ILLUMINATING THE NASCENT POTENTIAL COMPETITOR ACQUISITION THEORY OF HARM: THREAT TO START-UPS

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ABSTRACT

The growing number of startups in digital markets in India has given a boost to the Indian economy. Even after this significant number of technology startups, Big Tech remains dominant in this technology industry. One of the primary reasons behind this is the acquisitions done by these big tech companies. The authors in this paper discuss the 'nascent potential competitor theory of harm' and advocate the need for attention to be given to such acquisitions, as it is more detrimental to the competition than the much-discussed 'killer acquisition theory of harm'. The authors suggest a two-step solution of Notification and Identification for countering such nascent potential competitor acquisitions in the digital markets. For the first step, the authors suggest modifications in the 'deal value threshold', and for the second step, the role of the newly set up Digital Markets Data Unit ("DMDU") is highlighted. The authors suggest that DMDU should utilize the Systematically Important Digital Intermediary ("SIDI") tag mechanism to put additional tailor-made compliances on the acquisitions by big tech. The authors contend that a digital startup does not only compete with a particular service or product of the big tech but it competes with the whole ecosystem of such big tech companies. Thus, it is suggested that DMDU should promote interoperability to make a fair ground to compete, which will in turn disincentivize startups that are at their nascent stage of growth, from being acquired. Lastly, the authors give some suggestions for DMDU to bring the much-needed technological egalitarianism to the digital markets.

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I. INTRODUCTION

The Indian startup industry has reached the landmark position of being the fourth largest in the world.[1] A closer look into the nature of the new-age startups would prompt the viewer towards their common characteristic which is an attempt to reach the widest possible audience and attain a digital presence. While a few startups have a mere digital presence, India is also seeing a rise in the number of startups that may be called *digital startups* and are part of the digital startup industry.[2] These are the startups that primarily operate in *digital markets* as opposed to brick-and-mortar markets where the interested parties mandatorily have a physical presence in the market. These are also termed traditional markets. On the contrary, *digital markets* may be defined as those that bring the *two sides* of a market, the consumer and the producer, together on one platform, blurring the line between buyer, seller, customer, and employee making such markets *multi-sided*.[3] The applications that bring these two sides of a market together on one digital platform to explore and sell products or services have been labelled as digital markets on account of their function in the digital space which is similar to traditional markets.

Several Indian startups such as Zomato, Swiggy, Flipkart, etc., whose market role will be analyzed through the lens of anti-trust further in the course of this paper, have taken advantage of the opportunities brought forth by *Digital Markets*. However, their actions in the digital space have raised several eyebrows and have exposed the loophole present in India's Competition Act, 2002,[4] which lacks a robust mechanism to govern mergers and acquisitions in this market. A *democratic Internet ecosystem*[5] can only thrive when the rules are made for all to compete on an equal footing. With the rise of global *Big Tech* i.e. Google, Amazon, Facebook, Apple, and Microsoft, digital markets are becoming spaces where *ex-post regulations* are failing to curb anti-competitive practices.[6]

The increase in mergers and acquisitions in the *digital markets* has led to the origination of two theories of harm. The first is the *killer acquisition theory of harm* and the second is the *nascent potential*

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[1] BS Web Team, 'India fourth in number of startups with over $50 million funding: Scaleup report' (*Business Standard*, 25 September 2023) <https://www.business-standard.com/industry/news/india-fourth-in-number-of-startups-with-over-50-mn-funding-scaleup-report-123092500356_1.html>accessed 2 December 2023.

[2] Dr. Prashant Prabhakar Deshpande, 'Contribution startups revolution is making to India's growth' (*The Times of India*, 11 September 2023) <https://timesofindia.indiatimes.com/blogs/truth-lies-and-politics/contribution-startups-revolution-is-making-to-indias-growth/>accessed 3 December 2023.

[3] Arno Rasek, 'Two-Sided Market' (*Concurrences*) <https://www.concurrences.com/en/dictionary/two-sided-market>accessed 4 December 2023.

[4] The Competition Act, 2002.

[5] Urs Gasser, 'Interoperability in the Digital Ecosystem' (2015) 2 HLOSC <https://dash.harvard.edu/handle/1/28552584>accessed 5 December 2023.

[6] Amar Patnaik, 'Big Tech and the need in India for ex-ante regulation' (*The Hindu*, 13 December 2022) <https://www.thehindu.com/opinion/op-ed/big-tech-and-the-need-in-india-for-ex-ante-regulation/article66255539.ece>accessed 5 December 2023.

competitor acquisition theory of harm ("nascent acquisition theory").[7] This paper sheds light on the much-neglected nascent acquisition theory of harm. The authors contend that acquisition under the latter theory is more complex to identify and needs the attention of enforcement agencies. This is because, in India, there is no specific legislation to regulate anti-competitive behaviour in the digital markets. The legislature is well aware of the requirement of a specific law for dealing with such issues arising in the digital markets, therefore a 16-member inter-ministerial Committee on Digital Competition Law was set up by the Ministry of Corporate Affairs to make a report on the same.[8] But for the time being, the Competition Act 2002 is the primary legislation dealing with digital markets.

