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Autorité de la Concurrence Introduction of a Merger-Control Framework for Addressing Below-Threshold Mergers

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Introduction

The International Center for Law & Economics ("ICLE") is a nonprofit, nonpartisan, global research and policy centre—based in Portland. Oregon, United States—founded to build the intellectual foundations for sensible, economically grounded policy. ICLE promotes the use of law & economics methodologies, and economic findings, to inform public policy. More specifically, ICLE and its affiliate scholars have written extensively about competition and merger policy and routinely engage with policymakers and academics across the globe on these issues.

The Autorité de la Concurrence ("Autorité") has opened a consultation on the introduction of a merger-control framework for addressing below-threshold mergers likely to harm competition ("Consultation").[1] This follows the Autorité's previous consultations in 2017 and 2018, which explored how certain acquisitions of companies with low turnover—often involving nascent or potential competitors—might evade existing notification thresholds. In tandem, the Autorité also considered the possibility of relying on Article 22 of the EU Merger Regulation, which allows national competition authorities to refer transactions to the European Commission even if they do not meet the EU thresholds. The Commission's 2020 guidance encouraged greater use of such Article 22 referrals for below-threshold deals, and the Court of Justice of the European Union ("CJEU"), in its *Illumina/Grail* judgment of 3 September 2024, clarified that these referrals remain permissible provided national authorities have the requisite legal competence.

According to the Consultation:

> For several years, the Autorité has observed a steady increase in the number of mergers involving companies that play or are likely to play a key competitive role in the markets concerned but escaping control due to the low turnover generated by the target at the time of the merger.

Accordingly, the Autorité wishes to explore avenues for controlling such mergers that escape current notification thresholds but nevertheless harm competition on the French territory. In its latest public consultation, the Autorité has put forward three options:

1. The creation of a targeted call-in power by the Autorité, based on quantitative and qualitative criteria (Option 1).
2. The introduction of a new mandatory notification criterion for certain companies holding a degree of market power—for example, a dominant position or designation as a gatekeeper—based on a prior decision by the European Commission or the Autorité (Option 2).
3. Relying on ex post enforcement (under Articles 101 and 102 TFEU) to address potentially problematic outcomes that may have escaped merger review (Option 3).

[1] *Public Consultation on the Introduction of a Merger Control Framework for Addressing Below-Threshold Mergers*, AUTORITÉ DE LA CONCURRENCE (14 January 2025), https://www.autoritedelaconcurrence.fr/en/press-release/public-consultation-introduction-merger-control-framework-addressing-below-threshold.

We appreciate the opportunity to comment on the Autorité's Consultation, but caution that just because French policymakers *can* pass reforms to ensure mergers, particularly those involving startups, face more onerous reviews, does not mean it should.

While attempting to catch transactions that may harm consumers is commendable, it is important to understand the tradeoffs that ensue. Policing mergers is not costless, and any change in merger policy should consider both the benefits and the costs. Agencies will need to devote time and resources to assess mergers that previously were waved through without review. In turn, absent significantly more resources, this will reduce the review time devoted to the most problematic deals. Looking outside the agency, it will also increase the cost of mergers for parties, thereby chilling all deals, even procompetitive ones.

All in all, in devising alternate solutions to potential competition problems in the market for corporate control, it is important not to fall for the so-called "nirvana fallacy"—that is, comparing an imperfect current merger control systems against ideal new merger regime after the proposed reforms is implemented, as if they would be implemented in the real world perfectly and according to their purported goals.[2] Of course, under the current merger control some "Type II errors" will happen (that is, some anti-competitive mergers will not be captured). However, that some imperfections can be identified is not sufficient to justify changes to the system.

The Autorité itself has recognized these concerns, having previously ruled out reforms that would create significant legal uncertainty, complexity, or unnecessary costs (e.g., thresholds based on transaction value or market shares).[3] Our comment thus analyses these tradeoffs in more detail, ultimately concluding that lower merger-filing thresholds and fewer safe harbours may be inappropriate when viewed through the lens of the error-cost framework. Section I puts the current Consultation in a global context, explaining the impetus for—and weakness of—recent efforts to bolster merger enforcement worldwide. Section II outlines some of the implications of the error-cost framework for merger policy. Section III concludes by posing four questions that policymakers should consider when they amend merger-enforcement law and policy.

The Global Crackdown on Mergers

A growing number of policymakers and scholars are calling for tougher rules to curb corporate acquisitions. But these appeals are premature. There is currently little evidence to suggest that mergers systematically harm consumer welfare. More importantly, scholars fail to identify alternative institutional arrangements that could capture the anticompetitive mergers that evade prosecution without

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[2] *See* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. ECON. 1, 22 (1969), ("The view that now pervades much public policy economics implicitly presents the relevant choice as between an ideal norm and an existing "imperfect" institutional arrangement. This nirvana approach differs considerably from a comparative institution approach in which the relevant choice is between alternative real institutional arrangements.").

