ALLEN & OVERY

Global trends in merger control enforcement

March 2021

This PDF has elements
of interactivity included

Contents

A review of global merger control activity

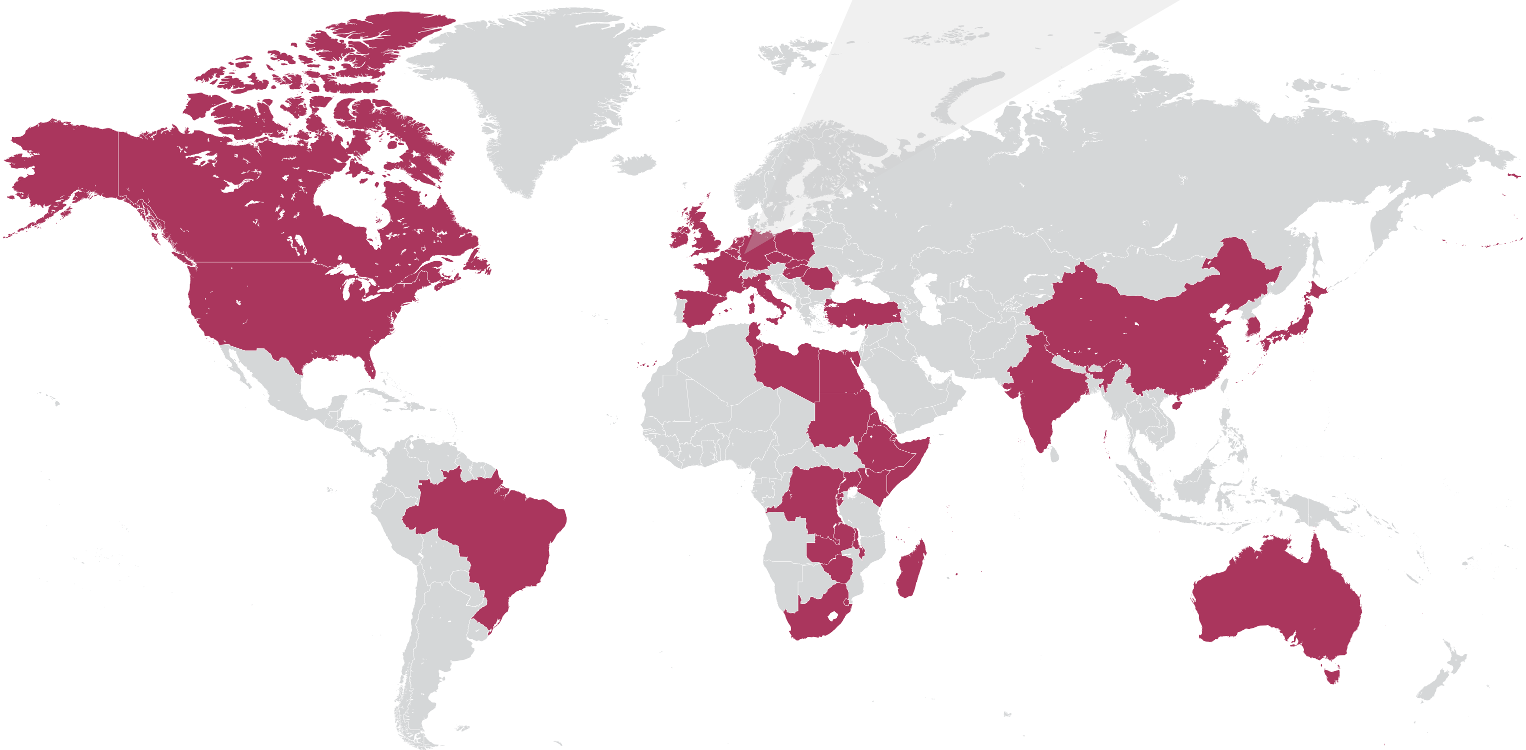
We have collected and analysed data on merger control activity for 2020 from 26 jurisdictions. In this report, we give you the key trends and developments from the past year, focusing in particular on the EU, UK, U.S. and China. We also look ahead at what to expect from merger control enforcement in 2021.

Jurisdictions surveyed

UK
U.S.
China
Australia
Brazil
Canada
COMESA
India
Japan
Singapore
South Africa
South Korea
Turkey

EU

1. Belgium
2. Czech Republic
3. France
4. Germany
5. Hungary
6. Ireland
7. Italy
8. Netherlands
9. Poland
10. Romania
11. Slovakia
12. Spain



Introduction

2020 was a year of two halves for global M&A. Deal activity slowed dramatically in H1 as the Covid-19 pandemic took hold across the world. This resulted in a drop in global announced deals (by both volume and value) for the year as a whole.[1]

But in Q3 we saw the beginnings of a strong recovery, with global deal levels bouncing back. This looks set to continue into 2021, although as the economic impact of the pandemic persists, the road ahead is unlikely to be smooth.

Merger control activity unsurprisingly tracks trends in global M&A. We therefore saw the number of merger control decisions taken by antitrust authorities fall in 2020 – by 15% across the jurisdictions surveyed. Towards the end of the year, however, notifications were on the rise. In the U.S. and Germany in particular, the authorities reported filings reaching their highest levels for several years.

However, we did not see any let up in antitrust authorities' tough approach to merger control enforcement last year. In fact, some jurisdictions, such as the UK, clocked up record numbers of blocked and abandoned deals. Clearances on the basis of the failing firm defence remained the exception rather than the rule, even in the face of the acute economic shock caused by the pandemic.

Instead, the immediate impact of the crisis on merger control enforcement was felt mainly in terms of procedure and timing, as authorities requested temporary delays in notifications, extended or suspended review periods and faced difficulties in collecting information from merging parties and other stakeholders.

Despite diverting many resources to deal with issues raised by the pandemic, antitrust authorities continued to engage in fierce policy debates over merger control reforms. Most focused on tightening scrutiny of deals in the digital sector. Many jurisdictions also took steps to toughen up foreign investment control regimes.

At EU-level, the European Commission (EC) ended 2020 bruised from a defeat before the General Court over its prohibition of Three/O2, but ready to fight its case before the European Court of Justice (ECJ). Competition Commissioner Vestager set out the EC's plans for the future of EU merger control, including streamlined reviews and a controversial use of the referrals system to enable it to look at so-called 'killer acquisitions'.

Alongside racking up record levels of enforcement (yet again), the UK Competition and Markets Authority (CMA) prepared for life outside the EU and proposed radical new rules (including a new merger control regime) for the digital sector. At the same time, the UK Government tabled a long-awaited and far-reaching revamp of its existing national security screening regime which looks set to introduce a significantly expanded layer of merger control scrutiny.

In the U.S., we saw the number of Federal Trade Commission (FTC) challenges soar, many relating to life sciences transactions, prompting merging parties to call off deals in a number of cases. Divisions along party lines remained a common theme. The election of Joe Biden is likely to inject further vigour into U.S. merger control enforcement going forward.

In China, merger enforcement levels remained steady. The continued trade tensions with the U.S. did not appear to negatively impact the review of deals involving U.S. firms. However, despite overall improvements in review periods, we continued to see Chinese approval come after clearances in other jurisdictions for certain remedy cases.

[1] Source: Refinitiv, Full Year 2020.

Report highlights

Antitrust authorities continued to frustrate deals as the UK stood out once more

Antitrust intervention targeted life sciences and transport sectors but the global focus was on digital

New and tougher foreign investment controls increased obstacles

Procedural merger control enforcement stayed firmly on the agenda

Remedies cases remained high as authorities coordinated outcomes

Merger review periods held steady despite the pandemic

Looking ahead: changes in store for merger control policy and practice

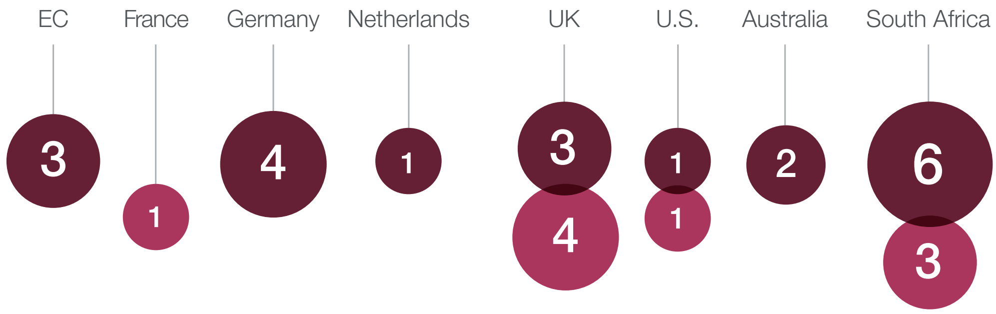
Antitrust authorities continued to frustrate deals as the UK stood out once more

Total deals frustrated

Deals prohibited

by volume

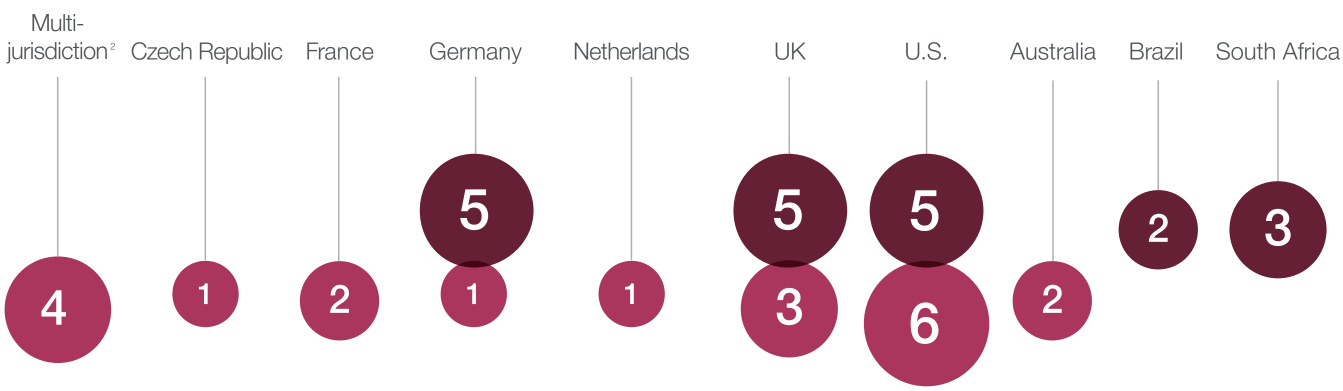
2019: Total 20   2020: Total 9



Deals abandoned

by volume, allocated to jurisdiction where antitrust concerns led to parties' decision to abandon the deal

2019: Total 20   2020: Total 20



[2] Illumina/PacBio (abandoned due to antitrust concerns in the U.S. and UK), Edgewell Personal Care/Harry's (abandoned due to concerns in the U.S. and Germany), Johnson & Johnson/Tachosil (abandoned due to concerns in the U.S. and at EU-level) and McGraw-Hill Education/Cengage (abandoned due to concerns in the U.S. and UK).

