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Comments of the International Center for Law & Economics

Reforming Mergers and Acquisitions – Exposure Draft

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Introduction

We thank the Treasury of the Australian Government for the opportunity to comment on the exposure draft of the Treasury Laws Amendment Bill 2024: Acquisitions.[1] The International Center for Law & Economics (ICLE) is a nonprofit, nonpartisan global research and policy center founded with the goal of building the intellectual foundations for sensible, economically grounded policy. ICLE promotes the use of law & economics methodologies to inform public-policy debates and has longstanding expertise in the evaluation of competition law and policy. ICLE's interest is to ensure that competition law remains grounded in clear rules, established precedent, a record of evidence, and sound economic analysis.

While some of the reforms included in the exposure draft are positive (clearer review timelines may bring more legal certainty to merging parties), others threaten to erode the current merger-review regime by unduly focusing on market structure rather than competition; significantly decreasing legal certainty; increasing the number of unnecessary merger notifications; incorporating untested concepts that fall outside the scope of traditional competition; subverting time-honed theories of harm; punishing benign and even procompetitive transactions; and, ultimately, harming consumers. Our overriding concern is that intellectually coherent antitrust policy must focus on safeguarding competition and the interests of consumers, rather than competitors or a predetermined market structure.

Our comments focus primarily on five modifications to the Australian Competition and Consumer Act of 2010[2] (CCA):

1. Setting notification thresholds based on market-concentration metrics;
2. Including a presumption that the acquisition of 20% or more voting power concedes control of the body corporate and is therefore subject to the mandatory notification regime;
3. Modifying the "substantial lessening of competition" ("SLC") test to include operations that merely create or strengthen market power;
4. Changing the relevant factors to be considered under the SLC test; and
5. Reviewing so-called "serial acquisitions" by considering the combined effect of all acquisitions by the merging parties within a three-year period.

In its ongoing efforts to ensure that antitrust law in general, and merger control in particular, remain tethered to sound principles of economics, law, and due process, ICLE has submitted responses to consultations and published papers, articles, and reports in a number of jurisdictions, including the European Union, the United States, Brazil, the Republic of Korea, the United Kingdom, and India. These and other publications are available on ICLE's website.[3] In January 2024, ICLE submitted comments[4] to the Competition Taskforce's Reform Consultation on Merger Reform

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[1] *Reforming Mergers and Acquisitions – Exposure Draft*, AUSTRALIAN GOVERNMENT, THE TREASURY (24 Jul. 2024), https://treasury.gov.au/consultation/c2024-554547.

[2] Competition and Consumer Act 2010, No. 51, 1974 (Aus.).

[3] International Center for Law & Economics, https://laweconcenter.org.

[4] Dirk Auer, Geoffrey A. Manne, & Lazar Radic, *ICLE Response to the Australian Competition Taskforce's Merger Reform Consultation*, INT'L. CTR. LAW ECON. (19 Jan. 2024), https://laweconcenter.org/resources/icle-response-to-the-australian-competition-taskforces-merger-reform-consultation.

("Consultation").[5] Our comments on the exposure draft to a significant extent build on the arguments raised therein.

I. Notification Thresholds Based on Market Concentration

A notification threshold based on market-concentration metrics would run counter to one of the stated objectives of the merger reform process, which is to achieve "a merger control system that is faster, stronger, and simpler."[6]

According to the International Competition Network's (ICN) Recommended Practices for Merger Notification and Review Procedures, notification thresholds should be "clear and understandable"[7] and "should be based on information that is readily accessible to the parties to the proposed transaction."[8] A notification threshold based on market concentration does not meet these requirements. Most companies do not readily have information about market shares and concentration levels. Even where they do, such information might be measured in terms of narrowly defined markets that do not readily translate into the antitrust context. Such notification criteria could significantly increase parties' compliance costs.

The problem is compounded by the discretion afforded in setting notification thresholds. According to the exposure draft, notification thresholds are set either by regulation or the minister (s.51ABG). The latter's power, however, is entirely discretionary and is checked only (albeit very vaguely) by the minister's ability to consult the ACCC. The ensuing lack of legal certainty as to why, when, and how the minister might change the merger-notification thresholds is likely to increase the cost of doing business in Australia, as well as inject political influence in what has hitherto remained a largely predictable and technical exercise.

