Mergers & Acquisitions: EU Overview

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Introduction

In common with most of Europe, the Middle East and Africa (EMEA), mergers and acquisitions (M&A) in the European Union fell significantly in 2023. All sectors were affected, including traditionally strong ones such as technology, media and telecoms (TMT), which saw the value of its deals decline by 23 per cent. The start of 2024 improved, with aggregate TMT deal values rising by 100 per cent. Falling inflation, easing monetary policy and a need to deploy dry powder have meant that activity is returning. The legal landscape remains similar but with some helpful reforms under the EU Listing Act.

Year in review

Overview of M&A activity

Tightening monetary policy created a challenging environment for European M&A from the second half of 2022 and into 2023. The number of transactions in 2022 was down by 4 per cent and total value fell by 23 per cent to €1 trillion.[2] Rates continued to rise, and, in September 2023, the European Central Bank raised eurozone rates to 4 per cent, its 10th successive rate increase. The Bank of England, too, raised rates in August to 5.25 per cent, a level not seen since February 2008. These rates made M&A exceptionally challenging. Debt financing became expensive, and players were minded to wait out the storm. Additionally, it became clear that the Russian invasion of Ukraine will continue and will bring sustained economic uncertainty. In October, conflict erupted in the Middle East, threatening the stability of the region. However, towards the end of the year there was some positive news with annual eurozone inflation in December 2023 falling year on year to 2.9 per cent from 10 per cent.

Unfortunately, European M&A did not recover in the second half of 2023. Instead, there was a shift towards small and mid-market deals, with the average deal value being €51 million compared with €62 million in 2022.[3] The number of transactions fell and the aggregate value dropped by 26 per cent to €814 billion.[4] It was, however, not all negative news, considering that deal count levels remain 20 to 30 per cent higher than pre-2021 levels.[5]

A breakdown of M&A activity by sector showed that TMT retained its position as the most active and valuable area of the market in 2023. There were 3,629 TMT-related deals, up from 2,968 in 2022 and representing an increase of 23 per cent.[6] However, the value of TMT deals dropped slightly from €218 billion to €176 billion, a fall of 19 per cent. Interestingly, private equity was particularly active in this sector and accounted for 47.5 per cent of value (€84 billion, an increase of 6 per cent) and 1,111 transactions.[7] The largest deal was Telecom Italia's sale of its fixed-line business, FiberCop, to KKR for €21.7 billion and illustrates how telecoms – the third constituent of TMT – continues to prop up the sector.

In second place, the industrials and chemicals (I&C) sector followed the trend of moving towards small and mid-cap deals. Total deal count in 2023 rose to 2,476 (from 1,830) and value slipped to €109 billion (down 31 per cent from €155 billion).[8] The number of upper mid-cap deals in the range of €2 billion to €5 billion fell by 57 per cent to just six in 2023, which contrasted a 14 per cent increase in deals valued between €500 million and €2 billion.

Into 2024 there is a quiet sense of optimism and a feeling that recovery may be around the corner. Eurozone inflation has hovered between 2 and 3 per cent for much of the year, and, in June, the European Central Bank cut rates to 3.75 per cent, its first cut since September 2019. While this came a little later than markets were hoping, market participants are confident that further rate cuts are on their way. Stabilising inflation and falling rates will allow M&A participants to pursue ambitious acquisitions once again.

The first half of 2024 saw the return of big-ticket deals and a private equity comeback. The number of deals worth over US$2 billion increased to 41 with a combined value of US$217 billion (up from 28 deals worth US$119 billion in the first half of 2023). Aggregate deal value is also up 33 per cent to US$438 billion from US$293 billion.[9] While the number of deals fell slightly in the first quarter year on year, recovery in the second quarter meant that deal volume rose to 6,791, a 33 per cent rise compared with the first half of 2023.[10] The number of private equity buyouts increased by 147 per cent year on year and their value reached US$96 billion across 580 deals. In particular, with their valuations down, public companies have been the most attractive targets. Deals targeting them have increased from US$71 billion to US$167 billion year on year.[11]

Each of the top three sectors saw improvements in the first quarter of 2024. TMT remains at the top with aggregate deal value of €45 billion, a 100 per cent year on year increase. Likewise, I&C transactions rose by 49 per cent to €23 billion and those in energy, mining and utilities to €27 billion, a 28 per cent increase.[12] There is light at the end of the tunnel for European M&A. A period of depressed dealmaking and high interest rates means that there is dry powder available for deployment. With inflation and interest rates now falling, there is cautious optimism that M&A will flourish again soon.

