

Unclassified

English - Or. English

29 November 2023

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Serial Acquisitions and Industry Roll-ups – Note by BIAC

6 December 2023

This document reproduces a written contribution from BIAC submitted for Item 11 of the 141st OECD Competition Committee meeting on 5-8 December 2023.

More documents related to this discussion can be found at
www.oecd.org/competition/serial-acquisitions-and-industry-roll-ups.htm.

Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08.

JT03532893

BIAC

1. Introduction

1. *Business at the OECD* (BIAC) welcomes the opportunity to comment on the topic of serial acquisitions and industry roll-ups, which have come under closer scrutiny more recently from competition authorities for their possible effects on competition, innovation, and consumer welfare.

2. BIAC believes that serial acquisitions and roll-ups do not have predictable competitive effects and should be viewed objectively. They can generate significant efficiencies and benefits to the economy and bring added value and service to consumers. In some cases, they can reach a level of concentration that may lead to competition concerns. Competition authorities should adopt a balanced and evidence-based approach in evaluating whether such transactions result in anticompetitive effects. Authorities should use appropriate reporting thresholds, screening mechanisms, and theories of harm to identify and address potentially anticompetitive transactions, while avoiding over-enforcement and chilling effects on procompetitive acquisitions.

3. This submission builds on BIAC's previous contributions on related topics, including: (i) investigations of consummated and non-notifiable mergers,¹ (ii) conglomerate effects of mergers,² (iii) start-ups, killer acquisitions, and merger control,³ (iv) the concept of potential competition,⁴ (v) interim measures in antitrust investigations,⁵ and (vi) disentangling consummated mergers.⁶

2. Serial Acquisitions and Roll-ups

4. Serial acquisitions are a business strategy of acquiring, merging, and integrating multiple smaller companies, usually over extended periods of time. This strategy often involves several similar or complementary businesses, including start-ups or low-turnover firms, being combined into or under a larger entity. Given the smaller individual transaction

¹ OECD, *Investigations of Consummated and Non-Notifiable Mergers – Note by BIAC*, DAF/COMP/WP3/WD(2014)26 (Feb. 20, 2014), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2014\)26/En/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2014)26/En/pdf).

² OECD, *Conglomerate Effects of Mergers – Note by BIAC*, DAF/COMP/WD(2020)12 (May 28, 2020), [https://one.oecd.org/document/DAF/COMP/WD\(2020\)12/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)12/en/pdf).

³ OECD, *Start-ups, Killer Acquisitions and Merger Control – Note by BIAC*, DAF/COMP/WD(2020)29 (June 4, 2020), [https://one.oecd.org/document/DAF/COMP/WD\(2020\)29/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)29/en/pdf).

⁴ OECD, *The Concept of Potential Competition – Note by BIAC*, DAF/COMP/WD(2021)27 (June 1, 2021), [https://one.oecd.org/document/DAF/COMP/WD\(2021\)27/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2021)27/en/pdf).

⁵ OECD, *Interim Measures in Antitrust Investigations – Note by BIAC*, DAF/COMP/WP3/WD(2022)17 (June 9, 2022), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2022\)17/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2022)17/en/pdf).

⁶ OECD, *Disentangling Consummated Mergers—Experiences and Challenges – Note by BIAC*, DAF/COMP/WD(2022)45 (June 3, 2022), [https://one.oecd.org/document/DAF/COMP/WD\(2022\)45/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2022)45/en/pdf).

sizes, these transactions generally fall below most merger control reporting thresholds. Roll-ups, on the other hand, are serial acquisitions that aim to combine and integrate portions of a more fragmented market in the same industry or sector. These strategies can have procompetitive aspects, including providing consumers with lower pricing and better quality.

