January 2024

Global merger control trends

More interventionist merger control environment around the globe

European Union

In the EU, the EC is more likely than ever to block a merger. The EC issued two prohibition decisions in 2022 and one in 2023 compared to **none** in 2021 and 2020. In the past ten years (2014 – 2023), there have been nine prohibition decisions, six of which occurred in the past five years (2019 – 2023).

In July 2023, the Court of Justice of the European Union (CJEU) delivered a landmark judgment for CK Telecoms. The judgment provides the EC with renewed confidence to challenge mergers, particularly in oligopolistic markets. The judges ruled that the EC needs to show only that a transaction "more likely than not" will result in a significant impediment to effective competition, rather than the higher standard of "strong probability" to block a merger or require remedies. According to the EC, this lower standard of proof applies in any type of merger control review.

The CJEU also clarified the EC's interpretation of the notions of "closeness of competition" and "important competitive force." The CJEU held that merging parties' closeness relative to their competitors can be used by the EC as evidence against the merging parties. However, the EC does not need to show that parties are "particularly close." In addition, a merging party may be considered an "important competitive force" even if it does not "stand out" from its competitors by, e.g., being more aggressive in terms of pricing conduct. It suffices that it has "more of an influence on the competitive process than its market share or similar measures would suggest."

United States

In the US, the Biden administration continues to encourage greater intervention by the FTC and DOJ, and there is a greater chance of a transaction being challenged in court. For the fiscal year ending September 30, 2022 (the most recent period for which there is publicly available data), the FTC brought 24 enforcement actions, while the DOJ brought 26, the highest in over 20 years. The toughening merger control enforcement is also manifested through the new merger guidelines issued in December 2023. The guidelines reflect the FTC's and DOJ's focus on market structure over economic effects and application of novel theoretical approaches, especially those they consider likely to encourage moat building or to discourage entry or expansion by nascent competitors.

United Kingdom

The toughening merger control enforcement is also evident in the UK, with merger control reviews becoming more aggressive and less predictable both in terms of substantive assessment as well as timing. Nearly 60% of the CMA reviews in 2022 resulted in a prohibition, remedies or the deal being abandoned compared to 43% in 2020 and 25% in 2021. The CMA is also now more likely to investigate a transaction in Phase 2, another indicator of a more interventionist approach. In the period between April 2022 to April 2023, the CMA sent 14 cases to Phase 2—that is four more than in the same period last year and the first time the CMA has made that number of referrals in nearly a decade. Most notable, however, is the approach that the CMA is taking during those cases, with a clear focus on "novel" theories of harm and a continued willingness to assert jurisdiction in areas with a less-than-obvious UK nexus.

Australia

The Australian Competition and Consumer Commission (ACCC) continues to identify and investigate mergers that were not notified to it, undertaking eight investigations of completed acquisitions between October 2022 and 2023. The ACCC refused to grant authorization to two transactions in the past year, with both appealed to the Australian Competition Tribunal. Of the two transactions the ACCC did authorize, both were subject to conditions. By comparison, no merger authorizations were sought the previous year. Under its informal clearance process, the ACCC opposed four transactions in the past year, a significant increase compared to the prior year in which it opposed none. This strong stance is accompanied by the ACCC advocating for significant change to the merger control regime, to provide the regulator with more insight and control over mergers, including a shift to a mandatory and suspensory process.

Middle East and North Africa

In the MENA region, competition authorities are pushing towards more merger control enforcement. For example, in 2023, the Saudi Arabian General Authority for Competition imposed for the first time behavioural and structural remedies as conditions for merger clearance, and they did so in at least three separate transactions. Applying remedies in merger control suggests the authority is increasing its scrutiny of transactions and looking at options to mitigate potential competitive harm. The UAE also became the latest country in MENA to change its competition regime (after, e.g., Kuwait, Morocco, and Jordan). Among other things, the new UAE regime introduced a turnover threshold for notification, which triggers a suspensory filing requirement, pending the enactment of new implementing regulations. The introduction of a turnover-based threshold, coupled with potentially steep fines for violations, will likely result in more filings in the UAE as compared to the old regime, which was triggered only if the parties' combined market share exceeded 40%. Egypt also amended its competition law, changing the merger control process from a post-closing notification regime to a suspensory pre-closing clearance regime. The new Egyptian regime will go into effect only after the issuance of new implementing regulations, which are still pending. Finally, the competition authorities in MENA have also been increasing their collaboration efforts, including through the Arab Competition Network and other bilateral initiatives. Companies that have sales or assets in the MENA region should expect to see more merger control enforcement from these antitrust authorities.