Developments in corporate and takeover law and their impact

Brexit update

The UK left the EU on 31 January 2020, starting a transition period that ended at 11pm on 31 December 2020. During this transition period, the UK continued to follow EU rules, pursuant to the European Union (Withdrawal Agreement) Act 2020 (EUWA), and trade between the two was exactly as it was before 31 January 2020. At the end of the transition period, EUWA created a new body of UK law, referred to as retained EU law, based on the EU legislation that applied in the UK on 31 December 2020. However, much of this retained law required amendment to function in the context of the UK legal system. This amendment process has primarily been achieved through statutory instruments, operating under powers granted by the EUWA.

The Commission published an updated notice to stakeholders on the withdrawal of the UK from the EU and EU rules on company law in March 2021. The notice highlights the principal consequences of a no-deal Brexit for M&A activity within the EU involving the UK. Primarily, the UK is now a third country and EU company law will no longer apply to it. The EU freedom of establishment principle ceased to apply to the UK at the end of the transition period, so whether a given Member State recognises the limited liability of UK companies is a matter for that Member State's national law. This could result in shareholders of UK companies that have their principal base within the EU losing their limited liability.[13] Cross-border mergers under EU law will no longer be possible with the UK, so national rules for mergers with companies established in third countries will now apply following the transition period. Furthermore, Directive 2004/25/EC on takeover bids, which sets rules for takeover bids where all or some of the securities are traded on a regulated market in one or more Member States, no longer applies where the securities are traded in the UK.

On 1 January 2024, the provisions of the Retained EU Law (Revocation and Reform) Act 2023 took effect. The legislation revoked around 600 specified EU-derived laws on 31 December 2023, abolished the supremacy of EU law and revoked the general principles of EU law. For more information, see the 'Legal framework' section in the UK chapter of this edition.

General Data Protection Regulation (GDPR)

As discussed in previous editions of *In-Depth: Mergers & Acquisitions*, the GDPR was published in the Official Journal on 4 May 2016 and, as a regulation, it has had a direct effect in all EU Member States from 25 May 2018 (although in the UK only until 31 December 2020). The aim of the GDPR was to harmonise the data protection regime across the EU, replacing existing national laws based on the Data Protection Directive of 1995 (which was implemented in the UK through the Data Protection Act 1998). The GDPR has a wide extra-territorial scope, as it applies to any organisation that offers goods and services to individuals in the EU (including those that are free of charge) or any organisation that monitors their behaviour. This means that a larger number of overseas businesses are potentially affected. Sanctions for non-compliance with the GDPR include fines of up to 4 per cent of annual worldwide turnover or €20 million (whichever is greater). The GDPR also regulates the transfer of personal data to countries or companies outside the EU, providing formal mechanisms to permit international data flows.

Following Brexit, the GDPR was written into UK law by way of the EUWA referred to above, creating the UK GDPR. The UK GDPR is supplemented by the Data Protection Act 2018 (DPA 2018). The UK GDPR is very similar to the EU GDPR, although divergences in interpretation and enforcement are emerging between the regimes of the UK and the EU Member States and are likely to increase over time. Notably, legislation to make modest amendments to the UK data protection regime has been proposed as part of the new government's legislative agenda. The Digital Information and Smart Data (DISD) Bill is expected to make a limited number of clarificatory changes to the UK GDPR and to introduce frameworks for the sharing of data ('smart data scheme'), although the exact scope of the DISD Bill remains to be seen at this stage.

On 28 June 2021, the Commission published two adequacy decisions in respect of the UK. These related to transfers under the EU GDPR and for transfers under the Law Enforcement Directive. These adequacy decisions mean that personal data can continue to flow freely from the EU to the UK, in the majority of cases. The decisions are due to last until 27 June 2025, though the Commission can decide whether to extend the adequacy decisions for the UK for a further period of maximum four years.[14] The UK has reciprocal arrangements in place for the free flow of personal data from the UK to EU Member States and from the UK to countries or territories that have the benefit of an adequacy decision from the EU (granted prior to 31 December 2020).

Prospectus Regulation and listing reform

In an M&A context, the EU prospectus regime is relevant primarily where:

a. the purchaser offers its own shares to the sellers as consideration;
b. the purchaser offers loan notes as an alternative to cash; or
c. the purchaser offers cash consideration and seeks to finance all or part of this by raising new equity funding.

