24 2025

ANTITRUST / M&A YEAR-IN-REVIEW 2024

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2024 was a significant year for merger enforcement worldwide. In the United States, the Biden administration continued the aggressive approach reflected in the revamped Merger Guidelines issued in December 2023. In Europe, the President of the European Union appointed a new Commissioner for Competition, Teresa Ribera—signaling an increased focus on promoting innovation and protecting European businesses—while the European Commission suffered a major setback in the courtroom. Asia was a mixed bag: Enforcers scaled back regulatory hurdles for lower-risk deals yet continued to scrutinize more complex transactions. And developments in Australia and New Zealand, including Australia's proposal of a new premerger notification regime, signal increased scrutiny of future M&A deals.

To state the obvious, the developments in Europe, Asia, and Australia/New Zealand are far more helpful in predicting future outcomes than the developments in the United States. Elections matter, and the Trump administration may scale back—if not unwind entirely—a number of its predecessor's more ambitious changes. But some are sure to stick, and efforts to restore prior enforcement practices may take time to implement. We therefore believe that last year's events—in the United States and abroad—will provide valuable insight to companies exploring potential M&A transactions in 2025 and beyond.

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UNITED STATES

Despite the Biden administration's tough rhetoric on merger enforcement, M&A transactions continued across industries and deal sizes. The vast majority of transactions closed after the initial 30-day Hart-Scott-Rodino ("HSR") waiting period, without a Second Request or other delay. And while the Biden administration focused on certain industries—including energy, agriculture, health care, tech, and private equity—M&A activity in those sectors continued, too, without substantial enforcement.

In fact, a number of sizeable transactions closed in 2024, including in energy (ExxonMobil's $64.5 billion acquisition of Pioneer, Chevron's $54 billion acquisition of Hess, and Diamondback's $26 billion acquisition of Endeavor Energy Partners); tech (Cisco's $28 billion acquisition of Splunk); agriculture (Koch Ag & Energy Solution's acquisition of Iowa Fertilizer Company); and health care (Saint Luke's Health System of Kansas City's merger with BJC HealthCare; Amolyt Pharma's $1.05 billion acquisition by AstraZeneca). Private equity transactions also continued, including Roark Capital's $9.6 billion acquisition of Subway.

ENFORCEMENT POLICY: SUBSTANTIAL SHIFTS, AT LEAST FOR NOW

In the United States, this past year saw the culmination of four years of work by Biden officials to overhaul federal antitrust review of mergers, including both in substance (e.g., the new Merger Guidelines) and procedure (e.g., changes to the HSR premerger notification form).

New Merger Guidelines

2024 saw the first full year of antitrust merger review under the DOJ and FTC's 2023 Merger Guidelines (see Jones Day's prior analysis, "The Hammer Falls: U.S. Antitrust Agencies Issue Final Antitrust Merger Guidelines" and "Merger Guidelines—1960s Manifesto Style"). The new Guidelines represent a complete overhaul of the DOJ and FTC's substantive merger review, including, among others:

- **Lowered market share thresholds**. The Merger Guidelines lower significantly the market shares and concentration levels at which the agencies consider a merger presumptively anticompetitive.
- **New types of transactions subject to scrutiny**. The Merger Guidelines explicitly call out vertical mergers, so-called "conglomerate" mergers, serial or roll-up transactions, and acquisitions of nascent competitors, among others, as subject to heightened antitrust scrutiny—each a substantial shift from the prior guidelines. In addition, the Merger Guidelines target mergers involving multi-sided platforms.
- **New theories of harm.** The Merger Guidelines identify a broader list of potential anticompetitive effects, including blocking access of critical inputs to rivals, acquiring "nascent" and other potential competitors, facilitating anticompetitive information exchanges, and advancing trends toward concentration.
- **Labor in focus**. The Merger Guidelines also introduce new guidance for assessing a merger's impact on competition for labor, including harm to competition in labor markets; the impact of a transaction on wages, salaries, and benefits; and jobs lost due to a transaction.

Despite these changes, the vast majority of transactions subject to U.S. merger review were still cleared within 30–60 days.

Attention to Private Equity

Consistent with the new Merger Guidelines' reference to serial or roll-up transactions, the Biden administration continued to focus on private equity transactions in 2024. In May, for example, the agencies jointly issued a request for information regarding public opinion on serial acquisitions and roll-up strategies. That request for information, as reported by the FTC, complemented a parallel inquiry about "how certain health care market transactions by private equity firms and other corporations may increase consolidation and generate profits while threatening patients' health, workers' safety, quality of care, and affordable health care for patients and taxpayers." Despite the agencies' increased scrutiny of private equity, however, we did not observe any noticeable uptick in enforcement actions with respect to transactions involving private equity firms.

New HSR Form

In October 2024, the FTC issued a final rule that will increase the scope and burden of preparing a premerger notification under the Hart-Scott-Rodino Antitrust Improvements Act. The FTC's new rule, expected to go into effect in early 2025, is a material change from the prior HSR rules and will likely lengthen the merger timeline—even for transactions without substantial overlaps (*see* Jones Day's prior analysis, "DOJ and FTC Release Final Rule Expanding HSR Premerger Filing Requirements"). Key changes include:

- **Detailed descriptions of horizontal overlaps**, including the "principal categories" of products and services that compete, including products in development that "could" compete with the merging party. This requirement is similar to many non-U.S. merger filings, and firms that have made such filings may remember the difficulty in assessing whether certain tangentially related products "compete."
- **Detailed descriptions of supply relationships**, including a description of all products sold to the merging party and identifying all sales to and purchases from the merging party as well as to other businesses that use the product to compete with the merging party.
- **New document and data requests**, including certain regularly prepared business plans presented to the company's CEO (unrelated to the transaction) as well as documents relating to the transaction provided to the "supervisory deal team lead."