[3] Autorité, *supra* note 1, at 1-2.

disproportionate false positives and administrative costs. Their proposals thus fail to meet the requirements of the error-cost framework.

Taking a step back, there are multiple reasons for the antitrust community's about-face. These include concerns about rising market concentration,[4] labour-market monopsony power,[5] and of large corporations undermining the very fabric of democracy.[6] But of these numerous (mis)apprehensions, one has received the lion's share of scholarly and political attention: a growing number of voices argue that existing merger rules fail to apprehend competitively significant mergers that either fall below existing merger-filing thresholds or affect innovation in ways that are, allegedly, ignored by current rules.

These fears are particularly acute in the pharmaceutical and tech industries, where several high-profile academic articles and reports claim to have identified important gaps in current merger-enforcement rules, particularly with respect to acquisitions involving nascent and potential competitors.[7] Some of these gaps are purported to arise in situations that would normally appear to be procompetitive:

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[4] *See, e.g.*, Germán Gutiérrez & Thomas Philippon, *Declining Competition and Investment in the U.S.* (NBER Working Paper 1, 2017), ("The U.S. business sector has under-invested relative to Tobin's Q since the early 2000's. We argue that declining competition is partly responsible for this phenomenon."); *Contra*, Esteban Rossi-Hansberg, Pierre-Daniel Sarte & Nicholas Trachter, *Diverging Trends in National and Local Concentration*, 35 NBER MACROECON. ANNU. 1 (2021),("Using US NETS data, we present evidence that the positive trend observed in national product-market concentration between 1990 and 2014 becomes a negative trend when we focus on measures of local concentration. We document diverging trends for several geographic definitions of local markets. SIC 8 industries with diverging trends are pervasive across sectors. In these industries, top firms have contributed to the amplification of both trends. When a top firm opens a plant, local concentration declines and remains lower for at least 7 years. Our findings, therefore, reconcile the increasing national role of large firms with falling local concentration, and a likely more competitive local environment.").

[5] *See, e.g.*, José Azar, Ioana Marinescu, Marshall Steinbaum, & Bledi Taska, *Concentration in U.S. Labor Markets: Evidence from Online Vacancy Data*, 66 LABOUR ECON. 101886 (2020), ("These indicators suggest that employer concentration is a meaningful measure of employer power in labor markets, that there is a high degree of employer power in labor markets, and also that it varies widely across occupations and geography.").

[6] *See, e.g.*, TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018), at 9, ("We have managed to recreate both the economics and politics of a century ago—the first Gilded Age—and remain in grave danger of repeating more of the signature errors of the twentieth century. As that era has taught us, extreme economic concentration yields gross inequality and material suffering, feeding an appetite for nationalistic and extremist leadership. Yet, as if blind to the greatest lessons of the last century, we are going down the same path. If we learned one thing from the Gilded Age, it should have been this: The road to fascism and dictatorship is paved with failures of economic policy to serve the needs of the general public.").

[7] *See* Collen Cunningham, Florian Ederer, & Song Ma, *Killer Acquisitions*, 129 J. POL. ECON. 649 (2021); Sai Krishna Kamepalli, Raghuram Rajan, & Luigi Zingales, *Kill Zone* (Nat'l Bureau of Econ. Research Working Paper No. 27146, 2020);DIGITAL COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION (2019), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf;STIGLER CENTER FOR THE STUDY OF THE ECONOMY AND THE STATE, STIGLER COMMITTEE ON DIGITAL PLATFORMS (2019), *available at* https://www.publicknowledge.org/wp-content/uploads/2019/09/Stigler-Committee-on-Digital-Platforms-Final-Report.pdf; AUSTRALIAN COMPETITION & CONSUMER COMMISSION, DIGITAL PLATFORMS INQUIRY (2019), *available at* https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf; *see also* Jacques Crémer, Yves-Alexandre De Montjoye, & Heike Schweitzer, *Competition Policy for the Digital Era Final Report* (2019), *available at* https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf [*hereinafter* "Crémer Report"].

> Established incumbents in spaces like tech, digital payments, internet, pharma and more have embarked on bids to acquire features, businesses and functionalities to shortcut the time and effort they would otherwise require for organic expansion. We have traditionally looked at these cases benignly, but it is now right to be much more cautious.[8]

As a result of these perceived deficiencies, scholars and enforcers have called for tougher rules, including the introduction of lower merger-filing thresholds—like what has been put forward in the Consultation —and substantive changes, such as the inversion of the burden of proof when authorities review mergers and acquisitions in the digital-platform industry.[9]

These proposals, however, tend to overlook the important tradeoffs that would ensue from attempts to decrease the number of false positives under existing merger rules and thresholds. While merger enforcement ought to be mindful of these possible theories of harm, the theories and evidence are not nearly as robust as many proponents suggest. Most importantly, there is insufficient basis to conclude that the costs of permitting the behaviour they identify is greater than the costs would be of increasing enforcement to prohibit it.[10]

In this regard, two key strands of economic literature are routinely overlooked (or summarily dismissed) by critics of the status quo.

