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DEAL-VALUE THRESHOLD: REVISITING TRADITIONAL THRESHOLDS FOR MERGER CONTROL

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ABSTRACT

In India, there has been a significant rise in mergers and acquisitions in the digital market, most of which have a potential of escaping the scrutiny of the Competition Regulator, thus giving rise to antitrust concerns. In most cases of mergers and acquisitions in digital markets, the turnover and asset of the amalgamated entity or the target entity are so low that they do not require notification to the Competition Regulator. Thus, the crucial stage of antitrust review by the regulator does not take place which means that even potential AAEC causing transactions are also completed. In this note, an attempt has been made to discuss the causes behind the above-mentioned loophole in the Indian merger control regime and the various theories of harm that arise with it. The authors propose that Deal Value Threshold ["DVT"] can be adopted to fix the loophole in the present regime. The authors discuss how various parameters under DVT should be set for an efficient merger control in India so that potentially anti-competitive mergers/acquisitions do not escape the Regulator's scrutiny. Furthermore, the authors suggest that there should be a provision for an ex-post review of mergers so that if a potentially anti-competitive merger/acquisition escapes the threshold set under DVT, it can be investigated by the Regulator at a later stage post the completion of the merger.

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I. INTRODUCTION

The 21st Century has witnessed the rise of some of the biggest tech companies[255] in all the sectors globally. With similar developments in India, it is expected to become one of the biggest markets for tech companies.[256] With the advancement in technology and digital markets, the companies have diversified their portfolio and have ventured into various new sectors, especially through digital markets. Such rapid growth has incepted huge opportunities for the entities in digital markets which in turn has boosted the activity of mergers and acquisitions involving companies that engage in providing online services.[257] In the light of the rise in mergers and acquisitions of corporate entities, it has been observed that big and established online service providers tend to acquire small and budding companies that might pose a threat to the established entity in the future (e.g. Facebook's acquisition of Instagram).[258] The fate of such new entrants hangs on a thin thread held on by the established players. In the last 10 years, the top five big-tech companies (Amazon, Apple, Facebook, Google, and Microsoft) have engaged in more than 400 acquisitions globally.[259] This unprecedented activity of mergers and acquisitions taking place in the digital market calls for a robust merger control regime concerning digital markets, given that there is a fair chance that such transactions may end up being detrimental to the consumers if the loopholes in the present merger control regime are not addressed.

II. NEED FOR CHANGES IN THE PRESENT MERGER REGIME

The major challenge faced by competition authorities in different jurisdictions is that their merger control regime is not designed to scrutinize mergers and acquisitions in digital markets and it is for this reason that most of such mergers are completed without antitrust scrutiny. The big-tech companies, in the last 30 years, have consummated over 800 acquisitions, with 32 acquisitions

255 Manyika J and Tuin M, 'It's Time to Build 21st Century Companies: Learning to Thrive in a Radically Different World' (12 May 2020) <https://www.mckinsey.com/mgi/overview/in-the-news/its-time-to-build-21st-century-companies> last accessed 28 October 2021.
256 Economics Times 'McKinsey Says Indian IT Industry to Touch $300-350 Billion in Five Years' (18 February 2021)<https://economictimes.indiatimes.com/tech/technology/mckinsey-says-indian-it-industry-to-touch-300-350-billion-in-five-years/articleshow/81093397.cms> last accessed 28 October 2021.
257 Global Data 'Race for Technology Mergers amid Digitalization Spree Brings Global M&A Value over $1 Trillion in Q2 2021' (August 3, 2021) <https://www.globaldata.com/race-technology-mergers-amid-digitlization-spree-brings-global-ma-value-1-trillion-q2-2021-says-globaldata> last accessed 28 October 2021.
258 CMA "Digital Markets Strategy- GOV.UK" (July 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814709/cma_digital_strategy_2019.pdf> last accessed 28 October 2021.
259 ibid.

