

Merger Control and FDI Outlook For 2024

Newsletter

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Foreword

Continued geopolitical turbulence and strong macroeconomic headwinds adversely affected global deal-making activity in 2023, while agency scrutiny and intervention both in merger control and foreign direct investment (FDI) intensified.

Merger control authorities continue to expand the scope or interpretation of existing rules to catch a wider range of deals, with established agencies increasingly reviewing transactions which do not meet the traditional notification thresholds, and emerging regimes legislating to enable the review of high-profile global transactions. Deals which may historically have escaped scrutiny are now being pursued more vigorously, with agencies entertaining novel theories of harm outside of the traditional antitrust assessment framework.

In the US in particular, the Federal Trade Commission (FTC) announced proposed changes to premerger filings under the Hart-Scott-Rodino (HSR) Act that, if finalized in similar form, will require parties to provide significantly more information upfront, creating a significant additional burden for both financial sponsors and strategic filers.

The global COVID-19 pandemic, Russia’s subsequent invasion of Ukraine, and the conflict in the Middle East exposed the risks that highly concentrated supply chains can pose to various economies. Escalating geopolitical tension, coupled with the rapid development of critical advanced technologies led governments to tighten foreign policy and adopt increasingly protectionist measures. As a result, FDI scrutiny remains a key deal issue typically with protracted and opaque processes, with additional obstacles anticipated in the form of an outbound screening mechanism announced – both in the US and the EU – to protect key technologies and preserve national and economic security.

In 2024, we expect the dealmaking environment to remain challenging in the wake of shifting antitrust, FDI and financial subsidy regulation.

1. Increased Enforcement of Below-Threshold Mergers

Antitrust agencies continue to assert jurisdiction over a broader range of transactions than ever before. In some jurisdictions, agencies are repurposing existing legal tools to expand their reach (e.g., in the EU). In others, legislators have enhanced traditional revenue and/or asset value-based merger control thresholds and introduced alternative transaction value tests (e.g., in Austria, Germany, Mexico, Russia, and South Korea), or introduced call-in powers for transactions which do not satisfy the relevant thresholds (e.g., in Ireland, Italy, Norway, Sweden, China, and Japan, with more to follow).

Following its prohibition of Illumina’s completed acquisition of GRAIL in 2021, which ultimately resulted in a gun-jumping [fine](#) and an [unwinding order](#), the European Commission (EC) called in two “below-threshold” transactions for review in August 2023 using the Article 22 EU Merger Regulation (EUMR) referral mechanism. While these acquisitions ([Qualcomm / Autotalks](#); [EEX / Nasdaq Power](#)) are only the second and third referrals, Article 22 enquiries from the EC are now relatively routine for transactions in the life science and technology sectors, irrespective of their size. This represents a new challenge for dealmakers.

EU Member States are also increasingly relying on existing competition enforcement tools to challenge potentially anticompetitive acquisitions, a development largely endorsed by the Court of Justice of the European Union (CJEU). In its *Towercast* [judgment](#) of March 2023, the CJEU held that an acquisition by a dominant company that does not satisfy the EU or national Member State notification thresholds may nevertheless infringe competition law and be reviewed *ex post* under the EC's abuse of dominance rules (Article 102 TFEU).

The Belgian Competition Authority (BCA) [opened](#) an antitrust investigation into Proximus's acquisition of its telecommunications rival EDPnet, noting an "application of the *Towercast* case law". Following a finding of *prima facie* abuse of dominance, the BCA [imposed](#) a series of far-reaching interim measures on Proximus to ensure operational autonomy of EDPnet, including supervision by an independent trustee for 15 months. In November 2023, the BCA [closed](#) its investigation after Proximus agreed to divest EDPnet Belgium to Citymesh (a fourth telecommunications operator in Belgium). While abuse of dominance investigations are less likely to result in a transaction being unwound given the prevalence of behavioural commitments and the principle of proportionality under Article 102, it provides another avenue for agencies to investigate mergers.

In the UK, the Competition and Markets Authority (CMA) relies on its wide margin of discretion when applying the share of supply test to assert jurisdiction over transactions. In January 2023, for example, the CMA [concluded](#) that the completed acquisition of Jus-Rol by Cérélia resulted in a substantial lessening of competition, ordering Cérélia to divest Jus-Rol in its entirety. The CMA asserted jurisdiction based on the parties' combined share in the supply of dough-to-bake products to grocery retailers of 60-70%, notwithstanding the parties' argument (in Phase I) that they did not compete directly and there was no "no increment in the parties' respective shares of supply". The Competition Appeal Tribunal (CAT) upheld the CMA's decision on appeal.

Significant amendments to the UK competition and consumer law regimes [announced](#) in April 2023 would further expand the CMA's merger review powers. The proposed new filing threshold, for example, would not require an overlap between the merging parties' activities in the UK. It would capture any acquisition by a company holding a 33%+ share of supply and £350m+ in UK revenue. The change would solidify the CMA's ability to establish jurisdiction over acquisitions by large companies of targets with little or no revenue in the UK, following a series of controversial applications of the current share of supply test.

