Discussion Points

Presented by the *Business at OECD* Competition Committee to the OECD Competition Committee

Start-Ups, Killer Acquisitions and Merger Control Thresholds

June 11, 2020

1. *Business at OECD* appreciates the opportunity to submit these comments to the OECD Competition Committee for its roundtable on start-ups, killer acquisitions and merger control thresholds.

2. In recent years, concerns have been raised regarding acquisitions of nascent competitors by larger, well-established players, particularly in the tech sector. Some commenters have dubbed these as "killer acquisitions" seeking to equate merger with murder. It is fair to say that the international competition community has progressed beyond mere labels. But the issue of nascent competitor acquisitions deserves appropriate analytical focus by the competition community.

3. Concerns have been expressed that innovative upstart tech companies are being acquired by large, incumbent technology platform companies to prevent them from growing into significant independent companies that could impose competitive constraints, or perhaps even unseat, incumbents. Challenges exist, however, in determining whether the nascent competitors would have matured into actual significant competitors. And while hindsight can identify the more and less successful acquired companies, it cannot tell what might have been in the absence of the acquisition.

4. Various solutions to this challenge have been suggested, including shifting of the burden of proof to the acquiring party to demonstrate lack anticompetitive effect or, in other words, declaring any acquisition by a company of a certain size or category to be presumptively unlawful irrespective of competitive effects unless it can be proven otherwise.[1] This would apply a principle that, because the ultimate long-term impact of acquisitions of nascent competitors is inherently unpredictable, the ends of preventing "killer acquisitions" is justified by the means of dispensing with competitive analysis. But such an approach would not be consistent with the economic underpinnings of competition law, particularly when sound competition analysis can be brought to bear on the evaluation of such mergers. As this Committee has explored in prior sessions, there is also a risk that preventing mergers of nascent competitors may deter the very start-up activity that leads to important innovation and economic growth.

5. Decades of merger analysis have provided myriad tools that can help competition authorities to evaluate both the short- and long-term potential of a nascent competitor relative to its larger acquirer. These tools include means of factual, legal and economic analysis that can provide insight on

[1] *See, e.g.*, On Nascent Competition in Merger Analysis—Comments of Anant Raut (Jan. 27, 2019), *available at* https://www.ftc.gov/system/files/documents/public_comments/2019/01/ftc-2018-0088-d-0017-163741.pdf.

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the acquired and acquiring companies in a way that will improve the outcomes of merger review in such cases. This contribution seeks to evaluate a number of those tools. It is almost certainly non-exhaustive and omits additional tools that agencies can identify through their own experience. The use of these tools is a preferable approach to non-economic reactions based on speculative approaches.

6. We note that these merger tools should not be employed as a means of policing concerns about dominance that may exist independent of a specific transaction; to the extent that abuses of dominance occur, those concerns should be addressed under separate statutory authority granted to agencies.

7. In addition, this article will touch on notification thresholds as a means to detect potentially problematic transactions in this area, exploring whether alternative, purchase price based, notification thresholds are justified and, if so, what conditions should be considered in implementing alternative notification measures.

I. Introduction

8. Before the introduction of merger control rules, in many jurisdictions the acquisition of companies had been analyzed under the rules relating to anticompetitive agreements or abuse of dominance. With a view to the inherent difficulties regarding *ex post* remedies for completed transactions, *ex ante* merger control was introduced, subject to certain filing thresholds, to anticipate potentially problematic transactions in a given market before structural changes had set in.

9. Ex ante merger review is an inherently predictive exercise. But a long history of evaluating mergers has provided many predictive tools. The 2010 U.S. Horizontal Merger Guidelines begin by stating that merger policy in the U.S. is focused on enforcement "with respect to mergers and acquisitions involving actual or **potential competitors**."[2] Thus, the Guidelines are based on predictive tools have been refined at federal agencies and courts for many decades and are designed to capture potential competition at all stages.

10. Because predictive tools exist, enforcement should not be based on unbounded speculation as to possible success of a nascent company. Indeed, it would be a great irony in an exercise requiring predictive tools for agencies to approve mergers in cases where the acquisition of an established and reasonably significant competitor was involved, but to reject them where a nascent company of unknown competitive significance was in play. Agencies should not take an approach of "the less we know, the more certain we can be that a problem will exist." That being said, it also would be improper for agencies to ignore the competitive potential of an upstart company, particularly in technology markets that involve the potential for Schumpeterian changes and network externalities. Clearly, a balance must be sought.

