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Global trends in merger control enforcement

March 2022

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Introduction

We have collected and analysed data on merger control activity for 2021 from 26 jurisdictions.[1] We give you the key trends and developments from the past year, focussing in particular on the EU, UK, U.S. and China.

M&A activity bounced back in 2021. The value of global announced deals increased by 64% to over USD5.8 trillion, a record high.[2]

Unsurprisingly, this went hand in hand with record numbers of merger control filings in many jurisdictions. Across the countries surveyed, the volume of merger control decisions made by antitrust authorities rose by over 30%.

No let-up in antitrust intervention

Overall, antitrust intervention remained high.

In response to global concerns about industry concentration and increasing calls for stricter merger control enforcement to curb the alleged market power of large companies, antitrust authorities continued to take a tough approach.

Debate over reforms fuelled international coordination

All of this activity inevitably put a strain on antitrust authorities' limited resources. But last year those same authorities still found time to engage in policy debates over how best to reform merger control rules.

Tougher scrutiny of digital transactions was high on the agenda, as was how to take account of sustainability issues. Many jurisdictions took steps to bolster their merger control regimes. Strengthening foreign direct investment (FDI) controls was also a key focus.

These debates triggered a marked increase in coordination between antitrust authorities.

A number of cross-jurisdiction initiatives were established in 2021, often focussed on particular sectors, such as digital and pharma. Separately, some authorities got together to advocate for tougher merger control enforcement more generally, aiming to leverage their collective influence.

Meanwhile, antitrust authorities continued the trend of coordinating on individual cases, particularly in relation to remedies packages.

New personnel to chart a different course?

In the U.S., both of the federal antitrust agencies saw new heads appointed. Lina Khan was confirmed as Chair of the Federal Trade Commission (FTC). Jonathan Kanter took office as Assistant Attorney General for the Antitrust Division of the Department of Justice (DOJ). Together these appointments signal a more aggressive and progressive antitrust agenda under the Biden administration.

In China, Gan Lin was appointed as head of the newly formed State Antimonopoly Bureau, which sits within the State Administration for Market Regulation (SAMR). Under her leadership, we expect SAMR to continue to focus on the digital sector.

More personnel changes are set for 2022. The French Competition Authority's new president took office in January. New authority heads are due to take the reins in the UK, Australia, and Ireland during the course of the year. We will see in next year's report how these appointments influence enforcement activity.

[1] Australia, Belgium, Brazil, Canada, China, COMESA, the Czech Republic, the EU, France, Germany, Hungary, India, Ireland, Italy, Japan, the Netherlands, Poland, Romania, Singapore, Slovakia, South Africa, South Korea, Spain, Turkey, the UK and the U.S.

[2] Source: Refinitiv, Full Year 2021.

Major developments in key jurisdictions

At EU-level, we saw a rise in abandoned deals as a result of European Commission (EC) concerns. The EC also stepped up its scrutiny of vertical transactions. It controversially expanded its so-called "referral up" policy. The parties to the first referred transaction, Illumina/GRAIL, appealed the EC's jurisdiction and then completed the deal without waiting for clearance. A gun-jumping investigation is underway.

In the UK, intervention levels fell – a reversal from the record volumes of previous years. But the Competition and Markets Authority (CMA) remained active. It reviewed its first transactions in parallel with the EC. It also issued its first prohibition of a deal involving Big Tech, while imposing a record fine for breach of a freeze order. The UK government pushed forward with plans for reforms to the merger control rules, including in the digital sector. Businesses and officials alike prepared for the introduction of a strengthened and far-reaching UK national security screening regime, which came into effect in January 2022.

Alongside new figures at the helm of the U.S. antitrust agencies, we saw a number of important policy amendments by the FTC, indicating an overall more interventionist approach. Numbers of abandoned cases and merger challenges remained high. All the signs point to increased frustration levels going forward.

In China, SAMR blocked its first deal since it took responsibility for merger control enforcement three years ago. Procedural enforcement cases rocketed, with the authority focussing heavily on non-notified digital transactions. Long-awaited amendments to the Anti-Monopoly Law were proposed.

2021 highlights

Antitrust authorities continued to frustrate M&A, including vertical deals

Page 06

Bolstered rules, new policies and greater international coordination signal tougher enforcement

Page 09

Antitrust intervention targeted life sciences, energy and transport sectors but not (yet) tech

Page 12

Procedural enforcement surged, with China leading the charge

Page 15

Authorities coordinated on remedies as use of behavioural conditions declined

Page 18

Green deals and merger control: sustainability considerations may have a role

Page 22

Tougher foreign direct investment regimes complicated deal making

Page 24

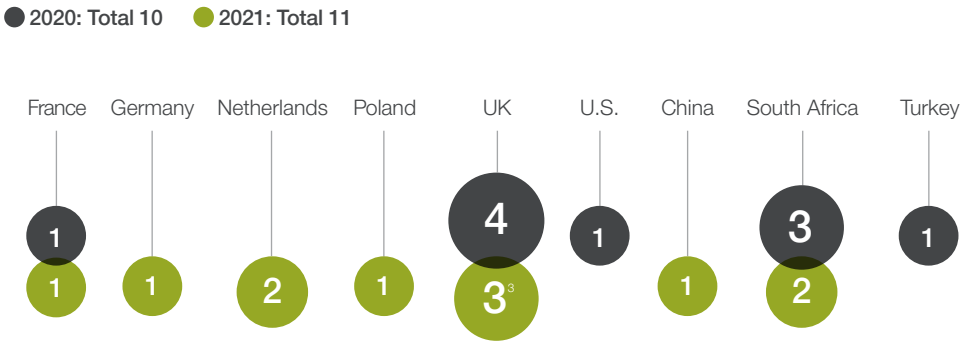
Antitrust intervention in M&A remained high in 2021. Going forward, all signs are that this trend will continue. Expect strengthened merger control rules and tougher enforcement.

Antitrust authorities continued to frustrate M&A, including vertical deals

Total deals frustrated

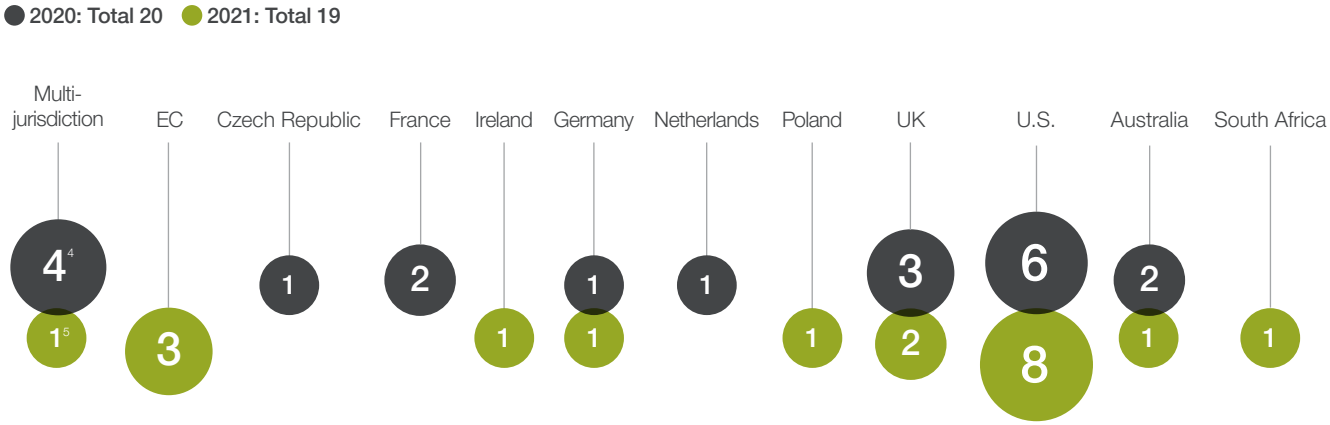
Deals prohibited

by volume



Deals abandoned

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



[3] JD Sports/Footasylum, which was blocked again on remittal in 2021, is included in both 2020 and 2021 figures.

