Global trends in merger control enforcement

February 2023

This PDF contains
interactive elements

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Introduction

We have collected and analysed data on merger control activity for 2022 from 26 jurisdictions.[1] We give you the key trends and developments from the past year, focusing in particular on the EU, UK, U.S. and China.

The volume and value of global M&A fell in 2022, particularly during the second half of the year. Unsurprisingly, that led to a corresponding decrease in the overall number of merger control decisions across the jurisdictions surveyed.

However, it did not translate to a reduction in intervention. We saw antitrust authorities step up their scrutiny of M&A and adopt increasingly aggressive approaches to enforcement. Robust foreign direct investment screening by governments/regulators imposed additional obstacles for merging parties.

At EU level, the European Commission (EC) frustrated twice as many deals as the previous year.

These included some vertical mergers. The EC also adopted hard-hitting new regimes – covering digital markets and foreign subsidies – that, once in operation, will have a significant impact on deal making. Important court rulings/opinions look set to give the EC greater scope to review below-threshold transactions and challenge deals in concentrated markets.

In the UK, the Competition and Markets Authority (CMA)'s strong record of antitrust intervention continued.

The CMA's unwillingness to accept certain types of remedy led to the first major UK merger control divergence from the EC. Private equity transactions were under scrutiny, as was compliance with initial enforcement ("hold separate") orders. The first year of the UK's new national security screening regime yielded prohibitions and a string of deals cleared subject to conditions.

The new leadership at the U.S. agencies has now bedded in and is having a major impact on policy and enforcement.

The pledge made by the head of the Department of Justice (DOJ) Antitrust Division to litigate more cases resulted in an uptick in merger challenges and not a single DOJ conditional approval in 2022. The Federal Trade Commission (FTC) adopted onerous new policies, reinstating the "prior approval" mechanism in remedies cases and taking a wider approach to assessing "unfair methods of competition" which could stretch to M&A. The agencies increasingly focused on labour market issues, private equity investments and interlocking directorates.

Finally, in China, the State Administration for Market Regulation (SAMR) was once again the leading enforcer of procedural merger control infringements, focusing on gun-jumping.

Key changes to the Anti-Monopoly Law have given SAMR much stronger powers to penalise gun-jumping in future. Intervention by SAMR in 2022 centred on remedies in tech transactions. Lengthy in-depth investigation periods also caused issues for merging parties.

"We saw antitrust authorities step up their scrutiny of M&A and adopt increasingly aggressive approaches to enforcement."

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.

2022 highlights

01
Aggressive merger control enforcement causes a rise in frustrated deals

More transactions, including vertical mergers, are prohibited or abandoned as antitrust authorities continue to take a tough approach.

02
Scepticism over remedies results in rejected behavioural commitments and bolstered conditions

Merging parties find it harder to persuade key antitrust authorities to accept some types of (or even any) remedies.

03
Scrutiny of tech deals remains a priority with PE and labour markets in the spotlight

Antitrust intervention also hits life sciences, energy and industrial and manufacturing deals.

04
Below-threshold deals increasingly face review

Uncertainty for merging parties as antitrust authorities adopt new rules and policies designed to catch hard-to-reach transactions.

05
Gun-jumping and breaching merger remedies generate heavy sanctions

Antitrust authorities take a zero tolerance approach and total fines increase.

06
Fast track and simplified reviews lead to quicker review periods

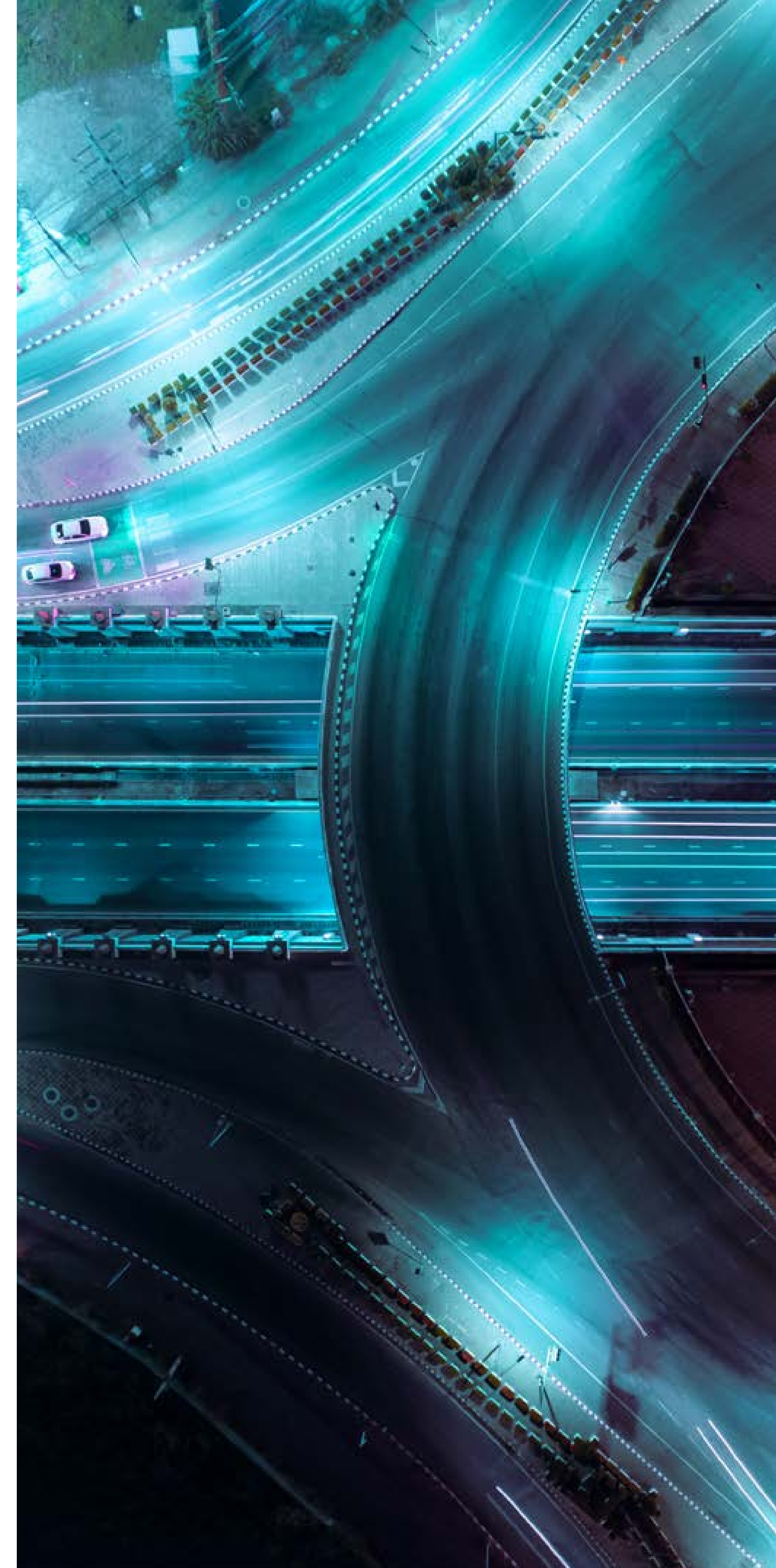
Authorities and merging parties alike are keen to speed up investigations and streamline reviews of global transactions.

07
Evolving foreign direct investment regimes add yet more hurdles for M&A

Assessing FDI risk is crucial for a growing number of deals in light of new and strengthened rules and intense enforcement.

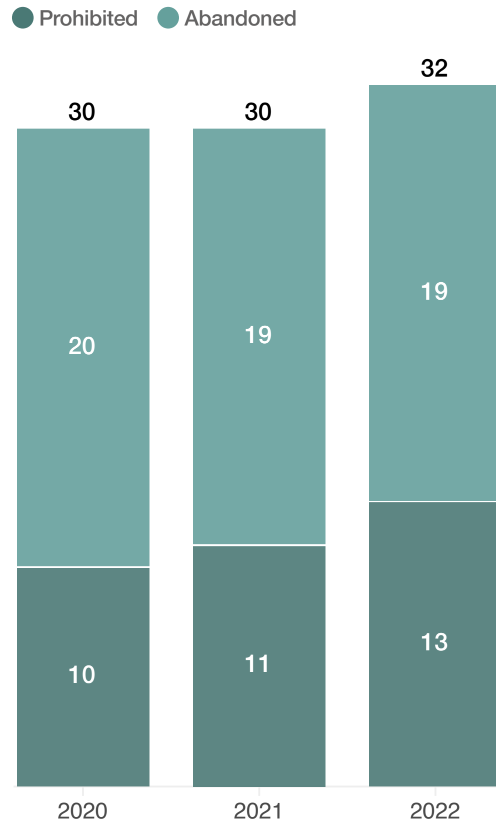
08
Surge in antitrust and FDI intervention means appropriate deal provisions are vital

Allocation of execution risk remains heavily negotiated through conditions, obligations around remedies and reverse break fees.

