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SCHUMPETER PROJECT ON COMPETITION POLICY

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COMMENTS OF ITIF

Before the

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Parkes, ACT 2600

In the Matter of:	)	
	)	Public Comment
Merger Reform	)	

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PROTECTING INNOVATION: EVALUATING THE MERGER REFORM CONSULTATION PAPER

CONTENTS

INTRODUCTION

On November 20, 2023, the Competition Review Task Force in Australia's Treasury Department ("Task Force") issued a Consulation Paper for public comment that proposes a number of changes to Australia's merger control regime.[1] The Schumpeter Project on Competition Policy of the Information Technology and Innovation Foundation (ITIF), the world's leading think tank for science and technology, appreciates the opportunity to comment on the Consultation Paper and specifically add a U.S. perspective focusing on the importance of protecting innovation in merger review.

ITIF supports the efforts of the Task Force to foster a merger control regime that promotes competition, which it recognizes as an "important driver of dynamism, productivity, and wages growth."[2] At the same time, as the Consultation Paper acknowledges, "[m]ergers are important for the efficient functioning of the economy" and provide a key avenue "for firms to achieve economies of scale and scope, diversify risk and exist businesses," as well as "enhance efficiency and consumer welfare."[3]

To be sure, although "[m]ost mergers do not raise competition concerns,"[4] a merger control regime is an important tool to identify those select few mergers which may, on balance, be harmful to competition. As the Consultation Paper explains, merger review should be "risk based, where the regulatory burden reflects the expected costs and benefits to the community."[5] In other words, this is a two-sided test: enforcement resources should not be directed at transactions that may have a small negative impact on competition but a larger and more sustained and positive effect on productivity, innovation, or Australian competitiveness.

[1] Competition Task Force, Merger Reform Consultation Paper (Nov. 2023) [hereinafter Consultation Paper].

[2] *Id.* at 4.

[3] *Id.* at 9.

[4] *Id.*

[5] *Id.* at 11.

Innovation has long been understood as the principal driver of long-run economic growth.[6] Indeed, a key dimensionality of competition in many industries today is dynamic, where "firms compete through innovation for temporary market dominance, from which they may be displaced by the next wave of product advancements."[7] Moreover, as the economist Joseph Schumpeter recognized long ago, this innovation and dynamic competition is often spurred by scale, which incentivizes appropriability and risk-taking, and can be facilitated by mergers.[8]

Concerns about concentration are therefore often misinformed: while increased market concentration or market power may seem problematic from a static perspective, it can drive innovation and dynamic efficiencies that ultimately yield productivity gains that far outweigh any short-run harms. In fact, much of the purported concerns about increased concentration levels in the United States are not only ill-founded but give short shrift to the tremendous consumer benefits that have resulted from large-scale American innovators over the past several decades.

Over this period of unprecedented innovation and technological progress, the mandatory notification system provided for by the Hart Scott Rodino ("HSR") Act[9] constituted the basic framework in the United States for identifying anticompetitive mergers and acquisitions *ex ante*. Under this regime, transactions that satisfy statutory thresholds are required to provide, prior to consummation, basic information to the Antitrust Division of the Department of Justice ("DOJ") and Federal Trade Commission ("FTC"), who may attempt to block the transaction in court if they believe there may be a substantial lessening of competition.

The analysis of whether a merger may substantially lessen competition should be focused on assessing the probable effects of the transaction on consumer welfare. Specifically, problematic mergers typically harm consumers by either increasing the post-merger ability for collusive behavior, or unilaterally through a loss of head-to-head competition. Additionally, some unlawful mergers may substantially lessen competition indirectly through exclusionary effects, where the merged firm is able to raise the costs of its rivals and ultimately gain power over price.

This comment proceeds in five parts. The first explains the misunderstandings surrounding claims of increased concentration levels and markups in the United States. The second analyzes several of the procedural proposals put forward by the Australian Competition and Consumer Commission (ACCC) in reference to the U.S. experience. The third criticizes the ACCC's proposed expansion of merger law. The

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[6] *See* Robert M. Solow, *Technical Change and the Aggregate Production Function*, 39 REV. ECON. & STAT. 312 (1957); *see also* Charles I. Jones, *Sources of U.S. Economic Growth in a World of Ideas*, 92 AM. ECON. REV. 220 (2002).

