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Serial Acquisitions and Industry Roll-ups – Note by the United States

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

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United States

1. Introduction

1. In recent years, there has been growing concern in the United States about the effects of "roll-ups" and "stealth consolidation," primarily in the technology and healthcare industries.[1] Serial acquisitions involve a number of acquisitions by the same firm that consolidate a fragmented market, typically composed of many relatively small competitors. The U.S. Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) (together, the Agencies) recognize that serial acquisitions can result in harm to competition and are focused on identifying those situations and taking appropriate action.

2. This paper discusses concerns raised by serial acquisitions and the challenges of detection, relevant U.S. law, and the Agencies' enforcement experience. It concludes by looking at remedies presently available and suggesting additional solutions.

2. Serial acquisitions and industry roll-ups in the United States

3. Firms may find that a strategy of growth through acquisition is more profitable than organic growth. A pattern or strategy to buy up smaller competitors or firms in the same or related lines of business that pose a competitive threat can reduce competitive pressures in the market, leading to higher profits. Incumbents can be well-placed to identify industry developments and have the incentive to stave off emerging threats. Rolling up smaller competitors or killing off nascent threats before they emerge can lead to the same magnitude and type of harm as mergers of larger or established firms and are less likely to attract the attention of enforcers until the strategy is identified. Firms that already have a dominant position may preserve that market power through various "moat-building" tactics, including acquisitions, to create barriers that will protect their position from outside threats (see, e.g., Paragraphs 12 and 13).

4. Serial acquisition strategies have been undertaken in the United States economy since the latter half of the 19th century.[2] Competition reports to Congress in the late 1940s highlighted serial acquisitions in traditionally "small business" industries by large, often national, corporations fueled by wartime capital.[3] Congress sought to address these

[1] *See, e.g.*, Thomas Wollmann, *How to Get Away with Merger: Stealth Consolidation and its Effects on U.S. Healthcare* (NBER Working Paper Series, Working Paper 27274, 2021) at 19–20, https://www.nber.org/papers/w27274; Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. Econ. Persp. 69, 76–77 (Summer 2019), https://www.aeaweb.org/articles?id=10.1257/jep.33.3.69; Cory Capps, David Dranove & Christopher Ody, *Physician Practice Consolidation Driven by Small Acquisitions, So Antitrust Agencies Have Few Tools to Intervene*, 36 Health Affairs 1556, 1560–61 (Sept. 2017), https://doi.org/10.1377/hlthaff.2017.0054.

[2] *See, e.g.*, *Standard Oil Co. v. U.S.*, 221 U.S. 1, 31–42 (1911); *U.S. v. American Tobacco Co.*, 221 U.S. 106, 157–60 (1911).

[3] *See* Federal Trade Commission, The Merger Movement: A Summary Report 7 (1948) ("Where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four large concerns produce the entire supply. This latter pattern

concerns in 1950 when it amended the Clayton Act, which the Supreme Court observed was specifically intended to address "the rising tide of economic concentration . . . in its incipiency to brake this force at its outset and before it gathered momentum."[4] The legislative history of the 1950 amendments makes clear that Congress intended U.S. merger law to address market power achieved through a series of acquisitions.[5]

5. Today, our experience indicates that serial acquisitions are most often favored by technology companies and private equity firms. Large technology companies with excess liquid capital often expand their dominion by entering related or adjacent markets or buying up competitors, both of which have raised concerns among policymakers in the United States and abroad.[6] Meanwhile, private equity firms execute "buy-and-build" strategies through a portfolio company that buys a firm, often the market leader, and "rolls-up" smaller competitors using the private equity firm's money and acquisition expertise.[7] Private equity has been particularly active in healthcare markets.[8]

6. To better understand the acquisition strategies of individual firms in the technology sector, the FTC collected information about unreported acquisitions of five large technology companies in 2019. The study focused on 819 non-reported acquisitions made by Apple, Amazon, Facebook (now Meta), Alphabet (including Google), and Microsoft over the course of 2010-2019, and analyzed the pace, size and types of acquisitions to provide a comprehensive overview of all the acquisitions these companies made during that time period. From this study, the FTC gained insight into these companies' practices

. . . is likely to be characterized by avoidance of price competition and by respect on the part of each concern for the vested interests of its rivals.").

