U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

January 19, 2024

Competition Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600
CompetitionTaskforce@treasury.gov.au

The U.S. Chamber is the largest business advocacy organization in the world, operating in over 50 countries to promote free enterprise and advance American trade and investment globally, representing companies of every size and from every sector. The Chamber's Australia Working Group promotes the bilateral economic relationship via high-level meetings, briefings, and other events, while fostering a policy dialogue aimed at the removal of barriers to trade and investment and enhancing U.S.- Australia trade.

The Chamber is also a leading business voice on international competition policy. We support the International Competition Network and its principles of non-discrimination and procedural due process for all competitors in all jurisdictions. We regularly engage with competition agencies and policymakers around the globe on best practices and sound policy frameworks to promote trade, support economic growth, and foster innovation. Moreover, the Chamber is at the forefront of shaping digital economy policies globally, including data privacy, cross-border data flows, cybersecurity, digital trade, artificial intelligence, and e-commerce.

The Chamber is pleased to offer comments on the Merger Reform consultation. We support the government's assessment that mergers "are important for the efficient functioning of the economy." As the government notes, "[m]ost mergers do not raise competition concerns" and instead "can provide a way for firms to achieve economies of scale and scope, diversify risk and exit businesses." Mergers also "can enhance efficiency and consumer welfare."

Keeping in mind these principles, we offer the following points.

Australia's Merger Review Regime Is Sound

Competition law should promote the welfare of the consumer, rather than individual competitors, and the consumer's interests in terms of price, quality, and other competitive factors. Such a policy relies on competitive forces to police the market, avoids picking winners and losers, and acts only to ensure that the competitive process is benefitting consumers via such objective metrics as low prices, high output, quality products, and innovation of new products.

Prior to considering changes to its merger review regime, the Chamber encourages Australia to study and identify both its competitive concerns and assess the depth of any shortcomings in its current laws that cannot address those concerns. In terms of competitive concerns, the dynamism and pace of change in many markets, including digital ones, are all reasons to *maintain* the current high standards for governmental merger review. Dynamic markets are a sign of healthy competition, not something for government to manage competitive outcomes. Dynamic markets are very likely to adjust on their own, without any involvement from the government, whereas government intervention, including pre-approval requirements, actually may cement the status quo instead of allowing for these dynamic markets to evolve. The last two years alone have seen substantial changes across every economy. New companies are rising to challenge market leaders, and market leaders are seeing erosion of their market shares and market capitalizations. Legacy companies are investing heavily in digital tools to compete more effectively. Excessive governmental involvement is more likely to harm, rather than help, competition.

Moreover, Australia already has numerous enforcement tools to address any genuine concerns, including enforcement actions to unwind consummated mergers. Australia should, of course, continue to enforce its existing competition laws in an even-handed manner across the economy, but should hesitate before affording itself extraordinary new powers that would shift the burden of proof in merger cases or downgrade the protections offered by the court system.

Accordingly, the available evidence does not support the need for dramatic changes to Australia's merger review processes. The consultation rests on the premise that "increasing market concentration" has weakened the intensity of competition and reduced productivity. This premise is at best dubious, and at worst outright false. The government acknowledges that "there is a lack of comprehensive statistical evidence demonstrating the link between the merger control regime, industry concentration and market outcomes in Australia."

Instead, recent international data refutes the overconcentration narrative. Although the consultation cites several studies from the United States, the most recent data and studies have debunked the notion that America's economy has become overconcentrated. In an exhaustive study of all available U.S. government census data from the past two decades, including data that became available only recently, economists found that, since 2002, U.S. economic concentration has remained flat.[1] In fact, since 2007 in both the manufacturing sector and the broader economy, the economy became *less* concentrated.[2] Another study, from 2021, found that "just 4 percent of U.S. industries are highly concentrated, and the share of industries with low levels of concentration grew by around 25 percent from 2002 to 2017."[3]

[1] See Klovers and Kulick, *Is Concentration Actually Increasing, or are We Just Defining Markets More Narrowly*? (June 1, 2022). CPI North America Column 2022, at https://ssrn.com/abstract=4344251.
[2] See U.S. Chamber, *Industrial Concentration in the U.S. is Declining, Not Increasing* (Mar. 9, 2022), at https://www.uschamber.com/finance/antitrust/u-s-chamber-study-industrial-concentration-in-the-u-s-economy-is-declining-not-increasing.
[3] See Atkinson and Lage de Sousa, *No, Monopoly Has Not Grown* (June 7, 2021), at https://itif.org/publications/2021/06/07/just-4-percent-us-industries-are-highly-concentrated-itif-finds-analysis-new/.

Further, rising concentration does not, by itself, suggest a lack of competition. According to a U.S. commission, economic research finds procompetitive reasons to explain highly concentrated markets, namely, "that the most efficient firms were winning the competitive struggle and thereby achieving high market shares."[4] Indeed, one study shows that rising industry concentration often correlates with higher levels of economic output, more jobs, and higher wages. Finally, as the government surely appreciates, market concentration, which is the focus of antitrust merger control, is different from industrial concentration, and, even then, the data show industrial concentration has been declining.