11. Clayton Act Section 7, EC Article 102 and other regimes require probabilistic analysis based on factual and economic analysis. In recent years, court decisions in both the U.S. and EU have required agencies to focus on econometric and documentary evidence to support this predictive exercise.

[2] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 1 (2010), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf (emphasis added).

Absent such analysis, agency decisions to challenge or block a transaction are likely to be unsuccessful or overturned, with the potential to create bad legal precedent.

12. Thus, speculation need not guide this exercise and likely would not be accepted by reviewing courts if it did. There are numerous tools available to guide analysis of nascent competitor mergers that can lead to competitive outcomes and avoid Type I error that is a significant risk in these circumstances. Below we identify some of the economic and factual tools that have been utilized and can be useful in evaluating mergers involving smaller or nascent competitors.

II. General Factors for Evaluation of Nascent Competitor Transactions

A. Horizontal, Adjacent or Vertical?

13. As with any merger, the observable competitive relationship between the parties should be a starting point for evaluating the potential for competitive concern. Thus, the initial consideration should be to evaluate whether the nascent competitor currently sits in a horizontal, vertical or adjacent relationship to the acquirer.

14. Horizontal Relationships: Horizontal relationships have proven over decades to present the greatest concern. There is no reason to believe the same rule shouldn't apply to nascent competitor acquisitions. If a horizontal relationship exists, is the nascent competitor a mere copycat or does it represent (potential) Schumpeterian innovation? Either may present a problem, although there is growing evidence that preserving transformative innovation is more important than addressing allocative efficiencies. But evaluating the current competitive interaction as it reads on the near and longer term is the appropriate starting point. For example, is the nascent competitor a "maverick" or just another potential player? Is the company truly a "nascent" horizontal competitor or is the competition still just "potential?"

15. Adjacent Relationships: If the nascent competitor is not a direct competitor but is in an adjacent market, the threat of harm may not be as immediate as a horizontal competitor. Entry often occurs from adjacent markets, so an adjacent competitor could eventually become a threat to the large tech acquirer. But where a company is nascent in an adjacent market—i.e., is not even a substantial competitor in that adjacent market—the likelihood that they become a competitive threat in the acquirer's market becomes more remote.[3]

16. Vertical: As with all vertical mergers, the key question often will be whether the acquisition will foreclose rivals. The foreclosed competitors may be actual or potential rivals. Thus, the greatest threat might exist where the merger forecloses competition from one or more nascent competitors. Whether dominance is reinforced through foreclosure is not always directly observable, but sometimes can be discerned by looking to development efforts of the companies.[4]

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[3] Some of the oft-cited nascent acquisitions—e.g., WhatsApp and Instagram by Facebook—were not in markets in which the acquired companies were direct competitors to Facebook's social media platform from the user's standpoint but instead in adjacent forms of social interaction. The potential competitive interaction of the companies would have to have been measured, therefore, in other (broader) markets, such as advertising.

[4] In February 2013, the FTC challenged the merger between Nielsen and Arbitron. At the time of the merger, Nielsen and Arbitron did not compete directly, but operated in complementary areas of media measurement, principally television and radio audience measurement. The FTC identified a relevant product market—a nationally syndicated cross-platform audience measurement service—that was still in development and was not yet commercially available. However, Nielsen and

17. Vertical deals normally should not be presumed to be anticompetitive where a nascent competitor is involved. If, for instance, a vertical acquisition by a company of a well-established, mature competitor would not create a problem, then an acquisition of a nascent competitor—which may or may not ever make it to maturity—should not be viewed as anticompetitive and certainly should not be presumed as such.

B. Stage of Product Development

18. The stage of product development, of both the incumbent and nascent competitor, often can materially inform the potential for anticompetitive effects.

1. State of commercialization

19. An important factor is the stage of commercialization of the underlying product or service offering. Combinations or acquisitions of fledgling rivals that are already in full commercialization can create issues, even when the market is relatively young and underdeveloped, if the acquisition combines two uniquely-positioned competitors.

20. At the same time, nascent products that are further from commercialization may not create issues, even where one party is already well-established. This scenario often arises in connection with pharmaceutical mergers, where a more transparent product pipeline allows for further analysis.