5. Combining multiple smaller companies into a unified company can lower prices for consumers. The previously separated companies can achieve synergies that result in cost savings when consolidated into a single operating entity.⁷ The types of synergies that can be achieved include productive and pricing efficiencies. First, the centralization of common operations and management reduces costs, which has a compounding effect for each company acquired.⁸ Second, companies can achieve economies of scale and scope, such as efficient use of inputs by spreading operation and research & development costs among a larger consumer base.⁹

6. Executing a serial acquisition strategy can also provide consumers with other benefits, in addition to lower prices. For example, more fully integrated firms may be able to expand their offering in terms of the scope of products, services, or geographic regions. Certain resulting procompetitive efficiencies have been specifically recognized for acquisitions of nascent companies. The first is an efficiency in development, where the “acquisition may increase the probability or speed that an innovative product reaches the market.”¹⁰ For example, larger firms with more resources may be able to provide the funding or expertise necessary to bring an innovative product to market that a nascent company may struggle with accomplishing.¹¹ The second is dynamic efficiency associated with the incentive to innovate as acquisitions can provide a viable exit route for innovators.¹²

7. In some industries, such as digital, pharmaceutical, retail, and media, the benefits associated with serial acquisitions may be more pronounced. For example, in response to the heightened enforcement attention being paid to serial acquisitions, some life science industry participants have outlined the importance of these types of acquisitions that “allow[] life sciences companies to combine their complementary resources and expertise . . . which could mean the difference between an innovative treatment or cure reaching patients or stalling in the lab.”¹³ Similarly, it has been recognized that overenforcement of serial acquisitions in digital industries could have negative consequences. For example, Professor Cabral of NYU Stern School of Business explained that “a restrictive merger policy” would dampen the innovation incentives of nascent firms because acquisition by

⁷ See Jay Ezrielev, *Shifting the Burden in Acquisitions of Nascent and Potential Competitors: Not so Simple*, COMPETITION POL’Y INT’L (Nov. 4, 2020), https://www.pymnts.com/cpi_posts/shifting-the-burden-in-acquisitions-of-nascent-and-potential-competitors-not-so-simple/.

⁸ See, e.g., Manav Chada, *Digital Conglomerates and EU Merger Control - Analysis of the Leverage Theory of Harm* 23-26 (Sept. 30, 2019), <https://ssrn.com/abstract=3563485>.

⁹ *Id.*

¹⁰ OECD, *Start-ups, Killer Acquisitions and Merger Control* 33 (2020), www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf.

¹¹ *Id.* at 34.

¹² *Id.* at 34-35.

¹³ *The Pro-Competition Policies Driving Life Science Innovation*, PULSE (Oct. 3, 2023), <https://pulseforinnovation.org/the-pro-competition-policies-driving-life-science-innovation/>.

large companies is a “main exit route[] for investors” and venture capitalists to take on risky innovations.¹⁴

8. As noted by Professor Cabral, “[e]veryone seems to agree that innovation is important . . . there is always a paragraph acknowledging the importance of innovation” in every paper, report, and set of guidelines.¹⁵ Yet, innovation is a complex topic, especially in an ex-ante assessment of an acquisition.¹⁶ For example, Professor Yun, a respected antitrust scholar, cast doubt on criticism of Facebook’s acquisition of Instagram by highlighting Instagram’s “substantial expansion in users and output” post-acquisition as the “opposite of what we typically consider an anticompetitive outcome.”¹⁷ Although arriving at the appropriate balance between promoting innovation and enforcing merger policies is complex, Yun explained that situations like Facebook’s acquisition of Instagram provide “the potential for strong efficiencies—particularly if the product is highly differentiated from the acquiring firm’s product.”¹⁸

3. Competition Concerns and Theories of Harm Associated with Serial Acquisitions

3.1. Potential Negative Effects of Serial Acquisitions

9. In recent years, competition authorities’ scrutiny of serial acquisitions has increased based on a number of concerns that consider the anticompetitive effects as out of proportion with the size of the transaction. First, as with any transaction, there is a concern that reducing the number or viability of actual or potential competitors may have negative consequences. However, the nature of serial acquisitions involving smaller companies means that any reduction in direct competition is traditionally accepted by competition authorities as not being anticompetitive. Competition authorities have recognized that it is difficult to establish that a single acquisition by a firm executing a serial acquisition strategy violates competition laws because lower market shares are usually involved.¹⁹ But when a serial acquisition strategy is viewed in its totality, it may be that multiple acquisitions over time result in a larger, more established firm slowly accumulating a combined market share that together could have triggered antitrust scrutiny.²⁰

10. There is also a concern that serial acquisitions could involve innovative, upstart firms being acquired by larger incumbent firms to protect themselves against future

¹⁴ Luis Cabral, *Merger Policy in Digital Industries*, 54 INFO. ECON. & POL’Y 1, 5 (June 7, 2021); see, e.g., Ezrielev, *supra* note 7.