[7] U.S. v. Microsoft, 253 F. 3d 34, 49 (D.C. Cir. 2001) (citations omitted).

[8] *See, e.g.*, JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 105 (1944) (explaining why "[t]he firm of the type that is compatible with perfect competition is in many cases inferior in internal, especially technological, efficiency").

[9] Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified in 15 and 28 U.S.C. (2000)).

fourth provides several recommendations for the Australian government to consider as it continues to evaluate possibilities for merger reform. A brief conclusion follows.

EMERGING CONCERNS

While the Consultation Paper states that regulatory changes should be "informed by robust empirical evidence, including studies based on large datasets of merger activity over an extended period and across a range of markets,"[10] it concedes that "there is a lack of comprehensive statistical evidence demonstrating the link between the merger control regime, industry concentration and market outcomes in Australia."[11]
As such, the Consultation Paper refers to evidence internationally both that "merger control regimes may have been, at the margin, too permissive" and which "casts doubt on the frequency and extent to which mergers give rise to efficiencies."[12]

The factual predicate of the Consultation Paper—that systemic underenforcement against anticompetitive mergers has resulted in higher concentration, increased market power, or reduced economic dynamism—is not supported by the U.S. experience. On the contrary, claims regarding "increasing market concentration" in the United States have on the whole failed to pass muster. For example, a widely read paper[13] from the White House Council of Economic Advisers ("CEA") looked at concentration levels for the fifty largest firms in a given industry, which does not measure competition in any meaningful sense.[14] Moreover, the use of U.S. Census 2-digit (as in the CEA study) and even 4-digit[15] NAICS codes are too aggregated to stand in for relevant antitrust markets, making the resultant concentration estimates uninformative at best.[16]

In fact, as ITIF has found, looking at the four largest firms using 6-digit NAICS does not support the increased concentration narrative.[17] Indeed, other studies that have attempted to identify more antitrust-relevant product markets using purchase data found that concentration had decreased—even though, when aggregated like the other studies, the data showed an increase in concentration.[18] Moreover, even in some

[10] Consultation Paper at 10.

[11] *Id.* at 12.

[12] *Id.* at 10.

[13] Jason Furman & Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise of Inequality*, Presentation at "A Just Society" Centennial Event in the Honor of Joseph Stiglitz, Columbia University (Oct. 16, 2015).

[14] *see also* Carl Shapiro, *Antitrust in a time of populism*, 61 INT'L J. INDUS. ORG. 714, 723 (2018) (noting that the CR_{50} measure "is not informative regarding the state of competition").

[15] *See, e.g.*, D. Autor et al., *The fall in the labor share and the rise of superstar firms*, 135(2) Q. J. ECON. 645 (2020).

[16] *See* Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration,* 33 ANTITRUST MAGAZINE 74 (2018).

[17] *See* Robert D. Atkinson and Filipe Lage de Sousa, *No, Monopoly Has Not Grown*, ITIF (June 7, 2021) (concluding that "the widely accepted narrative that monopolization is increasing to crisis levels is not supported by the facts").

[18] C. Lanier Benkard, Ali Yurukoglu, and Anthony Lee Zhang, *Concentration in Product Markets*, NBER Working Paper Series No. 28745 (April 2021).

studies that find an increase in concentration at the national level, concentration is found to have decreased locally[19]—a fact that is explainable in part by the rise of digital services.[20]

Even if concentration has increased, it has long been understood that concentration is a poor predictor of market power or economic performance. For this reason, others have pointed to higher markups to argue that market power has increased and competition has declined.[21] However, as ITIF has noted, "studies that find increases usually miscalculate by failing to consider changes in marginal costs, especially related to the growing share of intangible capital."[22] Indeed, ITIF has observed that "as a share of GDP, overall corporate profits are now lower than they were in the 1960s."[23]

However, as with concentration, simply looking at measures like corporate profits also says little about overall consumer welfare: increases in corporate profits and market power can be a product not just of anticompetitive tactics, but efficiency-enhancing and procompetitive behavior.[24] Indeed, studies have found that the existence of higher markups is due to decreases in marginal costs flowing from technological progress.[25] In other words, rather than reflect a lack of competition, higher markups evince the healthy process of dynamic and innovative competition described by Schumpeter decades ago.