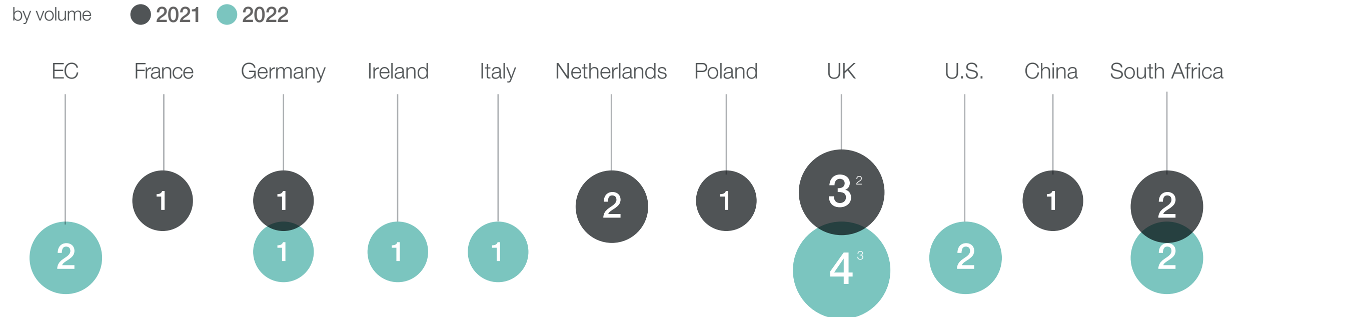


Aggressive merger control enforcement causes a rise in frustrated deals

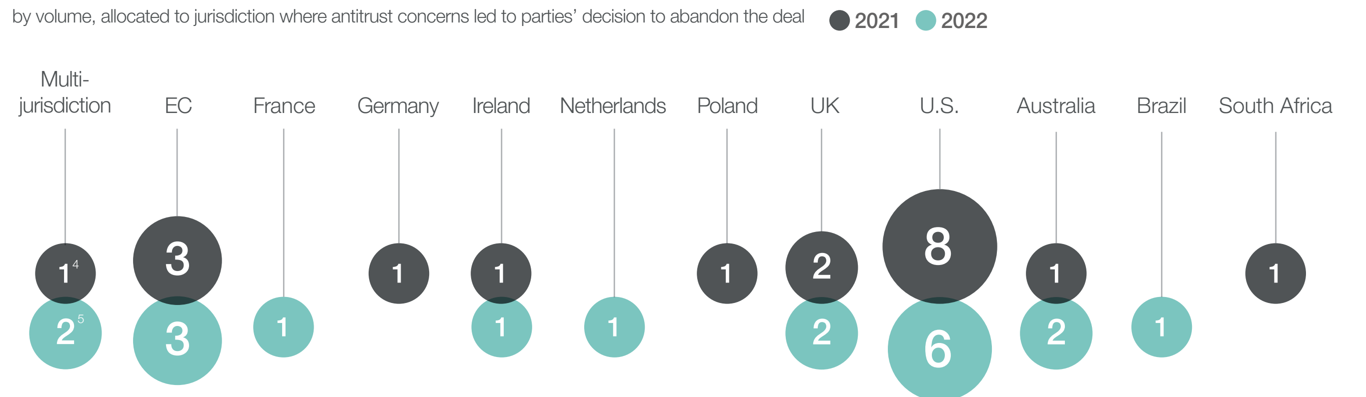
Total deals frustrated



Deals prohibited



Deals abandoned



2 JD Sports/Footasylum, which was blocked again on remittal in 2021, is included in both 2020 and 2021 figures.
3 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.
4 Tronox/TTI (abandoned due to antitrust concerns in the U.S. and UK).
5 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).

Antitrust authorities' scrutiny of M&A further intensified in 2022. A greater willingness to challenge transactions (including vertical mergers) combined with an increasing scepticism around the effectiveness of merger remedies unsurprisingly resulted in a rise in prohibited and abandoned deals.

Last year, a total of 32 deals were frustrated in the jurisdictions surveyed. 13 transactions were blocked and a further 19 were abandoned due to antitrust concerns. In particular, we saw an increase in the number of deals frustrated in each of the EU, UK, and U.S.

Antitrust authorities continued to coordinate on their overall approach to tackling potentially anti-competitive deals as well as on individual cases. However, they did not always reach the same result, demonstrating the unpredictability of merger review outcomes for international deals.

In a number of jurisdictions, court rulings were crucial in confirming the authorities' enforcement approach. Looking ahead, these judgments will likely give authorities even greater confidence to adopt an interventionist stance.

EC doubles the number of deals frustrated

Deals frustrated at EU level doubled in 2022, from three to six – the highest since we started this report in 2015.

After two years without a prohibition, the EC blocked two mergers: Illumina's completed acquisition of GRAIL and the HHI/DSME shipbuilding deal. Parties walked away from a further four transactions due to the EC's concerns. No deal was waived through an EC phase 2 probe in 2022 without some form of intervention.

Illumina/GRAIL is a landmark case. It is the first use by the EC of its new policy to encourage referrals by EU Member States of deals falling below EC and national merger control thresholds (see chapter 3 for more on this). It is the first time the EC has blocked a purely vertical deal. It also marks the first imposition by the EC of interim measures in a merger review, in response to Illumina completing the transaction while the EC's phase 2 investigation was ongoing.

Illumina and GRAIL are challenging many of these decisions. The result of the appeals is likely to set an important precedent for the parameters of the EC's powers in future cases. In the meantime, the EC has set out provisional steps on how the deal should be unwound.

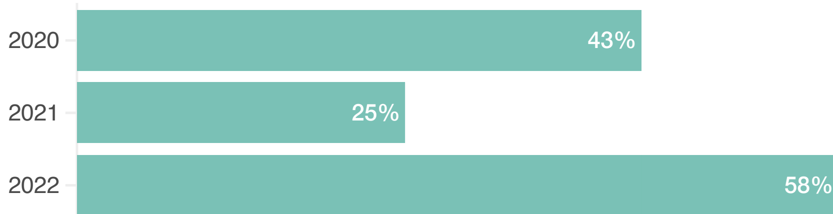
Separately, the EC scored a duo of important court wins in 2022. The General Court upheld the decisions to prohibit two metal deals (Wieland-Werke/Aurubis and Thyssenkrupp/Tata Steel), confirming the EC's approach to market definition and assessment. The rulings will no doubt motivate the authority to take future enforcement action.

Looking forward, the European Court of Justice (ECJ) will hand down its ruling in CK Hutchison/Telefónica UK later this year. The EC originally blocked the deal. The General Court overturned this decision in a 2020 judgment, which was criticised last year in an important Advocate General opinion. If the ECJ follows the opinion, consolidation in telecoms (and other concentrated) sectors may become more challenging.

"Antitrust authorities continued to coordinate on their overall approach to tackling potentially anti-competitive deals as well as on individual cases."

UK sees rise in intervention and divergence from the EU

Proportion of CMA decisions resulting in intervention



After a dip in total deals frustrated in the UK in 2021, last year we again saw an increase. The CMA blocked four deals and three more were abandoned due to the authority's concerns.

Three (75%) of the prohibitions were completed deals, resulting in the acquirer having to unwind the transaction (or, in one case, the UK part of the transaction). In addition, we saw a phase 1 decision that was tantamount to a prohibition – the CMA accepted commitments from the acquirer to sell off the whole target business.

Two cases deserve particular mention.

First, the CMA again blocked Meta's purchase of Giphy. Following Meta's appeal against the original prohibition, the UK Competition Appeal Tribunal (CAT) had ordered the CMA to reconsider the transaction.

The CAT found fault with the way the authority treated certain third-party confidential information. However, it upheld the CMA's finding that the merger substantially reduced "dynamic" competition. This will be important for future deals in digital and other fast-moving markets.

The CMA's new prohibition decision was based on concerns over Meta "denying or limiting other social media platforms' access to Giphy GIFs…or changing the terms of access".

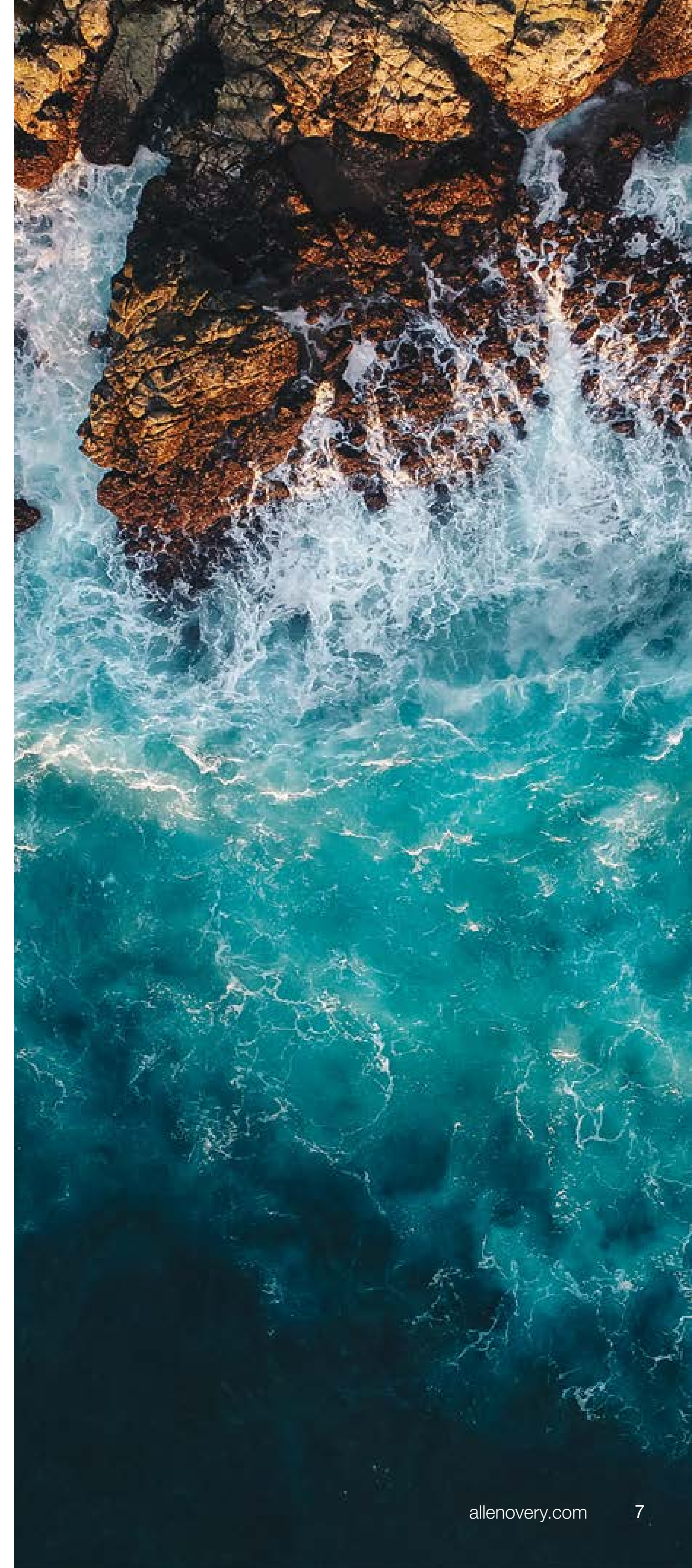
The authority also found the merger "would negatively impact the display advertising market".

Second, the prohibition of Cargotec/Konecranes by the CMA marks the first major post-Brexit merger control divergence between the CMA and the EC.

While the EC was (together with some other jurisdictions) willing to accept a remedies package that included assets from both the acquirer and the target (a "mix and match" remedy), the CMA was not. The CMA said that this approach was complex and risky, and that only divestment of the entire relevant divisions of one of the parties would be enough. The DOJ and Australian Competition and Consumer Commission (ACCC) raised similar concerns to the CMA, but the parties abandoned the transaction before they could reach their final decisions.

CMA officials have stressed that the authority is not on a mission to block deals and its intervention record is a product of the complex deals that are coming across its desk.

However, with nearly 60% of decisions taken by the CMA in 2022 resulting in a prohibition, abandonment or remedies (compared to 43% in 2020 and 25% in 2021), it is hard not to conclude that the CMA is taking a tough stance.



U.S. agencies continue to prioritise litigation

In 2022, we saw eleven deals frustrated by the U.S. antitrust agencies.