having a value of more than 1 billion US Dollars.[260] The Federal Trade Commission [“**FTC**”], in its 2021 study discovered that the big-tech made 616 non-notifiable transactions of value more than $1 million each from 2010 to 2019.[261] Moreover, the FTC, at the backdrop of this study accused the big-tech of exploiting the loopholes for avoiding antitrust scrutiny,[262] and noted that there is a need to *‘plug gaps’* in the existing framework.[263] In the UK, from 2015 to 2020, over 250 mergers involving the big-tech were concluded where not one of them was blocked or approved subject to conditions by the Competition and Markets Authority [“CMA”] for potential antitrust concerns, indicating that there has been an *‘under enforcement of digital mergers.’*[264] Similarly in India, the acquisitions of Freecharge by Snapdeal, Myntra by Flipkart, and WhatsApp by Facebook,[265] were made by established players of the market and were consummated without antitrust scrutiny. Looking into the above-mentioned scenario, it is apparent that there is an urgent need of regulating mergers and acquisitions in the digital markets failing which, various theories of harms may arise which have been discussed later in this note.

III. MERGER CONTROL IN INDIA

In India, mergers are governed by the Competition Act, 2002 [“**the Act**”] and its allied Regulations. Mergers, acquisitions, and amalgamations that breach the thresholds set under Section 5 of the Act,[266] are referred to as ‘Combinations’, and are required to be notified to the competition watchdog, i.e. the Competition Commission of India [“**the Regulator**”] for its approval.[267] The Regulator is vested with the role of scrutinising every notified combination for

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[260]‘Visualizing Tech Giants’ Billion Dollar Acquisitions’ (5 May 2020) <https://www.cbinsights.com/research/tech-giants-billion-dollar-acquisitions-infographic/> last accessed 22 March 2022.
[261] ‘Non-HSR Reported Acquisitions By Select Technology Platforms, Federal Trade Commission’ (USA Federal Trade Commission, September 2021) <https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf> last accessed, 2 March 2022, page 36.
[262] ‘Non-HSR Reported Acquisitions by Big Tech Platforms, Prepared Remarks of FTC Commissioner Rohit Chopra’ (USA Federal Trade Commission, 15 September 2021) <https://www.ftc.gov/system/files/documents/public_statements/1596340/20210915_final_chopra_remarks_non-hsr_reported_acquisitions_by_big_tech_platforms.pdf> last accessed, 2 March 2022.
[263] ‘Non-HSR Reported Acquisitions By Select Technology Platforms, Remarks Of Chair Lina M khan’(USA Federal Trade Commission, 15 September 2021) https://www.ftc.gov/system/files/documents/public_statements/1596332/remarks_of_chair_lina_m_khan_regarding_non-hsr_reported_acquisitions_by_select_technology_platforms.pdf last accessed, 2 March 2022.
[264] ‘Digital Competition Expert Panel (UK) ‘Unlocking Digital Competition: Report of Digital Competition Expert Panel’ (March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> last accessed 28 October 2021, para 3.43. [Hereinafter, *DCEP*].
[265] ‘Ministry of Corporate Affairs Report of Competition Law Review Committee’ Chapter 7: Combinations (Ministry of Corporate Affairs Government of India, July 2019) <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf> last accessed, 28 October 2021, page 132 [Hereinafter, *CLRC Report*].
[266] Competition Act, 2002, Section 5.
[267] Competition Act, 2002, Section 6.

any potential anti-competitive concerns that may arise owing to that combination. It is important to note that the notification thresholds as set under the Act are strictly based on the combined asset and turnover of the combining parties/ group.[268] However, this criterion of determining the threshold may not be best suited for present-day technology driven mergers because the entities involved may have a potential of causing Appreciable Adverse Effect on Competition ["AAEC"] and still not breach the thresholds set under Section 5. In most acquisitions in the digital market, the target enterprise may not create a huge asset base and turnover,[269] and not generate "*any significant revenue*" for years,[270] owing to its offering of free products and/or services and priority on creating a user base.[271] Since the revenue of such targets is significantly less, their acquisition either completely escapes the thresholds set under Section 5 or gets the benefit of *de minimis* exemption.[272] Therefore, determining the value of digital companies based on turnover and assets may not be effective. Hence, in order to bring such mergers under the ambit of the Regulator's scrutiny, a broader approach needs to be adopted for the determination of the threshold so that the actual value (including future ramifications) of the proposed merger/acquisition is reflected in calculating the value of the combined entity.

Additionally, Section 20(1) of the Act,[273] limits the power of the Regulator to inquire into transactions covered exclusively by Section 5. Therefore, even if a merger/acquisition prima facie appears to be anti-competitive, the Regulator cannot conduct an investigation into it.