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

[5] Tronox/TTI (abandoned due to antitrust concerns in the U.S. and UK).

In 2021 a total of 30 deals were frustrated in the jurisdictions surveyed. 11 transactions were prohibited and a further 19 were abandoned due to antitrust concerns.

This is in line with 2020's tally. It is perhaps surprising, however, that the figure is not higher, given the increase in global M&A volumes and record numbers of filings in a number of jurisdictions.

The reason for this may be timing.

As the economic climate becomes more settled and deal-making picks up, companies are increasingly willing to engage in strategic, transformative deals. But such transactions usually undergo lengthy merger control scrutiny before potentially being prohibited or abandoned. Data on prohibition and abandonment of deals may be lagging data on deal volumes.

Watch out, therefore, for a rise in frustration levels in 2022.

EC concerns cause a rise in abandoned deals

Three deals were abandoned last year due to EC antitrust concerns, up from just one in 2020. Interestingly, all were in the transport sector: two airline mergers (IAG/Air Europa and Air Canada/Transat) and a shipbuilding transaction.

For the second year in a row, no deals were blocked. However, in early 2022 the EC prohibited Hyundai Heavy Industries' acquisition of Daewoo Shipbuilding and Marine Engineering (DSME), another shipbuilding transaction. No remedies were formally offered by the parties. Hyundai plans to appeal.

The Hyundai/DSME review is also notable in that the EC's decision came over two years after the parties filed the deal. This is unusually long. But in-depth reviews with (sometimes multiple) suspensions and extensions remain a growing trend at EU-level, even for deals that end up being cleared. Parties should be alive to the possibility of delays which might impact the overall transaction timetable.

A dip in frustrated deals in the UK

In a break from the trend of previous years, total deals prohibited and abandoned in the UK dipped in 2021, from nine to six. But this is still a significant number, second only to the number of frustrated transactions in the U.S.

It certainly does not signal a less interventionist approach by the CMA. In fact, late in the year, the authority announced adverse provisional findings in two phase 2 cases. One was cleared in March 2022, subject to a large divestment package. The final decision in the other is due in the coming months.

The CMA's decision to block Meta (formerly Facebook)/Giphy in December was particularly significant in that it marks the UK's first Big Tech prohibition. Meta has appealed.

The CMA started its post-Brexit journey in 2021. It reviewed large and complex mergers in parallel with the EC, although as yet we haven't seen the predicted increase in overall case numbers.

The CMA and EC coordinate on these parallel cases, and some follow a similar path. S&P Global/IHS Markit, for example, was cleared with remedies by both authorities after a phase 1 review. But there is no guarantee of matching outcomes, or timetables. Veolia/Suez was cleared at phase 1 (with remedies) by the EC, but is currently in the midst of an in-depth CMA probe.

In May, the Court of Appeal handed down an important ruling in Sabre/Farelogix. The judgment confirms the CMA's broad discretion to determine whether a merger falls within its jurisdiction and arguably vindicates its expansive approach to the contentious share of supply test. Parties to global transactions will need to consider carefully whether their deals are at risk of being called in for review by the CMA, and could be subject to intervention, even where the nexus to the UK is limited.

"As the economic climate becomes more settled and deal-making picks up, companies are increasingly willing to engage in strategic, transformative deals."

Deals abandoned due to U.S. concerns remained high

Nine deals were abandoned in 2021 due to U.S. antitrust agency concerns. This is in line with 2020, and reflects the agencies' continued willingness to challenge transactions. The agencies sued to block seven deals in 2021. There have been three challenges so far in 2022.

The USD30 billion Aon/Willis Towers Watson megamerger showed how antitrust concerns in one jurisdiction can halt a global transaction. A number of jurisdictions cleared the deal, including the EU where the EC accepted a substantial divestment package. But the DOJ sued to block after finding the proposed remedies did not meet all of its concerns. As a result, the parties abandoned the transaction.

Going forward, expect more litigated challenges. In January 2022, DOJ head Jonathan Kanter made clear in a speech that he favours blocking deals which are likely to lessen competition, rather than trying to fix them with remedies. He also intends to litigate more.

China saw SAMR's first merger block

In July, SAMR blocked a deal between the country's two largest video game live-streaming platforms, Huya and DouYu.

Tencent (which solely controls Huya and jointly controls DouYu) withdrew and refiled the transaction to allow SAMR more time to review, on top of an already extended investigation period. It also offered several rounds of commitments to try to get the deal cleared. Ultimately, the remedies were not enough to resolve SAMR's concerns.

This is the first time SAMR has vetoed a transaction since it took over merger control reviews in 2018, and only the third ever in China since the Anti-Monopoly Law took effect in 2008. It will be interesting to see if 2022 brings any more prohibitions.

> "...a number of frustrated deals in 2021 raised vertical concerns, either on their own or together with horizontal concerns."

Vertical concerns can frustrate deals

Vertical transactions are often seen as pro-competitive, generating efficiencies which are passed on to customers and ultimately consumers. Interestingly, a number of frustrated deals in 2021 raised vertical concerns, either on their own or together with horizontal issues.

In the UK, the CMA's decision to block Meta/Giphy was in part based on concerns that Meta could disadvantage its social media rivals by limiting their access to Giphy's GIFs.

In China, SAMR cited Tencent's ability to implement a "two-way vertical blockade" over upstream and downstream game markets as part of its reasoning for prohibiting Huya/DouYu.

At EU-level, EC officials have flagged a rise in complex vertical mergers. While no vertical deals were frustrated, three out of seven deals referred to phase 2 in 2021 raised vertical concerns. In two of the four conditional phase 2 clearances, remedies were required to address vertical issues.

In a significant move, the FTC rescinded its approval of the 2020 U.S. guidelines on vertical mergers. Chair Lina Khan said they improperly suggested that efficiencies or pro-competitive effects may rescue an otherwise anti-competitive transaction.

We also saw vertical deals being frustrated in the U.S. Tronox and TTI abandoned their metallurgy merger after the FTC (and the CMA) found that the deal could raise vertical threats to competition for a key input.

The FTC also sued to block Nvidia's USD40bn acquisition of ARM. In parallel, the deal was undergoing in-depth reviews at EU-level and in the UK (where the CMA was assessing it on both competition and national security grounds). The parties later abandoned the transaction. The FTC notes that the lawsuit "should send a strong signal that [it] will act aggressively to protect [U.S.] critical infrastructure markets from illegal vertical mergers".

All of this points towards a more aggressive approach to vertical deals which looks set to continue into 2022. We have already seen the FTC sue to block Lockheed Martin's acquisition of Aerojet Rocketdyne over concerns it would enable Lockheed to cut off other defence contractors from critical components for missiles. The deal was then abandoned.

Parties to vertical deals should take heed.

Bolstered rules, new policies and greater international coordination signal tougher enforcement

As part of a push to ensure that merger control rules remain fit for purpose, we saw a flood of rule and policy changes being proposed and, in some cases, taking effect in 2021. Authorities also stepped up efforts to coordinate with one another on policy initiatives and individual cases.

Many of the changes relate to the digital sector, where calls have been loudest for tougher rules to reflect the fast-evolving nature of markets and to address criticism of under-enforcement. Some of the key digital proposals and reforms are set out in the section below.

Other amendments and cooperation initiatives were much broader in scope and varied in nature.

The upshot of all of this change is clear: expect tougher merger control enforcement going forward.

Revised EU referrals policy targets killer acquisitions

In a controversial move, the EC announced an update to its Article 22 referral policy. The EC now encourages Member States to refer transactions to it for review, even where the deal falls below national filing thresholds. This includes completed deals.

The aim is to enable the EC to review so-called killer acquisitions, which might otherwise evade merger control scrutiny. The EC has its sights on deals in the digital, pharma or biotechnology sectors, or other sectors where innovation is an important parameter of competition (and where the competitive constraint posed by the target business may not be fully reflected in its turnover figures alone).

So far, however, the change has not resulted in a deluge of referrals, as some had feared. In fact, only one deal (Illumina's acquisition of GRAIL) has been referred to the EC under the new policy.

