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Global trends in merger control enforcement

2024

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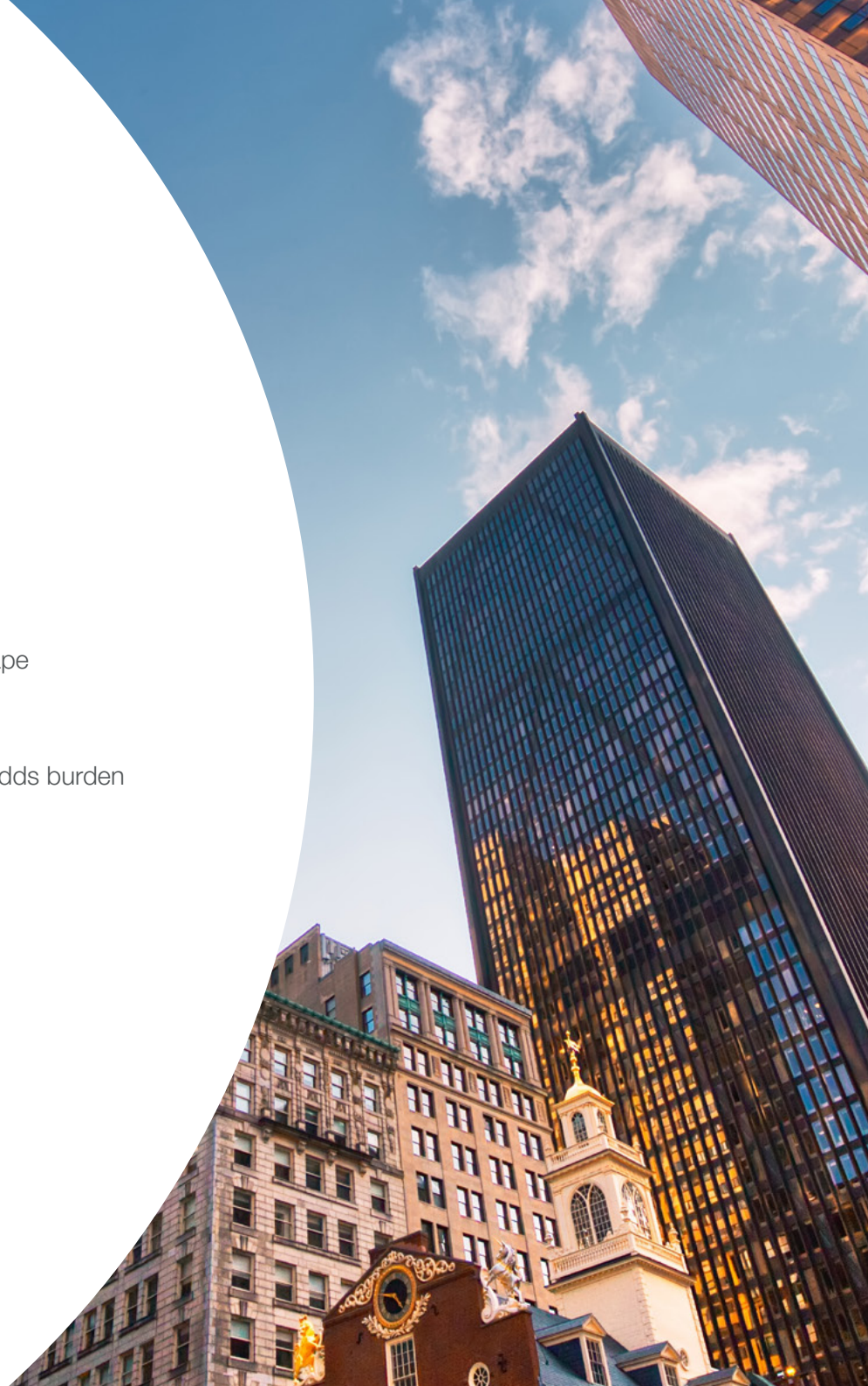
Contents



Introduction

Global deal value and volume fell again in 2023, down 33% and 18% respectively compared to 2022. This is unsurprising, given persistently tough macroeconomic conditions and geopolitical tensions. Dealmakers are also facing an increasingly challenging antitrust environment.

Antitrust authorities continued to take an aggressive approach to merger control enforcement. They frustrated more deals, with prohibited transactions rising by over 50%.

Merging parties found it harder to convince authorities to accept remedies, at least in certain key jurisdictions. In the U.S., the antitrust agencies continued to litigate, challenging more transactions and securing a win rate of 67% at trial. They agreed to remedies in only a handful of cases. Revised U.S. merger guidelines and planned reforms to the Hart-Scott-Rodino (HSR) merger filing form signal that even tougher merger control enforcement is to come.

The risk of divergent outcomes between authorities, particularly the EU and UK, created added uncertainty. Microsoft/Activision Blizzard was the headline example, with the UK Competition and Markets Authority (CMA) flexing its muscles and blocking the deal after the European Commission (EC) cleared it conditionally. Ultimately, in an unprecedented turn of events, the CMA cleared a restructured version of the transaction.

Other tech mergers also faced antitrust hurdles as intervention levels rose in the digital sector. Private equity acquisitions faced close scrutiny and are set to remain in the antitrust spotlight going forward.

Some (including U.S. Department of Justice Head Jonathan Kanter) have speculated that this heightened risk of antitrust intervention is having a deterrent effect on dealmakers' appetite to engage in transactions that could raise antitrust concerns. It may well be the case that the impact of merger control enforcement on M&A is even greater than the data suggests.

Beyond merger control, governments continued to introduce, expand and strengthen foreign investment regimes. The administrative burden of assessing and making filings can be high. However, intervention under these regimes is – with some exceptions – relatively low. The newly operational EU Foreign Subsidies Regulation introduces additional complexity to an already demanding regulatory landscape. Providing for these risks in deal documentation is increasingly complicated, but necessary.

We have collected and analysed data on merger control activity for 2023 from 26 jurisdictions.[1] We have also gathered statistics on the operation of key foreign investment control regimes. In this report we give you the key trends and developments from the past year, focusing in particular on the U.S., EU, UK and APAC.

1 Australia, Belgium, Brazil, Canada, China, COMESA, the Czech Republic, the EU, France, Germany, Hungary, India, Ireland, Italy, Japan, the Netherlands, Poland, Romania, Singapore, Slovakia, South Africa, South Korea, Spain, Turkey, the UK and the U.S.

2023 highlights

01
Tougher merger control enforcement frustrates more M&A

Antitrust authorities continue their aggressive approach and total deals prohibited or abandoned rose.

02
Antitrust authorities remain unwilling to accept merger remedies

Many favour prohibition where a deal gives rise to serious antitrust concerns, creating a challenging environment for merging parties crafting remedy proposals.

03
Digital M&A runs into antitrust hurdles with consumer, life sciences, transport and energy deals also targeted

Antitrust authorities make good on their promise to intervene in digital transactions as well as focusing enforcement in other key sectors.

04
Private equity deals under increasing antitrust scrutiny

PE faces particular headwinds in the U.S., UK and EU with “roll-ups” under the microscope and authorities seeking more information on investments.

05
Review of below-threshold mergers creates uncertainty

Even where filing thresholds are not met, merging parties must assess the risk of intervention.

06
Record EU gun-jumping penalty contributes to surge in merger control fines

Sanctions soar as antitrust authorities continue to clamp down on procedural merger control infringements.

07
Complex deals face longer merger review periods

Suspensions and extensions are frequently used at phase 2 but fast-track and simplified reviews speed up straightforward cases.

08
Diverse foreign investment landscape presents challenges for dealmakers

Regimes continue to emerge, expand and strengthen with significant variations in intervention rates and timing.

09
EU Foreign Subsidies Regulation increases M&A regulatory burden

New filing obligations increase administrative burden and could extend deal timetables or even halt transactions.

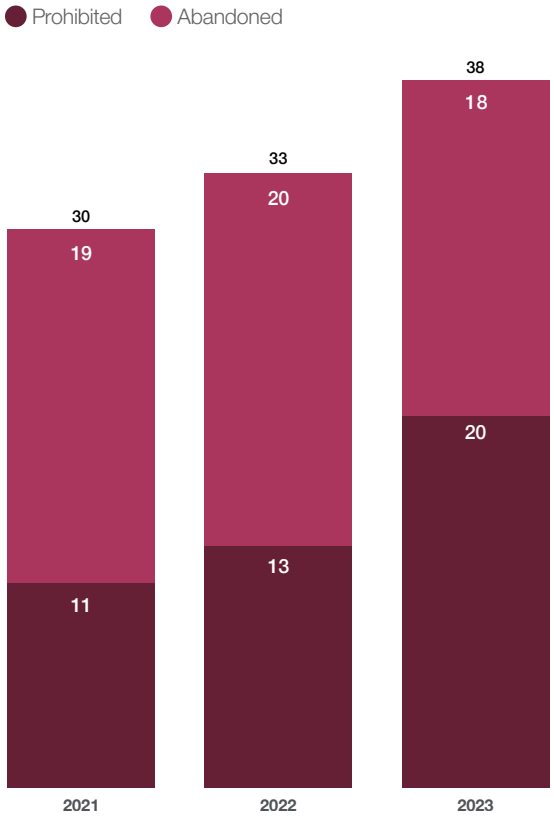
10
Heightened risk of antitrust and foreign investment intervention met with robust deal provisions

Conditioning deals on approval is the norm, with heavy negotiations around remedy obligations and reverse break fees.

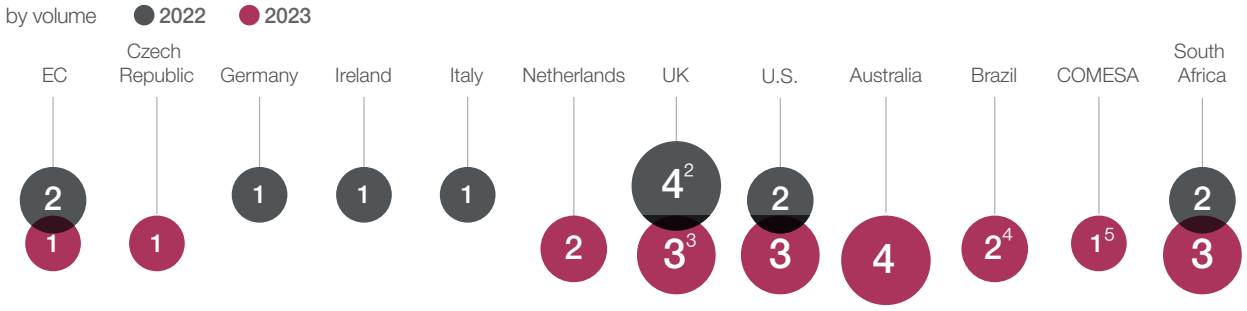
01

Tougher merger control enforcement frustrates more M&A

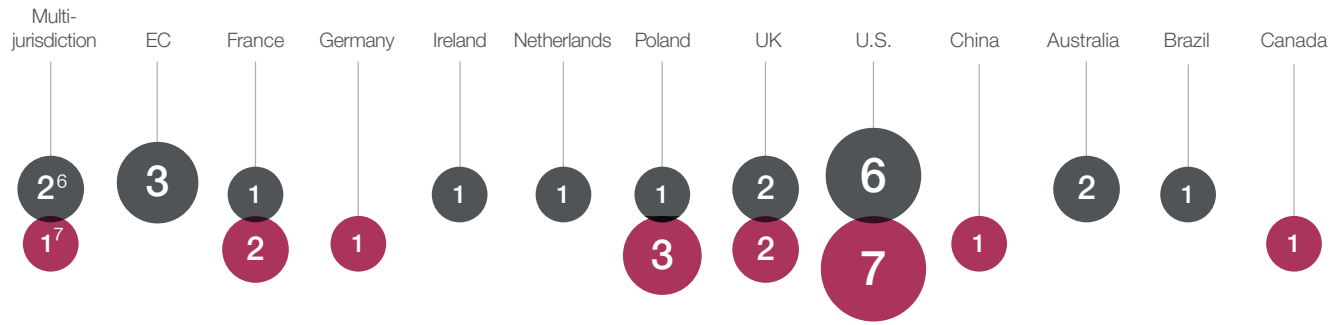
Total deals frustrated



Deals prohibited



Deals abandoned



2 Includes Cargotec/Konecranes: prohibited in the UK and then abandoned. U.S. and Australian authorities expressed similar antitrust concerns. Meta/Giphy, which was blocked again on remittal in 2022, is included in both 2021 and 2022 figures. In CHC/Babcock the CMA ordered the unwinding of the UK parts of the transaction.
3 Includes Cochlear/Oticon, which is a partial prohibition (the CMA approved the sale of one business to the acquirer).
4 Includes the prohibition of a joint venture to create a platform to exchange information related to the auto industry, which was conditionally cleared in 2022 and then blocked in 2023 after the parties did not comply with the remedies.
5 Prohibition was partial and only related to certain COMESA Member States.
6 Nvidia/ARM (abandoned due to antitrust concerns in the U.S., UK and at EU level) and China International Marine Containers/Maersk Container Industry (abandoned due to antitrust concerns in the U.S. and Germany).
7 Adobe/Figma (abandoned due to antitrust concerns in the UK and at EU level).