In short, the consultation should not produce a solution in search of a problem. There is a lack of data to suggest that Australia has a concentration problem, nor one that shows a lack of merger enforcement tools has resulted in harm to competition. At a minimum, the Chamber encourages the government to initiate a comprehensive study and to identify its genuine competitive concerns prior to implementing dramatic changes to its merger control regime.

Any Changes Should Protect the Core Elements of Due Process

To the extent that Australia moves forward with changes, it should retain the core elements that protect due process in a merger review regime. Specifically, the government should retain the burden of proof of demonstrating that a merger would reduce competition and the government should have to carry its burden in court, before a neutral arbiter, rather than allowing the competition agency to have complete or partial deference.

At the outset, the Chamber has serious concerns about proposals that would give an agency the power to block mergers. Such an unchecked power would set a dangerous precedent insofar as the Australian Competition and Consumer Commission (ACCC) would gain the powers of investigator, judge, and jury—anathema to our Anglo-American legal and political traditions. Without a full judicial check, and the necessity of carrying the burden of proof, any enforcement agency would find it tempting to block transactions based on subjective criteria irrespective of competitive harm. Agencies should not interfere with private competitive practices, whether on behalf of favored political groups or domestic industries, absent an empirical showing that those private practices are more likely than not to harm consumers. To lower those standards would invite politicization, protectionism, and untethered prophesizing.

The government should have to show actual, meaningful competitive harm prior to interfering with private transactions. In a free market economy, this is how it should be because overenforcement can chill the very competition antitrust laws are intended to protect, thus hurting consumers. A lower evidentiary standard would encourage competitors and interest groups to petition the government for intervention every time a merger disfavors their interests, without regard to effects on consumers. By way of comparison, the U.S. has declined to adopt the numerous proposals that would have given the competition agencies more enforcement

[4] Report of the Antitrust Modernization Commission 34, at https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

discretion. Indeed, if the government relieved the ACCC of carrying the burden of proof, the government would undermine its own conclusions that "[m]ost mergers do not raise competition concerns."

Moreover, by shifting the burden of proof from the agencies to the companies, Australia would harm its investment climate and overall economy. Unlike the U.S. and Australia, much of Europe has a prior approval regime. The Chamber respectfully invites Australian policymakers to compare Europe's economy with that of the U.S. In fact, our approach is exemplified by U.S. adherence to the consumer welfare standard and a merger regime that places the burden on the government, which in turn has helped to propel our innovative economy far beyond anything seen in the European Union.

Europe lags well behind the United States, Japan, and other economies in innovation and investment in research and development.[5] According to an economic study, from 2017 to 2019, there were roughly twice as many venture capitalists in the United States as there were in Europe.[6] Over this same time period, total venture capital in Europe increased from $18 billion to $36 billion, while in the U.S., venture capital increased from $86 billion to $132 billion. Investors rightly believe that U.S. companies are poised for far greater growth or profitability.

Merger policy explains at least part of the discrepancy.[7] For the past forty years, the U.S. has enjoyed a predictable and transparent antitrust framework that allows larger companies to invest in innovative start-ups, compete in new product markets, and grow organically without artificial regulatory restrictions. The United States does not "shoot the winner" of the competitive marketplace. On the other hand, Europe discourages such investments and cross-market growth by holding larger companies to an amorphous "abuse of dominance" standard that often leaves smaller companies without the financing they need to grow and prosper.

Thus, merging parties' incentives to continue contributing to an innovative ecosystem, keeping assets open to the ecosystem, and continuing to invest in and advance the respective technologies, should be evaluated and properly accounted for by the agencies as pro-competitive benefits. There should be no presumption that mergers are restrictive. Such a burden should remain within the reviewing agency based on existing analytical tools.

For these reasons, the Chamber strongly opposes any lowering of standards that would allow the government to forbid private market activity based on speculative harms. Economic freedoms that allow two companies to merge should not be blocked based on bias, but instead held to a legal standard that shows harm outweighing any benefits to consumers.

---

[5] *Europe is no longer an innovation leader* (2019), at https://www.weforum.org/agenda/2019/03/europe-is-no-longer-an-innovation-leader-heres-how-it-can-get-ahead/.

[6] See Reform or Regress? An Assessment of Proposed Antitrust Legislation, at https://americanedgeproject.org/wp-content/uploads/2022/07/Reform-or-Regress-An-Assessment-of-Proposed-Antitrust-Legislation-July-2022_FINAL.pdf.

[7] See What Would Hamilton Do, at https://americanedgeproject.org/what-would-hamilton-do-about-giphy-and-grail/.

The Need to Respect International Comity and Local Nexus Requirements

The International Competition Network's (ICN's) procedures protect "fundamental due process norms."[8] These norms include the principles of non-discrimination, transparency, notice, timeliness, confidentiality, opportunity to defend, written decisions, and judicial review. In terms of non-discrimination, for example, a competition agency must afford "Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances." Together, these principles and procedures ensure that Australian, American, and foreign companies can compete under the same rules across the globe.