The reach of competition agencies outside of Europe is also expanding:

- The Chinese State Administration for Market Regulation (SAMR) adopted in April 2023 [implementing regulations](#) to accompany the wide-ranging amendments to the PRC Anti-Monopoly Law, including guidance on how SAMR will investigate transactions falling below Chinese merger notification thresholds if there is evidence that the deal may eliminate or restrict competition. In September 2023, the SAMR [issued](#) its first conditional approval for a deal that fell below the merger notification thresholds (Simcere Pharmaceutical Group's acquisition of Beijing Tobishi Pharmaceutical).
- The Japan Fair Trade Commission (JFTC) has also conducted several *ex officio* reviews into deals that do not satisfy the traditional jurisdictional thresholds, with 15 such cases in FY2023 (including Microsoft's acquisition of Activision).
- In March 2023, the Australian Competition and Consumer Commission (ACCC) proposed [wholesale reforms](#) to the existing (voluntary) regime, including a new mandatory and suspensory notification regime. If implemented, transacting parties may need to notify the ACCC based on their global or domestic turnover or transaction consideration. Under the proposal, the ACCC would also have the power to 'call in' a transaction falling below the threshold where the transaction raises competition concerns.

Takeaways

Assess the risk of a transaction being reviewed even if the traditional jurisdictional thresholds are not met.

- Do not assume that transactions with little ex-US nexus will avoid ex-US scrutiny – European agencies in particular routinely review unreportable deals or deals with limited local nexus.
- Consider voluntary filings in jurisdictions where the thresholds are not met but potential competition concerns may arise, and consider springing conditions in your purchase agreements.

It is not the size of the target, but the size of the antitrust issue that is most important.

- Expect filings in transactions that may impact competition and where the parties' revenues do not necessarily reflect their competitive potential.
- Significant transaction multiples are likely to attract scrutiny.

Minority (even non-controlling) interest acquisitions, certain joint ventures, collaboration agreements, and IP licensing agreements may trigger notifications under antitrust and/or FDI regimes globally.

Ensure antitrust provisions in transaction documents anticipate the risk of a potentially protracted antitrust review process.

Having a global, well-planned approach to your clearance strategy is more important than ever.

- Coordination with global FDI and EU foreign subsidy reviews is critical.

2. Tougher Reviews of Non-Horizontal Mergers

2023 saw a resurgence of agency appetite to pursue non-horizontal mergers, examining both vertical and conglomerate theories of harm in high profile technology and life sciences deals. The US, EU, and UK authorities remain the toughest enforcers, but sometimes reach divergent outcomes. In many cases, however, outright prohibition appears to give way to agreed remedies.

Microsoft's \$69bn acquisition of Activision highlights agency divergence. In the UK, the CMA initially [prohibited](#) the transaction in April 2023 based on concerns that the deal would affect the future of the fast-growing cloud gaming market, thus reducing innovation and choice for UK gamers. The EC [cleared](#) the transaction conditionally in May 2023 (with remedies including a 10-year licensing deal with competitors) and, despite some initial uncertainty, confirmed that Microsoft's restructured deal (to get CMA approval) would not require another approval. The CMA [cleared](#) Microsoft's restructured deal (agreeing to divest Activision's cloud gaming rights to Ubisoft) in October 2023. In the US, the FTC filed a lawsuit in administrative court to block the transaction in December 2022, and subsequently sought a preliminary injunction in federal court. The federal trial court refused to grant the preliminary injunction in July 2023, but the FTC appealed that decision, oral argument was held in December 2023, and a decision on the appeal is anticipated in the next several months. Although the FTC briefly withdrew its administrative lawsuit in July 2023, the FTC later [returned the matter to adjudication](#) in September 2023, noting concerns that *"Microsoft and Activision's new agreement with Ubisoft presents a whole new facet to the merger that will affect American consumers"*. Nevertheless, Microsoft closed the transaction in October 2023 and the FTC's administrative case is slated to recommence 21 days after the federal appellate decision sometime in the first or second quarter of 2024.

In September 2023, the EC issued its first prohibition [decision](#) based solely on "ecosystem" concerns in *Booking / eTraveli*, departing from its Non-Horizontal Merger Guidelines in pursuit of an arguably novel theory of harm focused on the entrenchment of dominance. The EC found that the acquisition of eTraveli, a flight online travel agency (OTA) services provider (and important customer acquisition channel for accommodation OTAs), would expand Booking's travel services "ecosystem" by restricting the ability of accommodation OTA competitors to challenge Booking's dominant position in accommodation OTA services, reinforcing indirect network effects and increasing barriers to entry and expansion. The EC's decision contrasts with the unconditional clearances issued in the US, the UK, and Ukraine. Booking subsequently appealed to the General Court.

Other vertical mergers examined by the CMA in 2023 include *Broadcom / VMWare* and *United Health/EMIS*, both cleared unconditionally following Phase II reviews. In *Broadcom / VMWare*, the CMA [decided](#) that the deal would not harm innovation or impact the ability of Broadcom's rivals to compete, whereas the EC [required](#) commitments on access and interoperability. In *United Health / EMIS*, the CMA examined whether the deal would allow United Health to limit its competitors' access to the data held within EMIS's patient record system or to degrade the digital connections to this

system, which rivals rely on to provide integrated software. Following a detailed investigation involving the review of thousands of internal documents, the CMA found that it would not be commercially beneficial for the merged entity to restrict access to EMIS's electronic patient record system, and [cleared](#) the deal unconditionally in September 2023.