Antitrust authorities frustrated more deals in 2023, adopting an increasingly tough approach to merger control enforcement. They used novel arguments to challenge transactions, continued to reject remedy offers and reached diverging outcomes. This created an extremely challenging environment for dealmaking – something that is set to continue into 2024.

Many antitrust authorities have denied adopting a more "interventionist" approach. But the data suggests otherwise. In 2023, 20 deals were prohibited and a further 18 were abandoned due to antitrust concerns. This represents a 54% rise in prohibitions and a 15% increase in overall intervention from 2022.

In practice, real deal frustration levels are likely to be even higher. According to U.S. Department of Justice Antitrust Division (DOJ) Head Jonathan Kanter: "most anticompetitive deals are no longer getting out of the boardroom". The potential for antitrust objections and the risk of intervention is causing some parties to drop transactions at a very early stage, or not pursue them at all.

Concerns over ecosystems and innovation block deals

Antitrust authorities focused on novel and evolving theories of harm in 2023, particularly for non-horizontal deals in the digital and life sciences sectors.

For the first time, the EC blocked a deal on the basis of "ecosystem" concerns. It concluded that Booking's acquisition of eTraveli would allow Booking to expand its travel services ecosystem by adding eTraveli's flight product, making it more difficult for rivals to contest Booking's position in the hotel online travel agency market.

Other authorities have used similar concerns to challenge deals. In its suit to block Amgen's acquisition of Horizon Therapeutics, the U.S. Federal Trade Commission (FTC) relied on a portfolio/entrenchment theory of harm for the first time in decades. It alleged that Amgen had a history of leveraging its broad portfolio of blockbuster drugs to gain advantages over potential rivals.

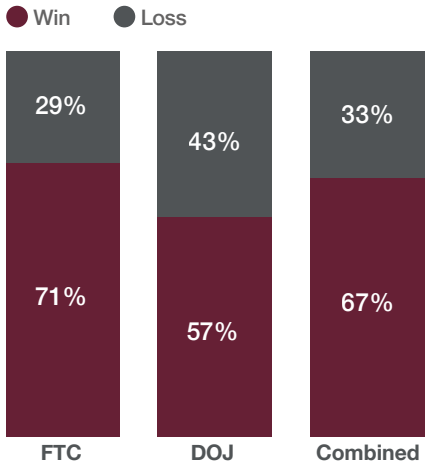
Ultimately the parties agreed remedies with the agency. But more U.S. complaints on this basis are expected. As noted below, revised U.S. merger guidelines set out how the FTC and DOJ will scrutinise deals that risk entrenching or extending a dominant position.

We also saw an increasing number of deals frustrated (at least in part) due to their impact on innovation, often combined with concerns over the removal of new rivals and/or future competition. EC and CMA objections on these grounds caused Adobe and Figma to abandon their tie-up. Sanofi similarly walked away from a licensing deal for a Maze drug after the FTC alleged it would remove a potential competitor.

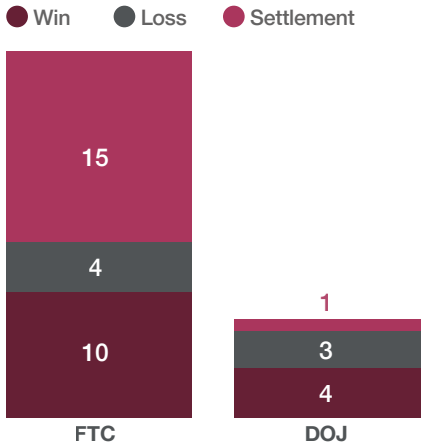
Companies with entrenched or strong positions in dynamic and rapidly evolving markets should prepare for intense scrutiny when planning acquisitions, even where the target is not (or not yet) a rival.

Win rate of U.S. agencies under current leadership

(as a proportion of contested deals resulting in a trial verdict)



Outcomes of U.S. agency complaints under current leadership



U.S. win rates high with reforms set to boost intervention

The U.S. agencies have stepped up merger control enforcement efforts under the Biden Administration. This trend continued in 2023.

Three transactions were formally prohibited. In Illumina/GRAIL the FTC won on appeal, with Illumina then agreeing to sell off GRAIL in light of the court's ruling and the EC's order to unwind the deal. Each agency also secured a permanent injunction – Jet Blue/ American Airlines (DOJ) and a healthcare technology transaction (FTC).

A further seven deals were abandoned due to U.S. antitrust concerns. These figures are in line with previous years, despite a sharp drop (over 25%) in the number of deals reviewed.

The agencies' willingness to litigate more cases is clear and has been fuelled by their hardline approach to merger remedies (see Chapter 2 for more on this).

And their win rate in court is relatively high. Under the leadership of Lina Khan, the FTC won 71% of contested deals that resulted in a verdict at trial (ten of 14). For the DOJ under Jonathan Kanter, the rate is slightly lower at 57% (four of seven). In total, the U.S. agencies won at trial in two thirds of cases.

The DOJ is even positive about the cases it has lost. It insists these have produced pro-competitive benefits by deterring anti-competitive deals.

But some merging parties considering whether to fight an agency challenge in court may read the data as giving them a reasonable chance at a favourable outcome. In nearly two thirds of FTC complaints the parties were able to proceed with the deal in some form, either by securing a win at trial or agreeing a settlement. The same was true in half of DOJ complaints.

Looking ahead, merging parties can expect greater intervention in the U.S.

Revised merger guidelines, adopted in December 2023, have rewritten how the DOJ and FTC will review transactions.

The new guidelines contain a lower threshold for presumption of illegality of horizontal mergers (set at 30% market share). They also target serial acquisitions, partial ownership and minority interests, transactions that would further entrench dominant players, and set out how the agencies will assess vertical mergers and the impact of a deal on labour market.

The ability of the U.S. agencies to apply the guidelines will be vastly enhanced by planned changes to the HSR filing form, expected to take effect in the second or third quarter of 2024. The new form will require submission of far more extensive information, including current and potential overlaps between the parties, effects on labour markets, minority interests,prior acquisitions dating back ten years and foreign subsidies. It will significantly increase the administrative burden on notifying parties.

UK CMA navigates Microsoft/Activision Blizzard and blocks completed M&A

The number of frustrated deals in the UK last year remained high at six.

Microsoft/Activision Blizzard was the headline case. The CMA prohibited the deal, rejecting the behavioural (licensing) remedies offered by the parties. Then, in an unprecedented move, the CMA conditionally cleared a restructured version of the transaction following a fast-tracked phase 1 review.

Some have speculated whether the case opens the door for parties to future blocked deals in the UK to have a second "bite at the cherry". The CMA has firmly rejected this "phase 3" option and will likely be wary of merging parties trying to tread a similar path.

Unwinding completed deals was a key trend for 2023. One of the three prohibited mergers (Cérélia/Jus-Rol) was already completed and so required a full divestment of the target. At phase 1, the CMA accepted remedies in over 20 completed transactions that required the sale of the whole acquired business.

EU court ruling makes some dealmaking harder

Booking/eTraveli was the only deal blocked by the EC last year. Compared to 2022, fewer cases were abandoned due to the EC's concerns.

But merging parties should not expect an easy ride. Companies looking to merge in concentrated sectors should take note of the European Court of Justice (ECJ)'s ruling in Three/O2, which restores the EC's wide scope to block transactions that risk harming competition without creating a dominant position. Careful risk assessment will be vital.

Divergence continues to create unpredictability

We continued to see divergence in merger control outcomes, particularly between the EC and CMA on high-profile transactions. Half of the 12 cases decided in 2023 that were reviewed by both the EC and CMA resulted in divergence of some kind.

In some instances, the authorities reached different conclusions as to whether the deal raised concerns. This could be due to differing market conditions across jurisdictions. Booking/eTraveli was blocked by the EC but cleared at phase 1 in the UK after the CMA concluded eTraveli has a modest market position in the UK.

In other cases, authorities did not agree on whether remedies offered by the parties were sufficient to address the concerns found. The EC accepted licensing commitments to clear Microsoft/Activision Blizzard that were rejected by the CMA (and the FTC).

In a third category, the EC and CMA reached the same conclusion, but one did so after phase 1 and the other after an in-depth review (eg Sika/MBCC's conditional clearance). In these types of cases, parties must work hard to coordinate investigation timetables.

Both EC and CMA officials stress that divergence is the exception, not the rule. They can point to cases where they are on the same page, eg Adobe/Figma, as mentioned above. But the potential for diverging outcomes poses an increasing challenge for parties to multinational transactions. When assessing antitrust risk, parties should take time to understand any differences in local market conditions as well as the likely approaches of the authorities.

50% (**6 of 12**) of cases decided by EC and/or CMA in 2023 resulted in divergence

Australian prohibitions rise against backdrop of regime overhaul

Four deals were prohibited by the Australian Competition and Consumer Commission (ACCC) in 2023 – the most we have seen blocked in Australia in a single year since we started the report.

Two transactions were in the transport sector. In one, the ACCC rejected the parties' offer of divestments in favour of prohibition. The authority also prohibited an additional deal (ANZ/Suncorp) under the merger authorisation process, although this was overturned on appeal in early 2024. Overall, the ACCC completed seven phase 2 reviews – the highest total since 2019.

This rise in enforcement activity sits against a backdrop of proposed reforms to the Australian merger control regime, which aim to give the rules more teeth.

Options are being considered by the government. These include, most radically, a shift from the current voluntary system to a mandatory and suspensory regime, potentially coupled with a power to call in deals falling below notification thresholds. Amendments to the substantive test, including prohibiting deals that entrench, materially increase or extend market power, have also been put forward.

We should know more about the likely direction of travel in the coming year.

New tougher and tighter merger control regimes

Australia is just one of the jurisdictions considering major amendments to merger control rules. Across the globe, regimes are being tightened, clarified or introduced.

These include proposals designed to capture so-called "killer acquisitions", ie purchases by large players of start-ups or small innovative firms with little or no turnover. A new notification threshold is proposed in the UK and deal value thresholds are planned in India (to apply generally) and COMESA (to apply to mergers involving digital platforms).

By contrast, a planned new Chinese threshold based on market value was dropped, while other filing thresholds were increased.

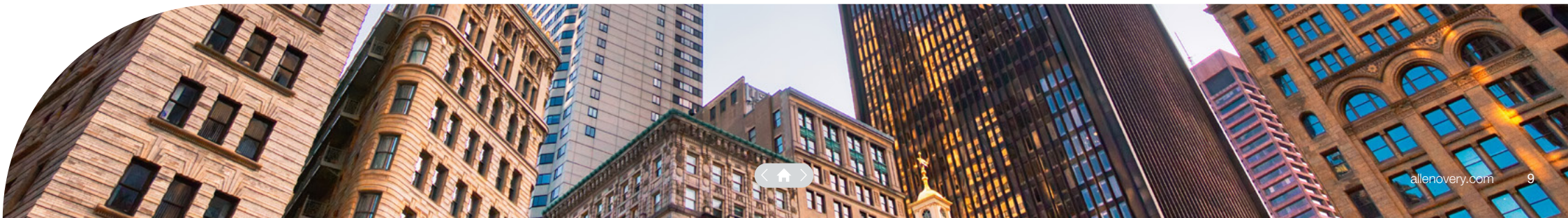
However, the State Administration for Market Reform (SAMR) retains the discretion to review below-threshold transactions, which in practice can catch killer acquisitions - see Chapter 5 for more on this.

Amendments to the South Korean regime will take effect later this year, expanding the scope of exemptions from the filing requirement and enabling parties to offer remedies (currently, only the authority can design and impose remedy packages). In Canada, the long-standing efficiencies defence has recently been abolished.

Beyond the jurisdictions surveyed in the report, important reforms have been adopted in the Middle East, including revised filing thresholds in Saudi Arabia and a new merger control regime in the UAE.