IV. THEORIES OF HARM

Since these mergers, which are mostly data-driven, escape the scrutiny of competition authorities, potential AAEC concerns that may arise in the future go unaccounted for. The consequence of these unaccounted mergers is that the acquirer may end up with an unreasonable advantage over its competitors, thus, paving the way for the merged entity to become dominant. For instance, in cases of mergers in digital markets, the acquirer, by getting access to the user base of its target,

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[268] Competition Act, 2002, Section 5.
[269] CLRC Report (n 11) page 128.
[270] 'Digital Competition Expert Panel (UK) 'Unlocking Digital Competition: Report of Digital Competition Expert Panel' (March 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> last accessed 28 October 2021, para 3.62.
[271] CLRC Report (n 15).
[272] '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> last accessed, 28 October 2021.
[273] Competition Act, 2002, Section 20(1).

can easily expand the market reach of the combined entity, which may end up making such entity dominant in the market, thus giving rise to AAEC concerns.[274]

Because acquisitions in the digital market have a scope of escaping the competition regulator's scrutiny, two probable theories of harm arise: a) killer acquisitions; and b) nascent potential competitors.[275] Killer acquisition is a theory of harm where an incumbent firm acquires the target to *'discontinue the development of the target's innovative projects and pre-empt future competition'* because the target's product competes with the incumbent's product and is thus perceived as a competitive threat.[276] In some cases, the incumbent firm may discontinue its own line of product after acquisition and continue with the target's product.[277] In a nutshell, killer acquisitions tend to terminate the development of the product of either the acquirer or the target so that only one product reigns in the market.[278]

In the case of nascent potential competitor theory of harm, the acquirer aims at eliminating competition from the target while the product continues in the market by simply buying the target.[279] Since, the acquirer can take decisions on price, quality, and innovation of the concerned product,[280] it eventually gains overarching control over the target's product, thus killing the competition automatically.[281] In the recent past, the acquisitions of Freecharge by Snapdeal, Myntra by Flipkart, and WhatsApp by Facebook were executed with the intent of *'eliminating potential threat'* from the target,[282] and it shows how the nascent competitor theory of harm came into play with the target's product not getting killed by the acquirer.

The two above-mentioned theories of harm highlight the imperative need for the regulation of mergers in the digital sector, in the absence of which big-tech companies will continue to weed out competition by acquiring small and budding businesses without being held accountable. It is for these reasons that the CLRC has recommended the provision of Deal Value Threshold for

[274] DCEP (n 16) para 1.75.
[275] Yun John M, 'Potential Competition, Nascent Competitors, and Killer Acquisitions' (2020). The Global Antitrust Institute Report on the Digital Economy 18, SSRN Electronic Journal: <https://ssrn.com/abstract=3733716> last accessed, 28 October 2021.
[276] Cunningham, Ederer, and Ma, 'Killer Acquisitions' (2021) vol. 129, issue 3, 649 - 702.
[277] Pike C, 'Start-Ups, Killer Acquisitions and Merger Control' (2020). SSRN Electronic Journal. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3597964> last accessed, 28 October 2021 para 7. [Hereinafter, *Pike C*].
[278] ibid. para 9.
[279] ibid para 15.
[280] ibid para 192.
[281] ibid para 17.
[282] CLRC Report (n 11).

merger notification.[283] In the following section, the authors will discuss the important aspects of deal-value threshold and provide an outline of how Deal Value Threshold should be implemented in the Indian competition regime.

V. IMPLEMENTATION OF DEAL VALUE THRESHOLD

Deal Value Threshold ["DVT"] is a deviation from the traditional turnover and asset-based criteria for determining whether a merger/acquisition is required to be notified to the competition authority for its approval. Since target companies that form a part of the digital market may not have a huge asset base and a significant turnover, judging whether the acquisition of such targets is notifiable or not based on their turnover and asset may not be effective. The European Parliament in its study had noted that the turnover criteria for such target entities is not a practical metric to measure their size.[284] DVT attempts to overcome this shortfall by setting a new threshold that takes into account the transaction value and the domestic presence of the target companies, where merger activities breaching the threshold would be liable for notification and approval from the competition regulator. DVT ensures that potential anti-competitive combinations involving targets not having significant turnover and assets do not escape the scrutiny of the competition regulator. Given that there is a grave importance of an efficient merger control in digital markets, the inclusion of DVT has been provided in the Competition (Amendment) Bill, 2020,[285] under the proviso to Section 5 of the Act, however, the Bill has not been enacted as law until now.