In 2020 a total of 29 deals were frustrated in the jurisdictions surveyed. Nine transactions were prohibited, and a further 20 were abandoned due to antitrust concerns.

Significantly, this is down 28% on 2019's tally of 40. However, this overall reduction does not a signal a softer approach – antitrust authorities for the most part have not relaxed their attitude to the assessment of mergers in the face of the pandemic.

Rather, it is a product of two factors: first, the impact of the global pandemic on global M&A volumes in the early part of the year; and second, the fact that, due to the uncertain economic climate, companies had less appetite to try their hand at strategic, transformative deals. Overall, therefore, authorities saw fewer transactions of the type most likely to give rise to antitrust concerns coming across their desks in 2020.

No surge in failing firm cases

In the first few months of 2020 there was some speculation that the pandemic would lead to an uptick in otherwise anti-competitive deals being waived through on failing firm grounds. But this has not played out in practice. There are only a few examples of failing firm arguments being accepted in 2020 (the most notable relating to a merger between Korean airlines). This reflects the high bar in many jurisdictions for meeting the defence. However, as Covid-19 continues to impact the global economy into 2021, we expect to see a rise in failing firm cases going forward. We discuss this later in the report in our predictions for the coming year.

A rise in multi-jurisdictional concerns

Interestingly, in 2020 we saw a significant increase in the number of deals frustrated due to concerns in more than one jurisdiction. The last example of this was in 2018. In 2020, there were four cases. All were abandoned transactions, and involved the U.S. agencies raising concerns alongside either the EC or authorities in the UK or Germany. Close cooperation between the authorities involved was a common thread in these cases, reflecting a growing trend in multi-jurisdictional merger reviews.

However, parallel reviews do not always end in a coordinated result. Sabre/Farelogix, an airline booking software merger, was a key example last year. Both the U.S. Department of Justice (DOJ) and CMA raised concerns over increased fees and loss of innovation. The DOJ sued to block the deal, but the court then decided to clear it. Two days later the CMA issued a prohibition decision, currently under appeal.

Mixed results in Europe

At EU-level, there were no prohibitions in 2020. In fact, the EC suffered a significant blow when in June the General Court annulled the 2016 prohibition of the Three/O2 telecoms merger. The court's ruling is widely regarded as making it harder for the EC to block transactions that fall short of creating or strengthening a dominant player, even where the market is already relatively concentrated. It is likely to have implications both for telecoms deals and more broadly. Unsurprisingly the EC is appealing. The ECJ's judgment is hotly anticipated.[3]

In terms of abandoned deals, the EC notched up only one last year – Johnson & Johnson/Tachosil. The parties pulled out after both the EC and FTC expressed concerns. Will we see a higher rate of EU-level frustration in 2021? It is currently hard to tell. The EC has a number of ongoing in-depth reviews on its books, although many of these look like candidates for a remedies decision rather than a prohibition.

Elsewhere in Europe, frustration levels were higher. In France, the French competition authority secured its first ever merger block (E. Leclerc and Soditroy's acquisition of a Géant Casino hypermarket) after finding prohibition was the only way to address its concerns. Two further transactions were abandoned.

In the UK, the CMA continued its role as one of the most aggressive antitrust enforcers. It frustrated nine deals in 2020, exceeding its previous record set in 2019. See the section below for more details.

> "...antitrust authorities for the most part have not relaxed their attitude to the assessment of mergers in the face of the pandemic."

[3] See our alert for more details on the General Court's ruling.

Peak in U.S. challenges causes parties to walk away

Ten deals were abandoned in 2020 due to U.S. antitrust agency concerns – the highest total since we started our trends analysis in 2015 and double 2019's tally. All followed complaints or concerns raised by the DOJ or FTC, and reflect the agencies' increased appetite to challenge deals last year. The agencies sued to block a record eleven deals in total (some of which are still pending litigation). The FTC also had some success in court. In September, its challenge to Peabody/Arch Coal was upheld. But this was the only deal formally prohibited in the U.S. in 2020. The antitrust agencies lost suits in a number of high profile cases, including Sabre/Farelogix, as mentioned above.

The FTC continued to make headlines for its focus on consummated deals. At the start of 2020 the agency challenged the completed merger between Axon and VieVu (both suppliers of body-worn cameras to police departments). The FTC also challenged a completed tobacco deal – Altria's acquisition of a non-voting 35% stake in JUUL (Altria later filed to convert the shares to voting securities, so the deal ended up being reviewed through the HSR process).

And, in a very interesting turn, the FTC brought a monopolisation suit against Facebook, alleging that Facebook illegally maintained its personal social networking monopoly through its now consummated acquisitions of Instagram and WhatsApp. The FTC is seeking a permanent injunction which could require Instagram and WhatsApp to be divested.

The outcomes of these cases are ones to watch in 2021. The uncertainty created by such challenges, not to mention the possibility of having to 'unscramble' transactions, means that this is a worrying trend for merging parties. And it is a development we have seen in other jurisdictions. The Canadian Competition Bureau, for example, challenged a completed non-notifiable transaction in the agriculture sector.

Australian authority hit by court defeats

In Australia, two bids for the same target – in the laundry sector – were abandoned after the Australian Competition and Consumer Commission (ACCC) raised concerns due to the overlapping activities of the parties in each case. This keeps deal frustration rates in Australia on a par with 2019.

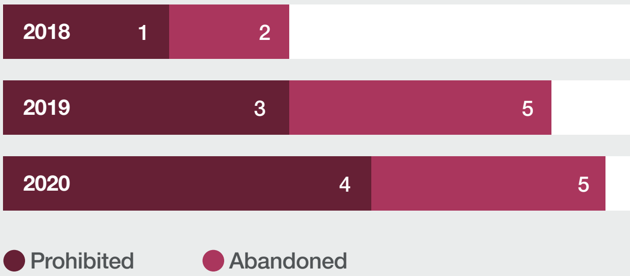
The ACCC, however, suffered two major court losses in 2020: the federal court overturned its 2019 prohibition of TPG Telecom/Vodafone, and found that a rail terminal acquisition (Pacific National/Acacia Ridge Terminal), opposed by the ACCC in 2018, was not anti-competitive. The ACCC has said that it is carefully considering the rulings. It will be interesting to see if they impact the authority's appetite to challenge mergers going forward.

> "The FTC continued to make headlines for its focus on consummated deals."

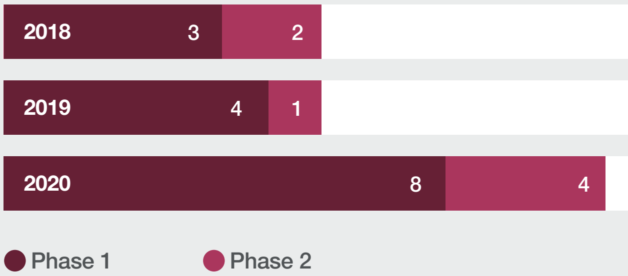
"The FTC continued to make headlines for its focus on consummated deals."

UK CMA notches up another record year for tough merger control enforcement

Frustrated deals



Remedies cases



In last year's report we noted an exponential increase in intervention by the CMA. In 2020 we have seen yet a further rise. UK merger enforcement is continuing at record-breaking levels.

The total number of deals frustrated was nine. The CMA blocked four – one more than in 2019. Three of these (JD Sports/Footasylum, Hunter Douglas/247 Home Furnishings and FNZ/GBST) were completed transactions, meaning that the acquirer was required to sell off the whole of what it had purchased, effectively 'unscrambling' the deal.

Five deals were abandoned. Two of these were due to concerns of both the CMA and the U.S. FTC, including the high-profile acquisition by Illumina of PacBio.

Remedies tantamount to prohibition

The CMA also stepped up intervention in the form of remedies in 2020. Even when accounting for the fact that the four phase 2 conditional decisions in 2020 relate to a single set of transactions involving the Bauer media group, the rise in the number of remedies cases last year was significant. The extent of these remedies is also of note. Very unusually, we saw two phase 1 cases (in the wool and motorcycle insurance sectors) where the parties agreed to a full divestment of the target, effectively resulting in a prohibition. We look at remedies in more detail later in the report.

Bumps in the road

It was not all plain sailing for the CMA in 2020. It suffered a knock late in the year when the Competition Appeal Tribunal (CAT) quashed certain aspects of its prohibition of JD Sports/Footasylum. The court took issue with the way the CMA gathered information about the impact of Covid-19, including failing to follow up inquiries with market participants and reaching conclusions without evidence. The CMA has appealed.

The fate of the blocked FNZ/GBST deal is also unknown. FNZ appealed the decision but at the CMA's request the CAT has overturned it and remitted the case, apparently due to potential errors in market share calculations following the receipt of inconsistent information. This is the first time we have ever seen this happen.

But the CMA remains undeterred

Despite these setbacks, the CMA's tough enforcement approach has continued into 2021. In January, it blocked a commercial vehicle and trailer parts transaction. And a metallurgy merger was abandoned after the CMA rejected the remedies offered by the parties and said it would refer the deal to phase 2 (and the FTC staff recommended a challenge in the U.S.).

We also expect the CMA to continue to take an expansive approach to jurisdiction, in particular its broad interpretation of the "share of supply test", which includes scrutinising deals which appear to have little or no nexus to the UK. This approach is, however, currently under review by the CAT in the Sabre/Farelogix appeal. The ruling is expected imminently.

Brexit: more work for the CMA and merging parties

All of the above sets the stage for the CMA to take a seat at the table with other major antitrust authorities now that the UK has left the EU. On 31 December 2020 the Brexit transition period ended, with the result that the EU Merger Regulation is no longer applicable in the UK and the UK has a fully standalone merger control regime. In practice, this means that a transaction could be reviewed by both the CMA and EC if the relevant jurisdictional thresholds are met. The CMA has predicted that it could review 50 additional mergers each year – an 80% increase. It also means that the CMA will play a more prominent role in reviewing global deals (it has, for example, announced it is investigating Nvidia's planned takeover of ARM). The CMA has been preparing for this for some time. It has recruited additional staff and has updated key sets of guidance on its processes going forward.

The UK merger control regime is voluntary, meaning that there is no obligation to notify before closing, or even at all (although later in the report we discuss proposals for a separate mandatory regime applying to certain digital firms). But as we have seen above, where a deal might raise antitrust concerns, taking a decision to notify after completion, or not to notify at all, is a risky business.