Increased jurisdictional uncertainty with below-threshold mergers on regulators' radar

European Union

While the US has had the option of reviewing below-threshold deals for a long time, the EC had long discouraged referrals of transactions pursuant to the Article 22 EUMR if they did not meet any national filing thresholds. This has now changed: the Article 22 referral policy, according to which the EC may encourage referrals of transactions that do not meet any filing thresholds at the national level, has become the new reality. The EC has started to actively monitor transactions to call them in for review under the Article 22 EUMR, and focus on the value of the deal relative to the target's revenue as an indication for an Article 22 application. This experience is confirmed in practice, with the EC actively prompting national competition authorities to consider referring in cases that pique the EC's interest. Since *Illumina/Grail*, there have been two such referrals for cases that did not meet any filing thresholds at the Member State or EU level, both of which White & Case is advising on. Illumina appealed the GC judgment confirming the EC's right to review below-threshold mergers on the basis of the Article 22 EUMR. The CJEU's judgment that will rule on the legality of the referral policy is likely expected during 2024.

With the CJEU's Towercast judgment from March 2023, national competition authorities also gained a new tool for the ex-post review of below-threshold transactions under abuse of dominance rules. The CJEU clarified that transactions that fall below EU and national merger control thresholds, and have not been referred to the EC pursuant to the Article 22 EUMR, may still be subject to ex-post intervention based on the Article 102 TFEU. The day after the judgment, the Belgian authority opened an investigation into the completed acquisition by Proximus of near-bankrupt broadband communications service provider EDPnet, explicitly citing the Towercast case law (the investigation closed after divestment of EDPNet by Proximus).

United Kingdom

In the UK, the share-of-supply test continues to give the CMA a significant amount of discretion in deciding which transactions it wants to review. The CMA's elastic application of its jurisdiction under the share-of-supply test only looks set to continue following confirmation by the CAT in the *Sabre-Garelogix* appeal in 2021 that the CMA has "broad discretion" in its application and can ultimately determine what criteria it deems appropriate to an assessment on a case-by-case basis. Indeed, the Digital Markets, Competition and Consumers Bill will further enhance the CMA's reach in this regard, with a new jurisdictional threshold that will dispense with the requirement that there will be an "increment" in any UK market, in favor of a threshold based on the acquirer's UK presence (via either a 33% share of supply or £350 million in UK turnover). This is specifically aimed at capturing vertical and conglomerate mergers or "killer acquisitions," i.e., products and services by established incumbents that may have no UK supply to date due to their emergent status.

The attention to below-threshold transactions is here to stay in 2024 and beyond. Transaction parties need to factor in the possibility in transaction timetables, closing conditions and risk allocation provisions in the deal documents even for non-reportable transactions that may give rise to competition concerns.

Increased international divergence continues

In past years, it has become more and more common that competition authorities have reached different outcomes in merger control proceedings.

A prominent example of this is *Microsoft/Activision Blizzard*, which the EC cleared conditionally with long-term licensing commitments as a remedy, while the CMA blocked it, not being convinced by the same remedies that convinced the EC. A couple months later, Microsoft re-filed the deal with the CMA, proposing a remedy by opting to divest the cloud streaming rights to all current and future Activision games released over the next 15 years outside the EEA to Ubisoft. The CMA cleared the deal on this basis in October 2023. The FTC sued to block the transaction, but the court did not agree with the FTC's assessment. Despite the transaction closing, the FTC has appealed the trial court's ruling to the 9th Circuit Court of Appeal. The matter is expected to continue into 2024.

Booking/eTraveli is the next notable example, with the CMA clearing the deal while the EC prohibited it. While the EC was concerned that the merger would strengthen Booking's dominant position on the online accommodation market, the CMA stated that the addition of Etraveli to Booking's portfolio of services would not raise competition concerns because of Etraveli's modest market share in the UK. The CMA explained the divergence by stating that it focused on the UK market where the dynamics were potentially different from the rest of the EU.