VI. ASPECTS TO BE COVERED UNDER DVT

This note aims at laying down the methodology of implementing DVT in India. In our opinion, the Deal value Thresholds for the purpose of merger control must be inclusive of the following heads:

A. Monetary Threshold

For a combination to be notified for investigation there is a requirement of a threshold to be breached as per Sections 5 and 6 of the Act. Along similar lines, a threshold is also required for

[283] ibid para 5.12.
[284] European Parliament," *Challenges for Competition Policy in a Digitalized Economy*, (July 2015) 60.
[285] Competition (Amendment) Bill, 2020.

mergers/acquisitions in the digital market which would consider the true economic value of a combination and not just the turnover and asset of the parties involved. The German and Austrian competition regulators had released a Guidance Note ["**the Note**"] for the newly introduced transaction value threshold where one of the concerns that was explained by the Note was 'Value of Consideration'.[286] The Note states that value of consideration is an accumulation of 'all assets and other monetary benefits' that a seller receives from a buyer in a particular merger,[287] and if that value reaches a certain predetermined threshold, then the merger would be liable for notification.[288] The Note clarifies that the asset involved should be interpreted broadly and must contain all cash payments and the transfer of voting rights, securities, tangible assets and intangible assets, contingent considerations and payments for non-competition if any. For the calculation of value, the Note emphasises that it is imperative to differentiate between the company value calculated on the basis of business methods and the purchase price and consideration value for a company.[289] This distinction is especially important where the target is bought at a much higher price than its actual company value, for instance, in the Facebook-WhatsApp merger case.[290] This significant difference between the two values indicates that the target may have some unlocked potential that the buyer can anticipate and use the same to disrupt the relevant market and thus cause AAEC. Therefore, while ascertaining whether a particular merger breaches the threshold or not, only the consideration value of the said merger must be taken into account and not the company value of the target.

While assessing the value of consideration, there are two aspects that the merging parties should keep in mind, which the CLRC Report of 2019 had also pointed out:[291]

- Fluctuations in the value of consideration, and
- Future payments

i. <u>Fluctuations in the value of consideration</u>:

The value of consideration may fluctuate over time owing to the securities (e.g. shares) involved in the transaction. The traditional turnover criterion for notifying mergers does not cater to this problem because the assessment is done over a period of time and not on a particular date.

[286] Bundeskartellamt/BWB, *Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification*, para 11 [Hereinafter, *BWB*].
[287] ibid.
[288] ibid para 8.
[289] ibid para 12.
[290] Pike C (n 23) page 14.
[291] CLRC Report (n 11) page 133.

Therefore, it is essential that a relevant date be determined on which the value of the variable securities is to be taken into account. The Note on this account states that the completion date of the merger can be regarded as the relevant date.[292] However, this method of fixing the date may not work in cases where there is a fluctuation in the value of consideration at the time of notification. For such cases, the Note provides that the value of consideration must "relate to the time the notification requirement was reviewed by the parties to the merger".[293] And accordingly, parties may withdraw the notification if the value is below the threshold otherwise they may be obligated to notify the merger if the value crosses the threshold.[294] It is important to highlight that the option of withdrawal that the parties get after notifying their concerned merger is a dynamic advancement in merger regulation as it avoids unnecessary inquiry of benign mergers by the Regulator. The authors believe that this option of withdrawal should necessarily be adopted in the Indian regime so that parties to such mergers can withdraw their notification and conclude the transaction in a lesser time frame.

ii. <u>Future payments</u>:

The CLRC, in its report, had highlighted the need to specifically deal with parts of consideration that are to be paid at different times such as earn-outs,[295] and payments that are contingent on 'realisation of certain turnover' or 'profit targets' in the future.[296] The Note, for such payments, suggests that the current value of future payments must be considered for the calculation of value of consideration which may be calculated on the basis of discounting methods.[297] The authors believe that the parties to the merger should be given discretion in choosing the method for estimating the current value of future payments. However, the Regulator should be required to ensure that there is transparency in the method of calculation adopted by the parties.