In Africa, we saw updated thresholds and procedural rules in Morocco and await details of a new Egyptian pre-closing regime. In APAC, Cambodia established its first comprehensive merger control framework and the Malaysian antitrust authority continues to push for long-awaited merger control powers.

In many cases, these amendments give antitrust authorities greater powers of enforcement against M&A, adding additional complexity to the regulatory landscape for merging parties.

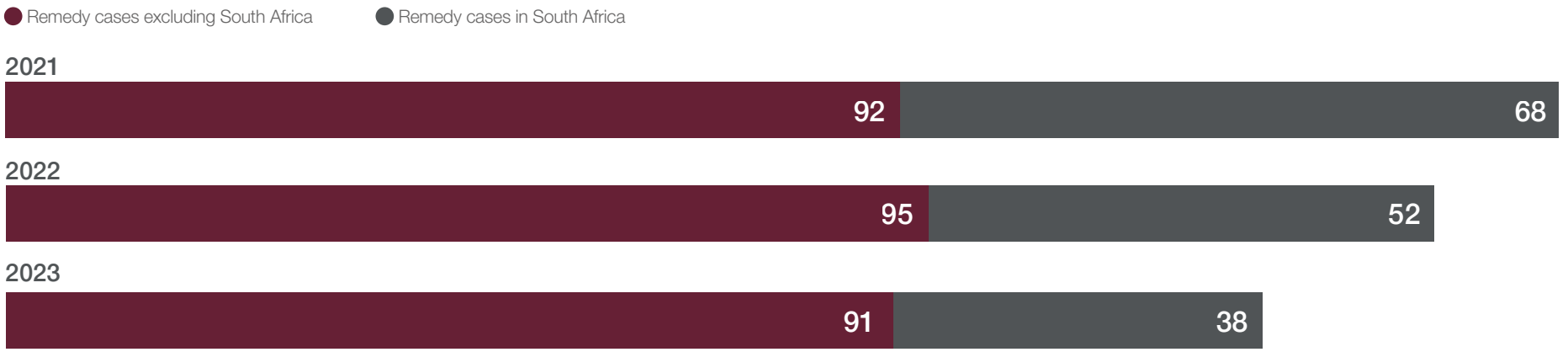


02

Antitrust authorities remain unwilling to accept merger remedies

The trend of favouring prohibition over remedies continued in 2023, at least in certain jurisdictions, eg the U.S., where agencies remained sceptical of whether behavioural or even structural remedies can effectively address antitrust concerns. Elsewhere, antitrust authorities were more open to granting conditional clearances, including behavioural commitments in appropriate cases. Faced with this unsettled landscape, merging parties had to work hard to persuade authorities to accept their remedy proposals.

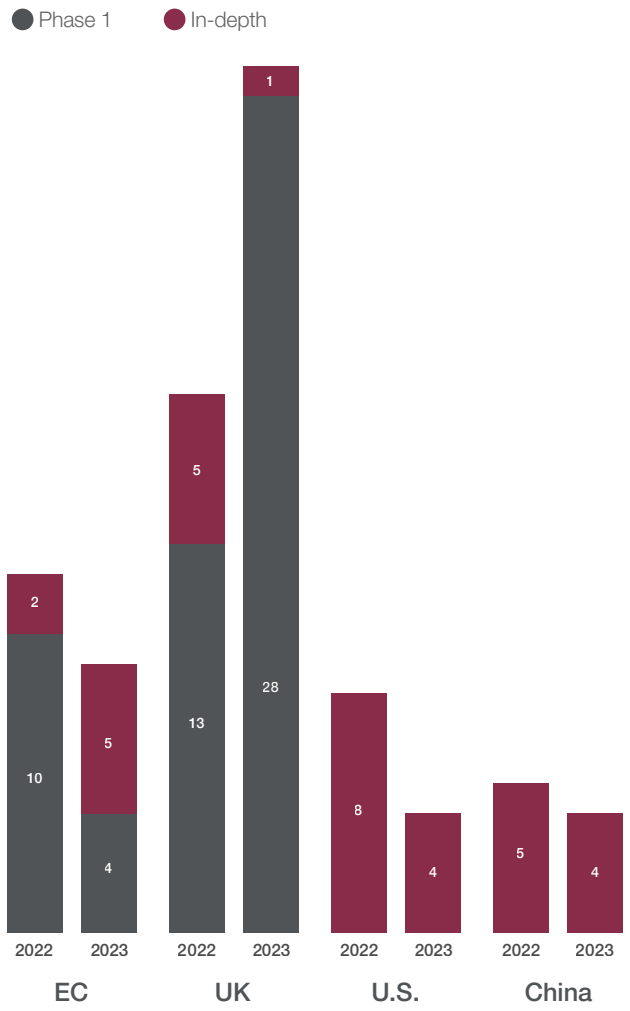
Total remedy cases



At first glance, antitrust authorities' sceptical approach to remedies does not appear to have translated into the overall number of conditional clearances. Excluding South African remedies from the data (where the authority's concerns focus on public interest alongside antitrust issues), the total number of remedy cases was 91, only a slight decrease from 2022.

However, considering that 20 of these remedy cases are attributable to two series of UK veterinary practice transactions, in 2023 the number of acquirers obtaining clearances through giving commitments has in fact decreased significantly.

Remedy cases in selected jurisdictions



Merger remedies still out of favour in the U.S.

Last year, we commented that total remedy cases in the U.S. had dropped to eight, a decrease of nearly 60%. In 2023 we saw a further 50% reduction to four.

This is a product of the continued reluctance by U.S. agencies, particularly the DOJ, to accept negotiated merger remedies. Instead they have favoured challenging deals.

It is striking that since DOJ Head Jonathan Kanter took office in 2021, the agency has agreed only one remedy (which was the result of a mid-trial settlement).The FTC, while more amenable than the DOJ to consent decrees, has also announced it is focusing more resources on "litigating, rather than settling".

Against this background, merging parties have more often chosen to "litigate the fix", meaning that where their remedy offer is deemed insufficient by the agency, they litigate that remedy as part of the agency's suit to block the transaction.

In some cases this has led to positive outcomes for the parties. In both Amgen/Horizon Therapeutics and ICE/Black Knight the FTC settled its challenge by accepting remedies. But this did come at a price – in each case the parties ultimately committed to a broader divestment package than originally offered.

There is every indication that the U.S. agencies' hardline approach will continue in the coming year. Parties to potentially problematic deals should be prepared for protracted litigation and should put in the groundwork to enable them to put forward a robust remedy proposal. Even if not accepted by the agency, it may give the parties more leverage in litigation.

Uptick in conditions in local UK mergers

In contrast to the U.S., we saw the number of remedy cases in the UK increase for a second year in a row. Phase 1 conditional clearances more than doubled from 13 to 28.

Most of these cases were mergers involving local overlapping businesses, including retail fuel stations, pharmacies, supply of car parts and, as noted above, 20 independent acquisitions in the vet sector by two private equity-backed acquirers (see Chapter 4 for more on scrutiny of PE acquisitions).

Many were also completed transactions, which the CMA called in after the parties decided not to notify and then required the acquirer to sell off most, if not all, of the businesses purchased. These effectively amount to retroactive prohibitions.

This highlights the dangers of the UK's voluntary merger control regime. The CMA's close monitoring of markets means it is increasingly likely that the authority will learn of potentially anti-competitive transactions and require notification, with potentially serious outcomes for the acquirer.

EC conditional clearances shift from phase 1 to phase 2

Overall, the EC handed out fewer conditional clearances in 2023: nine, compared to 12 in 2022.

At phase 1, the number of remedies accepted decreased to four (from ten). On the other hand, phase 2 conditional clearances more than doubled (five compared to two). This shift may be significant. It suggests that, while it remains possible to get conditional clearance at EU-level, the EC may need the additional time afforded by a phase 2 investigation to get comfortable that the remedy package addresses its concerns.

Approaches to mitigate antitrust risk

Faced with a more challenging environment in which to convince authorities to accept remedy packages, we saw parties employ various strategies to achieve conditional clearance.

1. **Crafting global remedy solutions** to address antitrust concerns across a number of jurisdictions. A good example is Sika/MBCC, where Sika committed to divest MBCC's admixture business in the EEA, the UK, the U.S., Australia, Canada, New Zealand and Switzerland. The relevant authorities coordinated extensively.
2. **Pulling and refiling notifications** where an authority has concerns about a deal but a tight phase 1 review period does not allow enough time to test the proposed remedies. Parties used this tactic in three of the four phase 1 remedy cases at EU-level, in each persuading the EC to grant conditional clearance after the second phase 1 review.
3. **Using extended pre-notification** to start early discussions on remedies with a view to getting complex commitments accepted at phase 1. Novozymes announced its acquisition of rival biotech firm Chr. Hansen ten months before it formally notified the deal to the EC. The EC's approval was conditional on a wide divestment package comprising businesses from both parties, including distribution and production assets, as well as a pipeline project.

Parties should remember that early and constructive engagement on remedies is generally encouraged by the authorities. In that context, however, the CMA's Chief Executive has warned merging parties against holding back "best and final" remedy proposals, saying that this tactic will extend the review unnecessarily and could result in a prohibition.

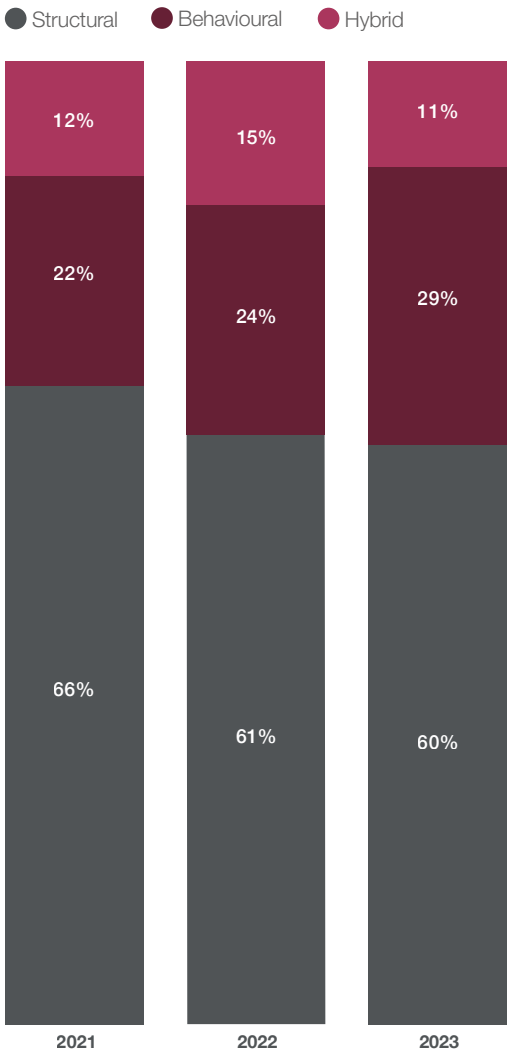
Behavioural remedies still accepted despite receiving bad press

Many antitrust authorities remained resolute in their preference for structural divestments over behavioural commitments, including in the EU, UK, U.S., Germany and Australia. This played out in some key cases in 2023, eg Booking/eTraveli, where the EC rejected a choice screen remedy in favour of blocking the transaction.

Despite this, last year the proportion of conditional clearances involving behavioural commitments or hybrid remedies (ie packages that combined structural and behavioural elements) increased for the second year in a row, to 40%.

Given the increased willingness of antitrust authorities to intervene in non-horizontal transactions, this is not a surprise. Antitrust concerns arising in such deals, eg in relation to access or interoperability, are usually most appropriately addressed by conduct commitments rather than structural divestments.

Conditional clearances by type of remedy[8]



Even in jurisdictions where the authorities have been most hostile to behavioural conditions, we saw them being accepted in certain (mostly non-horizontal) cases:

- **EU**: three of five phase 2 conditional clearances involved behavioural remedies. The EC heralded the licensing commitments accepted in Microsoft/Activision Blizzard as not only replacing competition lost by the transaction but in fact improving it, by empowering consumers and boosting the development of cloud game streaming technology. Access commitments were accepted in the other two cases, one of which raised horizontal concerns.
- **UK**: in its review of Microsoft/Activision Blizzard, the CMA initially rejected the licensing remedy. But it then cleared a restructured version of the deal under which cloud streaming rights to current and future Activision games (outside the EEA) would be sold to a third party, subject to commitments from Microsoft that ensure that the terms of the sale are enforceable by the CMA.
- **U.S.**: the FTC settled its suit to block Amgen/Horizon after the parties agreed not to bundle products or make rebates conditional on certain terms.

