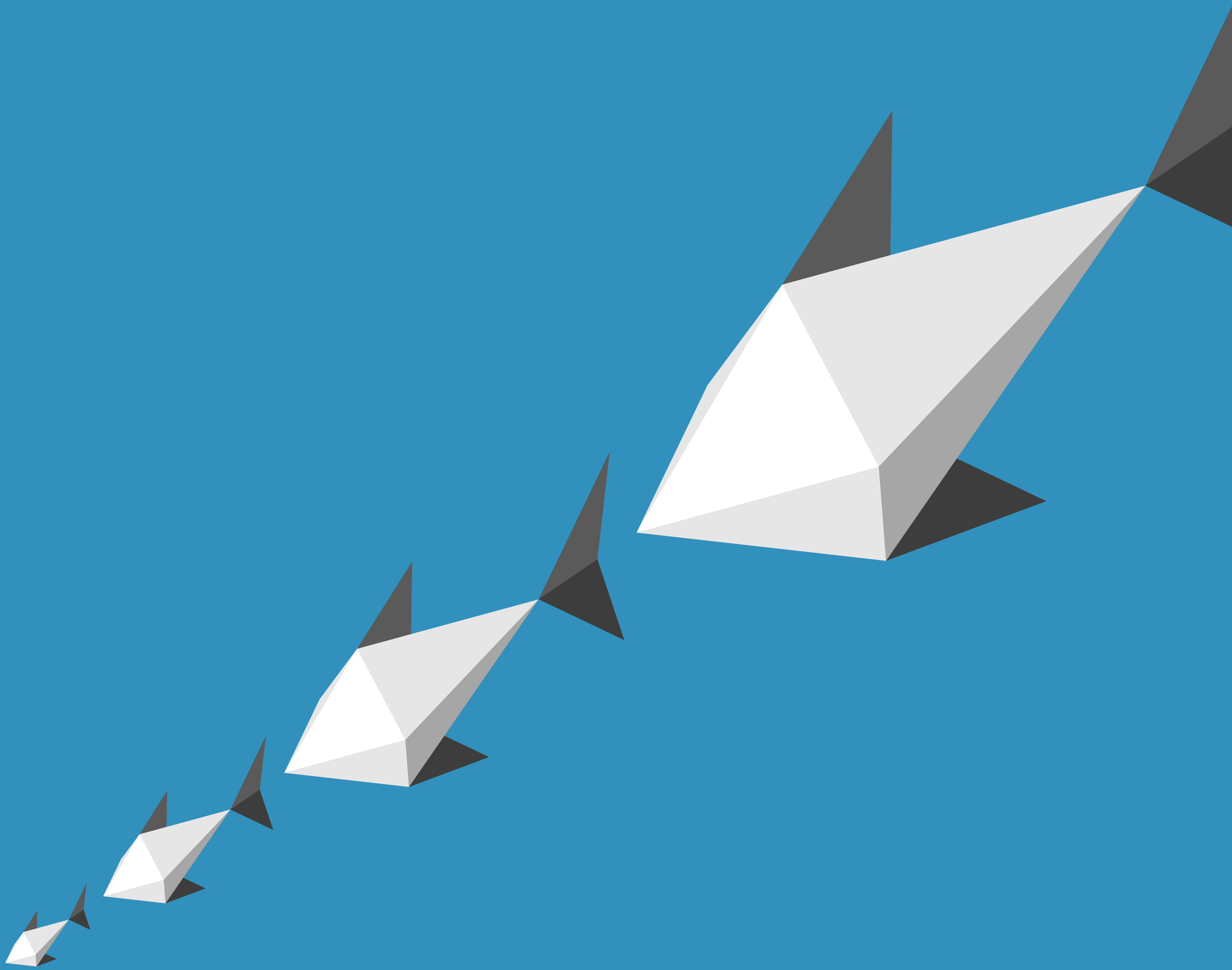
SERIAL ACQUISITIONS AND INDUSTRY ROLL-UPS

OECD Competition Policy Roundtable Background Note



OECD

Please cite as: OECD (2023), Serial Acquisitions and Industry Roll-ups, OECD Competition Policy Roundtable Background Note, http://www.oecd.org/daf/competition/serial-acquisitions-and-industry-roll-ups-2023.pdf*.*

This document was originally released on O.N.E. as an unclassified document under the reference code: DAF/COMP(2023)13.

Foreword

The serial acquisition and industry roll-up phenomenon, including the increased role of private equity participants, has spurred debate around consolidation risks and the potential need for increased scrutiny of such transactions, particularly in certain jurisdictions.

This background note explores the scope and magnitude of the issue, looking at the determinants of serial acquisitions, their potential to cause competitive harms, and at the gaps that may emerge both at the notification stage, with individual transactions potentially falling below notification thresholds, and at the substantive assessment stage, if the cumulative impact of a series of transactions cannot be taken into account. In assessing the current practice, this paper finds that there is no consensus on whether serial acquisitions are causing harms that cannot currently be adequately addressed. As such, it outlines a range of options for authorities to consider, depending on their existing merger regime and broader competition toolbox, and the prevalence of such transitions within their jurisdiction.

This note was written by Carolina Abate (OECD Competition Division) and Zoe Lyon (seconded to the OECD from the Australian Competition and Consumer Commission - ACCC). It benefited from comments by Ori Schwartz, Antonio Capobianco and Paulo Burnier from the OECD Competition Division and was prepared as a background note for discussions on "Serial Acquisitions and Industry Roll-ups" taking place at the December 2023 session of the OECD Competition Committee, *https://www.oecd.org/competition/serial-acquisitions-and-industry-roll-ups.htm*. The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

Table of contents

Boxes

1 Introduction

Serial acquisitions and roll-up strategies are well-established types of conduct that can be identified using different terminology, often depending on the jurisdiction. For the purpose of this paper, the terms serial acquisition and industry roll-up will be used interchangeably, to indicate a pattern and/or strategy of undertaking sequential acquisitions of a series of small companies by the same firm over time, in the same or adjacent markets, which it then consolidates into a larger, potentially dominant, company.

This strategy is to be distinguished from staggered acquisitions, which will not be covered in this note. This term usually refers to one company using multiple transactions to acquire cumulative shares of a second company, de facto undertaking a large acquisition through a series of smaller deals. A number of competition regimes allow for such transactions between the same two companies, taking place over a specified time period (generally two years), to be treated as one transaction. Finally, the term creeping acquisitions can refer both to serial acquisitions and staggered acquisitions, depending on the jurisdiction, so it will not be used in this paper.

The scope of this paper will be limited to serial acquisitions, as this type of strategy appears to be a more relevant concern for competition and competition authorities. This will also include roll-ups by private equity (PE) firms, i.e., investment firms that use their capital, and capital raised from investors, in addition to a significant volume of debt, to buy, restructure and manage companies before selling them for profit. PE acquisitions take place through investment funds, which can target both private and public companies.

Since the 2008 financial crisis especially, a variety of demographic and macroeconomic factors seem to have amplified the already growing trend of serial acquisitions, which are now capturing the attention of a number of competition authorities. This period has coincided with a low interest rate environment, leading to cheap debt but also to a need for higher-returning investment opportunities, and, as a consequence, to increased competition for acquisitions. Further, the so-called "silver tsunami" of baby boomer business owners pursuing retirement has also been cited as a contributing factor to the number of serial acquisitions in the past decade (Hearn et al., 2022[1]).

This tendency has not subsided since, with PE in particular achieving extraordinary growth in recent years (Mehta, Gerking and Grothouse, 2022[2]). Relevant to the issue of serial acquisitions, add-on acquisitions[1], as a share of total buyout count, has gone from 43% in 2002 to almost 72% in 2020 (PitchBook, 2021[3]). However, the trend of intentional consolidation of fragmented industries through serial acquisitions, which increasingly involves PE firms, appears to have been largely hidden, in that most of these transactions have fallen below notification thresholds. For instance, in the United States, less than 20% of the total merger transactions in 2021 were reported to the Federal Trade Commission (FTC) (Hearn et al., 2022[1]).

This paper will explore the serial acquisition phenomenon in depth, in order to better understand its relevance and the dynamics of this strategy, including why it appears to be more prevalent (and thus more of a potential concern) in certain sectors. Moreover, it will analyse the potential for competitive harm to be occurring, including through increased concentration and market power, which may not be able to be adequately addressed by competition authorities under existing merger regimes. It will also consider the instruments at the disposal of competition authorities to scrutinise these transactions.

More specifically, section 2 describes the main determinants of serial acquisitions, including PE roll-ups, and highlights the risks for competition deriving from this strategy. Section 3 analyses the current state of play in terms of legal provisions that cover serial acquisitions and various potential solutions that jurisdictions are implementing or that may be otherwise available to address this matter. Section 4 discusses the question of whether there is an enforcement gap in this area and Section 5 concludes.

2 Main determinants and harm to competition

2.1. Determinants of serial acquisitions

Serial acquisitions are currently mostly discussed by, and with reference to, a small number of countries, such as the United States, the UK and Australia, while in other jurisdictions there appears to be less discussion around these transactions and the issues they might raise. Moreover, serial acquisitions appear to be of particular concern in some sectors more than others. In order to understand why certain sectors seem to be prone to industry roll-ups, it is important to analyse the main drivers of serial acquisition strategies and the characteristics of the markets in which they occur.

A first key element is understanding the motivations behind serial acquisition strategies, and in particular, the distinction between financial and strategic drivers. Serial acquisitions driven by purely financial motives are commonly carried out by a "financial outsider", such as a PE firm, rather than a market participant, and generally aim to generate short-term gains from the difference between the acquisition cost and the stock market or sale value of the new consolidated entity (Lownie, 2000[4]). Such deals, which historically have been very highly leveraged, seek to exploit valuation arbitrage, that is, the fact that larger companies can command a proportionately much higher purchase price relative to their cash flow compared to small, local businesses (Hearn et al., 2022[1]).

On the other hand, with strategically motivated roll-ups, the acquirers are often existing industry participants pursuing a longer term goal of improving their market position and are thus generally seeking to accumulate "a set of assets and create positions sufficiently superior to their competitors' to extract a disproportionate share of future industry growth" (Smit and Moraitis, 2010[5]).

With strategic serial acquisitions, their value-generating potential relies on achieving greater efficiency through economies of scale, creating synergies, lower risk and faster expansion (compared with organic growth), the acquisition of better management, easier access to capital, access to more and better assets, capabilities and opportunities, or solely on increasing market power (Doan and Sercu, 2021[6]). They can occur in isolation as a pure consolidation strategy or in reaction to changes in market dynamics, such as regulatory or technology changes (Hearn et al., 2022[1]; Lownie, 2000[4]).

For instance, in respect to the latter, Fullerton (2020[7]) provides the example of the introduction of new onerous anti-contamination requirements for pharmaceutical manufacturers in the US following a major public health incident, which created an opportunity for a dominant player to consolidate the highly fragmented and regionally focused contamination control sector, in order to centralise compliance efforts. Another example is provided by Lownie (2000[4]), which relates to the substantial consolidation of the waste sector starting in the 1970s. This rapid expansion through acquisitions by two main industry actors followed a series of regulatory changes and the extensive advancements in solid waste management technology which resulted from it, which significantly raised barriers to entry.

Notwithstanding the general distinction between financial and strategic motivations, in recent years PE firms have been diversifying their roll-up strategies by also carrying out strategic serial acquisitions, thus acting more similarly to strategic buyers. Reasons for this include the desire for PE firms to capture valuable operating synergies through a longer-term strategic approach, and thus balance out the higher risks of shorter-term financial roll-ups, as well as the underlying transformation experienced by the PE market and its business models since the 1980s. With the PE equity market growing from a niche to mature investment market and becoming increasingly competitive, PE firms started to diversify their strategies in order to maintain high returns, focusing on long-term growth by holding targets for longer periods, and exerting competitive pressure on strategic buyers (Bansraj, Smit and Volosovych, 2019[8]). Section 2.1.1 will discuss the PE phenomenon in more depth.

Overall, research has shown that there is a strong correlation between shareholder value growth and frequent acquisitions (Hearn et al., 2022[1]). According to a recent EY study "companies that did not make any acquisitions experienced essentially flat enterprise value (EV) and total shareholder returns (TSR) growth, but companies that engaged in limited M&A activity (one to five companies) experienced EV and TSR growth at a rate nearly five times higher than non-buyers. As the scale increases, for every five additional acquisitions made, EV and TSR growth increased by roughly 500 basis points" (Ernst&Young, 2021[9]).

Although the motivations behind serial acquisition strategies are multi-fold, growth can be seen as the main driver, be it to achieve economies of scale and scope, increase shareholder value, or to strengthen market power and consolidate the industry (Doan and Sercu, 2021[6]).

This has implications in terms of which sectors are more prone to serial acquisitions. Serial acquirers are often active in industries where production can significantly benefit from economies of scale (for example, waste management, mining and bottom-fermentation brewing for beer) (Doan and Sercu, 2021[6]; Smit and Moraitis, 2010[5]), or that rely on costly, widespread, distribution networks. Markets with such characteristics that are also highly fragmented and profitable, often featuring a large number of small, relatively homogenous businesses without a dominant player, appear to be well suited for roll-ups.

Further, while not all markets targeted for serial acquisitions share all of these characteristics, in general they also tend to be characterised by historically low barriers to entry, which initially allowed a high number of small players to enter, as well as minimum efficient scale of operations, and thus low market power and buying power for industry participants (and conversely, relatively high buyer power for their suppliers and customers given the significant number of alternative options) (Lownie, 2000[4]).

Although the specific sectors where these consolidation patterns are prevalent vary between jurisdictions, examples generally include healthcare, especially in the US (Chopra, 2020[10]) where the features of its industry allow this phenomenon to be more pervasive (see Box 2.2 for more details), veterinary clinics, grocery retail, dental practices, pharmacies, but also waste management, hotel chains, regional banks, petrol and funeral homes. Another characteristic of these industries is the combination between the importance, for the type of economic activity, of local markets, and the significant potential for geographic expansion at the national (or international) level.

Box 2.1. Consolidation in the eyewear sector

The experience of the eyewear sector is illustrative of how a once fragmented industry can be gradually reshaped and become consolidated through a series of acquisitions.