Furthermore, even if one assumes that market power has increased in the U.S. due to anticompetitive behavior, there is certainly no consensus that inadequate merger enforcement is the culprit. Consider the retrospective studies of John Kwoka,[26] which are referenced in the Consultation Paper[27] and the Background Note on Economic literature ("Background Note").[28] Several methodological and data issues plague Kwoka's work that make it unreliable.[29] These include not just deviating from standard econometric methods, but using a data set where only seven of the 42 mergers in his sample occurred after the year 2000, and 30 of the 49 overall transactions were in just three industries—time and space limitations that make it "remarkably unrepresentative of recent merger activity."[30]

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[19] *See* Esteban Rossi-Hansberg, Pierre-Daniel Sartre, and Nicholas Trachter, *Diverging Trends in National and Local Concentration*, 35 NBER Macroeconomics Annual (2021).

[20] *See, e.g.*, Hadi Houalla, *Corporate Giants Break the Grip of Local Monopolies*, ITIF (Jan. 12, 2024).

[21] *See, e.g.*, Simcha Barkai, *Declining Labor and Capital Shares*, 75 J. FINANCE 2421 (Oct. 2020).

[22] Joe Kennedy, *Monopoly Myths: Is Concentration Leading to Higher Markups?* ITIF (June 1, 2020).

[23] Joe Kennedy, *Monopoly Myths: Is Concentration Leading to Higher Profits?* ITIF (May 18, 2020).

[24] *See, e.g.*, Harold Demsetz, *Industry Structure, Market Rivalry and Public Policy*, 16 J. L. & ECON. 1 (1973).

[25] *See, e.g.*, Hendrik Döpper et al., *Rising Markups and the Role of Consumer Preferences*, Harvard Business School Working Paper 22-025 (2022).

[26] John Kwoka, *Does merger control work? A retrospective on US enforcement actions and merger outcomes*, 78(3) ANTITRUST L.J. 619 (2013). *See also* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES (2015).

[27] *Id.* at 12 n.24.

[28] Background Note: Economic literature relevant to mergers.

[29] Michael Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L.J. (2018).

[30] *Id.* at 368.

Another recent study identified in the Background Note by Bhattachayra et al. is instructive, including with respect to the issue of efficiencies.[31] While finding that prices have increased for consumer-packaged goods and that stricter enforcement at the margins could be helpful, the mergers in the study had an average HHI over 3,300 and an average delta-HHI over 120—which would be nearly presumptively unlawful under longstanding U.S. standards[32]—and yet merging party prices still did *not* increase on average.[33] Additionally, the paper found that "not only do 28% of mergers lead both merging and non-merging parties to lower prices for consumers, but "22% of mergers cause merging parties to lower prices and non-merging parties to raise them"—facts that are highly supportive of an efficiency explanation.[34]

CHANGES TO THE MERGER CONTROL PROCESS

The Consultation Paper outlines several options for modifying Australia's current merger control regime, which takes the form of "a prohibition on mergers that are likely to have the effect of substantially lessening competition, assessed through voluntary informal merger review, voluntary merger authorization and Federal Court proceedings."[35] One reform proposal considered by the Consultation Paper in Option 1[36] involves formalizing the notification regime, whereby transactions that did not raise competition concerns would be given "formal immunity from court action" under Section 50.[37]

Formalizing Australia's voluntary notification regime will likely have the effect of incentivizing additional filings as well as greatly reducing legal uncertainty for businesses by making clear that transactions deemed to be procompetitive will not be challenged. Indeed, while the U.S. does not have a voluntary notification regime, the grant of formal immunity would mitigate many of the serious problems that have arisen as a result of the FTC's newfound and highly inefficient practice of issuing pre-consummation warning letters to parties whose transactions have satisfied the requirements of the HSR Act, which inform them that their deals may still be challenged on an *ex ante* basis (as distinct from a challenge based on *ex post* evidence of anticompetitive effects)—in other words, an policy of "close at your own risk."[38]

Another change contemplated by the Consultation Paper would introduce a mandatory notification system to replace Australia's current approach of voluntary notification. As reflected in Options 2 and 3, such a merger

[31] Vivek Bhattacharya, Gastón Illanes, and David Stillerman, *Merger Effects and Antitrust Enforcement: Evidence from US Consumer Packaged Goods*, NBER Working Paper Series No. 31123 (Dec. 2023).

[32] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N HORIZONTAL MERGER GUIDELINES § 5.3 (2010).