Other jurisdictions are much more willing to accept behavioural remedies. In China, all four remedies cases in 2023 involved a behavioural element. The same was true for all published decisions in Belgium, COMESA, Czech Republic, Hungary, Italy, South Korea and Turkey.

Viewed together, these cases send a clear message: where appropriate – particularly in non-horizontal mergers – behavioural remedies are not out of reach.

8 Excluding South African remedy cases.

Upfront buyers/fix-it-first continue to reduce remedy implementation risk

In last year's report we predicted an increase in the use of upfront buyer or fix-it-first remedies. This played out in both the UK and U.S. in 2023.

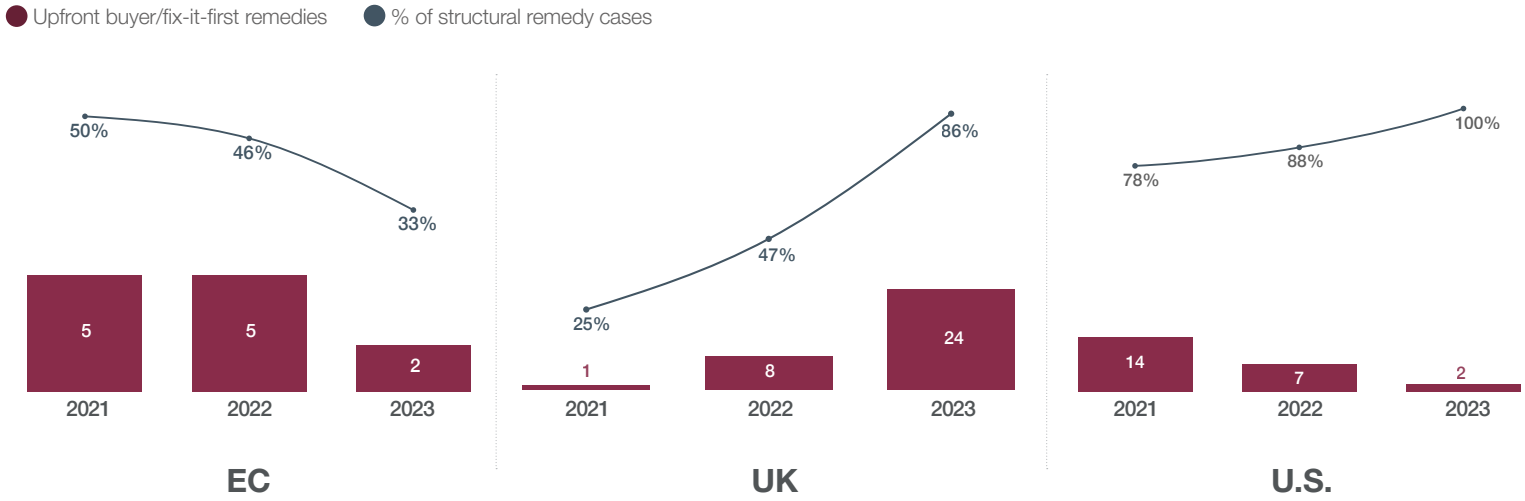
The data for the UK is particularly significant. In 24 out of 27 phase 1 conditional decisions with structural remedies an upfront buyer commitment was required, showing the CMA's eagerness to ensure that remedy packages are robust and implementation risk is minimised.

In the U.S., as remedy cases fell, a decline in the number of upfront buyers necessarily followed. However, the proportion rose: an upfront buyer was required in both structural remedy cases in 2023.

By contrast, in the EU, upfront buyers/fix-it-first remedies were announced in only 33% of structural remedy cases (two in total), a decline for the second year in a row. It will be interesting to see if we see a reversal of this trend. So far in 2024 the EC has (unusually) agreed to both an upfront buyer and a fix-it-first commitment in its conditional clearance of Korean Air/Asiana Airlines.

The EC is also taking a strict approach to compliance. It has launched an investigation into whether Vivendi breached its upfront buyer obligation (as well as the requirements to notify and not to implement the deal prior to EC approval) in relation to its acquisition of Lagardère.

Upfront buyers/fix-it-first in key jurisdictions

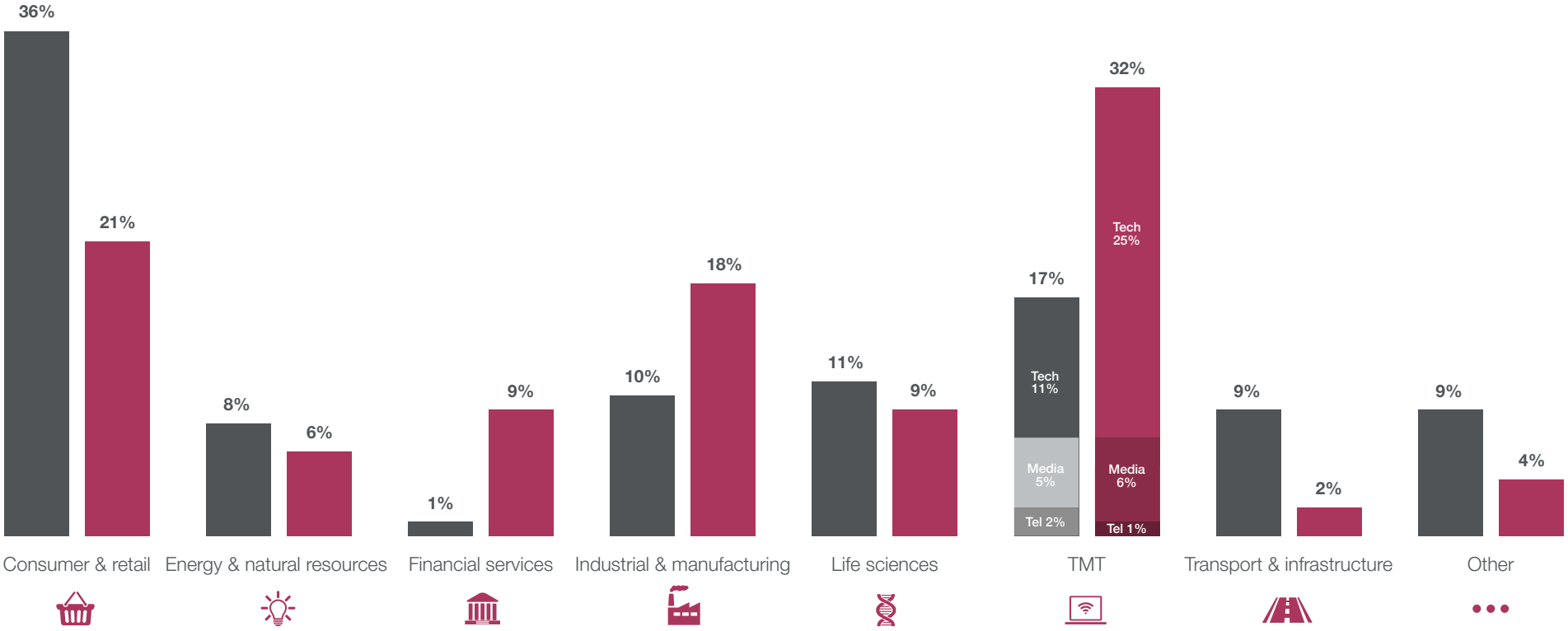


03

Digital M&A runs into antitrust hurdles with consumer, life sciences, transport and energy deals also targeted

Total antitrust intervention by sector

by volume



Digital/tech M&A faced antitrust stumbling blocks as authorities ramped up merger control enforcement in the sector. Overall, however, antitrust intervention in 2023 focused on consumer, life sciences, transport and energy deals. Sustainability considerations also began to feature more prominently in merger reviews.

Rise in tech sector intervention

In 2023, antitrust authorities continued to zero in on the potential anti-competitive effects of digital deals. As in the previous year, our data suggests that the level of antitrust intervention in the tech sector (11%) was comparatively lower than the proportion of global M&A accounted for by tech deals (25%).

However, this is up from just 8% in 2022. And the number of tech sector deals frustrated by antitrust authorities has tripled (six in 2023 compared to two the previous year). Authorities are starting to make good on their promises to closely scrutinise tech transactions and intervene more frequently.

Significantly, 20% of deals blocked in 2023 were in the tech sector. These included the EC's prohibition of Booking/eTraveli and Microsoft/Activision Blizzard, blocked in the UK although a restructured transaction was ultimately conditionally cleared.

Adobe and Figma abandoned their deal due to EU and UK antitrust concerns. In 2024 we have already seen the termination of Amazon/iRobot after the EC looked poised to block the deal. Amazon's GC cited "undue and disproportionate regulatory hurdles".

Several other deals secured a green light only after extensive remedies were agreed, sometimes across multiple jurisdictions. Broadcom/VMware was a good example, with conditional clearances in the EU, China and South Korea.

In China, semiconductor deals continue to be heavily scrutinised, accounting for ten out of 25 conditional SAMR clearances since 2018 (two of four in 2023). Last year we also saw Intel abandon its purchase of semiconductor rival Tower after failing to secure Chinese merger approval.

As discussed in Chapter 1, antitrust authorities' approaches to assessing tech mergers are evolving. They are increasingly looking at the impact of a deal on ecosystems, innovation and potential competition.

Deals resulting in data concentration are also being closely considered. And in the coming months we expect an increasing focus on transactions involving AI activities. Microsoft's partnership with OpenAI, for example, has drawn attention in several jurisdictions, including the EU, UK, Germany and the U.S., although formal reviews are yet to be launched.

In some jurisdictions, the increased appetite to intervene in tech transactions will be fuelled by greater information about acquisitions. In the EU, the new Digital Markets Act (DMA) regime requires "digital gatekeepers" to submit information about all deals involving digital services or that enable the collection of data. The forthcoming UK digital markets regime will impose similar requirements. U.S. regulators will have the benefit of additional information required up-front under the forthcoming new HSR rules.

More generally, it remains to be seen how new conduct requirements under these digital regimes, such as a ban on self-preferencing, will be considered in merger control assessments. We have already seen hints that merging parties may argue that their obligations will prevent a deal having anti-competitive effects.

Overall, the message for parties to tech M&A is clear: expect even more intense antitrust scrutiny and heightened intervention.

UK intervenes in 24 consumer/retail deals

Aside from tech transactions, in 2023 antitrust intervention focused on four other sectors. Consumer and retail deals represented 36% of total deals subject to antitrust intervention but only 21% of global M&A.

Most of this tally comes from the UK CMA, which blocked two deals and imposed remedies in 24 transactions in the sector. Of these, 20 were part of two series of acquisitions by PE-backed investors in the vet sector – see Chapter 4 to learn more.

As discussed in Chapter 2, a number of the conditional clearances related to completed mergers with the CMA ordering the purchaser to sell off the entire target business acquired, effectively amounting to a prohibition.

FTC ramps up scrutiny in healthcare sector

Life sciences transactions were once again a focus for antitrust authorities. The proportion of antitrust intervention reached 11%, compared to 9% of global M&A. When looking at deals prohibited or abandoned in 2023, this soared to 24%.

As in previous years, the U.S. FTC was particularly active. It scored a win on appeal in Illumina/GRAIL and raised concerns that caused the termination of five healthcare transactions. This included Sanofi/Maze – a rare intervention in a licensing arrangement. The FTC also agreed a consent order in Amgen/Horizon Therapeutics, the agency's first litigated pharma merger challenge in over ten years.

Transport intervention focuses on airline mergers

The amount of antitrust intervention in transport M&A (9%) was more than four times higher than the proportion of global M&A (2%).

Airline mergers have faced close scrutiny, accounting for two of the three prohibited transport deals. Some authorities, eg the EC, have taken a tougher approach to the remedies they are willing to accept. But securing approval is possible. After a 13-month review, Korean Airlines' acquisition of Asiana was cleared by the EC in February 2024, subject to novel conditions including a fix-it-first remedy (for air passenger services) and an upfront buyer commitment (for air cargo services). The remedies will likely be a blueprint for future EC merger reviews in the airline sector.

Energy deals cleared with merger remedies

Energy transactions made up 8% of antitrust intervention in 2023, compared to 6% of global M&A. For the third year running, conditional clearances accounted for almost all of this total, spanning a number of jurisdictions.

Sustainability starts to play a role

Looking beyond the traditional sector split in the chart, this year debates have continued over the extent to which sustainability considerations can (and should) be taken into account in merger control assessments.