¹⁵ Cabral, *supra* note 14, at 6.

¹⁶ See, e.g., John M. Yun, *Potential Competition, Nascent Competitors, and Killer Acquisitions*, in GLOBAL ANTITRUST INSTITUTE REPORT ON THE DIGITAL ECONOMY (Aug. 25, 2020), <https://gaidigitalreport.com/2020/08/25/killer-acquisitions-and-nascent-competition/>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ See, e.g., Jeffrey M. Wilder, *Potential Competition in Platform Markets*, Remarks as Prepared for the Hal White Antitrust Conference (June 10, 2019), <https://www.justice.gov/opa/speech/file/1176236/download>.

²⁰ See, e.g., *id.* at 1 (“It is exceptionally hard to establish that any individual acquisition leads to a substantial lessening of competition under the Clayton Act. Yet when we step back and look at the totality of the evidence, it is clear that a focus on individual transactions makes for a very blurry snapshot of what is happening in the market.”).

significant independent companies that could impose competitive constraints, or perhaps even unseat incumbents.²¹ For example, in the digital platform market especially, start-up companies may possess “disruptive innovations” that carry an ability to quickly scale a user base and threaten incumbent platforms.²²

11. Relatedly, when substitutes are widely available, consumers have more opportunities to switch to competing products or services. This, in turn, incentivizes firms to compete more fiercely on price, quality, and differentiation.²³ Thus, where the availability of viable substitutes is limited, possibly as a consequence of a serial acquisition strategy, it could be argued that the larger firms’ ability to increase prices, lower quality, or exclude rivals is increased.

12. Serial acquisitions may also affect other important market structure characteristics such as barriers to entry, network effects, or switching costs. Network effects and switching costs are particularly relevant in digital markets. For example, in the context of interoperability, certain acquisitions may enable larger firms to remove previously existing interoperability features that fostered dynamic competition, thereby increasing consumers’ switching costs. The European Commission considered this very issue in *Google/Fitbit*, where it found that approximately 50% of the wrist-worn wearable market could be affected by an ability to degrade and downgrade Google’s Android OS interoperability on competing devices.²⁴

13. Finally, serial acquisitions may have negative effects when data and intellectual property assets are being accumulated via numerous transactions over longer periods of time. Data has become a critical asset for most digital firms, and the accumulation of data may be used horizontally, to further entrench market positions, or vertically, to foreclose competition from other competitors relying on the availability of such data. In the horizontal sense, the accumulation of critical datasets over time may provide a larger, more established firm with the ability to strengthen an already dominant position, similar to what the EC assessed in *Google/Fitbit* where the EC found that Google could use Fitbit’s data profiles to better tailor its advertising services.²⁵ In the vertical sense, where certain datasets are critical inputs for other competitors, competition authorities may express concern that critical data could be withheld from competitors to the detriment of consumers.²⁶

3.2. Relevant Theories of Harm Being Considered by Competition Authorities

14. Competition authorities have advanced several theories of harm that are particularly relevant to serial acquisition strategies, including “killer” acquisitions “nascent competitor” acquisitions, “portfolio” or “conglomerate” effects, and “tipping” or “trend” effects. These

²¹ See OECD, Start-ups, Killer Acquisitions and Merger Control – Note by BIAC, *supra* note 3.

²² See Siyou Zhou, Merger Control in Digital Era, at 4 (Oct. 17, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3976594.