In the US, the FTC's [challenge](#) of Amgen's proposed acquisition of Horizon Therapeutics, marked the first time in over 40 years that a US antitrust agency challenged a transaction based on conglomerate effects concerns. The FTC alleged that the acquisition would allow Amgen to offer rebates on its blockbuster drugs to pressure insurance companies and pharmacy benefit managers to favour Horizon's products, raising rivals' barriers to entry, and insulating Horizon's products from competition. In September 2023, the parties [settled](#) on favorable terms with the FTC pursuant to which Amgen could close the transaction but would be prohibited from (i) bundling any of its products with certain Horizon drugs (Tepezza and Krystexxa), (ii) using any product rebate or contract term to exclude or disadvantage products that would compete with those drugs, and (iii) acquiring without the FTC's consent any competitors of the two Horizon drugs.

Takeaways

Be ready to engage on novel theories of harm in non-horizontal mergers, particularly for mergers in technology and life sciences sectors.

- Expect more thorough (and lengthier) investigations into 'ecosystems', innovation strategy, pipeline, and investment.
- Look beyond horizontal overlaps during initial diligence. Anticipate increased scrutiny of potential / pipeline overlaps, vertical relationships, and conglomerate effects concerns for those deals where the target is active in an adjacent or related market to the acquirer (including any of its controlled portfolio).

Educate deal teams on the importance of document hygiene – a bad document can make antitrust reviews much more difficult.

- Assume that antitrust authorities will review any deal-related presentations to management to assess the transaction rationale, valuation, competitive landscape, and the company's forward-looking strategy and projections.
- Develop/document any pro-competitive rationales for the deal valuation, including synergies and customer benefits.
- Avoid unfounded speculation or exaggeration.

Antitrust authorities are not always aligned.

- Merger control (or indeed FDI) clearance in one jurisdiction does not always mean other agencies will follow or accelerate their processes.

3. Private Equity Investors Remain in the Antitrust Spotlight

Private equity investors can expect continued scrutiny in 2024, with more onerous disclosure obligations in HSR filing processes, increased attention on roll-ups, bolt-ons, and carve-outs, and a renewed focus on interlocking directorates.

■ **Significant, burdensome updates to HSR Form & Instructions.** Wholesale changes [proposed](#) by the US DOJ and FTC to HSR premerger filings are expected to have a significant impact on the dealmaking landscape for all filers, with certain provisions targeted at financial sponsors, including PE firms, and generally bringing the process more into line with the “front-loaded” approach under European merger control. Where the current HSR review process is fundamentally a notice regime, with a limited set of directly relevant deal-related documentation that is submitted, and the antitrust agencies asking for additional information when needed to assess a transaction, the proposed changes move much more information into the initial filing. Indeed, the drastic increase in the amount of information demanded of parties upfront is more akin to an EU process, and essentially demands a mini-Second Request response with every filing, including:

- i. details about the transaction rationale, investment vehicles, and corporate relationships;
- ii. information related to products or services in both horizontal products and non-horizontal business relationships such as supply agreements;
- iii. projected revenue streams, transactional analyses and internal documents describing market conditions, and the structure of entities involved such as PE investments;
- iv. details regarding previous acquisitions; and
- v. information relating to the labour market, including data on employee classifications, geographic market information, and workplace safety histories. The agencies will also collect information on foreign subsidies from “*foreign entities of concern*”, currently China, Iran, North Korea, and Russia.

As a result, deal teams should anticipate the need to provide substantially more information and documents than they do currently, irrespective of whether the transaction affects competition. These changes, once implemented, will inevitably lead to a significantly greater lead time in the preparation of HSR notifications (even for acquisitions of minority shareholdings), more akin to ex-US filings. The days of HSR filings within five days of signing up transactions are very likely numbered.

■ **Increased focus on private equity roll-ups.** Agencies globally continue to crack down on successive small bolt-on acquisitions as a means for PE acquirers to consolidate an industry:

- In the UK, the CMA has identified roll-up acquisitions by financial sponsors as an enforcement priority, particularly in consumer-facing industries where competition takes place in local markets, such as veterinary and dentistry services. Typically, PE acquirers have resolved competition concerns through divestitures of the relevant practices.
- In the Netherlands, the Dutch Competition Authority (ACM) [warned](#) against the “*creeping control*” of “*predominantly (but not exclusively) private equity firms*”, citing specialized healthcare clinics, veterinary practices, and child-care centres as examples of where consolidation strategies have been employed to create or strengthen local or regional dominant positions.
- In the US, the FTC and DOJ have long [signalled](#) that they would apply more scrutiny to private equity acquisitions in healthcare. More recently, FTC Chair Lina Khan reinforced this commitment, noting the “*serious consequences*” stemming from roll-ups which have allowed firms to “*amass significant control over key services in local markets*”.

■ **Interlocking directorates a concern in the US (and potentially elsewhere).** For the first time in approximately 40 years, the FTC [issued](#) a formal enforcement action on the basis of Section 8 of the Clayton Act prohibiting interlocking directorates. In August 2023, the FTC announced an agreement with EQT Corporation (EQT) and Quantum Energy Partners (Quantum) – both competitors in the production and sale of natural gas in the Appalachian Basin in the US – to address alleged competitive harm in connection with EQT’s acquisition of two entities from Quantum. This included Quantum surrendering its rights to an EQT board seat and divesting its EQT shares, and other measures to prevent interlocking directorates and the potential for anticompetitive information exchange.

The EU’s new requirements under the EU simplified procedure now also require parties to identify cross-directorships in companies active in the same markets as any of the other parties or in vertically related markets.

Investors should therefore be wary of board composition when evaluating potential transactions.

Takeaways

HSR filings will no longer be routine processes.