Some merging parties have already experienced positive outcomes. In Australia, the ACCC for the first time conditionally cleared a transaction on environmental benefits grounds. It concluded that, while Brookfield and MidOcean's acquisition of Origin Energy would give rise to public detriments in the form of vertical foreclosure or discrimination, these detriments would be outweighed by the fact that the deal would likely accelerate Australia's renewable energy transition.

In the EU, the EC has issued a policy brief showing that it is willing – in theory at least – to take sustainability related issues into account in merger reviews. This includes defining markets, assessing how closely merging parties compete with rivals, efficiencies and remedies. Overall, the EC is clear that it will be vigilant in its approach to killer acquisitions involving "green" innovators. If these fall below EU or national merger control thresholds, the authority will seek to review them under its revised referral policy (see Chapter 5).

In Japan, new "Green Guidelines" recognise that certain mergers, such as those that strengthen R&D capabilities in technologies that contribute to the reduction of greenhouse gases, often have pro-competitive effects.

Convincing an authority to accept sustainability arguments may not be easy. Last year the Dutch Authority for Consumers & Markets rejected arguments that a merger between two waste management companies would result in sustainability benefits on the basis that the sustainability measures were not merger-specific but needed to be implemented anyway.

Some antitrust authorities are unlikely to entertain any sustainability arguments. FTC Chair Lina Khan has said that environmental, social or governance commitments will generally not be considered as a remedy to concerns.

As countries work to meet their green transition targets, we expect sustainability and environmental arguments to feature more heavily in merger control reviews. However, with a patchwork of positions emerging, a harmonised approach by authorities across jurisdictions is unlikely. Parties should be aware that sustainability related arguments resonating with some authorities will likely gain no traction with others.

04

Private equity deals under increasing antitrust scrutiny

Traditionally, private equity firms were seen as benign investors from an antitrust perspective. This is changing. In the past 12 months, PE-funded acquisitions have faced progressively more rigorous scrutiny by antitrust authorities.

Clamping down on roll-ups

Antitrust authorities in a number of jurisdictions, including the U.S., the UK and the Netherlands, have promised to crack down on PE roll-up strategies. They want to take a close look at situations where acquirers buy smaller assets – which on their own fall below merger control notification thresholds – and combine these into a larger entity that concentrates market power.

The U.S. antitrust agencies have been particularly active:

- **In a** landmark lawsuit against Welsh Carson the FTC alleged that the acquisition of 17 anaesthesiology practices over a ten-year period, together with price-setting and market allocation agreements, violated U.S. rules prohibiting monopolies, unfair methods of competition and anti-competitive acquisitions. If successful, the FTC is likely to pursue similar actions.
- **"Prior approval" obligations** are now imposed by the FTC in all transactions requiring remedies. These force the acquirer to seek FTC permission to close any future deal in the same (or adjacent) markets, even if it falls below reporting thresholds. They could clearly have a major impact on PE acquisition strategies in terms of both feasibility and timing.
- **Updated U.S. merger guidelines** explicitly encourage the agencies to evaluate series of acquisitions as part of an industry trend or to assess whether an overall acquisition pattern or strategy of the acquirer might harm competition.

In the UK, the CMA also has PE consolidation in its sights. Last year it investigated two sets of PE-backed roll-ups in the vet sector, in both cases calling in the deals (sometimes 18 months post-completion) after acquirers Medivet and IVC chose not to notify the individual transactions.

Medivet was forced to divest 12 of the 17 vet practices it had purchased. IVC had to sell off each of the eight target businesses. The CMA has since launched a market review into concentration levels in the sector.

"Looking ahead, PE firms and their acquisition strategies will continue to face antitrust headwinds."

Ramped up enforcement of interlocking directorates

The U.S. agencies have significantly increased enforcement action against "interlocking directorships". These are prohibited under Section 8 of the Clayton Act, which states that directors and officers cannot serve on the board of a competitor.

So far, the DOJ has unwound or prevented at least 15 interlocks involving 11 companies. PE firms have been among those targeted. The FTC has also stepped up, challenging Quantum Energy's seat on natural gas producer EQT's board. This is the first time that the FTC has applied Section 8 to a non-corporate entity.

Elsewhere, PE firms holding minority stakes in rival businesses have attracted attention. The head of the Australian ACCC has flagged potential antitrust concerns on the basis that it is often sponsors who make the more "competitively significant decisions", despite not being in control. It remains to be seen whether any concrete enforcement action will follow.

Bolstering information requirements in filing forms

Antitrust authorities need to be aware of roll-up strategies or interlocking directorates in order to take enforcement action. This may be challenging, especially where deals fall below notification thresholds. Some agencies plan to tackle this by adding information requirements into notification forms.

In the U.S., updates to the HSR filing form will require parties to provide details on fund ownership structures, cross directorships and details of prior acquisitions going back ten years.

At EU-level, the EC's revised Form CO now requests information on rivals with significant non-controlling shareholdings in the parties.

National regulators have also pledged to work together to share information. The Biden Administration has announced, for example, that the Department of Health and Human Services will share data to help the antitrust agencies identify potentially anti-competitive roll-ups. Authorities in other jurisdictions may follow suit.

Scepticism over PE firms as remedy takers

Where merging parties are required to divest businesses to obtain merger control clearance, some antitrust authorities have expressed doubts as to whether PE firms can be effective purchasers.

The theory is that a PE remedy-taker may prioritise financial returns over competing aggressively and innovating or may not have the experience to run the divestment business as a credible competitor to the merged firm. These concerns have been voiced by DOJ and CMA officials.

Ongoing merger control hurdles for PE firms

Looking ahead, PE firms and their acquisition strategies will continue to face antitrust headwinds. From a practical perspective investors should:

1. Expect close scrutiny of any roll-ups/serial acquisitions, especially in local markets. For roll-up strategies impacting voluntary merger control jurisdictions such as the UK, consider how and when to publicise the acquisitions – there is a fine balance between limiting the risk of the authority noticing a transaction(s) and ensuring that it does not have a long "look back" period to call in the deals.
2. Prepare to gather additional information when making merger control filings, at least in the U.S. and EU, which will inevitably increase administrative burden.
3. Be aware of the importance of internal documents. These can be critical to an authority's merger control assessment. Be careful about how they portray the market, the particular transaction and any wider acquisition strategy.
4. Be alert to the risk that minority stakes could be viewed unfavourably by antitrust authorities, especially where portfolios have overlapping activities.
5. Expect tougher lines of questioning when being considered as a potential divestment purchaser in merger control processes.

05

Review of below-threshold mergers creates uncertainty

Antitrust authorities continue to use powers to review deals that fall below merger control filing thresholds. For merging parties this means uncertainty. It is crucial that the possibility of review – including a post-closing investigation – is assessed and provided for in transaction documents and deal timetables.

As predicted in last year's report, the greatest attention has been on mergers in the digital and pharmaceuticals sectors. Authorities are keen to ensure that potentially anti-competitive killer acquisitions do not escape review.

But these are not the only sectors in focus. Below-threshold PE acquisitions have been in the spotlight. Transport and energy deals have also attracted scrutiny.

Going one step further, some authorities have even reached for non-merger control toolkits to enable them to review below-threshold transactions.

EC reviews more M&A under revised referrals policy

The EC's revised Article 22 referral policy received a green light in 2022 after the General Court endorsed the authority's decision to review Illumina/GRAIL. The policy encourages EU Member States to refer transactions (including completed deals) to the EC for review even where EU and national filing thresholds are not met. The EC ultimately blocked that deal.

Notwithstanding pending appeals by Illumina, last year the EC accepted two further Article 22 referral requests in cases where neither EU nor national merger control thresholds were met: a semiconductor merger (Qualcomm/Autotalks) and a transaction in the energy trading sector (EEX/Nasdaq Power).

Both deals remain in pre-notification but will be watched closely once formally notified to the EC.

These cases are significant. However, they are far from the flood of referrals that some expected.

We know from EC officials that the authority has assessed a number of cases for possible referral. But so far it appears to be taking a selective approach to reviews. While this does not remove the need for merging parties to assess Article 22 referral risk, it does give some comfort.

14/26 jurisdictions surveyed can review below-threshold deals

Other authorities use new and existing powers

Elsewhere, antitrust authorities also exercised their ability to scrutinise transactions falling below merger control thresholds:

- **China**: SAMR conditionally cleared Simcere/Beijing Tobishi, a pharma deal relating to an API and injections to treat hearing loss – the first time it has imposed remedies on a below-threshold transaction following merger control reforms in 2022.
- **South Korea**: for the first time (based on publicly disclosed transactions) the Korea Fair Trade Commission requested the voluntary filing of a below-threshold deal in the tech sector, asking Adobe to notify its acquisition of Figma over concerns that the merger could stifle innovation.
- **Brazil**: the Administrative Council for Economic Defense (CADE) ordered two resellers of air miles to notify their completed transaction for review, marking the sixth time it has used its below-threshold powers since the current Brazilian antitrust rules were enacted in 2012.

Some authorities have required firms to notify all future transactions, including below-threshold deals, as part of a merger remedy package. In the U.S., the FTC routinely imposes such obligations. We also saw this happen in Brazil.

In Germany, following a sector inquiry the Federal Cartel Office found that Rethmann Group holds a strong market position in certain waste disposal markets. The authority is now considering whether to exercise on Rethmann Group its recently expanded ability to require a company to notify all deals in areas covered by the sector inquiry, including below-threshold mergers.

More examples are likely in the coming year as authorities continue to strengthen and make use of their powers. The Irish Competition and Consumer Protection Commission has recently gained the ability to call in below-threshold mergers. Dutch and Czech authorities are seeking it. In Canada, there are proposals to extend the period during which the Competition Bureau can challenge non-notifiable deals from one to three years.

Beyond merger control

Generating even greater uncertainty for merging parties, some authorities are looking to non-merger toolkits to scrutinise transactions that fall outside the reach of merger control rules.

In the U.S., the FTC's lawsuit against PE fund Welsh Carson shows the agency's willingness to use behavioural antitrust rules – the U.S. prohibitions on monopolies and unfair methods of competition – alongside merger control tools to challenge serial acquisitions.

Across the Atlantic, the ECJ confirmed that behavioural antitrust provisions can similarly be used to scrutinise M&A in the EU. It held that Member State antitrust authorities can apply abuse of dominance rules to assess acquisitions by dominant companies that fall below national merger control thresholds. On the back of the ruling, the Belgian Competition Authority opened an abuse of dominance probe into Proximus' completed acquisition of edpnet. This action ultimately prompted Proximus to sell off edpnet's Belgian operations.

In the digital sector, reporting obligations introduced by the new EU DMA and forthcoming UK digital markets regime will give the EC and CMA greater visibility over below-threshold deals (see Chapter 3 for more on this). We expect the authorities to proactively use this information when prioritising enforcement action.

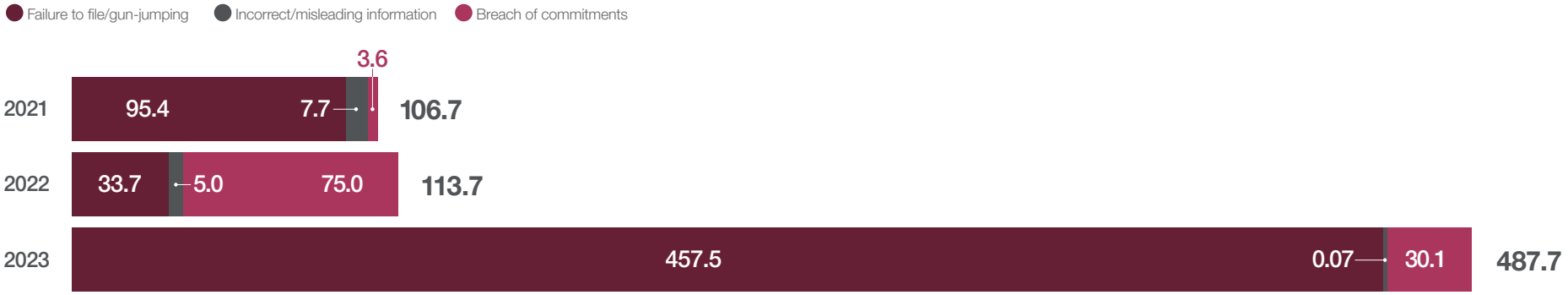
Similar powers are creeping into other new regulatory regimes. The EU Foreign Subsidies Regulation (FSR), for example, gives the EC the ability to require notification of M&A falling below FSR filing thresholds and, separately, to investigate suspected distortive foreign subsidies on its own initiative (see Chapter 9).