²³ See Adelaida Afilipoaiea, Karen Donders & Pieter Ballon, *The European Commission’s Approach to Mergers Involving Software-Based Platforms: Towards a Better Understanding of Platform Power*, 46 TELECOMM. POL’Y 1, 4 (2002).

²⁴ See Youenn Beaudouin, et al., *Market Enforcement in Digital and Tech Markets: An Overview of the European Commission’s Practice*, EC COMPETITION POLICY BRIEF (Dec. 2022), at 6, <https://data.europa.eu/doi/10.2763/29297>.

²⁵ See *id.* at 10.

²⁶ See *id.* at 11 (“Where the Commission finds ability to foreclose rivals from an important data input, in line with its framework, it will consider the incentives to foreclose.”).

theories of harm generally require competition authorities to project outcomes that are less than probabilistic and further in the future than transactions involving typical horizontal competition concerns, sometimes without clear evidence as to the eventual outcome of entry.²⁷ Depending on the market and transaction structures, competition authorities may advance any number of these theories when alleging harm relating to serial acquisitions.

15. Killer acquisitions involve the acquisition of innovative start-ups by dominant firms that aim to eliminate or prevent the development of products or services that could threaten or cannibalize the acquiring firm’s core business or market position.²⁸ However, one of the difficulties facing competition authorities when advancing this theory of harm, especially in the context of serial acquisitions, is how to isolate increased competitive significance that may be directly attributable to the larger firm’s acquisition strategy. While some have suggested that a high acquisition price may be one way to indicate the competitive potential of an underdeveloped competitor, it is unlikely that this alone can be determinative of future competitive significance given the numerous variables at play when parties negotiate the transaction consideration.²⁹

16. Nascent competitor acquisitions involve acquisitions of firms that have not yet entered or achieved significant market share but have the potential to become significant competitors in the future, based on their technology, innovation, or growth prospects. A critical step for evaluating a nascent competitor is assessing “potential competition.” For this, competition authorities will look to the competitive significance of a recent or prospective market entrant, where entry timing is especially important for determining whether a nascent competitor may function as a competitive constraint on the acquiring firm.³⁰

17. Portfolio or conglomerate effects may manifest in the acquisitions of firms that operate in different but related markets and that could enable the acquiring firm to leverage its market power, data, or assets across multiple markets, or foreclose or raise rivals’ costs through bundling, tying, or exclusive dealing. A conglomerate merger occurs when firms are not horizontally or vertically positioned, but the firms are active in two closely related markets, such as supplying complementary products in the same broader product range.³¹ Although generally procompetitive, some competition authorities have expressed concerns that post-acquisition, the combined firm may engage in tying, bundling, or other equivalent conduct that forecloses or harms the competitive process.³² Similarly, portfolio effects may arise when an acquisition of complementary products or services could enable the combined firm to increase its pricing strategy purely on the basis of being able to offer product or service packages that may appeal to customers who prefer “one-stop” shopping, without making the actual products or services more competitive.³³

²⁷ See OECD, The Concept of Potential Competition – Note by BIAC, *supra* note 4, at 2.

²⁸ See OECD, Start-ups, Killer Acquisitions and Merger Control – Note by BIAC, *supra* note 3, at 2.

²⁹ See Michael Katz, *Big Tech Mergers: Innovation, Competition for the Market, and the Acquisition of Emerging Competitors*, 54 INFO. ECON. & POL’Y (Mar. 2021), available at <https://doi.org/10.1016/j.infoecopol.2020.100883>.

³⁰ See OECD, Start-ups, Killer Acquisitions and Merger Control – Note by BIAC, *supra* note 3, at 3.

³¹ See OECD, Conglomerate Effects of Mergers—Note by BIAC, *supra* note 2, at 2.

³² See *id.*

³³ See *id.*, at 3.