[33] *Id.* at 15 (noting that while the mean price increase is 1.5%, "the averages for merging and non-merging parties are 0.0% and 2.1% respectively").

[34] *Id.* at 16–17.

[35] Consultation Paper at 4.

[36] *Id.* at 38.

[37] *Id.*

[38] For commentary, *see, e.g.*, Alex Witts, *Ex-antitrust officials: Unclear what FTC is trying to accomplish by sending deal warning letters*, GLOBAL COMP. REV. (Nov. 5, 2021).

control regime "would require mandatory notification of transactions above a threshold, although the ACCC would not be precluded from investigating mergers below the threshold."[39] This approach would accordingly entail "[u]pfront information requirements," with transactions being "suspended for a period of time while the ACCC conducts its assessment."[40]

As the Consultation Paper acknowledges, a mandatory notification system of this kind is similar to the HSR approval process in the United States.[41] And this system has worked well. Specifically, the primary advantage of mandatory notification is to limit the practical and remedial problems associated with "unscrambling the eggs" when challenging consummated mergers that substantially lessen competition.[42] As such, the introduction of a mandatory notification regime with basic information requirements could prove a key means of addressing issues identified by the Consultation Paper involving "parties notifying but threatening to complete before the ACCC has completed its review, failing to notify, and/or providing insufficient or inaccurate information."[43]

Unlike formalization and mandatory notification, other alternatives identified in the Consultation Paper are not likely to improve Australia's merger control regime. First, Option 1 and Option 3 contemplate a test whereby the ACCC "must be satisfied that the merger is not likely to substantially lessen competition," which effectively creates a presumption of illegality, and is distinct from the test in Option 2 which requires that the ACCC find the transaction "likely to substantially lessen competition," which reflects a presumption of legality that coheres with the U.S. approach.[44]

Treating mergers as effectively anticompetitive unless the ACCC proves the negative "that the merger is not likely to substantially lessen competition" is clearly not supported by the economic evidence. As the Consultation Paper itself admits, "[m]ost mergers do not raise competition concerns" and only "small proportion of proposed mergers…would be anticompetitive."[45] For this reason, a test that generally presumes mergers to be lawful unless rebutted by evidence to the contrary is not only appropriate, but will save the ACCC from costs associated with the highly burdensome process of proving that myriad ultimately benign mergers are not anticompetitive—not least because, as the Consultation Paper rightly acknowledges, "[i]t is difficult to predict the future competition and efficiency impacts of proposed mergers."[46]

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[39] Consultation Paper at 39.

[40] *Id.*

[41] *Id.*

[42] *See, e.g.*, William J. Baer, Director, Bureau of Competition, Fed. Trade Comm'n, Reflections on 20 Years of Merger Enforcement under the Hart-Scott Rodino Act, Remarks Before the Conference Board, Washington, D.C. (Oct. 29, 1996) ("Once a merger takes place and the firms' operations are integrated, it can be very difficult or impossible to unscramble the eggs and reconstruct a viable, divestable group of assets.").

[43] Consultation Paper at 14.

[44] *Id.* at 38–39.

[45] *Id.* at 4.

[46] *Id.*

Next, in Option 1 and Option 3 the Consultation Paper also consider making the ACCC the "primary decision-maker" in deciding whether a merger should be blocked.[47] Specifically, "[t]he ACCC proposes shifting Australia to an administrative model" where "the competition authority investigates and adjudicates cases, typically with some form of separation between the investigators and the decision-maker."[48] Importantly, on this approach, rather than be subject to judicial review by a Federal Court, "[t]he ACCC would not have to take action in the Federal Court to block a notifiable merger."[49]

This administrative model seems to risk conferring too much power on the ACCC. Indeed, while the United States' regime is indeed a "combination" of both the "judicial enforcement model" and the "administrative model,"[50] both the DOJ and FTC need a preliminary injunction from a federal court to prevent parties from consummating their transaction—even though the FTC retains the ability to challenge the transaction using its administrative process if a preliminary injunction is denied.[51] Moreover, the legal trend in the United States is strongly against giving increased authority to administrative agencies,[52] with the Supreme Court likely to hear constitutional challenges to the FTC's administrative authority in the coming years.[53]

