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Many recent articles have posited that dominant companies are squelching competition by buying up nascent companies before they can become effective rivals. Dubbed "killer acquisitions" by some, or "stealth acquisitions" by others, the argument is that these acquisitions are anticompetitive and must be stopped, and that new means are justified in doing so.[2] This article proposes that competition is better served by first determining whether the facts of the acquisitions themselves raise a threat to competition, using well-understood tools that effectively identify competitive harms. There is no need for frenzied reactionism where rational evaluation can provide informed answers to the key question of whether an acquisition of a nascent competitor is likely to harm competition.

Articles addressing this topic typically approach the question from a macro perspective, charging that the entrenchment of the dominant company is bolstered in general by a strategy to gobble-up would-be rivals before they can gain strength. Sometimes this phenomenon is examined in hindsight, identifying a specific prior acquisition. If the acquired entity is successful on the acquirer's platform, the assertion is that the nascent company was acquired to prevent its independent success, which is assumed irrespective of the platform's subsequent investments and synergies. If the acquired entity was unsuccessful on the acquirer's platform, then it is argued that the platform killed-off the alternative to maintain its own market position. This article does not tackle those issues specifically, but it does address an essential informative foundational point that those articles do not. Specifically, that analysis of merger effects is fact-specific and there are established methodologies that allow one to evaluate the potential competitive effects of the acquisition of a nascent competitor rationally, dispassionately, and free from the political, doctrinal, and other influences that often infect the dialogue on this topic. This article seeks to strip this analysis down to practical considerations and identify some of the relevant tools for this analysis.

Because predictive tools exist, enforcement should not be based on speculation as to the possible success of a nascent company. Indeed, it would be a great irony — in an exercise that relies on predictive tools — for agencies to *approve* mergers in cases where the acquisition of an established and reasonably significant competitor is involved

[1] The authors are Partners and members of the Antitrust and Competition Practice Group at Baker Botts, LLP. Portions of this article were prepared originally for the OECD Competition Committee Roundtable on Start-ups, Killer Acquisitions and Merger Control. The authors would like to thank members of the Business at OECD (BIAC) Competition Committee for helpful comments and acknowledge the substantial assistance of Jane Antonio in preparing this article. The authors have been involved both in defending and opposing mergers involving nascent competitors. Mr. Taladay's clients include two platform companies, but the original draft was prepared prior to these representations and he has not worked directly with those clients on matters involving alleged acquisitions of nascent companies.

[2] Cristina Caffarra, Gregory Crawford & Tommaso Valletti, "How Tech Rolls": Potential Competition and "Reverse" Killer Acquisitions, VoxEU (May 11, 2020), available at https://voxeu.org/content/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions; John D. Kepler, Vic Naiker & Christopher R. Stewart, *Stealth Acquisitions and Product Market Competition* (Nov. 19, 2020), available at https://ssrn.com/abstract=3733994.

but to *reject* mergers where a nascent company of unknown competitive significance is 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 said, it also would be improper for agencies to ignore the competitive potential of an upstart company, particularly in technology markets that involve the prospect of Schumpeterian change and network externalities. Clearly, a balance must be sought.

Decades of merger analysis have provided numerous tools that can help competition authorities evaluate both the short- and long-term potential of a nascent competitor relative to its larger acquirer. These tools include means of conducting factual, legal and economic analysis that can inform the counterfactual — looking to both the acquired and acquiring companies — in a way that will improve merger review outcomes involving nascent companies, whether that review is carried out *ex post* or *ex ante*. Our list of methods is almost certainly non-exhaustive and omits additional tools that agencies can identify through their own experience.[3]

I. Introduction

The hypothesized scenario is often this: an innovative upstart is acquired by a large technology platform company to prevent the upstart from growing into a significant independent competitor that could drive innovation, impose competitive constraints, or perhaps even unseat the incumbent. But because the nascent company lacks sufficient revenues (or turnover) or market share, competition agencies have no chance to stop the anticompetitive merger and are unable to unwind it once consummated. On the other hand, there is nothing hypothetical about the challenges in determining whether the nascent competitor would ever have matured into a significant competitor independently or in the hands of another, or whether it would have fallen into the vast scrapheap of unsuccessful, defunct start-up ventures. Hindsight can successfully identify the more (and less) successful acquired technologies that have flourished in the hands of a large platform company, but it cannot tell what might have been in the absence of the acquisition.