18. Tipping or trend effects may arise when acquisitions of firms contribute to the concentration or consolidation of a market that is already highly concentrated or prone to tipping, or that creates a pattern or strategy of anticompetitive behavior by the acquirer. These concepts are especially relevant in digital markets with strong network effects (i.e., platforms), where incrementally increasing a user base can increase the value of the product to other users and could possibly lead to tipping the market into a monopoly.³⁴ Importantly, tipping generally does not occur when products are highly differentiated or where users multihome, and tipping can be the consequence of perfectly legitimate procompetitive conduct.³⁵

4. Competition Authorities Rules and Policies to Curb Anticompetitive Serial Acquisitions

4.1. Difficulties Facing Competition Authorities When Assessing Serial Acquisitions

19. Many competition authorities around the world have expressed concerns that the current merger control frameworks make it difficult to capture and assess serial acquisitions. Chief among these concerns is that turnover thresholds are often too high to register serial acquisitions, the targets of which tend to have lower turnover not requiring notification. Many jurisdictions do not have mechanisms in place that allow for review of these “below-threshold” acquisitions, and those that do have the capability do so on a discretionary, not mandatory, basis.

20. Competition authorities also may struggle with the significant market uncertainty that can surround below-threshold acquisitions, particularly in dynamic or innovative sectors. An inherent efficiency at play in below-threshold mergers can often be a smaller player merging with a larger player for greater economies of scale or capabilities, which will enhance or shift product development. If these smaller players are still in the process of developing a product, such as a drug or technology, then authorities may struggle to find concrete evidence relating to product market, share, and actual competition. In these situations, “[a]ll that agencies can do is seek to collect the evidence that is available, and answer them as best they can.”³⁶ Imperfect counterfactuals against which to compare the impact of a merger can abound, and probabilities of harm must be assigned to each. These exercises in uncertainty can make identifying potential harm a guessing game and increase the potential for overenforcement if serial acquisitions are inappropriately blocked without a full and better appreciation of their procompetitive effects.

4.2. Proposed Solutions: Simple Shifting

21. While most current merger control frameworks can effectively combat these issues, competition authorities around the world have developed or proposed solutions that attempt to further curb anticompetitive serial acquisitions. Some are simple – to get around the issue of high thresholds not capturing serial acquisitions below them, jurisdictions like the United Kingdom, Spain, and Portugal have share-based tests, in addition to turnover thresholds, that focus on share of supply or market.³⁷ Austria and Germany have also recently

³⁴ See OECD, Interim Measures in Antitrust Investigations – Note by BIAC, *supra* note 5, at 14.

³⁵ See *id.*, at 14.

³⁶ OECD, Start-ups, Killer Acquisitions and Merger Control, *supra* note 10, at 22.

³⁷ Ricardo Oliveira & Martim Valente, *Portugal*, in MERGER CONTROL 2023 (June 19, 2023), <https://practiceguides.chambers.com/practice-guides/merger-control-2023/portugal/trends-and-developments/O13853>; Edurne Navarro Varona, *Spain*, MERGERFILERS (Nov. 14, 2023),

introduced a lower size of the transaction threshold as well in an attempt to capture transactions that might otherwise avoid detection under turnover tests.³⁸ Recent proposals in the U.S. also seek to focus more on existing concentration of dominant firms and create a presumption of anticompetitive effects at a 30% market share, regardless of incremental change resulting from an acquisition.³⁹ Also, as previously mentioned, many jurisdictions also rely on ex-post powers that allow authorities to “unwind” transactions.

4.3. Proposed Solutions: Targeted Notification

22. Some of the more innovative proposals for detecting potentially anticompetitive serial acquisitions feature a targeted approach that creates a special and selective regime of notification. These proposals may focus on specific firms, such as in Norway, where the Norwegian Competition Authority maintains a list of firms to which mandatory disclosure applies, regardless of thresholds.⁴⁰ These firms represent large players across a variety of sectors across Norway – motor fuel retailing, electricity generation, waste management and recycling, locksmith services, laundry services, garden centers, newspapers, and broadband services – which are deemed to be potentially at risk of higher prices and less choice if acquisitions went unnotified.⁴¹ Proposed laws in France and Italy have also sought to create lists of specific companies that are always required to notify but have not yet been formally adopted.⁴² While these targeted lists identify firms across a variety of industries, they are all alike in that they are deemed to be important economic players in impactful industries who, if allowed to acquire quietly, could pose anticompetitive harm to consumers.