The time needed to prepare an HSR filing may increase by several weeks—in fact, even the FTC expects the time needed to prepare an HSR filing will triple. Parties to potential transactions should plan ahead, up to and including compiling the data and information needed for the new HSR form well in advance of signing, to mitigate any delays to their transaction.

Looking Ahead

We expect the second Trump administration will make substantial changes to these procedures and processes.

The 2023 Merger Guidelines may be revised, or even rescinded, by Trump's FTC and DOJ. At least one Republican Commissioner, Melissa Holyoak, is on record stating she would consider rescinding the Guidelines. However, the Trump administration could also leave the Merger Guidelines as is, maintaining optionality but in practice adhering to a more traditional and orthodox antitrust approach.

But the new HSR Form is less likely to change absent action by Congress. The FTC Commissioners voted unanimously in favor of the new rules, reflecting compromises among the Democrats and Republicans. There may be little appetite to renegotiate in the near term.

TRENDS IN REMEDIES: EVEN DIVESTITURES FACED SKEPTICISM

One area in which the Biden administration notably diverged from past administrations relates to merger remedies. In particular, Biden administration officials announced that remedies of any kind (either structural or behavioral) are disfavored, a major shift from prior administrations. Accordingly, 2024 saw just a handful of pre-complaint settlements. Although this shift away from formal remedies can be a benefit to merging parties, it nevertheless presents new strategic considerations that firms must consider early—ideally before filing HSR—otherwise, they can create substantial impacts on both the scope and timing of the proposed transaction.

Divestitures and Other Structural Remedies Continue to Be Disfavored

In January 2022, U.S. antitrust enforcers announced an intention to shift away from structural divestitures pursuant to a consent decree, instead suggesting they would require parties to "fix" the anticompetitive portion of any transaction before filing HSR. That, according to the FTC and DOJ, would avoid the need for either agency to either negotiate the scope of any such divestiture or monitor the parties' compliance with consent decrees.

One example was Global Partners' acquisition of certain petroleum terminals from Gulf Oil. After a 16-month investigation, the parties amended their purchase agreement to carve out a terminal in South Portland, Maine, over which the FTC had expressed concerns. Under prior administrations, the FTC may have been willing to accept an agreement to divest the terminal within a reasonable period of time post-close.

FTC and DOJ Imposing Non-Structural Remedies to Address Non-Merger Concerns

In 2024, the FTC and DOJ increasingly used the HSR merger review process to address concerns not directly related to the at-issue transaction. In particular, in 2024, the FTC has imposed conditions on a handful of transactions relating to the composition of the combined firm's board of directors post-transaction. Two examples include the *ExxonMobil/Pioneer* transaction, in which the FTC required ExxonMobil to enter into a consent order preventing the founder and former CEO of Pioneer from either sitting on ExxonMobil's board of directors or serving in an advisory capacity post-transaction. There was no finding—by the FTC or otherwise—of any independent antitrust violation by that individual. But the FTC nevertheless asserted that his appointment would violate Section 7 of the Clayton Act, and prohibited Exxon from appointing him to its board. The FTC required a similar consent order in the *Chevron/Hess* transaction.

Looking Forward

The Trump administration is likely to return toward some acceptance of divestitures, but such remedies are unlikely to be as common as before. Even traditional antitrust enforcers at both agencies now assert that divestitures are frequently ineffective or cause long-term entanglements. Consequently, we expect some skepticism toward divestitures to continue forward.

As for non-merger remedies, both consent orders were highly criticized by the two Republican commissioners at the FTC. This approach is unlikely to continue under the Trump administration.

MERGER LITIGATION: SOME OF THE OLD, SOME OF THE NEW

Both the DOJ and FTC continue to challenge potentially anticompetitive mergers in federal court, although the overall number of cases filed in 2024 is similar to what was seen under the Obama and Trump administrations. Between the agencies, there were six mergers challenged in court (three by the DOJ and three by the FTC), which is consistent with the average of five mergers challenged annually from 2011 to 2023.

Even so, the Biden administration in particular has used litigation—and, sometimes, the mere threat of litigation—to coerce parties to abandon their transactions. Yet the agencies have had a mixed record before Article III courts, including one high-profile 2024 loss in *Novant/Community Health*. Merging parties must be prepared to take their transaction before an Article III court, in addition to effective and early advocacy before the agencies.

DOJ/FTC Litigating New Theories of Harm

The complaints filed by the DOJ and FTC in 2024 demonstrate the agencies' shift toward the more-aggressive 2023 Merger Guidelines (discussed further above). While several matters followed the usual, orthodox approach, several cases filed by the agencies asserted new theories of harm, including a vertical merger (*Tempur Sealy/Mattress Firm*) and at least one challenge focused on competition for labor (*Kroger/Albertsons*).

