International Center for Law & Economics

Comment of the International Center of Law & Economics Concerning Merger Enforcement in India and the Competition Amendment Act of 2023

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Introduction

We appreciate the opportunity to comment on some of the changes made by the Competition (the Amendment) Act, 2023 (Amendment Act) to India's Competition Act of 2002 (the Act).

The International Center for Law & Economics ("ICLE") is a nonprofit, nonpartisan, global research and policy center—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 Amendment raises several important issues, but our comments focus on the new notification criteria for M&A deals. The Amendment adds a new notification threshold to Section 5 of the Act, which outlines when parties need to notify their merger to the Competition Commission of India. Under the new Section 5 (d), parties must notify a transaction when:

> "(d) value of any transaction, in connection with acquisition of any control, shares, voting rights or assets of an enterprise, merger or amalgamation exceeds rupees two thousand crore:
>
> Provided that the enterprise which is being acquired, taken control of, merged or amalgamated has such substantial business operations in India as may be specified by regulations.[1]

These new thresholds appear designed to catch certain startup acquisitions that would otherwise escape merger review because the target firm has little to no turnover or assets. In other words, the amendment adds a new threshold that aims to ensure potential "killer acquisitions" are reviewed by enforcers.

But while attempting to catch transactions that may harm consumers is commendable, it is important to understand the important tradeoffs that ensue. Policing

[1] The Competition Act (2002), as modified by the 2023 Amendment, Section 5 (d).

mergers is anything but 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 deals.

Our comment analyzes these tradeoffs in more detail, ultimately concluding that lower merger=filing thresholds may be inappropriate when viewed through the lens of the error-cost framework. Section I puts the Amendment in a global context, explaining the impetus for and weakness of attempts to bolster merger enforcement around the world. Section II outlines some of the implications of the error-cost framework for merger policy. Section III concludes by putting forward four questions that policymakers should ask themselves when they amend merger-enforcement law and policy.

I. The Global Crackdown on Mergers

The antitrust policy world has fallen out of love with corporate mergers. After decades of relatively *laissez-faire* enforcement, spurred in part by the emergence of Chicago school of economics,[2] 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

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[2] *See, e.g.*, Jonathan B Baker, *Recent Developments in Economics That Challenge Chicago School Views*, 58 ANTITRUST L.J. 655 (1989) ("Over the past fifteen years, the courts and enforcement agencies have created Robert Bork's antitrust paradise. Antitrust has adopted the Chicago School's efficiency analysis and the Chicago School's conclusions about the effects of business practices."). Note that, in many ways, the Chicago and late-Harvard views are somewhat similar when it comes to mergers—both schools of thought might thus have influenced this loosening of merger policy. *See, e.g.,* Richard A Posner, *The Chicago School of Antitrust Analysis*, U. PENN. L. REV. 937 (1979) ("The change in thinking that has been brought about by the Chicago school is nowhere more evident than in the area of vertical integration. Kaysen and Turner, writing in 1959, advocated for- bidding any vertical merger in which the acquiring firm had twenty percent or more of its market. Areeda and Turner, writing in 1978, express very little concern with anticompetitive effects from vertical integration. In fact, as between a rule of per se illegality for vertical integration by monopolists and a rule of per se legality, their preference is for the latter.").

without 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,[3] labor-market monopsony power,[4] and of large corporations undermining the very fabric of democracy.[5] 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. For instance, Rohit Chopra, a former commissioner at the US Federal Trade Commission, asserted that too many transactions avoid antitrust scrutiny by falling through the cracks of HSR premerger notification thresholds. For instance, Rohit Chopra, a former commissioner at the U.S. Federal Trade Commission, asserted that too many transactions avoid antitrust scrutiny by falling through the cracks of the Hart-Scott-Rodino Act's premerger-notification thresholds. As a

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[3] *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 MACROECONOMICS ANNUAL 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.").

[4] *See, e.g.*, José Azar, Ioana Marinescu, Marshall Steinbaum & Bledi Taska, *Concentration in U.S. labor markets: Evidence From Online Vacancy Data*, 66 LABOUR ECONOMICS 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.").