As a starting point, under the EU Prospectus Regulation a prospectus must be published if there is an offer of transferable securities to the public in the EU or a request is made for transferable securities to be admitted to trading on a regulated market in the EU. However, there are various exemptions from the requirement to produce a prospectus. In relation to offers to the public, there are exemptions for:

a. offers made to or directed at qualified investors only;
b. offers made to or directed at fewer than 150 persons, other than qualified investors, per EU Member State; and
c. offers made in connection with a takeover by means of an exchange offer, provided a document is published that includes certain prescribed information about the offer, the purchaser and the combined group.

In relation to admission to trading on a regulated market, there are exemptions for:

a. shares that, when taken with other shares admitted to trading on the same market within the past 12 months, amount to less than 20 per cent of the shares already admitted (the secondary issue exemption); and
b. shares issued in connection with a takeover by means of an exchange offer, provided a document is published that includes certain prescribed information about the offer, the purchaser, and the combined group.

If the securities will both be offered to the public and admitted to trading on a regulated market, an exemption from the prospectus requirement is required in respect of both the offer and the admission. The exemptions mean that a prospectus is not required on most EU M&A transactions.

Steps are in progress to simplify EU listing rules, make public capital markets in the EU more attractive for companies and facilitate access to capital, particularly for SMEs. In May 2024, the European Commission published near-final versions of legislation (collectively known as the EU Listing Act), which, among other things, will amend the EU Prospectus Regulation. In particular, the secondary issue exemption referred to above will be amended so that:

a. a prospectus will be required only where the new shares represent 30 per cent or more of the existing share capital – although a short-form document containing key information for investors will have to be published; and
b. the exemption also applies to an offer to the public.

As a result, a prospectus will be required on even fewer EU M&A transactions than at present. The EU Listing Act is expected to be published in final form later in 2024, and the amendment to the secondary issue exemption will take effect immediately (although some other amendments to the EU Prospectus Regulation will take effect 15 or 18 months later).

Similar reforms have been introduced in the UK: see UK chapter.

Environmental, social and governance regulations

ESG regulations, legislation and voluntary frameworks continue to grow, with recent developments being most notable in respect of supply chain due diligence and social factors, such as human rights. Companies with complex supply chains and those in heavily regulated sectors such as finance are particularly open to ESG-related challenges and regulatory scrutiny. From an M&A perspective, this means thinking about how best to incorporate a target into the purchaser's due diligence plan, and testing governance arrangements and preparedness for current and future developments relating to, for example, sustainability reporting, supply chain due diligence and transition plans.

In particular, the EU's Corporate Sustainability Reporting Directive (CSRD), which, starting this year, imposes significantly increased sustainability reporting requirements on EU (and in due course non-EU) entities within scope. On a phased basis starting in July 2027, the Corporate Sustainability Due Diligence Directive (CS3D) will require entities to identify, assess, prevent, mitigate, bring to an end and remedy specified adverse human rights and environmental impacts in their own operations, those of their subsidiaries and of their business partners. Both the CSRD and CS3D include obligations relating to reporting on, or producing, a transition plan. Finally, the EU's Deforestation Regulations, from 30 December 2024, will impose a due diligence regime on companies within scope, in respect of specified products that are at risk of coming from deforested areas.

Artificial intelligence (AI)

The EU AI Act entered into force on 1 August 2024. It is a regulation, meaning it is directly effective across Member States, and it takes a risk-based approach. AI is either:

a. prohibited as the risk related to its use is unacceptable, for example in social scoring;
b. high risk, which is heavily regulated, such as CV scanning;
c. has additional transparency requirements (sometimes called limited risk), for example, chatbots and deepfakes; or
d. has minimal risk with very few rules, for example, spam filters.

One AI system may trigger more than one set of rules – for example, using a chatbot for a high-risk purpose would trigger both the high-risk and transparency obligations. The Act also contains specific rules for general purpose AI models and systems – these would include models such as those used by ChatGPT.

The Act has a wide scope, applying across all sectors (subject to some exemptions, for example, military use) and having a wide extra-territorial reach. It also applies to different actors across the AI supply chain – from providers (developers) and deployers (users) to importers, distributors and certain manufacturers. While the Act is very prescriptive and imposes high fines (the highest being the higher of €35 million or 7 per cent of worldwide annual turnover), it also contains some pro-innovation measures, including a requirement for sandboxes to be set up and provisions for SMEs.