Most notably, a substantial part of the FTC's case in *Kroger/Albertsons* involved an alleged loss of competition for unionized grocery store workers (in addition to alleged lost competition among grocery stores). In its Complaint and throughout trial, the FTC asserted that a combined Kroger/Albertsons would reduce the bargaining leverage for the union representing Kroger's and Albertsons' combined 700,000 employees nationwide, resulting in slower wage growth, deteriorated working conditions, and reduced employee benefits. The district court ultimately rejected this theory as based on insufficient evidence, but acknowledged in *dictum* that "traditional antitrust analysis" may be applied to labor markets.

Perhaps because of this shift to more novel theories, the agencies' track record has been mixed, including high-profile trial losses in *Microsoft/Activision* (2023) and *Novant/Community Health* (2024). For example, in *Novant*, the trial court denied the FTC's attempt to enjoin Novant's acquisition of two hospitals after concluding the FTC failed to carry its burden of showing a substantial lessening of competition. In particular, the trial court emphasized that Novant's and Community Health's facilities were not strong competitors, that other competitors were actively entering and expanding in the FTC's defined market, and that Community Health's hospitals were likely to deteriorate and ultimately close down but for the transaction. However, the parties subsequently abandoned the transaction after the FTC appealed and the Fourth Circuit issued an injunction pending appeal (without an opinion).

Mainstream Antitrust Analysis Still Applies

While several cases involve novel theories of harm, the agencies' majority of litigated cases involved orthodox antitrust analysis—i.e., focusing on mergers between horizontal competitors with high combined market shares.

For example, in January 2024, the DOJ successfully challenged JetBlue's proposed acquisition of Spirit Airlines, asserting that the transaction would eliminate competition in the low-cost carrier airline market. The trial court agreed, finding that the merger would eliminate a competitor on many popular routes and that the combined firm would further reduce capacity on those routes, likely leading to higher airfare. While the parties asserted the transaction was intended to allow JetBlue to better compete with the so-called "legacy" airlines, the DOJ argued—and the court agreed—that Spirit represented a uniquely disruptive competitor in the industry that would not be replaced post-transaction.

October brought another win for the government, when the FTC obtained a preliminary injunction blocking Tapestry's acquisition of Capri Holdings, a case involving two manufacturers of handbags. Much of the trial (and public criticism) focused on the FTC's narrow market definition of "affordable luxury" handbags. However, apart from the aggressive market definition, both the FTC and trial court applied a traditional horizontal merger analysis, concluding that the transaction—which would have resulted in a combined firm with nearly 60% market share—was likely to result in higher prices, fewer discounts and promotions, and decreased innovation.

Finally, in December 2024, a federal district court in Oregon and a Washington state court both enjoined the Kroger/Albertsons merger. Both courts found that the deal would harm competition in the market for supermarkets. The courts credited the plaintiffs' expert evidence that the merger would increase concentration to presumptively unlawful levels under either the 2010 or 2023 Merger Guidelines, and that the parties' head-to-head competition was sufficiently close that the merger may lead to unilateral anticompetitive effects.

EUROPE

The European Commission's ("EC") ability to scrutinize acquisitions of sub-threshold European startups, including so-called "killer acquisitions," is under attack following the European Court of Justice's ("ECJ") landmark ruling in *Illumina/Grail*, which annulled the EC's disputed decision to accept a referral of a non-reportable transaction. Meanwhile, the EC cleared several high-profile mergers in the airline industry, and the appointment of a new Competition Commissioner reinforced the policy trend toward safeguarding European innovation. In the United Kingdom, enforcers updated the phase 2 review process to improve transparency, while Parliament enacted new legislation intended to expand competition and consumer protection law in the digital markets.

DEALMAKERS RELIEVED … FOR NOW—ECJ SHUTS DOWN ATTEMPTED ANTITRUST REVIEWS OF NON-REPORTABLE TRANSACTIONS

Dealmakers and lawyers in Europe welcomed the ECJ's seminal *Illumina/Grail* judgment of September 3, 2024.[1] Illumina, a U.S. biotechnology company, convinced the ECJ to overturn the European General Court's ("GC") 2022 ruling that the EC had jurisdiction to challenge Illumina's €8 billion acquisition of Grail, a U.S. biotechnology company. The transaction was not notifiable under EU or national merger control regimes, as Grail had no customers, contracts, or revenues in the European Economic Area.

ECJ Rejects EC's Power Grab

In overruling the GC and annulling the EC's controversial decision to accept referrals from EU Member States of non-reportable concentrations (i.e., mergers) under Article 22 EUMR, the ECJ held that the GC erred in interpreting the European Union Merger Regulation ("EUMR") and that the EC's misguided interpretation of Article 22 EUMR "undermines the effectiveness, predictability, and legal certainty that must be guaranteed to the parties to a concentration."[2]

The EC's attempt to widen its regulatory oversight and scrutiny of minor deals, notably in view of catching "killer acquisitions," had caused deep concerns among companies. Businesses worldwide welcomed the ECJ's unequivocal affirmation of the "cardinal importance" of jurisdictional thresholds in achieving the objectives of predictability and legal certainty in merger control. For additional information about this landmark decision, *see Jones Day Commentary*, "EU Court Holds Back Expansion of Antitrust Reviews to Non-Reportable Transactions," September 5, 2024.

Aftermath

In addition to challenging the EC's new approach to Article 22 EUMR, Jones Day also represented Biocom in support of Illumina's separate challenge before the GC (Case T-709/22) of the EC's decision prohibiting the deal. In the wake of the ECJ judgment, the EC announced its withdrawal of that decision, thereby abandoning the procedure and eliminating the €432 million "gun-jumping" fine imposed against Illumina for closing the transaction while the EC's review was pending.