- Once the proposed changes are implemented (expected in mid-2024), PE investors should expect to provide significantly more materials even for routine transactions that do not present competition concerns.
- Investors should allow sufficient time in their deal timetable to accommodate a more protracted HSR process, and should rethink what previously had been routine commitments to submit the notification within 5-10 business days from signing a purchase agreement.
- Parties should still be mindful about language used in their routine internal documents and should assume that not just deal-related presentations to management, but also drafts of such documents created by or provided to the "Supervisory Deal Team Lead" will be submitted in the HSR filing and reviewed by antitrust authorities.
- US agencies (and indeed those around the world) will increasingly request details of a PE firm's organisational structure and LP investors, as well as potential overlapping activities (or supply agreements) with a PE firm's wider portfolio, however unconnected to the transaction. Similarly, agencies will often probe for details regarding prior transactions, and information on the labour market.

PE buyers should expect additional scrutiny from antitrust authorities, even for seemingly unproblematic transactions (e.g., low-value bolt-on acquisitions in local markets).

- Undertake an antitrust feasibility study pre-signing to avoid surprises. This should include understanding the likely market reaction and whether there is a Plan B (e.g., divestitures) that still makes economic sense.

Analyse your interlocking directorates position.

- Undertake periodic reviews of board representations across portfolio to ensure compliance with Section 8 of the Clayton Act.

Be careful when your investment thesis is predicated on a series of in-market or tuck-in investments that could be characterized as a "roll-up".

4. New EC Merger Simplification Package – Not So Simple?

With more than 90% of EU merger control reviews cleared unconditionally, these processes typically impose a significant burden on the notifying parties and often involve lengthy pre-notification discussions.

In April 2023, the EC adopted a package of measures aimed at simplifying its merger review process. These comprised a revised Merger Implementing Regulation, a Notice on Simplified Procedure (the **Notice**), and a Communication on the transmission of documents. The measures took effect from September 2023.

The package expands the categories of cases that may be eligible for the simplified procedure, and streamlines the review of simplified cases, and simplifies the notification process itself.

Key changes include:

- **New categories of simplified cases** where (i) the parties' individual or combined market share is below 30%, and their combined purchasing share is below 30%; and (ii) where the parties' individual or combined upstream and downstream shares are below 50% and the market concentration (HHI) index is below 150 and the company with the smaller market share is the same in the upstream and downstream markets.
- **Flexibility clauses** allowing (at the parties' request) the EC to review under the simplified procedure certain transactions which do not otherwise fall within any of the categories for simplified treatment, namely: (i) horizontal overlaps where the parties' combined market share is 20-25%; (ii) vertical relationships where either (a) the individual and combined upstream and downstream market shares of the parties are lower than 35%, or (b) the individual and combined upstream and downstream market shares of the parties are lower than 50% in one market and less than 10% in all the other vertically related markets; and (iii) JVs with annual turnover (including the turnover of any activities contributed to the JV) and total value of assets between €100 - 150 million in the EEA.
- **Safeguards and exclusions from the simplified procedure** (including where one party has a non-controlling minority shareholding in a company that has a "very significant" market share in the same market as the target or in a market upstream or downstream to it, the deal may not be reviewed under the simplified procedure, even if the thresholds for simplified procedure are met).
- **Introduction of a super simplified procedure**, which enables notification without pre-notification discussions for (i) mergers that do not involve horizontal overlaps or vertical relations between the parties, and (ii) acquisitions of joint control over a joint venture that is not active and does not have assets in the EEA.
- **Streamlining the review of simplified and non-simplified cases.** In an attempt to reduce the cost and administrative burden on the parties, the new rules introduce a simplified notification (Short Form CO) with tables and a "tick-the-box" format based on a series of multiple-choice questions. Unfortunately, significant information requests remain, which may prove burdensome for parties, including the provision of information on all "plausible" markets (which are often far-removed from business reality), cross-directorships in companies across the relevant markets (both overlapping, as well as upstream and downstream), pipeline-to-pipeline or pipeline-to-marketed product overlaps, and future innovation and expansion plans.

- **Electronic submission of documents** including the mandated use of a Qualified Electronic Signature.

The simplification package brings some welcome changes to the existing procedure, including an extension of the categories of cases that may benefit from the simplified procedure. However, parties may experience protracted pre-notification discussions with the EC around the eligibility of the deal for the simplified procedure (e.g., whether they are below the market share thresholds "under all plausible market definitions"). It is unclear whether cross-directorships or non-controlling minority shareholdings – which (unlike in other major jurisdictions such as the US, UK, and Germany) were traditionally not subject to particular attention by the EC – will now play a more significant role in the EC's assessment framework. In practice, while the EC gets to grips with its new notification form, parties are still experiencing the same issues in pre-notification as they were previously. In some instances (such as electronic submission or the inclusion of detail relating to interlocking directorates), the process is in fact more laborious than under the previous simplified procedure.

Takeaways

The EC simplification package introduces numerous welcome changes which are likely to reduce the administrative burden for parties in certain deals.

- The extension of the category of cases which can be notified under the simplified procedure and the introduction of a super-simplified procedure should serve to streamline the overall EU merger control review process.

Certain changes will, however, likely result in additional red tape for investors to prove eligibility for the simplified procedure.

- Parties must now answer a long list of questions relating to "safeguards and exclusions" – those reasons that the EC may compel the parties to switch from the simplified to the regular procedure. These include questions on non-controlling shareholdings and cross-directorships. Investors with large portfolios will need to assess these across the entirety of their portfolio.