In 2018, multiple regulators approved a EUR 48 billion merger between Luxottica, an Italian eyeglasses frames manufacturer and eyeglasses retailer, and Essilor, a French lens manufacturer (Blamont and Bartunek, 2018). Knight (2018[12]) reports that at the time of the merger, Essilor had around 45% of the global prescription lens market and Luxottica around 25% of the frames market.

However, prior to the merger, the growth of both Luxottica and Essilor had been fuelled by a series of smaller acquisitions. Luxottica, which launched in Italy in the 1960s, acquired eyeglass distributor, Scarrone, in 1974, enabling it to vertically integrate eyeglass manufacturing and distribution (Hearn et al., 2022[1]). Later, after listing on the NYSE in 1990, Luxottica quickly bought up a number of eyeglasses brands and retail stores, including Vogue Eyewear, LensCrafters, Persol, Ray-Ban, Sunglasses Hut, OPSM and Oakley.[1] Throughout the early 2000s, it also obtained licences to distribute a significant number of other luxury glasses brands including Prada, Versace, DKNY and Burberry (Bezemer, 2021[13]). On the other side of the transaction, Essilor had grown significantly since listing on the Paris stock exchange in 1975, making more than 250 acquisitions over 20 years prior the merger (Hearn et al., 2022[1]).

Post merger, the combined Essilor/Luxottica entity has continued to expand, acquiring GrandVision for USD 8.5 billion in 2021, which resulted in the company controlling more than 7 000 storefronts in forty countries (Hearn et al., 2022[1]).

While the continuation of separate brands for both glasses and retail stores may perpetuate a sense of competition and choice for consumers, critics of the market consolidation claim it has resulted in higher prices, including one accusing the company of charging mark-ups of 1000% (Lazarus, 2019[14] and Lazarus, 2019[15]). They also argue that the company has too much leverage over competitors. For example, Hearn et al., (2022[1]) and Goodman (2014[16]) point to a situation that arose in the early 2000s when Luxottica reportedly limited supplies of (then, independent) Oakley sunglasses at their Sunglasses Hut stores, leading to a drop in stock price for Oakley and a hostile takeover of the brand by Luxottica.

Note:
[1] List of acquisitions by Luxottica, https://www.essilorluxottica.com/en/group/history/

Sources:
Blamont, M. and R. Bartunek (2018[11]), “EU, U.S clear Essilor’s 48 billion euro merger with Luxottica”, Reuters, https://www.reuters.com/article/uk-essilor-results-idUKKCN1GD3VD.
Knight, S. (2018[12]), “The spectacular power of Big Lens”, The Guardian, https://www.theguardian.com/news/2018/may/10/the-invisible-power-of-big-glasses-eyewear-industry-essilor-luxottica.
Hearn, D. et al. (2022[1]), The Roll-Up Economy: The Business of Consolidating Industries with Serial Acquisitions.
Bezemer, B. (2021[13]), How Luxottica Monopolized the Eyewear Industry, https://everydayonlinemarketing.com/marketing-case-study/how-luxottica-monopolized-the-eyewear-industry/.
Lazarus, D. (2019[14]), “How badly are we being ripped off on eyewear? Former industry execs tell all”, Los Angeles Times, https://www.latimes.com/business/lazarus/la-fi-lazarus-glasses-lenscrafters-luxottica-monopoly-20190305-story.html.
Lazarus, D. (2019[15]), “Why are glasses so expensive? The eyewear industry prefers to keep that blurry”, Los Angeles Times, https://www.latimes.com/business/lazarus/la-fi-lazarus-why-are-eyeglasses-so-expensive-20190122-story.html.
Goodman, A. (2014[16]), There’s More To Ray-Ban and Oakley Than Meets The Eye, https://www.forbes.com/sites/agoodman/2014/07/16/theres-more-to-ray-ban-and-oakley-than-meets-the-eye/?sh=30220afd22cd

The characteristics of specific industries seem to be a more important driver for serial acquisitions than broader features of the jurisdictions they occur in. Although there are no clear correlations or causal links that explain why this phenomenon creates more concerns in certain jurisdictions, one justification that has been presented for serial acquisitions in smaller economies, is the industry rationalisation argument, or “national champions” thesis (Davey, 2003[17]; Ayling, 2010[18]).

According to this theory, economies of scale make it necessary for industries in smaller economies to have just one or two large suppliers, or ‘national champions’, which will then have the scale and strength to compete against foreign rivals. In this context, serial acquisitions would be a way to maximise industry efficiency in smaller economies, “rationalising” the industry through consolidation and thus allowing a few players to achieve economies of scale, which would not otherwise be attainable, and optimally operate. However, opponents of this theory argue that in fact stronger domestic rivalry in less concentrated markets leads to greater international competitiveness (Davey, 2003[17]).

The more detailed debate around this controversial theory opens the door to the discussion about the pros and cons of serial acquisitions from a competition perspective, and the appropriate degree of enforcement. This will be explored more in detail in section 4.

2.1.1. The private equity roll-up phenomenon

As mentioned in the previous section, financial buyers such as PE firms can be generally differentiated from strategic buyers, in that their acquisition strategies do not share the same motivations and objectives. However, while traditionally financial buyers relied on debt to acquire, restructure, combine and resell targets to generate value, nowadays, PE acquirers more often utilise a hybrid approach to roll-ups known as “buy and build”. (Bansraj, Smit and Volosovych, 2019[8]). This has been defined as the initial purchase by a PE firm of a well-positioned ‘platform’ company within the target industry, which is then used to make at least four additional ‘add-on’ acquisitions of smaller companies (MacArthur et al., 2019[19]). The percentage of buy-and-build deals (including both platforms and add-ons) to the total PE deal market went from just over 10% in 2002 to over 20% in 2017 (Bansraj, Smit and Volosovych, 2019[8]).

The buy-and-build approach is sometimes considered as a sign that financial buyers’ strategies are moving closer to those of traditional strategic buyers’, in that in addition to using arbitrage and leverage to create value and generate short-term returns, this strategy also offers an opportunity to exploit synergies and increase market power (Bansraj, Smit and Volosovych, 2019[8]).

Indeed, it is common for a PE investor to carry out parallel acquisitions of platform companies and use each as the basis for making add-on serial acquisitions across multiple product or geographic markets, in line with the buy-and-build principle. As explained by (Smit and Moraitis, 2010[5]), parallel platform acquisitions are used in a diversified strategy to acquire follow on targets in related sectors, allowing the platform firm to gain new knowledge and competencies, as well as to diversity and exploit economies of scope. Through each platform acquisition the PE firm positions itself as a “consolidator”, which can use economies of scale to increase its value and exit the market when the consolidation strategy matures.

While financial buyers generally focus on sectors with below average performance, aiming for specific years or countries to select their acquisition targets, with buy-and-build roll-up strategies the objective is often industry consolidation, so the choice of target industries could be broader, with characteristics more similar to those often targeted by strategic serial acquirers (Bansraj, Smit and Volosovych, 2019[8]).

Overall, the objective of buy-and-build remains that of creating a new business significantly more valuable than its individual parts, where possible improving the performance of the PE firm’s whole portfolio of companies. However, in order to create value, various determinants need to be in place, making this an effective strategy only in specific circumstances and industries.

The first element is the PE firm’s need to carry out a consistent sequence of acquisitions, given that the buy-and-build strategy partially depends on exploiting economies of scale. This means that a vast range of possible targets must be present in the chosen sector and the environment needs to be stable. Thus, successful buy-and-build strategies normally target fragmented sectors with sufficient targets of appropriate size, predictable growth, and a low risk of disruption from competitors. Moreover, in order to increase the strategy's effectiveness, PE buy-and-build commonly focus on acquisitions of targets sharing a core business, while targets in adjacent markets are believed to increase the level of risk associated with the operation and therefore only undertaken selectively (MacArthur et al., 2019[19]).

The debate around the dynamics of PE roll-ups and the motivations behind them has increasingly moved beyond the corporate strategy domain, with some authorities voicing concerns about their implications for competition. In a 2020 statement, FTC commissioner Rohit Chopra referred to the high percentage of PE buyouts in the US that were add-ons from previous acquisitions (see also (Haverstock, 2019[20])). He also highlighted the concern about serial acquisitions falling below authorities' radars, stating that as "the bulk of private equity transactions over the last decade were valued at less than USD 100 million, most of these transactions will never be subject to HSR[2] reporting, even though many will be part of a roll-up strategy" (Chopra, 2020[10]). Further, in a May 2022 interview with the Financial Times[3], Department of Justice (DoJ) Assistant Attorney General Jonathan Kanter criticised PE's motives as being "designed to hollow out or roll up an industry and essentially cash out". Further, he stressed how this method "is very much at odds with the law and very much at odds with the competition we're trying to protect" (Freedman, 2022[21]).

More recently, the CEO of the Competition and Markets Authority (CMA), Sarah Cardell, explained at an antitrust enforcement summit in Washington that, following a series of complaints, the CMA will focus on roll-up acquisitions, including those involving PE, particularly in consumer facing markets. She also noted how the proportion of independent veterinary practices in the UK declined from 89% in 2013 to 45% in 2021, while the presence of PE firms grew, signalling a broader concern with PE practices (the CMA's investigation into roll-ups in the veterinary sector are discussed further in Box 2.5).

Further, as mentioned above, purely financial PE roll-ups are increasingly coexisting with buy-and-build strategies, strengthening long-run PE consolidation. The following sections will discuss in more depth the issue of competitive harm from serial acquisitions, be it by strategic or financial buyers, and at the current and proposed initiatives to address it.

Box 2.2. Private equity roll-ups in the healthcare sector

Healthcare has been a key sector of interest for PE acquirers. For example, in the US, the number of PE deals in the healthcare industry rose from 443 in 2012 to 1 318 in 2022, with total deal values rising from approximately USD 45 billion to USD 112 billion over the same period (down from an all-time peak of USD 217 billion in 2021) (PitchBook, 2022[22]). Meanwhile in Europe, deal values in 2022 totalled nearly EUR 20 billion (Stevenson, 2023[23]).

In the US, there are many specialised PE funds focused on healthcare which have expanded into diverse speciality areas, in some cases accumulating considerable shares in local and regional markets through roll-ups. For example, Alexander et al. (2022[24]) reports that as of 2022, PE funds controlled 78% of the market for dermatologists in Lasing-East Lansing, Michigan; 80% of the market for anaesthesiology physician groups in Wilmington, North Carolina; and 91% of the market for radiology physician groups in Idaho Falls, Idaho. The interest in the sector is not surprising given that in 2021 it accounted for close to 20% of US GDP (Pitchbook, 2021[25]).

Those working within the sector as well as competition regulators have raised concerns about PE's increasingly significant presence, and in particular, the possibility that PE's profit-driven focus could come at the expense of patient care and safety, including by over-prioritising profitable service lines at the expense of less profitable ones (The BMJ, 2023[26]). This is clearly going to be more of a concern in jurisdictions which do not have other regulatory safeguards in place to address such issues.

In April 2022, the US competition agencies hosted a forum to enable stakeholders, such as doctors, pharmacists, nurses, researchers and patients, to provide their views on the effects of merger and acquisitions in the healthcare sector.[1] Participants voiced concerns that consolidation in the sector had led to a reduction in research, staff shortages and decreased patient care (Carroll, McKinnon and Ranganathan, 2022[27]). In a speech that followed in June 2022, DoJ Assistant Attorney General Andrew Forman noted the potential for PE's focus on "short-term gains and aggressive cost-cutting" to lead to "disastrous patient outcomes" as well as competition concerns in the healthcare sector.[2]

Healthcare roll-ups are also facing increased scrutiny at a state level. For example, in California, the newly created Office of Health Care Affordability has been given broad powers to review healthcare transactions for their effects on both competition and healthcare affordability. From 1st April 2024, healthcare providers will be required to notify the Office in advance of all transactions to allow the authority to conduct its review, the findings of which can be reported to the state's attorney general (Pitchbook, 2022[28]).

The particularly heightened focus of PE in the sector in the US, compared with other jurisdictions, is likely at least partly due to its highly privatised nature. Unlike Europe, for example, where healthcare is universal, healthcare spending in the US is primarily funded by the private sector and even when healthcare is publicly funded, it is usually delivered privately. As such, healthcare providers in the US have much more freedom to operate as profit-driven firms and set their own prices than elsewhere (BeKey, 2019[29]), and can more easily be acquired by PE firms.

However, it is not only the US regulators who are concerned about the impact of PE acquirers in healthcare. In the Netherlands, in a statement opposing to the government's decision to remove lowered merger notification thresholds for the sector (see Box 3.1 for more details), the competition authority voiced its concern that removing the lowered thresholds would make the Netherlands' healthcare sector more attractive to PE acquirers. The authority pointed to its decision in 2021 to block the PE-backed acquisition by Bergman Clinics of a competing independent treatment centre, finding that the merger would increase Bergman's already 'very strong' bargaining position vis-a-vis health insurers and that prices had already risen disproportionately compared to the sector as a whole, as a result of a previous merger. However, the District Court of Rotterdam has subsequently overturned the authority's decision.[3]

As previously mentioned, the UK's competition authority has also flagged PE roll-ups in consumer-facing sectors as a priority and has recently investigated several PE-backed roll-up acquisitions, including in the dental sector, in which it identified competition concerns.[4] The acquisitions were cleared after the CMA accepted divestiture undertakings.

Notes:

1 Transcript of FTC and DOJ Forum on Effects of Mergers in Health Care Industry, 14 April 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-DOJ-Listening-Forum-%20Health-Care-Transcript.pdf

2 Speech by DoJ Assistant Attorney General Andrew Forman at the ABA's Antitrust in Healthcare Conference, 3 June 2022, https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-delivers-keynote-abas-antitrust

3 Decision of the Court of Rotterdam, 12 May 2023, https://uitspraken.rechtspraak.nl/#!/details?id=ECLI:NL:RBROT:2023:4010&showbutton=true&keyword=bergman&idx=2

4 CMA's Portman Healthcare/Dentex Healthcare merger inquiry, completed 20 March 2023, https://www.gov.uk/cma-cases/portman-healthcare-slash-dentex-healthcare-merger-inquiry; CMA's Riviera Bidco Limited/Dental Partners Group Limited merger inquiry, completed 7 October 2022, https://www.gov.uk/cma-cases/riviera-bidco-limited-slash-dental-partners-group-limited-merger-inquiry

Sources:

PitchBook (2022[22]), US PE Breakdown 2022 Annual.