Also subsequent to the *Illumina/Grail* judgment, on September 18, 2024, the EC announced the withdrawal of all initial referral requests to review Microsoft's acquisition of certain assets of Inflection AI, a U.S.-based artificial intelligence startup. The transaction did not reach EU notification thresholds and was not notified in any Member State.

Still Hunting

Although the EC must withdraw, or very significantly amend, its guidelines on Article 22 EUMR, the EC's sights remain aimed at so-called "killer acquisitions."

The outgoing Commissioner for Competition Margrethe Vestager spoke of exploring ways to address killer acquisitions following the *Illumina/Grail* ruling, such as:

- **Revising the EUMR** to include a "safeguard mechanism" to allow the review of sub-threshold mergers. Reforms could reportedly extend the EC's jurisdiction over mergers involving companies that generate most of their revenue outside Europe and introduce a new threshold for taking over scrutiny of a merger, based on the deal's value rather than existing turnover criteria.
- **Member States expanding their own competition authorities' powers** to "call in" transactions not meeting national turnover thresholds when it finds that these pose concrete risks for competition, thereby enabling more referrals under the established Article 22 EUMR process. Eight Member States (Denmark, Hungary, Ireland, Italy, Latvia, Lithuania, Slovenia, and Sweden) have already introduced such powers.

Undeterred by the *Illumina/Grail* judgment, on October 31, 2024, the EC accepted Italy's Article 22 EUMR referral request to review Nvidia's proposed acquisition of AI startup Run:ai. The Italian competition agency had called in the below-threshold transaction, which was announced publicly about six months earlier. Notwithstanding the small revenues in Italy and the significant passage of time, the EC accepted the referral on the basis that it was best situated to examine the transaction, given its knowledge and case experience in related markets. The EC cleared the transaction in late December.

READY FOR TAKEOFF: THE EC CLEARS TWO AIRLINE ACQUISITIONS

The year also saw the combination of major players in the air transport industry, with the EC's clearance of Korean Air's proposed acquisition of Asiana Airlines on February 13, 2024, and the clearance of the acquisition of joint control over ITA Airways by Lufthansa and the Italian Ministry of Economy and Finance on July 3, 2024.

Korean Air/Asiana

In *Korean Air/Asiana*, Jones Day represented Korean Air in securing clearance following the EC's in-depth investigation of the company's $1.6 billion acquisition of Asiana Airlines. The transaction drew close scrutiny from the EC and antitrust authorities in Korea and worldwide. Jones Day advised Korean Air through the EC's investigation, working to rebut the EC's allegations that the merger would likely reduce competition for air passenger services on four routes between South Korea and Europe, as well as air cargo services between South Korea and Europe.

Although several recent airline mergers were abandoned after opposition from the EC, the Korean Air deal was cleared subject to novel commitments that depart from historically accepted remedies for airline mergers. This included a "fix it first" type of remedy for air passenger services (addressing the EC's concerns by divesting slots/assets before the deal closed), and an "upfront buyer" remedy in the air cargo services market (securing a buyer for divested assets as a precondition for approval). This novel structure is expected to serve as a significant precedent for future aviation cases.

Lufthansa/ITA Airways

In *Lufthansa/ITA Airways*, the EC raised concerns over the entities' overlap on flight routes and potential dominance at the Milan Linate airport. In response, the acquirers put forth remedies, under which the transaction would close following the EC's approval of suitable remedy takers for each of the short-haul, long-haul, and Milan Linate commitments. The EC would assess the suitability of remedy takers in the context of a separate buyer approval procedure.

Both decisions are significant as they mark the EC's shift toward more stringent remedies in airline mergers.

ANTICIPATING CHANGE: WHAT TERESA RIBERA'S APPOINTMENT AS EU COMPETITION COMMISSIONER COULD MEAN FOR EU MERGER ENFORCEMENT

On September 17, 2024, Teresa Ribera Rodríguez was nominated by re-elected President of the European Commission Ursula von der Leyen for the post of Executive Vice-President for a Clean, Just, and Competitive Transition and Competition Commissioner.

In tune with her sustainability- and environment-focused background, incoming Commissioner Ribera has been assigned a dual-policy portfolio, combining competition policy and the EU's green transition. President von der Leyen's mission letter outlines the need for a new approach to competition policy that is more geared toward goals such as decarbonization and a "just transition"—that is, a transition toward a climate-neutral economy that proceeds in a fair and equitable manner. This shift in competition policy could lead to a relaxation of competition rules in cases of demonstrable environmental gains.

In the area of merger control, the themes during incoming Commissioner Ribera's term likely will include promoting innovation and safeguarding European companies against foreign rivals.

Commissioner Ribera has been instructed to modernize the Horizontal Merger Control guidelines, giving weight to, among other things, the European economy's more acute needs with respect to innovation. This could lead to the introduction of an "innovation defense" that would allow transactions to be cleared based on expected innovation gains.

Commissioner Ribera has been tasked with addressing the risks posed by killer acquisitions. Acquisitions of nascent competitors, particularly in innovation-driven industries such as pharma and tech, may therefore face increased scrutiny from the EC going forward.