Filing lasagne – Foreign Subsidies Regulation and Foreign Direct Investment regimes

As of October 12, 2023, the EC requires an FSR filing prior to the implementation of an M&A transaction if the EU turnover of either the target, one of the merging parties, or the JV itself was at least €500 million in the prior financial year, and the combined foreign financial contributions of the parties involved were at least €50 million in the three years prior to the signing of the transaction. The FSR adds a third mandatory and suspensory filing regime to the increasing number of merger control and FDI regimes. At the time of the writing, all the FSR notifications that the EC has received so far run parallel to merger review. The FSR regime introduces a burdensome new requirement for companies with non-EU public funding to amalgamate all relevant information about foreign financial contributions on an ongoing basis in order to make all relevant disclosures in the filing to the EC. 2024 will likely see the FSR regime becoming a key feature of substantial M&A deals, with corresponding effects on transaction timetables and deal certainty.

In parallel, we have been witnessing a proliferation of foreign direct investments regimes and increased FDI scrutiny, which is likely to continue in the coming years. Out of 27 EU Member States, almost all have FDI regimes either in place or on the way. Given that the review remains under the control of the Member States, acquirers may face multiple national FDI notifications in transactions where the target has a multijurisdictional presence in the EU, not least given that the coming into force of the EU FDI Screening Regulation has given Member States and the EC notice of all national filings. Of received investment dossiers, 54% were subject to an FDI screening in 2022, compared to 29% in 2021.

In the US, the FTC and DOJ have proposed changes to the HSR form and instructions that would include, for the first time, information on certain foreign subsidies. The proposed rules would require parties to report subsidies from certain foreign entities or governments that pose "strategic or economic threats to the United States." Though the agencies are still evaluating public comments to the proposed changes, the new form and instructions are expected to be finalized in 2024.

Increased analytical uncertainty and focus on novel theories of harm

Competition authorities are nowadays increasingly focusing on novel theories of harm and to apply new analytical frameworks, especially with respect to non-horizontal mergers, which lead to more comprehensive reviews and complicated analyses.

In September 2022, the EC blocked *Illumina/Grail* based on purely vertical concerns. In September 2023, the EC blocked *Booking/eTraveli* merger based on an "ecosystem" theory of harm for the first time, on the grounds of the prospect that the deal could strengthen Booking's existing dominant position on the hotel online travel agencies market by acquiring a major customer acquisition channel. This would have allowed Booking to expand its travel services ecosystem.

Furthermore, mergers like *Meta/Within* and *Adobe/Figma* are examples of a growing regulator's scepticism toward the so-called make-or-buy decisions, i.e., where one party decides to buy (parts of) a business with a certain technology or a product rather than trying to develop it itself. The regulator's concern is about the acquiror stopping its own innovation efforts, strengthening its ecosystem, a broader issue about start-ups only innovating "around" and "in the vicinity" of the incumbents' business models in order to buy out at some point, a prevention of future competition from a business model that is complementary and not directly competitive today, and/or tying or bundling concerns. The EC consider that they can no longer be tied to classic market definition and need to focus on the assessment of dynamic competition on these markets. Thus, while foreclosure of rivals is still a key concern, theories such as reducing potential competition, entrenching a dominant position and preventing future innovation is very much to the fore in regulators' considerations. Regulators are also focused on preserving the uncertainty that boosts innovation (including green innovation and sustainability) and consider that concerns may arise when an input that was used as a disruptor in achieving green innovation is removed from the market.

In addition, the EC and the CMA have increased scrutiny on interoperability and data access considerations, in cases such as *Broadcom/VMware*.

Additionally, the concept of dynamic competition will continue to play an important role in the CMA's theories of harm. The CMA has been open about its focus in this regard with newly appointed CMA Chief Executive Sarah Cardell commenting that *"[i]t is true that a greater number of these deals are being scrutinised—both in the UK and elsewhere."* Partly that reflects an increase in the number of mergers in more dynamic and rapidly evolving markets including, but not limited to, digital and technology markets. But it also reflects a conscious decision by merger control authorities around the world, including the CMA, to adapt our approach in light of evidence of historic under-enforcement in these areas.

In the US, an example of a merger where the FTC engaged in a non-traditional theory of harm was *Amgen/Horizon*. There, the FTC pursued a novel "portfolio effects" theory of harm, alleging that Amgen would be able to leverage its extensive portfolio of blockbuster drugs to entice insurance companies and pharmacy benefit managers to favor Horizon's two monopoly drugs and disadvantage competitors. The parties finalized a settlement with the FTC in December 2023, with Amgen agreeing not to bundle any Amgen product with either Horizon drug, nor to use any product rebate or contract term to exclude or disadvantage any Horizon competitor.

Scan to see all global Antitrust lawyers

Scan to learn more about our Antitrust practice

Scan to see Antitrust Thought Leadership

LON0124014/05