Towards a Framework for Scrutinizing Combinations in the Digital Market – A Roadmap for Reform

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Preface

The impact of technology on the way we live and transact can hardly be overstated. Competition law has not been immune to this trend. Modern advances have put pressure on traditional understandings of how businesses operate. One area where this trend has been noticeable is the regulation of combinations.

Specifically, unlike their brick and mortar counterparts, the emphasis of entities operating in the digital market is more on expanding their user footprint and making cutting-edge innovation as opposed to earning more revenue, as explained in the first chapter of this Report. As a result, in order to determine what combinations involving actors in the digital market should trigger antitrust scrutiny, it is necessary to attune the screening mechanism for detecting such transactions to the mode of operation of digital markets. This Report is a step in that direction.

In its report in July 2019, the Competition Law Review Committee ("**CLRC/Committee"**) noted that many transactions in the digital market do not meet the existing asset and turnover- based thresholds for them to qualify as notifiable combinations under the Competition Act, 2002 ("**the Competition Act**").[1] Against this backdrop, the Committee suggested the adoption of new criteria for transactions to qualify as notifiable combinations that can account for the way the tech industry functions. It suggested that the Competition Act be amended to contain an enabling provision which empowers the Government to introduce necessary thresholds including a Deal-Value Threshold ("**DVT**") for merger notifications. Consistent with this recommendation, as per the first proviso to S. 5[c] of the Draft Competition Amendment Bill of 2020 put up for public comments, the Central Government is proposed to be empowered to lay down 'other criteria' for an acquisition to be deemed to be a combination.[2]

Using the CLRC's recommendations and the proposed proviso as its point of departure, this report seeks to closely examine the potential criteria that the Central Government can frame. To that end, it conducts a cross-jurisdictional survey of the fashion in which a range of jurisdictions have engaged with the issue of scrutinizing such combinations. Through this exercise, it arrives at an understanding of the main approaches that have been explored to date: fixing a DVT, identifying some entities [based on clear and objective criteria] whose combinations should be subjected to scrutiny or making such scrutiny a matter for the regulator's discretion. It concludes that the adoption of the DVT framework would be the most apposite intervention for India at this stage. It offers some thoughts on how this framework can be practically operationalized in India and concludes with an articulation of some issues warranting further reflection.

[1] The Competition Law Review Committee, 'Report of the Competition Law Review Committee-2018' (CLRC Report, July 2019) <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf> accessed 1 July 2021, para 5.3.

[2] Id, para 5.11. Also see Avimukt Dar, 'Antitrust Scrutiny Of Digital Market M&A: Facebook First To Face The Heat?' (*Mondaq*, 6th September, 2020) <https://www.mondaq.com/india/antitrust-eu-competition/1108846/antitrust-scrutiny-of-digital-market-ma-facebook-first-to-face-the-heat> accessed 16 October 2021.

I. Merger Scrutiny of Digital Transactions in India

In this chapter, we will examine how the modus operandi of businesses in the digital markets is different from their brick and mortar counterparts. We will then evaluate how far the existing framework for triggering merger scrutiny is apposite to detect combinations in the digital market that merit such scrutiny. We will finally outline the recommendations of the Committee that call for an amendment to the extant framework. This will serve as the foundation for a discussion as to the shape and form of the proposed amendment in chapters 2 and 3.

A. Unique features of transactions involving digital actors

There is a critical qualitative difference between transactions in the digital market vis-a-vis their brick and mortar counterparts. The former class of transactions often derive their value from business innovations of target companies which typically do not have a large physical asset base. Further, the business model of most tech companies is initially focused on creating a large user base, conducting research and development or data collection and analysis and not on revenue maximization.[3] Therefore, asset and turnover-based criteria can often be an inaccurate proxy to capture the full effects of transactions in the digital market.

As a Panel Report notes: "The business model of digital companies often means that they fail to generate any significant revenue for a number of years, focusing initially on user growth. For countries relying solely on turnover thresholds to apply jurisdiction, this is a significant issue that must be addressed."[4]

Today, such transactions are taking place at a very swift rate. For instance, in 2019, a Committee led by Jason Furman ("**Furman Committee**") in the UK found that, in the preceding 10 years, Facebook, Apple, Google, Amazon and Microsoft had made around 400 acquisitions globally. In the same vein, in 2018, the Economist reported that Alphabet (Google), Amazon, Apple, Facebook and Microsoft had together spent USD 31.6 billion acquiring start-ups.[5]

The issue as to a number of transactions in the digital market escaping scrutiny due to existing merger thresholds is well-studied. Illustratively, the Furman Committee noted the very real likelihood of concentrations in the digital market escaping antitrust scrutiny due to existing thresholds for triggering scrutiny resulting in false negatives.[6] This finding is echoed in the Lear Report [UK][7] and the Stigler Report [US].[8] This trend has also been replicated in India. As the following section will demonstrate, several concentrations in the digital sector have escaped the CCI's scrutiny by virtue of not meeting existing asset and turnover thresholds.

Apart from acquisitions in the digital market that currently escape scrutiny, it is also important to focus on acquisitions that have come to be called killer acquisitions. This term was first used by Cunningham and colleagues to describe acquisitions in the pharmaceutical sector whose aim is: "to discontinue the development of the targets' innovation projects and pre-empt future competition."[9] They found that 6% of acquisitions in the pharmaceutical sector in the US were of this nature.[10] Despite this figure being low, it has wide-ranging

[3] Directorate for Financial and Enterprise Affairs, 'Start-ups, Killer Acquisitions and Merger Control' (OECD, 2020), <https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf> accessed 10 October 2021, para 20.
[4] *Ibid*, para 94.
[5] *Ibid*, para 22.
[6] Report of the Digital Competition Expert Panel, 'Unlocking digital competition' (Furman Review, 2019), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 11 October 2021, para 3.43.
[7] 'Ex-post Assessment of Merger Control Decisions in Digital Markets' (Lear Report, 2019), <https://www.learlab.com/wp-content/uploads/2019/06/CMA_past_digital_mergers_GOV.UK_version-1.pdf> accessed 10 October 2021, p. 65.
[8] Scott Morton, F., Bouvier, P., Ezrachi, A., Jullie, N, A., Katz, R., Kimmelman, G., Melamed, D. and J. Morgenstern, *Stigler Committee on Digital Platforms* (Stigler Center for the Study of the Economy and the State, 2019), <https://www.publicknowledge.org/wp-content/uploads/2019/09/Stigler-Committee-on-Digital-Platforms-Final-Report.pdf> accessed 11 October 2021, p. 16.
[9] Colleen Cunningham et al, 'Killer acquisitions' (2021) 129(3) *Journal of Political Economy* 649.
[10] *Ibid*, 689.

implications on the operation of competitive forces in the market. In the rest of this paper, the term killer acquisitions has been used to refer to all acquisitions meeting the aforementioned definition, irrespective of the sector of operation.

B. Overview of the merger regime currently prevalent in India

Under Section 5 of the Competition Act, the obligation to notify a combination is dependent on the combined turnover and assets of the acquirer and target company. Therefore, combinations involving parties meeting the prescribed thresholds [as revised from time to time] must obtain the CCI's prior approval. In 2002, the prescribed turnover figure of the acquirer and target in aggregate was 3000 crores INR in India and the asset figure was 1000 crores INR in India.[11] In 2011, this was modified to Rs. 4500 crore and Rs. 1500 crore respectively[12] and to Rs. 6000 crore and 2000 crore in 2016. In 2016, the figures notified for a combination involving an enterprise with an India leg were assets of USD 1 billion with at least Rs. 1000 crore in India or turnover of USD 3 billion with at least Rs. 3000 crore in India.[13]

Further, in 2011, the Ministry of Corporate Affairs, through a notification, introduced the concept of a target de minimis threshold. The rationale behind having this provision is ascertaining whether there exists a possibility of anticompetitive effects in India. The relevant entity's assets or turnover are used as indicators to make this determination.[14] Consequently, combinations in which the prescribed asset or turnover thresholds of the entities in aggregate are met are exempt from the prior CCI clearance requirement if the target company's turnover or asset levels in India are below the prescribed thresholds. In 2011, the de minimis exception was applicable where the target had a turnover of less than 750 crores or assets of less than 250 crores in India.[15] In 2016, the figures were revised to 1000 crores or 350 crores respectively.[16] In March 2017, it was clarified that these thresholds will also apply to mergers and amalgamations, not just to acquisitions.[17] These thresholds apply for five years, meaning that they will apply till 29th March, 2022. Pertinently, the two conditions as to the asset or turnover of the target apply disjunctively. This implies that even meeting one of the parameters i.e. either assets or turnover of the target being below the prescribed amount will be sufficient to exempt the combination from merger scrutiny.

It follows from the above analysis that the CCI does not currently have the power to scrutinize transactions that do not meet these quantitative criteria as to assets or turnover, or that attract the de minimis exemption, even if they entail clear competitive harm to Indian markets.