This lack of specific legislation governing digital markets and protecting the interests of newly found digital Indian startups has led the authors to analyze the effectiveness of previous steps taken by the Competition Commission of India ("CCI") to curb the acquisitions that are done to hamper the Competition in the market. The introduction of the Deal Value Threshold ("DVT") through the Competition (Amendment) Act 2023,[9] has widened the scope of CCI's jurisdiction since it now makes mergers and acquisitions notifiable to the CCI based on transaction value, complementing the existing asset/turnover threshold thereby enabling CCI to ascertain and bring within its radar killer and nascent potential competitor acquisitions. However, the DVT, which is currently pegged at Rs. 2000 Crore, is an insufficient tool to assess which startups are at their nascent stage of growth and have the potential to give competition to the established monopolies of *Big Tech*. DVT has been introduced for making more mergers and acquisitions notifiable but assessing whether companies acquiring the target have the aim of eliminating potential future competition or not is *neither the objective of DVT nor is it capable of the same*.

Even if such a transaction gets notified before the CCI, there is no tool to assess whether the acquisition will result in the elimination of potential future competition. As already mentioned, the present act does not have any provision which deals specifically with *digital markets*. The increased acquisitions over the years have highlighted the underlying intentions of the acquirers, making CCI look even weaker in ascertaining which combinations to regulate. In light of this background, the authors through this paper examine the nascent acquisition theory of harm and suggest a robust mechanism to counter the same. Section II of the paper explains both killer and nascent acquisition

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[7] Organisation for Economic Co-operation and Development, *Theories of Harm for Digital Mergers* (DAF/COMP 6, 2023) 21.
[8] KR Srivats, 'Digital Competition Law: Inter Ministerial Panel to hold final meeting in early October' (*The Hindu Business Line*, 25 September 2023) <http://www.thehindubusinessline.com/economy/digital--early> accessed 6 December 2023.
[9] The Competition (Amendment) Act, 2023.

theory of harm through the lens of acquisitions in Indian digital markets. The authors through section III contend that the nascent acquisition theory of harm is more detrimental to competition, and needs the immediate attention of authorities. In section IV, a two-step process of *notification* and *identification* is laid down for countering the nascent acquisitions in the *digital markets*. Further, in section V of the paper, the authors advocate for the promotion of *interoperability* by the newly set up Digital Markets and Data Unit ("DMDU") of the CCI, to bring the much-needed technological egalitarianism in the *digital markets*.

II. THE TWO THEORIES OF HARM: KILLER ACQUISITION THEORY OF HARM AND NASCENT ACQUISITION THEORY OF HARM

As discussed above, startups play a pivotal role in the overall development of the Indian economy. It is of utmost importance to examine such acquisitions which are anticompetitive and cause harm to startups, especially in the digital markets. The killer acquisition theory of harm came to light after a study was conducted on the pharmaceutical industry.[10] In this study, it was observed that the targets were acquired to discontinue their innovation and thus pre-empt future competition. On the other hand, the nascent acquisition theory of harm suggests that the incumbent acquires the target intending to pre-empt the competition but the innovation in question is not hampered, rather it is developed by the acquirer.[11] Both these theories can be understood by the recent acquisitions observed in the Indian food delivery business.

Zomato**,** a prominent entity in online food delivery and restaurant discovery, undertook the acquisition of two major business rivals, namely Uber Eats, and Blinkit, over two years. The transaction involving Uber Eats, amounting to approximately Rs. 2,485 crores in an all-stock arrangement,[12] was followed by the acquisition of Blinkit, culminating in a total outlay of Rs. 4,446 crores.[13] However, it is essential to note that both of these acquisitions transpired before the implementation of the DVT of Rs. 2,000 Crore, introduced through the 2023 amendment to the Competition Act of 2002. Consequently, Zomato benefitted from the *de minimis* exemption[14],

[10] Colleen Cunningham, Florian Ederer and Song Ma, 'Killer Acquisitions' (2020) 129 JPE <https://economics.sas.upenn.edu/system/files/2019-07/SSRN-id3241707.pdf>accessed 25 November 2023.

[11] Organisation for Economic Co-operation and Development, *Theories of Harm for Digital Mergers* (DAF/COMP 6, 2023) 31.

[12] 'Zomato acquires Uber Eats for Rs. 2,485 crores: over 100 employees face uncertainty' (*Business Today,* 21 January 2020) <https://www.businesstoday.in/latest/corporate/story/zomato-acquires-uber-eats-rs-2485-crore-100-employees-uncertainty-243657-2020-01-21>accessed 7 December 2023.

[13] Binu Paul, 'What's driving Zomato's Rs 4,447 cr acquisition of Blinkit?' (*Business Today*, 25 June 2022) <https://www.businesstoday.in/latest/corporate/story/whats-driving-zomatos-rs-4447-cr-acquisition-of-blinkit-339181-2022-06-25>accessed 2 December 2023.