[5] *See, e.g.*, TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 9 (2018) ("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.").

result, Chopra claimed, "[t]he FTC ends up missing a large number of anticompetitive mergers every year."[6]

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:

> 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—similar to what is currently proposed with regard to India's proposed reform of its merger rules—and substantive changes, such as the inversion of the burden of proof when

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[6] Rohit Chopra, *Statement of Commissioner Rohit Chopra*, 85 FED. REGIS. 231, 77052 (2020) ("Adequate premerger reporting is a helpful tool used to halt anticompetitive transactions before too much damage is done. However, the usefulness of the HSR Act only goes so far. This is because many deals can quietly close without any notification and reporting, since only transactions above a certain size are reportable.").

[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"].

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

authorities review mergers and acquisitions in the digital platform industry.[9] As a result of these perceived deficiencies, scholars and enforcers have called for tougher rules, including the introduction of lower merger-filing thresholds—similar to what has been put forward in India's proposed reform of its merger rules—and substantive changes, such as the inversion of the burden of proof when authorities review mergers and acquisitions in the digital-platform industry.[10] Meanwhile, and seemingly in response to the increased political and advocacy pressures around the issue, U.S. antitrust enforcers have recently undertaken several enforcement actions directly targeting such acquisitions.[11] Meanwhile, and seemingly in response to the increased

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[9] As far as jurisdictional thresholds are concerned, *see, e.g.,* CRÉMER REPORT, *supra* note 7, 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 7, 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] As far as jurisdictional thresholds are concerned, *see, e.g.,* CRÉMER REPORT, *supra* note 7, 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 7, 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.").

[11] *See* FTC Press Release, *FTC Sues to Block Procter & Gamble's Acquisition of Billie, Inc.* (Dec. 8, 2020), https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-block-procter-gambles-acquisitionbillie-inc; DOJ Press Release, *Justice Department Sues to Block Visa's Proposed Acquisition of Plaid* (Nov. 5, 2020), https://www.justice.gov/opa/pr/justice-department-sues-block-visas-proposedacquisition-plaid; FTC Press Release, *FTC Files Suit to Block Edgewell Personal Care Company's Acquisition of Harry's, Inc.* (Feb. 3, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftcfiles-suit-block-edgewell-personal-care-companys-acquisition; FTC Press Release, *FTC Challenges Illumina's Proposed Acquisition of PacBio* (Dec. 17, 2019), https://www.ftc.gov/newsevents/pressreleases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio; DOJ Press Release, *Justice Department Sues to Block Sabre's Acquisition of Farelogix* (Aug. 20, 2019), https://www.justice.gov/opa/pr/justice-department-sues-block-sabres-acquisition-farelogix.

political and advocacy pressures around the issue, U.S. antitrust enforcers have recently undertaken several enforcement actions that directly target such acquisitions.[12]

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 behavior they identify is greater than the costs would be of increasing enforcement to prohibit it.[13]

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.[14] 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 welfare-enhancing, but

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[12] *See* FTC Press Release, *FTC Sues to Block Procter & Gamble's Acquisition of Billie, Inc.* (Dec. 8, 2020), https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-block-procter-gambles-acquisitionbillie-inc; DOJ Press Release, *Justice Department Sues to Block Visa's Proposed Acquisition of Plaid* (Nov. 5, 2020), https://www.justice.gov/opa/pr/justice-department-sues-block-visas-proposedacquisition-plaid; FTC Press Release, *FTC Files Suit to Block Edgewell Personal Care Company's Acquisition of Harry's, Inc.* (Feb. 3, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftcfiles-suit-block-edgewell-personal-care-companys-acquisition; FTC Press Release, *FTC Challenges Illumina's Proposed Acquisition of PacBio* (Dec. 17, 2019), https://www.ftc.gov/newsevents/pressreleases/2019/12/ftc-challenges-illuminas-proposed-acquisition-pacbio; DOJ Press Release, *Justice Department Sues to Block Sabre's Acquisition of Farelogix* (Aug. 20, 2019), https://www.justice.gov/opa/pr/justice-department-sues-block-sabres-acquisition-farelogix.