A second problem with concentration-based notification thresholds is that they unduly emphasize market structure. Our concern is that, by instituting market concentration as a notification criterion, the ACCC's subsequent merger-review process will remain committed to the analysis of market structure as the prime indicator of whether a merger should be allowed (this conclusion also follows from Question 9 of the Consultation, which asks whether Australia's merger regime should focus more on the overall structure of the market).[9] This would be a mistake. Market structure is, at best, an imperfect proxy for competitive effects and, at worst, a misleading one.

To start, the assumption that "too much" concentration is harmful presumes both that the structure of a market is what determines economic outcomes, and that anyone knows what the "right" amount

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[5] *Merger Reform Consultation Paper*, AUSTRALIAN GOVERNMENT, THE TREASURY (20 Nov. 2023), https://treasury.gov.au/consultation/c2023-463361.

[6] Exposure Draft, *supra* note 1, at 1.

[7] *Recommended Practices for Merger Notification & Review Procedures*, INTERNATIONAL COMPETITION NETWORK 5 (2002-2018), https://www.internationalcompetitionnetwork.org/portfolio/merger-np-recommended-practices.

[8] *Id.*, at 7.

[9] Consultation, *supra* note 5.

of concentration is.[10] But as economists have understood since at least the 1970s (despite an extremely vigorous, but ultimately futile, effort to show otherwise), market structure does not determine competition outcomes.[11] This view is well-supported, and held by scholars across the political spectrum.[12]

The absence of correlation between increased concentration and both anticompetitive causes and deleterious economic effects is also demonstrated by a recent, influential empirical paper by Shanat Ganapati. Ganapati finds that the increase in industry concentration in U.S. non-manufacturing sectors between 1972 and 2012 was "related to an offsetting and positive force—these oligopolies are likely due to technical innovation or scale economies. [The] data suggests that national oligopolies are strongly correlated with innovations in productivity."[13] In the end, Ganapati found, increased concentration resulted from beneficial growth in firm size in productive industries that "expand[s] real output and hold[s] down prices, raising consumer welfare, while maintaining or reducing [these firms'] workforces."[14] Sam Peltzman's research on increasing concentration in manufacturing finds that it has, on average, been associated with both increased productivity growth and widening margins of price over input costs. These two effects offset each other, leading to "trivial" net price effects.[15]

Further, the presence of harmful effects in industries with increased concentration cannot be readily extrapolated to other industries. Thus, while some studies have plausibly shown that an increase in concentration in a particular case led to higher prices (which has been found true in only a minority of the relevant literature), assuming the same result from an increase in concentration in other industries or other contexts is simply not justified:

> The most plausible competitive or efficiency theory of any particular industry's structure and business practices is as likely to be idiosyncratic to that industry as the most plausible strategic theory with market power.[16]

As Chad Syverson recently summarized:

> Perhaps the deepest conceptual problem with concentration as a measure of market power is that it is an outcome, not an immutable core determinant of how competitive an industry or market is… As a result, concentration is worse than just a noisy barometer

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[10] The following section is adopted from Geoffrey A. Manne, *et al.*, *Comments of the International Center for Law & Economics on the FTC & DOJ Draft Merger Guidelines*, INT'L. CTR. LAW ECON. 38 (18 Sep. 2023) https://laweconcenter.org/wp-content/uploads/2023/09/ICLE-Draft-Merger-Guidelines-Comments-1.pdf.

[11] *See, e.g.*, Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16(1) J. LAW ECON. 1-9 (Apr. 1973).

[12] Nathan Miller, et al., *On the Misuse of Regressions of Price on the HHI in Merger Review*, 10(2) J. ANTITRUST ENFORC. 248-259 (28 May 2022); *See, e.g.*, Steven Berry, Martin Gaynor, & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33(3) J. ECON. PERSPECT. 44-68, 48 (2019).

[13] Shanat Ganapati, *Growing Oligopolies, Prices, Output, and Productivity*, 13(3) AM. ECON. J. MICROECON. 309-327, 324 (Aug. 2021).

[14] *Id.*, at 309.

[15] Sam Peltzman, *Productivity, Prices and Productivity in Manufacturing: a Demsetzian Perspective*, Coase-Sandor Working Paper Series in Law and Economics 917, (19 Jul. 2021).