06

Record EU gun-jumping penalty contributes to surge in fines

Sanctions for procedural merger control infringements quadrupled in 2023. A total of EUR487.7 million fines were imposed in 28 decisions across the jurisdictions surveyed. This serves as a clear warning to merging parties that gun-jumping, submitting incorrect information and breaching remedies can come at a very high price.

Total fines split by fine type (EURm)



Record EU gun-jumping fine

Much of 2023's tally is made up of the EC's highest ever gun-jumping fine.

The EC fined Illumina EUR432m for completing its acquisition of GRAIL while the EC's phase 2 investigation was ongoing. Illumina publicly announced it had closed the transaction. The company argued that the EC had no jurisdiction to review the deal under its revised Article 22 referral policy and that the transaction would accelerate patient access to tests for early detection of cancers.

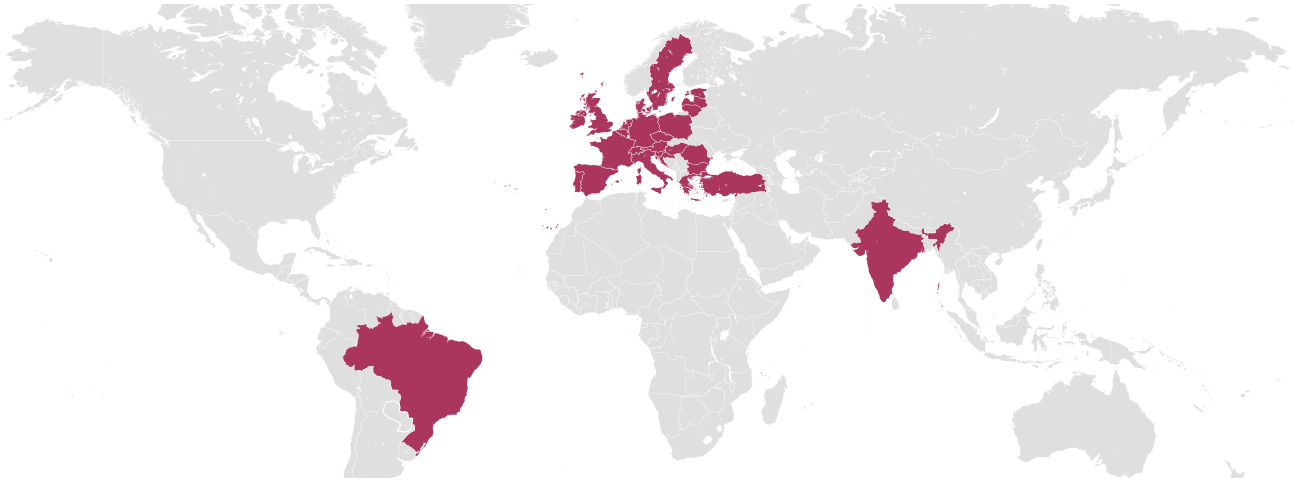
The EC imposed the maximum possible fine (10% of global group turnover) for Illumina's deliberate infringement of the rules.

This is an unusual case on its facts but shows the EC's strict approach to procedural enforcement. It also demonstrates the authority's willingness to hold a target company accountable for its role in any breach: GRAIL was fined a nominal EUR1,000.

An important court victory in a separate case is likely to give the EC further confidence. In November, the ECJ upheld Altice's fine for failure to notify and jumping the gun in relation to its acquisition of PT Portugal, albeit with a slightly reduced penalty of EUR115.2m.

As well as endorsing the illegality of Altice's conduct in the period before merger control clearance was obtained, the ruling confirms the importance of correctly framing pre-completion covenants in deal documents. They should not go further than necessary to preserve the value of the target pre-completion and must not give the acquirer veto rights over matters that would give it early control.

Jurisdictions where fines were imposed in 2023 (EURm)



Total EU: 464.1
European Commission: 432.0
Czech Republic: 0.01
Hungary: 0.1
Italy: 0.03
Poland: 0.01
Slovakia: 21.0
Spain: 11.0

UK: 2.9

Brazil: 1.2

India: 0.3

Turkey: 19.1

No published enforcement action in China

In previous years, China's SAMR has been the most prolific enforcer of procedural merger control rules. In 2022 it published over 30 separate fines for gun-jumping. Many expected the ten-fold increase in maximum fines that took effect that year to result in record penalties in 2023.

Instead, SAMR did not announce any procedural fines last year. There are two possible explanations. First, we understand that SAMR has now reached the end of its campaign to enforce against historic non-notified deals in the digital sector, which caused a spike in fining decisions in recent years. Second, SAMR may have continued to issue fines for gun-jumping but without publishing its findings.

Merger control compliance clearly remains on SAMR's agenda. During 2023 it consulted on guidelines that will clarify the calculation of fines under the new higher fining levels.

Other antitrust authorities continued their active approach to procedural enforcement in 2023. Brazil's CADE reached five fining decisions. The Competition Commission of India (CCI) totalled seven.

In several of the Indian cases, the CCI rejected arguments that an exemption from the filing obligation applied. This warns parties to deals with an Indian nexus to rigorously assess the application of exemptions under the Indian regime, particularly in situations where the CCI is likely to adopt a very literal interpretation of the rules.

Authorities tough on breach of merger remedies

Policing remedies remained high on the agenda in 2023. We saw a number of heavy fines:

- **Spain**: the Spanish National Markets and Competition Commission fined Telefónica twice (EUR11m in total) for breaching commitments in relation to its 2015 acquisition of pay-TV operator DTS. The company has been fined up to three times for non-compliance in less than a year.
- **Turkey**: EssilorLuxottica was fined TRY492m (approx. EUR19m) by the Turkish antitrust authority – the company imposed exclusivity provisions that infringed commitments entered into as part of its purchase of Essilor.
- **U.S.**: the FTC is suing 7-Eleven for violating a consent order by acquiring a fuel station in 2018 without notifying the agency. 7-Eleven faces a penalty of USD77m.

Stronger penalties in the UK and Ireland

Elsewhere, antitrust authorities are obtaining more robust powers`to enforce against procedural merger control infringements.

A new gun-jumping offence was introduced in Ireland, subjecting merging parties to fines of up to EUR250,000. This supplements the existing offence of failing to notify a deal.

In the UK, the CMA continued its strict enforcement of procedural rules with a GBP2.5m fine on Copart for breaching an initial enforcement ("hold separate") order. It also fined the same company GBP25,000 for failing to respond to information requests.

The difference between these two penalty amounts is striking. The UK regime currently caps the fine for information infringements (as well as breach of remedies) at GBP30,000. But repeated calls by the CMA for tougher fining powers for these types of violation have resulted in draft legislation that will dramatically increase penalties.

Once in force, merging parties will face fines of up to 1% of global group turnover for failing to comply with information requirements, and up to 5% of global group turnover for breaching merger remedies.

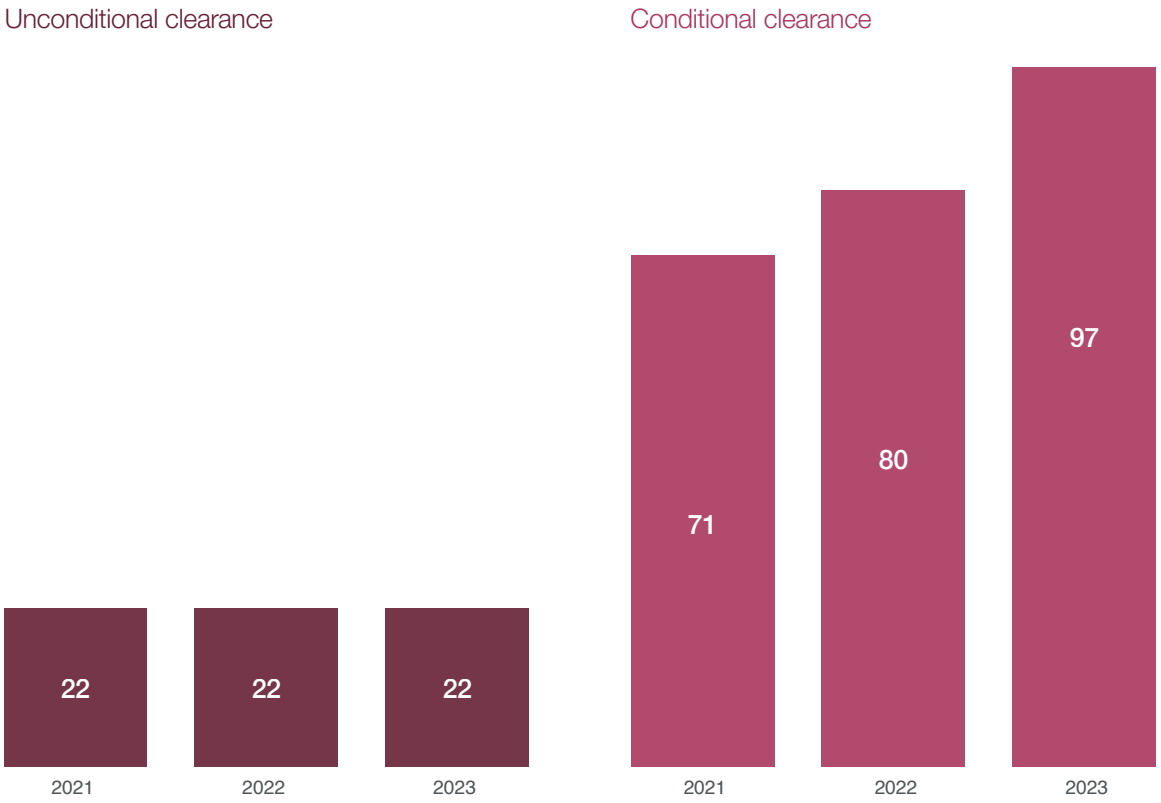
We expect both authorities to join other agencies in making full use of their new powers.

07

Complex deals face longer merger review periods

Antitrust authorities continued to take steps to speed up the review of transactions that do not raise antitrust concerns. Investigation periods in more complex cases are, however, a different story, with suspensions and extensions stretching out already lengthy timelines, resulting in uncertainty for merging parties.

Average phase 1 review periods (working days)[9]



Overall, the average time to get unconditional clearance at phase 1 (by far the most likely outcome of a merger review) remained consistent last year at 22 working days.

But for deals raising antitrust concerns, the story is rather different. Review periods are getting longer. The average time to receive a conditional phase 1 clearance, for example, increased to 97 working days across all jurisdictions surveyed.

The picture for phase 2 investigations remains extremely varied across jurisdictions. Adding in the often-lengthy pre-notification period before a transaction is formally filed, the merger control process for complex deals can last many months, and even years.

9 Weighted average across all jurisdictions surveyed, with some exclusions where data was unavailable.

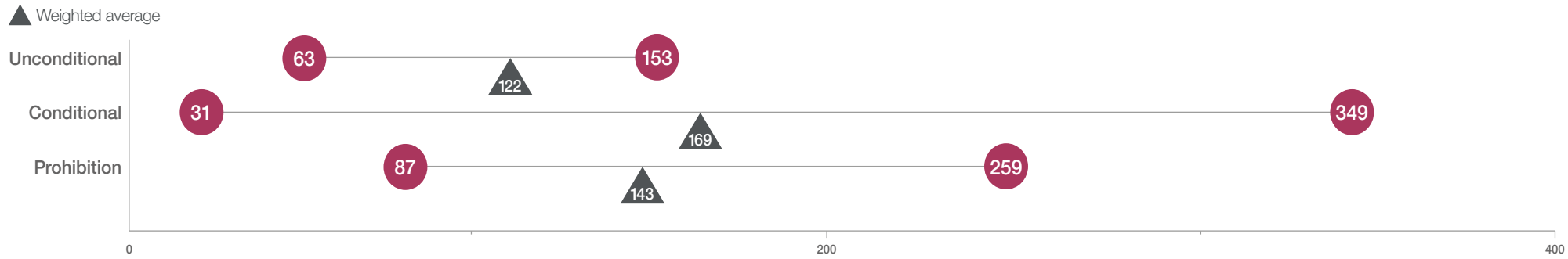
Fast-track procedures speed up many reviews

Keen to reduce the regulatory burden on merging parties and free up their own internal resources, several antitrust authorities made further improvements to fast-track or simplified procedures in 2023.