5. Public Interest Considerations Playing a Key Role in Global Merger Reviews

As environmental, social, and corporate governance (ESG) goals increasingly underpin M&A strategy, public policy considerations in global merger reviews are now more prevalent than ever. While several competition authorities (including in the EU, the UK, France, and the Netherlands) have for several years paid lip service to the importance of ESG and other public interest factors in their reviews, in recent months agencies around the world have taken significant strides to recognise these as serious considerations. Agencies are also increasing enforcement against restrictions on the labour market.

In Australia, the ACCC [cleared](#) Brookfield's proposed acquisition of Origin Energy in October 2023 on the basis that the transaction would result in public benefits which would outweigh the likely public detriments. The ACCC acknowledged that it could not exclude a substantial lessening of competition, but confirmed that the acquisition would likely result in benefits in accelerated and additional renewable energy generation and storage, and decrease Origin's emission intensity. The ACCC found that, together, these benefits would result in a reduction of greenhouse gas emissions in Australia.

The UK's CMA published new [guidance](#) setting out how UK competition law will apply to competing businesses which seek to collaborate on environmental sustainability goals. This includes guidance on the types of agreements that are unlikely to infringe competition law and how parties should self-assess restrictive agreements which may or may not benefit from sustainability-related exemptions. The Dutch ACM also published a [Policy Rule](#) in October 2023, which seeks to provide insight into how the ACM applies competition rules to sustainability agreements and how the ACM oversees this area.

China's current Antimonopoly Law does not have specific ESG provisions, instead allowing for broader considerations of factors such as the impact on national development and on consumers in merger control. However, China is expected to introduce in its new antitrust guidelines the role of ESG considerations in merger control, including the benefits in terms of employment, energy consumption, and environmental protection. Tencent, the Chinese tech conglomerate, recently acknowledged the ability to save jobs as a key reason that the SAMR approved its acquisition of search engine Sogou in 2021.

Public interest considerations remain at the forefront of South Africa's merger control agenda. Existing [legislation](#) requires dealmakers to consider a wide range of public interest factors, including *"the promotion of a greater spread of ownership, in particular to increase the levels of ownership by historically disadvantaged persons and workers in the market"*. South Africa's Competition Commission is increasingly taking the view that a merger that does not promote spread of ownership to *"historically disadvantaged persons"* is sufficient to render a merger unjustifiable on public interest grounds. Transactions are thus often being

conditioned on the deployment of an employee share ownership plan (ESOP), even in cases with very little South African nexus.

In Brazil, there are signs emerging that ESG goals and other public interest considerations are a growing priority. In June 2023, the national competition authority (Administrative Council of Economic Defense, **CADE**) approved a joint venture between agricultural commodities providers, whose objective is to develop and operate a B2B software platform for tracking and sustainability metrics across food and agricultural supply chains. Shortly after, a [decision](#) issued by the Labour Justice in August 2023 required CADE to consider labour conditions and unemployment effects when evaluating mergers or acquisitions, after a civil lawsuit filed by the Labor Prosecution Office alleged that workers' interests were not being considered in mergers that CADE analysed. While the decision is subject to appeal, it may signal an expansion of competition policy goals beyond consumer welfare or efficiency.

Takeaways

Agencies are increasingly considering ESG priorities in their decision-making.

- Undertake an analysis of the potential ESG efficiencies generated by the transaction. These may include, for example, improving product variety or quality (e.g., creating new or improved products which have a reduced impact on the environment) or shortening the time it takes to bring environmentally sustainable products to the market.
- Consider how any perceived benefits can be objective, concrete, and verifiable, and how the benefits will be passed on to consumers.

Anticipate closer scrutiny on the local labour market.

- Consider how the transaction may affect local labour conditions and be prepared for detailed disclosure obligations and potential remedies (e.g., a commitment not to make redundancies in a jurisdiction, or to introduce an employee share ownership plan).

6. New Reporting Obligations for Digital Gatekeepers

In 2023 legislators and antitrust enforcers introduced new regimes designed specifically to regulate the activities of large online platforms. The EC's Digital Markets Act (**DMA**) came into force and, in September 2023, the EC [designated](#) six companies as gatekeepers. The equivalent UK legislation, the Digital Markets, Competition and Consumers Bill (DMCC) is still in draft form and expected to come into force in 2024. Both regimes have implications for transactions involving regulated companies.

Under Article 14(1) of the DMA, a gatekeeper is required to inform the EC proactively about any merger with, or acquisition of, a company which provides core platform services (being the services for which gatekeeper status has been designated) or other services in the digital sector, or that enable the collection of data. Article 14(5) explicitly calls out that such information may be used by the national competition authorities to request an Article 22 referral, removing any ambiguity that such deals are certain to be further scrutinised under the EUMR framework. The purpose of Article 14(4), which mandates that the EC publish an annual list of all notifications, is less clear.

In the UK, the DMCC proposes a new mandatory merger reporting system with a standstill obligation for almost all transactions (including those in which the target does not undertake digital activities) undertaken by regulated firms. This requirement appears to be a safety net for the CMA, which already has significant merger monitoring activities, to ensure that transactions do not slip under the radar. But if implemented, the CMA could potentially receive an overwhelming number of reports.

New regulatory regimes such as these and others proposed in key global territories may chill big tech's acquisition pipelines, at least for an interim period while deal strategies are put in place.

Takeaways

Transactions involving regulated digital players will face additional merger control hurdles.

