

# REGULATORY HEADWINDS FOR M&A



CAPITAL FLOWS

Part of the Horizon Scanning series

M&A deals are facing greater regulatory scrutiny, hurdles and delay than ever before. In 2024 we expect this trend to persist as the consequences of recent developments in the fields of merger control, foreign investment and subsidy control continue to unfold.



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## MERGER CONTROL

Competition authorities worldwide are increasingly sceptical about the benefits of mergers, especially in concentrated industries. The UK Competition and Markets Authority (CMA), for example, intervened in over half of the mergers that were subject to a formal review in 2023, i.e., the transactions were prohibited, abandoned, or required remedies to secure clearance. Across the channel, the European Commission (EC) intervened in around a fifth of the non-simplified procedure cases it reviewed in 2023.

This interventionism is being driven by:

- concerns around previous under-enforcement, particularly in the tech sector
- a focus on the impact on innovation, particularly in tech and life science mergers
- renewed interest in vertical and conglomerate effects, and on non-price theories of harm
- uncertainty no longer being seen as a reason not to intervene

Increased interventionism is playing out both in terms of competition authorities adopting ever broader approaches to claim jurisdiction over global transactions, and through novel approaches to substantive reviews.

The CMA, for example, is willing to adopt creative approaches to establish its jurisdiction over cases where the target does not generate any turnover in the UK. One party acquiring 'material influence' over another is sufficient to intervene, giving the CMA further flexibility. Moreover, in 2024, the Digital Markets, Competition and Consumers Bill will **introduce** a new jurisdictional threshold to allow the CMA to review more vertical and conglomerate mergers.

In Europe, the EC now has a policy which allows it to examine deals where the jurisdictional thresholds are not satisfied in Brussels or the Member States. The EC used this policy to block Illumina's \$8 billion acquisition of GRAIL - a US/US deal which did not satisfy the thresholds for merger control review anywhere in the EEA. The EC announced in August 2023 that it had accepted referrals of two further below-threshold transactions using this policy (*Qualcomm/Autotalks* and *EEX/Nasdaq Power*). We anticipate more of these referrals in 2024 and beyond as 'gatekeepers' are required under the Digital Markets Act to report transactions in the tech sector to the EC.

From a substantive perspective, in addition to intervening in respect of horizontal mergers, authorities are increasingly ready to intervene on the basis of complex theories of harm across vertical or adjacent markets. For example, the EC's recent prohibition of *Booking/Traveli* showed a willingness to depart from established guidelines and consider novel 'ecosystem' theories of harm. This interventionist trend is likely to continue meaning we can expect in 2024 further uncertainty in respect of merger control outcomes for complex cases.

A final hurdle that is here to stay is the need to make parallel notifications in some cases in both the EU and the UK. This requires careful management given that over one quarter of the cases notified to both authorities have seen some form of divergence in the outcome. In particular, conflicting approaches to remedies have seen the two authorities disagree on the necessity or acceptability of remedies in major cases like *Broadcom/VMware*, *Facebook/Kustomer* and *Microsoft/Activision Blizzard*. More generally, authorities around the world are taking a stricter approach to remedies. Proposals are being subject to detailed review, up-front buyer commitments are required in many cases, behavioural remedies are unlikely to be accepted and there is increasing scepticism about the acceptability of carve-out remedies.

## FOREIGN DIRECT INVESTMENT

Recent years have seen a significant increase in countries equipping themselves with foreign investment screening regimes. Most recently Belgium, Estonia, Ireland, Luxembourg, the Netherlands, Slovenia and Sweden adopted legislation to establish new regimes. This trend is likely to continue in 2024 and beyond given geopolitical tensions, security of supply concerns and the presence of state-funded investors amongst other factors. Bulgaria and Greece, for example, are reported to be working on the development of screening regimes. The EU Foreign Direct Investment Regulation is also subject to revision soon. Since coming into force, it has led to more cooperation between European and national authorities, greater awareness of FDI issues and an increased prospect of national authorities tipping off their counterparts in other countries about transactions that may not have been notified.

The scope of investments that come under these regimes has also increased in many countries meaning that more transactions are now subject to mandatory reviews. Depending on the jurisdiction, reviews may cover direct and indirect stakes, minority investments, acquisitions of assets, real estate transactions, and joint ventures, among others. New technologies such as AI, data infrastructure, quantum computing and semiconductors, have joined traditional sectors for screening such as defence and energy.

Although more deals are now subject to foreign investment review, most transactions do not require remedies to secure clearance and only a handful are blocked each year. The UK government's **analysis** shows that, among the 866 notifications made under the National Security and Investment Act in the period between April 2022 and March 2023, around 1% of deals required some form of remedy, around 1% were withdrawn by the parties, and less than 1% were prohibited. In the EU, the EC's **analysis** shows that among the approximately 800 cases that were formally screened by EU Member States in 2022, around 9% were subject to a remedy, around 4% were withdrawn and around 1% were prohibited.

## SUBSIDIES

The EU's **Foreign Subsidies Regulation (FSR)** came into effect in July 2023. The FSR regime is intended to address distortions in the EU internal market caused by foreign subsidies.

Beginning in October 2023, the FSR introduced a new suspensory regime for acquisitions of companies with EU turnover of at least €500 million involving parties in receipt of substantial financial contributions from non-EU governments (at least €50 million across all relevant parties in the previous three years). Financial contributions are defined widely and include measures such as revenue from provision of goods/services, tax concessions, soft loans, support for the development of production facilities, funding for R&D initiatives, etc. Once a notification is made, the EC assesses whether the financial contributions entail a "subsidy". If the subsidies are found to distort the internal market, the EC can block or impose conditions on the transaction.

The FSR also includes a 'general market investigation tool', which allows the EC to investigate lower-value concentrations and all other market situations where a distortive foreign subsidy may be involved. In 2024 we will continue to see the effects this new regulation has on the market.

## IMPACT ON TRANSACTIONS

The increased number of regulatory hurdles that now apply to many transactions calls for the careful planning and execution of an appropriate regulatory strategy. This is crucial to avoid unforeseen delays and uncertainty. It is important for parties to analyse their position under all applicable merger control, foreign investment and subsidy regimes at the early stages of transaction planning. This exercise should be carried out for acquisitions of minority holdings, as well as acquisitions of control.

Various factors can have an impact on the likelihood of intervention, including the structure of the transaction, the identity of the merging parties, the impact on competition or national security, and the prevailing political context. Careful attention should also be given to the relevant gun jumping rules which apply to a wide range of transaction structures.

## CONTACT US TO FIND OUT MORE

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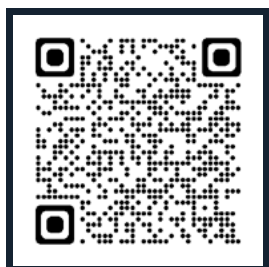
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