.[99] This led to the introduction of value-based thresholds in Austria and Germany, where high-value

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96 Unlocking Digital Competition (n 17).

97 Anuja Chaudhary, 'Deal Value Threshold-Proficient Enough to Make the Indian Merger Control Mechanism More Dynamic?' (2020) Competition & Commercial Law Review 25 August 2020 <https://www.tcclr.com/post/deal-value-threshold-proficient-enough-to-make-the-indian-merger-control-mechanism-more-dynamic> accessed 4 November 2020.

98 Summary of replies to the Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control (n 61).

99 Richard Waters, 'Microsoft-LinkedIn Deal Raises New Competition Concerns' Financial Times 4 November 2016 <http://www.ft.com/content/d5ceda60-a1e1-11e6-82c3-4351ce86813f> accessed 4 November 2020.

transactions can now trigger merger review proceedings.[100] Stigler Report (2019) also recommended the use of value-based transactions specifically in the case of mergers involving digital platforms and start-ups.[101] Deal Value Thresholds are generally determined through the consideration of the transaction and the substantial presence of the merging entities in the territory of that country.[102] Value of transaction will be significantly impacted by share prices and exchange rates "*between the announcement of a transaction and its closing*".[103] Also, the considerations of the transaction cannot be reduced to assets or the monetary value but other non-price factors such as data should be taken into consideration.

As discussed above, CLRC has also recommended introducing value-based thresholds to ensure that transactions that have an appreciable adverse effect on competition do not escape scrutiny.[104] Following this, the Draft Competition (Amendment) Bill 2020 provided for flexible criteria to evaluate combinations. However, the argument against the transaction value threshold asserts that it will create a disproportionate burden on the

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[100] Silke Heinz, 'Draft guidelines on new transaction value merger thresholds in Germany and Austria' (2018) Kluwer Competition Law Blog 18 May 2018 <http://competitionlawblog.kluwercompetitionlaw.com/2018/05/18/draft-guidelines-new-transaction-value-merger-thresholds-germany-austria/> accessed 1 November 2020.

[101] Stigler Committee on Digital Platforms (n 17).

[102] Bunderskartellamt and Bundes Wettbewerbs Behörde, 'Guidance on Transaction Value Thresholds for Mandatory Pre-Merger Notification' (2018) Bundeskartellamt July <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2> accessed 6 January 2021.

[103] European Commission, 'Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control' (2017) <https://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html> accessed 2 November 2020

[104] Report of Competition Law Review Committee (n 17).

CCI and would lead to a chilling effect on innovation by discouraging investments.[105] But the inferences from the initial experience of Germany and Austria reflect the opposite.[106] It has been reported by Bundeskartellamt that the number of transactions has not radically changed and it received merely 8 and 10 notifications in the year 2017 and 2018 respectively.[107] Similar results were reported in Austria.[108] Undeniably this threshold system comes with its own share of problems but the harm outweighs the benefits of including deal value which is to fill-in the enforcement gaps posed by the digital economy and ensure effective competition in the market.[109] Thus, the inclusion of deal value thresholds is essential for solving the growing concerns related to nascent acquisitions and the governments need to carefully formulate policies to deal with the associated problems.

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105 Martin Gassler, 'Why the introduction of a new transaction-value jurisdictional threshold for the EUMR has been postponed, at least for now' (2018) Oxford Competition Law 28 June 2019 <https://oxcat.ouplaw.com/page/775> accessed 3 November 2020.

106 Heinrich Kühnert, 'Joint Guidance on Transaction-Value Thresholds' (2018) 3 Euro Comp & Reg Rev 216 <https://www.dorda.at/sites/default/files/core_2018_03-009_0.pdf> accessed 2 March 2021; Martin Saumermann, 'New merger control guidelines for transaction value thresholds in Austria and Germany' (2018) Competition Policy International 26 July 2018 <https://www.competitionpolicyinternational.com/new-merger-control-guidelines-for-transaction-value-thresholds-in-austria-and-germany/> accessed 2 March 2021.