[14] Competition Commission of India, *Notification regarding (a) de minimis exemption; (b) relevant assets and turnover in case a portion of an enterprise or business is being acquired, taken control of, merged or amalgamated with another enterprise*: S.O. 988 (E), 989 (E) (CCI Notification No. 8, 2017).

effectively evading the requirement for notifying these substantial combinations. As per this exemption, a transaction is exempted from the requirement of notification if the target enterprise has assets less than INR 350 crores in India or if turnover is less than INR 1000 crores. Subsequently, an analysis of the transaction outcomes reveals *two distinct approaches* taken by Zomato. With the acquisition of Uber Eats, the Uber Eats app was discontinued and users were seamlessly redirected to the Zomato platform. This differs markedly from Zomato's decision to sustain the Blinkit app post-acquisition. This dichotomy underscores Zomato's strategic approach: while it aimed to eliminate competition within its domain through the cessation of the Uber Eats app, it simultaneously sought to disrupt the consumer base of another market.[15] The acquisition of Uber Eats is an example of a killer acquisition since the product itself is discontinued whereas the Blinkit acquisition is an example of nascent acquisition theory harm as Zomato has continued with Blinkit and expanded its access to new markets. These acquisitions done by Zomato may not be detrimental to the competition but when the same practices are adopted by *big tech* on a large scale, it changes the whole dynamics of the market and restricts new entrants.

III. MONOPOLY IN THE MAKING: THE DOMINO EFFECT OF NASCENT ACQUISITIONS OF POTENTIAL COMPETITORS

The authors contend that the issue of nascent potential competitor acquisition is more complex to identify and has *more detrimental effects* than killer acquisitions and thus needs special attention from the authorities. This is because, in killer acquisitions, the incumbent acquires the target and kills its product by hampering the innovation. In this situation, the possibility of a new entrant coming into the market is still there as innovation by such a new entrant can act as a catalyst. But in the case of nascent potential competitor acquisition, the acquirer develops the product of the target and there is very little scope for a new entrant to enter into the market as innovation is no longer a catalyst.

When the enforcement agencies allow any mergers or acquisitions which prove to be anti-competitive, it is termed as a *'false negative'*.[16] The most detrimental effect of such false negatives in the digital market is the monopoly established by *Big Tech*. This can be understood by taking

[15] Clayton M. Christensen, Michael E. Raynor and Rory McDonald, *'What is Disruptive Innovation?'* (*Harvard Business Review*, December 2015) <https://hbr.org/2015/12/what-is-disruptive-innovation>accessed 21 August 2023.

[16] Herbert J. Hovenkamp, 'Antitrust Error Costs' (2022) 24 (293) Univ. Pa. J. Bus. L. <https://scholarship.law.upenn.edu/faculty_scholarship/2742/>accessed 8 December 2023.

examples of two such nascent acquisitions undertaken by *Big Tech*[17] which if retrospectively assessed, turn out to be anti-competitive and have led to the establishment of monopolies.

A. Instagram and WhatsApp acquisition by Facebook

"*These businesses are nascent but the networks established, the brands are already meaningful, and if they grow to a large scale, they could be very disruptive to us*," was mailed by Facebook's Chief Execute Officer ("CEO") Mark Zuckerburg to his chief financial officer in 2012 right before the acquisition of Instagram by Facebook.[18] This communication by Mark Zuckerburg showcases that the intent of Facebook behind the acquisition of Instagram was to pre-empt any future competition and maintain the monopoly of Facebook in the social media market. This acquisition was notified to the United States of America ("USA")'s Federal Trade Commission ("FTC") and was passed without any hindrances. Similarly, Facebook acquired WhatsApp in 2014 and the deal was notified to antitrust watchdogs. In both acquisitions, the enforcement agencies later realized that the concerned acquisitions were anti-competitive as it has led to a monopoly in the market,[19] but at the time of acquisition, no such risk was identified by the enforcement agencies. This has led to the monopoly of 'Meta' in the social media market.

B. Waze's acquisition by Google

In 2013, Google acquired 'Waze' which is an app providing navigation services. It is important to note that Google itself is a player in the market of providing navigation services as Google owns 'Google Maps.' Though at the time of acquisition, Google seemed to be committed to a separate brand of Waze, in reality, this app never grew substantially as no substantial investment in promotion or innovation of this app was done by Google as the focus has always been on Google Geo (includes Google Maps, google earth, and street view). Finally, in 2022 a structural change was made by Google through which employees of Waze were integrated with Google Geo, and as expected, this structural change led to job cuts in Waze.[20] Waze's ex-CEO stated that "*Waze could*

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[17] Tom Relihan, 'Will regulating big tech stifle innovation?' (*MIT Sloan,* 27 September 2018) < https://mitsloan.mit.edu/ideas-made-to-matter/will-regulating-big-tech-stifle-innovation>accessed 8 December 2023.

[18] IANS,'Mark Zuckerberg bought Instagram as it was a 'threat' to Facebook' (*Business Standard*, 30 July 2020) <https://www.business-standard.com/article/international/mark-zuckerberg-bought-instagram-as-it-was-a-threat-to-facebook-120073000324_1.html>accessed 9 December 2023.