The reason? Some Member States, such as Germany, do not agree with the EC's new position. Illumina is also challenging the EC's jurisdiction under the policy in the EU courts. It is likely that Member States and the EC are awaiting the outcome of the appeal before pushing forward.

If referrals do start to increase, merging parties face a great deal of uncertainty. The EC can accept post-closing referral requests with no time limit, although it has indicated that reviews later than six months after completion are unlikely.

New UK guidelines codify interventionist approach

In 2021 the CMA published revised merger assessment guidelines. They set out how the CMA will assess potential and dynamic competition as well as deals in digital markets. They also highlight the CMA's wide margin to gather and use evidence.

Overall, the guidelines signal the CMA's continued willingness to take an interventionist approach to merger control.

Other reforms are under consideration. These include a new jurisdictional threshold aimed at catching more non-horizontal mergers and killer acquisitions, as well as increased sanctions for breaching merger remedies and for providing incorrect or misleading information. There are also plans to make the review process more efficient. We should know more during 2022.

Biden administration pushes for tougher U.S. enforcement

New leaders took the top spots at the FTC (Lina Khan) and DOJ (Jonathan Kanter) in 2021. President Biden issued an executive order urging the agencies, among other things, to revisit anti-competitive mergers that went unchallenged by previous administrations.

We saw the FTC introduce a number of policy amendments. The agency is now sending warning letters to merging parties where it has not taken action in the initial 30-day waiting period, alerting them that closing their deal risks a post-closing investigation. The FTC has also expanded information requests in in-depth reviews and has reinstated the practice of "prior approval", ie including provisions in merger remedies that restrict future acquisitions by the acquirer.

In January 2022 the FTC and DOJ launched a public inquiry seeking information on ways to modernise their merger guidelines to strengthen enforcement against illegal mergers. And we mentioned earlier Kanter's statement that he prefers prohibitions over remedies.

Together, these developments are a clear indication of the Biden administration's progressive and aggressive antitrust agenda.

Proposed reforms in China could impact intervention, timing and penalties

Long-awaited draft amendments to China's Anti-Monopoly Law were published in 2021. Deals in certain sectors – people's livelihood, finance, technology and media – are identified as facing strengthened merger reviews.

A "stop-the-clock" mechanism enabling SAMR to suspend the review period in certain circumstances (eg where parties fail to provide required information) has been proposed. This would give much-needed flexibility to the process but could result in delays.

The amendments also propose a significant increase in penalties for breaching the rules, including gun-jumping. We discuss this later in the report.

We expect the amendments to take effect in 2022.

Australian regulator proposes move to a mandatory regime

In Australia, the Australian Competition and Consumer Commission (ACCC) proposed major reforms, including to switch the long-standing voluntary merger control regime to a mandatory suspensory process. It also proposed a revised test for deciding whether a merger should receive clearance, including a new deeming provision that would prohibit a transaction where one merging party already has substantial market power and the transaction would be likely to entrench, materially increase or materially extend such market power.

Combined with a bespoke regime for acquisitions by certain digital platforms (see below), these proposals, if adopted and implemented by the Australian government, would significantly strengthen the ACCC's powers of intervention. The progress of the proposals is far from certain, however, with both a national election and a change in leadership at the ACCC slated for early 2022. The Australian government has not yet provided its response to the proposals (announced by the ACCC in August 2021) and is unlikely to do so before the election takes place.

"The upshot of all of this change is clear: expect tougher merger control enforcement going forward."

International coordination facilitates a harmonised global approach

Each set of reforms described above is designed to meet a local requirement. However, on top of these proposals, we are seeing authorities ramp up initiatives to cooperate internationally, both informally and by establishing formal dialogues and understandings.

The aim is to coordinate on wider policy goals as well as to discuss the review of individual transactions.

Some key examples:

– a statement by UK, Australian and German antitrust authorities on the need for rigorous and effective merger enforcement from antitrust agencies globally

– an initiative by ASEAN antitrust authorities to develop a portal to share information on merger cases

– a multilateral working group of EU, UK, U.S. and Canadian antitrust authorities looking to take an aggressive approach to tackling anti-competitive pharmaceutical mergers

– the EU-U.S. Joint Technology Competition Policy Dialogue

– a summit between G7 and other antitrust enforcers on antitrust in digital markets

We also saw the emergence of various bilateral cooperation agreements between antitrust authorities. And later in the report we discuss the continued trend for authorities to coordinate on remedies packages in multinational transactions.

Cooperation which facilitates a harmonised approach across jurisdictions can be good for merging parties where it means more predictability and a global landscape that is easier to navigate.

But where this coordination leads to tougher enforcement and increased intervention, dealmakers face a more challenging road to clearance.

Proposals for new powers to intervene in digital mergers are multiplying (and progressing)

EU

On top of the revised Article 22 policy, the proposed Digital Markets Act will require "digital gatekeepers" falling within its scope to notify all transactions involving digital services (and possibly also involving data) to the EC. The details of the regime are currently being debated by the EU institutions.

UK

A planned new regulatory regime for digital would force firms with "strategic market status" to inform the CMA of all mergers. A new threshold, combining transaction value and UK nexus, would bring more digital deals within the scope of the CMA's jurisdiction. A subset of these mergers could be subject to a mandatory review. There would be a lower standard for determining whether a digital merger is anti-competitive, enabling a more interventionist approach.

U.S.

A number of bills have been proposed that target Big Tech. Some seek to outlaw killer acquisitions.

Australia

A tailored merger regime is being considered for large digital platforms that meet pre-defined criteria based on their market power and strategic position in one or more digital platform markets. The regime could include specific notification requirements for relevant digital platforms, and a substantive test that is easier to fulfil.

India

The Indian Competition Commission (CCI) is carrying out a market study into digital M&A with a view to deciding whether to introduce a transaction value threshold.

South Korea

A new transaction value threshold took effect at the end of 2021, designed to capture killer acquisitions in digital (and other) sectors. There are plans for a study during 2022 to determine how to supplement traditional M&A rules to screen platform mergers.

South Africa

The Competition Commission is looking to amend merger guidelines to enable it to review more below-threshold deals in the digital sector.