Acquisitions of smaller European companies by foreign companies are also expected to be a priority, as per President von der Leyden's mission letter. This could mean a potential relaxing of merger control scrutiny for purely European players or, conversely, more rigorous reviews when non-European players are involved.

The legislative process for revising the EU merger regime is expected to start in 2025, but it could take years before any changes occur. For more information on the new slate of EU Commissioners, *see Jones Day Commentary*, "European Commission President Unveils Proposed New Team of EU Commissioners and Political Priorities," September 25, 2024.

MERGER REVIEW IN THE UNITED KINGDOM: CHANGES TO PHASE 2 AND A NEW FOCUS ON DIGITAL MARKETS AND AI

2024 was also a year of significant change to merger enforcement in the United Kingdom. Prompted in part by its recent experience reviewing the *Microsoft/Activision* deal, the Competition and Markets Authority ("CMA") introduced substantial changes to its phase 2 (in-depth) investigation process, with the aim of promoting better engagement and transparency. These changes include:

- **A more streamlined start to phase 2**, with the findings of the phase 1 decision now taken as the starting point for the phase 2 investigation;
- **Greater up-front engagement** with the CMA inquiry group, not only through teach-in sessions and site visits to familiarize the group with the relevant businesses and markets, but also through a new "initial substantive meeting" that provides merging parties an up-front opportunity for advocacy on substantive issues;
- **An "interim report"** setting out the CMA's provisional assessment prior to the main oral hearings with the parties, replacing "provisional findings" reports that were issued only following the hearings and at a relatively late stage; and
- **Opportunities for the parties** to discuss potential remedies at an early stage and without prejudice.

In addition to these changes, the chief executive of the CMA has also signaled a greater willingness to consider behavioral remedies.

Like enforcers around the world, the continued to focus on mergers in the technology space, with a particular focus on deals and partnerships between large technology companies and smaller artificial intelligence companies. In April 2024, for example, the CMA published a report[3] outlining its growing concerns in markets for artificial intelligence foundation models. In particular, the CMA identified three key risks: (i) that firms controlling critical inputs for developing foundation models might restrict access to shield themselves from competition; (ii) that powerful incumbents could exploit their positions in consumer or business-facing markets to distort choice in foundation model services and restrict competition in deployment; and (iii) that partnerships involving key players could entrench or expand market power through the value chain.

In May 2024, the United Kingdom enacted the Digital Markets, Competition and Consumers Act 2024 (the "DMCCA"), which will become effective in stages from January 2025 to spring 2026. The DMCCA represents a significant overhaul of the CMA's powers, covering three broad areas: (i) regulating digital markets by giving the CMA new powers to designate companies as having "strategic market status" and imposing conduct requirements on such companies; (ii) increasing competition enforcement powers, in particular by providing the CMA with an additional basis to review so-called "killer acquisitions" that do not involve direct competitors; and (iii) enhancing consumer protection rules, in particular by introducing direct enforcement powers so that the CMA may launch its own administrative proceedings and impose fines of up to 10% of group worldwide turnover where it finds an infringement.

ASIA

In 2024, merger enforcement in Asia remained largely consistent with prior years. Enforcers took steps to streamline the merger review process for certain transactions, while continuing to scrutinize—and occasionally reject—more complex or risky transactions.

MERGER REVIEW IN CHINA: MORE FOCUS ON COMPLEX TRANSACTIONS

In 2024, China took steps to reduce the filing burden for simple transactions unlikely to impact competition, while increasing antitrust scrutiny of more complex transactions.

Increased Filing Thresholds

China doubled its previous merger filing thresholds. Transactions now require prior approval from the Chinese antitrust regulator, the State Administration for Market Regulation ("SAMR"), if at least two parties: (i) each have more than CNY 800 million (approximately $116 million) in China revenues in the preceding fiscal year; and (ii) have more than CNY 12 billion (approximately $1.74 billion) in combined global revenue or more than CNY 4 billion (approximately $580 million) in China revenues. This resulted in a 16% decrease in notifications in 2024 compared to the same period in 2023, according to statistics published by SAMR.

Less-Burdensome Filing Form for Simple Transactions

SAMR also introduced a revised notification form tailored for simple cases, significantly reducing the information required for such cases. Transactions qualify for a simple filing and expedited review if: (i) the parties' combined market share is less than 15% in horizontal markets and less than 25% in any vertical or conglomerate markets; (ii) the transaction is an offshore joint venture with no business in China; (iii) the target has no business in China; or (iv) a joint controlling joint venture partner is exiting a JV. To focus more on complex transactions, for the past two years, SAMR has delegated approximately half the simple cases to its five provincial branches. Around 90% of the cases qualified for simple filings and were cleared within 30 days of phase 1 review (17 days on average for 2024).

Increased Use of Stop-the-Clock Mechanism

High-profile and complicated cases face prolonged review and uncertainty. The 2020 amendments to the Chinese Anti-Monopoly Law introduced the "stop-the-clock" mechanism as a new tool for SAMR to extend its review period; these amendments also started a gradual shift away from the previous "pull and refile" practice. Since 2023, SAMR has utilized the "stop-the-clock" mechanism to extend its review period by issuing numerous information requests. For the four conditional clearances granted in 2023 and 2024, SAMR's review on average took approximately 14 months from the time of initial filing, compared to only 12 months for the 10 conditional clearances granted in 2021 and 2022. This practice has injected uncertainty into the closing schedules for complex deals, as there is no statutory limitation on how long SAMR may stop the clock.

