# V. KILLER ACQUISITIONS: MYTH OR REALITY? COMPARATIVELY ANALYZING THE UNCERTAINTIES OF COMPETITION IN THE DIGITAL AGE

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ABSTRACT

This paper delves into the intricate world of acquisitions involving nascent or potential competitors, highlighting the challenges faced by policymakers, regulators, and legal professionals in navigating this evolving landscape. While acknowledging concerns about dominant technology companies stifling competition through such acquisitions, the paper emphasizes the limited empirical evidence supporting the widespread occurrence of "killer acquisitions." Key considerations explored include the inherent difficulty of predicting future market trajectories, the potential for mergers to yield both pro-competitive and anti-competitive effects, and the crucial need for a balanced approach that fosters competition while nurturing innovation. The paper critiques proposals advocating for an absolute presumption of illegality for acquisitions by dominant platforms due to insufficient evidence justifying such a drastic policy shift. Ultimately, the paper emphasizes the importance of a case-by-case approach that takes into account the specific circumstances of each acquisition, while advocating for further research and dialogue to develop a more comprehensive understanding of these complex issues.



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## I. INTRODUCTION

The assessment of competitive ramifications arising from acquisitions stands as a pivotal facet of antitrust enforcement, distinguished by a level of progression and formalization seldom paralleled in other antitrust endeavours.[1] Nonetheless, recent times have borne witness to a marked surge in focus directed toward a specific category of acquisitions—namely, the procurement of potential challengers and emerging competitive intrusions.[2] Within this closely interwoven context, apprehensions have emerged concerning the possibility that the acquiring entity, subsequent to the acquisition, could terminate the competitive or potentially competitive entity, a phenomenon colloquially termed as "killer acquisition." It's worth noting that the term "killer acquisition" also pertains to the broader concept of stifling potential competition, irrespective of whether the assimilated entity is discontinued.[3]

[1] 'Horizontal Merger Guidelines' (*U.S. Department of Justice*, 19 August 2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010> accessed 1 August 2023.

[2] Stephen Smith & Matthew Hunt, 'Killer Acquisitions and PayPal/iZettle' (2019) 18 (4)Elgar online < https://www.elgaronline.com/view/journals/clj/18-4/clj.2019.04.04.xml> accessed 1 August 2023.

[3] Claire Turgot, 'Killer Acquisitions in Digital Markets: Evaluating the Effectiveness of the EU Merger Control Regime' (2021) 5 (2) Eur Competition & Reg L Rev <https://core.lexxion.eu/article/CORE/2021/2/6> accessed 2 August 2023.

These concerns have spurred inquiries into the prospect of anticompetitive acquisitions transpiring beyond the ambit of conventional merger analyses—specifically, within realms where an emerging entity has conceived or is on the cusp of conceiving an innovative and competitive product, poised to challenge the dominance of established entities. However, inherent uncertainty accompanying this theory of harm must also be acknowledged, potentially leading to elevated overall error costs. Notably, an array of policy recommendations has recently emerged, aimed at addressing the notion that dominant industry players are engaging in acquisitions of emerging and potential rivals. These recommendations span from formulating new evidentiary standards under Section 7[4] of the Clayton Act to pre-emptive regulatory restrictions against designated acquisition categories.[5]

In this discourse, we embark on an exploration of several critical queries. Does the acquisition conduct of significant technology giants or platforms in relation to emerging contenders warrant scrutiny, focusing on the stifling of competition before these budding challengers attain robust maturity? Furthermore, if such a predicament indeed exists, do prevailing antitrust statutes, coupled with their enforcement mechanisms, provide a comprehensive toolkit to effectively counter this issue? Should that not be the case, could a legislative remedy be sought?

[4] Clayton Act 1914, s 7.

[5] Vaclav Smejkal, 'Concentrations in Digital Sector - A New EU Antitrust Standard for "Killer Acquisitions" Needed?' (*Semantic Scholar*, 2020) <https://www.semanticscholar.org/paper/CONCENTRATIONS-IN-DIGITAL-SECTOR-A-NEW-EU-ANTITRUST-%C5%A0mejkal/78abebb5ac5c9167d6888065473a44e7152b3d52> accessed 2 August 2023.

Within the context of India's legal terrain, similar concerns have garnered attention, particularly considering the burgeoning technology sector and its intersection with competition law. The Competition Act of 2002 serves as India's principal legislation addressing antitrust concerns. Sections 5[6] and 6[7] of the Act pertain to combinations (acquisitions and mergers), with the Competition Commission of India (CCI) vested with the authority to scrutinize these transactions for potential anticompetitive consequences.

CCI has dealt with instances where concerns about potential competition and stifling of rivals have been addressed. For instance, the Walmart-Flipkart deal[8] underwent CCI scrutiny due to fears of adverse effects on competition in the online retail sphere. The CCI assessed factors such as market dominance, potential competition, and impact on consumers before granting approval. Similarly, Facebook's acquisition of WhatsApp raised issues regarding data sharing and its implications for the instant messaging app market.[9] The CCI evaluated the potential for Facebook to leverage its social media dominance for unfair competitive advantage in the messaging sector.[10]

As the legal landscape evolves, vigilance and adaptability on the part of regulators, policymakers, and legal practitioners remain paramount to

[6] Competition Act, 2002 s 5.
[7] Competition Act, 2002 s 6.
[8] Richard Whish, 'Killer Acquisitions and Competition Law: Is There a Gap and How Should It Be Filled?' (2022) 34 (1). NLSIR < https://repository.nls.ac.in/nlsir/vol34/iss1/1/> accessed 2 September 2023.
[9] Bjorn Lundqvist, 'Killer Acquisitions and Other Forms of Anticompetitive Collaborations (Part I): A Case Study on the Pharmaceutical Industry' (2021) 5 (3) Eur Competition & Reg L Rev < https://core.lexxion.eu/article/CORE/2021/3/4> accessed 2 September 2023.
[10] ibid.

navigating the evolving dynamics at the confluence of competition and technology.