CHANGES TO THE MERGER CONTROL TEST

In addition to these procedural changes, the Consultation Paper considers several modifications to the substantive standards applied to evaluate mergers under section 50(3). At the outset, the Consultation Paper notes that "Australia could remove the merger factors and instead revert to a simple substantive test" which would "enable mergers to be assessed on competition criteria but not prescriptively identify which competition criteria should be taken into account."[54] In so doing, a "more flexible application of the law and a greater degree of economic analysis in merger decision-making" could be obtained.[55]

The Consultation Paper correctly notes that the "substantial lessening of competition" test in § 7 of the Clayton Act reflects by general statutory language. However, more specific agency guidelines have long been used to provide increased certainty to business about how the law will be enforced. Indeed, this is especially true in merger enforcement, with the U.S. agencies issuing or revising Merger Guidelines in 1968, 1982, 1984, 1992, 1997, 2010, 2020 and most recently in 2023. Importantly, as the merger guidelines are not

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[47] *Id.* at 38.

[48] *Id.* at 27.

[49] *Id.* at 28.

[50] *Id.* at 27.

[51] As noted above, both agencies have the right to challenge consummated transactions under Clayton § 7.

[52] *See, e.g.*, *West Virginia v. EPA*, 127 S.Ct. 2587 (2022).

[53] *See* Axon Enterprise, Inc. v. FTC, 143 S. Ct. 890 (2023).

[54] Consultation Paper at 31.

[55] *Id.*

themselves legally binding but only carry persuasive authority,[56] the benefits of providing increased certainty to businesses on balance far outweigh the harms associated with any undue *ex ante* limits on enforcement.

To be sure, the efficacy of specific guidance will depend on the extent to which it is consistent with the prevailing law and sound economics. Viewed in this light, one of the Consultation Paper's specific proposals includes adding a factor to assess "changes in market structure as a result of the merger – for instance, 'the height of barriers to entry and any increase in the height of barriers as a result of the merger.'"[57] This focus on market structure is similar to Guideline 8 of the DOJ and FTC's Draft 2023 Merger Guidelines, which stated that "mergers should not further a trend toward concentration" in a way that went beyond the typical (rebuttable) structural presumption.[58]

Merger analysis that focuses on market structure is fundamentally flawed. As we have seen, transactions that result in increased concentration may or may not ultimately reduce consumer welfare, as both entry and efficiencies can respectively negate or offset any *prima facie* anticompetitive harms. Moreover, as also discussed *supra*, increased concentration may itself improve consumer welfare by incentivizing the innovation and dynamic efficiencies that ultimately propel long-run productivity growth.[59] Indeed, following comments from numerous stakeholders including ITIF, the 2023 Merger Guidelines ultimately adopted by the DOJ and FTC—while still problematic in many respects—did not include Guideline 8.[60]

Another proposed change in the Consultation Paper involves consideration of "the likelihood that the acquisition would result in the removal from the market of a potential competitor."[61] In particular, the Consultation Paper highlights as a concern so-called "killer acquisitions" where "large companies acquire smaller competitors and discontinue development of the target's product/innovation."[62] In support, the

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[56] *See, e.g.*, St. Alphonsus Medical Center-Nampa v. St. Lukes, 778 F.3d 775, 784 n.9 (9th Cir. 2015).

[57] Consultation Paper at 30.

[58] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, DRAFT MERGER GUIDELINES 21 (July 19, 2023).

[59] Specifically, numerous studies across many economies around the world continue to confirm that the relationship between concentration and innovation often takes the form of an inverted-U, where markets characterized by many firms demonstrate less innovation than markets with a few firms, and markets with a few firms exhibit more innovation than those characterized by monopoly. *See, e.g.*, Philippe Aghion at al., *Competition and Innovation: An Inverted-U Relationship*, 120 Q. J. ECON. 701 (2005); Michael R. Peneder & Martin Woerter, *Competition, R&D and Innovation: Testing the Inverted-U in a Simultaneous System*, 24 J. OF EVOLUTIONARY ECON. 653 (2014) (Switzerland); Michiyuki Yagi & Shunsuke Managi, *Competition and Innovation: An inverted-U relationship using Japanese industry data*, Discussion Papers 13062, Research Institute of Economy, Trade and Industry (RIETI) (2013) (Japan); Michael Polder & Erik Veldhuizen, *Innovation and Competition in the Netherlands: Testing the Inverted-U for Industries and Firms*, 12 J. of IND, COMPETITION AND TRADE 67 (2012) (Netherlands); Chiara Peroni & Ivete Gomes Ferreira, *Market competition and innovation in Luxembourg*, 12 J. of IND, COMPETITION AND TRADE 93 (2012) (Luxembourg). Indeed, in some U.S. studies the relationship is negative. *See, e.g.*, Spencer Yongwook Kwon, Yueren Ma, Kaspar Zimmerman, *100 Years of Rising Corporate Concentration*, SAFE Working Paper No. #359 (2023); David Autor et al., *Foreign competition and domestic innovation: Evidence from US patents*, 2 AMER. ECON. REV. 357 (2020); Aamir Rafique Hashmi, *Competition and Innovation: The Inverted U Relationship Revisited*, 95 THE REVIEW OF ECONOMICS AND STATISTICS 1653 (2013).