For a start, as Judge Frank Easterbrook argued in his pioneering work on *The Limits of Antitrust*, antitrust enforcement is anything but costless.[11] In the case of merger enforcement, not only is it expensive for agencies to detect anticompetitive deals but, more importantly, overbearing rules may deter beneficial merger activity that creates value for consumers. Indeed, not only are most mergers

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[8] Cristina Caffarra, Gregory S. Crawford, & Tommaso Valletti, "*How Tech Rolls": Potential Competition and "Reverse" Killer Acquisitions*, 2 ANTITRUST CHRON. 1, 1 (2020).

[9] As far as jurisdictional thresholds are concerned, *see, e.g.,* Crémer Report, *supra* note 77, at 10 ("Many of these acquisitions may escape the Commission's jurisdiction because they take place when the start-ups do not yet generate sufficient turnover to meet the thresholds set out in the EUMR. This is because many digital startups attempt first to build a successful product and attract a large user base while sacrificing short-term profits; therefore, the competitive potential of such start-ups may not be reflected in their turnover. To fill this gap, some Member States have introduced alternative thresholds based on the value of the transaction, but their practical effects still have to be verified."). As far as inverting the burden of proof is concerned, *see, e.g.*, Crémer Report, *supra* note 77, at 11 ("The test proposed here would imply a heightened degree of control of acquisitions of small start-ups by dominant platforms and/or ecosystems, to be analysed as a possible strategy against partial user defection from the ecosystem. Where an acquisition is plausibly part of such a strategy, the notifying parties should bear the burden of showing that the adverse effects on competition are offset by merger-specific efficiencies.").

[10] *See, e.g.*, Noah Joshua Phillips, *Reasonably Capable? Applying Section 2 to Acquisitions of Nascent Competitors*, *Antitrust in the Technology Sector: Policy Perspectives and Insights from the Enforcers Conference* (29 April 2021), *available at* https://www.ftc.gov/system/files/documents/public_statements/1589524/reasonably_capable_-_acquisitions_of_nascent_competitors_4-29-2021_final_for_posting.pdf ("Some would-be reformers view M&A as fundamentally predatory and wish to "level the playing" field for smaller, less competitive, or more sympathetic businesses by throwing as much sand in the gears as possible. But their Harrison Bergeron vision of competition, handicapping successful businesses, will not so much level the field as tilt the scales dramatically in favor of the government, handing tremendous power to regulators, sapping American competitiveness, and hitting Americans in their pocketbooks.").

[11] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

welfare-enhancing, but barriers to merger activity have been shown to significantly, and negatively, affect early company investment.[12]

Second, critics are mistaking the nature of causality. Scholars routinely surmise that incumbents use mergers to shield themselves from competition. Acquisitions are thus seen as a means to eliminate competition. But this overlooks an important alternative. It is at least plausible that incumbents'