C. A Basis for Reform

In its report in July 2019, the CLRC noted that certain significant transactions in digital markets do not meet the existing asset and turnover based thresholds for them to qualify as notifiable combinations under the Competition Act. The Committee perceptively observed that, in digital markets, acquisitions often derive value from some business innovation of target companies which often do not have a large asset base. Further, the business model of tech companies is often focused on creating a large user base and not on revenue

[11] Prerna Parashar and Abdullah Hussain, 'Merger Thresholds and Merger Thresholds in the Digital Economy' (2020) 7 *NLS Business Law Review* 4.
[12] Ministry of Corporate Affairs, 'Notification S.O. 480(E)' (4 March 2011), <https://www.cci.gov.in/sites/default/files/notification/SO479%28E%29%2C480%28E%29%2C481%28E%29%2C482%28E%29240611.pdf> accessed 15 July 2021.
[13] Ministry of Corporate Affairs, 'Notification S.O. 675(E)' (4 March 2016), <https://www.cci.gov.in/sites/default/files/notification/SO%20673%28E%29-674%28E%29-675%28E%29.pdf> accessed 15 July 2021.
[14] Mrudul Dadhich, 'Regulation of Vertical Mergers under European Union Law: Lessons to Be Learnt by Other Jurisdictions'(Institute for European Integration, Study Paper No. 3/15) p. 10.
[15] Ministry of Corporate Affairs, 'Notification S.O. 482(E)' (Government of India, 4 March 2011).
[16] Ministry of Corporate Affairs, 'Notification S.O. 674(E)' (Government of India, 4 March 2016).
[17] Ministry of Corporate Affairs, 'Notification S.O. 988 (E)' (Government of India, 27 March 2017).

maximization. Therefore, asset and turnover based thresholds may not fully capture the significance of a transaction for competition.[18]

It noted that devising an alternative approach to enable competition regulators to scrutinize such transactions would not be premature. This is because "merger control, in terms of its intent and form, is an anticipatory regulation."[19] Therefore, it is not apposite to demand empirical validation in terms of a certain number of transactions escaping scrutiny due to prevailing asset and turnover thresholds or such oversight causing anticompetitive effects, before putting in place criteria to regulate such transactions. Further, given that many digital transactions have already taken place that have escaped scrutiny, there is a need to adopt a pragmatic and forward-looking approach to the regulation of such transactions. It cited 4 examples of such transactions:

Acquisition of

- Myntra by Flipkart;
- TaxiforSure by Ola;
- Whatsapp by Facebook; and
- Freecharge by Snapdeal.[20]

It therefore suggested that the Competition Act be amended to include an enabling provision which empowers the Government to introduce necessary thresholds including a deal-value threshold for merger notification. Any such thresholds, it held, must be based on: "clear and objectively quantifiable standards for computing the necessary figure as well as local nexus criteria."[21] This way, only transactions with a significant economic link to Indian markets would be covered by the new thresholds, thus avoiding undue regulatory burden on any actor.[22]

In light of the CLRC's analysis, as per the Draft Competition(Amendment) Bill, 2020, a proviso is proposed to be added to Section 5 of the Competition Act. It empowers the Central Government to lay down in public interest and in consultation with the CCI any other criteria for an acquisition to be deemed to be a notifiable combination for the purposes of the Competition Act. A notice for such an acquisition must be given to the CCI under section 6. The draft amendment is silent as to the exact form of such criteria and leaves matters of detail to delegated legislation that the Central Government may frame.

Conclusion

From our discussion in this chapter, two points are very clear. First, the extant merger regime in India is inadequate to meet the needs of the digital sector as well as other sectors in which assets and turnover are not appropriate indicators of a business's competitive strength. Second, the report of the CLRC, and the proposed amendment to the Competition Act, have provided a foundation to reform the existing framework. In the next chapter, we will explore how other jurisdictions have modulated their frameworks for triggering merger scrutiny in light of changing structural realities.

[18] The Competition Law Review Committee, 'Report of the Competition Law Review Committee-2018' (CLRC Report, July 2019), <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf> accessed 1 July 2021, para 5.3.
[19] Id, para 5.11.
[20] *Ibid*, para 5.1.
[21] Id, para 5.14.
[22] *Ibid*. *Also see* Avimukt Dar, 'Antitrust Scrutiny Of Digital Market M&A: Facebook first to face the Heat?' (*Mondaq*, 6 September 2020), <https://www.mondaq.com/india/antitrust-eu-competition/1108846/antitrust-scrutiny-of-digital-market-ma-facebook-first-to-face-the-heat> accessed 16 October 2021.

II. International Practices

In this chapter, we will canvas the varied approaches adopted by multiple jurisdictions to subject combinations in the digital sector [and other combinations hitherto escaping antitrust scrutiny] to merger scrutiny. We would like to canvas a diversity of possible approaches. The aim of doing so is to enable India to understand the full complement of approaches that can be adopted to scrutinize such combinations and to then adopt a well-considered view on which approach would be most suitable for Indian conditions. In what follows, we will provide a descriptive account of the approaches adopted by the UK, the US, the EU, Brazil, Singapore and Germany. This analysis will feed into a discussion in the next chapter as to the factors India must consider while deciding which approach to adopt.

A. Approach in the EU

A combination can trigger scrutiny of the European Commission ("**EC**") through three main channels as follows:

- Under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), as per Article 1(2) and 1(3) of the Regulations, some quantitative thresholds have been laid down. A concentration meeting those thresholds is automatically subjected to merger scrutiny. Illustratively, if the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5,000 million. Or if the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. Or if the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2500 million.

- Second, under Article 4(5) of the same Regulations, on a referral being made by three member states.

- Third, under Article 22 of the EU Merger Regulations ("**EUMR**"), a combination can be referred for scrutiny to the EC if a transaction (i) affects trade between Member States and (ii) threatens to significantly affect competition in the Member State(s) making the request.

A.1: Role of the Referral system

A number of transactions in the digital market have been subjected to scrutiny under the referral system. They include, by way of illustration: Microsoft/GitHub (2018), Apple/Shazam (2018), Amadeus/Navitaire (2016), Lenovo/Motorola Mobility (2014), Facebook/WhatsApp (2014), Cisco/Tandberg (2010), Google/DoubleClick (2008), TomTom/TeleAtlas (2007) and Nokia/Navtek (2007).[23] Through this mechanism, in August 2021, Austria referred Facebook's merger with Kustomer to the EU, and the referral was joined by eight other countries.[24] Some transactions such as Facebook/Instagram and Google/Waze escaped merger scrutiny under the referral system.[25]

It could be argued that the referral system is in fact equipped to capture mergers in the digital market, as evidenced by the Facebook-WhatsApp merger. Specifically, even though WhatsApp, in 2014, had a low turnover, it had 600 million users worldwide and 50 to 150 million users in the European Economic Area("**EEA**").[26] However, a country will refer a merger to the EC only if the domestic threshold set by it for combinations to be subjected to scrutiny is met. In other words, the success of the merger system is contingent on the ability of a domestic merger system to capture digital merger transactions. The referral system will not be able to overcome

[23] Organization for Economic Co-operation and Development, 'Start-ups, killer acquisitions and merger control – Note by the European Union' (*EU Note,* 25 May 2020), <https://one.oecd.org/document/DAF/COMP/WD(2020)24/en/pdf> accessed 1 July 2021, para 5.
[24] Eleanor Tyler, 'Analysis: EU, UK Putting Facebook Mergers Through the Wringer' (*Bloomberg News*, 11 August 2021), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-eu-u-k-putting-facebook-mergers-through-the-wringer> accessed 12 October 2021.
[25] Carolina Bueno, 'Killer Acquisitions: Is Antitrust Prepared to Deal with Innovative Young Rivals' (2020) 2 *Mulheres no Antitruste* 40.
[26] *See*, European Commission, Case M.7217 – Facebook/WhatsApp, 2014.

any shortcoming in the domestic system.[27] This problem is compounded by the need to have these systems in at least three jurisdictions. On this basis, the OECD concludes: "Indeed given the need for three referrals it could be important for larger numbers of national competition authorities to adopt thresholds that are not only simple, but also effective in ensuring that potentially anti-competitive mergers are given due attention."[28]

Indeed, in its note to the OECD in June 2020, the EU acknowledged that its existing frameworks are incapable of capturing some combinations in the digital market. It notes that some cases that met the local nexus criteria could constitute "candidate cases for non-simplified treatment under the EU Merger Regulation, that is to say, they could have merited (at least a basic) investigation. But it is not clear whether this would have led to interventions."[29]

Under the third route [Article 22 of the EUMR], the possibility has always existed of concentrations being referred to the EC, even if they do not constitute a notifiable combination as per the laws of the relevant member state. However, the EC had developed a practice of discouraging referral requests under Article 22 from a Member State where the transaction did not meet the Member State's own jurisdictional criteria for review.[30] A majority of concentrations that were referred to the EC under this route were from the German Federal Cartel Office, the Austrian Competition Authority, and the United Kingdom's Office of Fair Trading/Competition and Market Authority and were transactions which raised potential competitive concerns in a number of Member States.[31]

A.2: Guidance on Article 22 of the EUMR

According to guidance issued by the EC in March 2021 on Article 22 of the EUMR, the EC will work with domestic competition regulators to scrutinize concentrations that, even though they do not meet existing domestic thresholds for triggering antitrust scrutiny, have the potential to adversely affect competition.[32] The Guidance states that this can happen in circumstances where the "turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential."[33]

Elaborating on the first prong in Article 22 [where the transaction affects trade between member states], the Guidance states that this determination will be based on factors such as: "the location of (potential) customers, the availability and offering of the products or services at stake, the collection of data in several Member States, or the development and implementation of research and development (R&D) projects whose results, including intellectual property rights, if successful, may be commercialized in more than one Member State."[34]

The guidance classifies such concentrations into 5 categories:

"Where the undertaking

- is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues (or is still in the nascent phase of implementing such business model);
- is an important innovator or is conducting potentially important research;
- is an actual or potential important competitive force;
- has access to competitively significant assets (such as for instance raw materials, infrastructure, data or intellectual property rights); and/or

[27] Directorate for Financial and Enterprise Affairs, 'Start-ups, Killer Acquisitions and Merger Control' (OECD, 2020), <https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf> accessed 10 October 2021 para 33.
[28] *Ibid.*
[29] Organization for Economic Co-operation and Development, Start-ups, killer acquisitions and merger control – Note by the European Union (25th June, 2020) < https://one.oecd.org/document/DAF/COMP/WD(2020)24/en/pdf> accessed 24th December, 2021.
[30] European Commission, 'Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases' (*Article 22 Guidance*, 26 March 2021), <https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf> accessed 1 July 2021, para 8.
[31] *Ibid.*
[32] *Ibid*, para 23.
[33] *Ibid*, para 19.
[34] *Ibid*, para 14.