Stevenson, D. (2023[23]), *PE Drives Europe's Healthcare Consolidation*, https://pitchbook.com/news/articles/private-equity-European-healthcare-services-deals

Alexander, L. et al. (2022[24]), "Private Equity's Entry into Healthcare Reveals Gaps in Competition Policy", *CPI Antritrust Chronicle*, https://www.pymnts.com/cpi_posts/private-equitys-entry-into-healthcare-reveals-gaps-in-competition-policy/.

PitchBook (2021[3]), *Exploring Trends in Add-On Acquisitions*

The BMJ (2023[25]), *Evaluating trends in private equity ownership and impacts on health outcomes, costs, and quality: systematic review*

Carroll, J., M. McKinnon and S. Ranganathan (2022[26]), "Private Equity & Healthcase: Antitrust Enforcement in 2023 - PE Roll-Ups in the Cross Hairs", *Lexology*, https://www.lexology.com/library/detail.aspx?g=5933bdf3-06bb-4bc7-8a31-8eb8bf4a949a

Pitchbook (2022[27]), *Healthcare Services Report Q4 2022.*

BeKey (2019[28]), *Healthcare in the USA vs Europe: Differences, Challenges, Trends*, https://bekey.io/blog/healthcare-systems-in-the-usa-and-europe-differences-challenges-trends.

2.2. Competitive harm

As described in the previous section, one of the possible drivers behind serial acquisitions, especially if carried out by strategic buyers, is the acquirer's desire to increase its market power. Further, even when roll-ups are the result of valuation arbitrage investment strategies or are carried out as a means of achieving lower-risk expansion or greater efficiencies, by nature they may still result in industry consolidation and increased market power for the acquirer.

From a merger control perspective there are two main elements which make effectively assessing serial acquisitions and fully capturing the risk of competitive harms they carry potentially difficult. First, roll-up strategies are built on a series of small sequential transactions, each of which, due to their dimension, can easily fall below notification thresholds and thus escape merger control scrutiny. Second, even when assessed, it is likely that the competitive effect of each incremental acquisition in itself would not meet the substantive test, although the cumulative impact of the series of transactions may be harmful.

Proponents of the view that serial acquisitions' harm to competition is currently underestimated maintain that, if the competition authority is not able to take into account the impact of previous transactions in its assessment (see section 3 for the current enforcement practice), the harmful effects of the single acquisition as part of a wider roll-up strategy, as well as the structural effect of industry consolidation more broadly, risk not being captured and therefore stopped in time.

In contrast to the assessment of traditional mergers, in the case of serial acquisitions there appears to be a critical discrepancy between the economic perspective, for which the cumulative effect of the series of transactions is the core issue, and the conventional legal framework for assessment, in which each acquisition is viewed as self-standing and, in such a context, may not appear anticompetitive despite the final effect of the roll-up.

Moreover, as described in section 2.1 certain roll-ups can be implemented following a parallel acquisitions strategy, in which a firm uses acquisitions to branch out its operations within the sector it is already active in as well as in related and even unrelated industries, leading to a combination of horizontal and non-horizontal effects that might be challenging to capture. This generally takes place in the case of PE buy-and-build, however similar dynamics can be seen in digital markets, albeit with a different type of implementation, where the acquirer is a digital platform aiming to broaden or entrench its ecosystem (see section 2.3 below).

The requirement, under many regimes, to isolate and link the threat to competition to each single transaction, which may or may not be assessed, means that the number of cases where serial acquisitions have been analysed under existing merger control frameworks is limited. However, Box 2.3, Box 2.4 and Box 2.5 provide recent examples.

Despite their nature and the "staggered' source of harm, serial acquisitions' potential anticompetitive effects are mostly comparable to those of a traditional horizontal merger, i.e., a strengthening of market power due to the elimination of an important competitive constraint, with, in turn, higher prices for consumers and/or lower quality offered by the merged entity, or an increased risk of coordination due to the change in market structure. Although less common, where the acquirer's expansion moves into upstream or downstream markets, for instance through a roll-up of distributors, serial acquisitions might also create vertical concerns, with classical input or consumer foreclosure risks. Finally, parallel platform acquisition strategies might lead to conglomerate concerns, depending on the relationship between the platforms and the level of shared control by the parent PE. However, conglomerate considerations appear to be a more central issue in digital markets (see section 2.3 below).

Box 2.3. Serial acquisitions in Chile

In Chile, in 2008 the Fiscalía Nacional Economica (FNE) filed a complaint against the two major supermarkets chains, D&S and Cencosud, which were implementing a growth strategy based on the serial acquisition of small, regional supermarket chains.

The FNE considered that this aggressive strategy, based on the (hostile) takeover of competitors and acquisition of suitable land for location of supermarkets, had resulted in the elimination of competition and the creation of artificial barriers to entry.

Following the complaint, D&S settled with the FNE and committed to notify future acquisitions and implement general contractual terms agreed with small and medium-sized suppliers. With regard to Cencosud, in its judgment the Chilean Competition Court ordered the undertaking to notify any future merger in the supermarket industry which Cencosud proposed to undertake, either directly or indirectly.

Source: OECD (2011[29]), Economic Evidence in Merger Analysis - Contribution from Chile

However, serial acquisitions raise further considerations. First, the sequence of acquisitions can create, as a whole, a trend towards monopoly over time. However, unlike three-to-two or two-to-one mergers, in the case of serial acquisitions it is less clear which specific transaction is, in isolation, responsible for the critical structural change in the industry which could be deemed anticompetitive. The staggered nature of this strategy, which has a key time component, thus leads to most serial acquisitions falling under the authorities' radar, as mentioned above. This can be seen as a problem both at the notification stage and for the substantive assessment.

Second, the industries that are consolidated through roll-ups often offer goods and services that are local in nature (e.g., funeral homes, veterinary clinics and dentists), for which consumers cannot necessarily shop around. This reduces the degree of geographic substitutability with other providers and potentially increases the anticompetitive effect of the strategy.

Third, as highlighted in (Hearn and Shaban, 2022[30]) serial acquisitions might also have broader economic consequences, which, despite not being necessarily within the focus of competition enforcement, can have long-term effects in the market. These could include a reduction in independent local ownership to the benefit of foreign ownership (or at least ownership with no or limited local connection), especially in the case of PE, lost competitiveness of small businesses, and potential negative effects on industry resiliency.

On the latter point, PE deals can be highly leveraged which may make them less resilient in downturns. This is particularly important in industries that need to remain stable in response to economic swings, such as healthcare, grocery retail, veterinary care, i.e., the types of sectors PE often targets. Again, this will be more or less of a concern, depending on what other regulatory safeguards are in place within the jurisdiction to address such issues. The same argument might apply in the case of the short-term buyouts, with the risk that the provision of essential services could become less stable if there are constant changes in ownership or if efficiency is pursued at the expense of resilience.

Box 2.4. PE roll-ups in the dental sector in the UK

The UK's CMA recently identified limited competition concerns relating to two PE-backed roll-ups of dental practices, both of which were resolved through remedies proposed by the parties.

The first involved a completed acquisition by Riviera Bidco Limited of Dental Partners Group Limited. Pre-merger, the companies were the fourth and eighth largest corporate dental groups in the UK operating 148 and 66 practices respectively across the UK, providing treatment to both public and private patients. In its assessment, the CMA noted the parties' history of growth though serial acquisitions, having acquired more than fifty dental practices between them over the last two years.[1]

While the authority determined that the merger did not raise competition issues in most areas in which the firms operated, it did have concerns in relation to two local markets. The matter was resolved in October 2022 with the divestiture of two practices.

The second case related to the proposed acquisition by Portman Healthcare (Group) Limited of Dentext Healthcare Group Limited, both large corporate dental groups operating 209 and 149 practices respectively, which had grown in recent years, including through acquisitions. The CMA found that the transaction did not raise competition concerns in most areas, however it did identify concerns in relation to the provision of public orthodontic treatments and private dental treatments in a small number of local areas. The CMA ultimately accepted remedies requiring the divestiture of a limited number of practices.[2]

Notes:
[1] CMA case page, Riviera Bidco Limited/Dental Partners Group Limited merger inquiry, https://www.gov.uk/cma-cases/riviera-bidco-limited-slash-dental-partners-group-limited-merger-inquiry
[2] CMA case page, Portman Healthcare/Dentext Healthcare merger inquiry, https://www.gov.uk/cma-cases/portman-healthcare-slash-dentex-healthcare-merger-inquiry

In the context of PE roll-ups aimed at increasing shareholder value, it has also been noted that this may be coming at expense of increased prices or lower quality for consumers. Recent research into healthcare PE acquisitions in the US (CPI, 2023[31]) shows that in eight out of ten medical specialties PE acquisitions were associated with price rises, particularly in metropolitan areas where the acquirer controls more than 30% of the market. Price increases ranged from 9% in ophthalmology to 14% and 16% in gastroenterology and oncology, respectively. Moreover, efforts to maximise efficiencies, including cost cutting, can come at the cost of lower quality for consumers. This is particularly important in those industries, such as healthcare, where quality is of key relevance for public policy, and is not only a competitive parameter (Tzanaki, 2022[32]; Gupta et al., 2021[33]; Alexander et al., 2022[24]).

Moreover, while it is not unique to PE, PE firms with a specific industry focus may be at heightened risk of interlocking directorates and common ownership, both of which may result in anticompetitive effects (see also (OECD, 2017[34]) and (OECD, 2008[35])).

These risks are well summarised in the statement of FTC Chair Lina M. Khan, joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya, in the matter of JAB Consumer Fund/SAGE Veterinary Partners, which invites antitrust enforcers to pay attention to how PE business models can in some instances degrade the quality of goods and services and hamper competition. Moreover, the Chair highlights how "serial acquisitions or "buy-and-buy" tactics can be used by private equity firms and other corporations to roll up sectors, enabling them to accrue market power and reduce incentives to compete, potentially leading to increased prices and degraded quality" (Khan, 2022[36]).

This is illustrative of a new stance from a few competition authorities, which are now showing concern that certain potentially overlooked PE strategies, such as roll-ups, might ultimately harm consumers.

Historically, the acquisitions of PE buyers expanding their portfolios in a variety of different markets have not always raised significant attention. This is partly due to the lack of overlap between the buyer and the target's activities and, in turn, the reduced risk of substantive merger control problems, as well as the perceived role of PE firms as purely short-term financial investors. Moreover, the financial structure of PE firms and their acquisitions creates substantial obscurity for competition regulators around PE investments and their potential competitive effects. For instance, PE firms and their managers may oversee a multitude of individual funds with the same industry focus, so while certain acquisitions may not raise obvious competitive concerns, when viewed in the context of the specific acquiring fund, there may be conflicts in terms of the firm's broader portfolio of funds, which may not be apparent to regulators. This opaqueness is further exacerbated by lack of disclosure and data on PE ownership (Alexander et al., 2022[24]).

However, with the surge in industry roll ups and PE firms adopting acquisition strategies and market conducts increasingly similar to industry actors, antitrust scrutiny is intensifying in certain jurisdictions, as noted by a number of experts (Motta et al., 2022[37]; Mehta, Gerking and Grothouse, 2022[2]; Tzanaki, 2022[32]; Schwartz et al., 2023[38]). Section 3 will illustrate several approaches competition authorities are implementing to address the potential harms from serial acquisitions, including when carried out by PE buyers.

Box 2.5. Serial acquisition cases in the veterinary sector – the US and UK

The veterinary sector has become a prime target for roll-ups in the US and UK in recent years.

In the US, while it is difficult to measure precisely how concentrated the market has become on a national scale, one estimate suggests that as of 2021, approximately 25% of veterinary practices were owned by corporate consolidators, accounting for at least 40% of all client visits (Kelly, 2021[41]).

While the small scale of many acquisitions in the sector mean that they fly beneath the radar of the US regulators, two recent larger acquisitions by JAB Consumer Partners, a USD 55 billion PE firm, were assessed by the FTC.

The first related to JAB's acquisition, for USD 1.1 billion, of Sage Veterinary Partners, which owned and operated sixteen veterinary clinics in four states. JAB was already established in the sector through its holdings in two entities that operated speciality and emergency veterinary clinics. It had previously come to the attention of the FTC through its 2020 acquisition National Veterinary Associates from another PE firm, which the FTC cleared on condition of divestitures. The further acquisition of Sage, at the time, would have given JAB control over nearly 100 such entities across the US.

Through its assessment,[1] the FTC determined that the merger enabled JAB to establish an illegal, dominant position in the markets for certain speciality and emergency veterinary services in three local markets in California and Texas, which would likely lead to an increase in prices and a degradation in quality. It found that these markets were already highly concentrated, and the acquisition would significantly increase concentration (in some cases, going from three to two, in others, going from two to a monopoly). The decision also noted a growing trend towards consolidation in emergency and specialty veterinary services market across the US more generally.

In the second case that quickly followed, JAB proposed to acquire, for USD 1.65 billion, another PE-backed provider of speciality and emergency veterinary clinics, Ethos Veterinary Health, which operated across nine states. The FTC found[2] that the acquisition would provide JAB with a dominant position in local markets in Richmond (Virginia), San Francisco, Denver (Colorado) and Washington D.C.

Both cases were ultimately resolved through settlements that involved conventional divestiture remedies, with JAB being required to divest clinics in the markets of concern. However, the settlements also included some more controversial conditions designed to give the FTC greater oversight of JAB's acquisition strategy going forward. These are discussed further in section 3.2.

In the UK, the competition regulator has investigated no less than four corporate roll-ups in the sector over the last few years, each time relying on its power to call in already completed deals that were not notified under its voluntary notification regime.

The first of these involved the acquisition by CVS Group of Quality Pet Care (trading as The Vet) in August 2021. Prior to the merger, CVS operated more than 460 veterinary practices throughout the UK, while The Vet operated eight small local practices. The CMA determined that the acquisition gave rise to the prospect of a substantial lessening of competition in five local areas within the UK and CVS ultimately undertook to divest the entirety of The Vet business to address the CMA's concerns.