In addition, the CMA has the power to impose hold-separate orders to prevent integration and other action which might prejudice its investigation or any remedies required. In practice, these orders can be extremely wide in scope and difficult to manage, especially where the merging parties are active across multiple jurisdictions. The CMA actively enforces compliance with such orders – see later in the report for more on this.

In summary, it is clear that the UK has a merger control regime with teeth and one that can be inherently unpredictable. Merging parties should carefully consider the impact of a possible CMA review where their transactions might have a UK connection. They need to make sure that deal documentation includes appropriate provisions and should consider early engagement with the CMA.

"In last year's report we noted an exponential increase in intervention by the CMA. In 2020 we have seen yet a further rise. UK merger enforcement is continuing at record-breaking levels."

Internal documents continue to fuel merger control enforcement

In previous reports, we have noted the increased reliance by antitrust authorities on merging parties' internal documents. Authorities use these materials to try to discover the true rationale behind a transaction and to understand the extent to which the parties compete. We saw this trend continue in 2020 with some notable examples.

In the U.S., Visa's planned acquisition of Plaid highlighted how internal documents can undermine an acquirer's case for clearance. Visa argued that Plaid was not a rival. But in challenging the deal, the DOJ pointed to a number of internal documents indicating that Visa's strategy was to remove a potential competitor. The parties ultimately abandoned the deal early in 2021.

We saw this again in the 2020 U.S. Big Tech hearings. Emails were uncovered involving Facebook CEO Mark Zuckerberg which, it was alleged, suggested that the rationale for the 2012 acquisition of Instagram was to remove Instagram as a potential threat. The FTC has since filed a landmark suit against Facebook alleging a strategy of anti-competitive acquisitions.

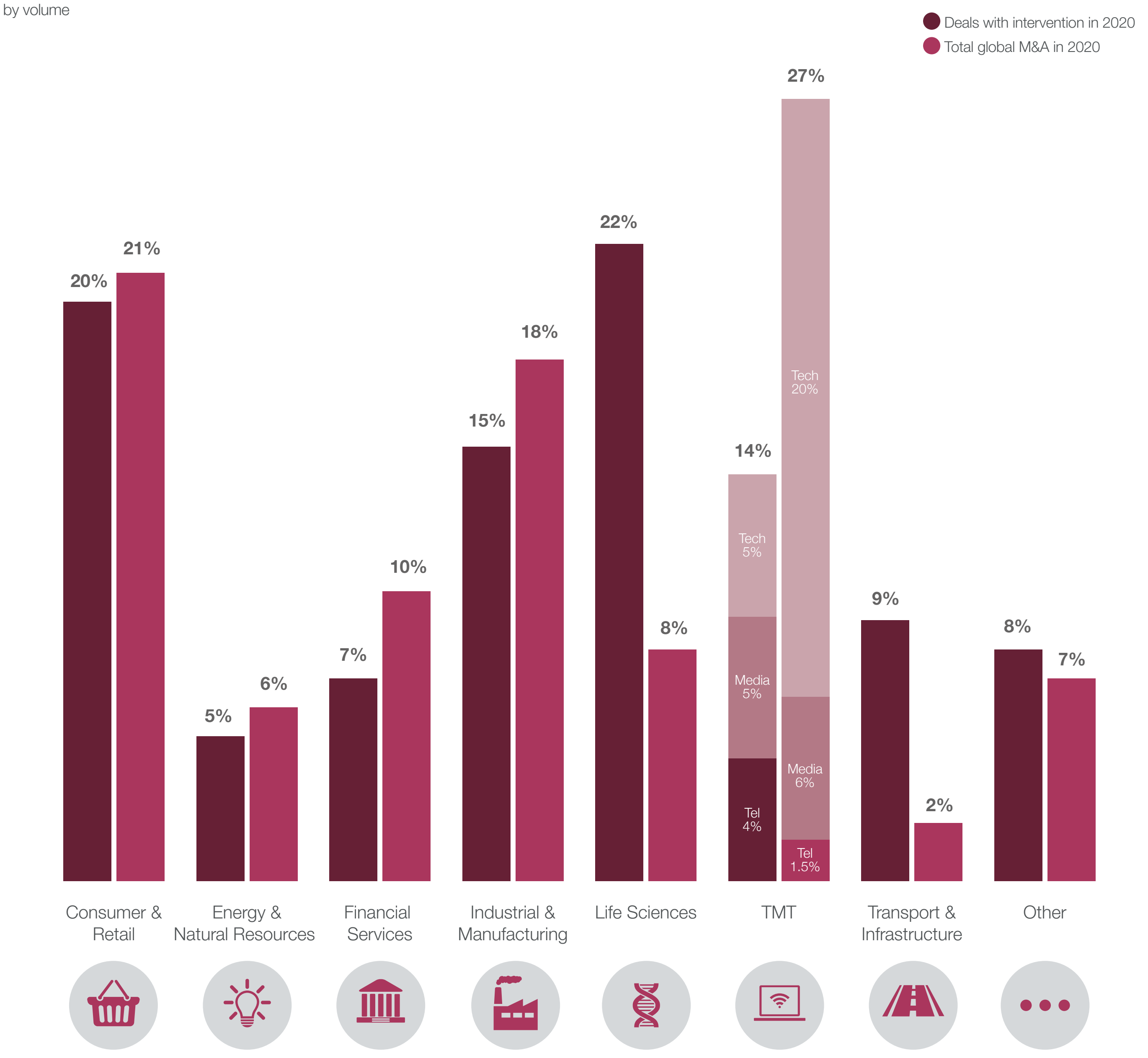
Across the Atlantic, the UK CMA's approach of zeroing-in on internal documents was evident in its phase 2 assessment of Amazon/Deliveroo. While ultimately clearing the deal, the CMA relied on Amazon's internal documents as providing insight into the rationale for the purchase of the 16% stake, claiming they showed that the investment was strategic as a first step towards a full acquisition. Internal documents showing strong competition between Taboola and Outbrain similarly fuelled the CMA's June decision to take a closer look at their merger.

Finally, in an analysis published following the collapse of the Illumina/PacBio transaction, the CMA noted that evidence is particularly persuasive when internal documents from different levels and areas of an organisation appear to tell the same story. Merging parties should take heed – being consistent when describing the efficiencies of a transaction and its overall benefits to consumers and competition is key. But a suite of internal documents from across the firm which corroborate a potential anti-competitive strategy could fatally undermine any pro-competitive narrative at board level.

Antitrust intervention targeted life sciences and transport sectors but the global focus was on digital

Total antitrust intervention by sector

by volume



Digital was at the forefront of antitrust policy considerations in 2020, as jurisdictions across the globe made significant progress with their plans for new or enhanced regulation of the sector. Following a flood of expert reports in 2019 setting out recommendations for reform, authorities and governments worked hard to put together concrete proposals, many of which were unveiled in the last 12 months. We set out the status and direction of travel below.

All of this talk is yet, however, to crystallise into enforcement action. In terms of global M&A volumes, the TMT sector accounted for the largest proportion in 2020 (27%), with technology deals making up the majority (20%) of that total. By contrast, TMT only accounted for 14% of antitrust intervention (ie deals prohibited, abandoned and reviews ending in remedies). Only two technology transactions were blocked – the airline booking software merger Sabre/Farelogix and investment technology deal FNZ/GBST. Both were prohibitions by the UK CMA.

Mergers involving Big Tech firms generally received clearance. And while some required extensive remedies (eg the commitments entered into by Google in order to get the green light for its purchase of Fitbit in the EU, Japan and South Africa), others were cleared unconditionally (Amazon/Deliveroo), albeit after a lengthy investigation. Going forward, we expect to see the rate of antitrust intervention in the TMT sector ramp up as the new/revised rules relating to the digital sector described below are rolled out.

Putting aside the digital sector, antitrust intervention focused on two sectors in 2020: life sciences and transport & infrastructure. This is consistent with previous years.

Cross-border life sciences mergers in the spotlight

Life sciences deals represented 22% of total deals subject to antitrust intervention, but only 8% of global M&A. A third of the abandoned deals in 2020 were in this sector, including Illumina/PacBio and Johnson & Johnson/Tachosil, both multi-jurisdictional transactions. Another cross-border deal, Elanco's purchase of Bayer's animal health business, was subject to divestment remedies in a number of jurisdictions, including the EU, U.S., Australia and Canada.

One abandoned merger and two in-depth remedy cases were attributable to intervention in the Netherlands.

And in the U.S., the life sciences sector, and hospital consolidation in particular, remained a high priority. FTC challenges yielded seven consent decree (remedies) cases in 2020 and five abandoned deals. Towards the end of the year the FTC lost its first challenge to a hospital deal since 2016 (a merger between two Philadelphia hospital systems). But it remains resolute in its scrutiny of the sector. In January 2021, the FTC ordered health insurance companies to submit information so it can study the impact of completed healthcare facility consolidation on competition, stretching back to 2015.

Issues in transport deals fixed with remedies

For transport & infrastructure transactions, the figure was 9% of antitrust intervention, compared to 2% of global M&A. Remedy cases accounted for all of this intervention, spanning across a number of jurisdictions, and relating to a variety of markets, including light commercial vehicles, trains and transportation services. The sector may well be in the spotlight again in 2021. France and Italy abandoned the shipbuilding merger between Fincantieri and Chantiers de L'Atlantique in January, in part due to EC concerns, and the EC has two in-depth investigations open – another in shipbuilding and one in air transport.

Preserving innovation and killer acquisitions remained key focus areas

Cutting across sectors, we saw antitrust authorities continue to intervene on the back of concerns over a loss of, or reduction in, innovation. There were high-profile examples: FTC and CMA concerns, centred on the impact of the deal on the parties' incentives to innovate, led Illumina to walk away from its acquisition of PacBio. Similar concerns led to remedies (in the EU, U.S. China and South Korea) in relation to Danaher's acquisition of GE's biopharma businesses. In fact, assessing the impact of a merger on innovation is now a mainstay in many merger assessments. The CMA, for example, has beefed up its merger assessment guidance to reflect its increased focus on innovation as a parameter of competition.

In many of these cases, the authorities' focus on innovation went hand in hand with concerns over the removal of nascent competition. Such deals are often described as 'killer acquisitions' – acquisitions of start-ups/targets with pipeline products by large players with the aim of preventing the target from emerging as a potential rival. They are particularly prevalent in the digital and pharma sectors and, importantly, may escape merger control review if the target's turnover does not trigger merger control thresholds. We discuss how some antitrust authorities plan to deal with killer 'tech' acquisitions on the following page.