## II. CLASSIFICATION AND CORRELATION WITH INDIA IN ANTITRUST JURISPRUDENCE

In the domain of antitrust jurisprudence, the distinction between "nascent" and "potential competitors" holds primacy. The term "potential competitor," gained prominence in the mid-20th century as scholars and policymakers sought to understand how market structures and dynamics impact competition and consumer welfare.[11] The term "potential competitor," steeped in historical context, delineates an entity promising to compete in the future or possessing the capacity to enter should prevailing market conditions transform, such as a price surge independent of cost considerations.

This concept branches into several allied yet subtly differing scenarios. Firstly, the acquiring entity might be an existing market player while the acquired one bears the potential of becoming a future market contender. Alternatively, the acquiring party could be an emerging market contender while the acquired company holds the standing of an established market participant. It's crucial to differentiate between "perceived potential competition," where acquiring a non-producing rival reduces ongoing competition but potential entry influences market dynamics, and "actual

[11] Rydell, J., and J. R. Speakman. "Evolution Of Nocturnality In Bats: Potential Competitors And Predators During Their Early History." (1995) 54 (2) Biol.J. Linn. Soc. <https://academic.oup.com/biolinnean/issue/54/2> accessed 4 September 2023.

potential competition," which pertains to an entity poised to influence competition from future entrants.[12]

Conversely, the term "nascent competitor," a relatively newer addition to antitrust discourse, emerged mainly in the late 1990s, notably during the Department of Justice's landmark Microsoft case.[13] This label applies to a supplier with an active product or technology, intrinsic or extrinsic to a relevant product market, which could potentially become a strong competitor over time.

From a broader perspective, the concept of potential competition signifies a product yet to establish itself in a specific market but expected to do so imminently. On the other hand, nascent competition centres on the realm of latent rivalry catalysed by an innovative product or technology that exists but hasn't matured as a significant contender, regardless of its presence within or outside the pertinent market. It forecasts future differentiation and the developmental path of a product or technology, alongside its potential market success.

A related concept worth noting is the "killer acquisition," where a company acquires another to suppress promising imminent competition, often

[12] Amy C. Madl, 'Killing Innovation?: Antitrust Implications of Killer Acquisitions' (*Yale Law School Journals,* 2020) < https://openyls.law.yale.edu/handle/20.500.13051/5442> accessed 17 September 2023.

[13] Peter Alexiadis & Zuzanna Bobowiec, 'EU Merger Review of "Killer Acquisitions" in Digital Markets - Threshold Issues Governing Jurisdictional and Substantive Standards of Review' (2020) 16 (2) NLSIR L< https://repository.nls.ac.in/cgi/viewcontent.cgi?article=1030&context=ijlt> accessed 17 September 2023.

without an efficiency rationale. In India, these classifications significantly correlate with antitrust principles.[14]

In India's diverse and growing market landscape, the interplay between nascent and potential competitors gains prominence. The Supreme Court's stance in *Excel Crop Care Ltd. v. Competition Commission of India*[15] highlights preventing anticompetitive practices that hinder nascent or potential competitors from entering the market.[16] Reducing the competition doctrine involves relaxing the strict scrutiny applied to mergers, which is currently mandated by the substantial lessening of competition doctrine. This would mean easing the scrutiny of mergers and acquisitions, potentially allowing more consolidation within industries. However, such a move would likely conflict with the goals outlined in the Competition Act, which aims to safeguard consumers and ensure fair competition. By relaxing the competition doctrine, there's a risk of diminishing consumer welfare and market competitiveness, as it could lead to increased market concentration and reduced choices for consumers.

## III. DOES A SYSTEMIC ISSUE EXIST REGARDING MAJOR TECHNOLOGY COMPANIES ACQUIRING POTENTIAL AND EMERGING COMPETITORS, THEREBY STIFLING

[14] Kelly Fayne & Kate Foreman, 'To Catch a Killer: Could Enhanced Premerger Screening for Killer Acquisitions Hurt Competition' (2020) 34 (2) Antitrust <https://www.lw.com/admin/upload/SiteAttachments/Sprng20-Fayne%c3%82.pdf> accessed 18 September 2023.

[15] *Excel Crop Care Ltd. v. Competition Commission of India*, 8 SCC 47 (2017).

[16] D. Daniel Sokol, 'Merger Law for Biotech and Killer Acquisitions' (SSRN, 31 August, 2020)<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3658337> accessed 18 September 2023.