21. In July 2017, the FTC challenged the merger of the two largest daily fantasy sports sites, DraftKings and FanDuel, alleging that the combined firm would control more than 90 percent of the U.S. market for paid daily fantasy sports contests. At the time of the proposed merger, the market was still evolving as many U.S. states had not authorized such "quasi-gambling" activity and neither company had turned a profit. The FTC challenged the deal alleging that the merger would violate Section 7 of the Clayton Act and Section 5 of the FTC Act by creating a single provider with by far the largest share of the market for paid daily fantasy sports contests in the United States. According to the FTC's complaint, DraftKings and FanDuel were each other's most significant competitor and

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Arbitron (in partnership with another company) each had been working to develop the product. The complaint alleged that Nielsen and Arbitron were the best positioned to develop the relevant product, that other companies lacked the same capabilities, and that the combination would both eliminate future competition in the relevant market and increase the likelihood of Nielsen's exercise of unilateral market power. The companies entered a consent agreement in which they agreed to divest assets to put another competitor in Arbitron's position with ongoing obligations by Nielsen to support the divestiture's effectiveness. Press Release, Fed. Trade Comm'n, FTC Approves Final Order Settling Charges that Nielsen Holdings N.V.'s Acquisition of Arbitron, Inc. Was Anticompetitive (Feb. 28, 2014), *available at* https://www.ftc.gov/news-events/press-releases/2014/02/ftc-approves-final-order-settling-charges-nielsen-holdings-nvs.

battled head-to-head to offer the best prices and product quality, including the largest prize pools and greatest variety of contests.[5] Shortly thereafter, the parties abandoned the transaction.[6]

22. Earlier, in 2001, the FTC reviewed the merger of Genzyme and Novazyme, two competitors with the leading R&D efforts to develop a treatment for a rare but devastating disease. In his statement, then-Chairman Tim Muris stated, "[t]he Commission's investigation properly focused on how the transaction would affect the pace and scope of research into pharmaceutical products for a life-threatening medical condition affecting infants and young children for which no treatment presently exists. The facts of this matter do not support a finding of any possible anticompetitive harm. Moreover, on balance, rather than put patients at risk through diminished competition, the merger more likely created benefits that will save patients' lives."[7] He further stated, "There is no evidence that the merger reduced R&D spending on either the Genzyme or the Novazyme program or slowed progress along either of the R&D paths. Although there have been schedule changes since the merger, there is no evidence that they resulted from anything other than the difficulties that attend challenging research efforts."[8]

23. The Genzyme/Novazyme example also reflects the importance of evaluating the potential for merger-specific synergies including in cases of nascent competitors. A nascent competitor, even one with a narrow portfolio and limited independent prospects, may fill an important gap for a larger competitor, unlocking new product offerings that may benefit a far larger population of consumers when placed on a broad platform.

2. Regulatory Hurdles

24. Where significant regulatory hurdles must still be crossed, the acquisition of a nascent competitor may be less likely to cause competitive harm. Merger review is a probabilistic exercise; the probability of a company obtaining necessary regulatory approvals therefore must be baked in to the evaluation of the potential for competitive harm. This is relevant, especially, in mergers in regulated sectors such as pharmaceuticals, telecoms and energy, among other sectors.

3. State of Market Development and Dynamism of Market

25. While some tech markets are more mature, other markets are themselves "nascent." For example, while cellular technology is well established, competition surrounding 5G product development and the use of cellular technology to implement the Internet of Things (IoT) is still very

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5 Press Release, Fed. Trade Comm'n, FTC and Two State Attorneys General Challenge Proposed Merger of the Two Largest Daily Fantasy Sports Sites, DraftKings and FanDuel (June 19, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/06/ftc-two-state-attorneys-general-challenge-proposed-merger-two; Press Release, Fed. Trade Comm'n, Statement from FTC's Acting Bureau of Competition Director Markus H. Meier on Decision by DraftKings and FanDuel to Abandon Their Proposed Merger (July 13, 2017), *available at* https://www.ftc.gov/news-events/press-releases/2017/07/statement-ftcs-acting-bureau-competition-director-markus-h-meier ("[T]he vigorous competition between DraftKings and FanDuel has spurred innovation and favorable pricing. In brief, consumers benefitted from the intense rivalry between the two leading players in this space. If this merger had been allowed to go through, those benefits would likely have been lost.").

6 Chris Kirkham & Ezequiel Minaya, *DraftKings, FanDuel Call Off Merger*, WALL STREET J., Jul. 13, 2017, *available at* https://www.wsj.com/articles/draftkings-fanduel-call-off-merger-1499976072.

7 Statement of Chairman Timothy J. Muris in the matter of Genzyme Corporation / Novazyme Pharmaceuticals, Inc. 1 (Jan. 13, 2004), *available at* https://www.ftc.gov/system/files/attachments/press-releases/ftc-closes-its-investigation-genzyme-corporations-2001-acquisition-novazyme-pharmaceuticals-inc./murisgenzymestmt.pdf.