Nine deals were abandoned, the majority after the DOJ or FTC filed its complaint about the transaction. This is in line with 2021 data. In addition, there were two prohibitions (ie permanent injunctions granted by the courts), one for each agency.

In total, the DOJ and FTC sued to block ten deals, up from seven in 2021. This aligns with DOJ Antitrust Division head Jonathan Kanter's announcement in January 2022 that the agency would litigate more deals.

However, losses suffered by both agencies at trial have led some to question the strategy in pursuing these cases, particularly those involving novel theories of harm. The DOJ suffered three separate merger defeats before managing a court victory in its challenge to Penguin Random House's acquisition of Simon & Schuster.

The agencies remain undeterred. The DOJ argues that the trial losses in fact produce pro-competitive benefits by delaying transactions or forcing additional concessions from the parties. Both agencies continue to challenge M&A aggressively and we expect litigation rates to increase even further in 2023.

Non-horizontal deals remain in the spotlight

In last year's report, we noted that a number of the deals prohibited and/or abandoned in 2021 raised non-horizontal – in particular vertical – antitrust concerns. This trend continued in 2022 with several high-profile frustrated cases.

Nvidia/ARM kicked off the tally, abandoned in January 2022 due to vertical concerns in the EU, UK and U.S. Illumina/GRAIL and Meta/Giphy, both discussed above, were blocked. Vertical concerns also caused the parties to walk away in Lockheed Martin/Aerojet Rocketdyne (U.S.) and may have contributed to the abandonment of Kronospan/Pfleiderer (EU-level).

Increased scrutiny of non-horizontal transactions continues in 2023. The tech sector remains a key focus, with in-depth investigations/challenges ongoing in cases such as Microsoft/Activision Blizzard. Deals involving important players at different levels of global supply chains are also likely to face headwinds.

Merging parties can expect welcome clarity on the likely approach to these cases in certain jurisdictions. New U.S. merger guidelines are expected imminently. In Brazil, new guidance on vertical mergers is due to be published in the summer.

Failing firm arguments succeed

Merging parties face a high bar when trying to convince an antitrust authority to waive through an anti-competitive deal on the basis that one of the parties is failing. We had thought we would see more instances of this failing firm defence in 2020 and 2021 as a result of the economic turbulence caused by the Covid-19 pandemic. This was not the case in practice.

In 2022, however, parties achieved greater levels of success:

- In France, the French Competition Authority (FCA) accepted failing firm arguments for the first time, clearing Mobilux (BUT)'s purchase of struggling rival furniture business Conforama.
- In Australia, the failing firm defence was accepted by the ACCC when approving a merger between two book printers.
- In the UK, the CMA approved a milk supplier deal on the basis that the target would have otherwise exited the markets due to financial failure.

As we move into a further period of economic disruption, these victories may encourage more merging parties to run a failing firm defence. They should anticipate that authorities will pore over financial statements and rigorously interrogate the submissions put forward, including on whether there are no less anti-competitive alternatives to the transaction (a condition for the defence in many jurisdictions). Having robust evidence will be crucial.

"Increased scrutiny of non-horizontal transactions continues in 2023."

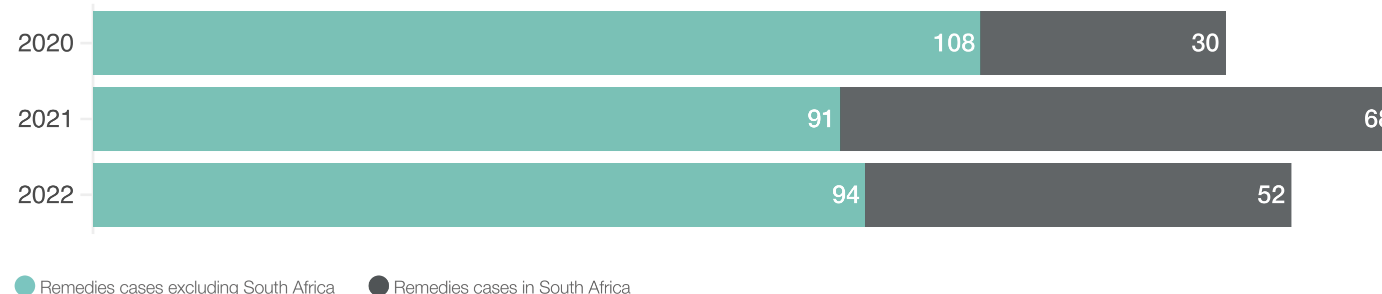
02

Scepticism over remedies results in rejected behavioural commitments and bolstered conditions

Certain antitrust authorities are increasingly sceptical about whether remedies can effectively address concerns in a problematic transaction. This has led to a reluctance to accept behavioural commitments in certain jurisdictions and the imposition of measures to safeguard structural divestments, all with the aim of mitigating implementation risk. In addition, particularly in the U.S., even structural remedies have faced increased scepticism.

However, this has not (yet) resulted in an overall decrease in the number of conditional clearances globally. Excluding South African remedies from the data (where the authority's concerns increasingly focus on public interest alongside antitrust issues), the number of remedies cases in 2022 (94) remains broadly in line with 2021 (91).

Total remedies cases



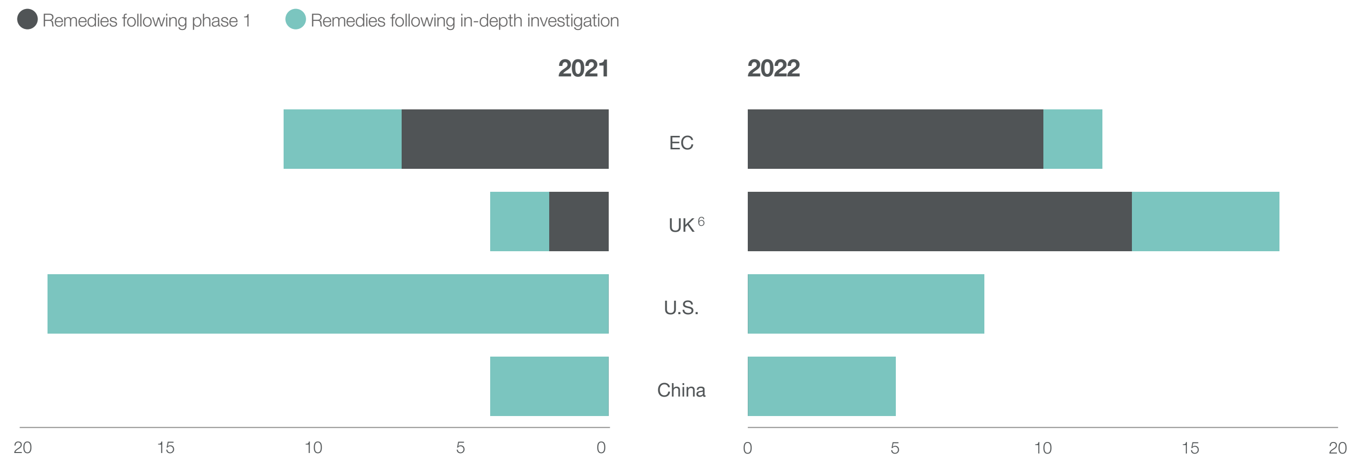
DOJ Antitrust Division head Jonathan Kanter has been a frontrunner in questioning the effectiveness of remedies. Early last year, he expressed his concern that “merger remedies short of blocking a transaction too often miss the mark”.

This has played out in practice. The DOJ has not agreed to a single merger remedy since Kanter took office in late 2021, instead choosing to challenge more deals. U.S. consent decrees dropped by 58% in 2022, from 19 to eight, and all eight were agreed by the FTC.

In contrast, in the UK we saw a more than four-fold increase in remedies cases in 2022. Combined with an uptick in prohibited and abandoned deals, this shows the CMA’s overall willingness to aggressively intervene in M&A. However, persuading the CMA to accept remedies can be an onerous task. As in the U.S., there were instances of the CMA rejecting remedies in favour of prohibition. The same was true of the EC.

If antitrust authorities continue to take a hard line approach to remedies, parties attempting to obtain merger control approvals for deals that raise antitrust issues will face an increasingly uphill battle. Convincing certain authorities to accept particular types of remedy, eg behavioural commitments and/or “mix and match” solutions, will be especially challenging.

Remedies cases in selected jurisdictions

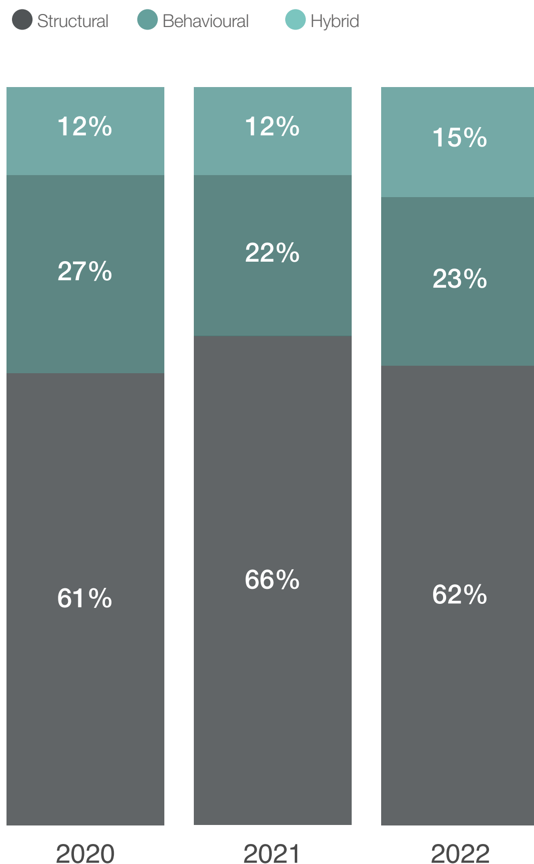


6 2021 data includes FNZ/GBST, which was conditionally cleared on remittal

Behavioural commitments out of favour in key jurisdictions

Many antitrust authorities continue to voice their strong preference for structural divestments over behavioural commitments. Behavioural remedies were rejected in several notable cases in 2022, including the EC's review of Illumina/GRAIL, which the EC went on to block.

Conditional clearances by type of remedy[7]



Executive Vice-President Margrethe Vestager says the EC is looking for "clean slate" remedies, by which she means stand-alone divestitures. She says this avoids the need for long-term monitoring, which is resource intensive and comes with increased risk of regulatory avoidance over time. U.S., UK, Australian and German authorities are all taking a similar stance.

It is therefore surprising that the proportion of conditional deals cleared on the basis of behavioural commitments did not decline in 2022 – in fact it increased slightly from 22% to 23%. However, looking at this statistic over the past four years, the proportion of behavioural-only remedies packages has dropped by nearly 40%.