- provides products or services that are key inputs/components for other industries."[35]

Another factor the Commission can consider is if the value of the consideration received by the seller is much higher than the turnover of the target. Domestic regulators have also been given the power to refer a transaction after it has been consummated. The Guidance clarifies that, while a determination as to whether such transactions should be scrutinized must be made on a case-by-case basis, the Commission is generally unlikely to accept a referral more than six months after the implementation of the concentration.[36] As per an analysis by Wilmer Hale, "A highly innovative, R&D-driven sector, or that may control key inputs or intellectual property, will be well advised to take the new Article 22 Guidance into account in their merger control analysis."[37]

As to the second factor [significant effect on competition], relevant factors for making the assessment as to whether a combination significantly affects competition as per the Guidance include:

- the elimination of an "important competitive force," including the elimination of a recent or future entrant or that the merger involves two important innovators;
- the reduction of the ability or incentive of a competitor to compete, including by making their entry or expansion more difficult or by hampering their access to supplies or markets; or
- the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices."[38]

A.3: Digital Markets Act Proposal

In December 2020, the EU floated a new proposal, called the Digital Markets Act ("**DMA**"), as a targeted intervention to deal with anticompetitive behaviour by entities labelled by the proposal as digital gatekeepers. This framework applies to Core Platforms run by Digital Gatekeepers providing services to business users established in the EU or end users located/established in the EU.[39] A digital gatekeeper is defined as a provider of core platform services designated pursuant to Article 3 of the DMA.[40]

A Core Platform Service has been defined in very broad terms, as including eight classes of service. These are online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communication services, operating systems, cloud computing services and advertising services, including any advertising networks, advertising exchanges and any other advertising intermediation services, offered by a provider.[41]

In order for a core platform service provider to qualify as a gatekeeper, the following three conditions must be met:

- Having a significant impact on the internal market;
- Operating a Core Platform Service which serves as an important gateway for business users to reach end users; and
- It enjoys, or will foreseeably enjoy, an entrenched and durable position in its operations.[42]

The Article then outlines some quantitative thresholds that create a presumption of an entity meeting the above criteria. These are:

[35] *Ibid.*
[36] *Ibid.*
[37] John Ratliff et al, 'European Union: Up Next' (*Mondaq*, 2 April 2021), <https://www.mondaq.com/uk/antitrust-eu-competition-/1053692/up-next-more-killer-acquisition-reviews-at-the-eu--new-policy-to-catch-transactions-that-may-create-competition-concerns-even-if-they-do-not-meet-eu-or-national-merger-control-thresholds> accessed 12 October 2021.
[38] Article 22 Guidance, para 15.
[39] Digital Markets Act, art 1(2).
[40] *Ibid*, art 2(1).
[41] *Ibid*, art 2(2).
[42] *Ibid*, art 3(1).

- Significant impact on the internal market will be presumed where the undertaking to which an entity entering into a combination belongs achieves an annual EEA turnover equal to or above EUR 6.5 billion in the last three financial years[43] or

- The parameter of serving as an important gateway will be presumed to be satisfied where the average market capitalisation or the equivalent fair market value of the undertaking to which the entity belongs amounted to at least EUR 65 billion in the last financial year, and it provides a core platform service in at least three Member States. Equally, this presumption will be attracted where the entity has more than 45 million monthly active end users established or located in the Union and more than 10,000 yearly active business users established in the Union in the last financial year.[44]

- The parameter of having an entrenched and durable position will be satisfied where the criteria outlined in Article 3[2][b] have been met in each of the last three financial years.[45]

A provider of a Core Platform Service that meets all the criteria outlined in Article 3[2] i.e. those that create presumptions as to the three criteria to be a digital gatekeeper, is required, within 3 months of meeting such thresholds, to notify the Commission of this fact and provide it the prescribed information.[46] The Act requires the Commission to review regularly, and no later than every two years whether digital Gatekeepers continue to satisfy the aforementioned 3 criteria. A rebuttable presumption arises that an entity is a gatekeeper on meeting the above quantitative criteria. This presumption can be rebutted by an entity by making a "sufficiently substantiated argument to demonstrate that, in the circumstances in which the relevant core platform service operates" and after accounting for some factors outlined in the DMA, the entity does not qualify as a gatekeeper.[47] and taking into account the elements listed in paragraph 6, the provider does not satisfy the requirements of paragraph 1.

The DMA outlines the criteria based on which an entity can rebut this presumption. These include: entry barriers derived from network effects and data driven advantages, analytics capabilities, business user or end user lock in and the market structure.[48] In evaluating whether an entity qualifies as a digital gatekeeper, the Commission must have regard to:

- Size, including turnover and market capitalization, operation and position, of the operator of Core Platform Services;

- Number of business and end users;

- Entry barriers derived from network effects and data driven advantages, in particular in relation to the provider's access to and collection of personal and non-personal data or analytics capabilities;

- Scale and scope effects the provider benefits from, including with regard to data;

- Business user or end user lock-in; and

- other structural market characteristics.[49]

Pertinently, Article 12 clarifies that a Gatekeeper has to inform the Commission of any intended concentration involving another provider of core platform services or of any other services provided in the digital sector irrespective of whether it is notifiable to a Union competition authority under the EUMR or to a competent national competition authority under national merger rules. Such Notification must set out the following:

- The target company's worldwide annual turnover in the EEA; and

- The core platform service's EEA annual turnover, their number of yearly active business users and the number of monthly active end users, as well as the rationale of the intended concentration.

[43] *Ibid*, art 3(2)(a).
[44] *Ibid*, art 3(2)(b).
[45] *Ibid*, art 3(2)(c).
[46] *Ibid*, art 3(3).
[47] *Ibid*, art 3(4).
[48] *Ibid*, art 3(6).
[49] *Ibid*, art 3(6).

In sum, a strengthened referral system, coupled with the DMA framework, should give the EU the tools needed to detect and appropriately respond to combinations hitherto escaping scrutiny.

B. Position in the US

In the US, it would be productive to assess the power of merger review, insofar as combinations that form the subject matter of this study are concerned, from three main angles:

- Power under Section 7 of the Clayton Act, read together with the quantitative thresholds outlined from time to time in the Hart-Scott-Rodino Antitrust Improvements Act ("**HSR Act**").
- Power under Section 2 of the Sherman Act.
- The bill approved by the House Judiciary Committee, currently before the U.S. Congress: the Platform Competition and Opportunity Act of 2021.

In what will follow, we shall analyze each of these in turn, followed by a discussion of the proceedings instituted by the Federal Trade Commission **("FTC")** against Facebook which involve, inter alia, Facebook's acquisitions of Instagram and WhatsApp.

B.1: Position under the Clayton Act

A chief source of merger review is Section 7 of the Clayton Act. This provision prohibits mergers or acquisition whose effect "may be substantially to lessen competition, or to tend to create a monopoly."[50] In 1976 the Clayton Act was amended by the introduction of the HSR Act. As per the HSR, the requirement to issue a pre-merger notification is determined on the application of three tests: the 'commerce test', the 'size of transaction test' and the 'size of person test'.[51] The power under the Clayton Act can be used retrospectively as well, to unwind crystallized mergers.[52] The current threshold came into force on 4th March, 2021. A transaction in excess of $92 million has to be reported, and these thresholds are updated each year.[53] The Horizontal Merger Guidelines contain the framework for a merger to be scrutinized under the Clayton Act. The agencies adopt a "*careful, fact-based approach to assessing the competitive effects of any merger or acquisition, focusing on the particular economic characteristics of the markets affected by the transaction.*" This exercise involves economic analysis, reviewing relevant documentation, taking testimonies and interviewing relevant participants.[54]

Crucially, a combination does not have to cross a certain quantitative threshold for it to be subjected to merger scrutiny. The agencies are empowered to scrutinize acquisition of stocks or assets, irrespective of whether any quantitative thresholds outlined in the HSR Act are met. This power can be exercised before or after the transaction is consummated.[55] For the period between 2015-2020, the FTC conducted an in-depth review of 15 transactions that were not notifiable under the Act and DoJ conducted in-depth reviews of 18 transactions that were not notified under the HSR rules during this period.[56] Such non-notifiable transactions are investigated in the same way as notifiable transactions. Parties are able to consummate the transaction even as the scrutiny is underway.[57]

[50] Section 7, Clayton Act, 1914 (15 USC § 18), <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title15-section18&num=0&edition=prelim> accessed 1 July 2021.
[51] Federal Trade Commission, 'Steps for Determining Whether an HSR Filing is Required' <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/steps-determining-whetherhsr-filing> accessed 1 October 2021.
[52] *Ibid.*
[53] Premerger Notification Office Staff, 'HSR threshold adjustments and reportability for 2021' (FTC, 17 February, 2021), <https://www.ftc.gov/news-events/blogs/competition-matters/2021/02/hsr-threshold-adjustments-reportability-2021> accessed 15 October 2021.
[54] *Ibid.*
[55] Organisation for Economic Co-operation and Development 'Start-ups, killer acquisitions and merger control – Note by the United States' (4 June 2020), <https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-killer_acquisiitions_us_submission.pdf> accessed 15 October 2021, para 33.
[56] *Ibid,* para 34.
[57] *Ibid.*

B.2: Power under the Sherman Act

The second source of the power to review combinations is S. 2 of the Sherman Act. This provision covers situations where a monopolist engages in exclusionary conduct, such as to eliminate the potential competitive threat posed by a technology, product, or service, even for those that are not currently viable substitutes. In order to substantiate this charge, proof of monopoly and anticompetitive conduct to retain that power must be offered.[58]

B.3: New measures

In the last two years, the US has taken cognizance of the need to develop new approaches that capture the impact of mergers on competition in the digital sector. This process began with the launch of an investigation in 2019 by the Subcommittee on Antitrust, Commercial and Administrative Law of the House Judiciary Committee to "examine the rise and use of market power online and assess the adequacy of existing antitrust laws and current enforcement levels in digital markets."[59] After cataloguing the practices that these gatekeepers engage in to consolidate their power, the Subcommittee outlined some potential solutions to remedy the status quo. Pertinently, it suggested flagging up any acquisition by a dominant undertaking as being 'presumably anti-competitive' so as to subject it to merger scrutiny.[60]