[4] *Brown Shoe Co. v. United States*, 370 U.S. 294, 317–18 (footnote omitted) (1962).

[5] H.R. Rep. No. 81-1191, at 8 (1949) ("Acquisitions of stock or assets have a cumulative effect, and control of the market . . . may be achieved not in a single acquisition but as the result of a series of acquisitions. The bill is intended to permit intervention in such a cumulative process when the effect of an acquisition may be a significant reduction in the vigor of competition"); S. Rep. No. 81-1775, at 4–5 (1950) ("Where several large enterprises are extending their power by successive small acquisitions, the cumulative effect of their purchases may be to convert an industry from one of intense competition among many enterprises to one in which three or four large concerns produce the entire supply.").

[6] *See, e.g.*, Staff of H. Comm. on the Judiciary, 116th Cong., Investigation of Competition of Digital Markets: Majority Staff Report and Recommendations 44 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 ("Leading economists and antitrust experts have expressed concern that serial acquisitions of nascent competitors by large technology firms have stifled competition and innovation."); Ken Buck, Doug Collins, Matt Gaetz & Andy Biggs, H. Comm. on the Judiciary, 116th Cong., The Third Way: Antitrust Enforcement in Big Tech 9 (2020), https :// buck. house. gov/sites/evo-subsites/buck-evo.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf.

[7] Statement of Commissioner Rohit Chopra, Regarding Private Equity Roll-ups and the Hart-Scott-Rodino Annual Report to Congress (July https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf.

[8] *See, e.g.*, Richard M. Scheffler, Laura M. Alexander & James R. Godwin, Soaring Private Equity Investment in the Healthcare Sector: Consolidation Accelerated, Competition Undermined, and Patients at Risk 8–16 (May 18, 2021), https://publichealth.berkeley.edu/wp-content/uploads/2021/05/Private-Equity-I-Healthcare-Report-FINAL.pdf.

and acquisition strategies, including how they structured acquisitions and how these acquisitions fit into the companies' overall business strategies.[9]

7. The Agencies are attuned to evolving business models and strategies in order to protect the public and the economy from the ill effects of serial acquisitions.[10] Given the increased concern posed by rollups, the Agencies will evaluate whether serial acquisitions have led to increased market power and leverage.

3. Competition risks with serial acquisitions

8. Empirical studies show that consolidation within an industry can lead to higher prices and reduced quality for consumers.[11] Such consolidation, and any resulting harm, can be the result of a single transaction or multiple transactions.[12]

9. Serial acquisition patterns or strategies can be hard to detect when some or all individual acquisitions are not notified to the Agencies or where the harm from the specific acquisition appears insignificant in isolation. Because serial acquisitions often involve relatively small acquired firms, the Agencies are less likely to be aware of them. The Agencies are notified of pending acquisitions under the Hart-Scott-Rodino (HSR) Act. For 2023, the transaction size-of-reporting threshold for agency notification under the HSR Act is $111.4 million, meaning generally only transactions of more than $111.4 million are notified to the Agencies.[13] Depending on the size of existing competitors, acquirors could significantly increase the concentration in a market through serial transactions without ever triggering the size-of-transaction threshold and thereby avoid HSR Act notification.

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

[10] *See* Executive Order No. 14036, 56 Fed. Reg. 36987, 36988 (July 9, 2021) ("It is also the policy of my Administration to enforce the antitrust laws to meet the challenges posed by new industries and technologies, including the rise of the dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects.").