[19] Gabrielle Canon, 'Facebook faces antitrust allegations over deals for Instagram and WhatsApp' (*The Guardian,* 8 December 2020) <https://www.theguardian.com/technology/2020/dec/08/facebook-antitrust-instagram-whatsapp>accessed 9 December 2023.

[20] Jenifer Elias, 'Google cuts jobs at Waze as it continues to merge mapping products' (*CNBC*, 27 June 2023) <https://www.cnbc.com/2023/06/27/google-cuts-jobs-at-waze-as-it-continues-to-merge-mapping-products.html>accessed 10 December 2023.

have grown faster if it were not acquired by Google". The constraints imposed by Google on Waze and the copying of Waze's ideas for Google Maps were the primary factors that led to the decline of Waze's growth.[21]

This is also an example of nascent acquisition as Google acquired Waze in its initial stage but the innovation was not stopped. Rather than killing the product itself, Google slowed it down and used the ideas of Waze for its own Google Maps. By this strategy, Google neither came onto the radar of enforcement agencies as it never actually stopped Waze, nor did it have to face the competition in the market as Waze was already in control of Google. This is a case of false negative as the acquisition in question was allowed by the agencies, which turned out to be conducive to establishing a monopoly of Google in the online navigation services market. These examples showcase how nascent acquisitions lead to the monopoly of *Big Tech* in the digital market and stun the growth of startups. The monopoly created by *Big Tech* in digital markets has led to a decline in the bargaining power of consumers. It creates a situation of '*take or leave'* as consumers do not have any other option but to comply and agree with the terms and conditions laid down by such *Big Tech* entities. In May 2021, WhatsApp came up with a privacy policy for its Indian users which required the users to give consent for allowing WhatsApp to process their personal information.[22] This new policy was imposed by WhatsApp as per which it had the right to give users personal and financial information to third parties. Even though the Supreme Court intervened and users were allowed to use WhatsApp without accepting the new WhatsApp privacy policy,[23] this instance showcases how monopolies indulge in abusive behaviour.

Therefore, there is a dire need to make a robust mechanism for making nascent acquisitions notifiable and acquaint CCI with adequate tools for the identification of such acquisitions so that market monopoly is not created by *Big Tech* in the digital markets.

[21] Paresh Dave, 'Waze's ex-CEO says app could have 'grown faster' without Google' (*Reuters*, 19 February 2021) <https://www.reuters.com/article/us-alphabet-google-waze-idUSKBN2AJ02O/>accessed 13 December 2023.

[22] Tech Desk, 'WhatsApp vs Indian government over new IT rules for social media: Top points to note' (*The Indian Express,* 28 May 2021) <https://indianexpress.com/article/technology/tech-news-technology/> accessed 18 December 2023.

[23] Utkarsh Anand, 'Privacy policy: SC tells WhatsApp to publicise '21 undertaking to govt' (*The Hindustan Times,* 2 February 2023) <https://www.hindustantimes.com/cities/delhi-news/privacy-policy-sc-tells->accessed 18 December 2023.

IV. THE TWO-STEP SOLUTION FOR NASCENT ACQUISITIONS: NOTIFICATION AND IDENTIFICATION

The authors have so far discussed how *Big Tech* has indulged in nascent acquisitions with the ultimate objective of maintaining its monopoly in the digital market. The authors propose a two-step solution of notification and identification of such acquisitions by the enforcement agencies.

A. Notification

The DVT has been introduced for making such acquisitions notifiable to CCI but several shortcomings need to be fixed to make DVT a reliable tool for making all such acquisitions notifiable. The most fundamental issue with the DVT is that it uses *monetary value* as a criterion to solve the problem of nascent and killer acquisitions in the *digital market,* which is not related to monetary value. This is because the value that such target enterprises hold is in terms of the innovation they bring in, as well as the large user base they possess. The DVT sets the value which shall be notified in monetary terms thus still leaving a lacuna as acquisition below a certain threshold will not be subject to the same. Bourreau & De Streel note that an additional transaction value threshold would "*not necessarily increase substantially the number of concentrations to be notified, as the merger transaction value is aligned with the merging firms' monetary turnover in the majority of cases*".[24] This statement showcases how enterprises that were not coming under the garb of asset-turnover threshold, may surpass this DVT as well since the transaction done by an enterprise will be somewhat aligned with the turnover of the enterprise. Enterprises can easily surpass this threshold merely by structuring their transactions in such a manner that they do not come under the mentioned monetary threshold of Rs 2,000 crore. In Austria, in the first year after the introduction of the threshold limit based on the value of the transaction, merely 13 out of 400 fillings were triggered due to the transaction value threshold. Even the transactions that were notified under DVT were not found to have any anti-competitive impact.[25] Germany which has a similar threshold mechanism also had the same experience. A written contribution to the Organisation for Economic Cooperation and Development ("OECD") from Germany reveals two key findings.