For the Indian merger control regime, the thresholds under DVT can be set on the basis of value of consideration of a transaction and wherever it crosses the threshold, it should require notification to the Regulator. Moreover, even those transactions should be made notifiable whose value of consideration falls short of the threshold by a marginal amount given that the merger control regime in India has little experience concerning data-driven/digital mergers and there is

[292] BWB (n 32) para 18.
[293] ibid.
[294] ibid.
[295] CLRC Report (n 37).
[296] BWB (n 32).
[297] ibid para 30.

no conclusive report on the effectiveness of DVT. This flexibility in DVT will ensure that potential anti-competitive mergers do not escape the Regulator's scrutiny merely because they fall short of the threshold by a marginal amount.

B. Qualitative Parameters

Since the concept of DVT is new and its formulation is at a budding stage, mere fixation of a monetary threshold may not be adequate in preventing potential anti-competitive mergers. Therefore, to effectively regulate data-driven/digital mergers, there is a requirement for some more parameters on which the business of the nascent target entity may be evaluated which would further help in determining whether the acquisition of such targets needs to be investigated. The parameters will also assist in determining the domestic presence of a target which has been highlighted in the Note,[298] as well as in the CLRC report.[299] The parameters are discussed below:

i. User Base

The user traffic generated by a target entity becomes relevant when it is an online service provider. The popularity of the target based on user base can help determine the extent and potential of its business and thus, apparently, the market presence which would further make comparison with the target's competitors convenient. Since the turnover criteria for such target entities is not a practical metric to measure their size, a broader method for the calculation of the same is needed. The same can be calculated accurately by examining the *'number of users together with an estimation of the size of the network effects.'*[300]

User base can be computed on the basis of *'monthly active users', 'daily active users', 'number of registered users',* and *'unique user.'* Unique user for a website is a user whose visit is counted once no matter howsoever times the user visits the website is a given period,[301] and that the case practice of the Bundeskartellamt indicates that a unique user 'appears to be most suited to reflect the intensity of a platform's usage.'[302]

ii. Data harvesting

[298] BWB (n 32) para 10.
[299] CLRC Report (n 37).
[300] European Parliament, '*Challenges for Competition Policy in a Digitalized Economy'*, (July 2015) 60.
[301] 'Unique Users' (*WACA Web Analytics Consultants Association.*) <https://www.waca.associates/en/web-analytics-dictionary/unique-users-uus/> last accessed 19 October 2021.
[302] Bundeskartellamt, *Working Paper – "Market Power of Platforms and Networks",* (June 16) 70.

With the growth of the digital economy, the prospect of collecting, processing, and making commercial use of data has enhanced remarkably in every sector and businesses rely on data to provide improved products and services and raise economic efficiencies.[303] Therefore, data constitutes a *'core economic asset'* for companies.[304] When such companies are sold, the buyer gets access to the data harvested which may provide the combined entity with a competitive advantage over its peers and may eventually result in tipping effects. Similar concerns were raised in the Google/Fitbit case; however, the acquisition was allowed subject to several conditions one of them being that Google would not use the data received from Fitbit for Google Ads.[305]

Additionally, the accumulation of user data or any sort of data with one single entity can lead to tipping effects in the market, and this motivates businesses to engage in data-driven innovations. This in turn helps them to better assess consumer demands, habits, needs and preferences. Access to data can represent a form of competitive advantage.[306] It is important to note that since data is of such significant value for companies, they may engage in acquisition just for obtaining access to volumes of data held by nascent/small companies. However, this data exchanged in such mergers goes unaccounted for under the present turnover/asset based criterion of assessing mergers. Therefore, it is crucial that data be treated as an asset and be made a parameter under DVT for determining whether a merger requires investigation by the Regulator.