[60] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES (2023).

[61] Consultation Paper at 31.

[62] *Id.* at 19.

Consultation Paper cites a well-known study analyzing the pharmaceutical industry and infers that killer acquisitions could comprise a significant amount of merger activity.[63]

Challenging mergers under an "innovation competition" theory,[64] a "perceived potential competition" theory,[65] or under certain circumstances an "actual potential competition" theory,[66] are all possible under current U.S. antitrust law, but rarely successful. Acquisitions of smaller firms regularly stimulate innovation by providing entrepreneurs with an exit pathway that is generally less costly and more amendable to retaining control relative to an initial public offering.[67] Moreover, as ITIF has found, fears about underenforcement in technology markets against "killer acquisitions" appear to be significantly overstated.[68] Accordingly, the FTC's recent loss in *Meta/Within* makes clear that cases alleging harm to potential competition face substantial burdens of proof to ensure that procompetitive transactions are not thwarted based on speculative theories of harm.[69]

[63] *See* Colleen Cunningham et al., *Killer Acquisitions*, 129 J. POL. ECON. 649 (Mar 2021). Concerns about killer acquisitions may be more well-founded in pharmaceutical markets characterized by drastic innovations, and where innovation milestones are easy to observe. *S*ee John M. Yun, *Potential Competition, Nascent Competitors, and Killer Acquisitions*, GAI REPORT ON THE DIGITAL ECONOMY 652, 662 (2020). This is distinct from technology markets driven by incremental innovations. See Julie Carlson, *The Platform Competition and Opportunity Act Is a Solution in Search of a Problem*, ITIF REPORT (Jan. 2022) ("The limited evidence of killer acquisitions in the pharmaceutical industry does not suggest that we should expect killer acquisitions in technology markets. The pharmaceutical industry is best characterized by radical innovation. Pharmaceutical innovation is intended to displace incumbent firms. Innovation in technology markets tends to be incremental or cumulative and builds on the prior innovations of incumbent firms."). Indeed, studies have shown that most of the innovation driven gains in growth come from incremental innovations by incumbents. *See, e.g.*, Daniel Garcia-Macia, Chang-Tai Hsieh, Peter J. Klenow, *How Destructive Is Innovation?* 87 ECONOMETRICA 1507 (Sept. 2019) (finding that most growth comes from incumbents and incremental innovations).

[64] For example, a merger between two firms engaged in rival R&D. *See, e g.*, Press Release, Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy, U.S. Dep't of Justice Antitrust Div. (Apr. 27, 2015).

[65] The acquisition of firm that is perceived as a potential competitor. *See* United States v. Falstaff Brewing Corp., 410 U.S. 526, 559–60 (1973).

[66] The acquisition of a firm that is a likely entrant, even if not perceived as such. *See* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 633 (1974).

[67] *See, e.g.*, Gilles Duruflé at al., *From start-up to scale-up: examining public policies for the financing of high-growth ventures*, Said Business School WP 2017-05 at 5 (2017).

[68] *See* Joe Kennedy, *Monopoly Myths: Is Big Tech Creating "Kill Zones,"* ITIF MONOPOLY MYTH SERIES (Nov. 9, 2020) (concluding that "concerns that large Internet companies are impeding competition by engaging in killer acquisitions are exaggerated"); *see also* Marc Ivaldi at al., *Killer Acquisitions: Evidence From EC Merger Cases in Digital Industries*, TSE Working Paper No. 13-1420 (Apr. 2023); Tiago S. Prado and Johannes M. Bauer, *Big Tech Platform Acquisitions of Start-ups and Venture Capital Funding for Innovation*, Information Economics and Policy, 100973 (Mar. 2022); Ginger Zhe Jin at al., *How Do Top Acquirers Compare in Technology Mergers? New Evidence from an S&P Taxonomy*, NBER Working Paper No. w29642 (Jan. 2022).