1) The German Federal Cartel Office ("FCO") is yet to handle a serious case that was alerted based on the transaction value threshold.

[24] Centre on Regulation in Europe, *Big Tech Acquisitions: Competition & Innovation Effects and EU Merger Control*, (Cerre, February 2020) 15.

[25] Author, 'Deal Value Threshold: Is It a Deal Breaker?' (*AZB & Partners*, 13 Jan, 2023) < https://www.azbpartners.com/bank/deal-value-threshold-is-it-a-deal-breaker/#_n1>accessed 19 December 2023.

2) the meagre number of new notifications from the adoption of DVTs.[26]

The authors relied on the practical example of *Flipkart's acquisition of Jabong and Myntra* to showcase the shortcomings of DVT.

In 2014, Flipkart, India's biggest e-commerce rival to global giant Amazon, acquired Myntra, which solely specialized in the e-fashion and apparel market. Though the details of the deal were not made public, analysts have estimated Myntra to be valued at about Rs. 2,000 Cr ($330 Million) by Flipkart.[27] However, this was not the only rival that Flipkart was targeting to compete with Amazon and retain its position as the number one e-commerce platform in India, Flipkart also acquired Jabong, another e-fashion platform for a mere $70 million in what was called a *discount deal*.[28] This combined entity of Flipkart-Myntra-Jabong now stands as the biggest e-commerce brand in India with a market share of 38.3%.[29] Jabong was, however, killed by Flipkart, and its users were redirected to the Myntra page.[30] These deals, though executed before the introduction of the DVT, would still be well under the threshold limit proposed in the new amendment to the Competition Act, 2002 which makes it obligatory for firms to notify a combination if the deal value exceeds Rs. 2000 Crores. Since the acquisition of Myntra by Flipkart has been estimated to be exactly for Rs. 2000 Crore, and since Jabong was acquired for a value much less than the prescribed limit, these combinations would not have become notifiable and CCI would still have lacked the jurisdiction even though such combinations might have an adverse appreciable effect on the competition in India considering the dominance it has gained in terms of market share.

Another criticism regarding the DVT is that considering the reduced review timelines in the 2023 amendment act, it will cause an *administrative burden* on the already understaffed CCI and resources will be exhausted on irrelevant transactions since this is a blanket threshold applicable to all the sectors.[31] This is one of the primary reasons why advisors to the European Commission

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[26] *Id.*

[27] 'Flipkart, Myntra merge in Rs. 2000 crore deal' (*The Times of India*, 24 May 2014) <https://timesofindia.indiatimes.com/tech-news/flipkart-myntra-merge-in-rs-2000-crore-deal/articleshow/35493912.cms>accessed 21 December 2023.

[28] Shrutika Verma, 'Flipkart's Myntra Acquires Jabong in $70 million 'discount' deal' (*Live Mint*, 26 July 2016) <https://www.livemint.com/Companies/iicvIYFijqp9VRAx0ON46I/Flipkarts-Myntra-acquires-Jabong.html> accessed 21 December 2023.

[29] Katie Arcieri, 'Flipkart is No. 1 in India but faces formidable foe in Amazon, say experts' (*S&P Global*, 10 October 2019) <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/flipkart-is-no-1-in-india-but-faces-formidable-foe-in-amazon-say-experts-54083920>accessed 21 December 2023.

[30] Lavanya Prabhakaran, 'Flipkart shuts Jabong to bet on Myntra' (*The Hindu Business Line,* 6 December 2021) < https://www.thehindubusinessline.com/info-tech/flipkart-shuts-jabong-to-bet-on-myntra/article30742850.ece>accessed 21 December 2023.

[31] Martin Gassler, 'Why the introduction of a new transaction-value jurisdictional threshold for the EUMR has been postponed, at least for now' (*Oxford Competition Law Blog*, 28 June 2019)

recommended not to include such a threshold in the European Union Merger Regulation ("EUMR").[32] This overreach can have a *deterring effect on innovation* as well as investments because startups may unnecessarily get burdened with jurisdictional issues.[33] It is important to understand that the DVT was introduced to mainly target the digital markets since players in digital markets are such who may not have substantial assets or their turnover might be below the threshold, but they have value in terms of their user base or the innovation they bring. The Asset and turnover threshold is adequate for many traditional sectors dealing with bricks and mortar markets. The Stigler report argues that *"it would not be prudent to alter the nation's antitrust laws to accommodate one difficult and fast-moving sector where false negatives are particularly costly".*[34] Legislations in India have time and again made exceptions. For instance, in 2017 certain regional rural banks were exempted from the merger control for 5 years. Similarly, the Petroleum Act of 1934 exempted all mergers and acquisitions involving Central Public Sector Enterprises engaged in the oil and gas sectors from the merger control regulations for five years.[35] This showcases that one straight jacket formula may not be feasible for all sectors. The concept of sectoral regulation becomes relevant here as the Competition Law Review Committee Report ("CLRC") 2019 has emphasized the need for DVT in the context of merger control in digital markets and thus one may argue that applying this threshold as a blanket provision can be detrimental.