## COMPETITION BEFORE THEY HAVE THE CHANCE TO BECOME FORMIDABLE RIVALS?

To elucidate this quandary, it is imperative to delve into the realm of conjecture. What if colossal technology conglomerates refrained from assimilating diminutive enterprises like YouTube or Instagram? How might the landscapes of the respective markets have unfolded? Furthermore, would consumers have been bestowed with enhanced prospects? Google acquired YouTube in 2006 for $1.65 billion, solidifying its position as a dominant player in online video sharing.17 YouTube's user-generated content platform has since become a cornerstone of internet culture, with billions of users worldwide. In 2012, Facebook acquired Instagram for approximately $1 billion, strategically expanding its social media empire and tapping into the growing popularity of photo-sharing apps. Instagram's user-friendly interface and emphasis on visual content quickly propelled it to become one of the most influential social media platforms globally.[18]

An inherent measure of ambiguity will invariably persist, given that the hypothetical scenario—the permitting or thwarting of a merger—can never be tangibly observed. This reality engenders an arduous path for predictive assessments, and, to a certain extent, it might provide leeway for unsubstantiated assertions that deviate from the contours of plausible outcomes.[19] However, of paramount significance is not the appraisal of whether the antitrust agencies accurately adjudicated specific mergers, but

[17] Luo, Jiewen "Analysis of the Benefits and Risks of M&A--Taking Google's Acquisition of YouTube as an Example."( Darcy and Roy Press, 2024) <https://drpress.org/ojs/index.php/HBEM/article/view/16625> accessed 18 September 2023.
[18] ibid.
[19] *FTC v. Procter & Gamble Co*., 386 U.S. 568, 575 (1967).

rather the inquiry into whether these agencies are systematically predisposed to green-lighting anticompetitive mergers (entailing a Type II error or a false negative) or obstructing procompetitive mergers (entailing a Type I error or a false positive).[20]

The recognition that antitrust enforcement engenders error costs is, in essence, an acknowledgment of the limitations concomitant with an agency and court's capability to evaluate and balance certain market practices. Even for meticulously scrutinized commercial stratagems, such as resale price maintenance (RPM) and exclusivity, disputes persist amongst practitioners and economists regarding their comparative merits.[21] The legality of these practices hinges ultimately upon the specifics of individual cases, as both are subjected to scrutiny under a rule of reason analysis—a process necessitating the juxtaposition of evidence pertaining to anti-competitive detriment with evidence substantiating procompetitive advantages.[22]

Although the task of identifying and establishing causation may entail a certain degree of finesse, the solution lies within reach. However, this does not hold true for the realm of emerging and potential competition. The very crux of the harm theory revolving around the loss of an emerging or potential competitor rests upon the premise that conventional metrics of competition remain inchoate and fail to predict the level of competition which will be manifested in the future.

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[20]Madl. (n 12).
[21]Fayne and Foreman (n 14).
[22] Mikah Roberts, 'Killer Acquisitions and the Death of Competition in the Digital Economy' (2022) 24 (1) Transactions: Tenn J Bus L. < https://ir.law.utk.edu/transactions/vol24/iss1/3/> accessed 25 September 2023.

This demarcation is also what sets the harm theory apart from "standard" horizontal mergers that involve extant rivals; if the merger is intrinsically anticompetitive, evidence of the harvest yielded from their erstwhile rivalry should be discernible, now squandered by the anticipated assimilation. Herein, however, lies the absence of such evidence in markets featuring emerging and potential competitors—where the harm constitutes an intangible, presumed forfeiture of future competition. What are the means available to agencies and courts to evaluate this harm theory? Is there a beacon of guidance that can be extended or, perhaps, a paradigm shift in policy that is imperative? In the context of these ponderings, a slew of propositions has recently surfaced to grapple with this inherent ambiguity.

Furthermore, it is important to draw parallels with the Indian legal landscape when contemplating these propositions. Notable legislations such as the Competition Act, 2002, and prominent case laws such as the Tata Motors case[23] might offer intriguing perspectives.[24] In the aforementioned case, several factors can be gleaned to assess the acquisition of potential or nascent competitors. Firstly, the court's examination of market dominance and competitive behaviour provides insights into how an acquisition might impact market competition. Secondly, considerations of consumer welfare and market competitiveness, as emphasized in the court's rulings, offer guidance on evaluating the effects of an acquisition on consumer choice and market dynamics. Additionally, the court's scrutiny of anti-competitive practices and the need to uphold fair competition underscores the importance of assessing whether an acquisition could stifle innovation or hinder new market entrants.

[23] *Neha Gupta v. Tata Motors Ltd. And Others,* Case No. 21of 2019.
[24] Lawrence B. Landman, 'Competition to Innovate and Future Potential Competition' (2023) 103 J Pat & Trademark Off Soc'y 177.

The principles of market dominance and abuse of dominance, as enshrined within the Indian legal framework, could be juxtaposed with the problems of technology giants and their potential exploitation of nascent competitors.

To illustrate the intricacies of forecasting market trajectories for potential competitive scenarios, a notable historical instance which dates back to 1967 can be referred to, when the Federal Trade Commission (FTC) championed the divestment of the Clorox Company by Procter & Gamble (P&G). This manoeuvre followed P&G's acquisition of Clorox in 1957,[25] which was ostensibly predicated, in part, on the supposition that the amalgamation would considerably stifle nascent competition by virtue of Procter & Gamble's prospective ingress into the sector. Reflective of regulatory prudence, this matter underscores the preservation of potential competition in the American landscape. In an overarching exploration of the Indian antitrust ethos, it serves as a reminder to safeguard market dynamics through regulatory intervention.

## IV. REVISITING COMPETITION PARADIGMS: THE CASE OF FACEBOOK'S ACQUISITION OF INSTAGRAM AND ITS IMPLICATIONS FOR ANTITRUST IN THE DIGITAL ECONOMY

With reference to digital economy, the acquisition of Instagram by Facebook in 2012 emerges as an exemplar that is frequently debated upon while discussing the incursion of strategic acquisitions leading to entrenched

[25] Bjorn Lundqvist, 'Killer Acquisitions and Other Forms of Anticompetitive Collaborations (Part II): A Proposal for a New Notification System' (2021) 5 (4) Eur Competition & Reg L Rev< https://core.lexxion.eu/article/CORE/2021/4/4> accessed 26 September 2023.

market dominance.[26] It spurs the discourse on competition authorities inadvertently overlooking transactions bearing anticompetitive imprints. Prior to its acquisition by Facebook, Instagram sported a revenue register with null figures and a skeletal workforce. However, since said acquisition, Instagram's user base has catapulted from a modest 30 million to an astronomical billion-plus.