- Ensure deal timelines include flex for potentially protracted regulatory processes, including Article 22 referrals in the EU.
- Consider a voluntary merger notification as part of deal strategy.
- UK deals falling within the new regime will be subject to mandatory notification requirements (and may not be completed without CMA approval).

7. Changes to FDI Regimes as the Number of Notifications Continues to Rise

Foreign investment control remains a relatively new tool for most jurisdictions, many of which have only recently introduced a regime (including Belgium, Estonia, Luxembourg, the Netherlands, and Sweden in 2023). As governments seek to assert control over their critical technology inputs and other national capabilities in the wake of escalating geopolitical tensions, global FDI scrutiny remains unprecedented. It is also unpredictable, with limited guidance and precedent in many regimes. We expect this trend to continue into 2024, with more countries launching regimes (including Ireland and Singapore) and an uptick in enforcement against traditionally "friendly" acquirer nations.

In its third annual [assessment](#) of the EU FDI screening mechanism, the EC reported another "significant increase" in formally reviewed cases in 2022 (approximately 55% of the 1,444 authorisation and *ex officio* cases in total, compared with 29% in 2021 and 20% in 2020). That 86% of cases were cleared unconditionally and 45% of requests for formal authorisation were not subsequently formally screened suggests a global trend of overly expansive criteria and defined terms, and abundant precautionary (and in many instances, unnecessary) notifications. The EC is due to present a report to the European Parliament and Council, evaluating the functioning and effectiveness of the screening mechanism, including various proposed revisions to the framework. Potential reforms include an anti-avoidance mechanism to capture transactions where the direct investor is established in the EU but ultimately controlled by a non-EU investor, and affording EU governments more power to prohibit transactions.

In the UK, the Government noted in its latest [Annual Report](#) that it received 866 notifications in its 2023 fiscal year. This figure compares quite unfavourably to the 2022 totals for Germany (306) and the US (286), in part owing to a broad regime which can capture internal reorganisations (with no change of control), domestic acquirers, or even foreign target companies with no UK subsidiaries. Inevitably, a vast number of transactions which present no national security concerns are therefore captured (including many filed by parties out of an abundance of caution where the rules are unclear) and, as a result, 93% are cleared within the initial 30 working day period. In November 2023, the Government launched a [call for evidence](#) to refine the scope of its FDI regime, improve the notification and assessment process, and optimise public guidance and communications. Among the main areas under consideration are refining the mandatory notification requirements (including updating the existing categories of sensitive areas) and introducing exemptions for certain types of transactions (e.g., internal reorganisations, or situations where temporary control of a distressed company is acquired by liquidators, official receivers, or special administrators). Responsive measures and potential legislative changes are expected to follow this year.

The French Government is also [implementing](#) changes to its national FDI regime, including making permanent its 10% voting rights threshold for investments in listed companies and adding the extraction and processing of critical raw materials as eligible sectors. French FDI control remains high on the government agenda, with a rare [prohibition](#) issued in October 2023 against US-based Flowserve in its anticipated acquisition of the French subsidiaries of Velan Inc., which manufacture and supply valves for French nuclear submarines and nuclear reactors. This marked only the second prohibition by the French government of an acquisition by a US investor, in a show of determination to retain control over its supply chains in highly sensitive sectors.

A similar display of protectionism over a strategic asset came from the Italian government in November 2023, in blocking the acquisition by French group Safran of Microtecnica, the Italian subsidiary of Collins Aerospace (itself a subsidiary of Raytheon) and its flight control systems division. Exercising its Golden Power rules, which afford the Italian government the ability to limit or stop FDI and corporate transactions involving Italian strategic assets, the government indicated that the deal “poses an exceptional threat to the essential interests of national defence and security”. Citing concerns that the acquisition could affect key supply contracts for the Eurofighter programme, the government noted that its investigation “does not allow to conclusively conclude” that Safran would “give the necessary priority to the industrial production lines of interest for national defence”. Italy also consulted with the German Government ahead of the decision, which expressed concern that the transaction may lead to the interruption of spare parts and services deliveries to the Eurofighter and Tornado jet fighter programmes (which were needed “to guarantee the operational requirements of NATO”). It is particularly rare to see a veto by an EU government in relation to an EU-based investor, although the decision in this case may have been motivated by the Eurofighter (made by a European consortium composed of Airbus, BAE Systems, and Leonardo) competing with French-built Dassault Rafale for export orders.

However justified they may seem, protectionist measures must still comply with core principles of EU law. In July 2023, the CJEU [ruled](#) that Hungary had infringed the freedom of establishment principle by prohibiting under its FDI screening rules a foreign-owned Hungarian company (Xella) from acquiring another Hungarian company (Janes és Társa Kft, which operates a gravel, sand and clay quarry). Xella was the subsidiary of a German parent and a Luxembourg grandparent, the latter being indirectly owned by a company based in Bermuda. The Hungarian Government initially prohibited the transaction in April 2021 because the target was a strategic company and the indirect acquisition by a Bermudan company would undermine the national interest and pose a long-term risk to the security of supply of raw materials to the construction sector. Shortly afterwards, the EC unconditionally cleared the acquisition, noting that the clearance was “without prejudice to any assessment of the Veto Decision by Hungary under Article 21(4) of the EUMR” (which affords the EC exclusive competence to assess

transactions with an EU-wide dimension). On appeal, the Budapest High Court requested a preliminary ruling from the CJEU on the compatibility of the Hungarian FDI screening mechanism with EU law, in particular with [Regulation 2019/452](#) and the principle of free movement of capital. The CJEU confirmed that Xella was to be considered an EU company and that its fundamental EU freedom of establishment had been restricted. Such restrictions can only be justified by genuine and sufficiently serious threats to a fundamental interest of society, and the Hungarian Minister failed to justify its decision to restrict this freedom. The CJEU confirmed that Member States cannot (without sufficient justification) restrict investments by EU-based companies, except where the transaction structure applies “artificial arrangements” to circumvent FDI rules. Given some Member States have national FDI regimes that extend to “indirect” foreign investments (such as investments by EU companies not controlled by third country investors), some harmonisation and alignment between the EC and the Member States would be welcome, and the revised EU FDI framework expected in 2024 provides an opportunity to do so.