Therefore, it can be concluded that the DVT might be considered to be a welcome step on the part of legislation for addressing nascent and killer acquisitions and making them notifiable[36] but to make the DVT, not just another procedural step but an effective mechanism that has a tangible impact in protecting the valuable and innovative startups in the Indian Digital Markets, there are certain alterations required. The legislation in India is already behind the curve in terms of establishing a robust merger control regime. Mechanisms such as the DVT itself which was introduced in other jurisdictions such as Germany and Austria way back in 2017 are being introduced in the Indian

<https://oxcat.ouplaw.com/page/775>accessed 21 December 2023.

[32] Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1.

[33] Martin Gassler, 'Why the introduction of a new transaction-value jurisdictional threshold for the EUMR has been postponed, at least for now' (*Oxford Competition Law Blog*, 28 June 2019) <https://oxcat.ouplaw.com/page/775>accessed 21 December 2023.

[34] Stigler Centre for the Study of Economy and the State, *Stigler Committee on Digital Platforms* (Final Report 2019) 111.

[35] Gaurav Bansal, 'India: Merger Control (4th Edition)' (*AZB & Partners*, 7 January 2020) <https://www.azbpartners.com/bank/india-merger-control-4th-edition/>accessed 22 December 2023.

[36] Vamsi Krishna, 'Using Competition Law to Tackle "Killer Acquisitions": Rethinking the Current State of Pre-Merger Screening (*GJLE*, 4 Jan, 2022) <http://gjle.in/2022/01/04/using-competition-law-to-tackle-killer-acquisitions-rethinking-the-current-state-of-pre-merger-screening/>accessed 23 December 2023.

competition regime in 2023. As the problem evolves, so does its solution and thus legislators shall adapt accordingly and robust mechanisms shall be in place rather than waiting for disaster to happen.

To address the lacuna in the existing merger control framework as well as to fix the same, the author proposes 2 fundamental alterations in DVT.

i. Sectoral Regulation

The CLRC took the example of *LinkedIn's acquisition by Microsoft* to drive home the point regarding the large number of acquisitions being undertaken by *Big Tech*. It is imperative to understand the context in which the committee suggested the introduction of the DVT. Firstly, the committee acknowledges how more than 400 acquisitions have been done by *Big Tech* in the last decade. Secondly, the committee highlighted that the stakeholders in a consultation on 'digital markets and competition issues' addressed the need for an ex-ante assessment of acquisitions in the digital space. Thirdly, the committee highlighted how acquisitions in the digital market often do not meet the asset/turnover threshold since the value derived by the acquirer from the target enterprise is in terms of innovation and data.

All these factors highlight that the need for such a threshold specifically exists in the digital markets and tailor-made regulations can be brought to address the potential competition law challenges rather than affecting other sectors which may not even pose such a threat.[37]

ii. Introducing residuary powers

This approach vouches for giving CCI power to investigate such combinations which may not be notifiable under any of the threshold limits but the CCI has apprehension that such combination or conduct can lead to appreciable adverse effects on competition. The example of *Instagram's acquisition by Facebook* showcases the significance of residuary power even in cases where the concerned transaction is notifiable. This usage of residuary powers by the enforcement agencies is not limited to massive controversial acquisitions like Facebook and Instagram but this power is often used when there exist competition concerns even if any threshold is not met. For instance, conditions were imposed by FTC on the *acquisition of college park industries by Ossur* even though threshold limits were not met. The FTC mandated divesture of the college park's assets about the electric elbow business since the market for the same was highly concentrated.[38]

[37] Author, 'The value and challenges of regulating Big Tech" (*Harvard Kennedy School,* 16 December 2020) <https://www.hks.harvard.edu/faculty-research/policy-topics/business-regulation/value-and-challenges-regulating-big-tech>accessed 23 December 2023.

[38] Federal Trade Commission, 'FTC Imposes Conditions on Össur Hf's Acquisition of College Park Industries, Inc.' (*FTC,* 7 April 2020) < *https://www.ftc.gov/news-events/news/press-releases/2020/04/ftc-imposes-conditions-ossur-hfs-acquisition-college-park-industries-inc*>accessed 25 December 2023.

The introduction of residuary power and limiting the DVT to specific sectors such as the digital market will be a balanced approach as it will limit false positives since the asset-turnover threshold is adequate for regulating the brick-and-mortar markets. This will also limit *false negatives* as CCI would have the power to regulate the acquisitions that do not meet the jurisdictional threshold but are likely to affect the competition in the market.