Concurrently, Facebook's user base also increased from 900 million to over two billion.[27] This expansionary chronicle, at odds with the traditional script of anticompetitive stratagems, compels us to revisit and re-evaluate competition paradigms. It might be thought that if Instagram hadn't been bought, it could have still done really well, maybe even better than it's doing now. While this idea makes sense, just thinking about it alone isn't enough to say that buying Instagram was a bad idea in hindsight.

In recent times, a maelstrom of disclosures unfurled, offering a glimpse into Facebook's inner sanctum. The pertinent confidential documents unveil the perception of Instagram as a formidable competitive adversary. While these archives certainly merit gravity in any investigation, it's imperative to note that regulatory agencies take a wide variety of evidence into consideration during the investigation. The unveiling of such documents, in itself, does not

[26]Fayne and Foreman (n 14).
[27] Kevin A. Bryan & Erik Hovenkamp, 'Startup Acquisitions, Error Costs, and Antitrust Policy' (2020) 87 U Chi LRev <https://lawreview.uchicago.edu/sites/default/files/BryanHovenkamp_StartupAcquisitions_87UCLR331.pdf> accessed 28 September 2023.

inherently imply a dereliction on the FTC's part in pursuing a legal course of action.[28]

Immersed in this deliberation is the pivotal inquiry: if one were to assert that the post-merger trajectory of Facebook and Instagram encapsulates an instance of anticompetitive ramifications, what would then be deemed procompetitive? Imagine, for a moment, the scenario where Facebook decided to cease Instagram's operations within a year of acquisition. Would such a turn of events necessitate the inference that Instagram was a lacklustre offering, thus rendering the acquisition innocuous? Alternatively, could one posit that Facebook's acquisition transpired with a motive to stifle a burgeoning rival, a phenomenon colloquially christened as a “killer acquisition”?

## V. CONTEMPLATING INSTAGRAM'S TRAJECTORY: EVALUATING THE IMPLICATIONS OF ACQUISITION ON COMPETITIVE DYNAMICS

In a similar vein, imagine an alternative situation where Instagram's trajectory persists but falls short of earlier growth projections. Would such a circumstance lead one to the inference that Instagram's calibre merely hovered around mediocrity, thereby casting the acquisition in a harmless light? On the other hand, could one contend that Facebook's investment fell short of the requisite quantum, hampering Instagram's potential? Essentially, the bedrock on which our determination rests pertains to the prognostication of what

[28] Mark Glick, Catherine Ruetschlin & Darren Bush, 'Big Tech's Buying Spree and the Failed Ideology of Competition Law' (2021) 72 (2) Hastings LJ <https://repository.uclawsf.edu/hastings_law_journal/vol72/iss2/1/> accessed 28 September 2023.

outcomes we anticipate as signals of either anticompetitive or procompetitive manifestations.

However, the challenge lies in understanding each situation in its own context and carefully considering many different possibilities. For instance, an acquisition culminating in the discontinuation of a product does not inherently bespeak either harm or benefit to consumers. The crux of the matter lies in contrasting the world absent the acquisition with the world influenced by its occurrence.[29] This comparative analysis embraces potential efficiencies reaped from the acquisition, ranging from synergies of intellectual property to abating transactional costs, exploiting economies of scope, and optimizing the allocation of skilled labour.

Nonetheless, an acquisition fanning the flames of prodigious expansion for both the acquiring and acquired entities inherently suggests a trajectory aligned with procompetitive undercurrents. This realization ushers us into a realm where the verdict remains contingent on the circumstantial particularities and a juxtaposition of varied counterfactuals.[30] As we traverse this complex terrain, one needs to scrutinize assumptions, fathom the consequences of market dynamics, and navigate with prudence the delicate balance between fostering competition and nurturing industrial growth.

## VI. THE RISE AND FALL OF GOOGLE+: LESSONS IN MARKET DYNAMICS AND ANTITRUST CONSIDERATIONS

[29] Luo, Jiewen (n 17).

[30] Mark J. Roe, 'Corporate Purpose and Corporate Competition' (SSRN, 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3817788> accessed 29 September 2023.

The triumph of prominent technology platforms in diverse markets is far from guaranteed. A noteworthy exemplar in this context is Google+, which made its debut on the 28th of June, 2011.[31] At that juncture, Google+ pronounced its ambitious intent: "We are transmuting Google + itself into a social haven at a calibre and extent heretofore not attempted—a quantum leap in terms of human resources, dwarfing any prior undertaking."[32] As espoused by Professor Catherine Tucker, an economist from the Massachusetts Institute of Technology, the potential for triumph seemed to be at Google's doorstep.[33] However, the curtain fell on Google + as a consumer-oriented entity on the 2nd of April, 2019. Google conceded to the astounding debacle that befell Google +.[34] Notwithstanding the allure of its online search emporium, consumers exercised their choice through alternative offerings. This Google + saga conveys the intricacies of prognosticating market ascendancy and predicting future competitive ramifications.