VII. NASCENT COMPETITORS

In cases of acquisitions in digital markets, there are many instances where an established player tends to acquire a new entrant in the market because that new entrant poses itself as a prospective competitor to the established player and thus, by acquiring the nascent entity the incumbent attempts to eliminate any competition that may arise in the future. A nascent competitor is a new entrant in a market whose innovation "represents a serious but uncertain future threat" to an

[303] Autorité de la concurrence/Bundeskartellamt, 'Competition Law and Data', (10 May 2016).
[304] Oskar Törngren, 'Mergers in big data-driven markets - Is the dimension of privacy and protection of personal data something to consider in the merger review?'(Thesis in EU law, 30, Stockholm University, Stockholm Autumn term 2017) page 9.
[305] European Commission *'Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions'* (17 December 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484> last accessed 28 October 2021.
[306] Chen Z and others, 'Data-Driven Mergers and Personalization', (2020) RAND Journal of Economics.

incumbent.[307] In an article[308] published in the University of Pennsylvania Law Review, the authors analysed the Microsoft-Netscape case,[309] where Netscape was perceived as a nascent competitor to Microsoft, and laid down three characteristics of a nascent competitor which Netscape possessed: a) Innovation; b) Future potency; and c) Threat to the incumbent.[310] Similarly, the acquisition of Instagram by Facebook in 2012,[311] is an example of a nascent competitor being acquired by an established player where Instagram with its innovative photo-sharing platform and growing user base[312] seemed to fulfil all the above-mentioned prerequisites for a nascent competitor. Facebook had scanned the market just like what Microsoft had done in the 1990s, in order to zero down to a nascent competitor.[313] The communications between the officials of Facebook reveal that Facebook was perceiving Instagram as its future rival. One email which was exchanged between the CEO and CFO of Facebook read as follows: *"The businesses are nascent but the networks are established, the brands are already meaningful and if they grow to a large scale they could be very disruptive to us."*[314]

Considering that nurturing innovation is one of the primary goals of Competition Law,[315] the regulatory authorities must strive to protect such nascent competitors. In India, the Regulator can adopt the above-mentioned criteria to identify nascent competitors and may disapprove such acquisitions where an incumbent is acquiring a nascent competitor. It is important that the Regulator is equipped with a method of identifying such new entrants. The Regulator can utilise the concept of Nascent Competitor for assessing the acquisition of such entities for AAEC at: a) the post notification stage of acquisitions which breach the threshold set under DVT; and b) in the *ex-post* review process.

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[307] C. Scott Hemphill & Tim Wu, '*Nascent Competitors'*, (2020) 168 U. Pa. L. Rev 1879, 1883. [Hereinafter, *Scott and Wu*].
[308] ibid.
[309] United States of America v Microsoft Corp, United States Courts of Appeal District of Columbia Circuit, (2001) Federal Reporter 34.
[310]Scott and Wu (n 52).
[311] Evelyn Rusli, 'Facebook Buys Instagram for $1 Billion', April 9, 2012. <https://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion/> last accessed 28 October 2021.
[312] AlexiaTsotsis 'With Over 30 Million Users on IOS, Instagram Finally Comes to Android' (April 3 2012) <https://techcrunch.com/2012/04/03/instagram-android-demum/?_ga=2.247509377.787894779.1647323546-884896453.1647323545> last accessed 28 October 2021.
[313] Sam Schechner & Parmy Olson, 'Facebook Feared WhatsApp Threat Ahead of 2014 Purchase, Documents Show'. (Nov. 6, 2019), <https://www.wsj.com/articles/facebookfeared-whatsapp-threat-ahead-of-2014-purchase-documents-show-11573075742> last accessed 28 October 2021.
[314] Email from Mark Zuckerberg, Chairman and CEO of Facebook, Inc., to David Ebersman, CFO of Facebook, Inc. (Feb. 27, 2012) [https://perma.cc/4B6V-S42E].
[315]Scott and Wu (n 53).

VIII. POST-MERGER REGULATION

Firstly, in digital markets, there remains compelling uncertainty regarding the development of a target's products,[316] which may act as a hindrance in assessing whether the acquisition will cause AAEC or not. Secondly, it cannot be denied that competition regulators around the world, including in India, have little practice whatsoever in investigating mergers and acquisitions in digital markets. Additionally, since there is no case practice or empirical study regarding DVT in India, its shortcomings and drawbacks are undiscovered. Consequently, there may be cases where DVT fails in its objective and a potential AAEC causing merger/acquisition bypasses the scrutiny of the Regulator. To overcome the above-mentioned dilemma, there is a need of a provision of post-merger regulation/*ex-post* review where the Regulator is vested with the authority to intervene and break up such mergers which appeared benign at the pre-merger stage but turn out to be anti-competitive post-completion.