Recent competition law developments

Treatment of mergers by the Commission

In 2023, the Commission received 356 merger notifications under the European Merger Regulation (EUMR). During that period, 320 cases were cleared unconditionally at Phase I. In four cases, Phase I clearance was conditional on certain remedies being implemented, while five cases were referred to Phase II for in-depth consideration. Of the nine Phase II decisions made during the period, two gave clearance without conditions, two gave clearance conditional upon remedies being implemented, one was a prohibition and one required effective competition to be restored.

In October 2023, the Commission adopted restorative measures requiring Illumina to unwind its completed acquisition of GRAIL, following the Commission's September 2022 decision to block the transaction. The one transaction prohibited by the Commission in 2023 was the proposed acquisition by Booking Holdings of eTraveli. At the time of writing, the Commission has issued no prohibition decisions in 2024. While the number of prohibitions is down on previous years, several merging parties have abandoned their transactions in recent years in the face of objections from the Commission and other authorities, including *IAG/Air Europa* and *Amazon/iRobot* in 2024 and *Adobe/Figma* in 2023. These developments reflect the fact that many competition authorities worldwide are increasingly sceptical about the benefits of mergers, especially in concentrated industries.

In terms of substantive assessment, the Commission has continued to focus its analysis on unilateral effects and, in particular, whether mergers may be expected to lead to price increases. However, the Commission is also increasingly carrying out detailed assessments of non-price theories of harm and examining potential vertical and conglomerate effects issues. An area of particular focus has been on the impact on innovation, particularly in the tech and life sciences sectors, and the Commission has identified concerns in various cases where a transaction would remove a player with significant pipeline products or R&D capabilities or where it would otherwise negatively affect future competition. In addition, other parameters of competition are increasingly playing an important role in the Commission's substantive assessment, such as quality, data protection and privacy.

The Commission issued new guidance in March 2021 regarding the application of the referral mechanism set out in Article 22 of the EUMR.[15] That provision allows Member States to request that the Commission examine a transaction even if it does not satisfy the EUMR turnover thresholds. In a break from previous policy, the Commission has been encouraging such referrals in circumstances where the Member States do not have jurisdiction themselves over the transaction at stake. The policy could capture potentially any deal where the turnover of at least one of the parties does not reflect its actual or future competitive potential. The Commission used this policy to block Illumina's acquisition of GRAIL, which was a US/US deal that did not satisfy the thresholds for merger control review anywhere in the European Economic Area. So far, the Commission has examined two further referrals of below-threshold transactions using this policy: Qualcomm's acquisition of Autotalks and European Energy Exchange's acquisition of Nasdaq Power (both of which were ultimately abandoned). However, on 3 September 2024 the European Court of Justice (ECJ) annulled the Commission's decision to review Illumina's acquisition of GRAIL and ruled that the Commission does not have the power to review transactions under Article 22 that do not meet national merger control thresholds, effectively declaring the Commission's new policy on Article 22 unlawful. In response, the Commission has said it will consider next steps to ensure it is able to review deals that would have an impact in Europe but do not otherwise meet the EU notification thresholds, and the judgment is expected to lead to calls for new legislation at both the EU and national level to fill the perceived enforcement gap.

As noted above, several transactions in recent years have been subject to extensive remedies packages to secure clearance. The Commission has maintained a strict approach in this area and proposals submitted by the merging parties are subject to detailed review and market testing. It is also increasingly common for the Commission to require upfront buyer commitments, meaning that the parties can only close the main transaction once they have signed a binding agreement for the divestment business with a purchaser approved by the Commission.

Post-Brexit, several transactions each year require notification to both the Commission and the UK Competition and Markets Authority (CMA). Of the cases subject to parallel review since the end of the Brexit transition period, around one-third have seen some sort of divergence in outcome. For example, Booking Holdings' proposed acquisition of eTraveli was cleared unconditionally by the CMA at Phase 1 but prohibited by the Commission following an in-depth investigation. In contrast, the Commission conditionally approved Microsoft's proposed acquisition of Activision Blizzard just a few weeks after the

CMA had rejected Microsoft's proposed remedies and blocked the transaction. In response to that prohibition, the parties notified a restructured transaction to the CMA, which then cleared the new deal in October 2023.