8 *Id.* at 17.

much evolving. Therefore, it is relevant to ask how "new" is the market and how fast is it evolving and changing.

26. Digital markets sometimes evolve very quickly because of fast innovation. This innovation may either be (1) sustaining, i.e. taking place within the value network of the established firms, or (2) disruptive, taking place outside the value network of established firms.

27. Just ten years ago, the landscape of arguably "dominant" companies in the tech sector would have looked quite different than today. Those markets were fairly new then and the leaders of that era obviously were overtaken by today's leaders, with some markets having now become more established. But it is clear that the leaders of the prior decade—i.e., Nokia, Blackberry, AOL, Yahoo, MySpace, etc.—did not pace with development and innovation and were outstripped. In quickly evolving markets, all competitors must evolve to remain relevant and even large players may need to acquire technology to remain competitive.[9] Where the state of market evolution has slowed, then the innovation may be more sustaining than disruptive. A fulsome analysis of the state of the market evolution is therefore an important precursor to evaluating potential competitive harm.

28. Heterogeneity of user preferences will lessen the likelihood of entrenchment. For instance, successive generations of users often find their own preferences for social media. Facebook's users reportedly are aging, with far more downloads in recent times going to Snapchat and TikTok, particularly among younger users.[10] The existence of dynamics such as these make future predictions of foreclosure particularly challenging. Where user preferences are not diverse nor shifting over a more substantial period of time, enforcers should consider whether other "lock-in" factors may contribute to entrenchment but should also consider whether innovation by the leading firm(s) may have led to ongoing consumer loyalty.

29. Recent enforcement actions by the U.S. Federal Trade Commission have employed tools to evaluate nascent competitor acquisitions and to protect consumers from anticompetitive transactions. In 2018, the FTC challenged the proposed merger between CDK and Auto/Mate. In CDK and Auto/Mate, a large, established firm with a substantial share of the automotive "dealer management systems" software market, was buying a relatively small upstart that had enjoyed some recent success and appeared poised to challenge the market leader more aggressively. While there was some current competition between the firms, the greatest concern identified was the likely future competition that would be lost, should Auto/Mate be absorbed by CDK.[11] In December of 2019, the FTC successfully challenged the proposed merger between Illumina and PacBio, where it alleged that Illumina, with 90% share of the market, attempted to "extinguish [PacBio] as a competitive threat" upon discovering that PacBio was on the verge of offering better, more cost-effective DNA sequencing products.[12] And in February of 2020, the FTC challenged the proposed merger between Harry's and

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[9] The Google+ example may be instructive here. Even with the built-in resources and user-base that Google brought to the table in 2011, the company launched a social networking platform that was unsuccessful and was shuttered by 2019.

[10] *See, e.g.*, Mark Sweney, *Is Facebook For Old People? Over-55s Flock in as the Young Leave*, THE GUARDIAN (Feb. 12, 2018), *available at* https://www.theguardian.com/technology/2018/feb/12/is-facebook-for-old-people-over-55s-flock-in-as-the-young-leave.

[11] In the Matter of CDK Global, Inc., et al, Docket No. 9382, Complaint (Mar. 20, 2018), *available at* https://www.ftc.gov/system/files/documents/cases/docket_no_9382_cdk_automate_part_3_complaint_redacted_public_version_0.pdf.

[12] In the Matter of Illumina, Inc. & Pacific Biosciences of Cal., Inc. (PacBio), Docket No. 9387, Complaint (Dec. 17, 2019), *available at* https://www.ftc.gov/system/files/documents/cases/d9387_illumina_pacbio_administrative_part_3_complaint_public.pdf.

Schick in the market for "wet shave razors." There, Harry's—a disruptive newcomer—successfully changed the market from a "comfortable duopoly to a competitive battleground."[13] These enforcement actions demonstrate that the agencies can and will use current antitrust laws to preserve competition between rivals, including nascent competitors.

III. Looking at the Nascent Company Factors and Assessing the Counterfactual

30. Nascent competitors are not all created equally and, therefore, do not all stand the same chance of posing a threat to large incumbents. There are numerous factual clues to the potential impact of a nascent company, even at relatively early stages of development. These factors should be evaluated in considering the potential for competitive foreclosure in cases involving nascent competitors.

A. Independent Business Plan

31. Just like IP exploitation, tech development is sometimes best exploited by those other than the inventor. Incubators are filled with examples of tech developments that were never intended to be exploited by the inventor, but instead were targeted from the start to be a complement to a large tech platform. At times, without the complementarities offered by the large tech platform, there is little or no utility to the technological development.