Merger control in the digital sector: the road ahead

The intense focus on merger control policy and enforcement in the digital sector in recent years has two main origins. First, it is a response to increasing calls for amendments to merger control rules to reflect the fast-evolving nature of digital markets. Second, authorities are seeking to address criticisms of under-enforcement, particularly in relation to 'killer acquisitions'.

The outcome of these debates looks set to result in a patchwork of approaches across jurisdictions. Some are overlapping, but many others are diverging. For merging parties, navigating the new landscape as it emerges will pose significant challenges.

There are three main categories of likely change:

1 New separate merger control rules for digital firms

This is the route proposed in the UK, where the Government is working on a new mandatory merger regime for acquisitions by digital firms designated as having 'Strategic Market Status'. It would sit alongside the standard, voluntary regime and is expected to take effect in the first half of 2021.

In the U.S., a report by the House Subcommittee on Antitrust recommended that dominant platforms should be required to notify all acquisitions regardless of whether the HSR thresholds are met. Australia and South Africa, too, are progressing proposals along these lines.

2 Catching 'killer acquisitions' with deal value thresholds

Deal value thresholds, which hook transactions even where the target has no, or little, turnover, are one way to ensure that such killer acquisitions are caught and can be reviewed under merger control regimes. A number of jurisdictions proposed them in 2020, including Brazil, India and South Korea.

But the jury is out as to their impact in practice. According to a report by Germany, its deal value threshold (introduced in 2017) has so far not resulted in any anti-competitive mergers being caught. Indeed, early 2021 changes to German antitrust rules introduced a new way to catch such deals – giving the Federal Cartel Office the power to order notification of deals in a particular economic sector even if the target's activities fall below German merger control thresholds, in cases where that economic sector has already been the subject of a sector inquiry.

This has perhaps fed into the EC's decision to look instead to its referrals system for the solution. In September, Competition Commissioner Vestager announced that the EC would accept referrals of transactions from Member State antitrust authorities of mergers "worth reviewing at the EU level" even where the national authorities have no power to review themselves. If implemented, this would be a highly controversial use of these referral powers. According to the EC, the new policy should be in place from mid-2021.

3 Reframing the assessment of digital mergers

This encompasses two potential measures/steps.

First, proposals to reverse or amend the burden of proof in digital cases. The U.S. House Subcommittee report recommended that the U.S. merger rules be amended to establish a presumption that any acquisition by a dominant platform is anti-competitive (only rebuttable if the parties can show it is "necessary for serving the public interest and that similar benefits could not be achieved through internal growth and expansion"). In the UK, a lower and more cautious standard of proof is under consideration.

Second, established guidance is being revised to take account of digital transformation. We saw this in the EC's consultation on its over 20 year-old market definition guidelines and the UK's revised merger assessment guidance. In antitrust guidelines for China's platform economy, the State Administration for Market Regulation (SAMR) has clarified that deals involving variable interest entity (VIE) structures should be reviewed under the Chinese merger control regime if the notification thresholds are met. We discuss this in more detail later.

These three sets of reforms are forward facing. They aim to enhance antitrust authorities' ability to review the impact of (and to prevent or modify) digital transactions before they take place. However, authorities are also looking to the past in order to inform future cases, by studying how their merger decisions have impacted digital markets in practice. Some, like the FTC and CMA, have already completed such studies. Others, including the EC, plan to do more going forward. Watch this space.

New and tougher foreign investment controls increased obstacles

Establishing or strengthening foreign investment controls was at the top of the agenda for many jurisdictions in 2020, cementing a rising trend from previous years.

Covid-19 triggered a number of emergency measures aimed at preventing opportunistic acquisitions of strategic domestic firms or assets during the pandemic. In some jurisdictions, these are only temporary – they will fall away once the pandemic slows. But in many others, the new or tougher measures introduced (or proposed) are permanent, their implementation accelerated as a result of the outbreak.

All of this means additional obstacles to deal making.

17 of the jurisdictions surveyed introduced or proposed new or tougher foreign investment controls in 2020.

New EU-level rules accompany stricter national regimes

A new EU Regulation on foreign investment control took effect in October 2020. The Regulation does not seek to put in place a 'one-stop-shop' screening regime – foreign investment reviews will remain in the hands of the Member States. However, it does establish minimum standards for national regimes. And it creates a framework for cooperation between Member States and the EC. The Regulation allows Member States to make comments and the EC to issue an opinion on certain transactions, which national authorities must take into account before adopting a decision. This brings a risk of increased complexity to national review processes, by adding extra (and potentially highly political) considerations into the mix. At the same time, the information exchange and inter-Member State cooperation mechanism increases the risk of parallel reviews across multiple EU jurisdictions.

Alongside this, a number of Member States strengthened their national foreign investment regimes during 2020. In France, we saw the rules expand to, for example, cover more types of investment/investor and a wider range of sensitive sectors. Tough new sanctions for non-compliance were also introduced. In Germany, prior approval is now needed for transactions concerning critical infrastructure (the scope of which has been widened) and there is a lower threshold for government intervention. The Italian special 'Golden Powers' regime was extended. And Poland introduced new rules. Several jurisdictions brought the health sector within the scope of review.

In all, 16 Member States have foreign investment screening mechanisms in place (the Czech Republic adopted a regime in February 2021 which takes effect from 1 May 2021). New rules are planned in Ireland and the Netherlands during the course of 2021.

In a separate (but related) EU development, firms in receipt of foreign subsidies that invest in the EU will likely face greater scrutiny. An EC White Paper last summer set out a number of possible instruments, including a new mandatory notification system for foreign-backed acquisitions of EU businesses with powers to remedy and even block deals. Unsurprisingly, the proposals have been criticised as adding an additional set of burdens. There are strong calls for any new rules to be coherent with existing regimes, including both the EU Merger Regulation and the Regulation on foreign investment. We expect to hear more on the initiative during 2021.

CFIUS reviews more deals

In the U.S. we saw the Committee on Foreign Investment in the United States (CFIUS) refine and finalise rules providing for mandatory filings of certain transactions involving U.S. businesses dealing with critical technologies, critical infrastructure and sensitive personal data. CFIUS has also set out rules involving certain non-controlling investments as well as investments involving real estate located near sensitive U.S. facilities.

CFIUS has become more aggressive in monitoring the market for announced deals. We have seen it increasingly make post announcement inquiries of non-filing parties. This has led parties to make more filings on a cautionary basis, increasing the workload of the of the Committee's staff, and resulting in longer timetables, even in straightforward transactions.

The rest of the landscape is evolving

Outside the EU and U.S., we also saw significant developments in 2020:

- The UK Government published its much awaited draft national security and investment legislation in November 2020. Read more about these proposals below.
- In Australia, a major overhaul took effect on 1 January 2021. The rules have been bolstered with a requirement to get approval for all investments in sensitive national security land or businesses regardless of value. The changes also introduced enhanced monitoring and investigation powers together with stronger enforcement and penalties.
- China has gradually loosened restrictions on foreign investments, as reflected by rules adopted early in 2020 that aim to grant national non-discriminatory treatment to foreign investment in areas that are not on the negative list, and the passing of an expanded Catalogue of Encouraged Industries for Foreign Investment at the end of the year. The EU-China Comprehensive Agreement on Investment, on which negotiations concluded in December, looks set to further open the Chinese market to EU investors. However, as from January 2021, new national security review measures expand the scope of foreign investments as well as industry sectors that may be subject to scrutiny. The application and practical implications of these newest rules are not yet clear.
- In Japan, foreign investors now need regulatory clearance to acquire stakes of just 1% (down from 10%) in domestic listed businesses in certain industries, although broad exemptions are available.

Across the globe, this trend of intervention shows no signs of slowing. Navigating the regulatory landscape is becoming increasingly complex and, as rules change quickly and frequently, keeping on top of developments is vital. So too is ensuring possible foreign investment filings are considered early, and including appropriate provisions in deal documentation.

New UK national security regime will significantly tighten scrutiny of M&A

The UK Government's National Security and Investment Bill (the Bill), published in November 2020, is ground-breaking. It will drastically expand the UK Government's powers to scrutinise investments on national security grounds.

Mandatory notification

Under the Bill it will be mandatory to notify any qualifying transaction in 17 "sensitive" sectors. The regime will catch acquisitions that involve the acquirer taking 15% or more of the target's votes/shares (and subsequent specified step increases), or acquiring voting rights that allow the acquirer to enable/ prevent passage of resolutions governing the target's affairs.

"Call-in" power

There will also be a significantly enhanced "call-in" power and voluntary notification system applying to an extremely wide range of transactions that qualify as trigger events across all sectors of the economy. Minority acquisitions, asset purchases, IP licences, loans and conditional acquisitions could all be caught.

Once the Bill is enacted, the UK Government will have the power to call-in any qualifying transactions completed on or after 12 November 2020. It will be able to call-in such transactions within six months of becoming aware of them, subject to an overall limitation period of five years.

Significantly, there are no turnover or market share thresholds attached to either the mandatory notification requirement or the call-in power. The target only needs to operate in the UK or supply customers in the UK to fall within scope.

Enforcement

The UK Government will be able to impose remedies, prohibit transactions or ultimately even unwind completed deals. There will also be tough sanctions for non-compliance, including fines of up to 5% of global turnover or GBP10m (whichever is greater) and up to five years' imprisonment for individuals in certain circumstances. Critically for dealmakers, transactions subject to the mandatory notification requirement will also be void if they take place without clearance from the UK Government.

National security vetting will be separate from, and may run in parallel with, review by the CMA under the UK's merger control regime (and, post-Brexit, quite possibly also by the EC under the EU merger rules). But under the proposals UK national security issues can 'trump' UK competition concerns (although the CMA will still be able to review deals on other public interest grounds such as financial stability and media plurality).

Still open to foreign investment?

Predictably, in announcing the reforms, the UK Government has stressed that it does not want to discourage foreign investment. Indeed, the new regime applies to domestic and foreign investors alike. But the measures as proposed are far-reaching, and will undoubtedly add a new level of administrative burden, timing uncertainty and potentially also transaction risk to M&A activity in the UK.

The new rules are expected to be adopted later in 2021.