[13] *See, e.g.*, Prepared Remarks of Commissioner 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 (Apr. 29, 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.").

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

barriers to merger activity have been shown to significantly, and negatively, affect early company investment.[15]

[15] 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*, Global Antitrust Institute, *Comment Letter on Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st* Century, *Vertical Mergers* 8–9, GEO. MASON LAW & ECON. RESEARCH PAPER NO. 18-27 (2018), 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, see, for example, 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), the long-run effects appear to be strongly positive. *See, e.g.*, 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 (Nov. 2017), *available at* https://ssrn.com/abstract=3082265 ("We examine the relation between venture capital (VC) investments and mergers and acquisitions (M&A) activity

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' 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 behavior. 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*[16]—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. 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,

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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.").

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

where authorities need to analyze 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 them that would lead to better overall outcomes. 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. All legal enforcement systems are imperfect, and it is not enough to justify changes to the system that some imperfections can be identified.[17] 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."[18] 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 in order to capture more of the problematic ones—which is presumably the purpose of the merger-related amendments in the 2023 Competition Act— 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 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.

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[17] *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.").

[18] Cunningham *et al.*, *supra* note 7, 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% = ν × 0 + (1 − ν) × 17.5% for ν which yields ν = 23.4%. Therefore, we estimate that 5.3% (= ν × 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.").

II. Antitrust and the Error-Cost Framework

Firms spend trillions of dollars globally every year on corporate mergers, acquisitions, and R&D investments.[19] Most of the time, these investments are benign, often leading to cost reductions, synergies, new or improved products, and lower prices for consumers.[20] 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?[21]

A. 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.[22] This is "the economists' way out."[23] 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

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

[20] *See supra* note 15.

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

[22] *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 14; Henry G. Manne, *supra* note 16; William M Landes & Richard A Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1980).

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

potentially anticompetitive practices from ones that are likely innocuous.[24] Depending on this initial classification, practices are then submitted to varying levels of scrutiny, which may range from *per se* prohibitions to presumptive legality.[25]

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.[26] 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.[27] 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.[28] Typically, less than 5% of these mergers are ultimately subjected to in-depth reviews.[29] 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.[30]

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[24] *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.").

[25] *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.").

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

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

[28] *See* FEDERAL TRADE COMM'N & U.S. DEP'T OF 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 also*, European Commission, *Merger Statistics, 21 September 1990 to 31 December 2020* (2021), *available at* https://ec.europa.eu/competition/mergers/statistics.pdf.

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

[30] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010), U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, 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,* 2008 O.J. (C 265) 6, 25.

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 of filters/presumptions to home in on those practices most likely to cause anticompetitive harm.[31] 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.[32]

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."[33]

In most jurisdictions around the world, today's competition merger-control apparatus is administrable,[34] somewhat predictable,[35] and—in the case of merger enforcement—it ensures that deals are reviewed in a relatively timely manner.[36]

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[31] *See* FEDERAL TRADE COMMISSION & U.S. DEPARTMENT OF JUSTICE, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY 15 (Jan. 12, 2017) ("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 also* European Commission, *Communication 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*, O.J. C. 45, 7–20 (Feb. 24, 2009).

[32] *See* Antitrust Guidelines for the Licensing of Intellectual Property, *id. See also*, *Commission Guidelines on Vertical Restraints*, 2010 O.J. (C 130) 1, 46, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52010XC0519(04)&from=EN.

[33] Easterbrook, *supra* note 14, at 15.

[34] It requires only limited government resources to function, compared to, for example, a system that reviews every merger in detail.

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

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

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).[37]

B. Calls for a Reform of Merger-Enforcement Rules and Thresholds

Against this backdrop, a growing body of economic literature has identified potential 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).[38] 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

[37] *See* Demsetz, *supra* note 17, at 1 ("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.").