32. Where a nascent competitor's business plans do not indicate the need for complementary resources from a larger platform, it should be studied to identify the relevant significant hurdles that must be crossed to evolve to an independent player (or platform), and the probability of succeeding at each turn. A realistic assessment should be employed, recognizing that the start-up itself is likely to have perhaps inflated confidence in its own success (as no start-up company concludes that it is destined to fail).

33. It is therefore relevant to ask whether the nascent competitor requires an existing platform to succeed or whether it is likely to succeed on its own. Obviously, the further down the path to success, the greater likelihood that it will have competitive significance in the market. The converse is also true with some companies affirmatively planning on being acquired, i.e., some tech inventions are not only intended to be sold to a platform but could not succeed otherwise.

34. Agencies should also consider the degree to which the nascent competitor's product must scale in order to compete. Some tech developments, particularly in the electronics and semiconductor space, are tied to the ability to mass produce the goods. For example, new tech that goes into handsets, computers or televisions may require hundreds of million units of production. While ODMs are sometimes available, where the technology may itself involve significant manufacturing know-how, a nascent competitor may lack the kind of production expertise that may be required and which resides only in the hands of a larger entity. So even if the underlying technology design itself is directly competitive with established market players, the nascent competitor may not effectively be able to scale up to compete without the proposed merger.

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[13] In the Matter of Edgewell Personal Care Co. & Harry's, Inc., Docket No. 9390, Complaint (Feb. 2, 2020), *available at* https://www.ftc.gov/system/files/documents/cases/public_p3_complaint_-_edgewell-harrys.pdf.

B. Unique Technology/Protected IP

35. It may also be useful to examine whether the nascent competitor will be able effectively to access the market in light of IP hurdles. If a nascent technology is truly unique this will not be an issue. But if it builds on prior discoveries in the industry, as is often the case, the nascent competitor may face significant challenges or allegations of infringement of existing IP in the hands of large players. If the nascent competitor does not have a "defensive" IP portfolio, it may have no protection in the event of a challenge and therefore no ability to negotiate a cross-license to technology. Patent thickets exist in many technology markets. While standards and FRAND commitments enable entry in some settings, many patent thickets involve non-standard essential patents that are capable of excluding infringing players. Therefore, in some markets, the likelihood of ultimate success of a nascent inventor may be much higher in the hands of an existing player with a stronger portfolio of IP. Thus, the competitive significance of a nascent competitor may be less likely if there is a patent thicket through which it must navigate.

C. Alternative Pathways

36. Agencies should consider whether, if the proposed merger is struck down, there are alternative path to success and, in some cases, alternative purchases of the nascent company. The counterfactual should not automatically be assumed to be an independent path to success. The realistic set of business alternatives—not just in the absence of the merger, but in the context of the deal being rejected, must be evaluated.

37. The nascent company's financing horizon also should be considered. For example, does the nascent company have the funding to continue, and for how long? Has it already received Series A and B funding? If the merger does not go through, will it have funding to sustain its development and reach a positive cash flow position? It should be borne in mind that some tech start-ups may be highly valued—and therefore readily funded by venture capitalists—precisely because they are attractive targets of larger platform companies. Notably small start-ups may not be able to monetize their inventions without a strong partner who can provide the necessary scale and/or complementary functionalities. Some start-ups, in contrast, may have aspirations or plans for an independent path to achieving economies of scale. These factors should be evaluated in light of the hurdles that would have to be surmounted in order to attain the company's plans.

38. Moreover, agencies should study the changed investment incentives that would accompany increased skepticism of acquisitions of nascent companies—a more hostile climate relating to such acquisitions could create disincentives for VCs to finance start-up activity.

39. If the merger with a platform acquirer is shot down, the prospects for the nascent competitor from that point forward may be very different than its prospects pre-merger. Also, the value of some technology is very time-sensitive (e.g., technology relating to a specific release of 5G standards). If the current merger fails, the nascent company may miss an important technology window necessary for its success or even its viability.

40. This is a particularly important consideration when assessing "pre-emptive" measures, such as the proposal to reverse the burden of proof in acquisitions undertaken by certain specific platform companies. The incentives to innovate and the fate of existing nascent competitors in tech industries

could become instantly uncertain. We are not aware of any empirical research on this topic, and it is not a measure that should be undertaken without significant study and certainty.

IV. Looking at the Potential Buyer Factors

41. Evaluating the status of the buyer in the relevant market(s) is also necessary. For example, is the buyer already entrenched as dominant or simply one of several competitors in the market? Has the buyer made serial acquisitions in the same market? Has there been robust entry in the buyer's market indicating ease of entry? Has the buyer engaged in independent innovation?