Mandatory notification in 17 "sensitive" sectors

- Civil nuclear power
- Data infrastructure
- Artificial Intelligence
- Cryptographic authentication
- Engineering biology
- Critical suppliers to the Government
- Communications
- Energy
- Autonomous robotics
- Advanced materials
- Military or dual-use technologies
- Suppliers to the emergency services
- Defence
- Transport
- Computing hardware
- Quantum technologies
- Satellite and space technologies

UK Government estimates (per year)

2,200 early engagements with Government

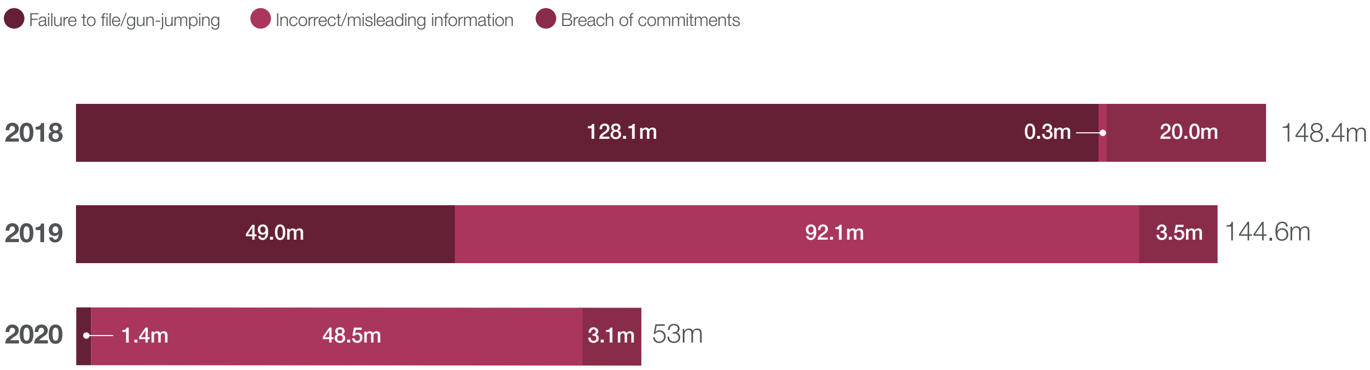
1,830 notifications

95 transactions called in for detailed review

10 remedy decisions

Procedural merger control enforcement stayed firmly on the agenda

Total fines split by fine type (EUR)



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

Jurisdictions where fines were imposed in 2020 (EUR)

Total EU: 6,645.5m
Poland: 6,645.0m
Czech Republic: 0.2m
Hungary: 0.2m
Italy: 0.2m
Slovakia: 0.03m

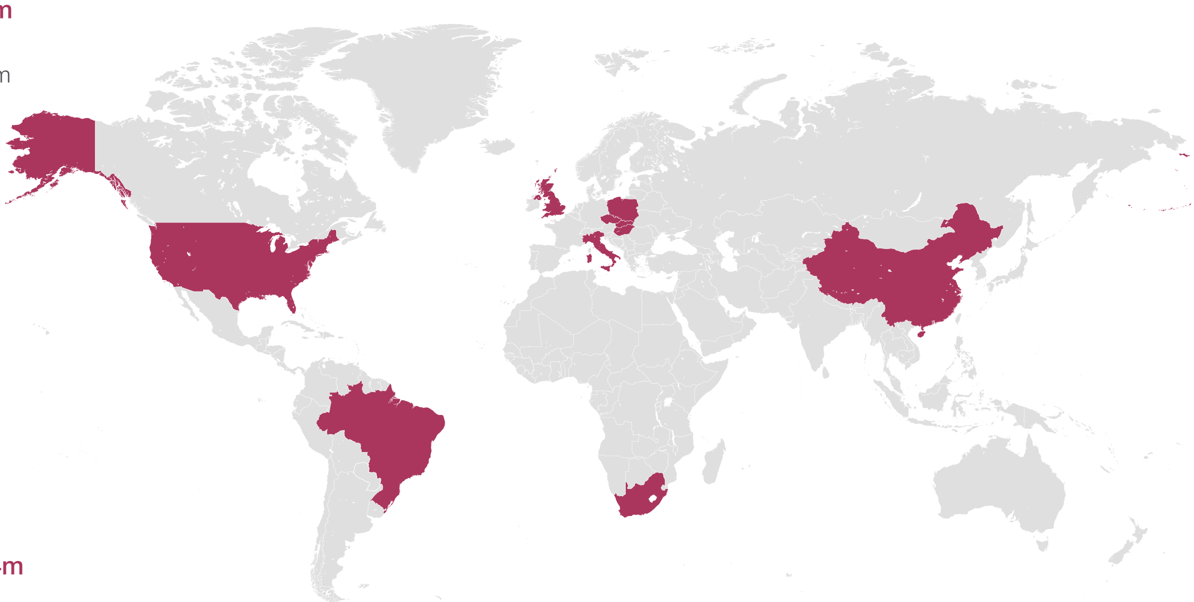
UK: 0.06m

Brazil: 0.7m

U.S.: 3.1m

China: 0.7m

South Africa: 0.04m



Total fines in 2020 for breaches of procedural merger control rules in the jurisdictions surveyed reached an enormous EUR6.65 billion. However, this includes a nearly EUR6.6bn fine imposed by the Polish UOKiK on six energy companies for alleged gun-jumping by entering into financing arrangements to construct the Nord Steam 2 gas pipeline. Excluding this case as an outlier, 2020 fine levels were EUR53 million, significantly less than the nearly EUR150m imposed in each of 2018 and 2019.

There is no single explanation for this dip. Overall, there were fewer procedural enforcement cases in 2020 (33, excluding the Polish outlier, compared to 40 in 2019). The EC, which often leads the charge in terms of procedural enforcement and imposes significant fines, reached no infringement decisions last year. And, Poland excluded, fines in individual cases were generally lower.

But merging parties should not take this as a sign to relax their approach to merger control compliance. Antitrust authorities across the globe continue to actively pursue suspected infringements of filing requirements, information requests and remedies orders/commitments.

EU progresses ongoing probes

At EU-level, the EC made headway with ongoing enforcement action in 2020. It progressed its investigation into whether Sigma provided incorrect or misleading information about an innovation project during the review of its acquisition by Merck. An investigation into Telefónica Deutschland over alleged breach of commitments in relation to its purchase of E-Plus is in the process of being finalised.

And we saw the ECJ uphold the EC's EUR20m fine on Marine Harvest for gun-jumping, ruling that the two-stage transaction in question should have been notified at the first stage, and not after the later public bid. This is an important ruling for parties considering this type of deal structure.

UK approach to freeze orders vindicated

In the UK, we did not see the same levels of procedural enforcement activity as the previous year. In 2019, the CMA reached nine decisions in total. In 2020 it was just two: Amazon for failing to provide complete responses to requests for information (GBP55,000) and JD Sports for failing to comply with an initial enforcement (ie hold-separate) order (GBP300,000). JD Sports appealed, but the CMA withdrew the penalty before the court delivered its ruling.

There was also an important judgment in the Facebook/Giphy transaction. Facebook challenged the CMA's refusal to grant derogations from an initial enforcement order. Rejecting the appeal, the CAT confirmed the CMA's broad discretion to impose such orders. The CMA believes that the ruling vindicates its approach to hold-separate requirements in the context of the UK's voluntary merger control regime. For merging parties, the case serves as a warning that the CMA is able to impose extremely broad obligations, which can stretch across all activities of the acquirer and not just its UK operations.

U.S. agencies settle remedy violations

The focus of the U.S. antitrust agencies' procedural enforcement was on breach of merger remedies. To settle FTC allegations that they violated a 2018 order to divest certain retail fuel stations, Alimentation Couche-Tard and a former affiliate agreed to pay a USD3.5m civil penalty. The FTC then published a blog post reminding firms that any timeframes set in an FTC divestiture order are 'real' deadlines.

The DOJ has also been active in this area. It settled (with no financial penalty) allegations that CenturyLink repeatedly violated a court ruling related to its 2017 acquisition of Level 3 Communications by soliciting customers that switched to the buyer of the divestiture assets. And, signalling that it will continue to prioritise compliance with merger remedies going forward, it has established a new unit with responsibility for enforcing consent decrees.

China focuses on failure to file

In China, as in previous years there have been a number of fines for failure to file – 13 in total (down from the 18 we saw in 2019). Most related to deals involving Chinese parties, but SAMR also penalised a foreign-to-foreign joint venture for failure to file. The most significant case involved penalties imposed on three companies relating to a variable interest entity (VIE) structure. See the next section for more details.

More generally, new merger control rules released by SAMR in October 2020 include a provision for shorter investigations into suspected failures to file. But as yet the significant increase in the current fine cap from CNY500,000 to 10% of turnover – proposed in January 2020 – remains elusive.

Looking forward, we expect 2021 to be an active year for enforcement of procedural merger control rules, as some authorities wrap up ongoing cases and others seek additional powers to deal with infringements (there are proposals on the table, eg, for the Irish CCPC to be able to bring criminal prosecutions for gun-jumping). Merging parties should take care to ensure that, even in these challenging economic conditions, merger control rules are not bypassed.

VIE structures come under scrutiny in China

VIE structures are complex contractual arrangements that allow foreign investors to enter restricted sectors of China's economy. They fall into a legally grey area and, historically, have rarely been reviewed under the Chinese merger control regime. This was despite there being no explicit endorsement that the arrangements were exempt from the rules.

Late in 2020 the position was clarified. In draft antitrust guidelines for China's platform economy (since finalised in February 2021), SAMR states clearly that deals involving VIE structures should be reviewed under the merger rules.

This was closely followed by the first enforcement action – fines imposed on Alibaba Investment, China Literature (a Tencent-controlled company) and Hive Box (a SF Express affiliated entity) for completing separate acquisitions involving a VIE structure without notifying SAMR. All three companies received the highest possible fines of CNY500,000, amounting to the largest gun-jumping penalty ever imposed in China.

Enforcement of VIE arrangements seems unlikely to stop there. SAMR has indicated that it is currently investigating other failure to file cases in the internet sector following third party complaints.