[11] *See e.g.*, Loren Adler, Conrad Milhaupt & Samuel Valdez, *Measuring Private Equity Penetration and Consolidation in Emergency Medicine and Anesthesiology*, 1 Health Affairs Scholar (July 2023), https://doi.org/10.1093/haschl/qxad008; Thomas Wollmann, *How to Get Away with Merger: Stealth Consolidation and its Effects on U.S. Healthcare* (NBER Working Paper Series, Working Paper 27274, 2021) at 19–20, https://www.nber.org/papers/w27274; Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. Econ. Persp. 69, 76–77 (Summer 2019), https://www.aeaweb.org/articles?id=10.1257/jep.33.3.69.

[12] *See, e.g., In re Nat'l Tea Co.*, 69 F.T.C. 226, 1966 WL 88025, at *19–20, *29 (1966) ("[W]hile the acquisition of a single enterprise with annual sales of $250 million may appear more significant than a series of acquisitions involving 25 firms with sales of $10 million each, the ultimate effect is the same.").

[13] Premerger Notification Office Staff, *HSR Threshold Adjustments and Reportability for 2023* (Feb. 16, 2023), https://www.ftc.gov/enforcement/competition-matters/2023/02/hsr-threshold-adjustments-reportability-2023. HSR thresholds are adjusted annually with changes in gross national product. 15 U.S.C. § 18a(a)(2). Despite this relatively high reporting threshold, the Agencies have experienced a record number of filings. *See* Federal Trade Commission & Department of Justice, *Hart-Scott-Rodino Annual Report: Fiscal Year 2021*, at 1 fig. 1 (2023).

10. Even if the Agencies are aware of a pattern of serial acquisitions in a market, assessing each acquisition singly may result in underenforcement, especially when individual acquisitions result in very small changes in concentration as measured by the Herfindahl-Hirschman Index. But it is possible for a company to acquire, through serial acquisitions, over 50 percent of a market without any single transaction triggering close scrutiny of potential effects.[14] The Clayton Act condemns mergers whose effect may be substantially to lessen competition or tend to create a monopoly "whether the acquiring corporation accomplished these results by one immense gobble of another large [competitor] or . . . by nibbling away at small [competitors.]"[15] Therefore, to avoid underenforcement, it is important that the Agencies assess the cumulative effect of serial transactions in a given market.[16] The Agencies' 2023 Draft Merger Guidelines describe this approach in assessing whether one or all of the acquisitions may substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act.[17]

11. The cumulative impact of serial acquisitions can lead to several different types of competitive harm. For instance, serial acquisitions can eliminate important head-to-head competition between the acquiring firm and its target(s).[18] Serial acquisitions can also result in a market that is highly concentrated, where a merger that eliminates even a small competitor creates undue risk that the merger may cause harm.[19] Further, serial acquisitions can increase the risk of coordination among the remaining firms in the market, for example through the elimination of a maverick firm.[20]

12. Serial acquisitions also can lead to the creation of a dominant firm, raising concerns that further acquisitions would give the firm the ability and incentive to reduce competition by making it harder for its rivals to compete, or to deter entry of new firms into the market. For instance, the acquiring firm may gain control over access to a product, service, or customers that its rivals use to compete, enabling it to weaken its rivals and thereby substantially lessen competition.[21] If the acquiring firm already has a dominant position, additional acquisitions may allow it to preserve or entrench its market power.[22]

13. Serial acquisitions by a dominant player may address not only emerging threats within its core market but may also be directed at threats emerging in related or adjacent

[14] Leemore Dafny & Nancy Rose, Response to DOJ-FTC Merger Guidelines Request for Information (April 21, 2022), https://www.hbs.edu/ris/Profile%20Files/Response%20to%20FTC-DOJ%20Request%20for%20Merger%20Guidelines%20Feedback_d7e77fe7-7bc3-4460-9938-b512f23376ba.pdf.

[15] *Crown Zellerbach Corp. v. FTC*, 296 F.2d 800, 822 (9th Cir. 1961) (enforcing *In re Crown Zellerbach Corp.*, 54 F.T.C. 769 (1957)), *cert. denied*, 370 U.S. 937 (1962).