Reforms to the EUMR

EUMR Simplification package

On 1 September 2023, a package of measures aimed at simplifying its merger control review entered into force. The package is intended to make the process for transactions that do not raise competition concerns easier and faster, and to enable the Commission to focus its resources on those transactions that may raise competition concerns. In addition to expanding and clarifying which cases can be examined under the simplified procedure, the package makes several changes to the notification templates to streamline some of the information requirements.

Revised Market Definition Notice

On 8 February 2024, the Commission published a revised version of the Market Definition Notice, which provides guidance on how the Commission applies the concept of relevant market to EU competition law, including merger control.[16] The Commission updated the original 1997 Notice to address new market realities, such as digitalisation and globalisation.

EU Foreign Subsidies Regulation

On 12 July 2023, the European Union's Foreign Subsidies Regulation (FSR) regime became applicable. The FSR regime is intended to address distortions in the EU internal market caused by foreign subsidies. The regime introduces a new mandatory and suspensory regime for M&A transactions and public tenders above certain financial thresholds. It also includes a 'general market investigation tool', which allows the European Commission (EC) to investigate lower-value concentrations and public procurement procedures, and all other market situations where a distortive foreign subsidy may be involved.

From October 2023, companies must notify the EC of any M&A transaction involving a lasting change of control where:

a. at least one of the merging undertakings, the acquired undertaking or the joint venture is established in the European Union and generates aggregate EU-wide turnover of at least €500 million; and
b. the acquirer, or acquirers, and the acquired undertaking, the merging undertakings or the JV partners and JV received combined foreign (non-EU) financial contributions of at least €50 million in the preceding three years.

'Financial contribution' for these purposes is broadly defined to cover a wide variety of arrangements that companies may have with governmental and associated entities. The EC has powers to impose conditions on or block relevant transactions where it finds that the financial contributions amount to a distortive subsidy, which will exist where the contributions are liable to improve the competitive position of an undertaking and affect competition in the internal market. The EC can also impose fines on companies for breaches of the regulation, which may reach up to 10 per cent of their turnover.

The EC published a briefing on the '100 days since the start of the notification obligation' for M&A transactions in February 2024.[17] The briefing explained that the EC had engaged in prenotification talks with the notifying parties in 53 cases, covering a large set of sectors, ranging from basic industries to fashion retail and high technologies. Out of those cases, 14 had been formally notified, of which nine had been fully assessed. In one of those 53 cases, the notifying parties decided not to proceed with the transaction and therefore abandoned the case in prenotification. In those first 100 days, the EC services did not identify in any case sufficient indications regarding the presence of a distortive foreign subsidy such as to warrant the opening of a second phase (in-depth investigation).

Most cases brought for assessment under the concentration module of the FSR have also been subject to parallel assessment under the EUMR (42 out of 53 pre-notified cases so far).

The Digital Market Act

The Digital Markets Act (DMA), which started to apply on 2 May 2023, has some implications on merger control. It requires 'gatekeepers' to make the Commission aware of any intended M&A where the target also provides core platform services, or services that enable the collection of digital data or other services in the digital sector. This obligation applies whether or not the transaction triggers merger control thresholds at the EU or national level. Member States can then rely on this information to request an Article 22 review (see above). Also, in the event of systemic non-compliance with the obligations under the DMA, the Commission may even prohibit gatekeepers from making acquisitions in the specific sector that is affected.

Tax law

Tax measures at the EU-level must generally be agreed unanimously by all Member States. This can mean that the Commission's directive proposals are much negotiated or prove impossible to agree. 'Pending tax measures' discusses three key pending proposals; another is mentioned under 'State aid' below.

Pending tax measures

The Commission published its proposal 'Business in Europe: Framework for Income Taxation' (BEFIT) on 12 September 2023. BEFIT replaces the Commission's previous ill-fated proposal for a consolidated corporate tax base and would establish a single corporate tax rulebook for the EU, building on the GloBE Rules (Pillar Two) (see 'Digital taxation and international tax reform' below).[18] At the time of writing, it does not appear to have significantly progressed.