[16] Timothy F. Bresnahan, *Empirical Studies of Industries with Market Power*, in HANDBOOK OF INDUSTRIAL ORGANIZATION, Richard Schmalensee & Robert Willig (eds.), 1011, 1053-54 (1989).

> of market power. Instead, we cannot even generally know which way the barometer is oriented.[17]

In other words, depending on the nature and dynamics of the market in question, competition may well be protected under conditions that preserve a certain number of competitors in the relevant market. But competition may also be protected under conditions in which a single winner takes all on the merits of their business.[18] It is reductive, and bad policy, to presume that a certain number of competitors is always and everywhere conducive to better economic outcomes, or indicative of anticompetitive harm.

This does not mean that concentration measures have no use in merger enforcement. Instead, it demonstrates that market concentration is often unrelated to antitrust enforcement, because it is driven by factors endogenous to each industry. In revamping its merger-control rules, Australia should be careful not to rely too heavily on structural presumptions based on concentration measures, as these may be poor indicators of those cases where antitrust enforcement would be most beneficial to consumers.

In sum, market structure should remain only a proxy for determining whether a transaction significantly lessens competition. It should not be at the forefront of merger review. And it should certainly not be the determining factor in deciding whether to block a merger. Similarly, it is not an appropriate notification threshold in merger control.

Our view is that there is no need to reinvent the wheel. Turnover has typically been used as a proxy for a merger's competitive impact because it offers a first indicator of the parties' relative position on the market. Despite the Consultation's claim that "mergers of all sizes are potentially capable of raising competition concerns,"[19] where the parties (and especially the target company) have either no or only negligible turnover in Australia, it is highly unlikely that the merger will significantly lessen competition. Again, as recommended by the ICN:

> Examples of objectively quantifiable criteria are assets and sales (or turnover). Examples of criteria that are not objectively quantifiable are market share and potential transaction-related effects. Market share-based tests and other criteria that are inherently subjective and fact-intensive may be appropriate for later stages of the merger control process (e.g., determining the scope of information requests or the ultimate legality of the transaction), but such tests are not appropriate for use in making the initial determination as to whether a transaction requires notification.

II. Presumption of 'Control' for the Acquisition of 20% or More Voting Power

The exposure draft introduces a rebuttable presumption stating that "if the person's voting power in the target is 20% or more at a particular time, the person is taken to control the target at that

[17] Chad Syverson, *Macroeconomics and Market Power: Context, Implications, and Open Questions*, 33(3) J. ECON. PERSPECT. 23-43, 26 (2019).

[18] Nicolas Petit & Lazar Radic, *The Necessity of the Consumer Welfare Standard in Antitrust Analysis*, PROMARKET (18 Dec. 2023), https://www.promarket.org/2023/12/18/the-necessity-of-a-consumer-welfare-standard-in-antitrust-analysis.

[19] Consultation, *supra* note 5, at 24.

time." While it is understood that, under certain conditions, minority shareholdings may have anticompetitive effects, this presumption may unjustifiably increase the number of merger notifications. The concept of "control" in competition law, and particularly in merger control, normally involves the ability to exercise decisive influence on an undertaking,[20] which normally should be linked to the power to take decisions unilaterally (more than 50% of voting rights, or right to appoint a majority of the Board of Directors, for instance).

There are, admittedly, jurisdictions that set lower thresholds for triggering the duty to notify a transaction, but this is generally reserved for specific instances where other, special conditions are met that increase the likelihood the acquirer will influence the target's competitive strategy. As noted by the OECD:

> …when percentage thresholds are established at the lower end of the scale, a combination with additional criteria that indicate a closer relationship between the two parties involved in the transaction might be preferable. The Japanese merger review regime illustrates this point well. In addition to a 50% interest threshold for share acquisitions it has two lower thresholds of a 10% or 20% interest in the target. **But in each case a review will be triggered only if additional indicators suggest some influence over the target: in the case of a 20% interest, the holder must be the largest shareholder; in the case of a 10% interest, the holder must be among the three largest holders of voting rights and a number of other criteria must be taken into account that suggest some ability to influence the target** (emphasis added).[21]

In most cases, however, a shareholder's acquisition of 20% of voting rights for a given target should not give rise to competition concerns. This specific change, therefore, would increase the administrative costs of the Australian merger-control regime without adding any significant benefits relevant to protecting competition and, ultimately, consumers.