[16] *See U.S. v. Jerrold Elecs. Corp.*, 187 F. Supp. 545, 565 (E.D. Penn. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

[17] *See* Draft FTC-DOJ Merger Guidelines for Public Comment, Guideline 9, at 22–23 (July 19, 2023).

[18] *Id.*, Guideline 2, at 7–9. *See, e.g.*, *In re Hosp. Corp. of Am.*, 106 F.T.C. 361, 1985 WL 668927 (1985), *enforced*, *Hosp. Corp. of Am. v. F.T.C.*, 807 F.2d 1381 (7th Cir. 1986); *U.S. v. Healthco, Inc.*, 387 F. Supp. 258, 271 (S.D.N.Y. 1975).

[19] *Id.*, Guideline 1, at 6–7.

[20] *Id.*, Guideline 3, at 9–11.

[21] *Id.*, Guideline 4, at 11–13.

[22] *Id.*, Guideline 7, at 18–21.

markets, such as new component technologies, key intellectual property, or complementary assets. This is a particular concern in platform markets, where competition may not neatly follow horizontal or vertical lines. A merger may entrench the dominant position of the acquiring firm by, for instance, increasing barriers to entry or switching costs, interfering with customers' use of competitive alternatives, depriving rivals of scale economies or network effects, or eliminating a nascent threat.[23]

14. Serial acquirors may also acquire partial ownership stakes or preserve the acquired firms' corporate entities and branding. Such strategies maintain a façade of competition while common ownership, sponsorship, affiliation, board membership, or management dampens any incentive to compete and facilitates undue coordination.[24] Private equity firms can use serial partial acquisitions to obtain board representation in competing firms, which can violate Section 8 of the Clayton Act and harm competition.[25]

15. Serial acquisition strategies may also violate Section 2 of the Sherman Act when a firm with monopoly power relies on acquisitions, among other conduct, to acquire or maintain its monopoly.[26] Section 2 of the Sherman Act prohibits firms from acquiring, conspiring or attempting to acquire, or maintaining monopoly power. Interpreting Section 2, the Supreme Court defined unlawful monopolization as possession of monopoly power plus "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[27] Monopoly power, defined as "the power to control price or exclude competition,"[28] can be shown directly by demonstrating the company at issue has the power to control price or exclude competition or indirectly, by showing "a predominant share of the relevant market."[29] Serial acquisition strategies which aim to achieve—or actually achieve—high market share, exclusion of competitors, suppression of wages, reduction in innovation, or pricing power may violate Section 2. The framework used to assess monopolization claims under Section 2 is well-equipped to address serial acquisitions because "merging viable competitors to create a monopoly is a clear § 2 offense,"[30] and the effects of the acquiror's anticompetitive course of conduct are considered "as a whole rather than considering each aspect in isolation."[31]

[23] *Id.*, Guideline 7, at 19–21.

[24] *Id.*, Guideline 12, at 27–28. *See, e.g., Reading Intern., Inc. v. Oaktree Capital Management LLC*, 317 F. Supp. 2d 301 (S.D.N.Y. 2003); *see also* Mike Moiseyev, *What's the interest in partial interests?* (May 9, 2016), https://www.ftc.gov/enforcement/competition-matters/2016/05/whats-interest-partial-interests; 15 U.S.C. § 19 (prohibiting interlocking directorates).

[25] *See, e.g.,* Department of Justice, Justice Department's Ongoing Section 8 Enforcement Prevents More Potentially Illegal Interlocking Directorates (Mar. 9, 2023), https://www.justice.gov/opa/pr/justice-department-s-ongoing-section-8-enforcement-prevents-more-potentially-illegal.

[26] *See, e.g., Credit Bureau Reports, Inc. v. Retail Credit Co.*, 358 F. Supp. 780 (S.D. Tex. 1971), *aff'd*, 476 F.2d 989 (5th Cir. 1973); *U.S. v. Jerrold Elecs. Corp.*, 187 F. Supp. 545 (E.D. Penn. 1960).