- **EU**: September 2023 revisions to EU merger control rules brought more deals within the scope of the simplified procedure. This means a lighter notification form and a quicker clearance decision. Average phase 1 unconditional clearance times have already fallen steadily in the past decade – a further decrease is likely.
- **China**: 90% of the nearly 800 merger control decisions taken by SAMR last year were under the simplified procedure. 97% of those simplified cases were cleared at phase 1 in an average of 11 working days. SAMR continues to bring efficiencies to its simplified cases through its ongoing pilot scheme to delegate certain reviews to provincial-level market agencies.
- **Spain**: a reduction in the deadline for the review of simplified cases from one month to 15 working days has resulted in the average review period for unconditional phase 1 approvals dropping to just 12 working days.
- **Brazil**: fast-track notifications can now be submitted digitally. The authority then plans to use AI (likely from mid-2024) to clear these deals on the same date as filing. The platform may be extended to non-fast-track cases in future. It will be interesting to see if this model is adopted in any other jurisdictions.
- **UK**: it is not just "no-issues" cases that can take advantage of fast-track procedures. Last year, several deals that raised antitrust concerns were fast-tracked to the phase 1 remedies stage, shaving around 30 working days off the review period. Proposed revisions to UK merger control rules include a new mechanism enabling parties to request (even in pre-notification) a fast-track to phase 2 without having to accept that their deal raises antitrust concerns.

Duration of in-depth investigations

As a range from jurisdiction with the shortest average to jurisdiction with the longest (working days)



Greater use of suspensions and extensions creates delays in complex cases

On the flip side, many deals raising antitrust concerns have faced longer merger control investigations due to the in-depth review period being suspended and/or extended.

- **EU**: suspensions of in-depth investigations continue to be the norm. In five of the eight phase 2 EC decisions in 2023, suspensions were imposed and ranged from 15 to 168 working days (a median of 59). Extensions to the phase 2 statutory review deadline are also commonplace, occurring in three quarters of cases last year. These can add up to 35 working days to the standard 90-day timetable.
- **UK**: it is usual for the CMA to extend its 24-week phase 2 review period to enable it to conduct further analysis or consider remedies. We saw this in all but one of the eight in-depth reviews concluded in 2023. Six of these were extended by the full eight-week maximum. The CMA's review period can also be extended if parties fail to respond to information requests by the required deadline. Until 2021, these types of extension were rare at phase 2. In the past three years, the CMA has extended its in-depth review on this basis in over a quarter of cases (seven of 26). Hitachi Rail/Thales, a 2023 conditional clearance, had over nine weeks added to its review timetable following two separate extensions.
- **Ireland**: the authority made frequent use of its powers to request further information, which suspend the review period. All four of its phase 2 reviews concluded in 2023 were suspended at some point.

In China, a "stop-the-clock" mechanism was introduced in 2022 to inject greater flexibility into the review process and remove the need for parties to refile their transaction if SAMR was unable to complete its assessment by the statutory deadline.

SAMR has started to make use of this tool, stopping the clock in three of its four conditional clearances last year (for around six, five and two months respectively). There are signs that this may be having a positive impact on in-depth review periods, but more examples are needed to confirm this.

Parties less willing to enter U.S. timing agreements

After the parties have substantially complied with a U.S. Second Request (ie where the antitrust agency seeks additional information to kick off an in-depth review), the agency has 30 days to complete its assessment.

Traditionally, parties have entered "timing agreements" with the relevant agency, giving it more time – typically an extra 30 to 60 days, with further extensions often agreed – to reach a decision. However, over the past year we have increasingly seen parties to complex deals resisting such agreements.

With the agencies taking an aggressive approach to enforcement and more frequently challenging deals, parties want to ensure that any court proceedings get underway as soon as possible and are not delayed by giving the agency additional time to reach its decision to launch a complaint.

For the agencies, this development puts strain on their already stretched resources. FTC Chair Lina Khan has recently called for longer statutory review periods to relieve some of the pressure.

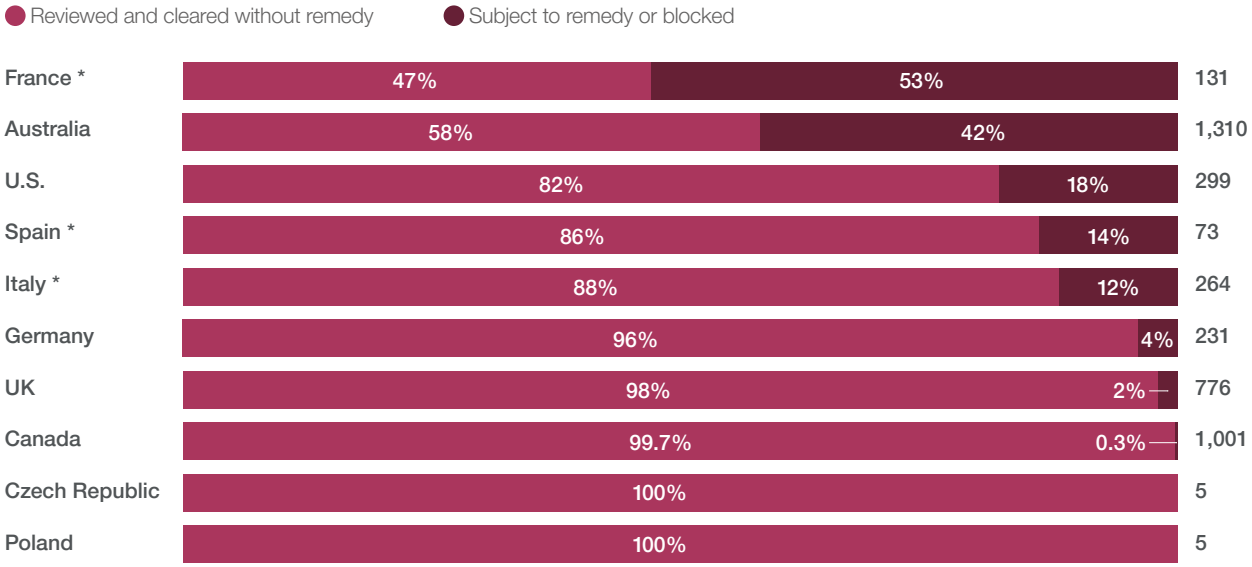
08

Diverse foreign investment landscape presents challenges for dealmakers

New foreign investment (FI) screening regimes continue to appear and existing rules are expanding in scope. While in some jurisdictions intervention rates are high, overall most deals subject to FI review are cleared without remedies. Dealmakers are becoming increasingly attuned to the risks and challenges that FI reviews pose to their deals around the world.

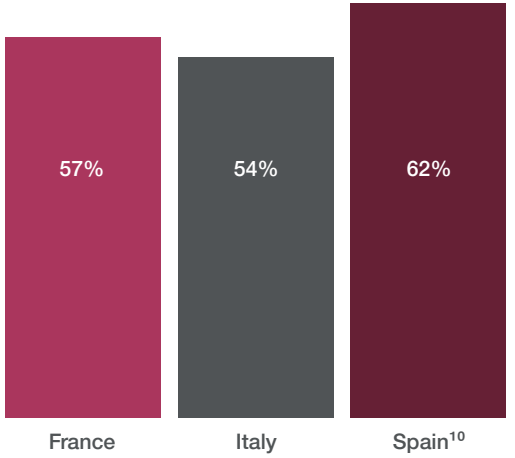
Outcome of FI screening review

Based on last published report by government/regulator



* In each of these jurisdictions a large proportion of notifications are deemed out of scope.

Notifications deemed out of scope



10 Includes voluntary consultations and requests for authorisation

The FI landscape – a mixed picture

Overall, across the globe, more deals are subject to FI review. We have seen upticks in the number of notifications, for example, in the U.S. But elsewhere, such as Australia, filing numbers are down on the previous year.

This likely reflects a more subdued M&A market.

It might also indicate that parties are growing more familiar with the scope of FI regimes.

But this does not appear to be the case across the board. In each of France, Italy and Spain, over half of notifications submitted were deemed out of scope. This suggests continued uncertainty about the reach of these regimes. In Spain, however, we are now seeing fewer requests for confirmation of whether the FI rules apply – perhaps a sign that this may be changing.

FI intervention levels also present a diverse picture.

In some jurisdictions, FI concerns result in prohibition or conditions/remedies in a high proportion of deals – 53% in France and 18% in the U.S. In others, FI regulators intervened in no, or very few, transactions. In five of the jurisdictions we analysed (including the UK, Germany, Canada) over 96% of deals notified were cleared without remedies.

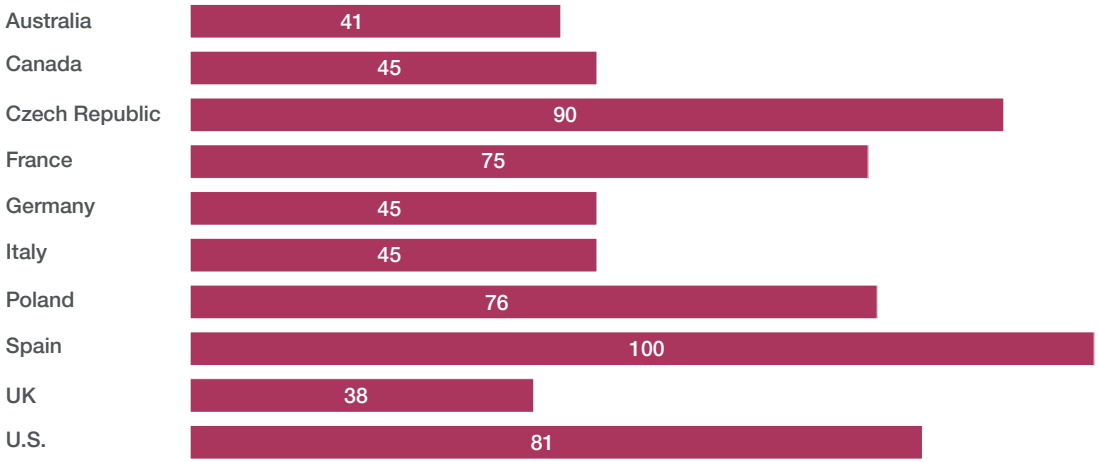
In terms of timing, the majority of reviews are completed within three months. However, where deals are complex and raise substantive issues, review periods are likely to be significantly longer. In the UK, for example, an in-depth review resulting in intervention takes on average 146 days.

Chinese investment drew attention from many FI regulators, although investors from the EU, UK and U.S. also raised concerns in some deals. Italy blocked French group Safran's proposed acquisition of a Collins Aerospace business. Already in 2024 it has imposed conditions on the sale of Telecom Italia's fixed line network to U.S. PE fund KKR. France prohibited the purchase of nuclear parts businesses by a U.S.-based acquirer and the UK government imposed conditions in deals involving investment by U.S. PE firms.

There is, however, some convergence in the sectors affected by FI intervention across jurisdictions. They include defence, energy, semiconductors, mining and technology. This will help parties pinpoint where concerns may arise.

All these features contribute to a complex environment for dealmakers. Looking ahead, the current geopolitical climate means that FI reviews will continue to be a significant hurdle in terms of administrative burden and potential execution risk. As we discuss in Chapter 10, planning for FI screening and allocating risk appropriately is crucial.

Indicative review period across surveyed jurisdictions (calendar days)



In all cases, the timing is indicative and there can be significant variations. Substantive issues will typically result in longer review periods.

The UK regime is maturing

In FY22/23, the UK intervened in 15 transactions, blocking (or ordering the unwinding of) five, and imposing conditions in ten. This amounted to an intervention rate of only 2%. So far in FY23/24, intervention rates are looking much lower. Only three deals have been subject to conditions (most recently e&'s investment in Vodafone in January 2024) and there have been no prohibitions.

The UK government is consulting on possible reforms to the regime which, if adopted, could reduce the burden on dealmakers.

Notably, the government is seeking feedback on possible exemptions for internal reorganisations and situations involving distressed businesses. It is also looking to update and clarify certain mandatory notification sectors, many of which have been criticised for being overly complex to apply in practice. There is, however, a residual risk that this exercise will result in expanding the scope of the regime into new areas – adding generative AI to the current definition of AI being a prime example.

Proliferation and development of FI regimes continue

The UK is not alone in updating its FI rules. FI regimes continue to be established and amended across the globe.

During 2023 Canada, Japan and Singapore each took steps to broaden the reach of their regimes. U.S. Congress has put forward proposals to expand the jurisdiction of CFIUS. In the EU, new Dutch, Belgian and Slovakian FI screening regimes came into force last year and the Spanish rules were clarified. A new Irish FI regime is imminent, and it is likely that the scope of the German regime will be fine-tuned in the course of 2024.

Looking ahead, the EC's proposed reform of FI screening, published in January 2024, will have significant implications for dealmakers in the EU.