Scrutiny of Below-Threshold Transactions

In late 2023, SAMR for the first time imposed remedies on a transaction in the health care industry that did not meet the merger filing thresholds, citing concerns about post-transaction dominance and downstream foreclosure. In 2024, SAMR requested filings for two more below-threshold transactions, citing potential competition concerns. Going forward, we expect that SAMR will continue to exercise its discretion to "call in" transactions below the thresholds for review, particularly those in highly concentrated markets or sensitive sectors.

JAPAN: CLEARANCE WITH STRINGS ATTACHED

In January 2024, the Japan Fair Trade Commission ("JFTC") conditionally approved the merger between Korean Air and Asiana Airlines, discussed above. This decision reveals three important points about the current state of merger enforcement in Japan.

First, the voluntary pre-filing consultation system continues to play an important role. According to the JFTC's press release, the parties filed on January 24 and the JFTC cleared the deal with conditions on January 31. This indicates that substantive review was already completed during the pre-filing consultation phase.

Second, the JFTC's press release confirms the agency's continuing efforts to coordinate its review of global deals with relevant competition authorities in other countries or regions. In its press release, the JFTC mentioned that it exchanged information with enforcers in the United States, Europe, South Korea, and China, among others.

Third, the JFTC required the parties to appoint a monitoring trustee to ensure compliance with the JFTC's conditions. Such trustees have not been strictly required in past cases, and the requirement of a trustee for this transaction may signal a shift in enforcement policy going forward.

In July 2024, the JFTC published an *ex post facto* analysis on a bank merger it reviewed and cleared in 2017. This study found that the transaction did not result in a substantial loss of competition, noting that customers of the merging banks continued to have meaningful choices and benefit from ongoing competition between the merged banks and their rivals. The JFTC's focus on qualitative aspects of competition (e.g., customer perceptions of reliability and trust) in addition to quantitative analysis reinforces the importance of addressing both when presenting future transactions to the JFTC.

SOUTH KOREA: A SHIFT TOWARD EFFICIENCY AND REDUCED BURDEN

The amended Monopoly Regulation and Fair Trade Act and related regulations, effective August 2024, introduced several key changes to South Korea's merger control framework. These changes were aimed at easing regulatory burdens and enhancing the efficiency of review by the Korea Fair Trade Commission ("KFTC").

Expanded Merger Filing Exemptions

Certain low-risk mergers are now exempt from the filing requirements, such as the establishment of private equity funds, intra-group mergers between a parent and subsidiary, interlocking directorships involving less than one-third of the board members (excluding the representative director), and mergers between affiliates involving a target with total assets or worldwide revenue of less than KRW 30 billion (approximately $21.3 million).

New Remedy Proposal System

Until this year, remedy discussions in merger cases had been informal. The new framework allows companies to submit formal remedy proposals during the review process to address the KFTC's concerns and discuss those remedies with the case team. The KFTC may issue conditional clearance for the merger after reviewing (and potentially modifying) the proposed remedy. This system brings South Korea's merger regime more in line with international practices.

Pre-Filing Consultation

The prior system allowed merging parties to submit a notification only after signing a binding transaction agreement. Under the new regime, the parties may request a pre-filing consultation to solicit views from the KFTC at an earlier stage. The KFTC case team will review the subsequent filing based on the outcome of the pre-filing consultation unless there has been a significant intervening change in the transaction or the relevant market.

Amended Merger Review Guidelines

In May 2024, the KFTC also amended its Merger Review Guidelines ("Guidelines") in response to the evolving digital economy.

With regard to market definition, the amended Guidelines explain how to define the relevant market when services are offered nominally free of charge, establish new standards for multi-sided markets, and provide examples of innovation markets.

With regard to anticompetitive effects, in cases where the services are offered nominally free of charge, the amended Guidelines take network effects into consideration and establish new standards for analyzing competitive effects (e.g., calculating market shares using alternative variables such as the number of service users or the frequency of use). The amended Guidelines consider the likelihood of tying and bundling in analyzing the potential effects of conglomerate mergers.

The amended Guidelines provide specific examples of pro-efficiency effects unique to digital sectors, such as increased number of service users, service innovations, cost reductions, expanded access to services, and the potential for a revitalized startup ecosystem.

In 2024, the KFTC approved two notable vertical transactions. The first was the acquisition of SM Entertainment (a music producer) by Kakao (a player in both production and distribution). The KFTC expressed significant concerns about potential self-preferencing. As part of the conditional approval, Kakao must refrain from refusing to supply music to competitors and establish an independent committee to monitor potential self-preferencing practices on its own streaming platform.