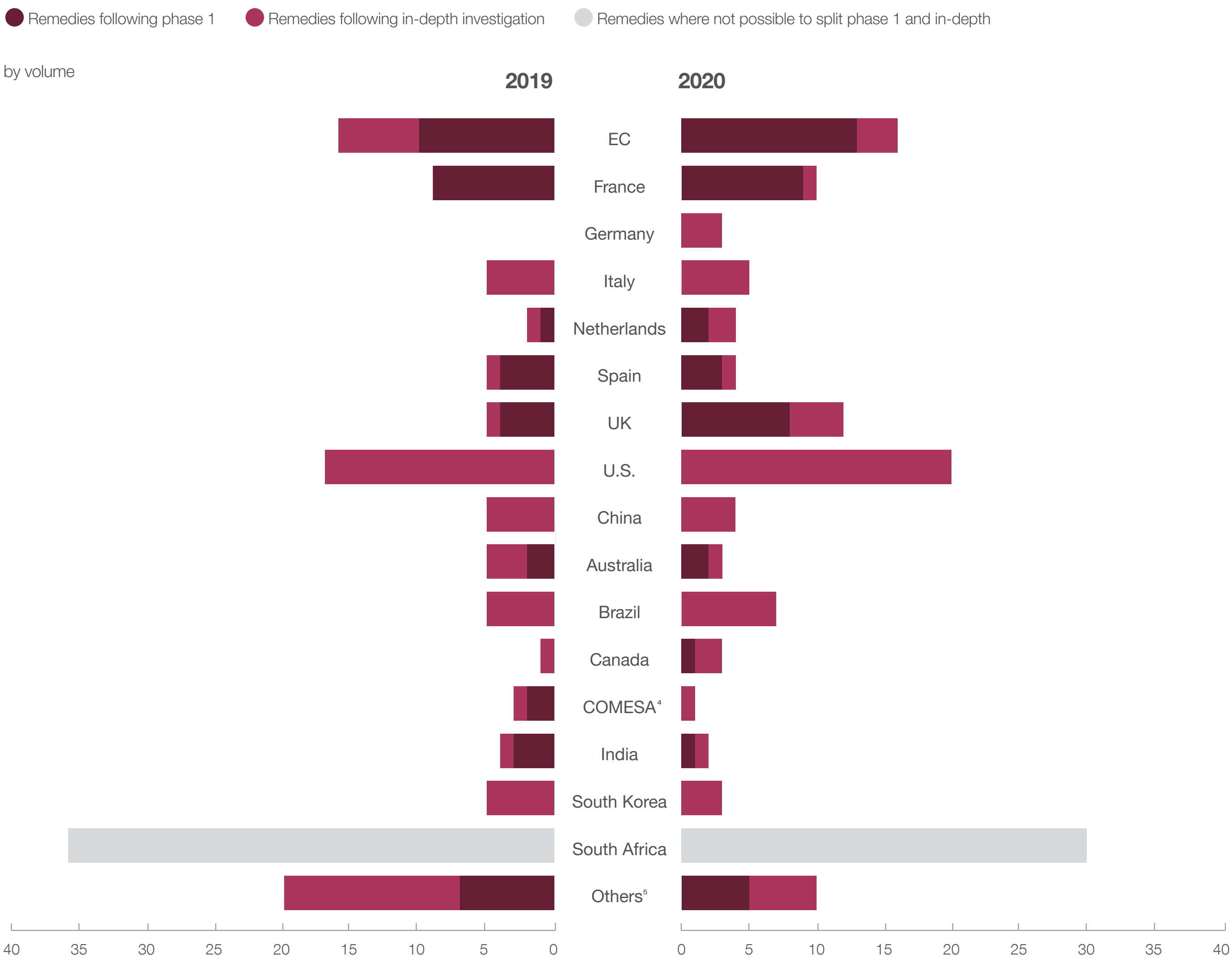
It is not yet clear, however, whether SAMR intends to systematically investigate all previously completed VIE-structured deals (and how it would go about this process), or whether it will focus on a narrower selection of transactions where complaints have been made.

Whichever direction SAMR chooses to take, it will likely prompt technology firms, and probably their investors, to carefully review their decisions not to file previous deals to the Chinese regulator. They will also and quite obviously need to consider SAMR's new policy going forward.

Remedies cases remained high as authorities coordinated outcomes

Total remedies cases

Cases resulting in remedies following phase 1 and in-depth investigations



[4] We have assumed that the 2020 remedies case is a phase 2 decision, although this cannot be confirmed as the COMESA Competition Commission suspended the phased assessment process in February 2020.

[5] The number of phase 1 conditional clearances for Japan and South Korea cannot be determined.

We reported earlier that there was a 28% dip in the number of frustrated transactions in 2020, which for the most part can be attributed to the general drop in M&A activity in the wake of the Covid-19 pandemic. We did not, however, see a corresponding fall in the number of remedies cases last year. In 2020 there were a total of 137 remedies cases – 44 agreed at phase 1, 63 put in place after an in-depth review and 30 relating to South Africa.[6]

EC unusually grants behavioural commitments

At EU-level, there was a slight rise in phase 1 remedies cases: 13 in total, compared to ten in 2019. At phase 2 there were only three conditional decisions, which is half of the 2019 total. Notably, all three involved behavioural commitments – unusual in a year where overall use of behavioural remedies declined – see the section below.

In one deal (Aurubis/Metallo) the parties offered remedies at phase 2 but the EC took the rare step of clearing the transaction unconditionally, even though it had earlier issued a statement of objections setting out its concerns. There has only been one other example of this in the past five years (T-Mobile NL/Tele2 NL).

Uptick in UK remedies at phase 1

In relation to the UK, we commented earlier that there was a significant increase in remedies cases in 2020. At phase 1 in particular, the total doubled to eight, with remedies in two cases effectively amounting to a prohibition. Interestingly there was a corresponding dip in the number of referrals to phase 2 (down from 15 to ten), suggesting that the CMA was more willing to address concerns after the first review stage, rather than heading into an in-depth probe.

U.S.: a win in court and updated guidance

The U.S. antitrust agencies agreed 20 consent decrees in 2020, up from 17 in 2019. T-Mobile/Sprint was an important case. DOJ (and Federal Communications Commission) concerns had been resolved through a court-approved settlement in 2019 involving a substantial divestment package and related commitments. Unconvinced by the effectiveness of the remedies, a coalition of state attorneys general sued to block the deal. A federal court rejected the challenge. The DOJ has hailed the result as a victory for both the government's ability to settle cases and for legal certainty for merging parties.

Continuing a theme we mentioned in last year's report, in around a third of FTC merger enforcement cases in 2020 the commissioners were split along party lines. There was also a lack of consensus over the new joint FTC and DOJ vertical merger guidelines, with the two Democratic commissioners supporting a more aggressive approach to vertical deals.

Also of note was the publication of a new version of the DOJ's merger remedies manual, marking the first update in nearly a decade. In it, the DOJ sets out its preference for structural divestments over behavioural commitments, as well as for upfront buyers. And it confirms that it may force merging parties to include assets in a divestiture package that do not relate to its antitrust concerns where necessary to enable the remedy taker to compete effectively.

An end date for Chinese remedies

In China there were four remedies cases in 2020 – no significant year-on-year change. The Danaher/GE decision is worth a mention. The structural remedies agreed with SAMR were broadly in line with the divestments agreed with the EC, FTC and Korean Fair Trade Commission. But they also stipulated that Danaher must continue to be involved in a divested pipeline project for two years after completion of the divestment, most likely to ensure its viability.

In addition, new Chinese merger control rules, effective from 1 December 2020, specify that the duration of merger remedies must be explicitly set out in the clearance decision. This is good news: it will give greater certainty for merging parties, and should address past criticism over conditions with no clear end date.

Upfront buyer remedies only used by a handful of authorities

Previous reports have commented that upfront buyer or fix-it-first remedies are not widely used across the jurisdictions surveyed.[7] They tend to be focused at EU-level, and in the UK and U.S. 2020 was no different. In the EU, the EC required an upfront buyer in a third (four of 12) cases involving divestments, broadly in line with 2019.[8] In the UK it was four out of eight. In the U.S., where as we noted above the agencies have a strong preference for upfront buyer provisions, we saw 80% of structural remedies (16 of 20) having such a requirement.

Outside these jurisdictions, we saw some instances of upfront buyer/fix-it-first remedies in France, India and Poland. We may see numbers of such remedies increase in 2021 if the economic climate results in there being fewer viable purchasers of divestment packages.

[6] Where data cannot be split between phase 1 and in-depth cases.

[7] An upfront buyer requirement is where the merging parties receive conditional clearance, but cannot complete the main transaction until they have entered into a binding agreement with the remedy purchaser and the authority has approved that purchaser. In a fix-it-first, the merging parties enter into a binding agreement with the remedy purchaser before the authority has conditionally cleared the main transaction (and the authority takes that agreement into account in its clearance decision). Note that the CMA uses the term "upfront buyer" to refer to any situation where the parties must enter into a binding agreement with the remedy purchaser and the CMA must approve that purchaser before it accepts the remedies. This could apply in both anticipated and completed deals.

[8] A number of decisions have not yet been published, meaning this figure could rise.

Three global remedies trends

Looking across jurisdictions, we identified three trends in remedy cases last year.

1 Post-decision amendments to remedy packages

In three EU-level cases, we saw the EC waive a divestment remedy (Takeda/Shire), grant partial waiver of a non-acquisition clause (Nidec/Embraco) and release a commitment to offer capacity through a certain auction mechanism (GDF/Suez). There were similar examples in Brazil (Disney/Twenty-First Century Fox, where a requirement to divest was converted to behavioural remedies) and Belgium.

It remains to be seen whether these are one-off, fact specific cases (the EC has, eg, taken a stricter approach more recently in Novelis/Aleris) or a more general sign of antitrust authorities' willingness to be flexible where market conditions do not follow an expected course.

2 Coordination to achieve a 'global' solution

There were a number of instances in 2020 of antitrust authorities coordinating on the design of mutually compatible remedy packages. Stryker/Wright Medical is a good example. On announcing the conditional phase 1 clearance a senior CMA official noted that "close cooperation with the FTC's inquiry and early engagement with both companies has…led to an outcome that works on a global basis." We also saw the FTC coordinate in a similar way with the EC in AbbVie/Allergan.

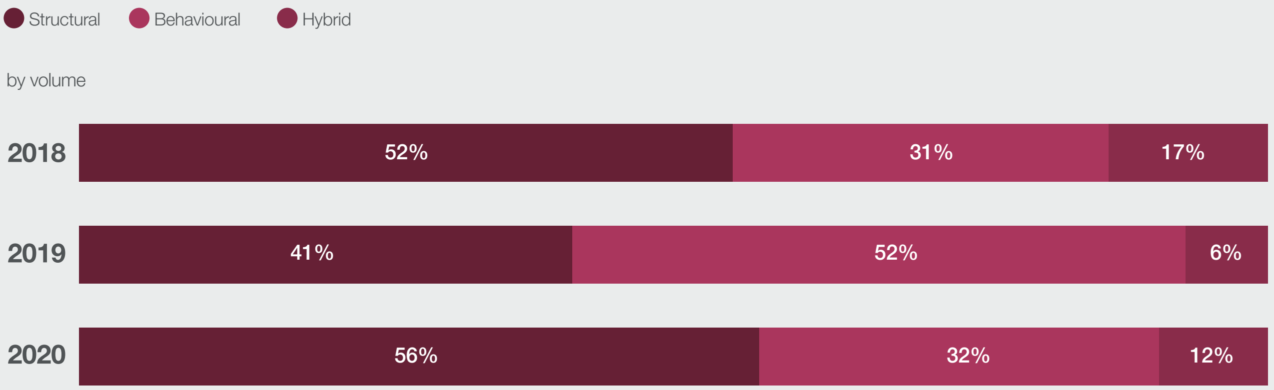
3 Reliance on remedies agreed elsewhere to streamline processes

As we have reported in previous years, as well as cooperating in terms of the substance of remedy packages, some antitrust authorities are also willing to rely on remedies agreed in other jurisdictions to address concerns in their own. Last year, the Canadian Competition Bureau, for example, relied on remedies agreed in the EU and U.S. in relation to the merger of UTC and Raytheon, removing the need for it to put in place its own package of conditions.