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[12] For vertical mergers, the welfare-enhancing effects are well-established. *See, e.g.*, Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 677 (2007) ("In spite of the lack of unified theory, over all a fairly clear empirical picture emerges. The data appear to be telling us that efficiency considerations overwhelm anticompetitive motives in most contexts. Furthermore, even when we limit attention to natural monopolies or tight oligopolies, the evidence of anticompetitive harm is not strong."); *see also* Abbott B. Lipsky, Joshua D. Wright, Douglas H. Ginsburg, & John M. Yun, *Comment Letter on Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st* Century, *Vertical Mergers* (Geo. Mason Law & Econ. Research Paper No. 18-27, 2018), at 8-9, https://ssrn.com/abstract=3245940 ("In sum, these papers from 2009-2018 continue to support the conclusions from Lafontaine & Slade (2007) and Cooper et al. (2005) that consumers mostly benefit from vertical integration. While vertical integration can certainly foreclose rivals in theory, there is only limited empirical evidence supporting that finding in real markets. The results continue to suggest that the modern antitrust approach to vertical mergers 9 should reflect the empirical reality that vertical relationships are generally procompetitive."). Along similar lines, empirical research casts doubt on the notion that antitrust merger enforcement (in marginal cases) raises consumer welfare. The effects of horizontal mergers are, empirically, less well-documented. *See, e.g.,* Robert W Crandall & Clifford Winston, *Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence*, 17 J. ECON. PERSP. 20 (2003) ("We can only conclude that efforts by antitrust authorities to block particular mergers or affect a merger's outcome by allowing it only if certain conditions are met under a consent decree have not been found to increase consumer welfare in any systematic way, and in some instances the intervention may even have reduced consumer welfare."). While there is some evidence that horizontal mergers can reduce consumer welfare, at least in the short run, the long-run effects appear to be strongly positive. *See, e.g.*, Gregory J. Werden, Andrew S. Joskow, & Richard L. Johnson, *The Effects of Mergers on Price and Output: Two Case Studies from the Airline Industry*, 12 MGMT. DECIS. ECON. 341 (1991); Dario Focarelli & Fabio Panetta, *Are Mergers Beneficial to Consumers? Evidence from the Market for Bank Deposits*, 93 AM. ECON. REV. 1152, 1152 (2003) ("We find strong evidence that, although consolidation does generate adverse price changes, these are temporary. In the long run, efficiency gains dominate over the market power effect, leading to more favorable prices for consumers."); *see also, generally,* Michael C. Jensen, *Takeovers: Their Causes and Consequences*, 2 J. ECON. PERSP. 21 (1988). Some related literature similarly finds that horizontal merger *enforcement* has *harmed* consumers. *See* B. Espen Eckbo & Peggy Wier, *Antimerger Policy Under the Hart-Scott-Rodino Act: A Reexamination of the Market Power Hypothesis*, 28 J.L. & ECON. 119, 121 (1985) ("In sum, our results do not support the contention that enforcement of Section 7 has served the public interest. While it is possible that the government's merger policy has deterred some anticompetitive mergers, the results indicate that it has also protected rival producers from facing increased competition due to efficient mergers."); B. Espen Eckbo, *Mergers and the Value of Antitrust Deterrence*, 47 J. FINANCE 1005, 1027-28 (1992) (rejecting "the market concentration doctrine on samples of both U.S. and Canadian mergers. By implication, the results also reject the effective deterrence hypothesis. The evidence is, however, consistent with the alternative hypothesis that the horizontal mergers in either of the two countries were expected to generate productive efficiencies"). Regarding the effect of mergers on investment, *see, e.g.*, Gordon M. Phillips & Alexei Zhdanov, *Venture Capital Investments and Merger and Acquisition Activity Around the World* (NBER Working Paper No. w24082, November 2017), *available at* https://ssrn.com/abstract=3082265 ("We examine the relation between venture capital (VC) investments and mergers and acquisitions (M&A) activity around the world. We find evidence of a strong positive association between VC investments and lagged M&A activity, consistent with the hypothesis that an active M&A market provides viable exit opportunities for VC companies and therefore incentivizes them to engage in more deals."). And increased M&A activity in the pharmaceutical sector has not led to decreases in product approvals; rather, quite the opposite has happened. *See, e.g.,* Barak Richman, Will Mitchell, Elena Vidal, & Kevin Schulman, *Pharmaceutical M&A Activity: Effects on Prices, Innovation, and Competition*, 48 LOYOLA U. CHI. L.J. 799 (2017) ("Our review of data measuring pharmaceutical innovation, however, tells a different story. First, even as merger activity in the United States increased over the past ten years, there has been a steady upward trend of FDA approvals of new molecular entities ('NMEs') and new biological products ('BLAs'). Hence, the industry has been highly successful in bringing new products to the market.").

superior managerial or other capabilities (*i.e.*, what made them successful in the first place) make them the ideal purchasers for entrepreneurs and startup investors who are looking to sell.

This dynamic is likely to be amplified where the acquirer and acquiree operate in overlapping lines of business. In other words, competitive advantage, and the ability to profitably acquire other firms, might be caused by business acumen rather than exemplifying anticompetitive behaviour. And significant and high-profile M&A activity involving would-be competitors may thus be the procompetitive byproduct of a well-managed business, rather than anticompetitive efforts to stifle competition.

Critics systematically overlook this possibility. Indeed, Henry Manne's seminal work on *Mergers and Market for Corporate Control*[13]—the first to argue that mergers are a means of applying superior management practices to new assets—is almost never cited by contemporary researchers in this space. Our comments attempt to set the record straight.

With this in mind, we believe that calls to reform merger-enforcement rules and procedures should be analyzed under the error-cost framework. Accordingly, the challenge for policymakers is not merely to minimize type II errors (*i.e.*, false acquittals), which have been a key area of focus for recent scholarship, but also type I errors (*i.e.*, false convictions) and enforcement costs. This is particularly important in the field of merger enforcement, where authorities need to analyse vast numbers of transactions in extremely short periods of time.

In other words, while scholars have raised valid concerns, they have not suggested alternative institutional arrangements to address those concerns that would lead to better overall outcomes. Indeed, it could be that antitrust doctrine currently condones practices that harm innovation, but that there is no cost-effective way to reliably identify and deter this harmful conduct.

For instance, as we discuss below, a recent paper estimates that between 5.3% and 7.4% of pharmaceutical mergers are "killer acquisitions."[14] But even if that is accurate, it suggests no tractable basis on which those acquisitions can be differentiated *ex ante* from the 92.6% to 94.7% that are presumed to be competitively neutral or procompetitive. A reformed system that overly deters these acquisitions to capture more of the problematic ones—which is presumably the purpose (or at least, the effect) of the Autorité's first two options—is not necessarily an improvement.