42. In this respect, an enforcer should consider whether the nascent competitor is developing a product for the market in which the buyer currently has a strong or dominant position, which could thereby threaten a dominant incumbent, or whether it relates to either a separate market, or a future generation of product for which the buyer's position is not established or secure. As an example, consider an acquisition by a company that is strong in 4G products or services but does not yet have a completed 5G strategy of a nascent 5G IoT technology. The buyer, although strong in 4G, may be one of several companies vying to be significant in 5G and their incumbent (even dominant) 4G position should not exclude them from competing aggressively to succeed in 5G. That scenario may be much different than an acquisition by the same buyer of a nascent company involving a product for a "mature" 4G network. Thus, the mere nascent stage of development of the seller's product itself does not tell the entire competitive story. In the first case, the buyer may be seeking to establish position in the evolving market, even if it is dominant in the mature market. In the latter case, it may be seeking to foreclose competition. Some large, even dominant, tech companies are not successful in developing products for the next generation (see Nokia, Blackberry). Thus, while their current competitive significance may be high, their future significance may be in doubt. Large current competitors should not be precluded from seeking alternatives to their own internal development for the next generation, so long as this does not slow innovation or lead to market foreclosure.

43. If a buyer is developing a product similar to the nascent competitor's product, then the stage of development and testing of the buyer's product will be extremely important. The further down the developmental pipeline both products are, the more reason for concern, and the opposite is equally true. This is well demonstrated in pharmaceuticals, but also may be applicable in the tech sector where products that are not yet successfully engineered or coded and have not yet succeeded in beta testing are likely to be of less certainty, and therefore of less competitive significance, than products closer to commercialization.

44. Another important consideration is what the buyer will do with the acquired technology. Deals in which the tech that is acquired and abandoned may to have fewer synergies than deals in which the tech is used to complement the buyer's current technology or become part of the future technology.

45. If the principal motivation for the deal is to prevent the technology from falling into hands of a rival who can successfully exploit it and undermine the current large or dominant player, then the transaction will be suspect. At the same time, if the acquisition will lead to efficiencies for the large buyer, it should not be condemned, absent market foreclosure, merely because greater synergies could have been obtained if acquired by another buyer.

46. Internal documents may be informative about the buyer's plans for its own technology absent the acquisition. Evaluation of the justifications for the acquisition—both positive and negative—may also be telling.

47. Also, some commentators have identified data compilation by platform companies as a potential competitive concern. To the extent that the acquisition includes exclusive data assets in the hands of the nascent competitor, the relevance of those data assets compared to the data assets of the buyer may be a relevant factor for evaluation.

V. Notification Thresholds and Related Considerations

48. In some jurisdictions, such as Japan, Canada, the United States and others, mergers falling below the notification thresholds may nonetheless be reviewed and challenged as unlawful. In this circumstance, notifications thresholds may not impede the ability of agencies to prevent or remedy anticompetitive nascent competitor acquisitions.

49. In other countries, the legal jurisdiction to review mergers is limited to instances where the merger triggers relevant merger notification thresholds. In these countries, notification thresholds are directly relevant to the ability of an agency to prevent anticompetitive mergers below the threshold. In any case, in order for a competition agency to analyze whether or not a given acquisition may substantially lessen competition or significantly impede effective competition, it must have the ability to review the relevant transaction.

50. Merger notification thresholds are an important factor in assuring adequate review by agencies. Subject to the conditions and considerations set forth below, an alternative merger notification threshold based on transaction value may be a reasonable alternative to a turnover (only) based test. But prior to considering such an alternative, a number of important factors should be evaluated by an agency, and a determination made as to whether such measures are beneficial and necessary.

A. Jurisdictional Nexus

51. Under principles that are well-established and accepted, basing notification on the size of the transaction alone, however, is not a sufficient basis for an agency to assert jurisdiction. The work of the ICN Merger Working Group over the past 15 years has established a sound set of principles to guide agencies in setting thresholds, including requirements that a sufficient jurisdictional nexus be established prior to requiring notification.[14] Agencies considering a change in thresholds to better capture nascent competitor acquisitions should ensure that the jurisdictional nexus standards are be well-articulated and administrable, which can at times present challenges.[15] Without a defensible jurisdictional nexus, concerns may arise that a jurisdiction is acting in protectionist fashion to guard against foreign acquisitions under the guise of antitrust.

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[14] INT'L COMPETITION NETWORK, ICN RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES, *available at* https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf.