107 Martin Sauermann, 'The Transaction Value Threshold in Germany – Experiences with the New Size of Transaction Test in Merger Control' (2019) Competition Policy International, 8 October 2019 <https://www.competitionpolicyinternational.com/the-transaction-value-threshold-in-germany-experiences-with-the-new-size-of-transaction-test-in-merger-control/> accessible 3 November 2020.

108 Martin Gassler (n 105).

109 Anuja Chaudhary (n 97).

D. Reversing the Burden of Proof

Under the current framework, merging parties and not the consumers enjoy the benefit of doubt. In the US, under certain circumstances, there is reversal of burden of proof, that is to say that consumers rather than the merging firms would be granted benefit of doubt. Shapiro & Hovenkamp (2018) recommended codifying the presumption established in the case of *United States v. Philadelphia Bank*.[110] This presumption means that a merger which produces a firm that controls the maximum share of the market, results in a significant increase in the concentration of the market and is likely to substantially stifle the competition, must be indicted unless contrary evidence is produced to show that the merger is not likely to diminish competition in the market. Reversal of burden of proof and creation of rebuttable presumptions in cases involving small firms with a view to detecting killer acquisitions has also been proposed by two former chief economists in the EU namely, Professor Valletti and Motta in the Cremer Report,[111] the Stigler Review (2019) and several other scholars like Tim Wu, Fiona Scott-Morton and Scott Hemphill.[112]

Motta and Peitz (2020) also suggested that where the acquirer is a dominant firm, the merging parties should prove that, a) the merger would

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110 *United States v Philadelphia Bank* (1963) 374 US 321.

111 Competition policy for the digital era (n 17).

112 Janith Aranze, 'DG Comp chief economist: Reverse burden of proof to catch killer acquisitions' (2018) Global Competition Review 20 November 2018 <https://globalcompetitionreview.com/dg-comp-chief-economist-reverse-burden-of-proof-catch-killer-acquisitions> accessed 25 October 2020; Nascent Competitors (n 1).

not create any anticompetitive effects in the market, or b) the efficiency gains are higher to justify the acquisition.[113] In case of the inability of the firm to provide evidence regarding these claims, the merger will be disallowed. The possible benefit of this reversal of burden will be the availability of data and information related to nascent acquisitions without which it would have been difficult for the consumers to prove the competitive constraints posed by the transaction.

On the contrary, some scholars argue that reversing the burden of proof will be detrimental to the interests of start-ups that are in the need of investment.[114] They further state that the reversal of burden of proof should be only limited to the clear-cut cases; for instance, where market share exceeds the threshold or there is economic research that indisputably establishes the anticompetitive effect.

In our opinion the reversal of burden of proof is not an ideal step because, *firstly*, it will impose unnecessary administrative burden; *secondly*, blanket application of this proposal without identification of clear cut cases and clarity on the rules for such identification would result in ambiguity; and *thirdly*, it would be extremely difficult for the merging entities to produce pieces of evidence that their merger would not harm competition

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113 Massimo Motta and Martin Peitz, 'Competition Policy and European Firm Competitiveness' (2019) Vox EU 20 February 2019 <https://voxeu.org/content/competition-policy-and-european-firms-competitiveness> accessed 3 November 2020.

114 Jacquelyn MacLennan and others, 'Innocent Until Proven Guilty- Five Things You need to know about Killer Acquisitions' (2019) Informa Connect 3 May 2019 <https://informaconnect.com/innocent-until-proven-guilty-five-things-you-need-to-know-about-killer-acquisi-tions/> accessed 3 November 2020.

in future and in the case they are unable to prove the same, this proposal can prohibit several merger activities including those which may generate efficiencies. Instead, we focus on an alternative approach that was formulated by Fletcher (2020) where he suggested that the burden of proof would be reversed only in those scenarios where the agency is able to show "reasonable prospects of harm".[115] For instance, if it is proved that the harm to the competition is 25-30%, only then there would be reversal of the burden of proof and not otherwise. This approach seems to be more flexible as the burden of proof will be reversed only in restrictive circumstances.