Further, while many of the arguments suggesting that the current system is imperfect are well-taken, these claims of systemic problems are not always as robust as proponents suggest. This further

[13] Henry G. Manne, *Mergers and the Market for Corporate Control,* 73 J. POL. ECON. 110 (1965).

[14] Cunningham *et al.*, *supra* note 77, at 692 ("Given these assumptions and estimates, what would the fraction ν of pure killer acquisitions among transactions with overlap have to be to result in the lower development of acquisitions with overlap (13.4%)? Specifically, we solve the equation $13.4\% = \nu \times 0 + (1 - \nu) \times 17.5\%$ for ν which yields $\nu = 23.4\%$. Therefore, we estimate that 5.3% (= $\nu \times 22.7\%$) of all acquisitions, or about 46 (= 5.3% × 856) acquisitions every year, are killer acquisitions. If instead we assume the non-killer acquisitions to have the same development likelihood as non-acquired projects (19.9%), we estimate that 7.4% of acquisitions, or 63 per year, are killer acquisitions.").

weakens the case for policy reform, because any potential gains from such reforms are likely far less certain than they are often claimed to be.

Antitrust and the Error-Cost Framework

Firms spend trillions of dollars globally every year on corporate mergers, acquisitions, and R&D investments.[15] Most of the time, these investments are benign, often leading to cost reductions, synergies, new or improved products, and lower prices for consumers.[16] For smaller firms, the possibility of being acquired can be vital to making a product worth developing.

There are also instances, however, when M&A activity enables firms to increase their market power and reduce output. Therein lies the fundamental challenge for antitrust authorities: among these myriad transactions, investments, and business decisions, is it possible to effectively sort the wheat from the chaff in a way that leads to net improvements in efficiency and competition, and ultimately consumer welfare? In more concrete terms, the question is: are there reasonable rules and standards that enforcers can use to filter out anticompetitive practices while allowing beneficial ones to follow their course? And if so, can this be done in a timely and cost-effective manner?[17]

The Use of Filters in Antitrust

What might appear to be a herculean task has, in fact, been considerably streamlined, and vastly improved, by the emergence of the error-cost framework, itself a byproduct of pioneering advances in microeconomics and industrial organization.[18] This is "the economists' way out."[19] The error-cost framework is designed to enable authorities to focus their limited resources on that conduct most likely to have anticompetitive effects. In practice, this is done by applying several successive filters that separate potentially anticompetitive practices from ones that are likely innocuous.[20] Depending on this initial classification, practices are then submitted to varying levels of scrutiny, which may range from *per se* prohibitions to presumptive legality.[21]

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[15] *See Value of Mergers and Acquisitions (M&A) Worldwide from 1985 to 2020*, STATISTA (15 January 2021), https://www.statista.com/statistics/267369/volume-of-mergers-and-acquisitions-worldwide; *see also Gross Domestic Spending on R&D*, ORGAN. ECON. CO-OPER. DEV., https://data.oecd.org/rd/gross-domestic-spending-on-r-d.htm (*last visited* 29 April 2021).

[16] *See* Werden *et al.*, *supra* note 1212.

[17] Running the antitrust system is itself a cost to society.

[18] *See, e.g.*, Olivier E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968); *see also,* Easterbrook, *supra* note 1111; Henry G. Manne, *supra* note 1313; William M Landes & Richard A Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1980).

[19] Easterbrook, *id.*, at 14.

[20] *See* Easterbrook, *id.*, at 17 ("The task, then, is to create simple rules that will filter the category of probably beneficial practices out of the legal system, leaving to assessment under the Rule of Reason only those with significant risks of competitive injury.").

[21] *Id.* at 15 ("They should adopt some simple presumptions that structure antitrust inquiry. Strong presumptions would guide businesses in planning their affairs by making it possible for counsel to state that some things do not create risks of liability. They would reduce the costs of litigation by designating as dispositive particular topics capable of resolution.").

Of the thousands of M&A transactions each year, only a few must be notified to antitrust authorities, and fewer still are subject to in-depth reviews.[22] For instance, in both the United States and the European Union, only deals that meet certain transaction values and/or revenue thresholds require merger notifications.[23] Accordingly, U.S. antitrust authorities receive somewhere in the vicinity of 2,000 merger filings per year, while the European Commission usually receives a few hundred.[24] Typically, less than 5% of these mergers are ultimately subjected to in-depth reviews.[25] These cases are selected by applying yet another set of filters that include: looking at the relationship between the merging firms (horizontal, vertical, conglomerate); calculating market shares and concentration ratios; and checking whether transactions fall within several recognized theories of harm.[26]