At EU level, the EC accepted behavioural remedies in only one case out of 12 in 2022. In the UK it was one in 18. There were no behavioural remedies accepted in the U.S. in 2022.

Despite this clear trend in the EU, UK, and U.S., a number of other jurisdictions remain willing to accept behavioural commitments. In China, all (five) remedies cases in 2022 involved a behavioural element. The same was true in several other jurisdictions, including France, Spain and South Korea. Common behavioural remedies included safeguards on information exchange, restrictions on price increases or supply reduction, interoperability requirements and prohibiting exclusivity clauses. In South Africa, remedies packages are often behavioural in nature with many comprising employment-related commitments.

Even in jurisdictions that have a strong preference against them, behavioural remedies may be the best solution in a particular case. Non-horizontal mergers are an obvious example. Indeed, Vestager has acknowledged that in some non-horizontal cases, especially in digital markets, structural remedies might not be appropriate to address concerns about interoperability or access.

Structural divestments must be clear-cut

While many antitrust authorities are alike in preferring structural remedies, they can have differing views on what an effective divestment package should look like. Certain authorities are taking a dim view of "mix-and match" divestments, comprising assets from both acquirer and target.

The UK CMA appears particularly unwilling to accept mix-and-match solutions. As mentioned in chapter 1, it blocked Cargotec/Konecranes after concluding that the process of carving out the proposed assets from each party and knitting them together would be too complex and risky. The DOJ and ACCC expressed similar concerns.

Meanwhile, the EC defended its decision to accept remedies in the case, saying that the package comprised the sale of "viable standalone businesses" and was supported by rivals and customers. It has since accepted remedies at phase 1 in ALD/Leaseplan consisting of the divestment of national leasing subsidiaries from each party to a suitable purchaser with the relevant financial resources, skills, motivation and experience to compete on a lasting basis.

Being aware of these differences in approach is crucial for merging parties when designing potential divestment packages, particularly where they plan to put forward a single set of "global" remedies as a solution for concerns cutting across several jurisdictions.

7 Excluding South African remedies cases.

Upfront buyers/fix-it-first reduce implementation risk

Certain antitrust authorities continued to make use of upfront buyer or fix-it-first remedies in 2022. While upfront buyer/fix-it-first remedies as a proportion of total structural divestments stayed relatively steady in the EU last year, we saw an increase in both the UK and U.S.

This is further evidence of authorities' eagerness to ensure that remedy packages are robust and implementation risk is minimised.

With the turbulent economic climate continuing into 2023, there is a potential scarcity of purchasers for divestment businesses. We may see upfront buyer and fix-it-first remedies used even more frequently in the coming months.

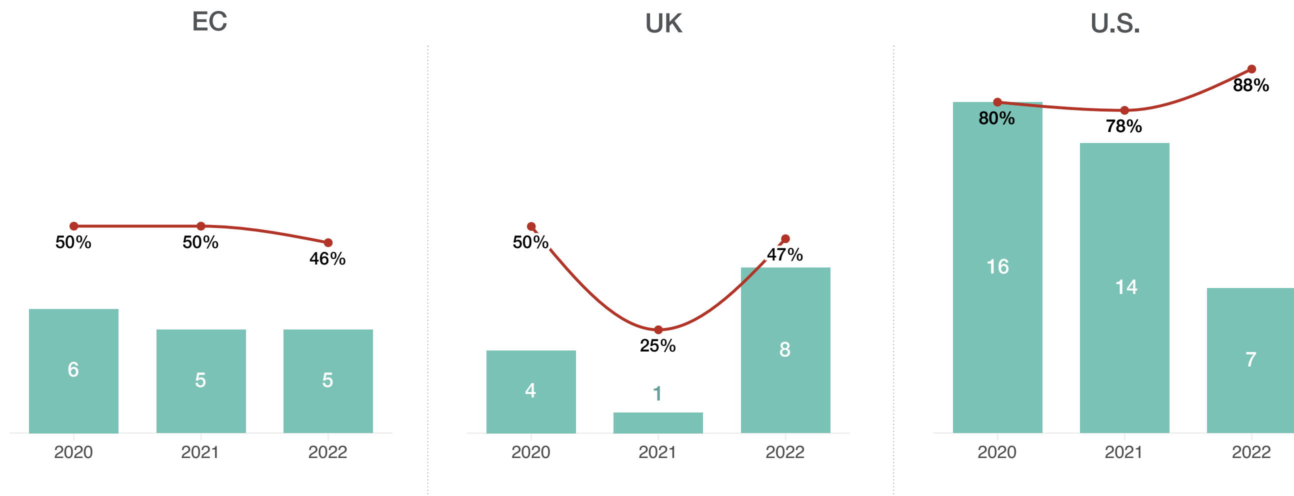
FTC uses remedy provisions to curb future acquisitions

Unlike the DOJ, the FTC has continued to negotiate remedies with parties.

However, last year it made the aggressive policy decision to reintroduce the "prior approval" mechanism in remedies cases. This requires the acquirer to obtain FTC approval before closing any future transaction in the markets where the FTC had concerns – or even in broader markets, depending on the circumstances – for a minimum of ten years.

Notably, this policy change coincides with recent comments by FTC leadership about concerns over private equity "roll-ups" in certain industries (see chapter 3 for more on this).

Upfront buyers/fix-it-first in key jurisdictions

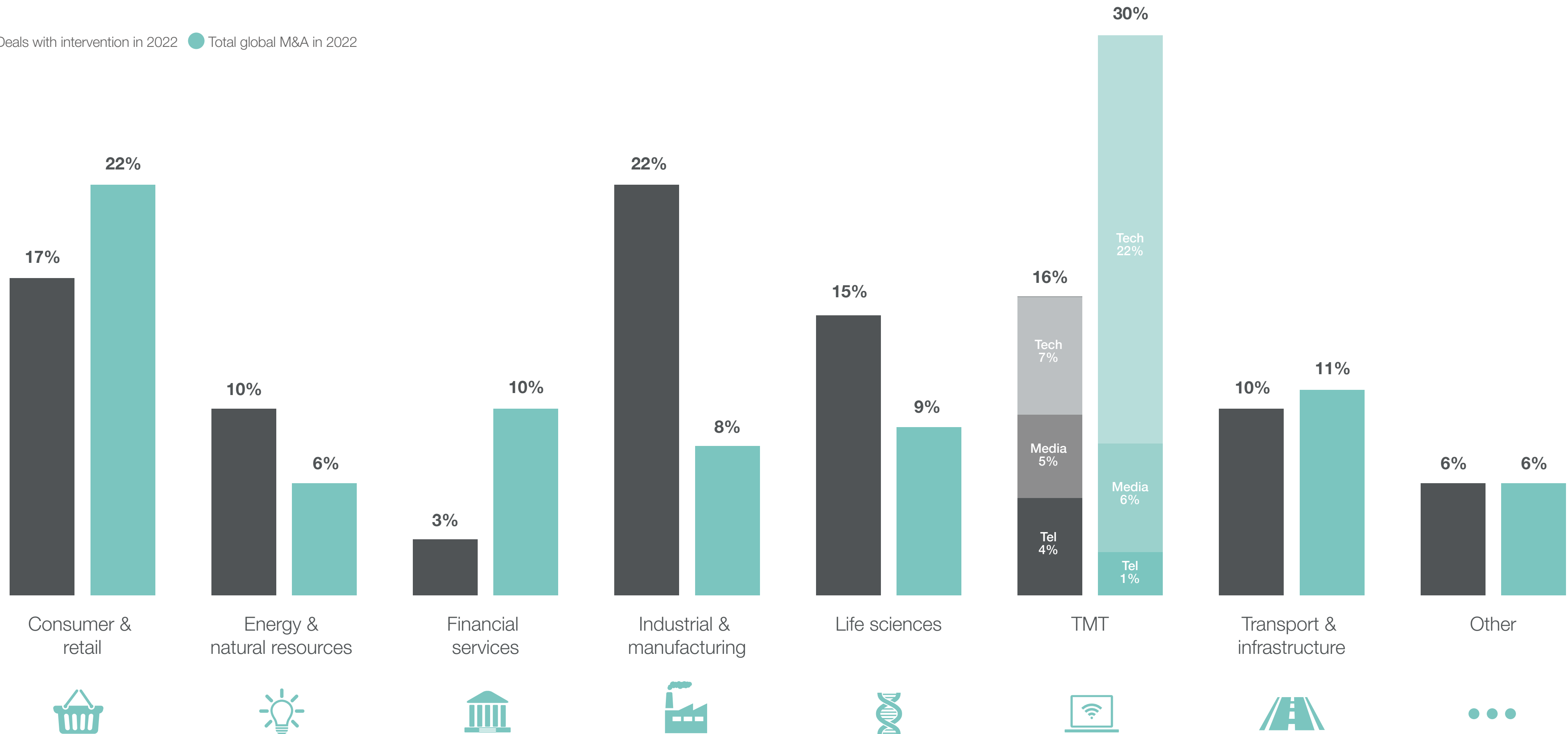


> "Certain antitrust authorities continued to make use of upfront buyer or fix-it-first remedies in 2022."

03

Scrutiny of tech deals remains a priority with PE and labour markets also in the spotlight

Total antitrust intervention by sector



Digital/tech transactions remain high on the enforcement agenda. Last year brought high-profile tech cases and progression of new digital rules. Overall, however, antitrust intervention focused on life sciences, energy and industrial and manufacturing deals. Private equity and labour markets were also under scrutiny.

Similarly to 2021, our data suggests that the level of antitrust intervention in the tech sector (7%) was actually comparatively lower than the proportion of global M&A accounted for by tech deals (22%).

Having said this, there were a number of key tech merger control decisions in 2022.

Antitrust concerns in the U.S., EU and UK led to the abandonment of Nvidia/ARM. In the UK, the CMA decided again to prohibit Meta's acquisition of Giphy on remittal. The EC cleared Meta/Kustomer subject to access remedies. In China, SAMR accepted conditions in three tech transactions – GlobalWafers/Siltronic, AMD/Xilinx (both semiconductor deals) and II-VI/Coherent.

Several important merger control reviews in the tech sector are ongoing. Microsoft's acquisition of Activision Blizzard, for example, is facing hurdles in a number of jurisdictions, including the EU, UK, U.S. and Japan.

With antitrust intervention in digital/tech deals lagging behind other sectors, it is unsurprising that antitrust authorities keep pushing forward with new digital rules that will give them greater powers of review. We discuss some of these in chapter 4 on below-threshold merger reviews.