V. CONCLUSION

The issue of nascent acquisition has now garnered the attention of competition regulators and researchers around the world.[116] This paper argued for a more flexible merger control arrangement to ensure better protection to the consumers. The idea is to review most of the mergers that have the potential to hinder competition in the present or the future market. We also identified the enforcement gaps and lack of flexibility in merger control regimes of major jurisdictions across the world.

The anti-competitive impact of killer acquisitions or nascent potential acquisitions has also been felt in digital markets. Gautier and Lamesch (2020) examined 175 acquisitions by Google, Amazon, Facebook,

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115 Amelia Fletcher, 'Video contribution to the OECD roundtable on Start-ups, killer acquisitions and merger control' (2020) OECD 11 June 2020 <https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf> accessed 3 November 2020.

116 OECD Secretariat (n 8); Elena Argentesi (n 9).

Amazon and Microsoft and found that in 105 cases the brand of the target firms was discontinued within a year of acquisition.[117] The Furman Review (2019) recommended that digital companies that have been accorded with strategic market status should be required to report all their intended acquisitions.[118] We recommend a targeted approach in the assessment of mergers wherein the agencies assess the majority of the nascent acquisitions involving dominant firms. On similar lines, the draft law in France proposed the introduction of a requirement of 'Systemic Companies' to inform the French competition authority about their acquisitions.[119]

This paper also illustrated some of the approaches that can be adopted by the enforcement agencies in dealing with the adverse effect of nascent acquisitions. *Firstly*, we highlighted the losing relevance of turnover based threshold. The same has already been recognised by the Competition Law Review Committee Report in India, which was established with a view to suggest amendments to the Competition Act 2002. In lieu of the same, the Competition (Amendment) Bill 2020 now provides a provision that empowers the central government to alter the notification requirement and existing threshold requirement.[120]

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117 Alex Gautier and Joe Lamesch, 'Mergers in Digital Market' (2020) CSEifo, Working Paper No 8056 13 January 2020 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3529012> accessed 4 November 2020.

118 Unlocking Digital Competition (n 17).

119 Law Proposition no 2701 in the National Assembly of France, art 7 <http://www.assemblee-nationale.fr/dyn/15/textes/l15b2701_proposition-loi> accessed 8 March 2021.

120 Draft Competition (Amendment) Bill 2020 (n 75).

The shift from turnover based threshold to deal value threshold is one of the primary responses that has been considered by various regulators, the inspiration for which came from the German and Austrian enforcement agencies.[121] The introduction of the deal value threshold is ideal for developed countries with an improved digital economy. However, with respect to India and other evolving economies, the immediate introduction of a deal value threshold might not be the right approach. The reason being that the digital economy is still emerging in developing countries and there is not sufficient empirical study to assess the enforcement gaps in the current merger control regime. Additionally, it may also discourage investments in start-ups and nascent firms, which are essential for developing a digital ecosystem.

Secondly, this paper also focused on the establishment of a relevant counterfactual and ex-post review in assessing killer acquisition and nascent potential acquisitions. We argued that the focus should be to block any acquisition that disturbs the balance of power or tips the market in favour of the incumbents. A correct determination of the counterfactual thus becomes essential. The factors that may be taken into account are dominance of the entity, rationale of the transaction, presence of other competitors, potential of the target firm to emerge as a rival competitor, the possibility of survival of the target in the absence of the merger and the period of time in which the target's product might mature.

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[121] Germany and Austria Guidance on Transactional Value Thresholds for Mandatory Pre-merger Notification (n 60).

Lastly, we argued that a reversal of burden of proof in every circumstance as suggested by various pieces of literature might not be a sound legislative action. Inclusion of the presumption against the incumbent in cases of nascent acquisitions will discourage investment. In lieu of this, we align with the views of Fletcher (2020)[122] that is to consider the reversal of burden of proof in restrictive circumstances.

Through this paper, we have tried to provide a synthesis of diverse approaches, to highlight the problem and reach a definite list of suggestions. The central argument remains that the potential for harm in cases of nascent acquisitions should be duly addressed and dealt with in order to ensure continuous innovation in dynamic future markets.

[122] Jacquelyn MacLennan (n 114).