[27] *U.S. v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

[28] *U.S. v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

[29] *Grinnell Corp.*, 384 U.S. at 571.

[30] *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 53 (D.D.C. 2022) (quoting Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, vol. III, ¶ 701a, at 200 (4th ed. 2015)).

[31] *See LePage's Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003) (en banc).

16. Finally, early cases before the FTC recognized that "[i]t may be appropriate to scrutinize a series of acquisitions over a long period of time from the standpoint . . . of whether the respondent's course of conduct viewed as a whole constitutes . . . an unfair method of competition" under Section 5 of the FTC Act.[32] "The series of acquisitions may justify relief beyond what might be appropriate in a Section 7 or Section 5 case challenging a particular one or number of the acquisitions in the series, and irrespective of whether every individual acquisition, viewed separately, is unlawful."[33] Reflecting this view, the FTC's policy statement on Section 5 explicitly identifies as a potential unfair method of competition "a series of mergers, acquisitions, or joint ventures that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws."[34]

4. Agency Experience with Serial Acquisitions

17. The Agencies are focused on enforcement against serial acquisition strategies.[35]

18. In June 2022, the FTC took action to protect competition in markets for specialty and emergency veterinary services. JAB Consumer Partners, a private equity firm, had previously acquired Compassion-First Pet Hospitals and National Veterinary Associates, large veterinary chains in United States.[36] Then it proposed to acquire Sage Veterinary Partners, LLC, which would have eliminated head-to-head competition in local markets in Texas and California, which the FTC prevented as part of a consent decree.[37] JAB also sought to acquire another veterinary chain, Ethos Veterinary Health, with significant competitive overlap in Richmond, Virginia, Washington, D.C., Denver, and San Francisco. Again, the FTC required divestiture to stem the growing trend towards consolidation in the emergency and specialty veterinary services markets.[38]

19. In September 2023, the FTC filed suit against U.S. Anesthesia Partners, Inc. and its private equity sponsor, Welsh, Carson, Anderson & Stowe. The complaint challenges their

[32] *In re Beatrice Foods*, 67 F.T.C. 473, 1965 WL 92798, at *172 (1965), *supplemented*, 68 F.T.C. 1003 (1965), *modified*, 71 F.T.C. 797 (1967); *see also* In *re Dean Foods, Co.*, 70 F.T.C. 1146 (1966); *In re Foremost Dairies, Inc.*, 60 F.T.C. 944 (1962) (market extension theory); *In re Nat'l Tea Co.*, 69 F.T.C. 226, 1966 WL 88025 (1966) (same).

[33] *In re Beatrice Foods*, 1965 WL 92798, at *172.

[34] Federal Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

[35] *See supra* notes 26 and 32, which includes some examples of historical enforcement.

[36] The FTC had previously required divestiture as part of JAB's acquisition of National Veterinary Associates in 2020.

[37] *See* Federal Trade Commission, *FTC Acts to Protect Pet Owners from Private Equity Firm's Anticompetitive Acquisition of Veterinary Services Clinics* (June 13, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-acts-protect-pet-owners-private-equity-firms-anticompetitive-acquisition-veterinary-services.

[38] *See* Federal Trade Commission, *FTC Takes Second Action Against JAB Consumer Partners to Protect Pet Owners from Private Equity Firm's Rollup of Veterinary Services Clinics* (June 29, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-takes-second-action-against-jab-consumer-partners-protect-pet-owners-private-equity-firms-rollup-of-veterinary-services-clinics.

multi-year anticompetitive scheme to consolidate anesthesia practices in Texas, drive up the price of anesthesia services, and increase their own profits. Together they acquired more than a dozen anesthesiology practices in Texas to eliminate competition and create a single dominant provider with the power to demand higher prices. As a result of the scheme, U.S. Anesthesia Partners, Inc. dwarfs its rivals both in terms of sheer size and cost to patients. Without relief, the complaint alleges, competition will remain stifled, and the defendants can continue to engage in similar conduct.[39]