To operationalize the Subcommittee's recommendations, in June 2021, the House Judiciary Committee approved six bills. One of the bills, H.R. 3826, the Platform Competition and Opportunity Act of 2021, prohibits acquisitions, total or partial, by Covered Platforms of the stocks or assets of any person engaged in or implicating commerce.[61] The Bill defines a Covered Platform as one that has been designated as such under S. 4(a) of the Bill. The Bill outlines criteria for designating a digital platform as a 'Covered Platform'. These are to be met at the time that it is designated as such, or in the 12 months preceding such designation/ in the 12 months preceding the filing of a complaint against it. These criteria are:

- Having at least 50,000,000 United States-based monthly active users on the online platform; or
- Having at least 100,000 United States-based monthly active business users on the platform;
- Is owned or controlled by a person with net annual sales, or a market capitalization greater than $600,000,000,000, adjusted for inflation on the basis of the Consumer Price Index, at the time of the Commission's or the Department of Justice's ("**DoJ**") designation under section 4(a) or any of the two years preceding that time, or at any time in the 2 years preceding the filing of a complaint for an alleged violation of this Act; and
- Is a critical trading partner for the sale or provision of any product or service offered on or directly related to the online platform.[62]

Section 4-A empowers the FTC or the DoJ to characterize a platform as a covered platform. This determination has to be made based on the aforementioned criteria. It has to be published in writing and applies for a period of 10 years. Crucially, the Bill specifically clarifies that an acquisition which results in access to digital data may, on its own, "enhance, increase, or maintain a covered platform's market position."[63]

The FTC and the DoJ have look back powers which are not temporally constrained. In exercise of this power, they can open up a consummated merger on an ex-post basis.[64]

[58] *Ibid*, para 9.
[59] Subcommittee on Antitrust, Commercial and Administrative Law of the House Committee on the Judiciary, 'Investigation of Competition in Digital Markets' (2020), <https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519> accessed 1 October 2021, p. 6; House Committee on the Judiciary, 'House Judiciary Committee Launches Bipartisan Investigation into Competition in Digital Markets' (*Press Release, Washington DC*, 3 June 2019), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2051> accessed 1 October 2021.
[60] *Ibid*, pp. 387-88.
[61] Section 2(a) of the Bill.
[62] Section 3(d) of the Bill.
[63] Section 2-D of the Bill.
[64] Organization for Economic Co-operation and Development, Start-ups, killer acquisitions and merger control – Note by the United States (4th June, 2020) < https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/oecd-killer_acquisiitions_us_submission.pdf> accessed 24th December, 2021, para 34.

B.4: FTC's proceedings against Facebook

In December 2020, the FTC instituted proceedings against Facebook, alleging that Facebook was maintaining its monopoly through a course of anticompetitive conduct over a year. To substantiate this charge, the complaint foregrounds Facebook's acquisition of WhatsApp in 2012 and of Instagram in 2014. As per the Complaint, this course of conduct: "harms competition, leaves consumers with few choices for personal social networking, and deprives advertisers of the benefits of competition."[65] The FTC, on this basis, is seeking a permanent injunction requiring Facebook to, inter alia, seek prior approval for future mergers and acquisitions.

The complaint documents, in painstaking detail, how Mr. Zuckerberg viewed Instagram as an existential threat to Facebook.[66] Facebook initially tried to improve its photo-sharing features, but it recognized that Instagram had left it far behind. Recognizing that Instagram outperforming Facebook was a real threat, Mr. Zuckerberg said to a colleague: "we might want to consider paying a lot of money" [for Instagram].[67]

Apropos WhatsApp, the Complaint states that Facebook recognized that "over-the-top" apps threatened its monopoly power. Facebook leadership understood that such an app could enter the personal social networking market, "either by adding new features or by spinning off a standalone personal social networking app."[68] While Facebook initially made a valiant effort to compete with WhatsApp, it realized soon that WhatsApp was far ahead of it.[69] The complaint notes: "As with Instagram, Facebook decided to acquire WhatsApp rather than compete with it, in an effort to neutralize a significant competitive threat to its personal social networking monopoly."[70]

In June 2021, the Court dismissed the Complaint, reasoning that it had failed to plausibly establish Facebook's monopoly power.[71]

C. Position in the UK

This analysis can helpfully be divided into two phases – the period before the release of the Strategic Market Status ("**SMS**") proposal and the SMS Proposal. The latter is a culmination of the recommendations of the Furman Committee, the Digital markets Taskforce and the Competition and Markets Authority ("**CMA**"). At present, the SMS framework is in draft form and hence the framework under the Enterprise Act, 2002 ("**Enterprise Act**") continues to hold the field.

C.1: Framework under the Enterprise Act

Under the Enterprise Act, where two or more entities cease to be distinct and are brought under a common ownership and control, the Act is attracted. Thereafter, one of the following criteria needs to be met for merger scrutiny of the CMA to be triggered:[72]

- the UK turnover associated with the enterprise which is being acquired exceeds £70m (the "standard turnover test"); or
- As a result of the merger, a share of 25 per cent or more in the supply or consumption of goods or services of a particular description in the UK (or in a substantial part of the UK) is created or enhanced (the "standard share of supply test"); or

[65] FTC, 'FTC Sues Facebook for Illegal Monopolization' (9 December 2020), <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization> accessed 12 October 2021.
[66] FTC, 'First Amended Complaint for Injunctive and other Equitable Relief' (9 December 2020), <https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf> accessed 12 October 2021, pp. 6-34.
[67] *Ibid*, para 89.
[68] *Ibid*, para 107.
[69] *Ibid*, paras 115-116.
[70] *Ibid*, para 120.
[71] Salvador Rodriguez, 'Judge dismisses FTC and state antitrust complaints against Facebook' (*CNBC*, 28 June 2021), <https://www.cnbc.com/2021/06/28/judge-dismisses-ftc-antitrust-complaint-against-facebook.html> accessed 12 October 2021.
[72] Enterprise Act, s 23.

- If the transaction is in one or more of the military and dual-use, multi-purpose computing hardware, quantum technology, artificial intelligence, cryptographic authentication technology or advanced materials sectors:
    - The target has an existing share of supply of particular goods or services in the UK of 25 per cent or more (with no requirement that the merged entity's share of supply must be increased); or
    - The UK turnover associated with the enterprise being acquired exceeds £1m.

Once the jurisdiction of the CMA to conduct merger review is triggered, the review is a two-stage process. First, it has to be determined if the merger raises prima facie competition concerns. Second, an in-depth review is conducted for mergers that are more contentious.[73]

Merger scrutiny can be triggered in three ways:

- Suo motu, based on information in the public domain.
- Following the parties notifying the merger.
- Following a third-party complaint.[74]

At the phase 2 stage, the CMA has to investigate whether:

- There is a relevant merger situation falling within the UK merger control regime;
- That relevant merger situation has resulted, or may be expected to result, in a substantial lessening of competition; and
- It should take action to remedy any substantial lessening of competition identified and, if so, what action.[75]

Pertinently, under the standard share of supply test, it does not matter that the parties do not have any turnover in the UK, as long as they supply or acquire goods or services of the same description in the UK. Instead of market share of the concerned parties, the CMA's focus is typically on the closeness of competition between parties. Illustratively, the CMA scrutinized the combination between Facebook and Giphy, even though Giphy does not earn any revenue within the UK. This was based on:

- The parties' combined share of apps that allow UK users to search for GIFs (measured by average monthly searches), and
- the parties' combined share of searchable animated sticker libraries supplied to UK users (measured by sticker library size).[76]

The CMA has reviewed several mergers amongst actors in the digital sector. These include: Taboola/Outbrain, Ion Group/Broad way Technology, viagogo/StubHub, Crowdcube/Seedrs, Adevinta/eCG, Uber/ Autocab and Imprivata/Isosec.[77]

C.2: Strategic Market Status proposal

The existing regime in the UK has resulted in several combinations in the digital sector being scrutinized. However, in the last three years, the UK has undertaken several measures to assess how far its existing regime is able to keep pace with combinations in the digital market. In 2018, the Furman Committee was created to

[73] Ems legal update, 'Quickguides | Overview And Merger Control' (*Ashurst*, 28 January 2021), <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---uk-merger-control> accessed 16 October 2021.
[74] *Ibid.*
[75] *Ibid.*
[76] Nicholas Levy, 'Chambers Merger Control 2021 Global Practice Guide: UK' (*Cleary Gottlieb*, 29 July 2021), <https://www.clearygottlieb.com/news-and-insights/publication-listing/chambers-merger-control-2021-global-practice-guide-uk> accessed 16 October 2021, p. 3.
[77] *Ibid*, p. 7.

study and make recommendations towards making digital markets competitive and contestable.[78] Thereafter, a Digital Markets Taskforce was set up to build on the Furman Committee's report and to assist in designing a new pro-competitive framework for digital markets.[79]

The thought process set in motion by these groups culminated in the introduction of the Strategic Market Status ("**SMS**") proposal, discussed below. This regime singles out some entities for special treatment. It has to be determined, based on an economic evidence-based assessment, whether the entity has "substantial and entrenched market power"[80] in relation to a specific digital activity and, second, whether that power provides the entity with a strategic position.[81] The assessment of such power is to be based on a multifactorial assessment. Relevant factors include: availability of alternatives, scope for entry and expansion of new players, degree of innovation in the market and the ease of switching for consumers.[82] The assessment of SMS is to be made with reference to specific activities undertaken by comparable entities that have a similar function or which, in combination, fulfil a specific function.[83]

Whether an entity has strategic position depends on such factors as the entity's size and scale, its bargaining power in a specific market segment, its gatekeeping function, its ability to define the rules of the game within its own ecosystem and also in practice for a wider range of market participants, and the extent to which the entity can leverage its market position from one market segment to another through the development of an ecosystem of services.[84]

As per the proposed regime, SMS entities are required to report acquisition of de jure or de facto control. Pertinently, the trigger for the disclosure obligation to kick in is proposed to be crossing the prescribed DVT. In this regard, the relevant Committee Report states: "Our preferred option would be to assess the materiality of a transaction by reference to its transaction value (similar to the tests used in other merger control regimes)."[85] The Committee rejects suggesting the standard share of supply test on the ground that it would not cover combinations involving entities that are vertically related to each other.[86] Further, such transactions cannot be consummated prior to their clearance.[87] Instead of the standard of "balance of probabilities" to assess substantial lessening of competition, the standard proposed now is "realistic prospect".[88] A Digital Markets Unit is proposed to be set up in the CMA[89] to administer the new regime in a timely fashion.[90]