In addition:

- **EU:** the Digital Markets Act (DMA) was adopted last year and will start to take effect in the coming months. It requires firms designated as "digital gatekeepers" to inform the EC of all transactions involving services in the digital sector or that enable the collection of data. This obligation will start to apply six months after designation, at the latest by 6 March 2024.
- **UK:** proposed new rules will (similarly to the DMA) introduce a requirement for firms with "strategic market status" to inform the CMA before completion of certain transactions. This will give the authority earlier visibility of mergers most likely to lead to antitrust concerns.
- **China:** a new filing threshold designed to tackle "killer acquisitions" has been proposed (alongside increases to the general turnover thresholds).
- **Australia:** a tailored merger control regime is being considered for large digital platforms that meet pre-defined criteria based on their market power and strategic position.
- **Turkey:** the concept of "technology undertakings" was incorporated into merger control rules and made subject to lower notification thresholds in May 2022.

As these new provisions continue to crystallise, digital and tech firms should prepare for their deal making to face additional obstacles.

Life sciences, energy and industrial/manufacturing deals saw greatest intervention

Life sciences deals represented 15% of total deals subject to antitrust intervention in 2022, but only 9% of global M&A.

At EU level, the EC blocked Illumina/GRAIL. In the U.S., a number of healthcare deals were frustrated or subjected to remedies. FTC head Lina Khan made a statement to the Senate that the agency is committed to preventing further consolidation in the hospital sector. Shortly after, the FTC challenged two hospital mergers. We expect further FTC activity in this area in 2023.

Antitrust intervention in energy transactions (10%) was nearly double the proportion of global M&A in the sector (6%). Like 2021, remedy cases accounted for the majority of this intervention, spanning a number of jurisdictions.

For industrial and manufacturing, the figure was 22% of antitrust enforcement, compared to only 8% of global M&A (a drop from 16% of global M&A in 2021, most likely due to economic and geopolitical uncertainty).

Antitrust authorities are generally keen to take a close look at deals in this sector, particularly where they take place in concentrated markets. In 2022, ten industrial and manufacturing transactions were frustrated (four prohibited and six abandoned) and a further 18 required remedies.

Spotlight on PE-funded acquisitions

Both the U.S. agencies and the UK CMA have paid particular attention to private equity deals in the past year and we expect this scrutiny to intensify.

The DOJ is looking closely at the potential adverse impact of PE activity, particularly in healthcare M&A and deals relating to technology stacks. The agency is concerned that investments may chill competition on the merits, eg by reducing incentives of the target to innovate or act as a maverick, or causing the target to focus only on short-term financial gains. In certain litigated cases, the DOJ has also expressed scepticism as to whether PE firms can be effective as purchasers of a divestment business.

The DOJ's renewed focus on interlocking directorates (ie the same individual serving as an officer/director of two or more competing companies) may also have an impact on PE investment. In April, the agency announced that it would be expanding its enforcement efforts in this area. In November, it made good on this promise, with seven directors resigning from the boards of five companies in response to DOJ investigations. Further action seems likely.

Meanwhile, the FTC is concerned about private equity "roll-ups", particularly in already concentrated markets. It imposed onerous "prior approval" remedies on PE firm JAB Consumer Partners in relation to its acquisitions of veterinary clinics (see chapter 2 for more on the revival of prior approval).

In the UK, the CMA scrutinised several PE-backed acquisitions. Like the FTC, the vet sector was in its sights. When raising concerns over CVS Group's completed purchase of The Vet, the CMA noted that many independent veterinary practices were being acquired by corporate groups. CVS ultimately committed to selling off the whole of the target, effectively amounting to a prohibition of the deal.

Remedies were required to gain CMA clearances in other PE deals in 2022, including another vet clinic purchase, as well as transactions in the dentist and student accommodation sectors.

Labour market issues gain increasing importance

There is a rapidly growing focus on the potential impact of M&A on labour markets.

The U.S. antitrust agencies now consider labour issues as part of all merger control reviews. This is resulting in enforcement action.

Towards the end of 2022, the DOJ obtained a permanent injunction from the U.S. District court to block Penguin Random House's proposed purchase of publishing rival Simon & Schuster. It argued that the merger was likely to impact authors, who could face lower advances and less favourable contract terms. DOJ Antitrust Division head Jonathan Kanter heralded the case as "a victory for workers more broadly".

Across the Atlantic, European antitrust authorities have not paid as much attention to labour issues in their merger assessments. However, last summer the head of the Dutch antitrust authority urged authorities to look at transactions that give the merged entity the power to suppress wages or degrade working conditions.

In China, recent amendments to the Anti-Monopoly Law emphasise that the review of deals in key sectors, including those concerning "people's livelihood", should be strengthened. A guiding opinion of the State Council also calls for enhanced scrutiny of transactions in "labour-intensive" industries, among others.

Parties to deals with possible impacts on workers or labour markets should expect heightened scrutiny.

"The U.S. antitrust agencies now consider labour issues as part of all merger control reviews. This is resulting in enforcement action."

04

Below-threshold deals increasingly face review

Antitrust authorities continue to grapple with how best to ensure that potentially anti-competitive transactions do not escape scrutiny. A solution gaining traction in a number of jurisdictions is to enable authorities to review deals that fall below merger control thresholds.

Calls for greater enforcement have been loudest in the digital and pharmaceutical sectors, where so-called "killer acquisitions" (acquisitions by large players of start-ups or small innovative firms) are, according to antitrust authorities, most prevalent. Unsurprisingly, therefore, this is where authorities and governments have focused their attention.

However, many of the reforms we saw proposed, enacted or confirmed in 2022 are not limited to digital/pharma deals – they could catch below-threshold deals across any sector.

This means increased uncertainty for merging parties. The possibility of review (including post-closing) must be taken into account in both deal documentation and transaction timetables. Risk assessment will inevitably be complex.

50% of the jurisdictions surveyed can review below-threshold deals

New EU referrals policy gets the green light

In July, the General Court upheld the EC's decision to review Illumina's acquisition of GRAIL after a referral by the French competition authority. This was the first use of the EC's revised Article 22 policy, which encourages EU Member States to refer transactions (including completed deals) to it for review even where EU and national filing thresholds are not met.

The EC recently issued guidance on how merging parties can approach it for an indication of whether their deal would be a good candidate for a referral. This route will be helpful, giving parties a degree of comfort and certainty. But only to a point. The EC's view is ultimately non-binding and cannot fully remove the referral risk.

Digital deals are among the most likely candidates for referral, particularly after the DMA starts to apply. Under the DMA, from 6 March 2024 (at the latest), "digital gatekeepers" must inform the EC (pre-closing) about all transactions involving services in the digital sector or that enable the collection of data. The EC will pass this information to Member State antitrust authorities, which may use it to request an Article 22 referral.

Other likely targets are transactions in the pharma and biotechnology sectors, as well as those involving innovative products or services.

So far, Illumina/GRAIL is the only deal to be captured under the new policy. But with the court's endorsement, information requirements in the DMA and the fact that some Member States (eg France) are particularly keen to make use of the tool, we expect the EC will take jurisdiction over more below-threshold transactions in the coming year.

Separately, an Advocate General opinion late last year recommended the use of abuse of dominance rules to assess acquisitions by dominant companies that fall below EU and national thresholds. This is significant. If the ECJ follows the opinion, the EC and national authorities will have yet another avenue to pursue below-threshold deals involving dominant firms.

FTC's revised section 5 policy could catch mergers

The U.S. antitrust agencies already have the ability to review deals that fall below U.S. merger control thresholds.

However, a new FTC policy statement threatens to give the agency even more scope to investigate below-threshold transactions. In the statement, the FTC embraces an expansive view of conduct that might amount to "unfair methods of competition" under section 5 of the FTC Act.

It gives several examples such as mergers, acquisitions and joint ventures that have the "tendency to ripen into violations of the antitrust laws" and series of transactions that "tend to bring about the harms that antitrust laws were designed to prevent". The statement also mentions mergers or acquisitions of a potential or nascent competitor that may tend to lessen current or future competition.

Time will tell how much use the FTC will make of this new policy in the M&A context. To the extent that it does, merging parties face additional risks of divestiture or other remedial action.

Other jurisdictions bolster below-threshold review powers

In addition to the EU and U.S., a number of other jurisdictions have recently proposed or introduced new rules that enable the review of below-threshold transactions:

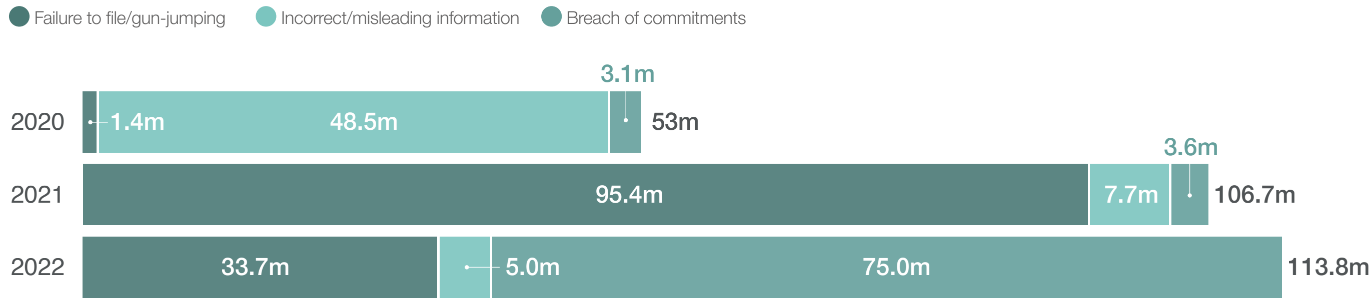
- **China:** the amended Anti-Monopoly Law now explicitly recognises that SAMR has the power to investigate a transaction that falls below notification thresholds if there is evidence that it has or may have the effect of eliminating or restricting competition (before, this authority was only provided for in regulations). It suggests that SAMR may more actively investigate below-threshold deals going forward.
- **Italy:** new rules allow the Italian Competition Authority to review below-threshold deals (up to six months post-closing) where: (i) only one of the standard turnover thresholds is met, or the aggregate worldwide turnover of the undertakings concerned exceeds EUR5 billion; and (ii) the deal could raise antitrust concerns in Italy.
- **Ireland:** the Competition and Consumer Protection Commission (CCPC) will soon have a new power to require parties to notify below-threshold deals that, in the CCPC's opinion, may have an effect on competition.
- **Japan:** in a revised policy document, the Japanese Fair Trade Commission has announced it will actively review non-notifiable transactions.
- **South Africa:** recent amendments enable the Competition Commission to request the notification of mergers that fall below the standard thresholds.

05

Gun-jumping and breaching merger remedies generate heavy sanctions

Antitrust authorities continued their aggressive campaign against procedural merger control infringements in 2022. A total of EUR113.8m fines were imposed in 70 decisions across the jurisdictions surveyed.