Presently, a few countries have vested the power of *ex-post* review with their competition regulators which include the US, Japan, Hungary, and the UK.[317] The Japan Fair Trade Commission had conducted an *ex-post facto* review in the acquisition of Nihon Ultmarc by M3,[318] and Fitbit by Google,[319] on the grounds of a possibility of restraint of competition and large value of total consideration respectively. Aside from that, the Autorité de la concurrence, the French Competition Regulator, in June 2018 had suggested the introduction of *'ex-post control'* of mergers, where the French Regulator would be authorized to step in and conduct a thorough investigation if there appears even a mist of an anti-competitive environment post the merger or acquisition.[320]

One of the major advantages of having an *ex-post* review is that it is conducted after the completion of a merger. This means that it will be easy for the Regulator to assess the merger for potential AAEC given that the Regulator will already be disseminated with the economic data of the merged entity. In several cases, it may be possible that the actual anti-competitive character

[316] OECD Secretariat Background Note, "*Start-ups, Killer Acquisitions and Merger Control",* (10-12 June 2020), para 49.
[317] ibid para 187.
[318] Japan Fair Trade Commission, 'The JFTC Reviewed the Acquisition of Shares of Nihon Ultmarc Inc. by M3, Inc' (2019) <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191024.html> last accessed 28 October 2021.
[319] Japan Fair Trade Commission, 'The JFTC Reviewed the Proposed Acquisition of Fitbit, Inc. by Google LLC' (2021) <https://www.jftc.go.jp/en/pressreleases/yearly-2021/January/210114.html> last accessed 28 October 2021.
[320] *"Modernization and Simplification of Merger Control"* (*Autorité de la concurrence* June 7, 2018) <https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/07-june-2018-modernization-and-simplification-merger-control> last accessed 28 October 2021.

of a merger is revealed only after its completion. Such mergers/acquisitions can only be blocked or reviewed if the Regulator is provided with the power of *ex-post* review.

Therefore, it is evident that there is a requirement of an *ex-post* review in the Indian merger control regime so that in case any potential anti-competitive combination escapes the Regulator's scrutiny, for the reasons mentioned above, the authorities are still left with an option of investigating into the combination at a later stage. Apart from this, for proper implementation of the *ex-post* review, it is important that a right time limit is set within which the Regulator can intervene for investigation. On one hand, if a shorter time frame is set, it can lead to incomplete investigation due to inadequate data to estimate the true effect of the combination,[321] whereas a longer time frame may make investigation extremely difficult due to significant integration.[322] The success of *ex-post* regulation is directly dependent on the time limit set for investigation. Thus, the time frame must be set in such a manner that it captures all the possible effects of a combination,[323] and the Regulator must be provided with the authority to determine the suitable time frame for *ex-post* review.

IX. CONCLUSION

Presently, the competition regime in India is not equipped to efficiently deal with mergers and acquisitions taking place in digital markets which provides an easy opportunity for companies to stifle competition in the market. Deal-value Threshold attempts at resolving the issue by fixing the loopholes under the present threshold-based merger control regime by ensuring that the acquisition of start-ups and nascent competitors is notified to the Regulator. The authors believe that DVT would be better able to regulate mergers and acquisitions when it is coupled with qualitative thresholds, such as user base and data harvested by target entities, and *ex-post* review. However, the merger control provided by DVT should be implemented with precaution so that it does not end up over-regulating the process. Over-regulation would make the merger review process cumbersome which might discourage even benign mergers/ acquisitions from taking place. This will cause a detrimental effect on innovation which would further dissuade foreign companies from doing business in India and would be detrimental to the country's economy. The above scenario will lead to an adverse effect on innovation and investment, which would take a

[321] Duso, Tomaso & Spagnolo, Giancarlo & Buccirossi, Paolo & Ciari, Lorenzo & Fridolfsson, Sven-Olof & Vitale, Cristiana, 'A Short Overview of a Methodology for the Ex-Post Review of Merger Control Decisions', De Economist (2008) 22. [Hereinafter, *Duso*].
[322] Pike (n 23) para 190.
[323] Duso (n 67).

toll on the ease of doing business in the country. There is also a possibility that over-regulation may cause a boomerang effect, and instead of promoting competition, it would end up curtailing it. Therefore, to overcome this problem, the authors suggest that an approach of checks and balances between antitrust scrutiny and innovation must be adopted by the Regulator and DVT should be implemented only after evaluating all the probable consequences that may arise post-implementation.