The ICN also recommends that competition authorities only assert jurisdiction over "transactions that have a material nexus to the reviewing jurisdiction." A material nexus to the reviewing jurisdiction is present "when a proposed transaction has a significant and direct economic connection to the jurisdiction." Competition authorities typically show a nexus by pointing to local sales or local asset levels. Put another way, "[n]otification should not be required unless the transaction has a material nexus to the reviewing jurisdiction." That means "each of at least two parties to the transaction have significant local activities" or "the acquired business has a significant presence in the local territory."

In keeping with these principles, the ACCC should not review transactions that lack a material local nexus to Australia, yet it appears that the ACCC proposes to review transactions based on global turnover or global transaction value. Under this theory, two firms with no economic presence in Australia could be subject to the ACCC's merger review, with the ability to assert jurisdiction over any transaction anywhere in the world based on speculative assertions about potential effects on Australian commerce many years in the future. As a result, businesses could face an increasingly onerous patchwork of merger control systems across the world, raising the prospect of unnecessary trade disputes. The practical implications of such multi-jurisdictional reviews and their costs are likely to dissuade pro-competitive transactions from being undertaken at all. Instead, the government should affirm its adherence to principles of international comity and local nexus requirements.

Notification Thresholds Should Be Objective

The Chamber advises caution in establishing pre-merger notification rules to capture more transactions. Such a move would, of course, raise the costs to the private sector and likely delay many smaller transactions that raise no competitive concerns. Of perhaps greater concern, such a move likely would lead the ACCC to use its resources inefficiently. By having to spend time and money reviewing smaller deals that are very unlikely to raise competitive concerns, the ACCC will have fewer resources to study the larger transactions that are more likely to raise legitimate concerns. In the U.S., for instance, the Federal Trade Commission (FTC) has ended

[8] See FTC Becomes a Founding Member, at https://www.ftc.gov/enforcement/competition-matters/2019/05/ftc-becomes-founding-member-icn-framework-promote-procedural-fairness-competition-enforcement.

the practice of granting "early termination" review to transactions that are very unlikely to raise competitive concerns, but the end result has been that the FTC is bringing fewer enforcement actions and staff morale has plummeted.

Moreover, even without a filing requirement, the ACCC can still challenge a merger that raises competitive concerns. If there are legitimate issues worthy of investigation, industry stakeholders, particularly customers and competitors, are likely to alert the ACCC, whether or not there has been a filing. Is there any evidence that ACCC has missed an opportunity to review any transactions that raised competitive concerns, or lacked an opportunity to challenge a consummated transaction afterwards? In fact, cases where the ACCC has identified a completed merger and acted either to undo it or to seek penalties appear to be rare.

To the extent that the government creates mandatory notification thresholds, the Chamber encourages the government to adhere to the principles set forth by the ICN. The ICN has emphasized that merger notification thresholds should be "clear and understandable" and based on objectively quantifiable criteria.[9] Objective criteria allow for better transparency, predictability, and legal certainty. That stability is one reason why "[e]fficient operation of capital markets are best served by clear, understandable, and easily administrable 'bright-line' tests."[10] "The specified criteria should [also] be defined in clear and understandable terms" and may include references to taxes, intra-company transfers, and depreciation of assets.[11] In contrast, the ICN explains that "[e]xamples of criteria that are not objectively quantifiable are market share and potential transaction-related effects."[12] Those sorts of considerations "are not appropriate for use in making the initial determination as to whether a transaction requires notification."[13]

Merger Tests Should Focus on the Welfare of Consumers, Rather than Market Structures

As the consultation explains, Australia could remove its merger factors and instead revert to a simple substantive test, such as a 'substantial lessening of competition' test, which is similar to the flexible and time-tested standard applied in the U.S.

To the extent that the government adopts more formal guidance, the Chamber emphasizes the paramount importance of identifying an objective measure to evaluate a firm's conduct in terms of anticompetitive harm. In the U.S., that measure is the consumer welfare standard; such an objective measure provides the private sector with predictability and specificity while still affording the ACCC sufficient flexibility to identify competitive threats. In contrast, international regimes have avoided imposing bright line rules as every market is defined by different dynamics that can constrain or enhance firms' abilities to compete.

---

[9] International Competition Network, Recommended Practices for Merger Notification and Review Procedures (2018), Section II, D and E.
[10] *Id*. at Section II, D.
[11] *Id*. at Section II, E.
[12] *Id*.
[13] *Id.*

U.S. Chamber of Commerce

1615 H Street, NW
Washington, DC 20062-2000
uschamber.com

***

The Chamber thanks The Treasury for the opportunity to provide these comments. We would welcome further engagement with interested agencies and policymakers in the coming months.

John Goyer
Executive Director, Southeast Asia
U.S. Chamber of Commerce

Sean Heather
Senior Vice President
International Regulatory Affairs & Antitrust
U.S. Chamber of Commerce