20. In 2010, the Antitrust Division and several state attorneys general brought an action to unwind Dean Foods' acquisition of dairy processing businesses in Illinois, Wisconsin, and Michigan.[40] Dean Foods had become the largest fluid milk processor in the United States—partially by making unreportable acquisitions. The Division litigated and settled the action, securing a Final Judgment requiring Dean to divest a fluid milk processing plant. In order to guard against future serial acquisitions, the settlement also required Dean to give the Division notice before making any future acquisition of milk processing plants where the purchase price was more than $3 million. In 2020, Dairy Farmers of America ("DFA") —a dairy cooperative which also owned fluid milk processing facilities—agreed to acquire 44 fluid milk processing plants out of the Dean Foods bankruptcy auction. The Division brought an action requiring DFA to divest three fluid milk plants with which it overlapped, and, to prevent serial acquisitions, it also required DFA to give notice to the Division of fluid milk processing acquisitions in the future.[41]

21. In January 2023, the DOJ, along with a number of state attorneys general, filed a civil antitrust suit against Google for monopolizing multiple digital advertising technology products, in part based on a pattern of acquisitions aimed at neutralizing or eliminating ad tech competitors.[42] These acquisitions included Google's 2007 acquisition of DoubleClick, a dominant publisher ad server; its 2009 purchase of AdMob, a technology system that allowed publishers of mobile apps to sell ads as well; its 2010 acquisition of Invite Media, a demand side platform; and its 2011 purchase of AdMeld, which had developed technology to provide "yield management" functionality to publishers.[43] As alleged in the Complaint, "Google's acquisitions of DoubleClick, Invite Media, and AdMeld helped Google achieve dominant positions at each level of the open web ad tech stack and set the

[39] *See* Federal Trade Commission, *FTC Challenges Private Equity Firm's Scheme to Suppress Competition in Anesthesiology Practices Across Texas* (Sept. 21, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/09/ftc-challenges-private-equity-firms-scheme-suppress-competition-anesthesiology-practices-across.

[40] *See* Department of Justice, Justice Department Reaches Settlement with Dean Foods Company (Mar. 29, 2011), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-dean-foods-company.

[41] *See* Department of Justice, Justice Department Requires Divestitures as Dean Foods Sells Fluid Milk Processing Plants to DFA out of Bankruptcy (May 1, 2020), https://www.justice.gov/opa/pr/justice-department-requires-divestitures-dean-foods-sells-fluid-milk-processing-plants-dfa.

[42] *See* Department of Justice, Justice Department Sues Google for Monopolizing Digital Advertising Technologies (Jan. 24, 2023), https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies.

[43] Complaint, United States v. Google LLC, No. 1:23-cv-00108, 31-35 (E.D. Va. Jan. 24. 2023),https://www.justice.gov/opa/press-release/file/1563746/download.

stage for Google to control and manipulate the process by which publishers sell and advertisers buy open web display inventory."[44]

5. Remedies and solutions for serial acquisitions

5.1. Preventative Oversight

22. As discussed above, many transactions that are part of a serial acquisition strategy may not meet the HSR Act thresholds for required filing, and thus may remain undisclosed. In order to provide more relevant information to the Agencies, the FTC, with the concurrence of the Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice, has proposed to expand information collected in the premerger notification form to require more robust information about prior acquisitions of each party to the transaction.[45] Other proposals would require the filing persons to identify each rationale for the transaction, and identify the documents included in the filing which support each rationale.[46] If adopted, these proposals would provide the information to better identify serial acquisition strategies at an early stage when meaningful intervention may prevent the accumulation of market power.