[69] Fed. Trade Comm'n v. Meta Platforms, Inc., No. 5:22-cv-04325-EJD, 2022 WL 16637996, at *1 (N.D. Cal. Nov. 2, 2022).

The Consultation Paper also identifies "the nature and significance of assets, including data and technology, being acquired directly or through the body corporate" as an additional factor that could be considered in merger analysis.[70] While the effect of such a factor is unclear in the abstract, the Consultation Paper clarifies that this factor "would be particularly relevant to digital platforms."[71] As such, this factor bears more than a family resemblance to Guideline 9 of the DOJ and FTC's newly released 2023 Merger Guidelines, which lays out a series of special considerations for digital platforms.[72]

Singling out digital markets is highly problematic for antitrust law which, unlike regulation, is designed to be of general application and not market specific. Indeed, the existence of features in digital markets like network effects are not only not fundamentally different from other types of economies of scale and scope that exist throughout the economy, but are not at all a guarantee of "winner-take-all" or "tipping" toward dominance, as many platform markets are characterized by multi-homing strategies—which increases competition in the market.[73] Other seemingly digital or platform specific issues, such as competitive advantages (or barriers to entry) through data, are also not unique to digital markets, but have long been a key part of the competitive process.[74]

RECOMMENDATIONS

For these reasons, ITIF respectfully submits the following recommendations in response to the Task Force's Consultation Paper:

- **Reevaluate the justification for merger reform:** There is no firm basis supporting claims about increased concentration and market power in the United States, let alone "international evidence" relevant to Australian merger reform suggesting that such phenomena are caused by anticompetitive conduct in general or permissive merger enforcement in particular.

- **Merger control should reflect basic procedural best practices:** While attempts at formalizing and introducing a mandatory notification regime may be strongly considered, the ACCC's evidentiary standard should be whether a transaction may substantially lessen competition, with Federal Courts able to review any decision to block a merger.

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[70] Consultation Paper at 31.

[71] *Id.*

[72] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, MERGER GUIDELINES 23–26 (2023).

[73] *See, e.g.*, Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990, 991– 94 (2003); *see also* Catherine Tucker, *Network Effects and Market Power: What Have We Learned in the Last Decade*, 32 ANTITRUST 72, 75-76 (2018); DAVID EVANS & RICHARD SCHMALENSEE, PAYING WITH PLASTIC: THE DIGITAL REVOLUTION IN BUYING AND BORROWING 146–47 (2005) ("Multi-homing is common in many multisided industries").

[74] *See, e.g.*, Timoth J. Muris and Joseph V. Coniglio, *What* Brooke Group *Joined Let None Put Asunder: The Need for the Price-Cost and Recoupment Prongs in Analyzing Digital Predation*, GAI REPORT ON THE GLOBAL ECONOMY 1334 (2020) (writing that data is "hardly unique to digital firms" and highlighting that "the distinction between digital platforms and other businesses now almost entirely irrelevant with respect to the ability to use consumer data efficiently").

- **Additional factors in 50(3) should be economically defensible:** Although in certain circumstances market structure can be an important factor in evaluating whether a merger will harm competition, it should not be dispositive in merger analysis. Enforcement against transactions that reduce "potential competition," while cognizable, should not be based on speculative theories of harm and must not chill transactions that benefit innovation, efficiency, or global competitiveness.

CONCLUSION

ITIF agrees that the fundamental purpose of a merger control regime is to allow "a competition authority to consider mergers that could be harmful to the competitive process and, if necessary, amend [through an agreed upon remedy] or prevent harmful mergers."[75] As the calls for antitrust reform continue to multiply around the world, a sober look at the United States' experience not only calls for a healthy skepticism in response to allegations of a systemic failure of merger enforcement, but strongly supports both the virtues of a mandatory notification system with judicial review, as well as the importance of a substantive merger law that eschews a narrow focus on market structure and paranoid enforcement in digital markets in favor of guidance that allows innovation to flourish.

Thank you for your consideration.

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[75] Consultation Paper at 4.