There was a slight increase in the number of filings submitted to CFIUS in 2022 as compared to 2021, despite a significant decrease in new foreign direct investment in the US at the end of 2022. CFIUS reviewed 440 filings in 2022 (compared to 436 in 2021), comprising 286 full joint voluntary notices (a 5% increase over 2021) and 154 short-form declarations (a decrease of 6% over 2021). Notices and declarations were filed by investors from 52 different countries in 2022, with the number of filings involving investors from Singapore and the United Arab Emirates (UAE) significantly increasing.

The number of transactions that were subject to mitigation agreements as a condition of clearance also increased. CFIUS mandated mitigation measures for 23% of notices in 2022, compared to 10% and 9% of notices that were subject to mitigation in 2021 and 2020. Mitigation measures and conditions adopted in 2022 were similar to those identified in prior CFIUS annual reports, including the requirement for a US government-approved security officer, engagement of a third-party monitor or auditor, assurances of continuity of supply to the US government of certain products or services, establishment of governance mechanisms to limit foreign influence and ensure compliance, and restrictions on access by the foreign person to certain technology, systems, or sensitive information.

This year also marked an increase in CFIUS’s review of non-notified transactions. The Foreign Investment Risk Review Modernization Act (**FIRREA**) resulted in a significant allocation of resources for monitoring and enforcement and the establishment of a formal process to identify non-notified transactions. In 2022, CFIUS identified 84 transactions through the non-notified process and requested filings for 11 such transactions.

Takeaways

Include FDI filings as a primary factor in deal planning.

- Understand where filings are necessary or advisable, and whether the reviews may raise substantive risks and/or affect the deal timeline.
- Regimes cover non-controlling minority shareholdings (even <10%), internal restructurings, or investments by limited partners in fund structures (even where there is no change to the ultimate controller).
- Regimes are particularly vague with respect to the classification of “*sensitive activities*” and it may require extensive diligence to determine whether a company falls within the scope of the relevant regime. Regimes differ significantly, and it is often advisable to engage local counsel early where FDI processes are envisaged.
- Stay informed of the possibility of new regimes coming into force post-signing and requiring notifications as a condition to closing, and provide contractual protection for this.

FDI authorities are increasingly sceptical of acquirers from any foreign country when the target is involved in sensitive activities.

- Where traditionally intervention would be most prevalent in the context of Chinese- or Russian-owned investors, today we are increasingly seeing concerns raised against US or European investors as well.

FDI can also capture the acquisition of assets, including IP connected to sensitive activities.

Keep an eye on the geopolitical landscape and new developments.

- Governments are increasingly turning to FDI as a mechanism to intervene in transactions, even where the concerns are not ostensibly related to issues of national security.

Devise mitigation strategies early (e.g., to ensure security of supply, to protect the disclosure of sensitive information, or to preserve local jobs).

- Be mindful that where the target is active in a particularly sensitive industry, remedies may not always overcome complex FDI reviews. Difficulties ensuring compliance or the inability to protect the public interest can be sufficient concerns for authorities to justify a prohibition decision.

8. Emergence of Outbound Foreign Investment Control

Foreign investment regimes have traditionally focused exclusively on inbound investments by (typically) foreign companies into a given country's domestic businesses.

A significant increase in global geopolitical tensions in recent years has contributed to both sides of the Atlantic identifying concerns that domestic companies engaging in outbound investment pose a risk to national security through the loss of technology, adversely improving certain other countries' security, and creating entrenched geopolitical relationships.

On August 9, 2023, President Biden issued his long-anticipated "[Executive Order on Addressing United States Investments in Certain National Security Technologies and Products in Countries of Concern](#)" (the **Executive Order**), which represents the first step by the Biden administration to curb certain categories of US investment into China. The Executive Order instructs the Secretary of the Treasury, in consultation with the Commerce Department and other agencies, to impose notification requirements—and, in some cases, prohibitions—with respect to certain US person investments concerning China that involve semiconductors and microelectronics, quantum information technologies, or artificial intelligence. The Executive Order delegated the specifics of the prohibition and notice requirement to a rulemaking process. Concurrent with the Executive Order, the US Department of the Treasury issued an advance notice of proposed rulemaking (**ANPRM**) that explained how the Treasury anticipates defining and interpreting key aspects of the Executive Order and solicited public feedback. The ANPRM states that the Treasury is contemplating a range of exempted transactions, including certain passive investments made as a limited partner into a venture capital fund, private equity fund, fund of funds, or other pooled investment funds. The Executive Order applies to "*United States persons*," but could implicate certain non-US-person activity, depending on the scope of final regulations promulgated by the Secretary of the Treasury. We expect to see the final rule and additional guidance in 2024.