Evidently, the acquisition of a budding competitor can engender results that are detrimental to both consumers and innovation; conversely, it can also yield outcomes that unleash considerable consumer value. Over and above the customary efficiencies, an acquisition consummated in the early stages of a product's existence could substantially heighten the probability of the product's or technology's maturation and/or expedite its market introduction. Pre-emptively asserting that all or a majority of acquisitions orchestrated by

[31] Alexiadis & Bobowiec (n 13).
[32] Paul B. Stephan, 'Regulatory Competition and Anticorruption Law' (2012) 53 Va. J. Int'l L. < https://www.law.virginia.edu/scholarship/publication/paul-b-stephan/653676> accessed 25 August 2023.
[33] Neil Hodge, 'Competition Law: Avoiding Bad Behaviour' (2017) 2017 In-House Persp [13].
[34] Sharon Yadin, 'Shaming Big Pharma' (2018-2019) 36 JREG Bulletin <https://www.yalejreg.com/bulletin/shaming-big-pharma/> accessed 25 August 2023.

mammoth technological enterprises are injurious to consumers, sans substantial substantiation, risks dampening the reservoirs of innovation and consumer well-being.[35] This is not to insinuate that all research findings discount the issue of potential competition loss.

Amidst these uncertainties and the prerequisite to forge prognostications relating to market entry, product differentiation, and efficiencies that transcend the standard ambit of merger scrutiny, we are confronted with inquiries concerning the competency of agencies and tribunals to evaluate acquisitions encompassing nascent or potential competitors. Crucially, does this distinct paradigm warrant a novel evaluative approach? This is the inquiry that we now turn our focus to.

## VII. RECENT PROPOSALS TO ADDRESS THE ALLEGED PROBLEMS OF NASCENT, POTENTIAL, AND KILLER ACQUISITIONS

In light of the amplified obscurity and intricacies entailed in scrutinizing acquisitions of budding and potential contenders, a plethora of novel propositions has recently been unveiled. In the ensuing discourse, we shall elaborate upon three such propositions and interject our commentary therein, specifically within the context of India.

### A. Furman Report's Paradigm of “Equilibrium of Detriments”

[35] Sakshi Gupta, 'Sun Pharma - Ranbaxy: Combination Case Study' (2021) 3 (3)IJLLR <https://www.ijllr.com/post/sun-pharma-ranbaxy-combination-case-study> accessed 30 August 2023.

The Furman Report from the United Kingdom, propounds an innovative paradigm characterized by the "equilibrium of detriments" in grappling with mergers that enmesh budding competitors.[36] The crux of this conceptual framework lies in a careful computation of the anticipated value intrinsic to a merger's repercussions. This calculus mandates the assignment of probabilities to various states of the world, concomitant with the welfare accruals or depletions arising therefrom.

By way of illustration, imagine a scenario wherein a merger harbours a 20 percent likelihood of begetting $250 million in anticompetitive detriment, counterpoised by an 80 percent probability of eliciting net efficiencies amounting to $50 million.[37] Ergo, if the acquisition were to ensue, the transaction warrants impediment, as the calculus of anticipated value yields a deficit of substantial magnitude, manifesting as -$10 million.

The proposition at hand underscores a judicious and meditative endeavour to orchestrate economic scrutiny and welfare approximations as the linchpin of merger evaluations. The rationale of calculating the anticipated value is indeed compelling, as it assimilates the inherent unpredictability embedded in prognosticating the repercussions of a merger. If tenable, this calculus might be woven into a broader gamut of merger assessments, wherein various strands of evidence are imbued with commensurate gravitas.

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[36] D. M. Davis, 'Competition Law for the Digital Economy' (2020) 137 S African LJ <https://heinonline.org/HOL/Page?public=true&handle=hein.journals/soaf137&div=37&start_page=576&collection=journals&set_as_cursor=30&men_tab=srchresults> accessed 20 August 2023.

[37] Benjamin Little & Jeffrey Shafer, 'Canadian Competition Law and Internet Pharmacies' (2005) 2005 FDLI Update 46.

Notwithstanding, the pivot towards recalibrating merger policy to be centred on the outcomes of low probability underscored by pronounced detriments and advantages is not without reservations. For instance, imagine a scenario wherein a merger is fraught with a mere 5 percent probability of ushering in net efficiencies tantamount to $300 million per annum, as against a 35 percent probability of yielding net efficiencies approximating $45 million annually.[38] To compound matters, if the residual 60 percent of eventualities culminate in a net detriment of $50 million per annum, the merger would ostensibly be characterized as pro-competitive, courtesy of an anticipated value amounting to $0.75 million.[39]

While according primacy to an objective bedrock for engendering merger determinations has its merits, it presupposes that regulatory agencies possess lucid estimates of the assorted probabilities and welfare ramifications. Alas, this conjecture is liable to find a chasm of dissonance with most inquiries, rendering evaluations profoundly susceptible to infinitesimal fluctuations in probability assessments.[40]

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[38] Priyal Chandrakar, 'Competition Law and the Pharmaceutical Industry' (2021) 3 IJLLR <https://www.ijllr.com/post/competition-law-and-the-pharmaceutical-industry> accessed 20 August 2023.

[39] Steven C. Sunshine & Julia K. York, 'DOJ's Failure to Prove Its "Killer Acquisition" Claim in Sabre/Farelogix and Parallels to Other Recent Government Merger Litigation Losses' (2020-2023) 72 Fla. L. Rev. Forum <https://heinonline.org/HOL/Page?public=true&handle=hein.journals/flrf72&div=4&start_page=22&collection=journals&set_as_cursor=5&men_tab=srchresults> accessed 20 August 2023.