Various solutions to this challenge have been suggested, including shifting the burden of proof to the acquiring party to demonstrate a *lack* of anticompetitive effects. This is the equivalent of declaring every acquisition by a company of a certain size or category to be presumptively unlawful irrespective of actual competitive effects unless it can be proven otherwise.[4] This approach would adopt a principle that, because the ultimate long-term impact of acquisitions of nascent competitors is inherently unpredictable, the ends of preventing any "killer acquisition" is justified by the means of dispensing with competitive analysis. But such an approach presumes, without any empirical foundation, that nearly all

[3] These merger assessment tools are not meant to be employed as a means of policing concerns about the dominance of the acquiring firm that may exist independent of a specific transaction. Such concerns lie at the heart of some commentators' views on "killer acquisitions." In our view, to the extent that abuses of dominant market power exist, those concerns should be addressed under separate statutory authority granted to agencies to address dominance or monopolization. Seeking to curb the *pro-competitive* conduct of dominant firms does not protect competition or enhance consumer welfare.

[4] 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.

acquisitions of nascent companies harm competition. It would unnecessarily chill such acquisitions altogether and, thereby, deter the very start-up activity that leads to important innovation and economic growth. Moreover, it 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.

Recall that before the introduction of merger control standards centered around "substantial lessening of competition," some jurisdictions analyzed acquisitions utilizing 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.[5] These thresholds can be adjusted, and have been adjusted (typically upwards), to account for transactions that create a potential for material competitive harm.[6]

Ex ante merger review is an inherently predictive exercise. But a long history of evaluating mergers has provided many predictive tools. For example, 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.*"[7] Thus, the Guidelines incorporate predictive tools that have been refined over several decades and are designed to capture potential competition at all stages.

Clayton Act Section 7, EC Article 102 and the laws of other regimes require probabilistic analysis based on factual and economic analysis.[8] 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. 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. Thus, speculation need not guide this exercise and likely would not be accepted by reviewing courts if it did.

Identified below are some of the economic and factual tools that have been utilized and can be useful in evaluating mergers involving smaller or nascent competitors.

[5] This article does not address the issue of merger notification thresholds for nascent competitor mergers. That issue is intended for a future article.

[6] The International Competition Network (ICN) encourages agencies to "periodically review their merger notification thresholds to determine whether to modify them based on knowledge gained through the application of the thresholds, experiences of other jurisdictions, input from stakeholders, and other pertinent developments." INT'L COMPETITION NETWORK, ICN RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES 4 (2017), available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf. The ICN reassessed its own Recommended Practices regarding merger notification thresholds in 2017 and adjusted them to reflect new perspectives and past experience. See Maria Coppola & Paul O'Brien, *New Consensus on Merger Procedure and Analysis: the ICN's 2017 Recommended Practices*, COMPETITION POL'Y INT'L (July 2017), available at https://www.competitionpolicyinternational.com/wp-content/uploads/2017/08/ICN-Column-July-Full-1-1.pdf.

[7] 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).

[8] See 15 U.S.C. § 18; 2008 O.J. (C 115) 89. See also Competition and Consumer Act 2010 (CCA), s. 50 (Aus.); Enterprise Act 2002, s. 22 and 30 (UK).

II. General Factors for Evaluation of Nascent Competitor Transactions

A. Horizontal, Adjacent or Vertical?

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.