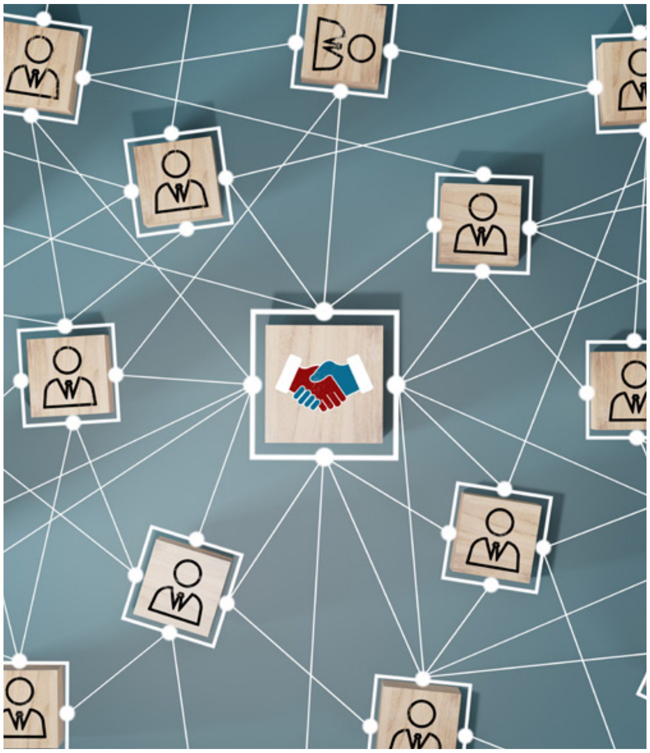
The other notable vertical deal was HD Korea Shipbuilding's acquisition of a minority stake in STX Heavy Industries. In that matter, the KFTC cited concerns about vertical foreclosure by the combined entity—namely, that it would not supply crankshafts to competing engine manufacturers. Therefore, the KFTC imposed behavioral remedies to mitigate those risks, including a prohibition on refusal to supply, a guarantee of minimum supply quantities, limits on price increases, and restrictions on delivery delays.

SINGAPORE: CHALLENGE TO DEAL INVOLVING DIGITAL PLATFORM

There were no major reforms to Singapore's merger review process in 2024. The Competition and Consumer Commission of Singapore ("CCCS"), however, issued a significant decision related to digital markets.

In its provisional decision proposing to block Grab Holdings' acquisition of Trans-cab Holdings, the CCCS found that the transaction might create barriers for rival "ride-hail" platforms, and that drivers and passengers could face higher prices if competition constraints on Grab from rival platforms were to be weakened. The CCCS noted that Grab might employ various strategies to "induce Trans-cab drivers to increase their usage of Grab's ride-hail platform,"[4] potentially resulting in "a greater degree of 'stickiness' of Trans-cab drivers to Grab's ride-hail platform and a potential reduction in usage of rival ride-hail platforms."[5]

This decision is consistent with a growing focus worldwide on competition involving digital platforms. It also underscores the need to evaluate carefully whether to obtain pre-merger clearance in voluntary regimes such as Singapore.



AUSTRALIA / NEW ZEALAND

Although Australia and New Zealand have voluntary filing regimes, merger control activity remained high in 2024. Both the Australian Competition and Consumer Commission ("ACCC") and the New Zealand Commerce Commission ("NZCC") intervened in transactions they considered likely to harm competition, and both agencies continued their practice of revisiting consummated (and previously reviewed) mergers, providing insights to their respective merger control processes and the impact of consummated mergers in the marketplace. Both agencies identified areas of emphasis for future enforcement, and both provided guidance suggesting they will closely scrutinize M&A transactions in 2025 and beyond.

Most notably, in 2024, Australia announced a mandatory filing regime that will take final effect on January 1, 2026, but that will be available to transaction parties as soon as July 1, 2025, to accommodate transactions expected to close in early 2026. Although the ACCC has yet to issue guidance about the forthcoming regime, the Legislature has passed the laws implementing the new regime, and the Treasury Department has identified likely merger notification thresholds.

AUSTRALIA'S PROPOSED MANDATORY FILING REGIME

In April 2024, Australia announced a complete overhaul of its merger control regime. Beginning effective January 1, 2026, mergers and acquisitions that exceed notification thresholds must be disclosed to the ACCC in advance, "bringing Australia into line with most other developed economies."[6] The law was passed in November 2024.

Under this new regime, merging parties must obtain ACCC approval before closing notifiable transactions. Until now, there has been no mandatory notification requirement in Australia, and the decision to notify a transaction was effectively made by transaction counterparties and their advisors (a regime similar to that found in the United Kingdom).

A particular focus of the new merger control regime is to regulate serial transactions, acquisitions of nascent competitors, and expansions into related markets (including digital platforms). The new regime will allow the ACCC to consider if an acquisition creates, strengthens, or entrenches a substantial degree of market power; it will also require certain acquisitions to be aggregated when analyzing notification thresholds. The details about notification thresholds remain subject to further consultation and revision.

For more information about this significant development, please review our April 2024 *Commentary*, "Australia Proposes Major Reforms to Merger Review Regime."

ANZ–SUNCORP: AN APPELLATE LOSS FOR THE ACCC

In February 2024, the Australian Competition Tribunal issued a landmark opinion overturning the ACCC's denial of authorization to ANZ Bank's proposed acquisition of Suncorp Bank. The ACCC's decision found likely competitive harm in markets for:

- Home loans, on a national basis;
- Small and medium enterprise banking services, in local or regional areas in Queensland; and
- Agribusiness banking services, in local or regional areas in Queensland.

Reversing the ACCC for the first time under the current authorization regime, the Tribunal rejected the ACCC's conclusions in all three relevant markets, finding that the acquisition would not likely have substantial competitive harm in any them. The Tribunal also found that the acquisition would be likely to result in net public benefits. On one hand, the Tribunal disagreed with the ACCC's conclusion that coordinated effects were likely, noting that the ACCC lacked evidence of actual past coordination in the relevant markets. On the other, the Tribunal found that the transaction was likely to generate substantial efficiencies, and that such efficiencies outweighed any harm to competition.