C.3: CMA's notable decisions of transactions in the digital sector

A recent notable decision by the CMA on reviewing an acquisition in the digital market concerns Paypal's acquisition of iZettle[91] for approximately $2.2 billion under a share purchase agreement dated 17 May 2018.[92] The parties overlap in the supply of in-store/offline payment services through mobile point of sale ("**mPOS**") devices in the UK. MPOS devices enable merchants to accept card payments using an app downloaded onto a smartphone or tablet, which is connected to a card reader.[93] The CMA concluded that, based on horizontal

[78] The Digital Competition Expert Panel, 'Unlocking Digital Competition' (2019), <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 23 November 2021.
[79] The Government of UK, 'Digital Markets Taskforce: Terms of Reference' (March 2020), <https://www.gov.uk/government/publications/digital-markets-taskforce-terms-of-reference/digital-markets-taskforce-terms-of-reference--3> accessed 23 November 2021.
[80] Competition and Markets Authority, 'A New Pro-Competitive Legal Regime for Digital Markets, Advice of the Digital Markets Taskforce' (December 2020), <https://assets.publishing.service.gov.uk/media/5fce7567e90e07562f98286c/Digital_Taskforce_-_Advice.pdf> accessed 24 November 2021, para 12.
[81] *Ibid.*
[82] *Ibid*, para 4.10.
[83] *Ibid*, para 4.15.
[84] *Ibid*, Appendix B, pp. 12-19.
[85] *Ibid*, Appendix F, para 68.
[86] *Ibid*, para 20.
[87] Competition and Markets Authority, 'Appendix F: The SMS regime: A distinct merger control regime for firms with SMS' <https://assets.publishing.service.gov.uk/media/5fce706ee90e07562d20986f/Appendix_F_-_The_SMS_regime_-_a_distinct_merger_control_regime_for_firms_with_SMS_-_web_-.pdf> accessed 1 July 2021.
[88] *Ibid*, para 132.
[89] Competition and Markets Authority, 'The CMA's Digital Markets Strategy: February 2021 refresh' (*UK Government*, February 2021).
[90] *Ibid.*
[91] Completed acquisition by PayPal Holdings, Inc. of iZettle AB, Decision on relevant merger situation and substantial lessening of competition, ME/6766/18, The CMA's decision on reference under section 22(1) of the Enterprise Act 2002 (26 November 2018).
[92] *Ibid*, para 20.
[93] *Ibid*, para 3.

unilateral effects in the supply of offline payment services via MPoS devices, there exists a realistic prospect of a substantial lessening of competition (SLC).[94] The CMA exercised its jurisdiction on the share of supply test being met. Specifically, it concluded that, based on the total payments volume (TPV) data submitted by the Parties, as well as their UK competitors, the parties' combined share of supply for offline payment services via mPOS devices in the UK is 80-90%, with an increment of 20-30%. It therefore concluded that the Share of Supply test had been met. [95]

A very recent example of the CMA scrutinizing a combination in the digital market concerns Facebook's acquisition of Giphy Inc. This combination was consummated in May 2020, and the CMA in exercise of its ex-post powers, opened up the transaction for scrutiny in January 2021. Giphy is a globally leading search engine and database, allowing users to search and share GIFs and GIF stickers. While a GIF is a digital file that displays a short and soundless video, a GIF sticker is an animated picture consisting of a transparent background over which text is placed.

Had Giphy not been acquired, the CMA found, it would have expanded into other markets and competed with Facebook for advertisements. The choking off of this competition was particularly troubling, given that Facebook controlled 50% of the online advertising market.[96] Pertinently, the CMA found, from Facebook's internal documents, that one of the concerns motivating the acquisition was that Giphy would otherwise be acquired by one of Facebook's competitors.[97] This points to the importance of internal documents as a tool in unearthing the true intention of the parties which enter into combinations. More on this in chapter 3. On the culmination of its inquiry, the CMA directed Facebook to sell Giphy, reasoning that the deal would reduce competition in the social media platforms and remove Giphy as a potential challenger in the display advertising market.[98]

D. Regime in Germany

Germany is a front-ranking jurisdiction in the family of jurisdictions that have dealt with killer acquisitions in a

bold and targeted fashion. Since 2017, it has deployed a DVT, aimed at capturing combinations that hitherto escaped scrutiny. It has also issued detailed guidance to address the issues connected with operationalizing this threshold. The accumulated experience that it has derived from deploying this threshold over a 4-year period is an instructive example for India, as it considers going down the same route.

The introduction of the DVT is rooted in the recognition that there were transactions in the "digital economy that do not generate a particularly high turnover at the time of the transaction but should nevertheless come under scrutiny because of the target's competitive potential on the relevant markets."[99] The DVT approach has the professed goal of ensuring that acquirers are not able to increase their portfolio, create entry barriers for competitors or buy emerging competitors without being subjected to antitrust scrutiny.[100]

The DVT approach works as follows. As per Section 35(1a) of the German Competition Act, subject to the turnover-based requirements outlined below, if an acquisition is valued more than EUR 400 million and the target undertaking has "substantial operations" in Germany, such transaction is subject to the merger control review of the German competition regulator. The following turnover-based conditions are applicable:

- The combined worldwide turnover of all undertakings concerned exceeded €500 million;

[94] *Ibid*, para 9.
[95] *Ibid*, para 26.
[96] Competition and Markets Authority, 'Facebook's takeover of Giphy raises competition concerns' (Government of UK, 12 August 2021), <https://www.gov.uk/government/news/facebook-s-takeover-of-giphy-raises-competition-concerns> accessed 12 October 2021.
[97] Avimukt Dar, 'Antitrust Scrutiny Of Digital Market M&A: Facebook First To Face The Heat?' (Mondaq, 6th September) <https://www.mondaq.com/india/antitrust-eu-competition/1108846/antitrust-scrutiny-of-digital-market-ma-facebook-first-to-face-the-heat> accessed 12 October 2021
[98] 'CMA Directs Facebook to Sell Giphy' (*GOV.UK*) <https://www.gov.uk/government/news/cma-directs-facebook-to-sell-giphy> accessed 22 December 2021.
[99] Organisation for Economic Co-operation and Development, 'Start-ups, killer acquisitions and merger control – Note by Germany' (28 May 2021), <file:///C:/Users/HP/Documents/Vidhi%20Competition%20Project%20Material/OECD%20Note%20by%20Germany%20on%20Transaction%20Value%20Thresholds.pdf> accessed 15 October 2021, para 1.
[100] *Ibid*, para 5.

- One undertaking concerned had a turnover exceeding €50 million within Germany; and
- At least one further undertaking concerned had a turnover in Germany exceeding €17.5 million.[101]

D.1: Guidance on operationalizing DVT Framework

In a note issued in July 2018, a number of practical issues connected with the operationalization of the DVT regime were clarified. This note is being summarized at length below. This is because, were India to opt for the introduction of a DVT, it would need to account for these issues and deal with them in a well-considered fashion. The note issued by Germany can serve as an excellent reference point in this exercise.

The Note first tackles one of the thorniest issues connected with operationalizing the DVT, namely, determining what constitutes consideration for computing the deal value. The note clarifies that consideration can consist of different items exchanged between the buyer and seller. These include: "cash, securities, company shares not traded as securities, other assets (real estate, tangible assets, current assets), intangible assets (licences, usage rights, rights to the company's name and trademark rights) and considerations for non-competition"[102] It also includes future and variable purchase price components, contingent on some future company parameters or certain conditions. It also includes payments conditional on milestones agreed between the parties involved, such as achievement of specific steps in a drug approval process. [103] Consideration includes liabilities assumed by the buyer. [104] Consideration does not include transaction cost, such as fees for legal advice and commission payments to investment banks.[105]

The guidance also clarifies that there is a difference between company value calculated on the basis of business methods and the purchase price and consideration value for a company. The latter also includes surcharges or premiums that exceed the determined value of the company.[106] As for the determination of substantial domestic operations, these have to be determined based on the target company's market-related activities, as opposed to its turnover.[107]

The assessment has to be a sector-specific one. In the digital sector, regard can be had to number of daily/monthly active users and the number of frequent visitors to the website. The note states: "The relevant criteria are context and case-specific and the particular choice should be guided by the aim to accurately determine that the relevant activity is connected to the domestic market and to ensure that it is geared towards the market."[108]

The guidance also anticipates a number of circumstances that could arise in arriving at the accurate valuation of a deal. Given that calculation of value can often depend on a party's internal assumptions and expectations about the future, the Guidance states that a written confirmation of the value and its assessment submitted by the buyer's management can not only improve the reliability of the valuation but also simplify the calculation of consideration value. The purchasing company should provide sufficient confirmation which must specify the amount of the consideration value as declared in the notification. Such confirmation must not predate the date of submission to the competition authority by more than 90 days. The method of valuation must also be confirmed. [109] If necessary, the value of the consideration must be determined by a valuation report.[110]

If the parties to the merger disagree on the exact value of the consideration, two potential scenarios can arise:

[101] Milbank LLP, 'Spotlight: the merger control regime in Germany' (*Lexology*, 2 August 2021), <https://www.lexology.com/library/detail.aspx?g=9dbb02f6-797b-4a3e-b8a2-e34c33ad04a2> accessed 12 October 2021.
[102] Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG) (July 2018) < https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2> accessed 25th December, 2021, para 14.
[103] *Ibid*, para 15.
[104] *Ibid*, para 16.
[105] *Ibid*, para 17.
[106] *Ibid*, para 11.
[107] *Ibid*, para 14.
[108] *Ibid*, para 15.
[109] *Ibid*, para 20.
[110] *Ibid*, para 22.