<u>Horizontal Relationships</u>:
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, it is proper to next ask whether the nascent competitor is a mere copycat of the acquirer or whether it represents a significant step forward in innovation. Either scenario may present a problem, although there is growing evidence that preserving transformative innovation is more important than addressing allocative efficiencies.[9] 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?"

<u>Adjacent Relationships</u>: 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 with 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 will become a competitive threat in the acquirer's market becomes more remote.

<u>Vertical</u>: As with all vertical mergers, the key question will often be whether the acquisition will foreclose rivals. The foreclosed competitors may be actual or potential rivals, including other upstarts. 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 this sometimes can be discerned by looking to the development efforts of the merging companies.[10]

[9] See Thomas O. Barnett, *Maximizing Welfare Through Technological Innovation*, 15 GEO. MASON L. REV. 1191, 1200 (2008) ("Since dynamic efficiency is crucial, preserving innovation incentives is one of the most important concerns of U.S. antitrust law."). See also *id*. at 1202 ("Fortunately, our task is more narrow, and more readily achievable: a fact-specific inquiry to determine whether a specific merger is likely substantially to lessen competition, and, if so, whether there is relief that would preserve competition while permitting some aspect of the merger to proceed.").

[10] 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 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

Vertical deals normally should not be presumed to be anticompetitive where a nascent competitor is involved.[11] 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

The stage of product development at the time of acquisition, considering both the incumbent and nascent competitor, often can materially inform the potential for anticompetitive effects. This is principally a factual analysis but can often be well informed by review of product roadmaps and strategic planning reviews. There are several elements to be considered.

1. State of Commercialization

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. At the same time, combinations of nascent products that are further from commercialization may not create issues. These scenarios often arise in connection with pharmaceutical mergers, where a more transparent product pipeline allows for further analysis. There, a probabilistic analysis can sometimes be undertaken in light of the phase in which the drugs are participating and the likelihood that either or both products will emerge successfully from clinical trials.

In July 2017, the Federal Trade Commission (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. Here, using traditional and well-established tools, the FTC concluded that the parties were far enough along in their respective developments to be counted as viable competitors in a new market. According to the FTC’s complaint, DraftKings and FanDuel were each other’s most significant competitor and battled head-to-head to offer the best prices and product quality, including the largest prize pools and greatest variety of contests.[12] Shortly thereafter, the parties

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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.

[11] See, e.g. U.S. Dep’t of Justice & Fed. Trade Comm’n, Vertical Merger Guidelines 11 (2020), available at https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf (“Vertical mergers combine complementary economic functions and eliminate contracting frictions, and therefore have the capacity to create a range of potentially cognizable efficiencies that benefit competition and consumers.”).

[12] 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-

abandoned the transaction and remain independent companies today.[13]

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. Despite the nascent stage of R&D in the market, the FTC used well-developed analytical tools to test whether the merger was likely to harm future development of the products. It realized that the combination of the two R&D initiatives could have either harmful or synergistic effects. 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."[14] 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."[15] 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

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

While some tech markets are more mature, other markets are themselves "nascent." For example, while cellular technology is well

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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.").

[13] 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.

[14] 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.

[15] *Id*. at 17.

established, competition surrounding 5G product development and the use of cellular technology to implement the Internet of Things (IoT) is still very much evolving. Therefore, it is relevant to ask how "new" is the market and how fast is it evolving and changing.

Digital markets sometimes evolve very quickly because of fast innovation or innovation "cycles." This innovation may either be (1) sustaining, i.e. taking place within the value network of the established firms; or (2) disruptive, i.e. taking place outside the value network of established firms.[16]

Just a decade or so 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 keep pace with development and innovation and were outstripped. In quickly evolving markets, competitors must evolve to remain relevant and even large players may need to acquire technology to remain competitive.[17] 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.