B. Identification

This is the step in which most anti-trust enforcement agencies are ***failing***. As discussed above, the credit for approving acquisitions that led to the absolute market dominance of Meta in the social media market goes to this shortcoming of USA enforcement agencies. To fill this lacuna, the author First highlights the newly introduced Digital Markets Unit ("DMU") of the United Kingdom ("UK")'s Competition and Markets Authority ("CMA"),[39] followed by suggesting how the newly set up 'Digital Markets and Data Unit' ("DMDU") of CCI can play a significant role in identifying such nascent acquisitions, thus countering them.

i. Understanding the UK's DMU

The regulation of *Digital Markets* in the UK has so far been handled by the offices of fair trade and competition tribunals. The preamble to the Enterprise Act, of 2002[40] outlines the objectives of the establishment of offices of fair trade and tribunals, which were to protect the interest of the consumers and disqualify those enterprises which entered into anti-competitive agreements. The CMA was established in 2013 after the Office of Fair Trade and the Competition Commission were merged. Currently, the CMA is the chief body that has the power to take action against individuals and firms engaging in anti-competitive conduct and the formation of cartels.[41] However, the UK too faced complications in governing the digital space with the current set of laws, for which it has come up with a special unit dedicated to handling *digital markets* within the space of competition law known as the DMU.

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[39] The Secretary of State for Digital, Culture, Media & Sport and the Secretary of State for Business, Energy and Industrial Strategy, 'A new pro-competition regime for digital markets' (*Competition and Markets Authority*, July 2021) <http:/assets.publishing.service.govt.uk2323> accessed 25 December 2023.

[40] Enterprise Act, 2002.

[41] Diane Coyle, 'Making Digital Competition Possible' (*University of Cambridge*, 13 March 2019) < https://www.bennettinstitute.cam.ac.uk/blog/making-digital-competition-possible/>accessed 23 December 2023.

ii. Functioning of the DMU and regulation of Digital Markets

Though the DMU does not have statutory backing, it has been given extensive powers under the new regime which is slated to be adopted for the regulation of digital markets in the UK such as,

1) To conduct evidence-based assessments of individual firms that have an *entrenched* market power. The purpose of this assessment has been kept as the identification of those firms that have an *entrenched* market power and operate from a given strategic position.[42]

2) Once such firms have been identified, they will be given a *Strategic Market Status* ("SMS") tag.[43]

3) Once a firm obtains an SMS tag, it will have to comply with regulations that will be tailor-made for its activities keeping in mind the market power that it enjoys.

This is a unique and innovative model that aims at *ex-ante regulation of digital markets* through SMS identification of firms. The SMS tag promotes a pro-competitive regime as this allows the DMU to carve out tailor-made regulations for each firm having *entrenched* market power. It is a forward-looking proposal that correctly ascertains the perils of over-regulating digital markets[44] and has come up with an extremely sophisticated model of governing *Big Tech* which has peculiar features of its own despite operating in the same space. The DMU, by granting the SMS tag can easily come up with suitable guidelines for the regulation of the UK's *digital markets*.

Though the establishment of the DMU seems to be a unique initiative on account of its pro-competition approach and its visionary idea of granting the SMS tag to *Big Tech*, the CCI is not bereft of such a unit and has recently set up the DMDU. Let us understand how DMDU can act as a catalyst in countering nascent acquisitions.

[42] *Id.*

[43] Biran Sher, Graeme Young and Russell Hoare, 'The UK's new digital regime regulating firms with "strategic market status": who is within scope?' (*Lexology*, 6 June 2023) < lawnow.com/en/ealerts/2023/06/the-uk-s-new-digital-regime-regulating-firms-with-strategic-market-status-who-is-within-sco> accessed 26 December 2023.

[44] Leonidas Theodosiou, Eric J. Pennesi, Velentina Semenikhina, 'Big Tech: UK Digital Markets, Competition and Consumers Bill submitted to Parliament' (*Morgan Lewis*, 15 May 2023) < https://www.morganlewis.com/blogs/sourcingatmorganlewis/2023/05/big-tech-uk-digital-markets-competition/>accessed 26 December 2023.

iii. The DMDU in India

The sixtieth report of the Parliamentary Standing Committee on Finance contained the details regarding the establishment of the DMDU and defined it as a *specialized interdisciplinary centre of expertise for Digital Markets*. This division contains officers from various other branches of the CCI and has the objective of checking anti-competitive conduct in the digital economy. The DMDU is similar to the UK's DMU to the extent that both are specialized units dedicated to regulating anti-competitive conduct in digital markets however, CCI's DMDU is currently a *toothless tiger* since it does not have the necessary tools to take steps to check anti-competitive conduct by *Big Tech*. While the DMU of the UK has the power to grant the SMS tag, the DMDU of the CCI is yet to receive clarity regarding how it can grant the *Systematically Important Digital Intermediary* ("SIDI") tag to *Big Tech*. SIDIs are similar to SMS tags granted by the DMU of the UK, which means it is a tag to be given to *Big Tech* based on revenues, market specializations, and number of active users. Conclusively, just like the UK's DMU, it was envisioned that India's DMDU may make tailor-made compliances for the acquisitions that are done by SIDIs, and thus the nascent potential competitor acquisitions by the big tech would come under *additional scrutiny* which will make it easier for enforcement agencies to *identify* such acquisitions and take the necessary steps in the interest of competition in the market.