[38] *See* Cunningham *et al.*, *supra* note 7; Zingales *et al.*, *supra* note 7; 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), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3506919.

to as "killer acquisitions."[39] 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.[40] 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.[41]

Along similar lines, it is sometimes argued that large tech firms create so-called "kill zones" around their core businesses.[42] 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.[43]

All of 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

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[39] *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.").

[40] *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.").

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

[42] *See* Zingales *et al. supra* note 7.

[43] *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.").

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 behavior, 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[44]).

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.[45] Instead, any change to the standards of government intervention that seeks to prevent more of these false negatives, with all the

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[44] *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 Directorate for Financial and Enterprise Affairs Competition Committee, Global Forum on Competition, DAF/COMP/GF(2019)13 (Dec. 6, 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.").

[45] 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.

accompany tradeoffs and risks inherent to this enterprise, must ultimately increases social welfare overall.

Take the example of Google. It has acquired at least 270 companies over the last two decades.[46] It has been argued that some of these—such as Google's acquisitions of YouTube, Waze, or DoubleClick—may have been anticompetitive. The real test for regulators, however, is whether they could reliably identify which of Google's 270 acquisitions are actually anticompetitive *and* do so under a decision rule that causes less harm to consumers from false positives caused by the current (alleged) false negatives. If the anticompetitive mergers are such a tiny percentage of total mergers, and if identifying them *a priori* is difficult, then a precautionary-principle strategy that results in many false positives would likely not merit the benefits from blocking one or two anticompetitive mergers.

Indeed, but for Google and Facebook's investments in YouTube and Instagram (to cite but two examples), it is far from clear that a mere "video-hosting service" or "photo-sharing app" would have grown into the robust competitor that advocates assume. Apart from the potential synergies arising from the combination of these products with the acquiring companies' other products (for example, YouTube's search and recommendation engines being developed by Google, the world's leading internet-search company, or Instagram's ad platform being integrated with Facebook's), corporate control by the acquiring company may lead to these firms being better managed. This concept of M&A as creating a "market for corporate control" adds an important new dimension to the understanding of the tradeoffs involved.[47]

These anticompetitive theories of harm can thus be separated into three broad categories: (1) large incumbents have become so dominant in their primary markets that venture capitalists decline to fund startups that compete head-on, reducing potential competition; (2) these incumbents acquire potential competitors or non-competitor startups so as to reduce the competition along several dimensions, and (3) that incumbents purchase competitors to shut down their overlapping innovation pipelines (*i.e.*, killer acquisitions).

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[46] *See* Carl Shapiro, *Antitrust in the Time of Populism*, 61 INT'L J. INDUS. ORG. 714 (2018).

[47] *See* Henry G. Manne, *supra* note 16.

III. Concluding Remarks

With this in mind, applying the error-cost framework should lead policymakers to carefully consider the following questions when evaluating the merits and policy implications of economic research in this space:

1. Do the papers advancing these theories identify *categories of conduct* that, on average, harm consumer welfare?
2. If not, do the papers identify additional factors that would enable authorities to infer the existence of anticompetitive effects in *individual cases*?
3. If so, would it be feasible for authorities to add these factors to their analysis (in terms of time and resources)?
4. Finally, would prohibiting these practices at an individual or category level prevent efficiencies that would otherwise outweigh these anticompetitive harms? And could these efficiencies be analyzed on a case-by-case basis?

In addition to these error-cost-related questions, it is also necessary to question whether the results of these studies are relevant outside of the specific markets that they examine, and whether they give sufficient weight to countervailing procompetitive justifications.

All of this has profound ramifications for amendments to India's competition law. Lowering merger-filing thresholds may be counterproductive if it means fewer enforcement resources are devoted to other, more important cases. To make matters worse, heightened merger-control rules may deter firms from merging in the first place. This could have dramatic consequences for an economy like India's, which depends on startup activity to remain on its current growth path. In short, we recommend that Indian policymakers carefully consider whether the possibility of catching an additional handful of anticompetitive mergers is worth the significant costs that would be incurred by the Indian economy.