In its decision, the CMA highlighted the strong trend towards consolidation in the sector, and that the change was primarily the result of acquisitions by corporate groups. It identified that these corporate groups generally seek to establish a significant presence in specific locations, allowing them to benefit from economies of scale as well as the cross-selling of related products and services, such as pet cremation and referrals to other speciality services, though their network of businesses. However, the authority also observed that this can lead to competitive harms through the removal of competitive constraints, noting that it had received complaints in recent years about increasing prices and lower quality services in the sector resulting from the consolidation of veterinary services in local markets.

The CVS matter was closely followed by a determination that the acquisition by PE-backed firm VetPartners of Goddard Holdco Limited in October 2021, the largest remaining independent veterinary service provider in the UK, also gave rise to competition concerns in the market for veterinary care for small animals in eleven local areas within Greater London.[3] The matter was concluded with the CMA accepting undertakings involving the divestiture of eight sites.

Subsequently, the authority investigated a series of acquisitions undertaken by another PE-backed firm, IVC, of eight independent vet business over the period September 2021 to March 2022. IVS was already the largest provider of vet services in the UK with more than 1 000 practices. After the CMA raised competition concerns relating to the supply of veterinary services in twenty-three local areas, the firm undertook to divest all eight businesses.[4]

Finally, the CMA accepted undertakings from Medivet Group, another PE-backed multinational with more than 400 veterinary businesses, to appease competition concerns relating to the acquisition of twelve veterinary businesses over the year September 2021 to September 2022.[5]

Notes:

[1] FTC case page, In the matter of JAB Consumer Partners/National Veterinary Associated/SAGE Veterinary Partners, 5 August 2022: https://www.ftc.gov/legal-library/browse/cases-proceedings/2110140-jab-consumer-partnersnational-veterinary-associatessage-veterinary-partners-matter

[2] FTC case page, In the matter of JAB Consumer Partners/VIPW/Ethos Veterinary Health, https://www.ftc.gov/legal-library/browse/cases-proceedings/211-0174-jab-consumer-partnersvipwethos-veterinary-health-matter

[3] CMA case page, VetPartners Limited/Gooddard Holdco Limited, https://www.gov.uk/cma-cases/vetpartners-limited-slash-goddard-holdco-limited-merger-inquiry

[4] CMA case page, Independent Vetcare Limited (IVC)/multiple independent veterinary businesses merger inquiries, https://www.gov.uk/cma-cases/independent-vetcare-limited-ivc-slash-multiple-independent-veterinary-businesses-merger-inquiries

[5] CMA case page, Medivert Group Limited/multiple independent veterinary business merger inquiries, https://www.gov.uk/cma-cases/medivet-group-limited-slash-multiple-independent-veterinary-businesses-merger-inquiries

Source: Kelly, R. (2021[39]), "Pandemic hastens ongoing trend in veterinary consolidation", Vin News Service, https://news.vin.com/default.aspx?pid=210&Id=10652228

2.3. Serial acquisitions and digital markets dynamics

The serial acquisition strategies and patterns considered by this paper so far have focused on sequential acquisitions of smaller horizontal competitors, often within the same local or regional geographic market. However, parallels can be drawn between the issues raised by these acquisitions, and those being undertaken by platforms in digital markets, which have also garnered increased attention.

Serial acquisitions by platforms in digital markets do not necessarily involve targets that are direct horizontal competitors. Instead, the targets are often active in related markets, either providing complementary or upstream/downstream products or services which are linked to the platform's existing services via technology. In such cases, the acquisition may be a vehicle through which the platform can expand its ecosystem, enabling it to single-handedly offer consumers a broader range of interlinked products and services. While the addition, through acquisition, of each complementary service to the platform's ecosystem may not in itself have a material impact on competition, considered cumulatively, the acquisitions may further strengthen of the 'moat' around the platform's core service offering, thus locking-in users and entrenching the platform's dominant market position (for further discussion of the competitive dynamics of digital ecosystems see (OECD, 2020[40]) and ecosystem theories of harm see (OECD, 2023[41])). This is essentially the scenario that the DoJ alleges has played out in the ad tech sector through its ongoing case against Google (see Box 2.6).

Box 2.6. Digital ecosystem expansion strategies

In their case filed in January 2023, the DoJ, along with a number of state attorneys-general, have accused Google of engaging in illegal monopolisation of the 'ad tech stack',[1] including by undertaking a series of anti-competitive acquisitions aimed at 'neutralising or eliminating' competitive threats.[2] Specifically, the DoJ alleges that Google initially established its presence in the advertiser side of the ad tech sector through the launch of Google Ads (then called AdWords), which was a buying tool for advertisers. Google then sought to progressively expand its dominance into the publisher side of the sector by acquiring firms which offered related services, including DoubleClick. The DoJ is seeking a break-up of Google's ad tech business through divestitures.

Central to the DoJ's case is the cumulative impact of this series of acquisitions on Google's position in the market and competition. Specifically, the DoJ alleges that together, the acquisitions allowed Google to establish a dominant position at each level of the ad tech stack, which in turn enabled it to engage in further forms of anti-competitive conduct including by distorting and manipulating ad inventory auction competition. In other words, by incrementally expanding its portfolio of ad tech tools through acquisitions, Google was able to establish a monopoly position across the whole ad tech industry (essentially building and cementing its own ad-tech ecosystem) which it could then leverage to engage in anti-competitive conduct. It is perhaps implicit that any of these acquisitions, when considered in isolation, may not be considered to have had a sufficiently material impact on competition. This is supported by the fact the FTC cleared the DoubleClick acquisition at the time.

A further example of an ecosystem-building strategy can be seen in Brazil, through the series of acquisitions undertaken by Magazine Luiza (also known as Magalu), one of the largest online and 'bricks and mortar' retailers in the country. As outlined by (Zingales and Renzetti, 2022[44]), Magalu made twenty-three acquisitions between 2011 and 2022, but only four were referred to the competition authority for review because the remainder did not reach notification thresholds. Magalu's acquisitions included businesses operating in online retail (including fashion, beauty, and food delivery) and related logistics, payment technologies and advertising. These acquisitions formed part of a broader digital transformation strategy, which has led to the formation of an expansive online, multi-sided ecosystem centred around the Magalu app. To help further cement its position, Magalu incentivised customers to stay within its ecosystem through conditions attached to its own payment services, MagaluPay and the Magalu credit card. These acquisitions reportedly form part of a concerted strategy of expansion which aims to position Magalu as a regional trading hub comparable to Amazon and Alibaba (Filippe, 2020[45]).

Notes:

[1] Defined in the complaint as a set of technological tools that connect website publishers selling display advertising opportunities to advertisers wishing to buy those opportunities.

[2] DoJ press release, Justice Department sues Google for monopolising digital advertising technologies, 24 January 2023, https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies

Sources:

Zingales, N. and B. Renzetti (2022[42]), "Digital Platform Ecosystems and Conglomerate Mergers: A Review of the Brazilian Experience", World Competition, Vol. 45/4, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4264806.

Filippe, M. (2020[43]), "With acquisitions, Magalu builds an ecosystem similar to Alibaba and Amazon", Exame, https://exame.com/negocios/com-aquisicoes-magalu-monta-ecossistema-estilo-alibaba-e-amazon/.

In other cases of serial acquisitions in digital markets, the targets (which could be small start-ups) are viewed by the acquirer as potential competitors, and the strategy may be to capture and control the competitive threats before they develop into true rivals or potentially even to shut them down entirely (the 'killer acquisition' theory or harm) (OECD, 2023[41]).

Nascent acquisitions, including killer acquisitions, raise some of the same concerns as traditional serial acquisitions, as each acquisition on its own is unlikely to trigger notification thresholds and/or raise competition concerns (for more information on nascent and killer acquisitions see (OECD, 2020[44])). However, when multiple nascent acquisitions are undertaken as part of a concerted strategy over time, the effect may be to maintain or further entrench the incumbent's dominant position in a market, making subsequent entry increasingly difficult. Meta Platforms has been accused by the FTC of engaging in such conduct in a recent case, discussed in Box 2.7.

Box 2.7. FTC case against Meta Platforms

In an ongoing case filed in December 2020,[1] the FTC alleges that Meta, in seeking to transition its business from desktop to mobile and maintain its monopoly in personal social networking, and due to failures in its own internal efforts to develop mobile features, engaged in a systematic strategy to identify and acquire innovative competitors offering successful mobile technologies. Similarly to the DoJ's action against Google described in Box 2.6, the FTC's case focuses on the wholistic competitive impact of Meta's acquisitions of Instagram in 2012 and WhatsApp in 2014, both of which, when assessed in isolation by the agency at the time, were cleared. However, while the Google case and Magalu example involve acquisitions as a means of incrementally expanding an ecosystem, leading to a monopoly (or more extensive monopoly) position, the Meta case differs somewhat in that it alleges that acquisitions were strategically utilised to extinguish potential threats to its pre-existing monopoly.

Note:

[1] The original case was dismissed by a US District Court in mid-2021 for lack of evidence. However, the authority subsequently filed an amended complaint, which was officially given the greenlight to proceed in January 2022. See the FTC case summary page: https://www.ftc.gov/legal-library/browse/cases-proceedings/191-0134-facebook-inc-ftc-v

In both scenarios outlined above, given digital markets' focus on goods and services provided as or via digital technologies, geography may be less important than it is for serial acquisition strategies undertaken in traditional markets. Whereas in markets such as healthcare and grocery retail the acquisition strategies tend to play out in local or regional markets where a consumer's proximity to the product or service being provided is fundamental, in the digital sector the location of the targets may not be significant, as the product or technology being acquired may be relevant to the platform's operations nationally or even globally.

While the drivers and dynamics of serial acquisitions in digital markets may be different to those in traditional markets, they raise some similar concerns, both at the notification and assessment stage.

However, the difficulties at the assessment stage may be heightened in digital markets. Firstly, it will generally be more difficult to demonstrate that serial acquisitions involving targets that are not horizontal competitors (which, as previously mentioned, appear to be more common in digital markets) are anti-competitive, because non-horizontal mergers are already presumed to be less likely to adversely affect competition.[4] The assessment is also more complicated in serial acquisitions involving nascent potential competitors, as competition authorities are required to make predictions, supported by evidence to the requisite legal standard, about whether the target would, in the absence of the merger, have developed into a viable competitor in a market where it is not currently active, or only active in a very limited way (OECD, 2023[41]). The assessment of potential competition is far from straightforward, as it may be the case that the incumbent platform is, or at least can present a credible argument that it is, better positioned to develop and commercialise the innovations of the target and/or integrate them with its existing offering, creating efficiencies for the benefit of consumers.[5] It is therefore arguably less obvious, in each of these scenarios, that an acquisition will lessen competition, compared to the situation of a firm buying up a series of firms that are existing direct competitors.

In addition to these complexities, there are several characteristics of digital markets which may make the adverse effects of anti-competitive mergers even more pronounced, including as part of an anti-competitive serial acquisition strategy. These characteristics, which include the presence of network effects, data feedback loops, data-driven economies of scope and significant economies of scale, mean that digital markets have a greater propensity to 'tip' to a few or even one dominant firm. Once this occurs, new entry becomes exceedingly difficult and future competitive constraints very limited (OECD, 2023[41]). As such, it is arguably even more crucial for merger authorities to be able to identify and assess serial acquisition strategies in digital markets in their infancy so that they have an opportunity to prevent these 'winner takes all' dynamics accelerating to the point of no return.

The number of digital acquisitions that bypass merger review regimes appears to be significant. (Parker, Petropoulos and Van Alstyne, 2021[45]) estimate that between 1988 and 2020, GAFAM[6] undertook 855 acquisitions. (Kwoka and Valletti, 2020[46]) report that approximately 97% of digital mergers and acquisitions have not been assessed by any competition authority worldwide. Further, of those that are assessed, almost all have been cleared, with only one GAFAM merger to date blocked by any authority.[7] An inquiry by the FTC also identified more than 800 acquisitions by GAFAM that were not required to be reported over the ten-year period from January 2010 to December 2019 (Federal Trade Commissiom, 2021[47]). A number of jurisdictions have introduced digital-specific measures to try and address this issue, as referred to in Box 3.1.

3 Current practice and alternative approaches

The following section provides, first, an outline of the current practice of different jurisdictions in dealing with serial acquisitions. These broadly fall into two categories: measures allowing for the direct assessment of serial acquisitions under existing merger regimes (section 3.1), and measures aimed at helping authorities to identify serial acquisition patterns and assess potentially problematic smaller transactions that would not otherwise be notifiable under general thresholds (section 3.2). Next, section 3.3 outlines some alternative options for jurisdictions to consider when seeking to address serial acquisitions, including an assessment of their potential strengths and weaknesses. Some of these involve new measures specifically targeting the serial acquisition phenomenon, whereas others involve the deployment of existing tools that have a broader focus towards this particular issue.

As a starting point, there is no general consensus on whether specific measures are even needed, an issue that is discussed further in section 4. However, even when considering the jurisdictions that have looked to address serial acquisitions to date, it is clear that there is no widespread or standard approach for doing so.

For example, South Africa appears to be one of few jurisdictions to explicitly allow for the assessment of serial acquisitions in its general merger law, while elsewhere, such as in Germany and the US, the law has been deemed sufficiently flexible to permit the authority to assess serial acquisition strategies. Australia has also considered various legislative reform proposals over a number of years, but to date no substantive legislative change has been made (see Box 3.2 for more details).

In other jurisdictions, where there is not necessarily an explicit framework for assessing serial acquisitions, various mechanisms have been used to assist the authorities to identify when serial acquisition patterns occur, including by broadening notification requirements and/or reinforcing monitoring of non-notifiable mergers in respect of specific sectors or companies.

Finally, some jurisdictions are looking beyond their merger regimes and utilising tools such as ex-post enforcement powers and market studies to seek to unwind harms caused by serial acquisitions after the fact.

3.1. Directly assessing serial acquisitions under existing merger regimes

As noted above, in some jurisdictions the existing substantive merger test allows for the direct assessment of serial acquisitions. Such regimes allow the authority to consider not only the specific impact of the transaction under review, but also the position of the transaction as part of a broader acquisition pattern or strategy and the resulting competitive implications. This may allow the authority to intervene if it determines that the merger, when considered in this broader context, raises competition concerns sufficient to meet the legal test, even if the specific transaction viewed purely in isolation may not.