We are likely to see the CMA take this approach in future cases – its revised procedural guidance notes that, post-Brexit, it may not even open an investigation into a particular deal where any remedies imposed/agreed by another authority would be likely to address UK concerns.

Dip in use of behavioural commitments

Conditional clearances by type of remedy



The increased use of behavioural remedies (ie commitments by parties relating to future conduct) that we saw in 2019 was not maintained in 2020. Instead, only 44% of all remedy cases involved a behavioural element, either on its own or in combination with structural divestments (so-called 'hybrid' cases). This is perhaps surprising – there had been some suggestion that we would see more behavioural remedy cases in 2020 due to difficulties of finding purchasers and completing divestments in the current economic climate. But this has not (yet) played out in practice.

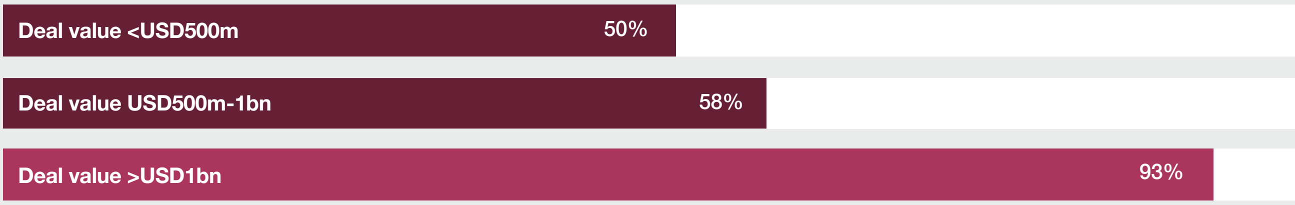
However, some jurisdictions bucked the trend. As mentioned above the commitments in all three EC phase 2 conditional clearances were behavioural or hybrid. The same was true for all remedies in Belgium, Hungary, Ireland and Spain. In China, it was three of four cases. Common types of behavioural commitment included continuation of supply on fair, reasonable and non-discriminatory (FRAND) terms, interoperability and confidentiality commitments.

Merging parties often view behavioural remedies as preferable to having to sell off businesses or assets. But in some cases, the long duration of the commitments results in a significant financial and administrative burden. The EC, for example, tends to stipulate ten years, and in Google/Fitbit it even built in the option to extend Google's commitment not to use Fitbit health and wellness data for advertising for up to a further ten years. The burden is two-way – authorities must also monitor compliance with the remedies over the relevant period, and many are not keen on this ongoing responsibility. In the Australian review of Google/Fitbit, similar remedies to those accepted by the EC were rejected by the ACCC due to concerns over effective monitoring.

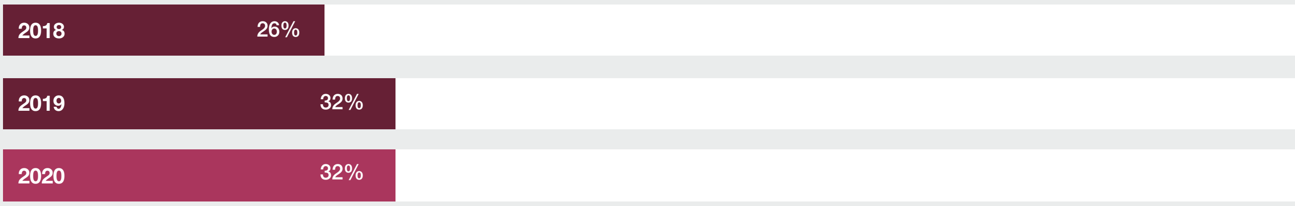
> "44% of all remedies cases involved a behavioural element, either on its own or in combination with structural divestments"

Sellers increased attempts to push execution risk on to buyers

Regulatory/antitrust conditions in private M&A, 2020



‘Hell or high water’ commitments



Allocation of execution risk was understandably an area of intense negotiation in 2020 due to the impact of the Covid-19 pandemic and, for (relatively) smaller transactions, we saw sellers pushing back hard: according to our research on global private M&A deals, there was a dip in the proportion of deals valued at less than USD1bn that were subject to antitrust or other regulatory approvals conditions.[9] Bigger-ticket deals, however, moved in the opposite direction, with the proportion subject to regulatory/antitrust conditions shooting up to 93% from 76% in 2019.

Earlier in the report, we discussed the proliferation and toughening of foreign investment regimes during 2020. Our analysis of deal conditionality reflects this. In the first half of 2020, only 7% of private M&A was conditional on foreign investment approvals. This increased to 19% in the second half.

The inclusion of ‘hell or high water’ commitments in deal documentation remained high in 2020, at 32% of transactions subject to antitrust/regulatory approvals. This is in line with 2019. They were even more prevalent in private equity exits, increasing steadily from half of deals requiring antitrust approvals in 2019, to two-thirds in the first half of 2020 and three-quarters in the latter half of the year.

Reverse break fees continued to make headlines in 2020. We observed from our private M&A deal analysis that the average reverse break fee was 4% of enterprise value (up from 3% in 2019). In public deals it is more like 1-3%, but typically only where there are significant antitrust or other regulatory risks associated with the transaction (and as a price for affording the bidder some flexibility on the nature of any remedies to be offered or agreed). Illumina had to pay PacBio a USD98m fee when it abandoned its planned acquisition early in 2020 due to antitrust concerns in the U.S. and UK. The reverse break fee in the Aon-Willis/Towers Watson deal, which is still undergoing merger control reviews, is USD1bn.

[9] Global trends in Private M&A, research based on over 1,400 M&A deals on which A&O has acted. Please be in touch with your usual A&O contact if you would like to learn more about the results.

Merger review periods held steady despite the pandemic

Average phase 1 review periods[10]

Unconditional phase 1

2019: 19 working days

2020: 20 working days

Conditional phase 1

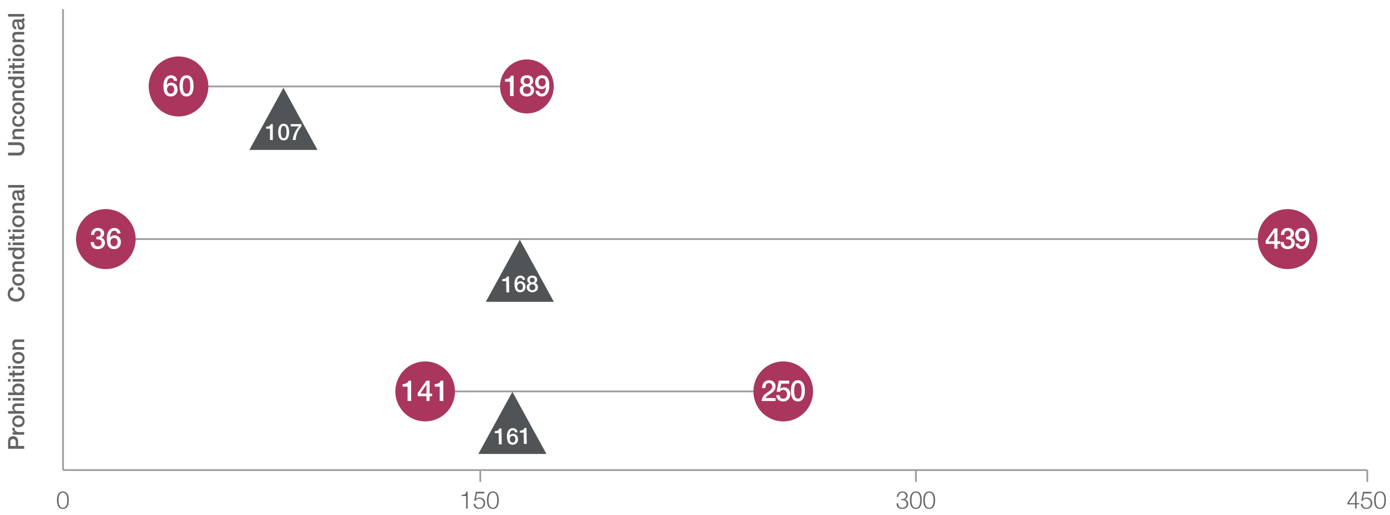
2019: 72 working days

2020: 71 working days

Duration of in-depth investigations[11]

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

▲ Weighted average



[10] Weighted average across all jurisdictions surveyed, with some exclusions where data was unavailable.
[11] From the start of the in-depth review. Excludes South Africa, for which no split could be made.

Measures to streamline merger control review periods have been high on antitrust authorities' agendas in recent years. The Covid-19 pandemic, however, resulted in significant disruption to both deal making and merger control procedures, particularly in the first part of 2020.

A number of authorities – including the EC, and authorities in Belgium, Hungary, Ireland and South Africa – asked merging parties to delay making notifications, especially for non-urgent deals. In some jurisdictions, merger review deadlines were temporarily extended or even suspended, due to the challenges in conducting and completing necessary inquiries with merging parties and other market players. This was the case, for example, in COMESA, France, Germany, Italy, Poland and Spain. In the U.S., the DOJ temporarily requested an additional 30 days to timing agreements and both U.S. antitrust agencies put a short-term halt on granting early termination.[12]

Despite all of this, looking at 2020 as a whole across all jurisdictions, the average duration of review periods for the various types of merger control outcome did not change significantly when compared to 2019. The reason? Many of the Covid-19 measures were only temporary. And in some jurisdictions surveyed (such as China), we saw merger reviews continue largely as normal despite the pandemic, even where officials were working remotely.

Average time to get unconditional clearance at phase 1 (by far the most likely outcome of a merger review) remained steady at 20 working days. The average duration of an in-depth investigation decreased.

But these aggregated figures do not tell the whole story. Looking at individual jurisdictions, as in previous years the picture remains varied, particularly in in-depth cases. The average duration of an in-depth review resulting in remedies, for example, ranged from 36 working days (Italy) to 439 working days (Hungary). Indeed some in-depth investigations, which in the absence of Covid-19 may have concluded in 2020, are ongoing. This suggests that, in some cases at least, we may not see the full impact of the pandemic on review periods until 2021.

EC aims to shorten review periods

In the EU, Competition Commissioner Vestager announced in September that the EC is looking at ways to make reviews faster, including cutting back on pre-notification in straightforward cases and seeking to bring more deals within the scope of the simplified procedure. This is welcome news for merging parties.