[40] Robert E. Green, 'The Court's New Giant Killer--The Tendency to Monopoly Clause' (1957) 9 Hastings LJ <https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1537&context=hastings_law_journal> accessed 15 August 2023.

Conclusively, the interface of the Furman Report's "equilibrium of detriments" model with the Indian legal and regulatory matrix beckons profound contemplation.[41] While the complexities and uncertainties intrinsic to merger evaluations remain universal, their manifestation and resolution within the Indian context coalesce as a nuanced narrative of legal evolution and pragmatic interpretation.

## B. Crémer Report's "Significant Impact on Effective Competition (SIEC)" Test

The Crémer Report introduces a cogent and perspicacious framework known as the "Significant Impact on Effective Competition (SIEC)" test, which commends regulators to exercise a heightened vigilance when scrutinizing acquisitions in the realm of dominant platforms characterized by robust affirmative network effects.[42] This mandate is especially pertinent when the acquired entity exhibits a burgeoning user base replete with "high future market potential." The nomenclature attributed to this doctrine serves to delineate its focus and import.

This SIEC test is predicated on the discernment of acquisitions wherein the primary impetus is safeguarding the bedrock offering or ecosystem of the ascendant platform.[43] Consequently, regulatory bodies are enjoined to divert their attention from the strictures of product market overlaps and instead direct their scrutiny toward the cohabitation of the two enterprises in either the

[41] Fayne & Foreman (n 14).
[42] Gupta (n 35).
[43] Alexandr Svetlicinii, 'Off-Label Use of Medicines under Scrutiny: Between Competition Law and Pharma Regulations' (2019) 38 SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3414068> accessed 20 September 2023.

"technological" or "user" sphere. This prescriptive divergence from conventional wisdom finds resonance in the nascent competition theory of harm exemplified by Microsoft.

In Microsoft, for instance, the focus was not solely on traditional product market overlaps but also on the potential for the merged entity to leverage its dominance in one market to stifle competition in adjacent or nascent markets.[44] Similarly, by considering whether the motivation behind an acquisition is to protect the dominant platform's core product or ecosystem, regulators can better assess the potential anti-competitive effects on nascent competitors and innovation.

In essence, the SIEC test coalesces harmoniously with the prevailing U.S. merger review modus operandi, eschewing a presumption of impropriety and prudently entertaining potential efficiencies that accrue from such unions.[45] The tenet of examining beyond the precincts of core product market overlap finds a concordant with the precedent set forth in the realm of nascent competition. An underpinning proviso, however, necessitates the regulatory authority's initial and unwavering determination of the network effects' nature—one that constricts market entry and confers formidable barriers thereto. Evidently, these effects are not homogenous but exhibit a heterogeneous array of attributes and strengths contingent upon the specific market dynamics.

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[44] Devlin, Alan J. "Killing Nascent Innovation as Abuse of Dominance and Monopolization" Research Handbook on Abuse of Dominance and Monopolization. (*Edward Elgar Publishing*, 21 April 2023) <https://www.elgaronline.com/edcollchap/book/9781839108723/book-part-9781839108723-30.xml> accessed 20 September 2023.

[45] Hodge (n 33).

Applying this framework to the Indian landscape, one could extrapolate instances wherein the SIEC test's criteria could have pertinently applied. Consider, for instance, the acquisition of Instagram by Facebook. While Facebook's standing as a monopolistic entity is a subject of debate, the pertinent question revolves around the precise purview of its monopolistic dominion. Categorizing it as a “social media” monolith usher in a plethora of contenders such as YouTube, Twitter, Pinterest, Reddit, LinkedIn, and the more recent entrants—Snapchat and TikTok. The pivotal query that arises is whether Instagram, at its embryonic stage, could have been posited as a distinctive nascent contender with the potential to dislodge Facebook's monopolistic foothold.

The answer, while not unequivocal, begets a thorough investigation—one that should not disregard Instagram's growth as a photo-sharing platform. The act of procuring a swiftly burgeoning enterprise within a peripherally related or remotely situated market introduces the prospect of assimilating a premium-grade product accompanied by an assemblage of valuable assets. This, in turn, accentuates the potential for deriving substantial efficiencies, particularly in scenarios where the acquired offering starkly diverges from the acquirer's existing portfolio. However, the intricate conundrum persists: navigating the intricate labyrinth of pre-emptive assessments concerning the association of burgeoning products and emergent technologies with a discerning eye on their future trajectory and differentiation.

## VIII. PRESUMPTION OF ILLEGALITY FOR ACQUISITIONS BY DOMINANT PLATFORMS

Several lawmakers in various jurisdictions such as the US have put forth a legislative remedy in response to the perceived problem arising from prominent digital platforms acquiring budding competitors. Their proposal entails an absolute proscription on takeovers meeting specific criteria.[46] A less stringent variant of this proposition leans toward a robust presumption of impropriety that can be challenged only within a restricted range of defences. While diverse formulations of this burden-shifting suggestion exist, its crux lies in obstructing acquisitions by technological conglomerates unless they can substantiate profound operational efficiencies.[47]

However, for a presumption of anti-competitive detriment to arise from substantial digital platforms procuring enterprises, substantial substantiation is imperative to confirm that these procurements genuinely culminate in anti-competitive practices and that they systematically evade rigorous enforcement under the existing legal framework.[48] As yet, no comprehensive study validating this assertion has come to our attention. Nonetheless, three recent studies have undertaken a scrutiny of antecedent platform acquisitions, delineated below. Collectively, these inquiries do not reveal pervasive evidence corroborating the notion of substantial technology acquisitions conforming to the "killer acquisition" narrative.[49] However, they

[46] Mikah Roberts, 'Killer Acquisitions and the Death of Competition in the Digital Economy' (2022) 24 (1) Transactions: Tenn J Bus L < https://ir.law.utk.edu/transactions/vol24/iss1/3/> accessed 14 September 2023.
[47] Yadin (n 34).
[48] Stephan (n 32).
[49] 'Competition Law' (2013) 12 Intell Prop L & Pol'y 605.

do concede that whether some of these procurements can be construed as anti-competitive remains an unresolved query. At most, the evidentiary landscape presents a blend of indications.[50] Even reports that harbor reservations about the prevailing extent of antitrust enforcement are hesitant to advocate such a sweeping policy shift.