Before those filters, notification thresholds are the first screen to determine if a given transaction merits a review. According to the International Competition Network's (ICN) Recommended Practices for Merger Notification and Review Procedures, mandatory notification thresholds should be based on quantifiable criteria (like assets or sales) and based on information that is readily accessible to the parties to the proposed transaction.[27] This recommendation by the ICN makes perfect sense. While a company's sales or asset value are an imperfect proxy for its market power, or for potential impacts on free competition, at this stage of the procedure —when a decision must be made on whether to notify the transaction— the parties to a transaction should not be required to perform complicated calculations or analyses. That is something that should be done at a later stage of the analysis. As these comments acknowledge, merger control regimes are imperfect, and some Type II errors will happen. However, in those cases (a minority, to be sure) in which a merger could cause damage to competition, competition agencies have at their disposal ex-post competition rules relating to behavioural control (e.g., prohibitions of cartelization and abuse of dominant position).

Similar filtering mechanisms apply to other forms of conduct. Incumbent firms routinely decide to enter adjacent markets, for instance, or to adopt strategies that might incidentally reduce competition in markets where they are already present. As with mergers, authorities and courts apply a series

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[22] *See Number of Merger and Acquisition Transactions Worldwide from 1985 to 2021*, STATISTA (14 May2021), https://www.statista.com/statistics/267368/number-of-mergers-and-acquisitions-worldwide-since-2005.

[23] *See* 15 U.S.C. §18a (1976); *see also*, FTC Premerger Notification Office Staff, *HSR Thresholds Adjustments and Reportability for 2020*, FED. TRADE COMM. (31 January 2020), https://www.ftc.gov/news-events/blogs/competition-matters/2020/01/hsr-threshold-adjustments-reportability-2020; Council Regulation 139/2004, 2004 O.J. (L 24) 1, 22 (EC).

[24] *See* FED. TRADE COMM. & U.S. DEP. JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2019 (2020), *available at* https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf; *see alsoMerger Statistics, 21 September 1990 to 31 December 2020*, EUR. COMM.(2021), *available at* https://ec.europa.eu/competition/mergers/statistics.pdf.

[25] *See* FTC and European Commission, *id.*

[26] *See* U.S. DEP. JUSTICE & FED. TRADE COMM., HORIZONTAL MERGER GUIDELINES (2010), U.S. DEP. JUSTICE & FED. TRADE COMM., VERTICAL MERGER GUIDELINES (2020); *see also Commission Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings,* EUR. COMM., 2008 O.J. (C 265) 6, 25.

[27] *ICN Recommended Practices for Merger Notification and Review Procedures*, INT. COMPET. NETW., at 6-7, *available at* https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf (*last visited* 20 February 2025).

of filters/presumptions to home in on those practices most likely to cause anticompetitive harm.[28] Firms with low market shares are deemed less likely to possess market power (and thus, less likely to harm competition); vertical agreements are widely seen as being less problematic than horizontal ones; and vertical integration is widely regarded as procompetitive, absent other accompanying factors.[29]

This system is certainly not perfect; filtering cases in this manner inevitably lets some anticompetitive practices fall through the cracks. Indeed, the error-cost framework is premised on the recognition of this eventuality. Nevertheless, the strengths of this paradigm arguably outweigh its weaknesses. "If presumptions let some socially undesirable practices escape, the cost is bearable.... One cannot have the savings of decision by rule without accepting the costs of mistakes."[30]

In most jurisdictions around the world, today's competition merger-control apparatus is administrable,[31] somewhat predictable,[32] and—in the case of merger enforcement—it ensures that deals are reviewed in a relatively timely manner.[33]

The contours of this system have profound ramifications for substantive antitrust policy. Potential reforms need to account for the tradeoffs inherent to this vision of antitrust enforcement: between false positives and false negatives, between timeliness and thoroughness, and so on. Accordingly, the relevant policy question is not whether existing provisions allow certain categories of potentially harmful conduct to go unchallenged. Instead, policymakers should ask whether there is a better set of filters and heuristics that would enable authorities and courts to prevent previously unchallenged anticompetitive conduct without overburdening the system or disproportionately increasing false positives. In short, antitrust enforcers must avoid the so-called "nirvana fallacy" of believing that *all* errors can be eliminated, and existing policies should thus always be weighed against alternative institutional arrangements (as opposed to merely identifying instances where they lead to false negatives).[34]

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[28] *See* FED. TRADE COMM. & U.S. DEP. JUSTICE, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (12 January 2017), at 15 ("The existence of a horizontal relationship between a licensor and its licensees does not, in itself, indicate that the arrangement is anticompetitive. Identification of such relationships is merely an aid in determining whether there may be anticompetitive effects arising from a licensing arrangement."); *see alsoCommunication from the Commission—Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings*, EUR. COMM., O.J. C. 45, 7–20 (24 February 2009).