The EC plans to oblige all Member States to introduce a screening regime (currently 22 of 27 have one, up from 18 in 2022) and adhere to set minimum standards. Cooperation and information exchange between Member States will be strengthened. Existing national screening mechanisms will likely need significant amendment to meet these requirements.

While on its face this means additional hurdles for dealmakers, in time, a greater degree of harmonisation of rules and procedures across the EU will be welcome for parties to cross-border deals.

Full harmonisation across the bloc is, however, not yet on the cards. Responsibility for FI review of acquisitions will remain exclusively with the Member States. We are therefore still some distance from a "one-stop shop" system similar to EU merger control.

Outbound investment controls on the horizon

Last year, a number of jurisdictions progressed plans to introduce outbound investment control regimes.

In the summer, the Biden Administration took steps to regulate certain types of U.S. outbound investment in semiconductors and microelectronics, quantum information technologies and AI where the investment might compromise U.S. national security.

The EU followed suit and announced it is considering an outbound investment screening mechanism. Early indications suggest it will focus on advanced semiconductors, AI, quantum technologies and biotechnologies.

The UK, as part of the Atlantic Declaration, has committed to evaluating the best way to address the national security risks associated with outbound investment. We expect further details in the coming months.

09

EU Foreign Subsidies Regulation increases M&A regulatory burden

The EU FSR took effect in July 2023. It aims to regulate subsidies granted by non-EU countries to ensure that they do not distort competition in the EU internal market. For dealmakers, it is already having a major impact. The new mandatory suspensory M&A notification obligation – up and running since October – has significantly increased the regulatory burden for deals with an EU nexus.

The FSR operates alongside existing merger control and foreign investment control regimes, adding a third regulatory hurdle for merging parties to clear.

It is early days, but the regime already appears to be catching more transactions than the EC initially expected. The authority had estimated that around 30 deals would require notification each year. According to an EC report on the first 100 days since the start of the transaction notification obligation, the EC has engaged in pre-notification discussions in 53 cases, 14 of which have been formally notified and nine fully assessed.

If notifications continue at this rate for the remainder of the year, over 50 transactions will be reviewed under the regime – 70% more than the EC predicted.

So far, the EC has not intervened in any transactions. But it has wide powers to take action against subsidies if it concludes they are distortive, including imposing remedies and even prohibiting deals.

EC report on first 100 days of the FSR transaction notification tool

53 cases pre-notified

14 cases formally notified

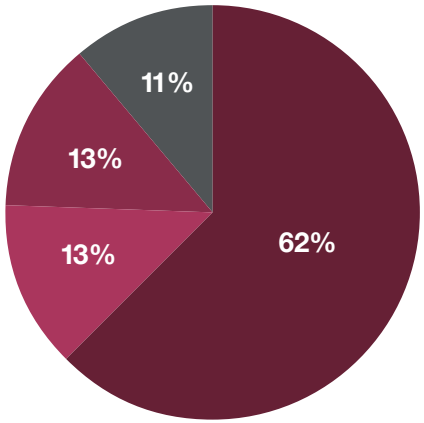
9 cases fully assessed

0 findings of distortive subsidies

79%
of cases also subject to EU merger control review

49%
of cases also subject to foreign investment screening in 1+ EU Member State

33%
of cases involve an investment fund as notifying party



62% of cases involved a cross-border EU-non-EU transaction

13% of cases involved a cross-border transaction outside the EU

13% of cases involved a cross-border transaction within the EU

11% of cases involved a transaction within the same EU Member State

Five key features of the FSR transaction review tool

Companies must notify the EC if at least one of the merging parties, the target or the joint venture is established in the EU and has EU turnover of at least EUR500m, and the parties received combined "financial contributions" from non-EU countries of more than EUR50m in the three calendar years prior to notification.

These are defined very broadly and can catch transfer of funds or liabilities, the foregoing of revenue that is due (eg non-ordinary course tax benefits), or even the purchase of goods/services by public authorities of a non-EU country or private companies whose actions can be attributed to non-EU countries. Importantly, financial contributions do not need to amount to a "subsidy" (much less one that could distort the internal market) to trigger notification.

The review period is similar to the EU merger control process, ie 25 working days plus 90 working days (with possible extensions) for an in-depth investigation. Also like the EU merger control regime, the EC can block transactions or approve them subject to remedies.

Failure to notify or implementing a deal during the review period can result in heavy fines – up to 10% of global group turnover.

The EC can require the notification of deals falling below the notification thresholds and, separately, can investigate suspected distortive foreign subsidies on its own initiative.

"The most common types of FFCs (foreign financial contributions) in the first notifications relate to the sources of financing of the notified transactions."

EC FSR Brief, February 2024

Five challenges for merging parties

1. **Identifying which financial contributions are caught.** This is not straightforward. There is uncertainty around many aspects, including tax measures and the extent to which contributions by a private entity can be attributed to a third country. The EC is providing piecemeal information on these (and other) points but has not yet issued comprehensive guidance.

2. **Collecting information on foreign financial contributions.** This is a challenging exercise for many businesses and will be particularly formidable for those with multiple portfolio companies. Companies are grappling with how to put in place mechanisms to track foreign financial contributions on a rolling basis.

3. **Completing the filing form.** The requirements are onerous. For example, notifying parties must submit granular data on sources of funding and a full breakdown of target valuation. While certain types of foreign financial contributions can be reported in aggregate, if disclosure exemptions do not apply then extremely detailed information must be provided. Determining whether exemptions apply can be difficult. How far the EC is willing to grant waivers in relation to information requirements is not yet clear.

4. **Coordinating FSR reviews with other regulatory investigations.** According to the EC, nearly 80% of FSR filings so far have been made in parallel with an EU merger control notification and around half have been subject to foreign investment screening in one or more EU Member State. Managing and coordinating the timing of these review periods is crucial. To date we have no visibility over the extent to which EC officials working on both processes are talking to each other.

5. **Determining when the EC may have substantive concerns.** The EC must assess whether any of the foreign financial contributions reported in the filing amount to a foreign subsidy and, if so, whether that subsidy distorts the market. The FSR sets out when a foreign subsidy is most likely to be distortive (eg when it directly facilitates a transaction) and enables the EC to balance positive and negative effects. However, the EC has not published guidelines on how it will carry out this assessment in practice.

The upshot

For all transactions with an EU nexus, the applicability of the FSR must be considered at the outset. A transaction risk analysis should be carried out alongside merger control and foreign investment assessments. If a filing is required, appropriate conditions should be included in transaction documents and the deal timeline should account for the EC's review period.

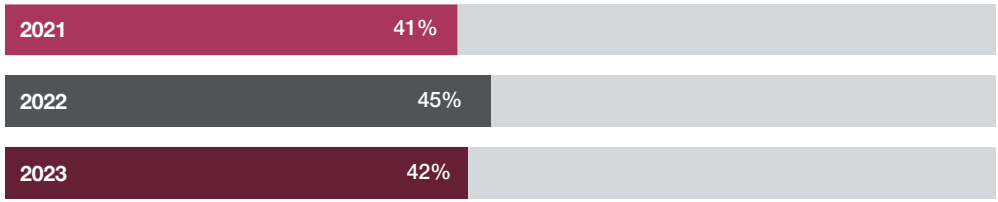
Foreign subsidies are also on the radar of the U.S. antitrust authorities. Reforms to the HSR filing form will require parties to submit information on subsidies received from certain governments or related foreign entities. The scope of the data required appears to be narrower than under the FSR. But parties should consider ensuring that any system set up to identify FSR disclosure requirements is also designed to collect information for U.S. merger filings.

10

Heightened risk of antitrust and foreign investment intervention met with robust deal provisions

With merger control and foreign investment intervention levels rising, allocating execution risk in deal documents was a priority for merging parties. The number of our transactions conditional on antitrust and foreign investment approvals remained steady and deal protections continued to be heavily negotiated.

Antitrust conditions in private M&A



Foreign investment conditions in private M&A

Antitrust and foreign investment conditions a mainstay

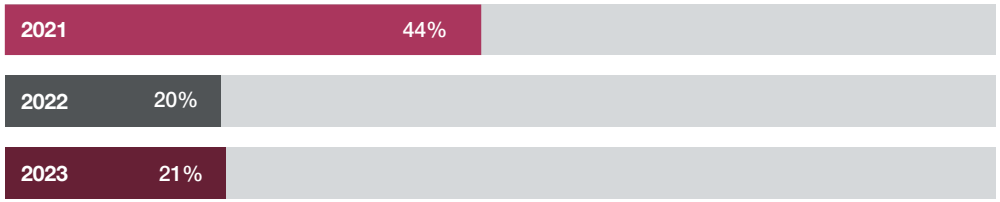
Our research on global private M&A deals[11] showed that while sellers remained focused on execution risk, overall there were slightly fewer conditional deals in 2023.

However, the proportion of our transactions subject to antitrust (ie merger control) approval conditions stayed in line with previous years, at 42%. Nearly a quarter of deals contained foreign investment approval conditions, an increase of 33% since 2021 and more than double what we saw in 2020.

This reflects the heightened risk of merger control and foreign investment intervention. Looking ahead, as the number of mandatory filing regimes keeps growing and regulators look set to maintain an aggressive approach to enforcement, we expect to continue to see a high percentage of deals containing these conditions.

11 Global trends in private M&A – research based on over 1,850 M&A deals on which A&O has acted. Please get in touch with your usual A&O contact if you would like to learn more about the results.

"Hell or high water" commitments in private M&A



Reverse break fees in private M&A

Deal protections heavily negotiated

Only 21% of our private M&A deals in 2023 which contained one or more antitrust conditions included a "hell or high water" (HOHW) commitment. This is an obligation that compels the buyer to do everything in its power to secure merger control clearance. This, as in 2022, is relatively low, and represents a more than 50% drop from 2021.

There are several possible reasons.

First, the persistence of a soft M&A market, favouring buyers in commercial negotiations. Reflecting this, we saw an increase in other types of more limited buyer obligations. 23% of our transactions included limited divestment obligations, requiring the buyer to sell businesses if required, but not above a certain threshold. This was up from 17% in 2022. In a further 35% of deals (compared to 28% the previous year), buyers committed to using reasonable or best endeavours to obtain relevant clearances.

Second, buyers may be unwilling to give HOHW commitments on the basis that the increasingly unpredictable nature of authorities' concerns (or the remedies needed to address them) could require them to make unforeseeable and far-reaching concessions.

Third, antitrust authorities continued to be sceptical about whether remedies can effectively address antitrust concerns. HOHW provisions are unlikely to be fruitful where an authority simply refuses to approve a deal. Sellers may therefore see less value in pushing for one (and instead may prefer, eg, a reverse break fee).

Use of reverse break fees continues to grow

Sellers continued to demand reverse break fees – a useful protection should an antitrust authority or foreign investment regulator intervene to block a transaction.

In 2023, 13% of our conditional private M&A deals contained a reverse break fee. This is up from only 8% two years ago.

The average break fee on our deals was 5% of enterprise value. This is in line with what we have seen more generally in the market for deals facing antitrust headwinds:

- Booking was obliged to pay a USD90m fee to eTraveli (5% of deal value) after the EC blocked its acquisition.
- Adobe is on the hook for a USD1 billion fee (5% of deal value) in relation to its acquisition of Figma after the parties terminated their deal following EU and UK antitrust objections.

This is notably higher than in 2022, where the average break fee on our deals was 2% of enterprise value. Sellers are seeking greater compensation to reflect the potential for higher execution risk, longer and more burdensome review processes and increased uncertainty.

In fact, in some cases in the market, the fee was even higher than 5%. It was 6.5% of deal value (USD353m) in Intel/Tower, payable when Intel abandoned the semiconductor transaction due to antitrust concerns in China. The fee payable by Amazon after the termination of its acquisition of iRobot in early 2024 reached 6.7% (USD94m).

Increase in conditional deals to come?

The number of deals subject to regulatory conditions will likely increase further in the coming year.

Merging parties are grappling with how to provide for the growing risk that authorities will review – and potentially intervene in – transactions falling below merger control or other filing thresholds (see Chapter 5). Where a risk is identified, deal conditions should be included.

The new EU FSR (see Chapter 9) also creates an additional layer of complexity when designing and negotiating deal provisions, particularly given the infancy of the regime.

We expect to see FSR conditions and related protections increasingly in transaction documents. The level of those protections will vary depending on the likely strength and nature of the foreign subsidy concerns. However, as with merger control and foreign investment reviews, the unpredictability of the EC's concerns under the FSR and how these can be addressed will likely result in buyers pushing back hard on HOHW or similar provisions.

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