- The parties agree that the value of the consideration exceeds €400m. The project can, in this case, be notified and the exact value submitted later. Such notification must indicate an estimate of the value of the consideration and state clearly that the thresholds will definitely be exceeded; or

- It is not clear whether the threshold of €400m will be exceeded. The parties can notify the merger on a precautionary basis, so as not to infringe the standstill obligation at a later date, as long as the plans have otherwise been worked out in sufficient detail.[111]

For a project to be notified in Germany, the plan has to specify such details as: "the form of the merger, the pursuit of a merger by the bodies appointed to the management of the buyer(s), the companies involved, the turnover thresholds or the consideration value."[112] If the precise value cannot be established but its likely upper or lower limits indicate that it will be clearly above or below the prescribed threshold, the limits must be explained. [113]

Another crucial consideration is the precise time at which the deal must be valued and such valuation disclosed. The default rule is the completion date of the merger. If no value is specified on the date of completion owing to value fluctuations, the relevant time for calculating the value would be the time the notification requirement was reviewed by the parties to the merger. If the value subsequently falls below the €400m threshold, the notification can be withdrawn. Conversely, if there is a rise in valuation as the price of the foreign currency or shares offered as a consideration rise to such an extent that they now exceed the thresholds, an obligation to notify the merger before the date of completion might arise. [114] When valuing future payments, the discounting methods commonly used in the financial sector, such as those used in multi-period (or dynamic) capital budgeting must be used.[115]

Further, 4 crucial points that the Guidance emphasizes are:

- Disclosing the basis for the calculation of the deal value to the competition authority;

- Declaring and justifying choice of assessment method;

- Valuation reports must assess the value in detail and in a comprehensible and plausible manner; and

- The plausibility of the assumptions underlying the assessment must be verified.[116]

In the same vein, the guidance deals, inter alia, with the valuation of the consideration in mergers involving asset swaps,[117] assumed liabilities[118] and payments for non-competition.[119] The Guidance then deals with how substantial operations in Germany of the target are to be determined. The *raison d'etre* of this jurisdictional limitation is to "eliminate cases from the scope of the provisions, which at their core relate to the takeover of a company only operating abroad."[120] Domestic activity can be safely assumed as regards companies that primarily or exclusively operate in the domestic market. Because the situation is not always so clear, some guidance is offered as to ascertaining the existence of domestic activity, geographical allocation of domestic activity (local nexus) and market orientation and significance.[121]

The principal determination has to be made as to the extent to which the target company is operating on the domestic market. Turnover is not the proxy for making this determination.[122] The relevant criteria vary across sectors.[123] In the digital sector, number of monthly active users, number of unique visitors on the website and daily active users are the key figures.[124] It is not enough for the target company to have a local asset in Germany; it is also important to ensure that the asset is used for a business activity.[125]

[111] *Ibid*, para 23.
[112] *Ibid*, para 24.
[113] *Ibid*, para 25.
[114] *Ibid*, para 28.
[115] *Ibid*, para 30.
[116] *Ibid*, para 49.
[117] *Ibid*, para 50.
[118] *Ibid*, para 52.
[119] *Ibid*, para 60.
[120] *Ibid*, para 64.
[121] *Ibid.*
[122] *Ibid*, para 65.
[123] *Ibid*, para 66.
[124] *Ibid*, para 67.
[125] *Ibid*, para 69.

Importantly, the assessment of the domestic activity has to be made with reference to the target company's activity at the time the merger comes into effect, not in the last financial year.[126] The assessment of local nexus has to be made with reference to the place of intended use [typically where the company's customer is located].[127] Such domestic activity must also have 'market orientation'. This exists where a company provides a service against payment on an existing market. Transactions without any monetary value could also have market orientation, however. The guidance cites two such examples of the same:

- A service is remunerated by means other than monetary payment. The Guidance characterizes such transactions as: "A service is offered free of charge but is monetised in a different way or can be expected to require payment in future or be monetised in a different way in future."
- The activity consists of research and development of (future) products or services."[128]

The guidance also contains several examples and case studies to demonstrate how the prescribed criteria would apply in practice.

For the new thresholds to be operationalized, some information is required from the parties. This is in the shape of the value of the consideration along with the basis for arriving at the same. The parties themselves are responsible for making the value assessment even in complex mergers which might entail an exchange of securities, other holdings and assets. This disclosure must finally include information on the type of domestic activity.[129] Lastly, the guidance clarifies that the regulator is happy to discuss any transaction not covered by this guidance on an informal basis.[130]

D.2: Practical experience of deploying the DVT

Pertinently, the introduction of the DVT did not translate into a significant increase in the number of notified transactions. In 2017, 8 mergers were notified and 10 in 2018. Out of these 18, 7 were withdrawn once it became clear that the transaction actually did not meet the merger threshold. The remaining 11 cases were cleared in phase 1.[131]

One such merger cleared by the Bundeskartellamt deserves mention. It relates to the acquisition of Honey Science Corp by PayPal. The target's turnover in the 2018 fiscal year was very low. However the transaction was valued at 3.6 billion euros and the target had undertaken considerable activities in Germany.[132] The ascertainment of whether the target conducted substantial activities in Germany was based on the number of its users located in Germany which was significant. While the target's sales figures were low, the Bundeskartellamt did not allow this to impact its assessment of the transaction. It held that the *raison d'etre* for introducing DVTs was to cover transactions that would have previously been excluded. Given that the target was still establishing its business in Germany, it did not matter that it had low sales figures. The fact that it had raised significant funds between 2014-18 indicated its competitive potential.[133]

Two other insights from the judgment merit emphasis:

- First, the target's business model, which involved connecting retailers and users, was going to grow based on how fast retailers and users grew. Such transaction platforms begin to monetize only some years after they enter a market. During the first few years, their sales figures rarely reflect their competitive potential.[134]

[126] *Ibid*, para 70.
[127] *Ibid*, para 72.
[128] *Ibid*, para 76.
[129] *Ibid*, para 117.
[130] *Ibid*, para 119.
[131] *Ibid*, para 16.
[132] Bundeskartellamt, B6-86/19, Decision of 17 December 2019, Case Summary of 31 March 2020, p. 1.
[133] Organisation for Economic Co-operation and Development, Start-ups, killer acquisitions and merger control – Note by Germany (28th May, 2021) < file:///C:/Users/HP/Documents/Vidhi%20Competition%20Project%20Material/OECD%20Note%20by%20Germany%20on%20Transaction%20Value%20Thresholds.pdf> accessed 15th October, 2021, para 30.
[134] Bundeskartellamt, B6-86/19, Decision of 17 December 2019, Case Summary of 31 March 2020, p. 3.

- Second, in determining if the target's activities in Germany were substantial based on number of users, it was crucial to remember that the target company was active on a very young and developing market. Further, the target's partnerships with retailers indicated its growing potential.

It concluded that, due to a broad range of competitive constraints on the relevant market and absence of horizontal overlaps, the transaction could be cleared without an in-depth investigation.[135] This judgment is an instructive example for India in ascertaining how the DVT framework can be practically operationalized. The judgment evidences the way a regulator can assess the potential effects of a combination in a manner attuned to the sui generis characteristics of digital transactions. Crucially, Germany's note to the OECD clarifies that a DVT does not replace any theories of harm or a solid competitive assessment. All that it does is to ensure that takeovers of unicorn firms with a low turnover do not escape scrutiny.[136]

D.3: Prescription of new thresholds to trigger scrutiny

In January 2021, Germany added Section 39A to its competition law. This provision empowers the Bundeskartellamt to require concentrations involving any entities in all or specified sectors to be notified to the Bundeskartellamt that meet any of the following thresholds:

- The worldwide turnover of the undertaking concerned was more than EUR 500 million in the last business year,
- There are objectively verifiable indications that future concentrations could substantially impede effective competition in Germany in the sectors of the economy specified, and
- In Germany, the undertaking supplies or procures at least 15 per cent of the goods or services in the sectors of the economy specified.

The provision further clarifies that the obligation to notify gets triggered only when the target being acquired meets the two following criteria:

- Achieved a turnover of more than EUR 2 million in the last business year and
- Achieved more than two thirds of its turnover in Germany.[137]

An order to notify must be preceded by an investigation by the Bundeskartellamt into the concerned sectors of the economy.[138] It is clear that such an investigation must bear a certain temporal link to the order so that its findings remain current and relevant.[139] The order applies for a period of three years.[140] The Bundeskartellamt does not expect more than 1-3 new transactions to be notified each year under this new route.[141]

E. Regime in Brazil

At present, concentrations in Brazil are governed by Law No. 12,529/2011. Concentrations meeting the following quantitative thresholds have to be notified to the regulator:

[135] *Ibid*, p. 4.
[136] Organisation for Economic Co-operation and Development, Start-ups, killer acquisitions and merger control – Note by Germany (28th May, 2021) < file:///C:/Users/HP/Documents/Vidhi%20Competition%20Project%20Material/OECD%20Note%20by%20Germany%20on%20Transaction%20Value%20Thresholds.pdf> accessed 15th October, 2021,, para 30.
[137] ARC, s 39A-A(2).
[138] *Ibid*, s 39-A(3).
[139] Falk Schoening, 'Less is more" – Germany eases merger control requirements' (*Hogan Lovells Engage*, 18 January 2021), <https://www.engage.hoganlovells.com/knowledgeservices/news/less-is-more-germany-eases-merger-control-requirements> accessed 15 October 2021.
[140] ARC, Section 39-a(4).
[141] Falk Schoening, 'Less is more" – Germany eases merger control requirements' (*Hogan Lovells Engage*, 18 January 2021), <https://www.engage.hoganlovells.com/knowledgeservices/news/less-is-more-germany-eases-merger-control-requirements> accessed 15 October 2021.