[29] *See* FTC, *id.*; *see also Commission Guidelines on Vertical Restraints*, EUR. COMM., 2010 O.J. (C 130) 1, 46, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XC0519(04)&from=EN.

[30] Easterbrook, *supra* note 1111, at 15.

[31] It requires only limited government resources to function, relative to, *e.g.*, a system that reviews every merger in detail.

[32] Companies can self-assess whether their mergers are *likely* to be struck down by authorities and adapt their investment decisions accordingly.

[33] Even in-depth merger investigations are typically concluded within months, rather than years.

[34] *See* Demsetz, *supra* note2, at 1.

Calls for a Reform of Merger-Enforcement Rules and Thresholds

Against this backdrop, a growing body of economic literature claims to have identified inadequacies in both the U.S. and EU merger-control regimes, as well as the antitrust rules that govern the business practices of digital platforms (notably, vertical integration and tying).[35] These critiques focus on ways in which incumbents might prevent nascent or potential rivals from introducing innovative new products and services that could disrupt their existing businesses. In short, this recent economic literature purports to show how incumbents might use their dominant market positions to reduce innovation.

For instance, recent empirical research purports to show that mergers of pharmaceutical companies with overlapping R&D pipelines result in higher project-termination rates, thus reducing innovation and, ultimately, price competition. These are referred to as "killer acquisitions."[36] Others have argued that killer acquisitions also occur in the tech sector, although the empirical evidence offered to support this second claim is much weaker. In large part, this is because it does not differentiate between legitimate, efficient discontinuations of acquired products (such as the product being unsuccessful on the market, or the acquisition being done to hire the staff of the acquired firm) and the elimination of potential competitors.[37] Acquisitions of nascent and potential competitors undertaken with the intention of reducing competition have also been described as "killer acquisitions," even if they do not involve their products being discontinued.[38]

Along similar lines, it is sometimes argued that large tech firms create so-called "kill zones" around their core businesses.[39] Similarly, some scholars assert that incumbent digital platforms might seek to foreclose rivals in adjacent markets by "copying" their products, or by using proprietary datasets that tilt the scales in their favor.[40]

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[35] *See* Cunningham *et al.*, *supra* note 77; Kamepalli *et al.*, *supra* note 77; Kevin A Bryan & Erik Hovenkamp, *Antitrust Limits on Startup Acquisitions*, 56 REV. INDUS. ORG. 615 (2020); Mark A. Lemley & Andrew McCreary, *Exit Strategy* (Stanford Law and Economics Working Paper No. 542, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3506919.

[36] *See* Cunningham *et al.*, *id.* at 650 ("We argue that an incumbent firm may acquire an innovative target and terminate the development of the target's innovations to preempt future competition. We call such acquisitions 'killer acquisitions,' as they eliminate potentially promising, yet likely competing, innovation.").

[37] *See, e.g.*, Axel Gautier & Joe Lamesch, *Mergers in the Digital Economy*, INFO. ECON. & POL'Y (2000), ("There are three reasons to discontinue a product post-acquisition: the product is not as successful as expected, the acquisition was not motivated by the product itself but by the target's assets or R&D effort, or by the elimination of a potential competitive threat. While our data does not enable us to screen between these explanations, the present analysis shows that most of the startups are killed in their infancy.").

[38] John M. Yun, *Potential Competition, Nascent Competitors, and Killer Acquisitions*, in GAI REPORT ON THE DIGITAL ECONOMY (Ginsburg & Wright, eds. 2000).

[39] *See* Zingales *et al.*, *supra* note 77.

[40] *See, e.g.*, Kevin Caves & Hal Singer, *When the Econometrician Shrugged: Identifying and Plugging Gaps in the Consumer-Welfare Standard*, 26 GEO. MASON L. REV. 396 (2018), ("Or imagine the platform was appropriating or "cloning" app functionality into its basic service. The only potential harm in this instance would be that independent edge providers would be encouraged to exit or discouraged from entering in future periods. In theory, edge providers might be discouraged to compete in the app space given what they perceive to be a slanted playing field.").

All these practices are said to harm innovation by deterring the incentives of competitors to invest in innovations that compete with incumbents. And the overarching theme of the above research is that existing antitrust doctrine is ill-equipped to handle these practices—or, at the very least, that antitrust law should be enforced more vigorously in these settings.

But while the above research identifies important and potentially harmful conduct that cannot be dismissed out of hand, it is important to recognize its inherent limitations when it comes to informing normative policy decisions. Indeed, there is a vast difference between identifying *categories of conduct* that *sometimes* harm consumers, on the one hand, and being able to isolate *individual* instances of anticompetitive behaviour, on the other (and even then, it is important to distinguish conduct that harms consumers *overall* from conduct that merely harms certain parameters of competition while improving others. In other words, antitrust law should prohibit conduct when the category it belongs to is generally harmful to consumers and/or when harmful occurrences of that conduct can readily be distinguished[41]).