Further, heterogeneity of user preferences will lessen the likelihood of entrenchment. For instance, successive generations 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.[18] The existence of dynamics such as these make future predictions of foreclosure particularly challenging. Where user preferences are neither diverse nor shifting over time, enforcers should consider whether other "lock-in" factors or network externalities may contribute to entrenchment. They also should consider whether ongoing customer loyalty may be due to innovation or quality exhibited by the leading firm(s). All of this fits into an established approach to analyzing the likelihood of successful entry.

Recent enforcement actions by the U.S. FTC 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 that case, 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

[16] Deloitte, Digital era Technology Operating Models: Volume 1 | Digital Technologies, Digital Disruption and Digital Strategy 18 (2017), available at https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/technology/deloitte-nl-digital-era-tom-v1.pdf.

[17] 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. *See* Johan Moreno, *After Its Public Shutdown, Google+ Users Continue To Mourn*, FORBES (May 26, 2019), available at https://www.forbes.com/sites/johanmoreno/2019/05/26/after-its-public-shutdown-google-users-continue-to-mourn/?sh=67a0187e1c76.

[18] 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.

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.[19] The parties ultimately abandoned the transaction.[20]

In December 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.[21] And in February 2020, the FTC challenged the proposed merger between Harry's and Schick in the market for "wet shave razors." There, Harry's — a disruptive newcomer — changed the market from a "comfortable duopoly to a competitive battleground."[22] Again, the parties ultimately abandoned the transaction.[23] These enforcement actions demonstrate that the agencies can and will use the tools available under current antitrust laws to preserve competition between rivals, including nascent competitors.

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

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

It is relevant to ask whether the nascent competitor requires an existing platform to succeed or whether it is likely to succeed on its own. Just like intellectual property (IP) exploitation, tech development is sometimes exploited by the inventor, but at other times is best exploited by others. 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 become 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.

[19] 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.

[20] Press Release, CDK Global, CDK Global & Auto/Mate to Terminate Planned Transaction (Mar. 20, 2018), available at https://investors.cdkglobal.com/news-releases/news-release-details/cdk-global-automate-terminate-planned-transaction.

[21] 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.

[22] 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.

[23] Sharon Terlep & Brent Kendall, *Schick Owner Abandons Takeover of Harry's Following FTC Suit to Block It*, WALL ST. J. (Feb. 10, 2020), available at https://www.wsj.com/articles/schick-owner-abandons-takeover-of-harrys-11581345469.

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 for the upstart to evolve into an independent player (or platform), and the probability of succeeding at each turn. A realistic assessment should be employed, recognizing that the start-up and its investors are likely to have perhaps the most optimistic view of the company's success (as no start-up company launches on the premise that it will fail).

Obviously, the further down the path to success, the greater likelihood that the nascent company will have competitive significance in the market, and that the merger will have anticompetitive effects. The converse is also true, with some companies affirmatively planning on being acquired. Indeed, some tech inventions are not only intended to be sold to a platform, but could not succeed otherwise.

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 millions of units of production. While ODMs are sometimes available, certain technology may involve significant manufacturing know-how, in which case a nascent competitor may lack the kind of production expertise that may be required and which resides only in the hands of a larger, more established entity. So even if the underlying technology design itself is flawless and directly competitive with established market players, there may be uncertainty as to whether the nascent competitor can scale up production and compete effectively.

B. Unique Technology/Protected IP

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 and IP within the industry segment, as is often the case, the nascent competitor may face significant IP hurdles or allegations of patent infringement 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 necessary foundational 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 technology 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 reduced if there is a patent thicket through which it must navigate.

C. Alternative Pathways

Agencies should consider whether, if the proposed merger is struck down, there are alternative paths to success. In some cases, this may require an evaluation of whether there are (or were) alternative purchasers for the nascent company who could effectively exploit the company's invention. 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.