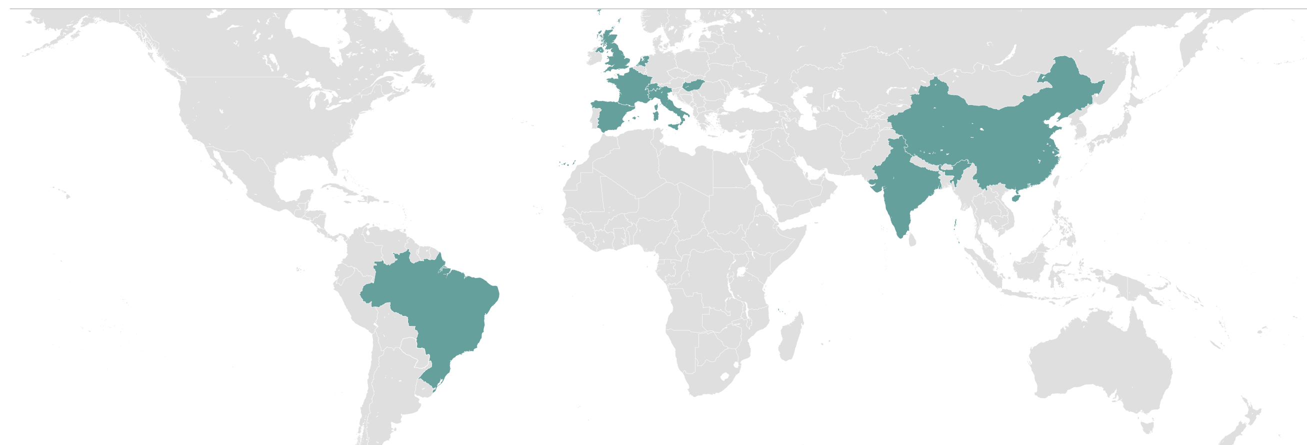
Total fines split by fine type (EUR)



2020 figures shown excluding EUR6,597m fine imposed in Poland for gun-jumping

This is an increase of 7% from 2021. China was once again the most prolific enforcer, with SAMR gun-jumping decisions making up nearly half of the overall volume. Elsewhere, breach of merger remedies was an enforcement priority, attracting the highest individual fines of the year.

Jurisdictions where fines were imposed in 2022 (EUR)



Total EU: 91.6m

Czech Republic: 0.06m
France: 82m
Hungary: 0.09m
Italy: 0.3m
Netherlands: 2.2m
Spain: 6.9m

UK: 7.3m

China: 2.5m

Brazil: 12.1m

India: 0.3m

China remains the headline enforcer

Continuing a trend that goes back five years, in 2022 SAMR adopted the highest number of procedural enforcement decisions of any of the authorities surveyed. It imposed 32 separate fines for gun-jumping.

However, this is a material decrease compared to the 107 decisions reached in 2021. The drop suggests that SAMR may be nearing the end of its long-running campaign to investigate past gun-jumping cases in the tech sector, which have made up the vast majority of decisions in the past two years.

While the number of gun-jumping decisions has been high in China in recent years, the level of fines imposed has not. This is likely to change going forward.

Important new rules took effect in August, significantly increasing the maximum fine for gun-jumping. For deals raising no antitrust concerns, fines are capped at RMB5m (EUR700,000) – ten times the previous level. Where a transaction has, or may have, the effect of restricting competition, penalties can be as high as 10% of turnover. SAMR could even increase those fines by two to five times if it finds the violation is extremely serious.

EC gears up for major gun-jumping fine

The EC imposed no fines for procedural enforcement in 2022.

However, the authority took important steps in a landmark investigation into Illumina and GRAIL. It issued a statement of objections, alleging that the parties jumped the gun when they completed their deal (later blocked by the EC) while the EC's phase 2 investigation was ongoing. It is rumoured that the EC is preparing to impose maximum possible fines, which would amount to 10% of global turnover.

The EC also secured a win when the General Court upheld its decision to fine Canon EUR28m for a "warehousing" structure. The Court confirmed that actions that contribute to a change of control over the target – and even those that do not necessarily constitute a change of control itself – are enough to constitute a breach of EU merger control rules.

This is a wide test, and one that may encourage the EC to challenge further multi-step deals. Parties should therefore be cautious where an initial transaction step could trigger an EU notification requirement.

French authority shows breaching merger remedies comes at a price

Merging parties received a stark reminder from the FCA that complying with remedy packages is vital. The FCA fined Altice EUR75m for failing to implement commitments entered into in relation to its acquisition of SFR in 2014.

The authority had already fined Altice EUR40m in 2017 for initial non-compliance with the commitments. It also imposed several injunctions setting a schedule for implementation of the commitments, some of which had penalty payments attached. Last year, the FCA found that Altice did not properly comply with the injunctions within the time limits set. The additional fine settles the penalty payments and sanctions Altice for non-compliance with the 2017 injunctions.

UK CMA continues to police "hold separate" orders

After imposing a record fine on Meta in 2021, the CMA continued to scrutinise merging parties' compliance with initial enforcement ("hold separate") orders (IEOs). The CMA typically puts IEOs in place to prevent integration before it reaches a final decision. They are standard in completed deals.

In 2022, the CMA imposed a further GBP1.5m (EUR1.8m) fine on Meta in relation to its (now prohibited) acquisition of Giphy, this time for allegedly breaching the terms of the IEO by "failing to notify the CMA of key staff resigning and departing the employment of Meta."

The authority also sanctioned JD Sports and Footasylum nearly GBP4.7m (EUR5.5m) after their CEOs met and exchanged commercially sensitive information in violation of an IEO and the parties failed to alert the CMA of the breach.

These cases evidence the wide-ranging nature of the obligations that the CMA can impose on merging parties, which can stretch across all activities of the acquirer and not just its UK operations.

The CMA's powers to sanction breaches of merger remedies and failure to respond to information requests are currently much weaker than those for IEO infringements (maximum fines of GBP30,000 (approx. EUR35,000) compared to up to 5% of global turnover). This is set to change, with the UK government planning a 5% turnover cap for all procedural merger control breaches. Even heavier procedural fines in the UK are therefore only a matter of time.

No sign that authorities' appetite to pursue procedural breaches is waning

In several other jurisdictions, we saw increased powers or new initiatives to deal with procedural infringements.

The Irish CCPC, for example, will soon get powers enabling it to bring summary proceedings for failure to file a notifiable transaction and for failure to comply with CCPC information requirements, rather than having to rely on the Director for Public Prosecutions to initiate them. In Hungary, maximum fines for gun-jumping increased on 1 February 2023.

Some authorities are even contemplating novel ways to detect more infringements. Brazil's antitrust authority is reportedly considering an online tool to expose potential gun-jumping. No details are available yet, but if implemented successfully it could prompt other jurisdictions to develop a similar tool.

06

Fast track and simplified procedures lead to quicker review periods

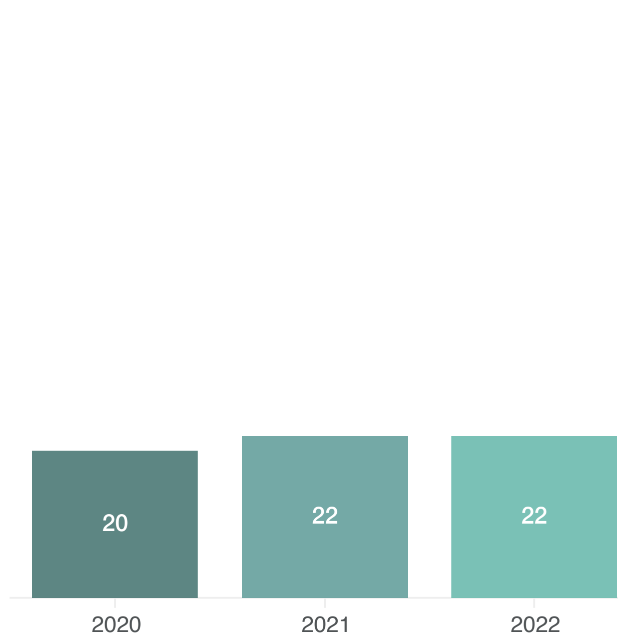
The majority of pandemic-related disruptions to merger review processes have now ended and many authorities have reinvigorated initiatives to speed up reviews. The use of fast track and simplified processes resulted in shorter investigations in a number of jurisdictions.

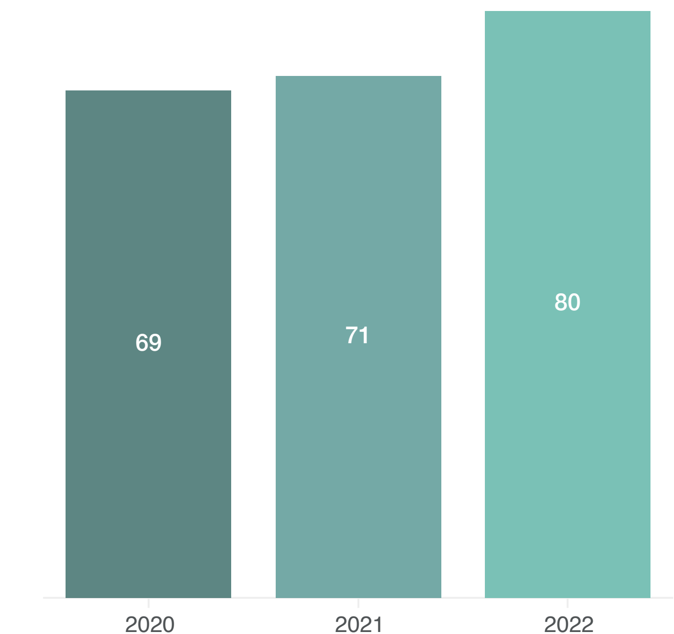
This is clearly good news for merging parties. Overall, the average time to get unconditional clearance at phase 1 (by far the most likely outcome of a merger review) remained steady last year at 22 working days. We also saw a decrease in the time taken to reach other types of decision, such as unconditional and conditional clearances after an in-depth investigation.

However, looking at aggregated data on review periods does not tell the whole story. The picture remains varied across jurisdictions, particularly in relation to in-depth probes.

In international transactions, we also saw the filing strategies of merging parties having an impact on timing of clearances (and relationships with certain authorities).