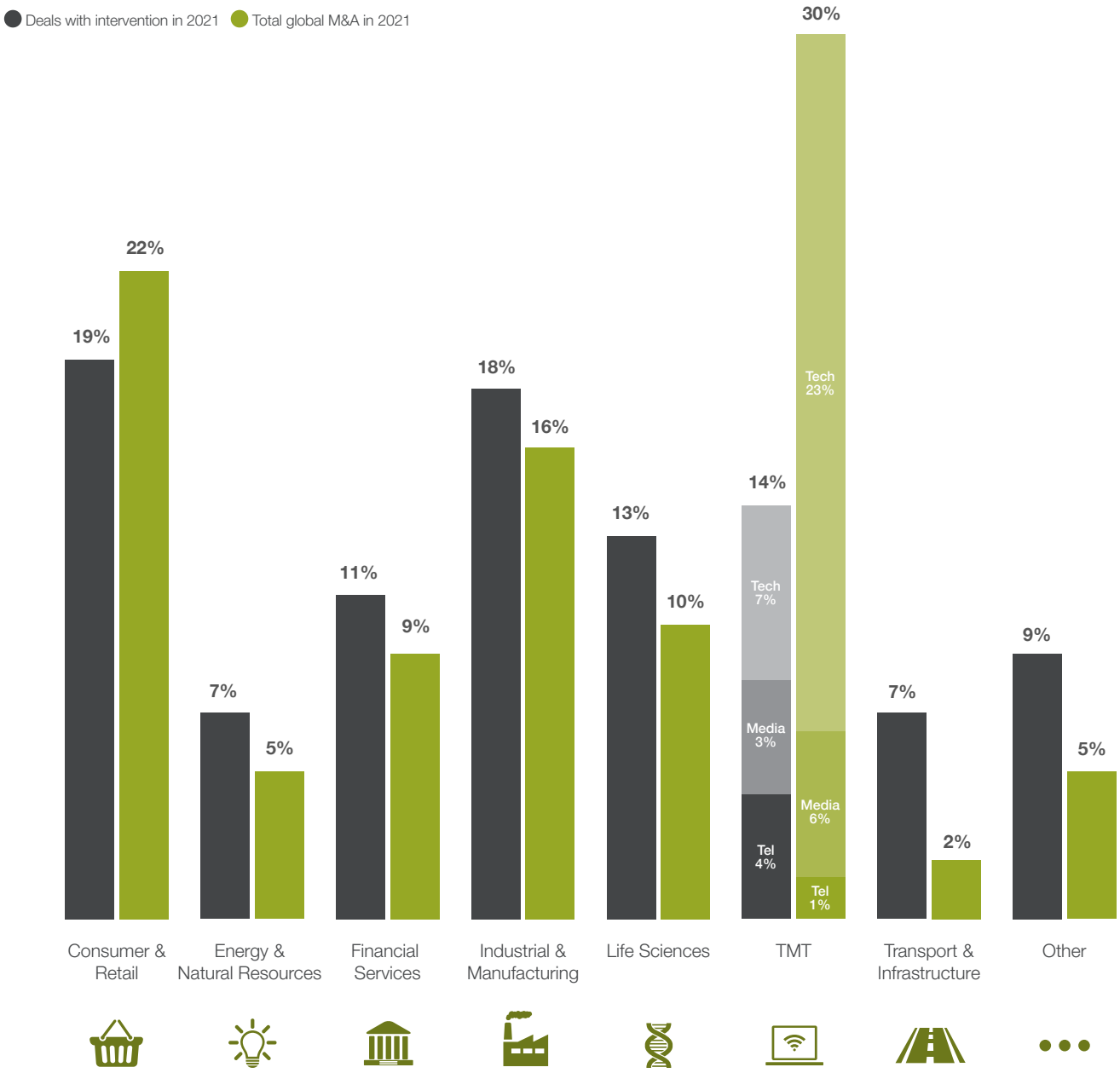
Turkey

From May 2022, acquisitions of "technology undertakings" that have operations or R&D activities in Turkey, or provide services to customers in Turkey, will not be subject to the standard notification thresholds. This includes where the target is active in the field of digital platforms, software, financial or health technologies and biotechnology.

Antitrust intervention targeted life sciences, energy and transport sectors but not (yet) tech

Total antitrust intervention by sector

by volume



Tech acquisitions dominated global M&A in 2021, accounting for over 23% of completed deal volumes. Our data suggests the level of antitrust intervention in the tech sector was comparatively lower, with intervention instead focussed on life sciences, energy and transport transactions. But, looking behind the figures, the picture may be more nuanced.

One reason behind the apparent lag in tech sector intervention is that many of the proposals for new or enhanced merger control scrutiny in the digital sector (as highlighted earlier in the report) have not yet come into effect.

Another explanation is that what could be seen as a digital merger might appear in sectors other than just "tech". For example, Viagogo/StubHub, conditionally cleared in the UK last year, is categorised by the CMA as a recreation and leisure deal. But the CMA was assessing the impact of the transaction on secondary ticketing platforms, which clearly has a digital element.

In fact, there were some notable instances of antitrust intervention in tech transactions last year. The CMA's prohibition of Meta/Giphy, as well as two abandoned tech deals (Crowdcube/Seedrs and Imprivita/Isosec), show the UK authority's focus on the sector. Likewise in China, where SAMR blocked Huya/DouYu and cleared two tech transactions with remedies.

So far in 2022, semiconductor deals have in particular made headlines. This includes the recently abandoned Nvidia/ARM and two deals (AMD/Xilinx and GlobalWafers/Siltronic) that received conditional Chinese clearance.

As new digital rules and regimes take effect, parties to upcoming tech sector deals should be prepared for more aggressive enforcement and increased intervention.

Hospital/healthcare deals frustrated and pharma mergers in the spotlight

Life sciences deals represented 13% of total deals subject to antitrust intervention in 2021, but only 10% of global M&A. A number of hospital/healthcare deals were frustrated, including two prohibitions in the Netherlands.

Signs point to a more aggressive approach to life sciences deals in the future, particularly pharmaceuticals transactions. 2021 saw the establishment of a cross-border working group on pharma mergers, involving the U.S. antitrust agencies (and offices of State Attorneys General), Canadian Competition Bureau, EC and CMA.

The group is considering issues such as types of remedy and the potential impact of pharma mergers on innovation.

The initiative could lead to more consistency and decrease diverging outcomes. But in practice, it is also likely to result in more scrutiny and increasingly detailed reviews.

Concerns in energy deals fixed with remedies

For energy transactions, the figure was 7% of antitrust intervention, compared to 5% of global M&A.

Remedy cases accounted for the majority of this intervention, spanning across a number of jurisdictions, but focussed in particular on the U.S.

We can expect energy mergers to continue to get the attention of the FTC in the coming year.

In August, Chair Khan set out specific actions to address concerns in the oil and gas industry. This includes scrutiny of fuel station mergers. On remedies, she plans to ensure that any divestments do not contribute to further consolidation and will impose prior approval requirements.

Transport deals faced headwinds in the EU

We mentioned earlier in the report that all three mergers frustrated by the EC in 2021 were in the transport (airlines and shipbuilding) sector. A fourth transport deal – Hyundai Heavy Shipping/Daewoo – was blocked in early 2022.

With other transport mergers undergoing in-depth reviews in 2022, and speculation of further airline consolidation in the wake of the pandemic, we may well see transport deals continue to be a focus of antitrust authorities over the coming months.

"As new digital rules and regimes take effect, parties to upcoming tech sector deals should be prepared for more aggressive enforcement and increased intervention."

Financial services, waste management and funeral mergers also saw intervention

There were several high-profile antitrust interventions in the financial services sector.

Aon/Willis Towers Watson, abandoned due to U.S. antitrust concerns, is a key example. Visa/Plaid, which suffered a similar fate, is another. At EU-level, a mixture of horizontal and vertical concerns in relation to LSEG's purchase of Refinitiv led to divestments and access/interoperability remedies.

Elsewhere, we saw consolidation in the waste management and funerals sectors result in intervention, mostly in the form of remedies. These deals fall in the "other" sector category, explaining why this amounted to 9% of antitrust intervention in 2021.

Expect greater scrutiny of labour markets

Cutting across sectors, last year we saw antitrust authorities start to sharpen their focus on the potential effect of mergers on labour markets.

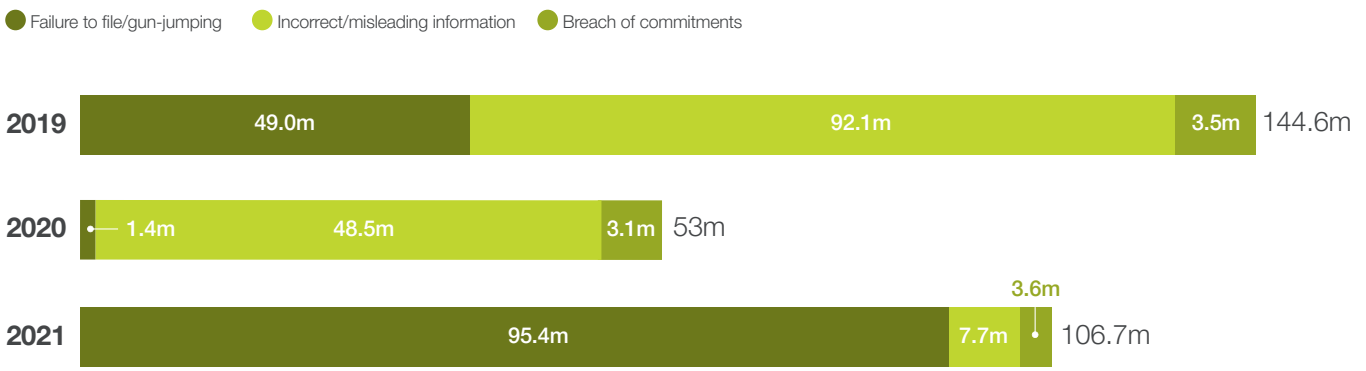
The U.S. antitrust agencies have committed to investigate potentially illegal transactions that substantially lessen competition for labourers, as directed by President Biden's executive order, resulting in requests for information on labour effects during merger reviews. Talent acquisitions ("acqui-hires"), where a company purchases a start-up primarily for its employees, have been a particular topic of discussion among officials.