One of the clearest examples of this is in South Africa, where the Competition Act was amended in 2019 to require the competition authority to consider, when assessing a merger, any other mergers engaged in by any of the parties to the merger 'for such period as may be stipulated by the Competition Commission'. As such, the Competition Commission is required to consider not just the competitive impact of the specific transaction under review, which may on its own not have a significant effect, but also the broader cumulative impact of any prior mergers that took place over a period that the Commission, in its discretion, specifies.

In respect of the issue that individual transactions within a broader serial acquisition strategy may not meet notification thresholds (as outlined in section 2.2), the Commission already had powers under the act to require notification and approval of a below-threshold merger if it considers that the merger may substantially prevent or lessen competition (or cannot be justified on public interest grounds). This can occur up to six months after the merger has been consummated.[8] However, bolstering this, in 2022 the Commission also revised its 'Guidelines on Small Merger Notification' to strengthen notification requirements to capture high-value acquisitions of small firms by large acquirers.[9]

While most jurisdictions' merger laws do not appear to explicitly deal with serial acquisitions, the authority may still be able to consider them under existing frameworks. In Germany, while not legally binding, merger guidelines published by the competition authority make it clear that there are circumstances in which a company makes several small-scale acquisitions, any of them by itself insignificant, but when considered together may have a substantially negative effect on the market.[10]

The authority's approach was confirmed by the Federal Court of Justice in 2008, when it held that the lower court, in prohibiting a merger between two energy companies, was able to take into account the parties' previous activity of buying up minority shareholdings in other electricity suppliers to strengthen market dominance. Rather than this constituting a deviation from the specific transaction under assessment, the Federal Court held that this previous activity was relevant to showing why the competitive effect may go beyond the individual case.[11]

Brazil's merger guidelines also reference serial acquisitions noting that the authority may need to 'soften' its use of Herfindahl Hirschman Index assumptions in situations where a market has become increasingly concentrated through a series of small, incremental acquisitions, each of which only results in a marginal increase in total market concentration[12].

In the US, anti-competitive serial acquisitions are also captured by the general prohibition on anticompetitive mergers, however in practice, changes to the merger regime over time have weakened the authorities' ability to identify and therefore assess them. As described by (Hearn et al., 2022[1]), serial acquisitions were explicitly considered in the legislative background to the Celler-Kefauver Act of 1950. This act strengthened and removed loopholes in the Clayton Act (implemented in 1914), which prohibits mergers with a standard for 'incipient monopolisation', that is, prohibiting not only mergers with an immediate anti-competitive impact but also those that may substantially lessen competition in the future.

Based on a broad interpretation of the incipiency standard, mergers were blocked in markets that were, at the time, relatively unconcentrated, but where there was concern about a trend towards consolidation that could harm competition in the future.[13]

However, subsequent changes to the merger regime centred its attention more squarely on larger mergers, including the introduction of notification requirements and thresholds based on transaction size, as well as safe harbours. This made it less likely that smaller acquisitions will be assessed and as a result, arguably less likely that anti-competitive serial acquisition strategies will be identified. However, a number of recent developments suggest a reversal of this trend.

As previously discussed, the US authorities have made it clear in various fora that serial acquisitions will receive increased attention.[14] Building on these public comments, the draft revised merger guidelines released by the FTC and the DoJ for public consultation in July 2023 explicitly state that when a merger is part of a series of acquisitions, the agencies may examine the whole series and consider the cumulative impact of the acquisition pattern or strategy.[15] They also specify that in considering a serial acquisition pattern or strategy, the agencies can have regard to both the firm's historical practices, but also its future incentives. The guidelines also re-emphasise the role of the incipiency standard, stating that a merger may be anti-competitive if it 'contributes to a trend towards concentration'.[16] In conjunction with this, the agencies are proposing changes to their pre-merger notification form to require firms to provide details of their previous acquisitions.[17]

3.2. Mechanisms for identifying serial acquisition patterns and assessing smaller transactions

Despite not necessarily having an explicit avenue for assessing serial acquisitions under their merger law, some jurisdictions have mechanisms to help alert competition authorities to serial acquisition patterns taking place in particular markets. The focus of such mechanisms is often notification thresholds, i.e., making them more stringent to capture smaller acquisitions. Generally, the authority will then have the power to assess such transactions. In some cases, these measures will target specific firms, whereas in others they may apply to a sector more broadly.

These mechanisms can help authorities identify serial acquisitions patterns that they may not have become aware of otherwise and enable them to review individual transactions. Despite this, if the authority does not also have the ability to factor the broader acquisition pattern into their assessment, they will still face the obstacle of demonstrating that a particular acquisition, considered in isolation, harms competition to the extent required under the substantive test. However, such a measure could help inform whether further reforms might be needed to address serial acquisitions.

A firm-specific regime exists in Switzerland, where, once a firm has been found dominant in a market in a proceeding under the competition act, it is required to notify the authority of any acquisition concerning that market, an adjacent market, or an upstream or downstream market.[18] The German competition act similarly allows the authority to make a formal decision requiring firms meeting specific criteria, for a three-year period, to notify any future transaction in one or more sectors if there are indications that future concentrations could substantially impede competition in the identified sectors.[19] For this power to be enlivened, the authority must have first carried out an inquiry in one of the affected sectors.

In terms of regimes applying to entire sectors, in most cases, these also broaden the circumstances in which acquisitions must be notified, enabling the authority to identify and assess smaller mergers in sectors where serial acquisitions have been identified as a potential concern. A distinction arises in the case of reforms targeting digital mergers; some require certain firms to inform the authority of future acquisitions (without necessarily also providing an avenue for assessment), while others provide the authority with jurisdiction to assess certain acquisitions of smaller firms. These sector-specific regimes are discussed further in Box 3.1.

Box 3.1. Sector specific approaches

In the UK, since 2010, 'designated' large grocery retailers have been required to notify the competition authority of any acquisition of another grocery store with more than 1 000 square meters of retail space.[1] This was one of several remedies introduced following a market investigation into the supply of groceries in the UK that identified adverse effects on competition.[2]

A variation on this regime exists in Israel, whereby, since 2014, large supermarket chains have been required to seek approval from the competition authority to open new stores in defined catchment areas if the supermarket's existing share of total sales in the catchment area exceeds 30%. This followed findings published by the authority showing that as of 2013 almost 40% of large supermarkets were located in such 'concentrated markets'.[3]

In addition, Israel has a specific notification regime for the petrol retail sector, under which large petrol retailers are required to seek approval for acquisitions of petrol stations that are located within 1 km of any of their existing stations within urban areas, or 10 km elsewhere.

A notification regime specific to the healthcare industry also formed part of the Netherland's merger framework until relatively recently. In 2008, the government implemented lowered turnover thresholds for mergers in the sector for an initial period of five years, which was subsequently extended twice for further five-year periods. However, in July 2022, the government confirmed that the order would not be extended again and thus the lowered thresholds ceased to have effect from the end of 2022.[4]

The stated reason for introducing these lowered thresholds was a concern that an anti-competitive concentration of the industry could impact the quality, affordability, and accessibility of healthcare. This was coupled with a concern that the local nature of healthcare markets could mean that acquisitions of firms with small turnovers, which would not trigger the standard thresholds, could still lead to undesirable levels of market power. In declining to renew the measures, the relevant Minister determined that the additional administrative burden for businesses was not sufficiently offset by what was viewed as a relatively limited additional protection of competition.[5]

The Netherlands' Authority for Consumers and Markets (ACM), strongly opposed the decision, including because it believed it would incentivise PE interest in the sector, leading to increased prices. It also considered that the Government was understating the competitive impact because the lowered thresholds would have also deterred additional anti-competitive mergers from being initiated.[6]

While not specific to the issue of serial acquisitions, a number of jurisdictions have introduced, or are in the process of introducing, reforms aimed at increasing scrutiny over smaller mergers which are particularly focused on the digital sector. While the drivers for such reforms have centred more around concerns about acquisitions of nascent potential competitors, including killer acquisitions, the reforms may also assist the authorities to identify and address serial acquisition patterns due to their focus on smaller acquisitions.

Such reforms include the EU's Digital Markets Act, which requires 'gatekeeper' firms to inform the European Commission (EC) of every intended concentration where the merging firms or the target provide digital services or enable the collection of data.[7] While this requirement does not necessarily give rise to an assessment of every merger, it is expected that it will, applied in conjunction with Article 22 of the EU Merger Regulation, which enables an EU member state to request the EC to review a merger that does not meet EU or national merger control thresholds, if the transaction threatens to significantly affect competition (Komninos, 2022[50]).

The UK is also seeking to introduce an 'acquirer only' threshold as part of its Digital Markets, Competition and Consumers Bill, which will give the competition authority jurisdiction to review mergers where the acquirer meets certain conditions, regardless of the size or financial position of the target.[8] This is being proposed in tandem with a proposed new mandatory reporting requirement which will apply to firms designated as having 'strategic market status', however this will only apply to certain acquisitions meeting a transaction value threshold.

Notes:
[1] The Groceries Market Investigation (Controlled Land) Order 2010, article 11
[2] Explanatory note to accompany The Groceries Market Investigation (Controlled Land) Order 2010, https://www.gov.uk/government/publications/groceries-market-investigation-controlled-land-order-2010
[3] Israel Competition Authority press release, 26 November 2014, https://www.gov.il/en/Departments/news/geographicmodel
[4] Letter from the Netherlands Minister of Health, Welfare and Sport, 15 July 2022, https://open.overheid.nl/documenten/ronl-6ee49c8314501314ffab55e069e1751fbe1be17f/pdf
[5] Research commissioned by the Government found that, on average, one merger falling under the lowered threshold is blocked, permitted subject to conditions, or withdrawn each year.
[6] ACM's view on lowered turnover thresholds for healthcare concentrations, 19 July 2022, https://www.acm.nl/nl/publicaties/zienswijze-acm-op-verlaagde-omzetdrempels-zorgconcentraties
[7] Article 14 of the EU Digital Markets Act
[8] Reforming Competition and Consumer Policy: Government Response, 20 April 2022, https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response#chapter-1-competition
Source: Komninos, A. (2022[48]), "The Digital Markets Act (DMA) Goes Live", White & Case Insight Alert, https://www.whitecase.com/insight-alert/digital-markets-act-dma-goes-live

Moving away from broader legislative measures, some jurisdictions have utilised remedies in specific contested merger cases to enable them to monitor and potentially address future serial acquisition activity by certain companies. These expand the circumstances under which the company must inform the authority of future acquisitions, and in some scenarios, seek their prior approval. For example, in the US, in reaching its recent settlements with JAB Consumers Partners, which were outlined in detail in Box 2.5, the FTC put in place somewhat controversial notification and pre-approval requirements for JAB.

In the case of the Sage acquisition, the settlement included a requirement for JAB to notify the FTC of any future acquisition, within the next ten years, of any emergency or speciality veterinary clinic located within 25 miles of a JAB-owned clinic anywhere in the US, despite the fact that the markets of concern in the FTC's complaint were limited to a narrower set of speciality veterinary services in Texas and California only (see also (Kattan, Breed and Battaglia, 2022[49])). JAB is also required to seek prior approval for any acquisition of a specialty or emergency veterinary clinic within 25 miles of a JAB-owned clinic in California or Texas. Similar conditions were agreed in relation to JAB's acquisition of Ethos.

While the settlement terms were ultimately accepted by all FTC commissioners, there was significant divergence in their views surrounding the need for such broad-ranging notification and pre-approval requirements and whether they could be justified. However, for now, based on their joint statement (referred to in more detail in section 2.2), it appears that a majority of the FTC Chair and commissioners will support the use of such remedies going forward.

In Brazil, remedies have also been used by the authority to assist it to both monitor and slow the pace of serial acquisition activity. In 2018, following a complaint by a market participant, the Brazilian authority, CADE, assessed the acquisition of All Chemistry do Brasil Ltda. by SM Empreendimentos Farmacêuticos Ltda, which were both active in the pharmaceutical input distribution market. The complaint raised a concern that previous acquisitions by the acquirer's parent company had already resulted in significant market consolidation, and that the firm was undertaking a deliberate strategy of sequential acquisitions that would not trigger notification thresholds. In clearing the acquisition, CADE imposed remedies preventing SM Empreendimentos from making any further acquisitions in the same market within the following two years and requiring it to notify the authority of any further acquisitions in the following four years. CADE considered that the remedies were an appropriate mechanism "to solve the identified competitive problem, which resides not specifically in the effects of this operation in isolation, but in the movement of acquisitions seen over the last few years”.[20]

In addition to measures focusing on notification requirements, an increasing number of jurisdictions also have the ability to review non-notifiable mergers if certain conditions are met. This is discussed in the next section.

3.3. Alternative approaches

As can be seen from the previous section, even amongst those jurisdictions which have sought to address serial acquisitions, it is clear that there is no agreed ‘best practice’ approach. Further, given that concerns around these strategies seem to be more prevalent in certain jurisdictions and in certain sectors, an ideal ‘one-size-fits-all’ solution is unlikely. As such, the following section outlines some alternative options for seeking to address serial acquisitions, including consideration of their strengths and weakness. As noted at the beginning this chapter, some of these involve new proposed measures specifically targeting the serial acquisition phenomenon, whereas others involve the deployment of existing tools that have a broader focus towards this particular issue. The ease with which these latter measures could be adopted by different jurisdictions will clearly depend on what is available in their current competition toolbox. Some of these alternative approaches are still largely theoretical, whereas others have been, or are being, tested to a limited extent in certain jurisdictions.

These approaches broadly fall into three categories. First, to address the perceived assessment problem, authorities can consider upfront reforms to merger laws to explicitly allow them to assess the cumulative effects of serial acquisition patterns under their substantive test. Next, to address the perceived issue of individual transactions forming part of a serial acquisition falling under authorities’ radars, there are options for expanding the scope of acquisitions that come to the authorities’ attention, including through increasing surveillance of non-notifiable mergers. Finally, there is the potential to use ex-post powers to address harms that have already occurred.