23. Other jurisdictions, however, have proposed casting a wider net and instead identify whole sectors that must notify. For example, Turkey’s recent Communiqué No. 2022/2, exempts undertakings involved in certain markets and sectors from turnover thresholds, including digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals, and health technologies, if they operate or conduct research and development in Turkey, or provide services to Turkish users.⁴³ Likewise, the recently passed Vifo Act in the Netherlands requires notification of

<https://mergerfilers.com/guide.aspx?expertjuris=Spain#guidebook>; Neil Baylis et al., *United Kingdom*, MERGERFILERS (Jan. 21, 2022), <https://mergerfilers.com/guide.aspx?expertjuris=UnitedKingdom#guidebook>.

³⁸ German Competition Act (Gesetz gegen Wettbewerbsbeschränkungen, GWB), effective as of June 9, 2017; Austrian Cartel and Competition Law Amendment Act 2017 (Kartell- und Wettbewerbsrechts Änderungsgesetz 2017), effective as of May 1, 2017.

³⁹ U.S. Dep’t of Justice & Federal Trade Comm’n, Draft Merger Guidelines (2023), https://www.ftc.gov/system/files/ftc_gov/pdf/p859910draftmergerguidelines2023.pdf [hereinafter U.S. Draft Merger Guidelines].

⁴⁰ Press Release, Konkurransetilsynet, Disclosure Requirements Continued in Several Markets (Jan. 5, 2021), <https://konkurransetilsynet.no/disclosure-requirements-continued-in-several-markets/?lang=en>.

⁴¹ *Id.*

⁴² Proposition of Law No. 2701 of February 20, 2020 on Guaranteeing Free Consumer Choice in Cyberspace, Chapter 3, Article 7; OECD, Start-ups, Killer Acquisitions and Merger Control, *supra* note 10, at 46.

⁴³ Turkish Competition Authority, Communiqué Amending the Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board (Communiqué No: 2010/4) (Communiqué No: 2022/2) (Mar. 4, 2022), <https://www.rekabet.gov.tr/Dosya/2022-2-sayili-teblig-20231006161305483.pdf>.

mergers in “vital services,” business campuses, and sensitive technologies.⁴⁴ The Australian Competition and Consumer Commission has also recently recommended to its government that large digital platforms subscribe to a notification protocol (the country currently operates under a voluntary regime), and the EU recently passed the much publicized Digital Markets Act (DMA) in 2022.⁴⁵ Article 14 of the DMA requires mandatory notification where the merging entities or target provide core platform services or any other services in the digital sector, and currently applies only to a list of identified “gatekeepers” – Alphabet, Amazon, Apple, ByteDance, Meta, Microsoft, and Samsung.⁴⁶

4.4. Proposed Solutions: Broader Review and Investigatory Powers

24. In addition to the more targeted approach of list-making, a variety of jurisdictions are also opting to broaden competition authorities’ scope of review. In the U.S., the Federal Trade Commission and Department of Justice have proposed a sweeping overhaul of the Hart-Scott-Rodino (HSR) notification framework and merger guidelines.⁴⁷ The draft merger guidelines, for example, specifically direct the agencies to evaluate trends toward further concentration, as well as transactions that form a part of a pattern or strategy.⁴⁸ The undefined nature of these terms will allow the authorities to more easily justify investigating serial acquisitions, even if they are otherwise notifiable under the HSR Act.

25. Likewise, in 2021, the European Commission also published a guidance paper with immediate effect that enables Member States to request the Commission to review a transaction that would affect trade between Member States and threaten to significantly affect competition, even if it fell below European Union (EU) merger control thresholds.⁴⁹ Also within the EU and symbolic of further efforts to increase enforcement, the Italian Antitrust Authority has recently been empowered under Law No. 188/2022 to request notification of below-threshold transactions if no more than six months have passed since the consummation of the transaction, thresholds have been partially met, and the authority determines there are concrete risks for competition in the national market.⁵⁰

26. Competition authorities have undertaken these efforts to better identify and enforce against potentially anticompetitive serial acquisitions at a time when many have stated an intent to crack down on “Big Tech.” This has, in turn, resulted in increased investigation and enforcement in the digital sector. An increased focus on serial acquisitions, in tandem with these new (or proposed) identification and enforcement powers, are likely to enable

⁴⁴ Sarah Beeston et al, *Netherlands*, MERGERFILERS (Aug. 8, 2023), <https://www.mergerfilers.com/guide.aspx?expertjuris=Netherlands#guidebook>.