[15] *See, e.g.*, Martin Sauermann, *The Transaction Value Threshold in Germany: Experiences with the New Size of Transaction Test in Merger Control*, COMPETITION POL'Y INT'L (Oct. 2019), *available at* https://www.competitionpolicyinternational.com/the-transaction-value-threshold-in-germany-experiences-with-the-new-size-of-transaction-test-in-merger-control/.

B. *Setting Notification Thresholds*

52. Due consideration, preferably by way of empirical analysis, should be given prior to implementing changes to notification thresholds. On February 11, 2020, the U.S. Federal Trade Commission launched a study under 6(b) of the FTC Act designed to assess the sufficiency of the U.S. notification thresholds as they relate to nascent technology mergers.[16] Despite the relatively low thresholds applicable in the U.S., the FTC found that it should "deepen its understanding of large technology firms' acquisition activity, including how these firms report their transactions to the federal antitrust agencies, and whether large tech companies are making potentially anticompetitive acquisitions of nascent or potential competitors that fall below HSR filing thresholds and therefore do not need to be reported to the antitrust agencies."[17] The FTC is undertaking this study despite a low threshold that applies to merger notifications in the U.S. (nearly all transactions valued at over $94 million generally are reportable). The study is being conducted with respect to five major tech companies, specifically Alphabet/Google, Amazon, Apple, Facebook and Microsoft. These same companies often are cited as the major tech platforms in jurisdictions considering reforms. Accordingly, the findings of this study may well inform, and should be considered by, other agencies prior to undertaking changes to notification thresholds.

53. Nascent competitors (perhaps by definition) may not have achieved significant turnover or market penetration but may nonetheless have attained a position of competitive relevance due to their innovation, asset base (potentially including data), intellectual property or other technological evolution. Therefore, the purchase price of the company may better reflect its economic potential better than the turnover generated previously. But determining the appropriate purchase price at which to set the threshold should be considered in the context of competitive significance.

54. This can be demonstrated, in the most egregious theoretical case, where an entrenched dominant company in a well-defined market seeks to acquire an upstart rival that threatens to undermine its dominance in that market solely for the purpose of eliminating it from the market. In such a case, the dominant firm would have the entirety of its monopoly rent at stake, as well as the share of non-monopoly profits that would be captured by the entrant. Thus, if it was certain that the upstart firm would unseat its dominance, then to avoid the entrant undermining its position, the dominant firm should be willing to pay up to the net present value (NPV) of the sum of the future monopoly rents plus the NPV of the sum of future "normal" lost profits on its lost market share, less one cent. (Maybe it would arguably only pay half of that amount since it would be willing to split that amount with the entrant). This amount would have to be discounted, of course, by the ultimate odds of success of the nascent rival and augmented by the efficiencies gained, etc. But if the relevant market is of any meaningful size, this "reservation price" of the dominant firm should be a significant sum.[18]

55. The nascent firm would have a different reservation price, represented by the NPV of its future profits from the share of the market it would capture, plus one cent. As with the buyer, the seller would have to handicap that amount by a probability of success/failure. So, if the dominant player thought the odds of successful entry were only 20%, they would only be willing to pay 0.20 of the

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[16] Press Release, Fed. Trade Comm'n, FTC to Examine Past Acquisitions by Large Technology Companies (Feb. 11, 2020), *available at* https://www.ftc.gove/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies.

[17] *Id.*

[18] The deal valuation, in the alternative, could be reflected in the parties' views of the impact of the acquisition on share/company valuation. But the underlying competitive considerations should be the same.

amount above. And the nascent company would perform its own probability analysis (perhaps placing a higher likelihood on its odds of success than the incumbent).

56. In any case, in this hypothetical, in a market where the nascent competitor was not yet generating turnover, the acquisition by the dominant firm would escape review in many jurisdictions that rely purely on a turnover metric for merger notification. Of course, the theoretical case above should not remotely be presumed to exist. Acquiring companies, including large platform companies, have legitimate reasons to make acquisitions for the same pro-competitive reasons that pertain to other companies: to develop new areas, to generate efficiencies, to spur their own innovation efforts, etc. These reasons, and the value they provide, form the basis for valuation of an acquisition target in nearly all cases.

57. Using a purchase price threshold as an alternative measure to capture potentially problematic acquisitions of nascent companies, if set at an appropriate level, would be a reasonable alternative. A sufficiently high threshold should be set because lower value deals reflect that either the value of the monopoly rents is not high or the probability of successful of entry is not high, or some combo of the two, but in any case is a reflection of the lack of competitive significance of the acquisition in the eyes of the acquirer and acquired company.