In terms of proposed legislative reforms to explicitly empower authorities to assess and prevent harmful serial acquisitions, various alternative models have been proposed (for details on various reform proposals considered in Australia, for example, see Box 3.2).

One such model is the aggregation model, which enables (or requires) the authority, when assessing a merger, to also consider previous acquisitions by the acquirer over a specified number of years prior as well as their cumulative impact on competition.

This model has both perceived advantages and disadvantages. In its favour, it addresses the issue of serial acquisitions in a direct and targeted manner (that is, it is specifically limited to situations where a firm has grown its market share over time through a series of acquisitions) (Robb, 2014[50]). This provides a level of certainty for business and reduces the risk of broader unintended consequences.

However, this model also raises some conceptual difficulties in terms of analysing, within the framework of a forward-looking competition test, the cumulative competitive effect of a series of transactions that occurred at different times in the past. These difficulties include the fact that markets dynamics change over time and the market definition may not be consistent over the entire period of review (Robb, 2014[50]). It may be difficult to disentangle what changes in the market have occurred a result of the mergers as opposed to other factors.

Another potential drawback is that merger review may become more time consuming and costly for the authority who will need to review information not just about a single acquisition but also potentially a series of past transactions. The appropriate timeframe over which to consider previous transactions would also need to be carefully considered. An overly long timeframe may render the mechanism impractical, but too short a timeframe could lead to firms strategising out their transactions in such a way as to avoid capture. South Africa's regime seeks to address this by allowing the Commission to determine the appropriate timeframe on a case-by-case basis, however this could come at a cost of certainty for businesses.

Box 3.2. The journey towards legislative reform in Australia

Legislative reforms aimed at capturing serial acquisitions have been 'on-again, off-again' Australia's agenda for some time. In September 2008, the Federal Government released a discussion paper seeking comments on two proposed models for tackling serial acquisitions. The first model, the 'aggregation model', would require the Australian authority (the ACCC) to consider all acquisitions that had occurred over a specified period of time and assess their aggregate impact on competition. The second, the 'substantial market power model' (SMP model), would prohibit mergers by firms assessed to have substantial market power that results in any lessening of competition.

Subsequently, in May 2009, a second discussion paper was released showing a clear preference for the SMP model and proposing two further adaptations. The first would prohibit mergers by a firm with existing substantial market power that would 'enhance' that market power. The second involved the same test, but it would only apply to mergers by specific firms or in sectors that had been 'declared' by the relevant government minister.

Ultimately, none of these proposals went ahead and instead, in December 2011, much more modest reforms were passed clarifying that the authority was permitted to consider any market (which could include local, upstream and downstream markets) when assessing the impact of a merger and removing the requirement that the market be 'substantial'. While the explanatory memoranda to the legislation stated that the reforms would help to address some of the concerns about serial acquisitions, it is arguable that they had very limited effect in that regard given that the ACCC still needs to demonstrate that the lessening of competition is substantial (Ayling, 2010[18]).

The issue is back on the Government's radar again following a push by the ACCC for a broad suite of reforms to the Australian merger regime, which includes specific reforms to address serial acquisitions. Specifically, the ACCC wants additional wording in the legislation to clarify that the 'substantial lessening of competition' test includes 'entrenching, materially increasing or materially extending a position of substantial market power'. It also wants the inclusion of an additional 'factor' that the ACCC will be required to consider when assessing a merger, being 'whether the acquisition is part of a series of relevant acquisitions'.[1]

The proposed reforms, which form part of a broader suite of merger reforms being proposed by the ACCC, will be considered as part of a larger review by Australian Government of Australia's competition policy settings.

Note: [1] Speech by Gina Cass-Gottlieb, 'The role of the ACCC and competition in a transitioning economy' to the National Press Club, 12 April 2023, https://www.accc.gov.au/about-us/media/speeches/the-role-of-the-accc-and-competition-in-a-transitioning-economy-address-to-the-national-press-club-2023

Sources:

Ayling, S. (2010[18]), The Calls to Combat Creeping Acquisitions Continue: the Cases for and against Amending Australia's Substantive Merger Test, https://www.uts.edu.au/sites/default/files/law-form-simon-ayling.pdf.

Other models focus on the market power of the acquirer, by prohibiting any acquisitions by firms determined to have 'substantial market power' if the acquisition would further enhance that market power. While this test avoids some of the conceptual difficulties of the aggregation model, it does so by focusing less specifically on the serial acquisition scenario (Robb, 2014[50]) and thus potentially having broader scope.

It has also been criticised as unduly focusing on market structure, rather than the impact on competition (Clarke, 2009[51]), and essentially imposing a 'cap' on acquisitions by significant firms (Ayling, 2010[18]), which may still be a legitimate vehicle for efficient growth. A further argument relates to the potential loss of an 'exit strategy' through acquisition for smaller business (Clarke, 2009[51]), which may in turn deter new entry into the market. This may be more of a concern in some markets, such as digital, where being bought out by a bigger firm is a recognised strategy for start-ups.

The most recent proposal by the ACCC arguably avoids some of the pitfalls of these other prior approaches. As outlined in Box 3.2, this involves the addition of an explicit statement in the existing merger law clarifying that a substantial lessening of competition' test includes 'entrenching, materially increasing or materially extending a position of substantial market power', as well as a requirement that the ACCC consider, when assessing a merger, whether it forms part of a series of acquisitions. While this approach appears more closely aligned to the substantial market power model, the focus of the assessment remains on the acquisition's effect on competition, rather than market structure. However, the proposed reform does not appear to go as far as explicitly requiring the authority to measure the cumulative impact of past transactions on competition (as the aggregation model appears to), and it remains to be seen how, in practice, the authority will otherwise factor serial acquisition patterns into its assessments if the reforms are adopted.

Aside from legislative changes, authorities could improve their awareness of serial acquisition patterns through intelligence gathering. In some jurisdictions, this could be combined with other merger tools such as call-in powers, which are increasingly prevalent and allow authorities to require notification of a merger that does not otherwise trigger notification thresholds if certain conditions are met (or otherwise allow for the review of certain non-notifiable emergers). Jurisdictions with such regimes in place include Brazil, Canada, Chile, Ireland, Japan, Korea, Latvia, Lithuania, Mexico, Norway, Peru, Slovenia and Sweden (for more information on such powers see (OECD, 2022[52])). The ACM has also pointed to call-in powers as a potential avenue for addressing what it perceives to be an enforcement gap surrounding serial acquisitions[21] (the enforcement gap issue is discussed further in section 4).

Some jurisdictions are already utilising such an approach. For example, the Canadian competition authority, which is able to challenge consummated mergers for up to a year, established a specialised intelligence unit in 2019 which aims to identify potentially anti-competitive transactions that fall below notification thresholds, as well to generally increase the authority's understanding about acquisition patterns across various sectors (Bester and Byers, 2020[53]).

The UK, which is one of a small number of jurisdictions to have a voluntary notification regime, is also utilising a specialised mergers intelligence unit to assist it with identifying un-notified, anti-competitive transactions.[22] This unit was responsible for identifying some of the serial acquisitions occurring in the veterinary sector, which the CMA subsequently investigated, resulting in the imposition of remedies, as outlined in Box 2.5.

As is the case for measures targeting notification requirements (outlined previously), even if a transaction forming part of a potentially harmful serial acquisition pattern is identified, the authority will still face the challenge of demonstrating that the particular transaction raises competition concerns in accordance with their substantive test. Despite this, intelligence gathering could deepen the agency's insight into serial acquisition activity, including by helping it to identify sectors where it may be of particular concern. Again, if patterns of harm are identified that cannot be appropriately addressed under the existing merger regime, this may help build a case for further reforms. As an alternative to seeking to pre-empt problematic serial acquisitions, authorities could seek powers enabling them to intervene ex post in a market that has been a focus for serial acquisitions, once it is apparent that competitive harm may have occurred. This could involve undertaking an ex-post inquiry into the competitive impact the acquisitions have had on the market and, where the investigation reveals competitive harms that meet that ex-post mechanism's requisite test, seeking to impose remedies, such as divestitures, to reverse the harm. Depending on the circumstances, this could be done by way of an ex-post enforcement investigation into a particular company or companies, or through a broader market investigation into an industry of concern.

In relation to the former, the US authorities are currently seeking to utilise their ex-post enforcement powers to address previous acquisitions in their actions against both Google and Facebook, alleging illegal monopolisation of the markets for ad tech and personal social networking services, respectively (see section 2.3 for more details). In both cases, the authorities are alleging that the firms' breaches comprised a series of strategic acquisitions coupled with other instances of anti-competitive conduct. As previously outlined, the authorities are seeking significant divestiture remedies in an effort to reverse the harm. The US, however, is currently unique in having the power to investigate past transactions that were previously assessed and cleared by the authorities, and regardless of how much time has passed (OECD, 2022[52]).

The European Court of Justice has also confirmed that EC national competition authorities can review acquisitions by dominant firms under abuse of dominance laws, if those acquisitions are not notifiable under EU or national merger control laws.[23] The Court clarified that it is not sufficient to show that a dominant firm's position has been strengthened as a result of an acquisition, rather, it must be demonstrated that "the degree of dominance thus reached would substantially impede competition, that is to say, that only undertakings whose behaviour depends on the dominant undertaking would remain in the market", which commentators have noted appears to be a more stringent test than what is required under EU merger control laws (Besen, 2023[54]). As such, it would likely still be very difficult to demonstrate that any single acquisition in isolation forming part of a serial acquisition strategy meets this test. For more information on the use of structural remedies in antitrust investigations, including abuse of dominance cases, see (OECD, 2022[52]).

In respect of market investigations, the UK's broad-ranging suite of powers illustrate how these could be used to address serial acquisitions. The CMA can initiate a market study if it suspects a market is not functioning optimally. If a market study indicates competitive concerns and these are not resolved through voluntary remedies agreed with market participants, the CMA can initiate a market investigation[24] to determine whether there is an 'adverse effect on competition in the market', and if such an effect is found, it has broad ranging powers to impose remedies, including divestitures.

The CMA (and its predecessor) has in fact used these powers to require significant structural changes in certain markets, including the airport, and cement and concrete sectors. While these studies were not specifically focused on the impact of serial acquisition activity, these powers could be utilised to investigate markets that have become consolidated through such activity, and if harms are identified, divestiture remedies could be used to address them. Another market study in the UK led to a specialised notification regime for the grocery retail sector, as outlined in Box 3.1.

In Australia, concerns about serial acquisitions in the grocery retail sector, and consolidation of the market into a duopoly, were part of the impetus for legislative reform proposals targeting serial acquisitions (outlined in Box 3.2). These concerns culminated in the government directing the ACCC to undertake a market inquiry into the sector. The inquiry final report, published in 2008, ultimately found that the sector was 'workably competitive' and that serial acquisitions were not a significant current concern, however the ACCC maintained its support for a specific law targeting serial acquisitions, finding that 'particular structural features' of the grocery retail sector made it a potential sector of concern for serial acquisitions in the future. It also noted that Australia's existing merger law would be unlikely to be able to deal with serial acquisitions (ACCC, 2008[55]).

While most jurisdictions, even those with market studies powers, do not have the ability to impose broad ranging remedies equivalent to the CMA's, in theory such functions, if bolstered, could be used to address concerns in markets where an authority considers that serial acquisitions have resulted in anti-competitive markets.

Such ex-post approaches have the benefit of minimising type 1 errors. However, they increase the complexity of remedying the competitive harm, and in some cases it may not be feasible at all. For example, in its case against Google the DoJ is seeking divestitures of Google’s publisher ad server and ad exchange, however it remains to be seen how such a remedy, which would involve disentangling Google’s longstanding and integrated ad tech operations, could be implemented in practice. Similarly, Meta Platforms has been increasingly integrating the functionality of Facebook, Instagram and WhatsApp, which may impact the implementation of any divestiture remedies obtained by the FTC. The process of proving competitive harm and implementing remedies may also be very lengthy, and in the meantime the market may continue to operate anti-competitively, to the detriment of consumers and other market participants.

In conclusion, for jurisdictions that consider that there is currently an enforcement gap in this area (an issue that is discussed further in section 4) or want more information to help them determine this, there are a range of potential options to consider. As noted above, it is likely that the approach or approaches best suited to particular jurisdictions will differ, and those ultimately favoured will depend on their existing competition toolbox, as well as their view of the scope, scale and speed of any harm that is potentially occurring, which is not being captured by their existing framework.

4 Is there an enforcement gap?

Previous sections have shown serial acquisitions' potential harmful effects for competition. In particular, there seems to be a disconnect between the trend towards consolidation in certain sectors and the level of merger control oversight over serial acquisitions. This is linked to two main factors. First, the nature of the acquisition strategy, based on a series of transactions which, in isolation, seldom meet the notification thresholds and, even in those cases, rarely raise competition concerns sufficient to meet the substantive test. Second, the fact that very few jurisdictions have provisions designed to allow authorities to effectively pursue serial acquisitions.

To date there is no agreement in the antitrust community that any particular measures, including those outlined in the previous sections, should be adopted more consistently across jurisdictions, or that the limited enforcement against serial acquisitions is a problem for competition. However, competition authorities' limited means to intervene against roll-ups, as well as the steady increase in concentration that has resulted in a number of industries, could indicate that a more thorough consideration of these strategies might be needed.

As previously highlighted, certain authorities have expressed intentions to pursue stronger enforcement, including against PE roll-ups, due to the perceived severity of this problem. In the same remarks noted in the previous section, ACM Chairman Martjin Snoep identified horizontal consolidation involving a dominant company, such as roll-up strategies often used by PE buyers, which often fall below merger thresholds, as one of the four current main gaps in enforcement. Similarly, as previously mentioned, the ACCC considers that further elucidation of the SLC test is needed to properly account for the dynamics whereby a position of market power is increased incrementally over time, including through serial acquisitions.[25]

In South Africa, in the context of the merger between Edgars and Rapid Dawn in 2005,[26] the Competition Tribunal started to acknowledge the problem of serial acquisitions (see also Box 4.1), which was then addressed in 2019 with amendments to the competition act. In particular, it noted the increase in the number of acquisitions in which large competitors buy relatively small players, that claim to be financially constrained, leading to a "slow but steady increase in concentration". The Tribunal concluded that "cognizance should be taken of this creeping level of marginal acquisitions and the effect this might have on competition in the retail sector" (Robb, 2014[50]). This might be particularly relevant in those jurisdictions that do not have the powers to address ex-post issues of anti-competitive market structure, for example by conducting market investigations and imposing remedies as outlined in the previous chapter.