In terms of actual intervention, in November the DOJ challenged Penguin Random House/Simon & Schuster, based on concerns that the deal might harm authors. Similarly, in the UK the CMA opened an in-depth review into Sony's purchase of AWAL, partly due to concerns over the impact of the transaction on artists.

And in China, "people's livelihood" is identified as a sector for strengthened merger review in the draft amendments to the Anti-Monopoly Law.

Procedural enforcement surged, with China leading the charge

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 2021 (EUR)

Total EU: 10.0m
EC: 7.5m
Czech Republic: 0.18m
Italy: 0.01m
Spain: 2.3m

UK: 59.1m

U.S.: 2.3m

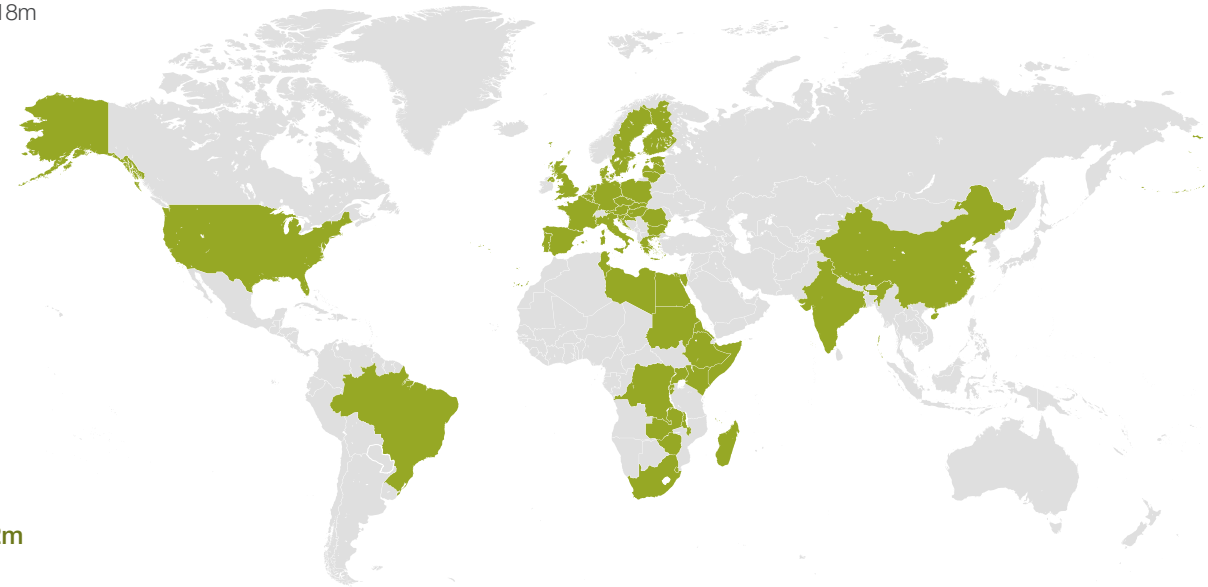
China: 9.4m

COMESA: 0.1m

Brazil: 2.5m

India: 23.1m

South Africa: 0.2m



Merging parties should now be well aware that breaching procedural merger control rules can come at a price. Antitrust authorities kept up their vigorous enforcement in this area in 2021.

We saw a surge in the number and level of fines imposed for procedural breaches last year. Our data shows that antitrust authorities reached over 130 individual infringement decisions in the jurisdictions surveyed, compared to 34 in 2020. Fines topped EUR106 million.

China was the headline enforcer in 2021. SAMR imposed over 100 gun-jumping fines – more than eight times its 2020 tally – totalling EUR9.4m. The section below gives more details.

Elsewhere, 2021 brought some important developments.

Court rulings and interim measures made EU headlines

At EU-level, the General Court handed down a landmark ruling in Altice. The Court confirmed the EC's findings that provisions in the transaction document gave Altice the possibility of exercising decisive influence over PT Portugal before the EC issued its clearance decision (and in some cases even before the deal had been notified). It also upheld the EC's conclusions that Altice intervened in the day-to-day running of PT Portugal, and that sensitive information about PT Portugal was exchanged. Altice has appealed.

Together, the EC's decision and General Court ruling give some guidance on the types of actions that are likely to breach EU gun-jumping rules. But, crucially, neither set out whether any of the particular rights granted to Altice would, on their own, have been enough to confer decisive influence. This lack of clarity will continue to cause practical issues for dealmakers.

In addition, in a historic move, we saw the EC impose interim measures for gun-jumping for the first time. It followed Illumina's public announcement that it had completed its acquisition of GRAIL, despite the EC's ongoing phase 2 review. Unsurprisingly, the EC swiftly launched a gun-jumping investigation and then ordered the parties to keep GRAIL separate from Illumina and not to share confidential information. Both parties have appealed. The outcome of the investigation and the appeals are hotly awaited in 2022.

Finally, the EC fined Sigma-Aldrich EUR7.5m for providing incorrect or misleading information during the 2015 review of its takeover by Merck. The authority found that Sigma-Aldrich failed to disclose an innovation project that was closely linked to the business to be divested as part of the remedies package.

Following the decision, merging parties should expect higher fines for information breaches relating to R&D. The EC notes that, as R&D is typically secret, it can only learn about these projects through truthful submissions by the parties.

Record UK fine for breach of a freeze order

In October 2021, the CMA imposed a GBP50.5m fine on Meta after finding that it breached an initial enforcement (ie hold-separate or "freeze") order put in place in relation to its completed acquisition of Giphy. These orders are typically put in place to prevent integration before a final decision is reached.

The CMA found that Meta breached the terms of the order by "consciously" not providing all of the information it was required to submit to the authority. It imposed a GBP50m fine, and a further GBP500,000 penalty after concluding that Meta changed its Chief Compliance Officer without first seeking consent.

The fine is significantly higher than other CMA penalties for freeze order breaches. The previous highest was GBP325,000. It shows the authority's increased willingness to take a tough approach. In February 2022, the CMA imposed a second fine on Meta – GBP1.5m – for allegedly failing to alert the CMA of key staff leaving the company. It also fined JD Sports and Footasylum nearly GBP4.7m for breaching a freeze order and failing to fully respond to information requests.

Importantly for merging parties, these decisions demonstrate that UK freeze orders can contain extremely broad obligations, stretching across all activities of the acquirer and not just its UK operations.

Repeat offenders faced penalties in the U.S.

In each of the four fines for breach of U.S. merger control rules in 2021 the infringer had been fined before by the U.S. agencies, or at least warned about non-compliance.

Two of the decisions relate to individuals, who failed to make the necessary filings in relation to stock acquisitions. In recent years the U.S. agencies have repeatedly shown their willingness to enforce the HSR rules against individual investors, with fines reaching above USD500,000 on several occasions.

"We saw a surge in the number and level of fines imposed for procedural breaches last year."

Some procedural breaches can negate the underlying clearance

In India, we saw the CCI suspend its clearance of Amazon's 2019 acquisition of Future Coupons after finding that Amazon did not provide full information in its notification. This is the first time the CCI has taken such action. It also imposed a record INR2.02bn (EUR23.6m) fine. Amazon was ordered to re-notify. The company has appealed.

Brazil's CADE revoked its 2014 clearance of a petrochemical acquisition and imposed a EUR1.4m fine because the parties did not comply with behavioural commitments. On appeal, the CADE Tribunal approved the transaction based on new commitments negotiated with the parties. In a second case, clearance was also revoked due to non-compliance with structural remedies, although no fines were imposed.

COMESA imposed its first fines

Under COMESA merger control rules, notifications must be made within 30 working days of the decision to merge. In 2021, the Competition Commission imposed its first ever penalty for failure to notify within the time limit. The parties to the deal – the acquisition of telecoms infrastructure providers in Madagascar and Malawi – were fined 0.05% of their COMESA turnover, amounting to around EUR86,000. The transaction was ultimately cleared unconditionally.