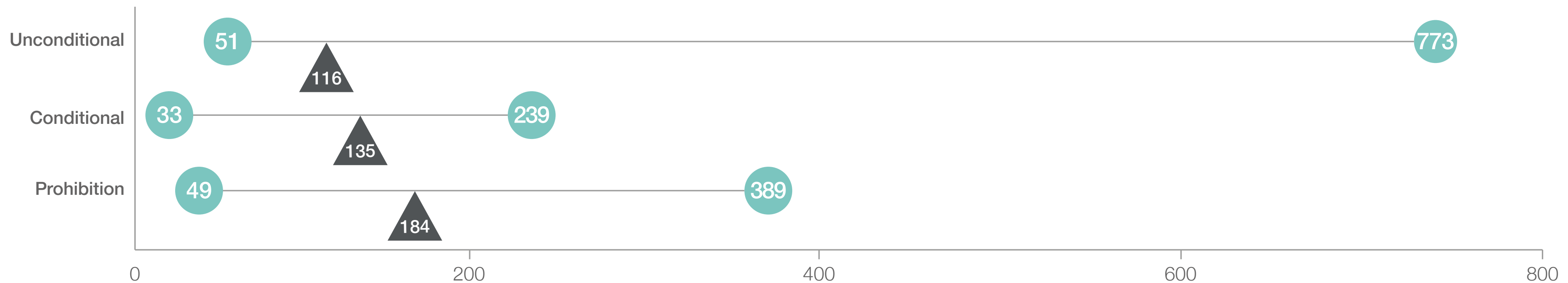
Average phase 1 review periods





Duration of in-depth investigations[8]

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



UK fast track procedures yield timing successes

In Carpenter/Recticel, the CMA used its phase 2 fast track process for the first time, reaching a decision more than two months before its phase 2 deadline. The parties triggered the expedited process by accepting that the deal raised antitrust concerns and requesting that the review progressed quickly to the consideration of remedies. The mechanism has since been used in another phase 2 case and we expect to see more of it in future.

Several phase 1 cases also were fast-tracked to the remedies stage.

This has led to a marked decrease in the average time to receive a UK phase 1 conditional clearance – 88 working days in 2022, down from 98 in 2021. In one 2022 case (Ali/Welbilt), the CMA accepted phase 1 remedies in just 32 working days.

The UK government is planning to build on these efficiencies by injecting further flexibility into the fast track system in upcoming reforms to the rules.

Chinese phase 1 simplified procedure remains quick

In China, 98% of cases benefitting from the simplified procedure were cleared in an average of 11 working days in 2022. This period has decreased steadily since we started compiling this report in 2015 and has plateaued over the past three years.

The amended Anti-Monopoly Law also introduces a new "classification and grading" merger review regime. For a three-year pilot period from August 2022, SAMR can delegate the scrutiny of qualifying simplified concentrations to certain provincial-level market agencies. SAMR remains the single window to accept merger filings. It then decides whether to delegate to the local agencies and reaches decisions after considering the opinions of the local agencies. This development is expected to improve the efficiencies of the simplified procedure in the long run.

In-depth SAMR reviews are, however, much more unpredictable. The average investigation period for a remedies case (including the often lengthy "initiation period" before SAMR formally starts the review period) was 310 working days in 2022, ie over a year. This is significantly longer than the 180-calendar day statutory maximum.

These long review periods clearly have a major impact on deal timetables. In one case last year (DuPont/Rogers), the parties walked away from the transaction after SAMR clearance could not be obtained before the long stop date.

SAMR has attempted to make improvements to the system by introducing a "stop-the-clock" mechanism in the amended Anti-Monopoly Law. This allows it to suspend the review period in certain circumstances, eg if parties have not submitted the required information.

We will keep an eye on the impact of the new rule in practice. It should inject greater flexibility to the benefit of both SAMR and merging parties, especially in complex cases involving remedy discussions. Historically, if SAMR was unable to complete its review within the statutory period in such cases, the parties often needed to refile, restarting the whole investigation period. However, the new mechanism could result in even longer reviews and more uncertainty.

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

EC consults on streamlining reviews

In 2022, over 80% of deals receiving phase 1 unconditional clearance from the EC were reviewed under the simplified procedure. Parties generally obtained clearance less than 20 working days from the date of filing, ie at least five days ahead of the standard phase 1 review deadline.

The EC wants to build on the success of the simplified procedure by bringing more deals within its scope. It has launched a consultation on possible changes. The EC is also seeking views on plans to streamline information requirements in short form and standard notifications. If adopted, these changes should alleviate some of the time and administrative burden of preparing an EC filing. They may also reduce pre-notification periods, which currently take around two to three months for simple cases and can be much longer for complex deals.

However, the proposals do not address investigation periods at phase 2. Here, extensions to the regular timetable (up to a maximum of 125 working days) and sometimes multiple suspensions (which stop the clock) are now standard.

For example, the EC's in-depth investigation into Illumina/GRAIL took 275 working days to complete. Its review of HHI's acquisition of DSME lasted over two years, which included three suspensions totalling 19 months.

For now, at least, there is no sign that the EC intends to take steps to reduce these in-depth review periods.

Other authorities act to speed up merger reviews

In Brazil last year, the antitrust authority started testing an automatic electronic review system for fast track deals. It hopes this will reduce review periods in fast track cases to an average of 15 days or less.

Improvements to the fast track review process were also a focus in South Korea. The Korean Fair Trade Commission (KFTC) expanded the list of transactions that can benefit from the 15-day review, including certain purchases of real estate.

Interestingly, the KFTC has also established an International M&A Division, prompted by a surge in the number of global deals reviewed by the agency. The aim is to increase internal resources and enable greater collaborate with other antitrust authorities. For non-problematic cases, this should lead to quicker reviews.

Authorities criticise parties' tactics in global transactions

Last year, officials at both the FTC and ACCC voiced concerns about certain behaviour of merging parties in relation to timing and (lack of) coordination across parallel merger control review processes.

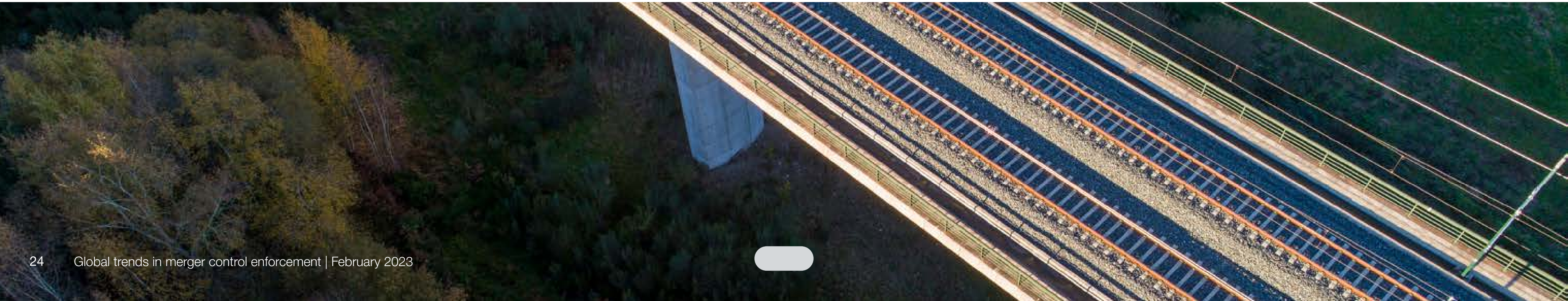
ACCC head Gina Cass-Gottlieb noted that some merging parties choose to focus their efforts on a particular jurisdiction and "appear to be marking time" until they secure that clearance. They then notify the deal in other jurisdictions at a later stage, attempting to leverage the already-obtained clearance. She believes this slows down the entire process.

FTC Director Holly Vedova observed that certain companies appear to have the mind-set that merger control is a "customer service" and that agencies are put under pressure to expedite reviews to get to a decision before the deal's long stop date.

We have also observed an uptick in the number of cases withdrawn and then refiled at EU level. There are two possible reasons for this. First, the parties are buying more time in an attempt to get approval in phase 1, avoiding a lengthy in-depth review. Second, they are trying to align the EU timetable with reviews in other jurisdictions, particularly the UK.

As a result, it is more important than ever that merging parties carefully consider their filing strategy in multinational transactions.

On one hand, parties may consider the potential for efficiencies by initially focusing on a smaller number of filings in certain jurisdictions and then making the remaining notifications after the first clearance is obtained. On the other, they should not underestimate the challenges that could arise in jurisdictions that consider the parties are trying to prejudge the outcome of their reviews by completing other merger control approval processes first.



07

Evolving foreign direct investment regimes add yet more hurdles for M&A

Navigating the international foreign direct investment (FDI) landscape is becoming ever more complex. In 2022 we saw a proliferation of new FDI regimes, a stream of revisions to existing rules and unprecedented levels of enforcement.

Of the jurisdictions surveyed, 23 of 26 have an FDI regime in place. Across the globe, over 100 jurisdictions now have some form of investment screening rules.

Last year we saw governments continuing to use FDI rules to intervene in transactions, in particular targeting semiconductor and critical infrastructure deals.

Rules and enforcement practices are evolving rapidly. The scope and focus of regimes varies widely and there is often a lack of transparency over jurisdictional tests, processes and substantive concerns. Considering FDI early in the transaction process is therefore vital. A clear global FDI analysis and filing strategy will help to assess risk and ensure consistency of notifications.

UK national security screening regime makes an impact

The UK's National Security and Investment Act is now one year old and having a significant impact on deal making.

Five deals were prohibited under the regime in 2022.

One of the most high-profile was the acquisition of the UK's largest semiconductor plant by Chinese-owned technology company Nexperia BV. This marked the first time that the UK government blocked a transaction using its powers to retrospectively review deals that completed before the rules took effect. It has since done the same in a second deal.

Nine other transactions were cleared subject to conditions.

More broadly, there remains uncertainty over many aspects of the regime. The scope and application of the 17 sensitive sectors (which trigger mandatory notification) are often hard to determine. There is a particular lack of transparency and dialogue in the review process.

What is clear, however, is that parties to any deal with a UK nexus – even one that does not obviously raise national security concerns – should consider very carefully the possible application of the regime.

23 of the 26 jurisdictions surveyed have an FDI regime

"A clear global FDI analysis and filing strategy will help to assess risk and ensure consistency of notifications."

Elsewhere governments intervene in M&A

In addition to UK enforcement activity, we saw a stream of government intervention under FDI rules throughout 2022.

In Germany, for example, the government blocked two Chinese investments in the semiconductor sector, as well as a completed deal in the medical sector. In a port acquisition case, the Ministry restricted the Chinese investor to a 24.9% stake. GlobalWafers was forced to abandon its purchase of Siltronic after failing to get German FDI clearance within the deal deadline.

Deals in the defence, energy and robotics sectors were blocked following FDI scrutiny in Italy.

Across the Atlantic, the Committee on Foreign Investment in the United States (CFIUS) recently required a global technology provider with offices in China to fully divest its ownership interests and rights in a U.S. solar energy storage supplier. The Canadian government ordered the divestiture of three separate Chinese investments in Canadian critical mineral companies.