Box 4.1. Serial acquisitions in South Africa

Two further mergers assessed by the competition authority in South Africa can help exemplify the difficulties of capturing harm from a serial acquisition strategy under most merger control frameworks. In the South African context, these mergers were reviewed before the 2019 reforms, which better endowed the competition authority with the ability to address these type of cases (as outlined in section 3.1).

In the acquisition by Phodiclinics of New Protector Group,[1] one of the stakeholders intervening in the merger hearing contended that the hospital industry had been experiencing serial acquisitions by the three major hospital groups, and that the cumulative effect was a high degree of concentration and price increases in the private hospital market. Despite sharing this concern, the Tribunal found that there was no evidence that the specific transaction under review, for which any harm would be outweighed by the failing firm factor, would, in itself, have a significant effect on competition (Robb, 2014[50]).

In 2012, in the context of Media24's acquisition of The Natal Witness,**[2]** the Competition Tribunal concluded that the relevant markets under consideration, i.e.**,** publishing and printing, experienced increasing levels of concentration due to large publishing companies', such as Media24, serial acquisitions of small independent publishers of community newspapers. While this particular transaction was ultimately cleared, to address the issue of these small transactions escaping merger control, being non-notifiable due to their size, the Tribunal required Media 24 to "notify all small mergers relating to small independent publishers or firms which provide printing services to small independent publishers" (Robb, 2014[59]). However, the substantive assessment of such further acquisitions would still require the Tribunal to find a substantial impact on competition linked to the individual transaction.

Notes:
[1] Case number: 122/LM/Dec05, Microsoft Word - Reasons 26 February non confidential.doc (comptrib.co.za)
[2] Case number: 15/LM/Jun11 S:\Cases\15.LM.Mar11 Media24 Natal 012179\Official docs\Main Matter 012179\20120705144828991.tif (comptrib.co.za)
Source: Robb, G. (2014[50]), Creeping mergers - should we be concerned? A case study of hospital mergers in South Africa, http://www.compcom.co.za/wp-content/uploads/2014/09/Creeping-mergers-conference-paper-Final.pdf.

The divergence amongst merger control frameworks' treatment of serial acquisitions perhaps reflects more broadly dissenting views on the need to regulate this conduct, or at least, whether it is of sufficient concern to be considered as a reform priority. In particular, a number of arguments rejecting the notion of an enforcement gap in this area have been put forward in different contexts and can be more or less applicable depending on the specific mechanisms and scope of the proposed reforms.

A first argument reasons that there is a need to gather more evidence to clearly demonstrate concrete harm from roll-ups before intervening with reforms, as the perception of a consolidation trend might not reflect the true level of competition in the industry (see also (Clarke, 2009[51])). One such example can be seen in the findings of the ACCC's 2008 inquiry in the groceries sector in Australia, discussed in the previous section, which, despite considerable concern about industry consolidation from many observers in the lead up to the report, determined that serial acquisitions were not a current concern (ACCC, 2008[55]). Similarly, the Israeli competition authority conducted an ex-post evaluation[27] of its decisions to approve, between 2017 and 2019, nine mergers between Holmes Place and various other gyms. Results showed that the approved mergers did not lead to higher prices or lower quality.

From this perspective, regulatory reforms could be viewed as premature and/or overreach if a market failure has not been clearly identified. Moreover, the fact that most serial acquisitions fall below commonly used notification thresholds or, when they are assessed, do not raise competition concerns to a level that meets the substantive tests, in itself could indicate that they are indeed not harmful, and not necessarily the presence of type 2 errors.

A second group of arguments contends that serial acquisition strategies, often used to achieve economies of scale, deliver efficiencies that would not materialise otherwise, and the current merger control frameworks are, generally, already flexible enough to account for the potential competitive harm when needed. (Robb, 2014[50]) highlights how according to this view, new provisions to limit serial acquisitions would constitute a "de facto market cap on firms which would prevent growth and efficiency". This argument is also behind the "national champions" thesis described in section 2.1 as one of the possible drivers for serial acquisition strategies.

Moreover, some consider that stronger enforcement against roll-ups risks reducing market entry in two possible ways: reducing incentives for international entry, if the new entrants know their ability to expand through acquisitions in that industry is potentially limited, and reducing incentives for new entry by small players, if exit through acquisition is a desired but less viable strategy (as mentioned in section 3.3, this is likely to be less the case in traditional sectors). The argument about deterrence of international entry has been often made in relation to the "substantial market power" model of reform, described in the previous section (see also (Ayling, 2010[18])), but to a lesser extent it could also apply to other reforms aiming to limit acquisitions by large players.

Overall, due to the limited experience of jurisdictions seeking to specially address serial acquisitions, neither the potential upsides from increased enforcement nor the potential downsides, which to a certain extent do not differ from classic arguments against merger control more generally, have been evaluated in practice. However, the previously described discrepancy between the core source of competitive harm, which lies in the cumulative effect of the series of transactions, and the legal framework used for the assessment, in which each acquisition is viewed as self-standing and can only be assessed as such, might indicate that the risk of type 2 errors could be higher than in traditional mergers. This could also be supported by the evidence of increased concentration in certain sectors, prone to roll-ups, as well as some initial research, cited in the previous chapter, on the effects of these strategies on price and quality.

Ex-post evaluations of serial acquisitions, as well as market studies in consolidated sectors that have experienced roll-ups, could help lead the way towards a better understanding of their effects as well as a reconsideration of current merger control frameworks and their ability to capture such strategies. Moreover, especially in light of the perceived higher likelihood of type 2 errors in the context of serial acquisitions, considerations around the cost of type 1 and type 2 errors and the willingness to more readily accept one type of error over the other could help inform the best way forward for legislators.

5 Conclusion

As outlined in this paper, serial acquisition strategies are not homogenous, and they diverge in some important respects. First, they vary in terms of the actors driving them and their motivations, be it strategic buyers, who are generally existing market participants, or financial buyers, such as PE firms. Next, serial acquisitions appear to be leaving a disproportionate footprint in particular sectors and jurisdictions, or at least they appear more prominently on the radar of certain competition authorities. Further, while traditionally serial acquisitions have involved the roll-up of horizontal competitors, often in local markets, they are taking on different forms in digital markets, as platforms seek to expand and entrench their ecosystems through the acquisitions of small firms offering complementary services.

The discussion around potential enforcement of serial acquisitions is equally nuanced, including the questions of whether they are causing competitive harms, and if so, whether additional measures are needed to address them and what they may look like. In particular, there are two junctures at which potential harms from serial acquisitions could go unaddressed, and the extent to which each is relevant will depend on the features of individual merger regimes. First, individual transactions forming part of a serial acquisition strategy may fall below notification thresholds, such that they are never brought to the attention of the authority. Second, even transactions that are assessed, may not, in isolation, have a sufficient impact on competition to raise concerns to the level required under the substantive test, even though the broader serial acquisition strategy may in fact cause significant harm. Indeed, while the potential harms from serial acquisitions are not dissimilar to those arising from traditional mergers, it might emerge only over time following several successive transactions.

While some jurisdictions have voiced concerns that there may be an enforcement gap, it does not appear that there is consensus on this point, nor that there is an ideal ‘one-size-fits-all’ approach for addressing the issue. A number of measures have been used or proposed by different authorities to address the two concerns outlined above, and they vary in terms of the extent to which they allow the authority to increase their level of scrutiny over, and intervention into, serial acquisitions specifically.

For example, focused intelligence gathering could be a starting point for assessing if and to what extent serial acquisitions are occurring, including whether they are more prevalent in specific sectors, as well as their potential implications for competition. The outcome of this may guide what, if any, further action might be needed. At the other end of the spectrum, seeking upfront changes to the merger regime to explicitly allow for the assessment of serial acquisitions (such as those implemented by South Africa) is the most direct route to addressing identified competitive harms. In the middle, there are various options, either general or sector-specific, for expanding the scope of transactions that must be notified so there is more opportunity for authorities to consider them, although they may face obstacles at the assessment stage.

There are divergent views around whether increasing enforcement against serial acquisitions is warranted, and whether, or to what extent, it is justified may indeed differ between jurisdictions. As such, in determining the best way forward, authorities may take into account a number of factors, including the existing structure of their merger regime, but also their broader competition law regime. At the outset, there is of course the question of whether the existing regime already allows for the assessment of serial acquisitions, which may or may not have been tested.

Other considerations may include existing merger notification threshold settings, whether their authority has call-in powers, the strength of any market study powers, and their ability to reconsider consummated mergers, including using ex-post enforcement powers. Also relevant will be the authority's current level of understanding about the prevalence of serial acquisitions within their jurisdiction and whether they are likely to be causing competitive harms.

In closing, serial acquisitions are not new, but the increased vigour with which these strategies have been adopted in recent years, by PE firms in particular, has reignited concerns by some regulators about their potential to cause competitive harms, and to do so while evading scrutiny. Further ex-post reviews of serial acquisitions patterns and/or studies into markets where consolidation is playing out and/or have been highlighted as a particular target for serial acquirers (for example, healthcare, veterinary care and digital) would increase the evidence base needed to evaluate such concerns. By consolidating the existing understanding around serial acquisitions, this paper aims to provide a jumping off point for such work.

Endnotes

[1] The acquisition of a smaller-sized target by one of the PE firm's existing platform companies.

[2] Hart-Scott-Rodino Antitrust Improvement Act.

[3] https://www.natlawreview.com/article/hot-antitrust-enforcement-climate-reaches-private-equity

[4] See for example paragraphs 11-14 of the EC's Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation of the Control of Concentrations Between Undertakings, https://eurlex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52008XC1018%2803%29&qid=1675871571943

[5] See, for example, Speech by UA Acting Deputy Assistant Attorney General Jeffrey M. Wilder at the Hal White Antitrust Conference, 10 June 2019, https://www.justice.gov/opa/speech/acting-deputy-assistant-attorney-general-jeffrey-m-wilder-delivers-remarks-hal-white

[6] Google, Amazon, Facebook, Apple and Microsoft

[7] The CMA's prohibition of the Meta/Giphy merger in 2022

[8] Section 13A of the South African Competition Act No.89 of 1998

[9] South Africa Competition Commission, Guidelines on Small Merger Notification, https://www.compcom.co.za/wp-content/uploads/2022/09/FINAL-GUIDELINES-ON-SMALL-MERGER-NOTIFICATION_.pdf. The Commission must be notified of a small merger if the acquirer's turnover or asset value alone meets the larger merger combined turnover/asset value threshold **and** the consideration for the target exceeds the target turnover/asset threshold for large mergers. Or alternatively, if the consideration for the acquisition of part of the target is less than the target turnover/asset threshold for large mergers but effectively values the target firm at above target turnover/asset threshold for large mergers.

[10] Bundeskartellamt, Guidance on Substantive Merger Control, 29 March 2012, https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidance%20-%20Substantive%20Merger%20Control.pdf?__blob=publicationFile&v=6, paragraph 16

[11] Bundesgerichtshof, decision of 11.11.2008, WuW/E DE-R 2451, 2461 – E.ON/Stadtwerke Eschwege, para. 63

[12] Administrative Council for Economic Defence, Guide for Horizontal Merger Review, paragraph 2.4.2, https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/GUIDE%20FOR%20HORIZONTAL%20MERGER%20REVIEW.pdf

[13] For example, Brown Shoe Co, Inc v United States, 370 U.S. 294 (1962) and United States v Von's Grocery Co., 384 U.S. 270(1966)

[14] See for example the speech by DoJ Deputy Assistant Attorney General Andrew Forman at they ABA's Antitrust in Healthcare conference, 3 June 2022, https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-delivers-keynote-abas-antitrust

[15] Draft FTC-DoJ Merger Guidelines, guideline 9, https://www.ftc.gov/legal-library/browse/ftc-doj-merger-guidelines-draft-public-comment

[16] Draft FTC-DoJ Merger Guidelines, guideline 8, https://www.ftc.gov/legal-library/browse/ftc-doj-merger-guidelines-draft-public-comment

[17] FTC press release, 27 June 2023, https://www.ftc.gov/news-events/news/press-releases/2023/06/ftc-doj-propose-changes-hsr-form-more-effective-efficient-merger-review

[18] Switzerland Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, article 9(4)

[19] German Competition Act (GWB), section 39a.