⁴⁵ ACCC, DIGITAL PLATFORMS INQUIRY – FINAL REPORT 30 (June 2019) <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>.

⁴⁶ Council Regulation No. 2022/1925, 2022 O.J. (L 265) 14.

⁴⁷ U.S. Draft Merger Guidelines, *supra* note 39; Press Release, Fed. Trade Comm’n, FTC and DOJ Propose Changes to HSR Form for More Effective, Efficient Merger Review (June 27, 2023), <https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review>.

⁴⁸ U.S. Draft Merger Guidelines, *supra* note 39.

⁴⁹ Commission Guidance on the Application of the Referral Mechanism Set Out in Article 22 of the Merger Regulation to Certain Categories of Cases, 2021 O.J. (C 113) 1.

⁵⁰ Strengthening of the Powers of the Italian Competition Authority, 5 August 2022, Law No. 188/2022, Published in the Italian Official Gazette no. 188 of 12 August 2022.

competition authorities to more easily and effectively scrutinize anticompetitive harm relating to serial acquisitions.

5. Best Practices and Recommendations for Effective and Proportionate Merger Control of Serial Acquisitions

27. While serial acquisitions and industry roll-ups can raise anticompetitive concerns, it remains important to bear in mind that they can create value for the acquirers, the target firms, and the investors by achieving economies of scale and scope, improving operational efficiency and quality, enhancing innovation and growth, and facilitating market entry and exit. These benefits can also be passed on to consumers in the form of lower prices, better services, and more choices. Moreover, serial acquisitions and industry roll-ups can foster competition by challenging incumbent firms, increasing market contestability, and creating more diversified and resilient market players.

28. In addition, the existing merger control frameworks in most jurisdictions are flexible enough to capture and assess serial acquisitions and industry roll-ups that may raise competition concerns, without imposing undue burdens on the parties or the authorities. Most jurisdictions have a substantive test that allows the authorities to consider the effects of a merger on competition, rather than on market structure or market share, and to take into account the relevant market conditions, such as entry barriers, buyer power, and efficiencies.

29. Many jurisdictions also have specific provisions or guidelines that enable the authorities to consider the cumulative impact of a series of acquisitions, or to call in or review transactions that fall below the notification thresholds, if they have reasonable grounds to suspect competitive harm. Furthermore, some jurisdictions have ex-post enforcement powers or market investigation tools that allow them to intervene in markets that have become consolidated through serial acquisitions, and to impose remedies, such as divestitures, if they find evidence of harm.

30. Therefore, BIAC recommends an approach to regulating serial acquisitions and industry roll-ups, which entails the following elements:

- Recognizing the potential benefits of serial acquisitions and industry roll-ups for the economy and society and applying a proportionate and evidence-based approach to assessing their competitive effects, taking into account the specific characteristics of the sectors and markets involved.
- Relying on merger control frameworks and tools that have demonstrable track records of utility to identify and address serial acquisitions and industry roll-ups that may harm competition and avoiding introducing untested or stricter rules or thresholds that may deter or discourage beneficial transactions or create legal uncertainty or regulatory costs for the parties and the authorities.
- Enhancing the cooperation and coordination among competition authorities, as well as with other regulators and stakeholders, to share information and best practices, to avoid inconsistent or conflicting outcomes, and to address any cross-border or cross-sectoral issues that may arise from serial acquisitions and industry roll-ups.
- Conducting market studies in consolidated sectors as needed and to monitor and continue to review the effectiveness and appropriateness of existing merger control frameworks and tools.