On 19 June 2023, the Commission proposed a Directive on Faster and Safer Relief of Excess Withholding Taxes (FASTER).[19] The proposal is intended to streamline procedures for obtaining relief from withholding tax while also preventing tax fraud and abuse. Its cornerstone is the establishment of national registers of certified financial institutions that would have to fulfil additional record-keeping and reporting requirements but would also be able to request relief from withholding tax on behalf of account holders. At the Economic and Financial Affairs Council (Ecofin) meeting on 14 May 2024, delegates reached a 'general approach' to the draft Directive that retained its broad structure subject to significant revisions.[20] Given the extent of these amendments, a reconsultation with the European Parliament (EP) is required, meaning the Directive is now expected to be adopted in early 2025, with implementing legislation to take effect from the start of 2030. This is three years later than the implementation date proposed by the Commission, which is good news for financial institutions since it will give them more time to put necessary systems in place.

The Commission's 'Unshell' or 'ATAD 3' Directive proposal of 22 December 2021 was intended to tackle the misuse of shell companies for aggressive tax planning, tax evasion or money laundering through the denial of tax benefits and additional transparency requirements.[21] So far, the proposal does not appear to have gained sufficient traction within the Council. An Ecofin report of 24 June 2024 notes that '[f]urther discussions will be needed in order to find compromise solutions on outstanding issues'.[22] If it was agreed as proposed (which seems unlikely), it would be prudent to stress test holding and acquisition structures to confirm whether any entities would be vulnerable to being regarded as a 'shell' for the purposes of the Directive (and to associated adverse tax consequences).

State aid

Article 107(1) of the TFEU sets out the prohibition against state aid in the following terms:

> Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

Member States forgoing revenues through granting preferential tax treatments quite clearly amounts to aid granted through state resources. Whether a preferential tax treatment meets the other criteria, in particular in relation to the selectivity of the advantage, is more difficult to pin down.

A number of the Commission's tax-related state aid decisions concerned the pricing of intra-group transactions, with the Commission broadly challenging tax rulings on the basis that the permitted pricing was not in accordance with the arm's-length principle as set out in the Organisation for Economic Co-operation and Development's (OECD) Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations. But in *Fiat Chrysler*,[23] the CJEU established that this was impermissible; whether a tax ruling constituted state aid had to be assessed by reference to the relevant national law, and the Transfer Pricing Guidelines could only be used as a reference point if they had been incorporated into national law. This was more recently reiterated by the CJEU in *Engie*[24] and *Amazon*.[25] In *Engie*, the CJEU further added that the Commission is, in principle, required to accept the national authority's interpretation of the relevant national laws unless it can be shown that a different interpretation prevails in national case law or administrative practice. These judgments should limit the Commission's scope to challenge tax rulings on state aid grounds but, given the potential financial risk and long limitation period associated with such a challenge, it may remain prudent to explore whether there are any concerns as part of the due diligence process or through warranties.

Interestingly, the Commission published a proposal for a directive on transfer pricing, which would require Member States to adopt the arm's-length standard into their national laws[26] alongside the BEFIT proposal referred to above. An Ecofin report of 24 June 2024, however, notes that the proposal 'cannot be supported by Member States in its current form',[27] so it seems unlikely that this proposal would go ahead.

Digital taxation and international tax reform

Discussions on international corporate tax reform within the OECD/G20 Inclusive Framework, which, as at May 2024, counted 147 members, centre around a set of measures that include the establishment of a 15 per cent minimum level of corporate taxation around the world (often referred to as the 'GloBE Rules (Pillar Two)') and the reallocation of certain taxing rights under what is known as 'Amount A of Pillar One'.

The GloBE Rules (Pillar Two) comprise an interlocking set of rules. The income inclusion rule (IIR) requires additional tax to be paid in the parent jurisdiction in respect of any foreign subsidiaries' income taxed at less than 15 per cent, whereas the undertaxed profits rule (UTPR) allows subsidiaries' jurisdictions to collect additional tax in respect of other group companies' undertaxed profits that are not already covered by an IIR charge. Subject to limited exceptions, Member States are required to implement and apply the IIR from 31 December 2023 and the UTPR from 31 December 2024 under the EU's Pillar Two Directive.[28] The progress of implementation has, however, been varied. On 23 May 2024, the Commission sent formal requests to comply to Cyprus, Latvia, Lithuania, Poland, Portugal and Spain, which had so far failed to notify their implementing legislation.[29] For groups within the scope of the GloBE Rules, it will be prudent in an M&A context to assess a target group's structure and preparedness for the application of the GloBE Rules, the availability of relevant data and its compatibility with the purchaser's systems and any historic issues that could affect the purchaser's group.