In the inaugural study, Latham et al. meticulously scrutinized acquisitions executed by the quartet of Google, Amazon, Facebook, and Apple (collectively referred to as GAFA) spanning the temporal arc from 2009 to 2020.[51] Their findings indicate that "only a minor fraction of transactions could potentially conform to the 'killer' narrative." Instead, "the predominant majority pertained to GAFA's acquisition of novel competencies and strategic positioning to penetrate fresh markets." In dissecting the repository of 409 acquisitions in their dataset, only 33 of these, constituting a mere 8 percent, adhered to what they termed a "core business" filter.[52] This filter operates on the basis of either a direct horizontal intersection or a scenario wherein the acquisition involves an entity "vertically connected to that core business and possesses credible potential to evolve into a competitive menace." Crucially, the authors underscore that among these 33 acquisitions, they "do not assert that transactions surviving these filters qualified as killer acquisitions."[53]

However, the study does raise a concern about "reverse killer acquisitions," wherein the incumbent entity discontinues its in-house product

[50] Svetlicinii (n 43).
[51] Bryan & Hovenkamp (n 27).
[52] Lawrence B. Landman, 'Competition to Innovate and Future Potential Competition' (2023) 103 J. Pat. & Trademark Off. Soc'y <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4284370> accessed 14 September 2023.
[53] Little & Shafer (n 37).

development in favour of integrating the procured product. While this apprehension is legitimate, it does not axiomatically follow that a reverse killer acquisition is inevitable, and even if it materializes, its impact on innovation's trajectory remains uncertain. For instance, amalgamating the strengths of two distinct developmental processes to expedite the market debut of a more innovative product might entail the cessation of one of the pre-merger products.[54] Similarly, doubts persist whether, even in the absence of merger, internal development would have continued unabated or achieved the same echelon of efficiency.[55]

Gautier & Lamesch delve into the realm of acquisitions originating from major tech platforms, expounding their findings on the correlation between these acquisitions and the acquisition targets' valuable research and development inputs. Their investigation, spanning from 2015 to 2017 and involving a meticulous scrutiny of 175 deals, evinces a scarcity of compelling evidence in support of the proliferation of so-called "killer mergers."[56] Instead, their inquiry singles out a solitary prospective instance that might have merited more rigorous inspection from competition regulatory bodies. Notably, this instance pertains to the 2016 acquisition by Facebook of the photo filter application Masquerade.

Concurrently, Gautier & Lamesch illuminate an intriguing facet reminiscent of the findings by Latham et al., proposing the notion of reverse

[54] Davis (n 36).
[55]. Roe (n 30).
[56] Mariya Papazova, 'Competition Protection Commission on the National Regulation of the Pharma Sector' (2020) 4 Eur. Competition & Reg. L. Rev. <https://pesquisa.bvsalud.org/global-literature-on-novel-coronavirus-2019-ncov/resource/pt/covidwho-926160> accessed 12 August 2023.

killer acquisitions. This conceptualization alludes to instances where the underlying motive behind an acquisition is not the attainment of synergistic benefits but rather the fortification of market dominance through the procurement of valuable market assets, thereby pre-empting their independent evolution and subsequent products.

Conclusively, the duo underscores that the resolution to this intricate puzzle is far from self-evident, necessitating a thoroughgoing, case-specific analysis to dispel ambiguity. Moving forward, Argentesi et al. extend their gaze towards mergers involving the tech titans Google, Facebook, and Amazon over the span of a decade, from 2008 to 2018.[57] In this pursuit, they encounter formidable challenges in gauging the competitive implications accompanying the absorption of nascent firms, whose trajectories remain enigmatic due to their relatively nascent life cycles. This uncertainty renders it arduous to prognosticate whether these targeted entities will eventually burgeon into substantial competitive forces.

Within this context, Argentesi et al. astutely encapsulate the intricate conundrums that beset competition authorities and agencies. The authors undertake a meticulous evaluation of the determinations rendered by the United Kingdom's Competition and Markets Authority (CMA) vis-à-vis the Facebook-Instagram and Google-Waze acquisitions.[58] Although they craft compelling arguments on both sides of the discourse, they refrain from delivering a resolute verdict.

[57] Alexiadis & Bobowiec (n 13).
[58] Roberts (n 46).

Evidently, the recent inquiries into the realm of substantial tech acquisitions do not culminate in categorical pronouncements. It is unequivocal that prognosticating the trajectory of products and technological advancements within the dynamic and highly innovative domains of the market is a daunting endeavour.[59] One salient insight gleaned from this analytical sojourn, pertinent to our ongoing policy discourse, is that the evidentiary basis does not substantiate the notion that regulatory agencies are systematically overlooking latent anticompetitive prospects within early-stage acquisitions. Consequently, there exists no imperious mandate to reconfigure the prevailing presumptions.