The decision is a reminder to merging parties that, while many jurisdictions have dropped filing deadlines from their merger control regimes, some do remain.

Separately, the Competition Commission fined ATC Heston EUR57,000 for breaching commitments relating to its acquisition of Eaton Towers in 2019. The authority found that ATC had made a submission ten months later than the deadline set out in the undertakings.

Tech deals in focus as China's SAMR ramps up enforcement action

Number of gun-jumping decisions in China

Total gun-jumping fines in China

China has consistently led the rankings for the number (if not value) of fines imposed for breaches of merger control rules, out of the jurisdictions surveyed. But past years pale in comparison to 2021, where we saw 107 separate decisions for gun-jumping infringements.

There are three main points to take away from last year's enforcement actions.

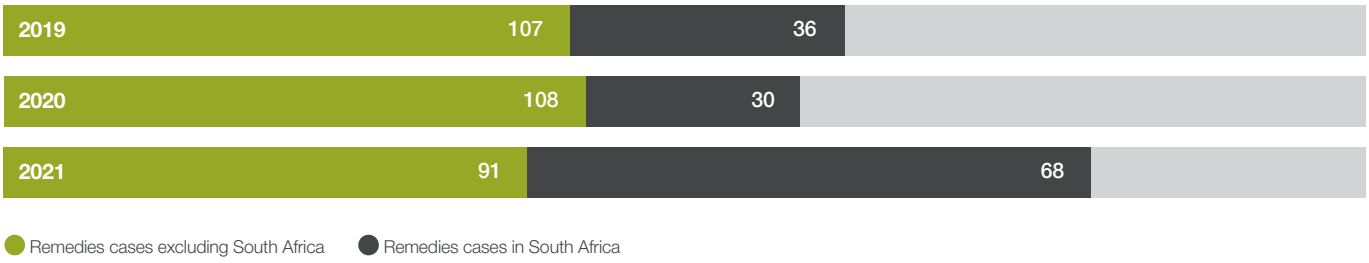
1. VIE-structures continue to face scrutiny
A significant proportion of the 107 enforcement decisions related to tech deals. This was after SAMR announced in 2020 that it was investigating past gun-jumping cases in the sector and encouraged firms to approach it to report completed deals. Many of the transactions involved variable interest entity (VIE)-structures – complex contractual arrangements that allow foreign investors to enter restricted sectors of China's economy. We expect SAMR to continue to take a hard line on non-notified tech transactions, whether past or future.

2. Remedial measures may be imposed on top of a fine
As well as imposing a fine on Tencent for failing to file its acquisition of China Music Corporation, SAMR also ordered Tencent to take remedial measures to restore market competition. In particular it required the firm to abolish exclusive music licensing rights. This is the first time we have seen SAMR take such action. It will be interesting to see if remedial measures become a more regular fixture in SAMR's merger control enforcement practice.

3. Expect fines to get much higher
The majority of the penalties imposed by SAMR in 2021 were the maximum possible amount under current rules (RMB500,000, approx. EUR65,500). But proposed amendments to China's Anti-Monopoly Law would give SAMR the power to impose fines of up to ten times that figure (RMB5m, approx. EUR655,000) for deals that raise no competition concerns. Where a transaction has or may have the effect of restricting competition, the cap will rise to 10% of turnover. And, significantly, the total fine could be increased by two to five times where SAMR finds the violation is extremely serious.

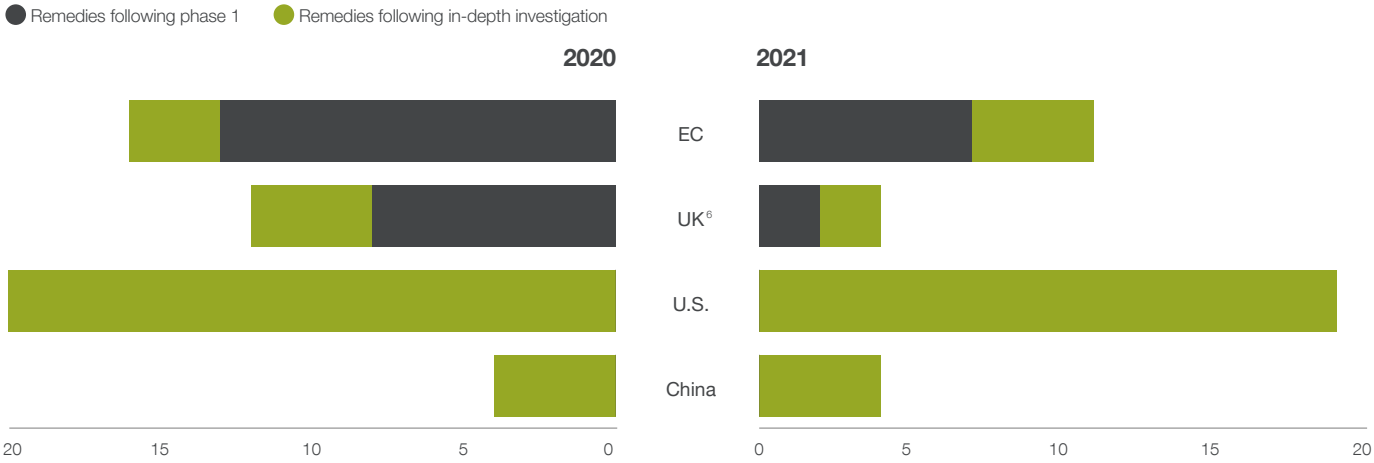
Authorities coordinated on remedies as use of behavioural conditions declined

Total remedies cases



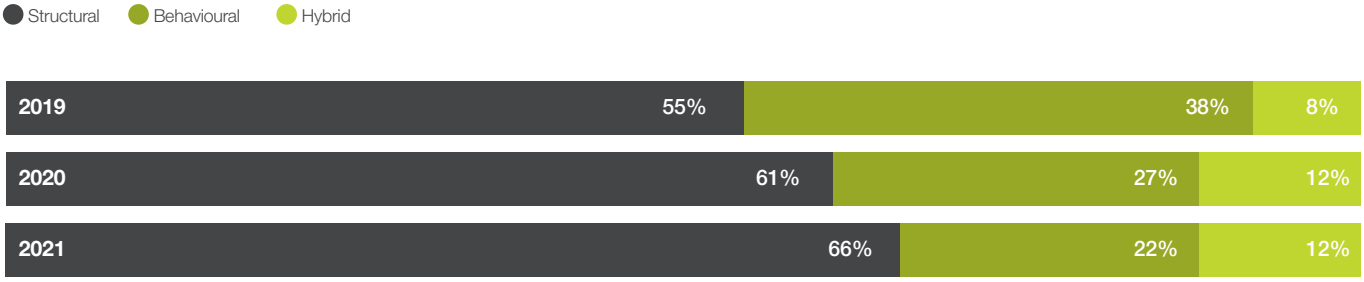
Remedies cases in selected jurisdictions

by volume



Conditional clearances by type of remedy[7]

by volume



[6] 2021 data includes FNZ/GBST which was conditionally cleared on remittal.

[7] Excluding South African remedies cases.

In 2021 there were a total of 159 remedies cases. 32 were agreed at phase 1 and 59 were put in place after an in-depth investigation.

The remaining 68 conditional clearances relate to South Africa, where no split between phase 1 and in-depth cases can be made.

This is an increase from 2020's total of 138. But this rise is solely attributable to South Africa, where the number of conditional cases more than doubled in 2021. Excluding these from the data, we actually see a 16% decrease from 108 to 91 remedies decisions.

The majority of this drop is due to a fall in conditional clearances in the EU (by nearly one third) and the UK (by two thirds). In both jurisdictions, the decrease was most noticeable at phase 1. Often such a trend can be explained by an increase in referrals to phase 2, but that was not the case in 2021.