5.2. Terminating Conduct, Restoring Competition, and Preventing Recurrence

23. As discussed in prior papers, it is generally easier to both investigate and secure an effective remedy for pending transactions than it is for consummated transactions.[47] The objective of an ex-post remedy is to stop any ongoing violation; restore full, open, competition to the market; and to prevent future violations. If a consummated merger violates the antitrust laws, broad equitable remedies are available.[48] Structural relief forces a reorganization or divestiture of the offending company's assets, while behavioral relief requires the offending company to engage in or refrain from certain conduct. In addition, the Agencies frequently seek means of monitoring the acquiror's future conduct and the market more generally.

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[44] Id. at 35.

[45] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42203 (June 29, 2023) (to be codified at 16 CFR pts. 801, 803), https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements. Proposals to improve reporting of prior acquisitions include requiring both parties to report such acquisitions (currently limited to the acquiring party); increasing the look-back period from five to ten years; eliminating the de minimis $10 million sales/assets threshold; and treating asset acquisitions the same as acquisitions involving voting securities.

[46] Premerger Notification; Reporting and Waiting Period Requirements, 88 Fed. Reg. 42191-92 (June 29, 2023) (to be codified at 16 CFR pts. 801, 803), https://www.federalregister.gov/documents/2023/06/29/2023-13511/premerger-notification-reporting-and-waiting-period-requirements.

[47] *See* Department of Justice and Federal Trade Commission, Disentangling Consummated Mergers – Experiences and Challenges 4–8 (2022), https://one.oecd.org/document/DAF/COMP/WD(2022)42/en/pdf.

[48] *See id.*

24. A series of acquisitions, whether challenged under the Clayton Act, Sherman Act, or FTC Act, "may justify relief beyond what might be appropriate in a Section 7 or Section 5 case challenging a particular one or number of the acquisitions in the series, and irrespective of whether every individual acquisition, viewed separately, is unlawful."[49]

25. When possible, the Agencies may seek to stop the series of acquisitions by obtaining an order barring any further acquisitions, thereby preventing any further degradation of competitive conditions. This remedy is particularly important if the Agencies catch the serial acquiror in early stages, but alone this remedy may be insufficient to return competitive conditions to their pre-acquisition status.

26. To fully restore competitive dynamism, the Agencies may seek structural relief in the form of divestitures. As the U.S. Supreme Court has explained, divestiture is the "most important of antitrust remedies," and it "should always be in the forefront of a court's mind when a violation of § 7 has been found."[50] Structural relief may require a complete unwinding of a series of mergers or a reorganization and spinoff of particular assets or divisions, including assets and divisions not directly involved in the illegal series of transactions. Divestiture can be relatively simple, administrable, and effective.[51]

27. The Agencies also may seek prior notice or prior approval of future acquisitions in the market.[52] Prior notice and prior approval are particularly important given that serial acquisitions often involve acquisitions below reporting thresholds. To ensure parent companies and private equity sponsors cannot evade these requirements through a new affiliate company, reporting requirements should attach to entities involved in the serial acquisition strategy above the direct acquiror.[53]

28. Ultimately, fashioning an effective remedy for a series of acquisitions should take into account marketplace realities, including degradation of assets, new entrants, and any other changes to the market that occurred during the consolidation scheme.

[49] *In re Beatrice Foods*, 67 F.T.C. 473, 1965 WL 92798, at *172 (1965).

[50] *U.S. v. E.I. duPont de Nemours & Co.*, 366 U.S. 316, 330 (1961).

[51] *Id.*

[52] *See, e.g.*, Federal Trade Commission, *FTC Imposes Strict Limits on DaVita, Inc.'s Future Mergers Following Proposed Acquisition of Utah Dialysis* (Oct. 25, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-imposes-strict-limits-davita-incs-future-mergers-following-proposed-acquisition-utah-dialysis.

[53] *See, e.g.*, Federal Trade Commission, *FTC Acts to Protect Pet Owners from Private Equity Firm's Anticompetitive Acquisition of Veterinary Services Clinics* (June 13, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-acts-protect-pet-owners-private-equity-firms-anticompetitive-acquisition-veterinary-services.