- At least one of the groups involved in the transaction has registered, in the last balance sheet, annual gross sales or total turnover in the country, in the year preceding the transaction, equivalent or superior to four hundred million reais (R$ 400,000,000.00); and

- At least one other group involved in the transaction has registered, in the last balance sheet, gross annual sales or total turnover in the country, in the year preceding the transaction, equivalent to or greater than thirty million reais (R$ 30,000,000.00).[142]

The article clarifies that, until the final decision on the transaction is made, conditions of competition must be maintained by the parties, at the risk of attracting penalty. [143] Substantively, the Article indicates that concentrations will be prohibited which involve: "elimination of competition in a substantial portion of the relevant market, which could create or strengthen a dominant position or that can result in the domination of the relevant market of goods or services."[144]

The Article goes on to clarify that, even if concentrations have the above effect, they may be permitted provided they are within the limits strictly necessary to achieve any of the following objectives, cumulatively or alternatively:

- Increase productivity or competitiveness;

- Improve the quality of goods or services;

- Encourage efficiency and technological or economic development; and/or

- A relevant part of the resulting benefits are transferred to consumers.[145] Finally, the Administrative Council for Economic Defence ["**CADE**"], the competition Regulator, has been given look back powers, to require the submission of concentrations that do not meet these quantitative thresholds within one year of the closing date of the transaction.[146]

In June 2020, the CADE General Superintendence initiated an investigation to collect information on acquisitions made during the past 10 years by certain international technology companies as well as Brazilian retailers.[147] The CADE has not released an official statement on this data gathering process. CADE representatives have also not voiced any opinion on concentrations currently escaping scrutiny in the digital market. It is expected that the proposed legislative intervention in the EU, through the DMA and the Digital Services Act, will prompt reflection in Brazil as to the need for an appropriate regulatory response.[148]

According to Guilherme Justino Dantas and André Franchini Giusti, Partner and Senior Associate in the Antitrust and Corporate Teams of the law firm of Siqueira Castro Advogados, Brazil's antitrust law should be modulated to ensure that it captures transactions currently escaping scrutiny where the target is small. They propose prescribing that 'big deals' [a term whose scope and meaning they do not define] should be presumptively anticompetitive, requiring the concerned entities to prove that their transaction will be helpful for competition and to share data about the impact of the transaction in the years to come. They do not expect this shift anytime soon but predict that it will emerge through precedents and Cade's interventions.[149]

CADE has, on one occasion, called for the notification of a combination that did not meet existing notification thresholds. This was the acquisition of All Chemistry do Brasil by SM Empreendimentos Farmacêuticos. It eventually approved the transaction, subject to compliance with some conditions imposed on SM Empreendimentos.[150]

[142] Law No. 12529/2011, art 88, s 1.
[143] *Ibid*, art 88, Section 4.
[144] *Ibid*, art 88, Section 5.
[145] *Ibid*, art 88, s 6.
[146] *Ibid*, art 88, Section 7.
[147] Procedure 08700.002785/2020-21.
[148] Lefosse, 'CADE: what to expect from the Brazilian Antitrust Authority for 2021?' (*Competition and Regulation*), <www.lefosse.com> accessed 16 October 2021.
[149] Guilherme Justino Dantas and André Franchini Giusti, 'Intangible Assets and Merger Control: What are the Main Concerns, Limitations, Remedies and Recent Trends?' in Guilherme FC Ribas, José Carlos Berardo and Marcio C. S. Bueno (eds), *Merger Control In Brazil: Frequently Asked Questions* <https://www.ibrac.org.br/UPLOADS/Livros/arquivos/Merger_control_in_Brazil_-_Frequently_asked_questions.pdf> accessed 24 November 2021.
[150] CADE. Merger N. 08700.005972/2018-42. Applicants: All Chemistry do Brasil and SM Empreendimentos Farmacêuticos. Decided on 20.5.2019. Published on 25.5.2019. *Also see*, Bueno, Carolina, Cristianne Zarzur, and Marina Chakmati, 'Killer Acquisitions: Is Antitrust Prepared to Deal with Innovative Young Rivals?' (2020) 2 *Mulheres no Antitruste* 40.

F. Regime in Singapore

Singapore prohibits mergers "*that have resulted, or may be expected to result, in a substantial lessening of competition within any market in Singapore for goods or services.*"[151] Singapore follows a voluntary merger regime. Such voluntary notifications can be made either for anticipated mergers[152] or for actual mergers.[153]

The Competition Commission of Singapore ("**CCCS**") is empowered to investigate mergers on its own. As per the Commission's guidance, it is unlikely to scrutinize mergers that involve small companies viz. where the turnover in Singapore in the financial year preceding the transaction of each of the parties is below S$5 million and the combined worldwide turnover in the financial year preceding the transaction of all of the parties is below S$50 million.[154] The Guidance states that the parties should notify any merger that is likely to result in substantially lessening competition ("**SLC**") in any market in Singapore.[155]

The possibility of an SLC, and consequent intervention by the CCCS, is unlikely unless:

- The merged entity will have a market share of 40% or more; or
- The merged entity will have a market share of between 20% to 40% and the post-merger combined market share of the three largest firms (CR3) is 70% or more.[156]

  Apart from the above two parameters, the Guidance outlines some circumstances in which there exist reasonable grounds of competition being lessened as follows:

- Where there are consistent complaints or one or more substantiated complaints;
- Where customers in Singapore appear, post-merger, to have limited choice;
- Where there is a possibility of competitors being foreclosed by virtue of a vertical merger.[157]

These criteria are only indicative and the CCCS is empowered to investigate transactions that fall below indicative thresholds in appropriate cases.[158]

As per an e-commerce market study published by the CCCS in September 2020, the CCCS continues to scrutinize online markets and killer acquisitions. Illustratively, it conducted a study in 2019 of the online travel booking sector.[159]

Conclusion

A perusal of the approaches adopted by different jurisdictions gives rise to the following conclusions. First, the regulation of combinations escaping scrutiny [of which killer acquisitions are a species] is a topic that is currently receiving sustained regulatory attention. There isn't a single approach that any country has formulated that offers the magical solution. While almost all jurisdictions are in agreement that existing approaches to merger scrutiny need to be attuned to meet the unique needs of the digital sector, there exists disagreement as to how this can precisely be done. Second, the adoption of the DVT approach gives rise to a series of complex policy choices that need to be made in practically operationalizing this framework. These issues are definitional and operational. Third, not only is there a need for reorientation in existing screening mechanisms for combinations in the digital market, but the substantive assessment of the combination also needs suitable modulation. This is made manifest

[151] Competition Act (Chapter 50B of Singapore), Section 54(1).
[152] *Ibid*, Section 57.
[153] *Ibid*, Section 58.
[154] Competition Commission of Singapore, CCCS Guidelines On Merger Procedures 2012 (1 July 2012), <https://www.cccs.gov.sg › legislation-at-a-glance>
accessed 15 October 2021, para 3.5.
[155] *Ibid*, para 3.4.
[156] *Ibid*, para 3.6.
[157] *Ibid*, para 3.10.
[158] *Ibid*, para 3.7.
[159] Competition and Consumer Commission of Singapore, 'E-commerce Market Study: Findings and Recommendations' (10 September 2020), <https://www.cccs.gov.sg › files › market-studies> accessed 15 October 2021, p.15

by the scrutiny of Paypal-Honey [Germany] and Paypal-iZettle [UK]. Against this backdrop, in the next chapter, we will summarize the key considerations that comparative experience and literature review dictate must be kept in mind as India chooses which approach to adopt.

III. The Way Forward

To recap, the first two chapters have made the following three points very clear. First, there is clearly recognition in India, in the CLRC report, that a new mechanism needs to be developed, in order to scrutinize combinations not captured by the existing framework outlined in Section 5 of the Act. Second, a variety of approaches to effectuate this objective are available, with the introduction of a DVT and imposing a heightened set of obligations on entities in the digital market with relatively more influence being the two predominant solutions. Third, not only does the choice of the screening approach need thought, but so does the manner in which the approach is operationalized and the combination is actually scrutinized. It is the second and third points that we will tackle in this chapter.

A. Digital Gatekeeper Framework

As we saw in chapter 2, the US, the EU and UK are exploring variants of this approach – of subjecting entities with significant market power [as measured based on the prescribed criteria] to heightened scrutiny and more obligations. Further, Germany has already operationalized this approach, through the introduction of Section 39-A to its competition law, as discussed in the previous chapter. On the positive side, this approach is more holistic in scope, inasmuch as it is not predicated on the prescription of a certain quantitative threshold in order to trigger merger scrutiny. It uses a mix of qualitative and quantitative criteria to gauge market power. Further, it has the potential to be a more effective mechanism for detecting transactions. This is because all combinations involving entities that meet the prescribed criteria will be subjected to heightened scrutiny.

On the flip side, however, designing such a framework will require sustained thinking and consultation on the subject. Since that has not yet begun in India, this framework will at best be implementable in the medium to long term.

Further, it must be empirically determined whether the combinations that are currently escaping scrutiny will be duly covered by implementing this framework. If the answer to this question is in the negative, this approach will be the wrong solution to the right problem.

Finally, this approach, if adopted, has to be flexible enough to accommodate shifts in market conditions so as to ensure that the obligation to scrutinize is only imposed on entities whose combinations actually merit such scrutiny. To achieve this, the exercise of identifying gatekeeper entities has to be undertaken on a periodic basis [as has been proposed in other jurisdictions exploring this option] and linked to thresholds appropriate for this purpose.[160] Thought must also be given to the market as regards which an entity is being labelled a gatekeeper. Illustratively, Google can be treated as a gatekeeper for general search, but not in certain other relevant markets in which it operates.[161]

B. Vesting the CCI with discretionary power

Another option is to vest the CCI with the power to scrutinize transactions that do not meet any existing thresholds for triggering merger scrutiny but that, in the CCI's considered view, are likely to harm competition and therefore merit scrutiny. This approach has been explored by some jurisdictions as another way to scrutinize combinations hitherto escaping scrutiny. Illustratively, in 2020, France launched a series of reform proposals which contemplate the use of an ex post power of review for transactions which meet a minimum level of turnover, where the merger is likely to result in competition concerns and where it does not fall within the jurisdiction of the Regulator.[162] In Japan, the Japanese Fair-Trade Commission has the residual authority to

[160] Peter Alexiadis, 'EU Merger Review of" Killer Acquisitions" in Digital Markets-Threshold Issues Governing Jurisdictional and Substantive Standards of Review' [2020] 16(1) Indian Journal of Law and Technology 101.
[161] David Llamo, 'Assessing "Killer Acquisitions": An Assets and Capabilities-Based View of the Start-Up' (Competition Policy International, 26th May) <https://www.competitionpolicyinternational.com/assessing-killer-acquisitions-an-assets-and-capabilities-based-view-of-the-start-up/> accessed 12 October 2021, p. 5.
[162] Organization for Economic Co-operation and Development, 'Start-ups, Killer Acquisitions and Merger Control - Note by France' (9 June 2020), <http://www.oecd.org/officialdocuments/publicdisplaydocumentpd-f/?cote=DAF/COMP/WD(2020)16&docLanguage=En> accessed 15 October 2021, paras 40-45.

scrutinize combinations that do not meet mandatory notification tests and can issue cease and desist orders in such cases. To illustrate, in 2019, the combination involving M3 /Nihan Ultmarc, aimed at integrating various medical data and web services that were in the hands of the respective merging platforms, was scrutinized by the JFTC when it came to light that the combination could substantially restrict competition.[163]

As a next step, the CCI could consider conducting a market study to determine if there are specific sectors in which a variant of this approach could be deployed in India.