Amount A of Pillar One is intricately linked to digital services taxes (which tend to be, broadly, taxes on gross revenues derived from certain online business activities to the extent attributable to users in the relevant jurisdiction). The imposition of such taxes by certain EU Member States (and the UK) triggered US trade sanctions. Amount A is intended to supplant these taxes, and the US agreed with those EU Member States (and the UK) to terminate trade sanctions pending the negotiation of Amount A. However, the OECD missed a 30 June 2024 deadline for reaching agreement on it. At the time of writing, the full implications of this are unclear, but it is expected that the digital services taxes will remain in place for the time being and that the US has no immediate plans to reimpose trade sanctions. In the longer term, it is possible that the Commission may propose an EU-wide digital services tax or similar measure, if agreement cannot be reached at the OECD level; after all, the EU's Pillar Two Directive envisaged that the Commission should, 'if appropriate, submit a legislative proposal to address those tax challenges in the absence of the implementation of the Pillar One solution' and the Commission had previously mooted the proposal of a digital levy.[30] In an M&A context, a prudent approach might, where relevant, consider the potential impact on the target's valuation if terminated trade sanctions were introduced.

Outlook and conclusions

While 2023 was a difficult year, the backdrop to M&A activity has improved in 2024. European GDP grew by 0.3 per cent in the first quarter and unemployment has fallen to historic lows.[31] Eurozone inflation fell to 2.4 per cent in March and the European Central Bank made its first – hopefully of numerous – interest rate cut.[32] As the economic climate stabilises, market participants feel they can return to making ambitious acquisitions, and big-ticket deals are returning. However, there is a case to remain cautious. There are some distress signals emanating from the German and French economies, and the path forwards for them is not obvious. Additionally, new faces in the French and European parliaments may bring changes to the political and regulatory environment. Last, there are no solutions yet to the crises in Ukraine or the Middle East. European M&A is turning a corner, but plenty of hazards remain.

Footnotes

[1] Mark Zerdin is a partner at Slaughter and May.

[2] Mergermarket, 'Deal Drivers EMEA – FY 2022'.

[3] Mergermarket, 'Deal Drivers EMEA – FY 2023'.

[4] ibid.

[5] Pitchbook, 'Global M&A Report 2023 Annual'.

[6] Mergermarket, 'Deal Drivers EMEA – FY 2023'.

[7] ibid.

[8] ibid.

[9] Mergermarket, 'M&A Highlights 1H 2024: In Recovery'.

[10] ibid.

[11] ibid.

[12] Mergermarket, 'Deal Drivers EMEA – Q1 2024'.

[13] Lexology, 'Corporate law update 10 July 2020'.

[14] ICO, 'Overview – Data Protection and the EU'.

[15] Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, 26 March 2021.

[16] Commission Notice on the definition of the relevant market for the purposes of Union competition law, 22 February 2024.

[17] European Commission, FSR briefing, issue 1, February 2024, https://competition-policy.ec.europa.eu/document/download/22197012-2036-4b1e-8b02-0eb8b2d6e666_en?filename=kdar24001enn_competition_FSR_brief_1_2024_100-days-of-FSR-notification-obligation.pdf.

[18] European Commission, 'Business in Europe: Framework for Income Taxation', https://taxation-customs.ec.europa.eu/taxation/business-taxation/business-europe-framework-income-taxation-befit_en.

[19] European Commission, 'Better withholding tax procedures to boost cross-border investment and help fight tax abuse', https://taxation-customs.ec.europa.eu/taxation/business-taxation/faster-initiative_en.

[20] European Council, 'Economic and Financial Affairs Council, 14 May 2024', www.consilium.europa.eu/en/meetings/ecofin/2024/05/14/.

[21] European Commission, 'Unshell', https://taxation-customs.ec.europa.eu/taxation/business-taxation/unshell-proposal_en.

[22] Council of the European Union, 'Outcome of Proceedings, 24 June 2024', https://data.consilium.europa.eu/doc/document/ST-11287-2024-INIT/en/pdf.

[23] Joined cases C-885/19 P and C-898/19 P, *Fiat Chrysler Finance Europe and Ireland v. European Commission*.

[24] Court of Justice cases C-454/21, *Luxembourg v. Commission*, and C-454/21, *Engie Global LNG Holding and Others v. Commission*.

[25] Court of Justice case C-457/21 P, *European Commission v. Amazon.com and Others*.

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