Remedies/conditions are (sometimes) more predictable

While concerns under FDI regimes can be extremely wide-ranging, some issues arise frequently. Access to sensitive information, IP or sites and/or the need to maintain national capabilities are often cited by governments when intervening in transactions.

In such cases, the remedies required to address the concerns are relatively well established. They include information barriers, appointment of government representation on the board and commitments to maintain national activities/capabilities.

This gives a welcome degree of predictability for merging parties. However, parties should not get too comfortable. With the introduction of new FDI rules and an evolution of approach in many existing regimes, the emergence of new concerns, or at least different ways of addressing common issues, cannot be ruled out.

For example, last summer we saw the UK government impose novel conditions in its approval of Cobham/Ultra. The government took "step-in rights" (similar to a golden share) enabling the transfer of ownership of the target business on national security grounds, either to a third party or to the UK government itself.

Regimes continue to appear in the EU

At EU level, the EC is still encouraging Member States to adopt and adapt national screening mechanisms to ensure the collective security of the EU and its Member States. It has named and shamed those that have not done so.

18 Member States now have an FDI regime in place and several more have new or revised rules in progress. The Netherlands, for example, adopted a revised screening bill in April, which is set to take effect in the first half of 2023. New rules will enter into force in Slovakia in March and in Belgium in July. In Ireland, too, we expect a new regime to commence in the coming year.

The EU FDI Regulation, which ensures that the EC and Member States are informed of all FDI notifications made in the bloc, continues to prompt merging parties to make precautionary filings across Member States.

Finally, adding yet another layer of regulatory scrutiny and complexity to deal making in the EU, a new foreign subsidies regime will take effect in July 2023. Find out more below.

CFIUS guidelines suggest uptick in enforcement action

In October 2022, CFIUS published its first ever enforcement and penalty guidelines. Violations of the mandatory filing requirement (such as failure to file or submission of incorrect information) or breaches of CFIUS mitigation agreements can result in heavy penalties – up to USD250,000 or the value of the transaction, whichever is higher. We expect CFIUS to pursue more enforcement action going forward.

In other developments, CFIUS continues to use its powers to require parties to agree to mitigation measures to address perceived national security risks posed by proposed transactions.

CFIUS is also increasingly monitoring non-notified transactions and contacting parties that have not submitted a filing to inquire about the circumstances of deals and, in some cases, to request or even demand a notification.

A recent Biden executive order may result in even closer CFIUS scrutiny for certain transactions. The order introduced an expanded range of national security factors that CFIUS must consider when evaluating inbound investments into the U.S. These factors include the effect of the deal on the resilience of critical U.S. supply chains or on U.S. technological leadership, industry investment trends, cybersecurity risks and risks to U.S. persons' sensitive data.

EU foreign subsidies regime adds to deal risk and administrative burden

The Foreign Subsidies Regulation (FSR) aims to regulate subsidies granted by non-EU countries so that they do not distort competition in the EU internal market.

Significantly, the new rules impose mandatory notification requirements for transactions. From 12 October 2023, 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 an 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.

The definition of financial contribution is deliberately wide. Transfer of funds or liabilities, the foregoing of revenue that is due (eg non-ordinary course tax benefits), or the purchase of goods and/or services by public authorities of a third country could all fall within scope.

The EC can block deals or accept remedies. Failure to notify can result in fines of up to 10% of turnover.

The EC also has the power, on its own initiative, to investigate suspected distortive foreign subsidies. This could include requesting notifications of transactions falling below the notification thresholds.

The FSR will operate alongside existing merger control and foreign investment control regimes, adding an additional filing and review requirement for acquisitions falling within its scope.

In order to ensure compliance, businesses will need to carefully monitor any foreign contributions received in the preceding three years, a task which could be particularly burdensome for investors with multiple portfolio companies.

There is considerable uncertainty about how the FSR will work in practice and how the thresholds for notification will be applied. We should get more clarity as the regime starts to operate.

The EU is not the only jurisdiction focused on policing foreign subsidies in M&A.

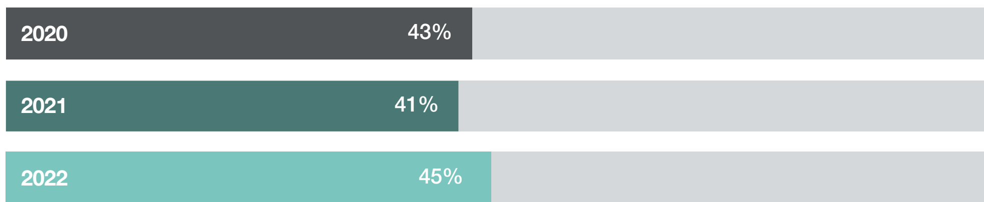
In the U.S., recently passed legislation will, once implemented, require merging parties to disclose the involvement of certain "foreign entities of concern" in the transaction or its funding. This includes entities controlled by the governments in China, Russia, Iran and North Korea. We will keep a close watch on whether other similar developments emerge across the globe.

08

Surge in antitrust and FDI intervention means appropriate deal provisions are vital

As intervention by both antitrust authorities and governments shows no sign of abating, allocating execution risk in transaction documents is ever more crucial. Unsurprisingly, the number of our deals subject to antitrust and FDI approval conditions increased in 2022. Inclusion of "hell or high water" obligations fell while we saw an uptick in reverse break fees.

Antitrust conditions in private M&A



Foreign direct investment conditions in private M&A

Antitrust and FDI conditions on the rise

According to our research on global private M&A deals,[9] the number of deals subject to antitrust (ie merger control) approval conditions rose in 2022, from 41% to 45%.

We saw an even greater increase in FDI approval conditions – from 18% in 2021 to 23% last year. Looking only at deals with a transaction value of more than USD500m, half of all our private M&A deals in 2022 were subject to an FDI condition.

This is expected. It reflects the continued proliferation of FDI regimes around the globe, strengthened powers of governments/regulators and increased intervention (see chapter 7 for more on this trend).

9 Global trends in private M&A, research based on over 1,700 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.

Steep drop in "hell or high water" commitments

In last year's report we commented on a sharp rise in the inclusion of "hell or high water" obligations in our private M&A deals (up from 32% in 2020 to 44% in 2021). These are provisions that compel the purchaser to do everything in its power to secure merger control approvals.

However, in 2022 hell or high water obligations declined significantly and were included in just 20% of deals subject to antitrust conditions.

There is no single reason for this dip. It is likely that a general shift to a softer M&A market has played some part. Antitrust authorities' increasing scepticism about whether remedies can adequately address antitrust concerns (as discussed in chapter 2) as well as their more aggressive stance more generally may be another cause. Sellers may have taken the view that it is fruitless to oblige the purchaser to do everything it can to secure merger control clearances if an antitrust authority is likely to block the deal.

Instead, we saw a range of more nuanced provisions.

Limited divestment obligations were included in 17% of deals. These often required the purchaser to sell the target's assets if required, but not its own, or applied a materiality threshold above which divestment was not required. In a further 28% of transactions, purchasers committed to use reasonable or best efforts to obtain clearance.

Use of reverse break fees increased although fee levels dropped

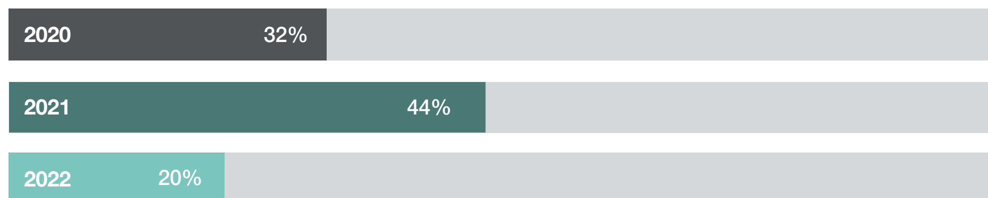
Given the increase in merger control and FDI hurdles, and the decline in hell or high water commitments, it is perhaps not surprising that we saw more reverse break fees last year. Such fees were agreed in 12% of our conditional private M&A deals, up 50% from 2021. The average fee was 2% of enterprise value.

Looking beyond our transactions, we saw a number of instances of reverse break fees becoming payable in 2022 after deals were frustrated due to antitrust concerns:

- Penguin Random House was obliged to pay Simon & Schuster's parent Paramount USD200m (9% of deal value) after its acquisition was prohibited.
- China International Marine Containers committed to pay USD85m (7.7% of deal value) on the collapse of its acquisition of Maersk Container Industry.
- The reverse break fee in Microsoft/Activision Blizzard, which is still undergoing merger control reviews, is USD2-3bn (3-4% of deal value), depending on timing.

Going forward, we may see a further rise in the use of reverse break fees, as well as a resurgence of hell or high water provisions in certain deals. In particular, we expect private equity buyers to attempt more complex deal strategies during 2023. If so, sellers are likely to push for deal provisions that hold buyers accountable for securing regulatory approvals.

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



Reverse break fees in private M&A

Report authors

Contributing offices

Input for this report has been collected by various offices of Allen & Overy and by the following firms:

- Blake, Cassels & Graydon (Canada)
- Cyril Amarchand Mangaldas (India)
- Mason Hayes & Curran (Ireland)
- Mori Hamada & Matsumoto (Japan)
- Nortons Inc (South Africa)
- Radu Taracila Padurari Retevoescu SCA (Romania)
- Shin & Kim (South Korea)
- TozziniFreire Advogados (Brazil)

Our global antitrust practice

Global Competition Review 2023 ranks us in the world's top 10 antitrust practices. Our global team – over 120 antitrust specialists operating from 22 offices in Asia Pacific, the U.S., Europe and Africa – secures merger control clearances for clients from antitrust authorities across the world. We have acted on some of the most high-profile and complex merger control cases in the market, including GlobalWafers/Siltronic, Refinitiv/LSEG, Liberty Global/Telefónica, Advent/PTTGC, Saudi Aramco/PKN Orlen assets, 21st Century Fox/The Walt Disney Company, BTG/Boston Scientific, Asahi/AB InBev, WIND/3 Italia, KPN and E-Plus/Telefónica Deutschland, Cargill/ADM, FedEX/TNT, and Tullet Prebon/ICAP.

Clients come to us for our ability to secure exceptional results against difficult odds. We have particular expertise in handling in-depth investigations and in identifying innovative remedies which are likely to satisfy regulators' concerns. We also have unrivalled experience in successfully guiding transactions through public interest/foreign direct investment reviews and sector-specific regulatory approval procedures, and managing the interplay between these regimes and merger control proceedings.

"The firm's highly regarded merger control practice continues to impress."

Global Competition Review 2023

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