One possible reason is that antitrust authorities are becoming increasingly sceptical of whether remedies can adequately address their concerns. As mentioned earlier, according to DOJ head Jonathan Kanter, merger remedies too often miss the mark. In his view, where the DOJ concludes that a merger is likely to lessen competition, in most situations the agency should seek a simple injunction to block. We may well see fewer U.S. remedies cases in the coming months.

Use of behavioural commitments falls again

In 2021, 45% of all remedy cases involved a behavioural element, either on its own or in combination with structural divestments (so-called "hybrid" cases). This is consistent with 2020.

However, excluding South African remedies decisions from the data – most of which are behavioural in nature with many comprising employment-related commitments – shows a different trajectory. In 2021, 34% of conditional clearances had a behavioural element, down from 39% in 2020 and 45% in 2019.

Why the decline? Statements by a number of antitrust authorities last year demonstrated that they strongly favour structural over behavioural remedies. Most notable was a joint notice by the UK, Australian and German authorities stating that taking action to block deals or impose structural divestments is more likely to preserve competition than behavioural remedies. This preference could well be starting to play out in practice.

In China, however, behavioural remedies are commonly accepted. They featured in three out of four conditional clearances last year. And in one transaction (SK Hynix/Intel) we saw SAMR accept an unprecedented commitment – that the merged entity must assist a third party rival to enter the market. It is unclear how this condition will be implemented in practice, and whether we will see it in future cases.

The data on behavioural remedies in next year's report will be very interesting. Despite certain authorities advocating that "structural fixes are better", a clear tension arises as a result of the increased scrutiny of vertical mergers that we noted earlier. Vertical issues are often more appropriately dealt with by behavioural commitments. Take the January 2022 EC clearance of Meta/Kustomer, for example. The EC's foreclosure concerns were addressed by access commitments. Watch this space over the coming year.

No uptick in upfront buyer/fix-it-first

In last year's report, we predicted that a potential lack of viable remedy takers due to the turbulent economic climate might mean an increase in the use of upfront buyer and fix-it-first remedies.[8] This has not, however, played out in practice.

At EU-level, there was an upfront buyer/fix-it-first requirement in 50% of cases involving divestment. This is in line with 2020. The U.S. was similarly steady: in 14 out of 18 divestment cases in 2021, compared to 16 out of 20 the year before. And there was a drop in their use in the UK: only 25% cases, down from 50% in 2020.

There was an interesting divestment in Germany. A waste disposal joint venture was cleared unconditionally after a divestment took place and contractual commitments were accepted. German merger control rules do not allow conditional clearances at phase 1. It appears that these "remedies" were offered and implemented during the pre-notification period, enabling the FCO to clear the transaction at phase 1, considering only the situation after implementation of these measures – in effect akin to a fix-it-first remedy.

[8] 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.

More time to put remedies in place

In view of the challenging economic environment, some antitrust authorities extended remedy implementation deadlines to try to ensure that the conditions could be fulfilled.

There were examples of extensions to divestment deadlines in Brazil and the Netherlands. In the EU, PKN Orlen's acquisition of Grupa LOTOS was conditionally cleared by the EC in July 2020. After two deadline extensions, the merged group announced that it had entered into all of the agreements to sell the divestment businesses in January 2022, 18 months later.

We also saw cases where parties did not manage to implement remedies before the deadline. Some had severe consequences. In Brazil, for example, the CADE Tribunal blocked Hapvida's planned purchase of Plamed when the parties failed to sell off assets within the required period. The Tribunal rejected the proposed buyer as unsuitable.

Coordination to reach a "global" solution

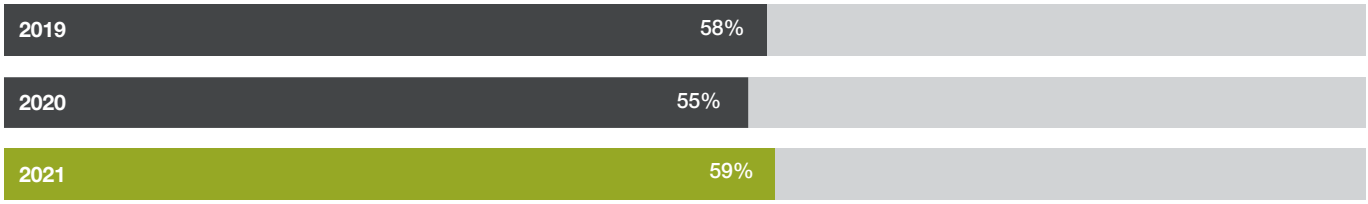
There were yet more cases in 2021 where antitrust authorities coordinated closely on the design of remedy packages to address concerns across multiple jurisdictions.

S&P Global/IHS Markit was a prime example. Divestment remedies were agreed first with the EC. Similar packages were then announced in the U.S., Canada and the UK.

But as we mentioned earlier in the report, offering global remedies is not always successful, especially where there are specific local antitrust concerns. Aon and Willis Towers Watson agreed to divest USD3.6bn of global assets to resolve the EC's and other authorities' concerns over their merger. Ultimately, though, this was not enough to satisfy the DOJ which sued to block the deal. The parties abandoned the deal.

Spotlight on execution risk: sellers were keen to close the deal

Antitrust, regulatory or foreign direct investment conditions in private M&A



Foreign direct investment conditions in private M&A

"Hell or high water" commitments in private M&A

Execution risk continued to be a key focus for merging parties in 2021. According to our research on global private M&A deals,[9] the number of deals subject to antitrust, regulatory or foreign investment approval conditions remained relatively steady at 59%.

But focussing only on FDI approval conditions, we saw a remarkable increase. They rose from 11% in 2020 to 18% last year. And they almost doubled from 23% to 42% for deals valued at over USD500m. This reflects the continued proliferation and toughening of FDI regimes. See later in the report for more on this.

In deals requiring regulatory approval, sellers increasingly attempted to push execution risk on to buyers. In particular we saw a significant rise in the number of "hell or high water" provisions, compelling the buyer to do everything in its power to secure approval.

Over the past five years, appearance of these clauses in our private M&A deals has risen from 24% in 2017 to 44% in 2021. This might be linked to FDI conditionality, with sellers requiring hell or high water provisions for deals that trigger technical FDI filings even though there is no obvious risk to national security.

Reverse break fees, however, have been in decline in private M&A transactions since 2018. Only 8% of conditional private deals in 2021 provided for one. This suggests that sellers are keen to close the deal by whatever means possible, rather than receive compensation for a transaction that ultimately falls apart.

Where we did see reverse break fees in private M&A in 2021, they tended to be in smaller deals. Here, the value of the fee relative to enterprise value is often higher. As a result, our data shows that the average fee was 9% of enterprise value or USD15m, up from 4% in 2020.

We also saw reverse break fees in public M&A. Aon had to pay Willis Towers Watson a USD1bn fee (3% of deal value) when it abandoned its planned acquisition. The reverse break fee in Microsoft/Activision Blizzard, which is still undergoing merger control reviews, is USD2-3bn (3-4% of deal value), depending on timing.

[9] Global trends in Private M&A, research based on over 1,500 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.

Green deals and merger control: sustainability considerations may have a role

M&A strategy is increasingly being driven by environmental and sustainability factors. The question of how to take these issues into account when assessing mergers is increasingly on the agenda of antitrust authorities across the globe.

There have been few merger control cases so far that have explicitly dealt with sustainability.

Some authorities, such as the EC, have started to take environmental issues into account when defining relevant markets, or even as a parameter of competition. In its 2021 decision on Schwarz/Suez, for example, the EC noted that environmental costs of transport were a factor taken into account by customers when awarding tenders.

But we have to look to policy documents and guidance for clues as to how antitrust authorities might deal with environmental and sustainability issues more broadly in their merger control assessments. Several were published in 2021, mainly in Europe. Three headline points are emerging.

1. Merger control intervention is unlikely to be used to prevent harm to the environment

This is the position of the EC. It appears unlikely that the EC would block a deal or impose remedies on environmental/sustainability grounds alone. The authority says it has no mandate to intervene on this basis.