C. *Weighing Alternatives*

58. The benefits of making such a change should be considered. Following a 2016 Consultation proceeding, the European Commission determined not to make changes at that time to notification procedures targeted at nascent competitor acquisitions.[19] The Commission's consultation determined that "the majority of public and private stakeholders responding to the questionnaire do not perceive any (significant) enforcement gap as regards highly valued acquisitions of target companies that do not generate sufficient turnover to meet the jurisdictional thresholds of [the EC Merger Regulation], which would require legislative action."[20] We note that the German and Austrian authorities have altered thresholds to try to capture potentially problematic transactions in this regard, but we are unaware of any mergers that have been challenged as a result.[21]

59. The U.S. utilizes a purchase price threshold as an alternative to the "size of person" test that otherwise would measure the size of person threshold based on sales or assets. The HSR Act dispenses with the size of person test for any transaction valued at more than $376 million. This amount is adjusted annually to account for inflation.[22] The U.S. ensures jurisdictional nexus and other aspects of

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[19] *See* Nicholas Levy, Patrick Bock & Esther Kelly, *EU Merger Control*, *in* THE MERGER CONTROL REVIEW 11, 14-15 (Ilene Knable Gotts ed., 2019).

[20] Summary of Replies to the Public Consultation on Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control 5 (July 2017), *available at* http://ec.europa.eu/competition/consultations/2016_merger_control/summary_of_replies_en.pdf.

[21] *See* BUNDESKARTELLAMT & BUNDESWETTBEWERBSBEHÖRDE, GUIDANCE ON TRANSACTION VALUE THRESHOLDS FOR MANDATORY PRE-MERGER NOTIFICATION (SECTION 35 (1A) GWB AND SECTION 9 (4) KARTG) (July 2018), *available at* https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2.

[22] Under Clayton Act Section 7A(a)(2), reporting is required if "as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person . . . in excess of $200,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2004. . . .)." The adjusted value now places the reporting threshold at $376 million. *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 85 Fed. Reg. 4,984 (Feb. 27, 2020), *available at* https://www.federalregister.gov/documents/2020/01/28/2020-01423/revised-jurisdictional-thresholds-for-section-7a-of-the-clayton-act.

the ICN "recommended practices" through the application of other aspects of the HSR Act. Moreover, the relatively "light touch" obligations of the notification itself, and the fixed initial waiting period with no extended "pre-notification" period, helps to ensure that significant inefficiencies do not attend these filings. Imposing heightened reporting requirements in jurisdictions that require more burdensome notification obligations, such as those applied by the EC, would have far more significant implications in terms of resources of the agency and the parties. Thus, changes to notification obligations should be calibrated in light of the burden of notification itself.

60. Finally, agencies should evaluate the potential for Type 1 error, which is observable in cases in which agencies reject mergers on the grounds of potential competition. Numerous agencies have applied a potential competition theory, and those cases lend themselves to analysis of whether the predictions of the competitive significance of the target company came to pass. There is some suggestion that agencies' abilities to forecast the success of nascent competitors is challenged.[23] As Judge Ginsburg explained in a recent article, the "focus naturally should be on the real-world evidence of what happened in the market following the acquisition."[24]

VI. Conclusion

61. The evaluation of nascent competitor acquisitions need not be conducted in the absence of sound economic and factual information that can inform the inherently predictive exercise of merger review and analysis. Indeed, there is good reason to believe that particular rigor is called for where the prospective competitiveness of a nascent company forms the sole basis for rejection of a deal.

62. Many tools exist that can inform this analysis, and they should be applied as agencies employ their well-tested analytical frameworks and guidelines to the acquisition of nascent companies.

63. Agencies are justified in setting thresholds that capture potentially harmful acquisitions including those involving nascent competitors, provided that there is a sufficiently strong jurisdictional nexus to the transaction. But the appropriate thresholds should be set in view of the significant value that would have to attach to an acquisition capable of causing meaningful harm to competition.

[23] *See, e.g.*, Koren Wong-Ervin, Anne Layne-Farrar & James Moore, *The Risks of Radicalism: Exacerbating Harms from Type I Errors*, COMPETITION POL'Y INT'L (Apr. 2020), *available at* https://www.competitionpolicyinternational.com/the-risks-of-radicalism-exacerbating-harms-from-type-i-errors/.

[24] Douglas H. Ginsburg & Koren W. Wong-Ervin, *Challenging Consummated Mergers Under Section 2* 5 (Geo. Mason Law & Econ. Research, Working Paper No. 20-14, 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3590703.