However, the steps as described would not appear to address timelines at phase 2, where extensions and stop the clock remain the norm. Each of the four in-depth reviews concluded in 2020 were extended at least once, and two investigations included suspensions (of 49 and 106 working days). A number of phase 2 cases remain on the EC's books, with difficulties in information gathering caused by Covid-19 resulting in suspensions that will stretch the review timeline well beyond the 125 working day statutory maximum.

[12] The U.S. antitrust agencies announced another temporary suspension on granting early termination in February 2021.

UK pushes the fast track

With the exception of phase 1 unconditional clearances which took on average 36 working days (in line with 2019), average review periods rose in the UK. Duration of phase 1 remedies cases was up over 25% to an average of 100 working days. This in large part can be explained by an increase in upfront buyer cases, which enable the CMA to extend its remedies timetable by a further 40 working days.

The CMA has been working on ways to reduce review periods, in particular by expanding the scope of its 'fast-track' procedures. At phase 1, this could involve parties requesting a fast-track to phase 2 (as we saw in Liberty Global/Telefónica) or a streamlined route to the phase 1 remedies process. We saw the latter used in Stryker/Wright Medical in order to align the UK review timetable with that of the FTC and to facilitate remedies discussions between the authorities.

Fast tracks during phase 2 are also possible, where merging parties concede that the deal is anti-competitive in a specific market or markets. It will be interesting to see how much these procedures are used going forward.

U.S. DOJ trials arbitration

In the U.S., the length of in-depth reviews improved last year. For the one prohibited case in particular, the time to get to a preliminary injunction was just over 150 working days – the shortest by some distance since we began our analysis in 2015.

Going forward, the DOJ has a novel tool up its sleeve. In Novelis/Aleris it for the first time used arbitration to resolve a dispute over market definition. The agency has hailed the procedure as a success, saving time and the expense of a federal court challenge. In December, the DOJ published updated guidance on the use of arbitration, signalling that it intends to make greater use of the process. Whether the process is used in the new administration, however, remains to be seen.

Improvements in China but SAMR remedies often still last

In China, 99% of cases benefiting from the simplified procedure were cleared in an average of ten working days. This is down from 12 working days in each of 2019 and 2018.

The average length of remedies cases reduced by over 25% to 208 working days. This is clearly good news for merging parties. That said, SAMR conditional clearances often come several months later than other jurisdictions. In Danaher/GE, for example, the EC issued its remedies decision in 35 working days. SAMR took over 200 working days to reach its decision.

Overall, efforts made or proposed by antitrust authorities to speed up merger review periods in 2020 are welcome. While the global pandemic persists, the full effect of these improvements are, however, unlikely to be felt immediately. In the meantime, parties to complex strategic deals requiring an in-depth investigation should continue to build sufficient time into their deal timetable to allow for merger control (as well as foreign investment) approvals.

Looking ahead: changes in store for merger control policy and practice

Many predicted that 2020 would be the year when policy debates and calls for reform to merger control rules translated into action. But the onset of Covid-19 delayed many of these initiatives, with government and antitrust authority resources being diverted to focus on the pandemic. Other reforms have taken more time than expected to craft. And others still will result from organic development. We are therefore gearing up for 2021 to be a period of significant change to merger control policy and enforcement across the globe. There are six key areas to watch.

Digital, digital, digital

We discussed earlier the abundance of merger control proposals dedicated to the digital sector. These encompass both wholly new regimes and revisions to existing systems. Many are likely to find their way onto the rulebook in 2021 as governments and antitrust authorities face pressure to take swift action.

And we expect to see more studies aimed at analysing the impact on competition of past acquisitions in the digital sector feeding into reform initiatives.

Surge in failing firm cases as the pandemic continues to impact the global economy?

Despite a rebound in M&A levels towards the end of 2020, Covid-19 continues to have a major impact on the global economy, especially in the retail and hospitality sectors. As a result, 2021 is likely to see an increase in attempts by merging parties to rely on the failing firm defence to justify otherwise potentially anti-competitive mergers.

Antitrust authorities will no doubt maintain a hard-line approach to such claims, requiring a significant amount of compelling evidence on the impact of the pandemic on competition in each case. The EC and authorities in the U.S. and Canada have been clear that they will take this approach, as has the UK CMA in refreshed failing firm guidance published in 2020.

But the profound effect of the pandemic on the economy means that some cases will inevitably meet this high threshold. Just how many, however, remains to be seen.

A year of transition for the U.S.

President Biden took office in January 2021. Under his presidency, we may well see more rigorous scrutiny of M&A in the U.S., with the U.S. antitrust agencies having an even greater appetite to challenge deals.

Consumer-facing industries and Big Tech are particularly likely to be in the spotlight. The pharma sector may also be a focus, especially given the appointment of Democratic commissioner Rebecca Slaughter as acting chair of the FTC, who has been an active critic of consolidation in this area.

The direction of the DOJ will depend on who Biden appoints as head of the Antitrust Division – as yet there is no nomination to fill the shoes of the outgoing Makan Delrahim.

And it will take the new appointments time to bed down. In practice, therefore, the real effects of the presidential transition on deal making may not be seen for some time.

Common shareholdings under the spotlight

A number of recent studies have considered the potential impact of common shareholdings on competition in and across markets. The issue: whether investors holding stakes in a number of competing firms in the same sector can coordinate those firms' strategies so that they compete less vigorously.

The conclusion, at least in the EU and UK – both of which published reports considering the issue in 2020 – is that there is currently insufficient empirical evidence to take any action and that more detailed analysis is needed on the causal link between a common shareholding and any actual impact on competition. Further research is expected in 2021. The Competition Commission of India (CCI), for example, has already launched a market study into common ownership by private equity investors.

How this plays out in merger control assessments in practice, however, is not yet clear. To date there have been few cases to consider the issue. The EC took into account common shareholdings in Dow/DuPont and Bayer/Monsanto in 2017 and 2018 but they have not become a regular feature in EU merger analysis.

And there are fewer cases still where common shareholding issues have resulted in intervention (an exception being the CCI's 2020 review of a 3% stake in Intas Pharmaceutical, where concerns over the acquirers' minority shareholdings in other pharma companies led to commitments restricting the exercise of veto rights and information flows). The outcome of further studies will determine how this theory of harm develops in the coming years.

Sustainability moves up the antitrust agenda

Towards the end of 2020, antitrust authorities started to consider how sustainability issues interact with antitrust policy and what, if anything should be done to ensure that antitrust rules do not hinder 'green' initiatives. Much of the debate focuses on behavioural antitrust and State aid. But merger control rules are also under consideration.

In its October call for contributions on competition policy and the Green Deal, the EC noted that mergers could eliminate the pressure between firms to innovate on sustainability aspects of some products or product processes. It is seeking views on how merger policy and environmental and climate policies work together. The EC plans to report on what it has learned by summer 2021.

On the practical side, the EC's chief economist has tasked a group within his team to develop a framework for assessing claims that mergers would help sustainability. Indeed, such arguments are starting to creep into merger assessments. When clearing the Aurubis/Metallo metal recycling deal in May 2020, for example, the EC considered sustainability and the circular economy as a factor.

We expect the debate on these issues to intensify in 2021 and anticipate a growing number of cases where sustainability is a factor in the merger review process.

UK Takeover Code changes set to level the playing field

Proposed amendments to the UK Takeover Code give the Panel, for the first time, the power to assess the materiality of UK and EU regulatory conditions and any remedies required to obtain approvals. This will put the UK and EU on the same footing as regulatory clearances in the rest of the world. It means that, in a UK bid, the bidder will need to prove materiality before invoking conditions relating to CMA or EC merger control approvals (or conditions relating to the planned new UK national security regime).

One potential challenge: in theory, the Panel could force bidders to complete if it considers that such conditions or remedies are not material. This could result in bidders being in breach of merger control rules. In practice, however, we consider it unlikely that the Panel would take this approach. The final amendments are expected to be published in spring 2021.

What does all this mean for merging parties? Expect greater scrutiny – particularly in strategic or transformative cross-border transactions – coupled with increasingly sophisticated merger control assessments. We expect there will be a great deal to report in next year's analysis.

Report authors

Elaine Johnston
Partner – Global Co-Head, Antitrust, New York
elaine.johnston@allenovery.com

Dominic Long
Partner – Brussels & London
dominic.long@allenovery.com

Peter McDonald
Partner – Sydney
peter.mcdonald@allenovery.com

Louise Tolley
PSL Counsel – London
louise.tolley@allenovery.com

Contributing offices

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

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

Our global antitrust practice

Global Competition Review 2021 ranks us in the top 10 of global antitrust practices. Our global team – over 120 antitrust specialists operating from 21 offices in Asia Pacific, the U.S., Europe and Africa – is highly regarded in the main legal directories.

We have an unrivalled and multiple award winning track record of securing merger control clearances for clients from antitrust authorities around the world. We were named Competition Team of the Year 2018 at the British Legal Awards for our work on 21st Century Fox/Sky and we also won Competition Team of the Year 2017 at the Legal Business Awards for our work on the WIND/3 Italia JV between VEON and CK Hutchison. Our other experience includes acting for notifying parties or interveners in some of the most high-profile and complex merger control cases in recent years, for example, Refinitiv/LSEG, Liberty Global/Telefónica, 21st Century Fox/The Walt Disney Company, Asahi/AB InBev, KPN and E-Plus/Telefónica Deutschland, Cargill/ADM, FedEX/TNT, Imperial Tobacco/Reynolds American, Tullet Prebon/ICAP and Saudi Aramco/Lanxess.

Our involvement in these cases demonstrates our ability to secure exceptional results for clients against difficult odds. We have particular expertise in identifying innovative remedies which are likely to satisfy regulators' concerns in the most challenging cases. We also have unrivalled experience in successfully guiding high-profile transactions through national public interest reviews and sector-specific regulatory approval procedures, and managing the interplay between national interest screening regimes and merger control proceedings.

Offices where we have specialist antitrust teams:

North America
New York
Washington, D.C.

Europe
Amsterdam
Bratislava
Brussels
Budapest
Hamburg
Istanbul
London
Madrid
Milan
Moscow
Paris
Prague
Warsaw

Asia Pacific
Bangkok
Beijing
Hong Kong
Shanghai
Sydney

Africa
Casablanca

"We have an unrivalled and multiple award winning track record of securing merger control clearances for clients from antitrust authorities around the world."

GLOBAL PRESENCE

Allen & Overy is an international legal practice with approximately 5,500 people, including some 550 partners, working in over 40 offices worldwide.

CS2101_CDD-62581_ADD-94173_2nd Mar