The presumption that the acquisition of 20% of the voting rights in a company constitutes "control," however, is arguably a symptom of a broader issue with the exposure draft. Namely, the exposure draft stretches the definition of "acquisition" beyond its natural limits. According to the exposure draft, the mandatory notification and suspension of a transaction is triggered by an acquisition of shares or assets, including property; legal or equitable rights that are not property; goodwill, or an interest in goodwill; as well as interests acquired through partnerships. This list is too broad and could lead to unintended consequences, such as capturing employee contracts. Whether this is the intent of the exposure draft is unclear, but it would be unfortunate if a reform aimed at achieving "a merger control system that is faster, stronger, and simpler" inadvertently stifled an employee's ability to leave a struggling and failing business.

III. The Modification of the SLC Test

The proposed draft amends Section 4G of the CCA to amplify the meaning of "substantially lessening competition" to include the creation, strengthening, or entrenching of market power.

[20] *See*, *e.g.*, Council Regulation (EC) No 139/2004 On the Control of Concentrations Between Undertakings (2004) *Official Journal* L24 1-22, Article 3 (2) (EU).

[21] *Definition of Transaction for the Purpose of Merger Control Review*, OECD 15 (24 Jan. 2014), https://one.oecd.org/document/DAF/COMP(2013)25/en/pdf.

According to the original consultation: "(u)nder the current substantial lessening of competition test, it may be difficult to stop acquisitions that lead to a dominant firm extending their market power into related or adjacent markets."[22]

The Consultation assumed this to be a problem, particularly in digital markets. Preventing dominant firms from leveraging their market power in one market to restrict competition in an adjacent one is a legitimate concern. We should, however, be clear about what is meant by "materially increase or materially extend a position of substantial market power."

Merger control should not, as a matter of principle, seek to prevent incumbents from entering adjacent markets. Large firms moving into the core business of competitors from adjacent markets often represents the biggest source of competition for incumbents, as it is often precisely these firms who have the capacity to contest competitors' dominance in their core businesses effectively. This scenario is prevalent in digital markets, where incumbents must enter multiple adjacent markets, most often by supplying highly differentiated products, complements, or "new combinations" of existing offerings.[23]

Moreover, it is unclear why the SLC test in its current state is insufficient to curb the misuse of market power. The SLC test is a standard used by regulatory authorities to assess the legality of proposed mergers and acquisitions. Simply put, it examines whether a prospective merger is likely to substantially lessen competition in a given market, with the purpose of preventing mergers that increase prices, reduce output, limit consumer choice, or stifle innovation as a result of a decrease in competition.

The SLC test is one of the two major tests deployed by competition authorities to determine whether a merger is anticompetitive, the other being the dominance test. Most merger-control regimes today use the SLC test, and for two good reasons. The first is that, under the dominance test, it is difficult to assess coordinated effects and non-horizontal mergers.[24] The other, mentioned in the Consultation, is that the SLC test allows for more robust effects-based economic analysis.[25]

The SLC test examines likely coordinated and non-coordinated effects in all three types of mergers: horizontal, vertical, and conglomerate. Horizontal mergers may substantially lessen competition by eliminating a significant competitive constraint on one or more firms, or by changing the nature of competition such that firms that had not previously coordinated their behavior will be more likely to do so. Vertical and conglomerate mergers tend to pose less of a risk to competition.[26] Still, there are facts and circumstances under which they can substantially lessen competition by, for example,

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[22] Consultation, *supra* note 5, at 19.

[23] NICOLAS PETIT, BIG TECH AND THE DIGITAL ECONOMY: THE MOLIGOPOLY SCENARIO (2020); *see also* Walid Chaiehoudj, *On "Big Tech and the Digital Economy": Interview with Professor Nicolas Petit*, COMPETITION FORUM (11 Jan. 2021), https://competition-forum.com/on-big-tech-and-the-digital-economy-interview-with-professor-nicolas-petit.

[24] *Standard for Merger Review*, OECD 6 (11 May 2010), https://www.oecd.org/daf/competition/45247537.pdf.