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? Agencies should remember 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. Other start-ups, in contrast, may have aspirations or plans for an independent path to achieving economies of scale and the financing to get there. These hurdles that the nascent company would have to surmount to attain its plans, absent the merger, should receive full consideration.[24]

If the acquisition of a nascent company is shot down, the prospects for the nascent competitor from that point forward may be very different than its prospects pre-merger, which enters into the counterfactual. Also, it should be recalled that the value of some technology is very time-sensitive (e.g. technology relating to a specific release of 5G standards). If a proposed merger fails, the nascent company may miss an important technology cycle necessary for the success of its invention and may even threaten its viability.[25]

IV. Looking at the Potential Buyer Factors

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 pre- or post-acquisition?

A. Acquirer's Product Development

One failing of many of the "killer acquisition" articles is that they generally assume that an acquisition by an allegedly dominant platform is harmful to competition irrespective of the possibility that the acquisition is made in order to better compete (including) with another platform. In other words, it assumes perfect acquisition alignment in that each large platform acquires *only the nascent firms that threaten them in their own market(s),* ignoring the incentives of other platforms to make the same acquisition in order to grow into the

[24] More generally, agencies should consider further study of the changed investment incentives that would accompany restrictions on acquisitions of nascent companies — a more hostile climate relating to such acquisitions could create disincentives for VCs to finance start-up activity.

[25] 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 invest in innovation, and the fate of existing nascent competitors in tech industries, could become instantly uncertain. The authors are not aware of any empirical research on this topic and implementing these measures without significant study seems risky.

competitive space of rivals. In effect, they assume that the platforms can perfectly predict the nascent competitors that will rise to success (as clearly not all nascent companies are acquired by the large platforms), *and* perfect market allocation among large platforms. In this respect, an enforcer should consider whether the nascent company is innovating in the market in which the platform/buyer currently has a strong or dominant position, or whether the buyer is extending into a market in which it may challenge another platform rival. For this reason, the notion of dispensing with market definition principles undermines the innovation goals of antitrust.[26]

Alternatively, the acquisition could relate to a future generation of product for which the buyer's position is not established or secure. As an example, consider a company that is already strong in 4G products or services, but does not yet have a complete 5G strategy, making an acquisition of a nascent 5G IoT technology. The buyer, although strong or even "dominant" in 4G, may be one of several companies vying to be significant in 5G but currently lacking the IP or technology to compete. Does it serve competitive objectives to exclude the dominant/incumbent 4G player 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 state of the seller itself does not tell the entire competitive story. In the first case above, the buyer may be seeking to establish its competitive position in the evolving market, even though it is dominant in the mature 4G market. In the latter case, it may be seeking to foreclose competition in the market it dominates. Recall that some large, even dominant, tech companies are not successful in developing products for the next generation (see Nokia, Blackberry, *supra*). Thus, while their current competitive significance may be high, their future significance may be in doubt. Large competitors in the present should not be precluded from seeking alternatives to their own internal development for the next generation of products or services, so long as an acquisition does not slow innovation or lead to market foreclosure.

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 along in 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.

B. Plan for Acquired Technology

Another important consideration is what the buyer will do with the acquired technology. Internal documents may be informative about the buyer's plans for its own technology absent

[26] This includes recent legislative proposals. See Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. § 13 (2021).

the acquisition. Evaluation of the justifications for the acquisition may also be telling as to the potential effects.

Deals in which the tech that is acquired and abandoned are inherently more suspect. They certainly will have fewer synergies than deals in which the technology is used to complement the buyer's current technology or become part of the future technology and are more likely to allow for an immediate reduction in competition. Such transactions may not always be anticompetitive, such as when customers are transitioned to a more efficient, more advanced, or less costly network without sacrificing important features of the old network. But they should be viewed with greater concern.

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

V. Conclusion

Rational evaluation of acquisitions of nascent competitors is well within reach. This exercise should be conducted in the presence of sound economic and factual information using predictive measures that have proven useful over many years of merger review. These tools can be applied as agencies employ their well-tested analytical frameworks and guidelines to the acquisition of nascent companies. Applying generalized concerns about dominance to specific acquisitions does not allow for a disciplined evaluation of potential merger-related effects.