Some authorities, however, may be more willing to investigate theories of harm based on sustainability considerations. In 2021 we saw the Dutch authority assess whether a calf-purchasing deal could lead to less sustainable dairy farming, albeit alongside more traditional considerations such as buyer power. The deal was ultimately cleared.

2. Intervention is more likely to protect green innovation

The EC says that it will enforce merger control rules strictly in order to protect green innovation. It gives the example of deals that might impact R&D or reduce incentives to innovate on environmentally friendly technologies.

In particular, the EC has stated that it will use its revised Article 22 policy (described earlier in the report) to prevent possible “green killer acquisitions” ie deals involving nascent green innovators.

Other European antitrust authorities, such as in Ireland and Spain, have agreed that such transactions could lead to concerns. In the UK, one of the CMA’s concerns in its ongoing review of Veolia/Suez is that loss of competition could reduce innovation to achieve net-zero targets.

3. Sustainability efficiencies or benefits could outweigh antitrust concerns

In revised UK merger assessment guidance published last year the CMA notes that sustainability benefits can be relevant to the merger control assessment and might outweigh antitrust concerns. The same goes for benefits that support the transition to a low-carbon economy.

At EU-level, the EC's chief economist has announced that his team are developing a framework for assessing "green efficiencies" in merger reviews.

In practice, this balancing exercise is likely to be difficult. In a recent call for submissions, the CMA has acknowledged that quantifying sustainability efficiencies or customer benefits could be challenging or not even feasible. It might be hard, for example, to show that a claimed benefit is merger specific. And the EC has indicated that it is likely to be less convinced of parties' arguments where the efficiencies occur in markets outside those in which the antitrust concerns have been identified.

Over the next 12 months we expect to get a better idea of how authorities intend to tackle sustainability efficiencies and benefits. Unhelpfully for merging parties, we may see differing approaches emerge across jurisdictions.

Merging parties be prepared

For now, acquirers of green innovators or businesses with sustainability activities should:

– take into account the real risk of an EC investigation, even where EU or Member State merger control thresholds are not met

– be prepared to have robust evidence to support any green efficiencies arguments put forward in merger control notifications

"Some authorities, such as the EC, have started to take environmental issues into account when defining relevant markets, or even as a parameter of competition."

Tougher foreign direct investment regimes complicated deal making

Continuing the trend from 2020, the tightening of controls on FDI and national security screening were high priority for many jurisdictions last year. Nearly 100 jurisdictions now have some form of foreign investment law, including 88% of the jurisdictions surveyed in this report.

23 of the 26 jurisdictions surveyed have FDI regimes and 16 introduced or proposed new/strengthened regimes in 2021

With regimes varying in scope and approach, and often a lack of transparency over processes and/or substantive concerns, navigating the international FDI landscape is becoming increasingly complex and challenging.

It is therefore important that merging parties consider FDI early in the transaction process.

They should factor in the need for (often extensive) analysis of the FDI position in the jurisdictions where the target has operations, and ensure the transaction timetable takes into account any relevant review periods. Early engagement with authorities in cases which may raise concerns may be appropriate, as might upfront consideration of remedies.

In cases where multiple FDI (and merger control) filings are required, parties should adopt a clear global filing strategy. They should take care to present a consistent narrative to regulators across jurisdictions. The sequencing of filings is also important. This will help maintain control over the deal timetable. It might also be possible to use clearance in one jurisdiction to support the case put forward in another.

We saw three key FDI themes in 2021.

1. Governments used FDI rules to frustrate deals

In 2021, we saw instances of transactions being blocked or abandoned as a result of government intervention under FDI regimes.

France, for example, blocked the proposed takeover of French retailer Carrefour by Canadian group Couche-Tard due to concerns over food security and food sovereignty.

Intervention stepped up in Italy. Verisem/Syngenta as well as two semiconductor deals were blocked under the Golden Power regime. It is worth noting more generally that semiconductor transactions remain under close scrutiny. In early 2022, GlobalWafers failed to get German FDI clearance for its acquisition of Siltronic. Nvidia/ARM was undergoing an in-depth UK investigation on both competition and national security grounds, before the parties abandoned the deal.

In Australia, China State Construction Engineering Corporation withdrew a bid to acquire a stake in Probuild following advice that the application would be rejected by the Foreign Investment Review Board (FIRB) on national security grounds.

Overall, however, transactions frustrated by FDI intervention remain rare. A recent EC report shows that, of over 360 investments formally screened by EU Member States in 2020, only 2% were prohibited.

2. The EU FDI framework led to more screening and new regimes

The EU FDI Regulation celebrated its first anniversary last year. The EC reported that from October 2020 to June 2021 it screened 265 transactions notified under the new regime.

The Regulation establishes a cooperation framework for screening foreign investments into the EU, based on the regimes in individual Member States. A Member State receiving a filing under its national FDI regime must immediately inform all other Member States and the EC of that filing and provide information as required by the other Member States and the EC. In practice, this is causing parties to transactions that are clearly notifiable under the FDI regime of one Member State to take an increasingly cautious approach when considering FDI filings in other Member States.

The EU FDI Regulation encourages – but does not require – Member States to adopt FDI regimes complying with certain minimum standards. Prompted by this, new Czech and Slovak screening regimes took effect in May. This means that 18 Member States now have an FDI regime. Six others have taken steps to introduce one.

Other Member States tightened existing controls. In Germany, we saw the expansion of the mandatory clearance requirement to a number of new (mostly high-tech) sensitive sectors, plus clarification of which add-on acquisitions fall in scope. A broader definition of "critical infrastructure" applied from 1 January 2022, bringing more firms within the rules.

The EU also progressed its plans in relation to foreign subsidies. Draft legislation published in May includes a mandatory notification regime for transactions where the EU turnover of the target (or of at least one of the merging parties) is EUR500m or more, and the amount of the financial contribution by a non-EU government exceeds EUR50m over the previous three years. If the rules are adopted, the EC will be able to block deals or impose remedies. The draft is currently being considered by the European Parliament and Council.

3. Outside the EU many existing regimes were strengthened

In the UK, much of 2021 was spent gearing up for the commencement of the new national security regime on 4 January 2022. The new rules dramatically expand the UK government's ability to review transactions on national security grounds.

There is a mandatory notification regime for acquisitions (by UK or foreign entities) in 17 sensitive sectors, backed by draconian penalties where parties fail to notify (including criminal sanctions, fines and the underlying transaction being void). In addition, a wide "call-in" power enables the scrutiny of acquisitions of entities or assets across the UK economy, even where a mandatory notification is not required. There are no turnover or market share thresholds, and the target need only operate in the UK or supply customers in the UK to fall within scope.

The full impact of the new regime will emerge over the coming months.

In Australia, major changes took effect in January 2021. Certain investments in sensitive national security land or businesses now require notification to and approval from FIRB, regardless of value. Enhanced powers were also introduced for the Treasurer to "call-in" transactions not otherwise requiring approval and to reconsider transactions already approved. And, in December, the Australian government proposed amendments to legislation that will expand the categories of critical infrastructure to include assets in 11 additional sectors, meaning more notifications will be triggered.

New Chinese regulations at the beginning of 2021 expanded the scope of transactions and sectors that may be scrutinised for national security purposes. Separately, however, China seeks to keep inbound foreign investment flowing. It has lifted restrictions in a number of sensitive sectors over the years, such as financial services, telecoms and automotive manufacturing.

In the U.S., aggressive enforcement by the Committee on Foreign Investment in the United States (CFIUS) continued during 2021. CFIUS is increasingly imposing risk mitigation measures, such as limiting post-closing access by non-U.S. persons to acquired U.S. businesses, as a condition for granting clearance. It is more frequently communicating and coordinating with other governments. There is also a growing trend for parties to seek clearance, even for transactions that pose no clear U.S. national security issues, to mitigate any potential risk that CFIUS might investigate post-signing or post-closing.

In Canada, updated FDI guidelines contain enhanced national security review measures for certain foreign investments.

But this tougher approach was not taken in all jurisdictions last year. India, for example, loosened restrictions and increased caps on permissible investments.

"...navigating the international FDI landscape is becoming increasingly complex and challenging."

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