[25] *Id.*; see also Consultation, *supra* note 5, at 31 (indicating that "[SLC test] would enable mergers to be assessed on competition criteria but not prescriptively identify which competition criteria should be taken into account. It may permit more flexible application of the law and *a greater degree of economic analysis in merger decision-making*" (emphasis added).)

[26] *See, e.g.*, *Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings*, (2008/C 265/07), paras 11-13 (EU).

foreclosing rivals from necessary inputs, supplies, or markets. These outcomes will often be associated with an increase in market power. As the OECD has written:

> The focus of the SLC test lies predominantly on the impact of the merger on existing competitive constraints and on measuring market power post-merger.[27]

In other words, the SLC test already accounts for increases in market power that are capable and likely of harming competition. As to whether the "entrenchment" of market power—in line with the 2022 amendments to Canadian competition law—should be added to the SLC test, there is no reason to believe that this is either necessary or appropriate in the Australian context. The 2022 amendments to Canadian competition law mentioned in the Consultation[28] largely align Canada's merger-control regime with its abuse-of-dominance provision. That provision prohibits anticompetitive activities that damage or eliminate competitors and that "preserve, entrench or enhance their market power."[29] But in Australia, Section 46 (the equivalent of the Canadian abuse-of-dominance provision) prohibits conduct "that has the purpose, or has or is likely to have the effect, of substantially lessening competition." The proposed amendment would thus create a discrepancy between merger control and Section 46, where the latter would remain tethered to an SLC test, and the former would shift to a new standard. Additionally, since it remains unclear what the results of Canada's 2022 merger-control amendments have been or will be, it would be wiser for Australia to adopt a "wait and see" approach before rushing to replicate them.

Lastly, there is the question of defining "materiality" in the context of an increase or entrenchment of market power. Currently, Section 50 of the CCA prohibits mergers that "substantially lessen competition," with no mention of materiality.[30] The Merger Guidelines do, however, state that:

> The term "substantial" has been variously interpreted as meaning real or of substance, not merely discernible but *material* in a relative sense and meaningful.[31] (emphasis added)

The proposed amendment follows suit, referring to the concepts of "material increase" and "material extension" of market power. What does this mean? How does a "material increase" in market power differ from a non-material one? In its comments on the proposed American Innovation and Choice Online Act ("AICOA"), the American Bar Association's Antitrust Law Section criticized the bill for using amorphous terms such as "fairness," "preferencing," and "materiality," or the "intrinsic" value of a product. Because these concepts were not defined either in the legislation or in existing case

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[27] OECD, *supra* note 24, at 16; see also *Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations between Undertakings* (2004/C 31/03)(2004) *Official Journal* C 265, 6-25 (EU).

[28] Consultation, *supra* note 5, at 30-31.

[29] Competition Act, R.S.C., 1985, c. C-34, at ss. 78 and 79 (Can.).

[30] Section 44G CCA, however, does mention a "*material* increase in competition." (emphasis added).

[31] ACCC, *Merger Guidelines* (2008) (Aus.); see also Australia, Senate 1992, Debates, vol. S157, p. 4776, as cited in the Merger Guidelines (2008).

law, the ABA argued that they injected variability and indeterminacy into how the legislation would be administered.[32] The same argument applies here.

As drafted, the new SLC test could be interpreted so broadly that *any incremental* increase in the market share of a company that already holds some degree of market power would "substantially lessen competition." This is misguided, and could capture swathes of procompetitive conduct. Indeed, there are many mergers that would—if permitted—benefit consumers, either immediately or in the longer term, but that may have some effect on enhancing market share or market power. Indeed, improving a firm's products and thereby increasing its sales will often lead to increased market share and market power. This is not a competition problem *per se*; the problem, rather, is when market power is misused, or is likely to be misused. Whether or not this is effectively the case is what competition authorities strive to ascertain. As drafted, the modified SLC test could substitute that judicious approach for a blunt, *de facto* prohibition of mergers and acquisitions by firms with market power.