[20] CADE decision, https://sei.cade.gov.br/sei/modulos/pesquisa/md_pesq_documento_consulta_externa.php?DZ2uWeaYicbuRZEFhBt-n3BfPLlu9u7akQAh8mpB9yM_acbyC2moaY3qs0OmpPIx6tXTtTWMOYunCH_M3RVK-JXxJWxJSasRcunbvqgONw5LIkkoutG6h7q9z0fg5P7W

[21] Speech by Martin Snoep, Plugging gaps' in Antitrust Enforcement, 2 March 2023, https://www.acm.nl/en/publications/speech-martijn-snoep-plugging-gaps-antitrust-enforcement

[22] MLex, Private Equity Dealmaking Draws Eye of UK, US Antitrust Enforcers, 27 March 2023, https://content.mlex.com/#/content/1459231?referrer=search_linkclick

[23] ECJ case C-449/21, 16 March 2023, https://curia.europa.eu/juris/document/document.jsf?text=&docid=271327&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2191011

[24] Enterprise Act 2002, section 131

[25] See also speech by Gina Cass-Gottlieb, 'The role of the ACCC and competition in a transitioning economy' to the National Press Club, 12 April 2023, https://www.accc.gov.au/about-us/media/speeches/the-role-of-the-accc-and-competition-in-a-transitioning-economy-address-to-the-national-press-club-2023

[26] Judgment of South Africa Competition Tribunal, 4 July 2005, http://www.saflii.org/za/cases/ZACT/2005/45.html

[27] Retrospective examination of the Competition Authority's decisions for 2020, https://www.gov.il/BlobFolder/news/retrospective2021/he/publications_%D7%A8%D7%98%D7%A8%D7%95%D7%A1%D7%A4%D7%A7%D7%98%D7%99%D7%91%D7%94%202021.pdf

References

ACCC (2008), *Report of the ACCC inquiry into the competitveness of retail prices for standard groceries*, https://www.accc.gov.au/about-us/publications/report-of-the-accc-inquiry-into-the-competitiveness-of-retail-prices-for-standard-groceries. [55]

Alexander, L. et al. (2022), "Private Equity's Entry into Healthcare Reveals Gaps in Competition Policy", *CPI Antritrust Chronicle*, https://www.pymnts.com/cpi_posts/private-equitys-entry-into-healthcare-reveals-gaps-in-competition-policy/. [24]

Ayling, S. (2010), *The Calls to Combat Creeping Acquisitions Continue: the Cases for and against Amending Australia's Substantive Merger Test*, https://www.uts.edu.au/sites/default/files/law-form-simon-ayling.pdf. [18]

Bansraj, D., H. Smit and V. Volosovych (2019), "Can Private Equity Act as Strategic Buyers? Evidence from Serial (Buy-and-Build) Strategies", https://efmaefm.org/0EFMAMEETINGS/EFMA%20ANNUAL%20MEETINGS/2019-Azores/papers/EFMA2019_0276_fullpaper.pdf. [8]

BeKey (2019), *Healthcare in the USA vs Europe: Differences, Challenges, Trends*, https://bekey.io/blog/healthcare-systems-in-the-usa-and-europe-differences-challenges-trends. [28]

Besen, M. (2023), *The ECJ's Towercast Judgment: Mergers can be challeneged as an Abuse of Dominance*, https://www.cliffordchance.com/briefings/2023/03/the-ecj-s-towercast-judgment--mergers-can-be-challenged-as-an-ab.html (accessed on 14 September 2023). [54]

Bester, K. and J. Byers (2020), "Emerging Questions about Merger Notification and the Canadian Response", *Journal of Antitrust Enforcement*, Vol. 8/1, pp. 1-9, https://academic.oup.com/antitrust/article/8/1/1/5739197?rss=1. [53]

Bezemer, B. (2021), *How Luxottica Monopolized the Eyewear Industry*, https://everydayonlinemarketing.com/marketing-case-study/how-luxottica-monopolized-the-eyewear-industry/. [13]

Blamont, M. and R. Bartunek (2018), "EU, U.S clear Essilor's 48 billion euro merger with Luxottica", *Reuters*, https://www.reuters.com/article/uk-essilor-results-idUKKCN1GD3VD. [11]

Business Council of Australia (2008), *Submission to the Treasury - Creeping Acquistions Discussion Paper*, https://www.bca.com.au/submission-to-the-treasury-creeping-acquisitions-discussion-paper (accessed on 6 September 2023). [60]

Carroll, J., M. McKinnon and S. Ranganathan (2022), "Private Equity & Healthcase: Antitrust Enforcement in 2023 - PE Roll-Ups in the Cross Hairs", *Lexology*, https://www.lexology.com/library/detail.aspx?g=5933bdf3-06bb-4bc7-8a31-8eb8bf4a949a. [26]

Chopra, R. (2020), *Federal Trade Commission, Statement of Commissioner Rohit Chopra*, https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf (accessed on 25 July 2023). [10]

Clarke, J. (2009), *Submission on Commonwealth Government Discussion Paper - Creeping Acquistions - The Way Forward*, https://static1.squarespace.com/static/5da3d2a597390948a4b98cb8/t/5db38d26f7a6c635a12c57ad/1572048167883/JC-2009creepingacquisitions.pdf. [51]

CPI (2023), "Study Shows Private Equity Acquisitions Of Physician Practices Result In Price Hikes", https://www.competitionpolicyinternational.com/study-shows-private-equity-acquisitions-of-physician-practices-result-in-price-hikes/. [31]

Davey, A. (2003), "Business and Mergers Law in Australia: Never the Twain Shall Meet", *Journal of Economic and Social Policy*, Vol. 8/1, https://search.informit.org/doi/epdf/10.3316/ielapa.200401392. [17]

Doan, M. and P. Sercu (2021), "merging One's Way to the Top: AB Inbev versus Heineken", *Journal of Wine Economics*, Vol. 16/1, pp. 32-55, https://www.cambridge.org/core/journals/journal-of-wine-economics/article/merging-ones-way-to-the-top-ab-inbev-versus-heineken/65421AE3270AE23417ED9504F4BD5A9B. [6]

Ernst&Young (2021), *How mergers and acquisitions can create value, defying M&A skeptics*, https://www.ey.com/en_us/strategy/how-mergers-and-acquisitions-can-create-value-defying-m-and-a-skeptics (accessed on 31 July 2023). [9]

Federal Trade Commission (2021), *Non-HSR Reported Acquistions by Select Technology Platforms, 2010-2019: An FTC Study*, https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf. [47]

Filippe, M. (2020), "With acqusitions, Magalu builds an ecosystems similar to Alibaba and Amazon", *Exame*, https://exame.com/negocios/com-aquisicoes-magalu-monta-ecossistema-estilo-alibaba-e-amazon/. [43]

Freedman, R. (2022), "Private equity in crosshairs under aggressive FTC antitrust posture", *LegalDive*, https://www.legaldive.com/news/private-equity-ftc-antitrust-enforcement-posture/637640/ (accessed on 26 July 2023). [21]

Fullerton, A. (2020), *Three Ingredients for a Successful Roll-up Strategy*, https://merger.com/key-ingredients-successful-roll-up-strategy/. [7]

Goodman, A. (2014), "There's more to Ray-Ban and Oakley than meets the eye", *Forbes*, https://www.forbes.com/sites/agoodman/2014/07/16/theres-more-to-ray-ban-and-oakley-than-meets-the-eye/?sh=4333534822cd. [16]

Gregory, A. (2023), "Private Equity Owndership Of Health Services Can Worsen Care, Review Says", *The Guardian*, https://www.theguardian.com/business/2023/jul/19/private-equity-ownership-of-health-services-care-review-higher-costs. [57]

Gupta, A. et al. (2021), "Does Private Equity Investment in Healthcare Benefit Patients? Evidence from Nursing Homes", *Becker Friedman Institute for Economics Working Paper*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3537612. [33]

Haverstock, E. (2019), *In the US middle market, soaring valuations beget an add-on frenzy*, https://pitchbook.com/news/articles/in-the-us-middle-market-soaring-valuations-beget-an-add-on-frenzy (accessed on 25 July 2023). [20]

Hearn, D. et al. (2022), *The Roll-Up Economy: The Business of Consolidating Industries with Serial Acquisitions*, https://www.economicliberties.us/our-work/the-roll-up-economy/. [1]

Hearn, D. and R. Shaban (2022), *The hidden trend reshaping and hurting the economy: serial acquisitions*, https://policyoptions.irpp.org/magazines/november-2022/the-hidden-trend-reshaping-and-hurting-the-economy-serial-acquisitions/. [30]

Kattan, I., L. Breed and L. Battaglia (2022), *Private equity In health care: In the antitrust crosshairs*, https://www.engage.hoganlovells.com/knowledgeservices/news/private-equity-in-health-care-in-the-antitrust-crosshairs/. [49]

Kelly, R. (2021), "Pandemic hastens ongoing trend in vetiniary consolidation", *Vin News Service*, https://news.vin.com/default.aspx?pid=210&Id=10652228. [39]

Khan, L. (2022), *Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya In the Matter of JAB Consumer Fund/SAGE Veterinary Partners Commission File No. 2110140*, https://www.ftc.gov/system/files/ftc_gov/pdf/2022.06.13%20-%20Statement%20of%20Chair%20Lina%20M.%20Khan%20Regarding%20NVA-Sage%20-%20new.pdf (accessed on 28 August 2023). [36]

Khan, L. (2021), *Memorandum on Vision and Priorities for the FTC*, https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf (accessed on 31 July 2023). [56]

Knight, S. (2018), "The spectacular power of Big Lens", *The Guardian*, https://www.theguardian.com/news/2018/may/10/the-invisible-power-of-big-glasses-eyewear-industry-essilor-luxottica. [12]

Komninos, A. (2022), "The Digital Markets Act (DMA) Goes Live", *White & Case Insight Alert*, https://www.whitecase.com/insight-alert/digital-markets-act-dma-goes-live. [48]

Kwoka, J. and T. Valletti (2020), "Scrambled Eggs and Paralyzed Policy: Breaking up Consumated Mergers and Dominant Firems", *SSRN*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3736613. [46]

Lazarus, D. (2019), "How badly are we being ripped off on eyewear? Former industry execs tell all", *Los Angeles Times*, https://www.latimes.com/business/lazarus/la-fi-lazarus-glasses-lenscrafters-luxottica-monopoly-20190305-story.html. [14]

Lazarus, D. (2019), "Why are glasses so expensive? The eyewear industry prefers to keep that blurry", *Los Angeles Times*, https://www.latimes.com/business/lazarus/la-fi-lazarus-why-are-eyeglasses-so-expensive-20190122-story.html. [15]

Legance (2023), *The Italian competition authority's new powers concerning mergers below the threshold*, https://www.legance.com/the-italian-competition-authoritys-new-powers-concerning-mergers-below-the-threshold/. [61]

Lownie, K. (2000), *The Pac-Man strategy: roll-up patterns and processes in three industries*, https://dspace.mit.edu/handle/1721.1/9219. [4]

MacArthur, H. et al. (2019), *Buy-and-Build: A Powerful PE Strategy, but Hard to Pull Off*, https://www.bain.com/insights/buy-and-build-global-private-equity-report-2019/. [19]

Mehta, V., M. Gerking and D. Grothouse (2022), *The Vampire Diaries: Antitrust scrutiny intensifies around private equity*, Competition Policy International, https://www.competitionpolicyinternational.com/wp-content/uploads/2022/10/2-THE-VAMPIRE-DIARIES-ANTITRUST-SCRUTINY-INTENSIFIES-AROUND-PRIVATE-EQUITY-Vishal-Mehta-Megan-E-Gerking-David-E-Grothouse.pdf. [2]

Motta, G. et al. (2022), *Antitrust Enforcers Intensify Scrutiny of Private Equity Deals*, Competition Policy International, https://www.pymnts.com/cpi_category/winter-2022-october-volume-2/. [37]

OECD (2023), *Theories of Harm for Digital Mergers*, https://www.oecd.org/competition/theories-of-harm-for-digital-mergers.htm. [41]

OECD (2022), *Distentangling Consummated Mergers: Experiences and Challenges*, https://www.oecd.org/daf/competition/disentangling-consummated-mergers-experiences-and-challenges.htm. [52]

OECD (2022), "OECD Handbook on Competition Policy in the Digital Age", https://www.oecd.org/daf/competition-policy-in-the-digital-age/. [59]

OECD (2020), *Competion Economies of Digital Ecosystems*, https://one.oecd.org/document/DAF/COMP/WD(2020)91/en/pdf. [40]

OECD (2020), *Start-ups, Killer Acquistions and Merger Control*, https://www.oecd.org/competition/start-ups-killer-acquisitions-and-merger-control.htm. [44]

OECD (2017), *Common ownership by institutional investors and its impact on competition*, https://www.oecd.org/daf/competition/common-ownership-and-its-impact-on-competition.htm. [34]

OECD (2011), *Economic Evidence in Merger Analysis - Contribution from Chile*, https://www.oecd.org/daf/competition/EconomicEvidenceInMergerAnalysis2011.pdf. [29]

OECD (2008), *Antitrust Issues Involving Minority Shareholdings*, https://www.oecd.org/daf/competition/41774055.pdf. [35]

Parker, G., G. Petropoulos and M. Van Alstyne (2021), *Platform Mergers and Antitrust*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3763513. [45]

PitchBook (2022), *US PE Breakdown 2022 Annual*, https://pitchbook.com/news/reports/2022-annual-us-pe-breakdown#:~:text=US%20PE%20found%20ways%20to,collided%20with%20higher%20interest%20rates. [22]

PitchBook (2021), *Exploring Trends in Add-On Acquisitions*, https://pitchbook.com/news/reports/q2-2020-pitchbook-analyst-note-exploring-trends-in-add-on-acquisitions. [3]

Pitchbook (2022), *Healthcare Services Report Q4 2022*, https://pitchbook.com/news/reports/q4-2022-healthcare-services-report. [27]

Pitchbook (2021), *US PE Breakdown 2021 Annual*, https://files.pitchbook.com/website/files/pdf/2021_Annual_US_PE_Breakdown.pdf. [58]

Robb, G. (2014), *Creeping mergers - should we be concerned? A case study of hospital mergers in South Africa*, http://www.compcom.co.za/wp-content/uploads/2014/09/Creeping-mergers-conference-paper-Final.pdf. [50]

Schwartz, K. et al. (2023), "Private Equity and Competition—Comparing U.S. Agency Views to Recent Policy and Empirical Evidence", *Antitrust Magazine Online* April, https://www.skadden.com/-/media/files/publications/2023/04/private_equity_and_competition_comparing_us_agency_views_to_recent_policy_and_empirical_evidence.pdf?rev=2c1ff11c7354469c966d3d939cc13afb. [38]

Smit, H. and T. Moraitis (2010), "Serial Acquisition Options", *Long Range Planning*, Vol. 43/1, pp. 85-103, https://www.sciencedirect.com/science/article/pii/S0024630109000909. [5]

Stevenson, D. (2023), *PE Drives Europe's Healthcare Consolidation*, https://pitchbook.com/news/articles/private-equity-European-healthcare-services-deals. [23]

The BMJ (2023), *Evaluating trends in private equity ownership and impacts on health outcomes, costs, and quality: systematic review*, https://www.bmj.com/content/382/bmj-2023-075244. [25]

Tzanaki, A. (2022), "Antitrust increasingly long arm: (minority) private equity investors beware", *CPI Antitrust Chronicle* October, https://deliverypdf.ssrn.com/delivery.php?ID=491127091069069004027090103077030026050022003031066092066127096071088079018114029085031117013039017027026064068112114002099065016071057082007066112114115096000090096095075052097082005126070108117094002101031091. [32]

Zingales, N. and B. Renzetti (2022), "Digital Platform Ecosystems and Conglomerate Mergers: A Review of the Brazilian Experience", *World Competition*, Vol. 45/4, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4264806. [42]

www.oecd.org/competition