PETSTOCK: A SUCCESSFUL DEAL, YET A CAUTIONARY TALE

The ACCC's most notable merger decision of the last 12 months occurred in December 2023, when the ACCC approved (with conditions) a leading retailer's acquisition of a controlling interest in Petstock, a specialist pet retailer. During its review of the transaction, the ACCC began investigating a number of previous, unreported Petstock acquisitions within the pet industry. The ACCC expressed concerns that certain previous acquisitions may have contravened the Competition and Consumer Act, and used those acquisitions as a basis for public criticism of Australia's current merger control regime. According to the ACCC, "Petstock's decision to make numerous acquisitions of this scale without notifying the ACCC demonstrates the limitations of Australia's current merger regime. It relies on the goodwill of businesses to voluntarily notify the ACCC and await an outcome. Absent this goodwill, businesses may be able to amass scale through serial and non-notified acquisitions which may fly under the ACCC's radar."[7]

Although the ACCC ultimately approved the acquisition at issue, this matter demonstrates that even non-notifiable transactions can present risk. It also reflects the ACCC's willingness to assess small and creeping acquisitions in the same way as larger transactions.

INDUSTRIES IN FOCUS

The ACCC continues to show interest in health care and life sciences. The ACCC cleared several transactions in these industries this year, including: *Monash IVF/Fertility North*, *Westpac/HealthPoint*, *Sigma Healthcare/Chemist Warehouse*, *Integral Diagnostics/Capitol Health, and Nucleus Network/I'rom Group*.

The ACCC also focused on technology and online platforms. Although the ACCC cleared Datasite's acquisition of Ansarada (dataroom software), its detailed scrutiny led to two other transactions being abandoned in 2024: Realestate.com.au abandoned its acquisition of Dynamic Methods (real estate platforms), and Global Payments Australia abandoned its proposed acquisition of School Bytes Learning (school information software).

MERGER RETROSPECTIVES

In 2024, enforcers in both Australia and New Zealand published studies reviewing past merger decisions. The ACCC's retrospective, released in February 2024, reviewed cases dating back to 2017, each involving a merger that the ACCC had approved based on the evidence available at the time. In its February 2024 report, however, the ACCC noted that "some of the predictions and assumptions made by the ACCC in the original review did not unfold as anticipated." In addition, the ACCC noted, "this report re-enforced the risks raised when clearance decisions rely on new entry and expansion, and also the inherent complexities associated with negotiating and implementing some undertakings." Given this comment by the ACCC, parties seeking to argue constraint from entry or expansion will need to carefully consider supporting evidence. Parties should also be prepared to submit detailed evidence supporting their assertions about future plans and competitive dynamics.

Similarly, the NZCC issued a retrospective analysis of 13 merger applications reviewed between 2014 and 2019. The NZCC's analysis indicates that it may view claims of entry, expansion, and countervailing buyer power with more scrutiny when analyzing future deals.

NEW ZEALAND: TWO BLOCKED DEALS

In 2024, the NZCC announced two significant decisions in which it declined applications for merger clearance. In October, the NZCC declined an application for merger clearance from Foodstuffs North Island Limited and Foodstuffs South Island Limited. The two grocery cooperatives sought to merge into a single entity with three retail grocery banners that would operate as distinct cooperatives serving distinct local areas. The NZCC considered impacts of the proposed merger on competition within the wholesale and retail markets, as well as the upstream market for acquiring grocery products. The NZCC also considered the possible risk of coordination between the merged entity and a supermarket chain. Ultimately, the NZCC found that the merged entity, which would have been New Zealand's biggest acquirer of grocery products, could potentially extract lower prices from suppliers and otherwise negatively affect suppliers.

The NZCC also declined clearance to AlphaTheta Corporation with respect to its proposed acquisition of Serato Audio Research Limited. AlphaTheta supplies DJ hardware under the Pioneer DJ brand and DJ software under the rekordbox brand, while Serato supplies DJ software. The proposed acquisition came to the NZCC's attention as part of its merger surveillance program, which identifies potentially harmful mergers that were not notified to the NZCC. The NZCC considered that Serato and rekordbox compete closely in the DJ software market. Although other DJ software providers would remain in the market, the NZCC did not believe these rivals, or the possibility of a new DJ software provider entering the market in the near term, would be sufficient to replace the level of competition that would be lost with the merger.

ENDNOTES

1 Joined Cases C-611/22 P | *Illumina v Commission* and C-625/22 P | *Grail v Commission and Illumina*, Court of Justice of the European Union, September 3, 2024 ("Joined Cases C-611/22 P and C-625/22 P").

2 Joined Cases C-611/22 P and C-625/22 P, para. 206.

3 Press release, CMA, "CMA outlines growing concerns in markets for AI Foundation Models."

4 CCCS media release July 11, 2024, "CCCS Issues Provisional Decision on Grab Holdings Limited's Proposed Acquisition of Trans-cab Holdings Ltd."

5 *Id.*

6 ACCC Media, "ACCC welcomes proposal for stronger merger laws."

7 ACCC Media, "Woolworths' acquisition of Petstock not opposed"

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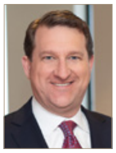

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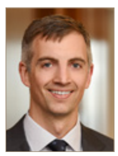

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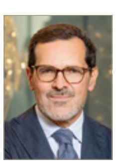

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