V. DMDU'S ABILITY TO KILL THE NASCENT ACQUISITIONS: PROMOTING INTEROPERABILITY

In the above section, it was highlighted by the authors that the DMDU as a unit may be used to fix the issue of identifying nascent acquisitions. However, since the DMDU currently cannot grant the SIDI tag, the authors suggest further steps that the DMDU should take which can fix the root cause of the issue of nascent acquisitions. The aim is to disincentivize the players who are in their nascent stage, from being acquired by a big player dominating the market. The Standing Committee report suggests several regulations for SIDIs including regulations to control the usage of data by SIDIs and to ensure fair access to digital markets for all the market participants. The most significant suggestion of the standing committee which if incorporated, can disincentivize the Nascent player from being acquired is the regulation of *data sharing*. The committee discussed how *Big Tech* adopts anticompetitive practices by acting as *gatekeepers*, hampering the growth of new entrants in the market. Here comes the issue of *interoperability*, which is the capacity of disparate technological systems to successfully communicate and exchange data with one another

For instance, CCI had imposed a penalty of Rs 936.4 Crores for its Google Play Store policy. Google is a tech giant that provides numerous services. It owns the Android operating system through which it enjoys indirect network effects and has been indulged in anti-competitive practices. In this case, Google had mandated the use of its payment gateway i.e. Google Pay for any third party or customers, if they wish to seek Google Play Store services. This has harmed both, the other payment gateways such as PhonePe, Paytm, etc.[45] as Google restricted their access to the market and also the Third-party applications, as they cannot reach the large consumer base that Google has by the reason of owning the Android Operating System ("OS") as Google can make its applications pre-installed on the device using Android OS. In this case, Google had voluntarily restricted interoperability so that a new entrant could not enjoy the indirect network effects that Google possesses. *This is the major reason why new entrants either fail or get acquired as they not only compete with the specific service of the big tech but the whole ecosystem of it.*

The author suggests that DMDU shall take steps to promote *interoperability* in the digital markets. Anti-competitive actions such as preventing competitors from getting data or impeding user portability can be regulated by DMDU. It can establish minimal requirements for data formats and interoperability, guaranteeing seamless platform interchange. DMDU can make regulations such as *mandatory open-source Application Programming Interface* ("API"),[46] which promotes interoperability and thus can eventually provide a fair battle for the new entrants in the market**.** The industry-wide adoption of open standards and interoperability solutions can be actively promoted by the DMDU. This larger initiative has the potential to improve the environment for data portability and interoperability.

The authors further propose that the DMDU of the CCI be made more robust by ensuring three things, notwithstanding any definition of SIDIs that the Standing Committee may come up with. *Firstly*, the CCI along with the DMDU must be adequately staffed since the functioning of a specialized unit must depend upon personnel that are dedicated to making tailor-made regulations for *Big Tech* who will ensure compliance with the same and flag any violations. Such activity would require a dedicated group of individuals who cannot come from other branches of the CCI as is

[45] Saksham Malik, 'Antitrust app store wars: timeline and impact on consumers and app developers' (*The leaflet,* 1 October 2021) < https://theleaflet.in/antitrust-app-store-wars-timeline-and-impact-on-consumers-and-app-developers/>accessed 26 December 2023.

[46] Siddharth Johar, 'Articulating Interoperability in the Regulation of Digital Markets in India' (*Centre for Competition Law and Economics*) < https://www.icle.in/resource/articulating-interoperability-in-the-regulation->accessed 28 December 2023.

the case with DMDU currently. *Secondly*, the DMDU should have the power to not just grant the SIDI status but also modify or revoke it when the need arises since the dynamic nature of digital markets must be handled with flexibility, which currently seems to be missing in any of the policy documents discussing the DMDU of the CCI. Flexibility in granting and revoking the SIDI status would not weaken the power of the DMDU rather would ensure that the DMDU stands to become a unit for pro-competitive practices and align it with the global standards of competition law governance. *Lastly*, the DMDU must be made more active and must not only remain on paper since there is no point in having a dedicated unit to govern digital markets if it does not play a proactive role in checking anti-competitive conduct. This is because, the digital market space is extremely moving and if anti-competitive conduct is not checked as soon as any such issue arises, it may never come to the notice of the CCI due to the complex nature of such transactions which the firms enter into for ensuring opacity of their actions.

VI. CONCLUSION

The Indian startup industry is booming and digital startups are playing a key role in this growth. Since 2018, killer acquisitions have been in the limelight, and enforcement agencies have introduced mechanisms such as DVT to counter such acquisitions. This was a welcome step, but the issue of *nascent acquisitions* needs the attention of the enforcement agencies as it can be more detrimental than killer acquisitions, especially for digital startups. In this paper, the authors have proposed a two-step solution of Notification and Identification for countering nascent acquisitions. For the first step, the authors contend that DVT is adequate but it needs certain additions. The author highlights the active role that DMDU should play by giving a SIDI tag which can mandate additional tailor-made compliances, thus creating a robust mechanism that can identify such acquisitions, after they have notified. The authors further suggest that DMDU should take active steps in promoting interoperability, which will disincentive the nascent players which are mostly startups, from being acquired by a tech giant as it will bring the much-needed technological egalitarianism