IV. The Relevant Factors Under the SLC Test

According to the exposure draft, the ACCC must consider not just the object of the CCA when reviewing mergers, but also "*all relevant matters,* including the interests of consumers" (S. 51ABX(2)-(4), emphasis added). While the direct reference to consumers is warranted, as consumer welfare has traditionally been at the forefront of Australian competition law and policy, the exposure draft clarifies that these additional factors (or relevant matters) would include concepts that traditionally have not fallen within the remit of antitrust law, and for which no cogent antitrust theories of harm currently exist, such as "financial and economic power." Financial and economic power deviate in subtle but important ways from the time-honed concept of "market power," which assesses a company's ability to profitably raise prices, reduce output, or deprecate the quality of a product (including through decreased innovation).

Market power dovetails well with the consumer-welfare standard, which forms the basis of the SLC (and thus the cornerstone of any antitrust theory of harm or efficiency defense), and which is properly understood as:

> Offer[ing] a tractable test that is broad enough to contemplate a variety of evidence related to consumer welfare but also sufficiently objective and clear to cabin discretion and honor the principle of the rule of law. Perhaps most significantly, it is inherently an economic approach to antitrust that benefits from new economic learning and is capable of evaluating an evolving set of commercial practices and business models.[33]

By contrast, "financial and economic power" could mean nearly anything, and could penalize companies merely for being profitable or having high turnovers—*i.e.*, for competing successfully on

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[32] Geoffrey A. Manne & Lazar Radic, *The ABA's Antitrust Law Section Sounds the Alarm on Klobuchar-Grassley*, TRUTH ON THE MARKET (12 May 2022), https://truthonthemarket.com/2022/05/12/the-abas-antitrust-law-section-sounds-the-alarm-on-klobuchar-grassley.

[33] Elyse Dorsey, *et al.*, *Consumer Welfare & The Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 PEPPERDINE LAW REV. 861 (1 Jun. 2020).

the market. As such, they are poor indicators of competitive harm and could, in fact, stifle the very conduct that Australian competition law aims to promote.

V. Serial Acquisitions

The merger-reform paper states that multiple or serial acquisitions will be treated as follows:

> …to respond to concerns regarding serial or creeping acquisitions and roll up strategies, all mergers within the previous three years by the acquirer or the target will be aggregated for the purposes of assessing whether a merger meets the notification thresholds, irrespective of whether those mergers were themselves individually notifiable.[34]

We understand that multiple small acquisitions can, under some circumstances, create a cumulative risk to competition, especially in highly concentrated markets. There remains the question of when this is likely to occur. While serial acquisitions and roll-up strategies merit further study, there is no apparent basis, in either the economic literature or enforcement experience, for any general changes to the procedures or substantive standards by which serial acquisitions are scrutinized. We urge the Treasury to consider whether the proposed change to the notification thresholds is well-tailored to identifying so-called "midnight mergers" or efforts to evade "merger control obligations by transaction structuring, for example, dividing or staggering the merger into several smaller transactions."[35]

As the Treasury is well-aware, any substantial lowering of notification thresholds will impose costs on both merging firms and the enforcers called on to scrutinize noticed acquisitions.[36] Moreover, bundling all mergers "by the acquirer or the target" across any moving three-year window will, in effect, greatly lower the threshold for those firms engaged in multiple acquisitions over time. We also question whether Treasury is aware of any theoretical or empirical basis for stipulating a three-year window. While any single three-year period may be clear enough, a moving window may create unnecessary uncertainty for consummated transactions well after operations or assets have been knit together, such that there is no efficient way to "unscramble the eggs."

Note, first, that serial acquisitions may range across product, service, or geographic markets. While there are circumstances under which vertical or conglomerate acquisitions may prove anticompetitive, such transactions typically prove procompetitive or benign.[37] Cumulative anticompetitive effects across geographic markets may be rarer still.

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[34] *Merger Reform: A Faster, Stronger, and Simpler System for a More Competitive Economy*, AUSTRALIAN GOVERNMENT, THE TREASURY 5 (10 Apr. 2024), https://treasury.gov.au/sites/default/files/2024-05/p2024-518262-merger-reforms-paper.pdf ("Merger Reform Paper").

[35] *Id.*

[36] *See, generally*, Brian Albrecht, Dirk Auer, Daniel J. Gilman, Gus Hurwitz, & Geoffrey A. Manne, *Comments of the International Center for Law & Economics on Proposed Changes to the Premerger Notification Rules*, INT'L CTR LAW ECON. (27 Sept. 2023), https://laweconcenter.org/resources/comments-of-the-international-center-for-law-economics-on-proposed-changes-to-the-premerger-notification-rules.