While national security within the EU remains the sole responsibility of Member States, the EC has nevertheless implemented an inbound screening regulation ([EU 2019/452](#)) and, in June 2023, it [published](#) (jointly with the High Representative for Foreign Affairs) its Communication on European Economic Security Strategy. This established a strategy for identifying and addressing geopolitical threats, as well as for developing a framework for managing security risks related to certain outbound investments. The Communication considers that the existing export controls are in themselves insufficient and noted concerns over "*the leakage of sensitive emerging technologies, as well as other dual-use items, to destinations of concern that operate civil-military fusion strategies, and to avoid the backfilling of any controlled exports and investments*". In October 2023, the EC [identified](#) advanced semiconductors, artificial intelligence, quantum technologies, and biotechnologies as the technology areas which are "*highly likely to present*

the most sensitive and immediate risks related to technology security and technology leakage". These four technologies are now subject to a targeted assessment, and other technologies (including space and propulsion, energy, and robotics and autonomous systems) are expected to be subject to assessment in 2024.

China already has an outbound investment control regime, where relevant investments must be registered with the National Development and Reform Commission (**NDRC**), the Ministry of Commerce (**MOFCOM**), and a state-approved foreign exchange bank, depending on the classification, sensitivity, and volume of the investment. Sensitive industries include weapons and military equipment, energy, media and communications, hotel, real estate, film, and sports sectors.

We expect to see other governments introduce or strengthen their outbound investment controls in response. In Japan and South Korea, some existing measures are already in place insofar as the investments relate to specific sectors, such as weapons. In Europe, both the UK and German governments have signalled that they too are contemplating introducing an outbound investment screening tool to tighten the rules on investment in China.

Takeaways

Consider applicability of outbound foreign investment filings in deal planning.

- Understand where filings are necessary or advisable, and whether the reviews may raise substantive risks and/or affect the broader deal timeline.
- Stay informed of the possibility of new regimes coming into force post-signing and requiring notifications as a condition to closing, and provide contractual protection for this.
- Pay particular attention where the target's activities may be perceived to threaten technology security or national security (e.g., semiconductors, artificial intelligence, quantum technologies, and biotechnologies).

9. EU Foreign Subsidies Regime Enters Into Force

The EU Foreign Subsidies Regulation (FSR) came into full effect in October 2023, requiring companies to notify the EC of certain acquisitions of high-value EU businesses and participation in large EU public tenders. The EC can now review the potential impact of ex-EU subsidies (including from US investors) on European markets, to assess whether they are distorting competition within the EU. This marks a potential third layer to EU filing obligations for certain deals, alongside merger control and FDI.

The EU introduced the FSR regime to address a perceived enforcement gap, as subsidies granted by EU Member States are regulated under the EU State Aid regime, whereas those supplied by non-EU countries were not caught. As a result, foreign subsidies could previously allow third country entities to undercut EU firms, thereby distorting competition on the market. An overview of the circumstances in which a transaction will be notifiable under the FSR is available [here](#).

As with the parallel merger control and FDI regimes, the FSR regime comprises an *ex ante* investigation where transactions cannot be implemented and tenders not awarded until the EC approves the deal (subject to commitments if deemed appropriate). Parties can face significant fines of up to 10% of worldwide turnover for failing to comply. The FSR permits the EC to conduct an *ex officio* review of completed deals and awarded public procurement contracts where it suspects that a distortive foreign subsidy may have been involved.

The regime is agnostic with respect to the recipient of the foreign financial contributions and does not target specific industry sectors or countries. Under the regime, financial contributions received by a single portfolio company (for example, in connection with COVID-related relief) could trigger requirements for the entire PE firm on every transaction, even if that financial contribution has nothing to do with the acquisition and that portfolio company has nothing to do with the target.

While specific guidelines may not be published until 2026, companies face a significant burden in designing and implementing systems for the collection of group-wide information relating to prior financial contributions received by a third country (including grants, tax breaks, and purchases from and sales to governments or government-linked companies). Gathering all relevant information is complex and time-consuming, with initial reactions from companies and business associations criticising the EC over its draconian approach and the excessive amount of information required to comply with these new rules.

Takeaways

Assess carefully whether the EU FSR regime applies and consider any implications on the transaction timetable.

- The notification may, but will not necessarily, align with an EU merger control review.
- Parties will have to build in additional time to quantify financial contributions if they do not have an up-to-date record.

Compile a record of “financial contributions” received from non-EU states (or state-owned enterprises, such as sovereign wealth funds) over the last three financial years and maintain it periodically.

- Start working with your accountants and tax advisers to identify and quantify non-EU government financial contributions for all of your portfolio companies for the last three years to determine whether the €50 million threshold is satisfied.

Ascertain whether the identified financial contributions were received on market terms.

- If thresholds are met, this will not relieve buyers of the notification obligation, but it is important to avoid financial contributions being qualified as foreign subsidies, which the regulation targets and which may lead to the EC requiring remedies or prohibiting a transaction. When mapping the received financial contributions, you should assess their impact on investments and economic activities in the EU and pre-empt any finding of distortion.

Adopt internal procedures to take account of FSR rules, especially in mergers and acquisitions and public tender processes.

- Put in place a tracking system and a reporting obligation for each portfolio company each time they receive a non-EU government financial contribution and determine whether it could be regarded as a distortive foreign subsidy.

On the sell-side, be mindful that this new regime will add complexity to the execution of exits.

- Sellers should diligence potential buyers to assess to what extent these new filing requirements affect the attractiveness of their bids.

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