## IX. DO THE PRESENT ANTITRUST STATUTES AND THEIR IMPLEMENTATION SUFFICE TO CONFRONT THE ISSUE AT HAND?

The assessment of prevailing antitrust legislation and its vigilant application in thwarting anticompetitive consolidations of burgeoning rivals invites a profound examination. Drawing from an array of evidentiary and scholarly discourse, it is posited that the current framework of U.S. federal antitrust laws, along with their invoked measures, demonstrates a sense of adequacy. This framework appears primed to effectively preclude injurious strides toward anti-competitive dominance.

Central to this discussion is the doctrine of potential competition, a venerable tenet within antitrust jurisprudence, spanning epochs of evolution.

[59] Affeldt, Pauline, and Reinhold Kesler. "Big Tech Acquisitions—Towards Empirical Evidence." (2021) 12 (6) Jl. of Eu. Comp. Law & Practice. <https://academic.oup.com/jeclap/article-abstract/12/6/471/6232342> accessed 12 August 2023.

This doctrine, embedded in the initial pronouncement of the Horizontal Merger Guidelines jointly administered by the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC), reflects a discerning recognition of the vitality of future rivalry.[60] This doctrine's historical lineage traces to its crystallization within the U.S. antitrust agencies, interweaving the notable doctrines of potential competition as seen in landmark cases such as El Paso Natural Gas and the nascent competition doctrine as exemplified in the Microsoft case.

However, transcending doctrinal intricacies, the vigilance of antitrust agencies in scrutinizing and, where warranted, enforcing actions comes into focus. This proactive stance is substantiated by active engagement, as evident in instances such as the FTC's scrutiny of the proposed acquisition of Arbitron by Nielsen in 2013.[61] Here, a novel strand of harm emerged, based on the concept of "potential-potential competition," creating a theoretical construct beyond conventional paradigms. This pioneering approach illuminates the FTC's disposition on the peripheries of the potential competition doctrine.

The year 2013 saw a crescendo of potential competition cases, exemplified by instances like Actavis-Warner Chilcott, Mylan-Agila, and Polypore-Microporous.[62] These underscored guardianship over nascent competition in the domain of forthcoming generic drug markets and demonstrated the FTC's stewardship in safeguarding prospective competition. The FTC's contestation of the Synergy Health acquisition by Steris Corporation in 2015 showcases its mettle in safeguarding potential

[60] Lundqvist (n 24).
[61] Smejkal (n 5).
[62] Whish (n 8).

competition.[63] Yet, judicial divergence was witnessed in instances like the Ohio district court's verdict in the Steris case, highlighting the complexities of applying nascent competition principles.

In the Indian context, there are significant parallels with antitrust efforts seen in other jurisdictions. Central to this is the Competition Act of 2002, which establishes the framework for antitrust regulation in India. The Competition Commission of India (CCI) plays a crucial role akin to the U.S. Federal Trade Commission (FTC), overseeing, adjudicating, and intervening in cases where competition is threatened.

A prominent example showcasing India's dedication to curbing the abuse of dominance and anticompetitive practices is the landmark case of CCI v. Google. In this case, the CCI investigated allegations against Google for abusing its dominant position in the market. Specifically, Google was accused of engaging in practices that favoured its own services over competitors' in search results, potentially stifling competition. This case exemplifies India's commitment to enforcing competition laws and ensuring a level playing field for all market participants.

Another significant case highlighting the Indian regulator's vigilance in safeguarding competition is the case of Uber India Systems v. CCI.[64] Here, the CCI intervened to protect nascent competition by scrutinizing agreements that restricted drivers from participating in rival platforms. Uber, a dominant player in the ride-hailing market, was under investigation for allegedly entering into agreements that hindered drivers' ability to work for competing

[63] Smith & Hunt (n 2).
[64] *Uber India Systems Pvt. Ltd. v. Competition Commission of India*, (2019) (8) SCC 697.

platforms. The CCI's intervention in this case underscores its role in promoting competition and preventing anticompetitive behaviour, even in emerging markets.

In the intricate terrain of antitrust, the Indian legislative framework and jurisprudential narratives contribute to the discourse. The CCI's assertive role in protecting competition resonates with the U.S. approach. This global correlation is seen in the FTC's inquiry into Roche's acquisition of Spark Therapeutics in 2019, mirroring India's Bayer-Monsanto case.[65]

These examinations reiterate regulatory agencies' proactive stance, transcending borders. The complexities are undeniable, and active enforcement underscores the principle that inquiries rest on a meticulous evaluation of market entry probabilities. Such inquiries parallel India's evolving competition jurisprudence, exemplified by cases such as Flipkart-Walmart. The notion of occasional fallibility isn't exceptional. While scrutiny should persist, it mustn't overshadow the agencies' robust decisions. Vigilance, open dialogue, and continuous enhancement form the essence. This resonates with India's regulatory landscape, urging the CCI to uphold competition and welfare while fostering continual refinement.

## X. CONCLUSION

While concerns exist regarding dominant technology companies acquiring potential rivals and stifling competition, the research in this paper suggests these “killer acquisitions” might not be as prevalent as initially thought. Predicting future market trajectories and discerning the true intent

[65] Madl (n 20).

behind acquisitions pose significant challenges. Acquisitions can be both pro-competitive and anti-competitive, highlighting the need for a nuanced approach. Absolute bans on acquisitions by dominant platforms lack sufficient evidence to be justified. Instead, careful case-by-case analysis and further research are crucial to navigate the complexities of this evolving landscape and ensure a balance between fostering competition and encouraging innovation.