[37] *See, e.g.*, Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, 10 HANDBOOK OF ANTITRUST ECONOMICS 391, 408-09 (2008); *see also* Francine Lafontaine & Margaret E. Slade, *Transaction Cost Economics and Vertical Market Restrictions–Evidence*, 55(3) ANTITRUST BULL. 587 (2010); James Cooper, Luke

More broadly, many of the activities described as "serial acquisitions" are indistinguishable from normal patterns of business growth and consolidation that occur in maturing industries. As a general matter, it is not clear why a company growing through multiple small acquisitions should be viewed differently than one growing "organically" or through fewer, larger acquisitions. This raises important questions about the underlying theory of harm. If the concern is market concentration, this can occur through various means, not just serial acquisitions. If the concern is about the specific process of multiple small acquisitions, it is unclear why this would be inherently more problematic than other forms of growth.

Recent research by Cohn, Hotchkiss, and Towery sheds light on the motivations behind roll-up strategies in private-equity buyouts of private firms.[38] Their study suggests that these strategies are often driven by two primary motives: unlocking growth potential in capital-constrained firms and improving operational performance in underperforming firms. They find that acquired firms often experience significant increases in sales growth and moderate improvements in profitability post-acquisition. Such findings support the view that these strategies can create value through both growth and operational improvements. They also suggest that properly executed roll-up strategies can serve legitimate business purposes beyond mere market consolidation.

Given the legitimate business reasons for acquisitions (serial or not), we are aware of no theoretical or empirical grounds on which to suppose that multiple acquisitions are typically anticompetitive. At the same time, there is no reason to suppose that the organic growth of a firm precludes anticompetitive conduct. The competitive effects of growth—whether through acquisition or internal expansion—depend on various factors, including market structure, barriers to entry, and the specific capabilities and assets being acquired or developed. For example, in some cases, serial acquisitions might allow a firm to quickly assemble complementary assets and capabilities, leading to increased innovation and more robust competition. In other instances, organic growth might allow a firm to build market power in ways that are difficult for competitors to challenge.

To be clear, we do not suggest that there are no circumstances under which serial acquisitions raise competitive concerns. Rather, we believe that considerable work remains to be done if competition enforcers seek to tailor notice requirements in a manner that is efficient for both commercial development and enforcement alike. As described in the Merger Reform Paper, the serial-notice requirement appears to us conspicuously overbroad, and decidedly at odds with Treasury's stated goal of a simpler, clearer, and more "targeted" merger-review process.

Froeb, Daniel O'Brien, & Michael Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L. J. IND. ORGAN. 639-664 (2005); David Reiffen & Michael Vita, *Comment: Is There New Thinking on Vertical Mergers?*, 63 ANTITRUST L.J. 917, 920 (1995); Henry Ogden Armour & David Teece, *Vertical Integration and Technological Innovation*, 62 REV. ECON. & STAT. 470, 470 (1980); Dennis W. Carlton, *Transaction Costs and Competition Policy*, 73 INT'L J. INDUS. ORG. 1, 7 (2019); regarding conglomerate mergers, *see*, *e.g.*, *Conglomerate Effects of Mergers – Note by the United States*, OECD (10 Jun. 2020), at 2.

[38] *See* Jonathan B. Cohn, Edith Hotchkiss, & Erin Towery, *Sources of Value Creation in Private Equity Buyouts of Private Firms*, 26 REV. OF FIN. 257 (2022).

Finally, while enforcers would do well to consider all relevant market factors—and likely pro- and anticompetitive effects—in scrutinizing those mergers that raise serious competitive concerns, we wonder whether the addition of the supplementary principles "replacing the 'merger factors' currently in section 50(3) of the CCA"[39] will further compound the problems of scope raised above. That is, will the open-ended list of potential considerations, and their extension to potential competition, together with the bundling of multiple acquisitions across markets, further undermine the goals of simpler, clearer, and more "targeted" and predictable merger review? One thing is clear: by implying that *no sale is ever final*, the new rules will create additional (and in our view, unnecessary) uncertainty for businesses, shareholders, and employees.

[39] Merger Reform Paper, *supra* note 34, at 9-10.