C. Deal value thresholds

A cross-jurisdictional analysis indicates that a targeted DVT framework, adopted by Germany and Austria, is the only framework that has till now been actually implemented. The UK, US and EU are at different stages of considering regulatory frameworks that capture digital transactions hitherto escaping scrutiny. Therefore, given that there exists some experience of implementing the DVT framework globally, it seems like the best option for India at this stage.

The practical operationalization of this framework, however, requires giving careful thought to many factors. These include:

- Determining what methodology to adopt to compute the DVT and what should come within the remit of the consideration for this purpose;
- Dealing with fluctuations in value of the deal;
- What monetary and non-monetary local nexus criteria should the DVT be coupled with;
- Increase in administrative burden for the regulator and transaction costs for parties likely to be occasioned by the introduction of the DVT. Here, it bears noting that, as the German example shows, introducing DVTs is not likely to result in a meaningful increase in the number of notified combinations. As experts note, this fact can also be ascribed to the fact that transaction value continues to be linked with the turnover of merging entities.[164]
- Arriving at a quantitative threshold that is neither underinclusive nor overinclusive.
- Operationalizing a mechanism for ensuring that the true and accurate deal value is disclosed by the parties.
- Dealing with efforts to do an end run around the DVT, for instance by unbundling the transaction so as not to cross the threshold.[165]
- Determining whether to apply such thresholds on a sectoral basis or a uniform basis across sectors. If the former route is chosen, it will have to be ensured that this exercise is conducted in a principled and predictable manner so as to minimize regulatory uncertainty.

Three points to keep in mind for India, if it were to deploy this framework are:

- Combining the introduction of the DVT with suitable modulation of the de minimis exception criteria, if necessary.
- Second, the CCI can consider issuing a guidance note similar to that issued in Germany, as discussed in the previous chapter. The note can be peppered with suitable illustrations and responses to them, so as to ensure that it is both comprehensive and on point.
- Finally, the CCI, like its counterparts in Germany, should open up an informal channel of communication with relevant entities so as to ensure that any teething issues not covered by the guidance note can be

[163] Organization for Economic Co-operation and Development, 'Start-ups, Killer Acquisitions and Merger Control - Note by Japan' (2 June 2020), <https://one.oecd.org/document/DAF/COMP/WD(2020)18/en/pdf> accessed 15 October 2021, p. 6.
[164] Marc Bourreau and Alexandre de Streel, 'Digital Conglomerates and EU Competition Policy' (Centre de Recherche Information, Droit et Societe, 26 February 2019).
[165] *Ibid.*

suitably addressed. To this end, the pre filing consultations/ preliminary conferences currently held by the CCI are a step in the right direction.[166]

C.1: Manner of operationalization

This framework can be operationalized in one of three ways:

- Prescribing that all combinations whose value exceed the prescribed value will be subjected to merger scrutiny.
- Deploying the DVT framework to make it selectively applicable to some designated companies. The determination of the criteria for designating entities will require wide-ranging consultation with relevant stakeholders.
- Applying the DVT framework on a sectoral basis, such that all combinations in the designated sectors that cross prescribed thresholds are subjected to merger scrutiny. The CCI can conduct a market study to determine what sectors the framework can apply to.

The first of the above approaches would fit within the four squares of the proviso that is sought to be added to S. 5(c). Its operationalization, therefore, would require the framing of appropriate delegated legislation. The second and third proposals, however, would be beyond the remit of the proposed Amendment. This is because the Amendment does not give the central government the power to engage in entity or sector-based regulation. To operationalize either of these approaches, then, the language of the proposed Amendment would require modification.

D. Concluding reflections and questions for further research

In this report, we have attempted to offer a studied exposition of the criteria that the Central Government can frame to ensure that combinations hitherto escaping merger scrutiny are duly scrutinized. Through a survey of comparative experiences and an evaluation of available approaches, we have offered well-considered inputs. These inputs should assist policymakers in designing new criteria to capture combinations hitherto escaping scrutiny and in informing public discourse in this crucial area of Indian competition law. It bears noting that the approaches explored in this report are not mutually exclusive. As Lamo states: "*it would be most effective and sensible to combine them, by including different sorts of ex ante and ex post mechanisms.*"[167]

Further, some thought needs to be given to how the CCI should conduct the substantive assessment of such combinations once its jurisdiction is triggered. In what way does the existing approach to scrutinizing combinations need to be modulated in light of the unique features of combinations in the digital sector? A critical element in this regard is ascertaining whether the burden of proof should shift to the acquirer to demonstrate that the transaction will not harm competition [using whatever standards are applicable to discharge this burden].

The idea of reversing the burden of proof has been proposed by a former Director General of Competition and Chief Economist at the European Commission[168] as well as the Stigler Report[169] and Australian Competition

[166] For instance, *see* Competition Commission of India, 'Consultation prior to filing of notice of the proposed combination under sub section (2) of section 6 of the Competition Act, 2002' <https://www.cci.gov.in/sites/default/files/cci_pdf/PFCguidancenote.pdf> accessed 24 November 2021.

[167] David Llamo, 'Assessing "Killer Acquisitions": An Assets and Capabilities-Based View of the Start-Up' (Competition Policy International, 26th May) <https://www.competitionpolicyinternational.com/assessing-killer-acquisitions-an-assets-and-capabilities-based-view-of-the-start-up/> accessed 12 October 2021, p. 6.

[168] Janith Aranze, 'DG Comp chief economist: Reverse burden of proof to catch killer acquisitions' (*Global Competition Review*, 20 November, 2020), <https://globalcompetitionreview.com/dg-comp-chief-economist-reverse-burden-of-proof-catch-killer-acquisitions> accessed 16 October 2021.

[169] Scott Morton, F., Bouvier, P., Ezrachi, A., Jullie, N, A., Katz, R., Kimmelman, G., Melamed, D. and J. Morgenstern, *Stigler Committee on Digital Platforms* (Stigler Center for the Study of the Economy and the State, 2019), <https://www.publicknowledge.org/wp-content/uploads/2019/09/Stigler-Committee-on-Digital-Platforms-Final-Report.pdf> accessed 11 October 2021, p. 111.

Commission Report.[170] In fine, under this proposal, combinations involving designated entities would be presumed anticompetitive, with the party concerned having to prove that the combination is procompetitive and likely to result in significant efficiencies.

According to the OECD,[171] the burden of proof should be reversed in well-defined circumstances, such as acquisitions of nascent digital players by dominant firms or where the acquisition increases the risk of competitive harm, such as when a reasonable proportion of the market has been affected.[172]

This opens up a whole range of issues, such as:

- First, what transactions should this reversal of the burden of proof apply to viz. having clear determining principles to make this assessment.
- Second, and related to the point above, appropriately constraining the discretion of the competition regulator to reverse the burden of proof.
- Third, applying this reversal on a blanket basis will sit uncomfortably with the presumption of innocence.

A key issue in such transactions will be the determination of how the assessment of the harm to competition of the proposed acquisition can be measured. How should the substantive assessment be conducted in a manner that accounts for the dynamism of digital markets. One crucial piece of evidence in this exercise will be reliance on internal documents of the parties. These documents can indicate what the true intent of the parties is, i.e. whether the merger or acquisition is aimed at eliminating a competitive threat. A prime example in this regard is the leaked email sent by Mark Zuckerberg, indicating that Facebook acquired Instagram because it feared that Instagram would otherwise emerge as a competitor. As we saw in chapter 2, internal documents also came into play in the scrutiny of Paypal's acquisition of iZettle and Facebook's acquisition of Giphy by the CMA in the UK.

The Commissioner for Competition in the EU, Margrethe Vestager, has noted that internal documents can help the Commission "make better decisions, and understand the markets and companies' plans for the future."[173][174]

We hope to explore these questions in a future working paper.

[170] Australian Competition and Consumer Commission, 'Digital Platforms Inquiry Final Report' (26 July 2019), <https://www.accc.gov.au/system/files/Digital platforms inquiry - final report.pdf> accessed 15 October 2021, p. 149.
[171] Directorate for Financial and Enterprise Affairs, 'Start-ups, Killer Acquisitions and Merger Control' (OECD, 2020), <https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf> accessed 10 October 2021, para 34.
[172] *Ibid*, p. 2.
[173] Kenneth B Schwartz et al, 'Merger Control Reviews: Spotlight on Internal Documents' (Skadden, 25 April 2021), <https://www.skadden.com/en/insights/publications/2021/04/takeaways-merger-control-reviews> accessed 16 October 2021.
[174] The three main types of documents from this standpoint are:
- Documents setting out the deal rationale, to confirm whether the truth corresponds to the version of events provided by the parties. This not only includes smoking gun evidence, but also evidence that points to the strategic interests and economic forces at play.
- Second, documents pointing to a "build/buy/partner" analysis. In reverse killer acquisitions, such documents can point to whether the buyer has expertise and resource to enter the concerned market organically in a short time span.
- Third, valuation materials. Crucial here is assessing if there is a 'deal premium' not justified by standalone value/synergies.

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