The above is merely a restatement of the error-cost framework, which highlights that the existence of false negatives is not a *sufficient* condition for increased intervention. The fact—if it can be proved—that there were some false negatives does not imply that there has been underenforcement with respect to the optimal level of enforcement. In other words, in the digital space, the argument can be made that an optimal merger policy on average leads to ex-post "underenforcement." Moreover, even if the level of enforcement has been lower than optimal, one must be careful not to swing too far in the opposite direction, especially in high-tech industries. The chilling effect on innovation could be significant.[42] Instead, any change to the standards of government intervention that seeks to prevent more of these false negatives, with all the accompany tradeoffs and risks inherent to this enterprise, must ultimately increases social welfare overall.

Concluding Remarks

Given the above, there are serious doubts that any of the Autorité's three proposals—namely, a targeted call-in power based on quantitative and qualitative criteria, a new mandatory notification criterion for firms previously designated as dominant or gatekeepers, and reliance on ex post

[41] *See, e.g.,* Eric Fruits, Justin (Gus) Hurwitz, Geoffrey A. Manne, Julian Morris, & Alec Stapp, *Static and Dynamic Effects of Mergers: A Review of the Empirical Evidence in the Wireless Telecommunications Industry*, OECD DIR. FINANC. ENTERP. AFF. COMPET. COMM., GLOB. FORUM COMPET., DAF/COMP/GF(2019)13 (6 December 2019) at ¶ 61, *available at* https://one.oecd.org/document/DAF/COMP/GF(2019)13/en/pdf ("Studies that do not consider these [non-price] effects are incomplete for purposes of evaluating the mergers' consumer welfare effects, and [are] all-too-easily used by advocates to misleadingly predict negative consumer outcomes. This is not necessarily a criticism of the studies themselves, which generally do not make comprehensive policy conclusions. The reality is that it is exceptionally difficult to comprehensively study even price effects, such that a well-conducted study of price effects alone is a valuable contribution to the literature. Nevertheless, in the context of evaluating prospective transactions, the results of such studies must be discounted to account for their exclusion of non-price effects.").

[42] Luís Cabral, *Merger Policy in Digital Industries*, (CEPR Discussion Paper No. DP14785, May 2020) at 12, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3612854.

enforcement under Articles 101 and 102 TFEU—would serve France or Europe's competition policy objectives without incurring significant adverse consequences.

A targeted call-in power, while ostensibly offering flexibility, ultimately hinges on the development of subjective thresholds. In practice, the lack of clear and objective criteria risks engendering legal uncertainty and inconsistent application. This would not only divert scarce enforcement resources to the review of borderline transactions, but it would also create a chilling effect on mergers that, although below existing thresholds, might otherwise yield substantial efficiency gains but are unnecessarily bogged down in regulatory red tape. More problematically, by focusing on the *cumulative* turnover of merging parties, would effectively cause merger reviews to be triggered by the competitive position of a single party. But looking at the competitive position of *one* merging party is not a useful proxy for assessing the competitive significance of a merger. This is why almost all existing merger systems tend to look at the market positions of *all* merging parties (for instance their turnover) to decide whether their transactions should be notified. In other words, basing merger notification requirements on the turnover of *both* merging parties (as is generally the case today) may not be perfect, but it remains vastly more accurate than looking at the turnover of *only one*.

Likewise, the introduction of a mandatory notification criterion tied to prior determinations of market power suffers from inherent inflexibility and a lack of specificity. Relying on static assessments—whether from past Autorité or European Commission decisions—fails to account for rapidly evolving market conditions. It also suffers from the critique exposed above, namely that one party being in a strong competitive position says little to nothing about the competitive significance of a merger. Reliance on such a criterion would thereby overinclusive.

Finally, the option of relying on ex post enforcement, as underscored by our analysis of recent ex post reviews, including the Facebook proceedings, presents its own set of challenges. Ex post review shifts the burden of uncertainty to the period after a merger has been consummated, exposing firms to the risk of retroactive legal action.[43] This approach, by its very nature, conflates post-merger outcomes with the merger's ex ante competitive effects. In doing so, it not only penalizes transactions based on hindsight but also undermines the incentives for pre-merger investment by effectively deterring deals that might otherwise promote long-term consumer welfare.

Given these concerns, we urge the Autorité to reconsider the proposals in their current form. A reformed framework should strive to minimize both false positives and false negatives while safeguarding the benefits of merger activity. Only by calibrating enforcement measures to target genuinely anticompetitive conduct—without imposing undue burdens on procompetitive transactions—can the delicate balance between regulatory oversight and market dynamism be preserved.

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[43] Dirk Auer, *Facebook and the Pros and Cons of Ex Post Merger Reviews*, TRUTH MARK. (11 December 2020), https://truthonthemarket.com/2020/12/11/facebook-and-the-pros-and-cons-of-ex-post-merger-reviews.