Simpson Thacher

Global Merger Regulation

Key Themes in 2023 and Predictions for 2024

January 2024

Preamble

2023 saw M&A volumes plummet while regulatory interventions continued to grow in both number and complexity. We have surveyed the rapidly changing landscape for antitrust and foreign investment regulation across three leading jurisdictions; the US, EU and UK. Here are our key themes from 2023 and predictions for 2024:

1 New antitrust paradigm crystallises in the US – will the courts fall in line?

The US agencies continued their aggressive enforcement agenda in 2023, having shown now that their bite matches their bark in terms of willingness to litigate tough cases. While formal complaints were down from 2022 (6 in 2023 vs. 10 in 2022), companies abandoned mergers in droves in the investigational stage in 2023 — 10 deals were abandoned in the face of the mere threat of litigation. After a dismal 2022 in which they had only one win to five losses, and two bruising high profile FTC defeats in the first half of the year (*Meta/Within* and *Microsoft/Activision*), the US agencies ended on a high with significant wins in *Illumina/Grail* and *IQVIA/Propel*, for an overall record of three wins to three losses. 2023 also saw the agencies change tack on settlements, settling three cases mid-litigation.

2 Across the Atlantic, the UK remains highly interventionist while the EU relies on conditions.

The CMA hit a new high for Phase I remedies in 2023, which were accepted in 34% of cases, up from 30% in 2022 (and significantly higher than the 5% rate in 2021). Progressing to Phase II remained a dangerous prospect, with 40% of deals prohibited or abandoned, and conditions accepted in 20% of cases. In contrast, the EC only blocked a single deal in 2023 and cleared 56% of its Phase II cases with conditions.

3 Ecosystem theories of harm at epicentre of most high-profile cases.

In the EU, for instance, a staggering *two-thirds* of merger control cases involving remedies at Phase I or II (including prohibitions) featured a non-horizontal theory of harm. Ecosystem theories were also at the heart of high-profile cases that led to diverging outcomes from key regulators, such as *Microsoft/Activision*, *Amazon/iRobot* and *Booking/Etraveli*.

4 Did PE rhetoric result in enforcement action?

While PE firms did not face an avalanche of new merger control enforcement actions in 2023, they remained under close scrutiny, particularly in the US and the UK. For instance, FTC Chair Lina Khan warned about the dangers of "roll-up" strategies and brought an action aimed at thwarting such a strategy involving Texan anesthesiology firms. In the UK, the CMA uncovered a high degree of consolidation in the vet sector and probed a number of relevant roll-up acquisitions, which also triggered a market study in the same sector.

5 Behavioural remedies: down, but not out?

Behavioural remedies are still strongly disfavoured in the US, but there are signs the tide is beginning to turn. The FTC settled *Amgen/Horizon* based on a pure behavioural remedy, a first under the Biden administration. Over in the UK, the CMA loudly and repeatedly proclaims its own disdain for behavioural solutions, but *Microsoft/Activision* suggests that position still leaves room to explore creative solutions. In the EU, by contrast, the EC is still required to consider behavioural solutions where they are offered by merger parties and has demonstrated it will accept them in appropriate cases.

6 EU/UK diversion: searching for common ground with an eye to D.C.

2023 did not see the EU and UK achieving high levels of alignment; more than 40% of overlapping cases experienced some form of divergence, with 6% prohibited by the CMA despite conditional clearance from the EC, 13% cleared at Phase 1 by both authorities but with different remedies and/or theories of harm, and a staggering 22% cleared with different conditions at different stages.

7 Telecom decisions provide an important "checkpoint" for European merger control.

2023 was a milestone year for the telecoms sector – and EU merger control – with the EU's highest court, the ECJ, backing the EC's original prohibition of the *Hutchison/O2* merger in the UK (originally decided by the EC in 2016, before Brexit took full effect). 2024 looks set to be similarly momentous, with the EC expected to hand down its Phase 2 decision on the planned merger of Orange and MasMovil's Spanish operations taking into account a significant remedy solution offered by the parties. In the UK, all eyes will be on the CMA's review of the *Vodafone/CK Hutchison* tie-up, which is another four to three consolidation attempt between domestic mobile network operators.

8 Digital mergers remain top-of-mind.

In the EU, the Digital Markets Act (DMA) came into force in 2023, which added teeth to merger control in relation to firms designated as "gatekeepers." In the UK, digital mergers will also come under further scrutiny in 2024 with the impending Digital Markets, Competition and Consumers Bill (DMCC). This legislation will similarly introduce stricter merger reporting requirements for any firms designated as having "strategic market status" (the equivalent to a "gatekeeper" designation under the EU's DMA).

9 National security and foreign subsidy concerns continue to drive increased governmental scrutiny.

FDI regimes continue to proliferate and expand in scope throughout Europe and the world. In the EU, the EC reported a significant increase in the proportion of formally screened cases in 2022 (EU figures are reported with a one-year lag), at 55% compared to only 29% in 2021. In the US, CFIUS's 2023 annual report revealed record levels of engagement by dealmakers in 2022, alongside increasing case volumes, longer review periods, increased reliance on the use of mitigation and an increase in the number of non-notified transactions for which the Committee sought a post-closing filing.

10 Adapting contractual stance to changed paradigm.

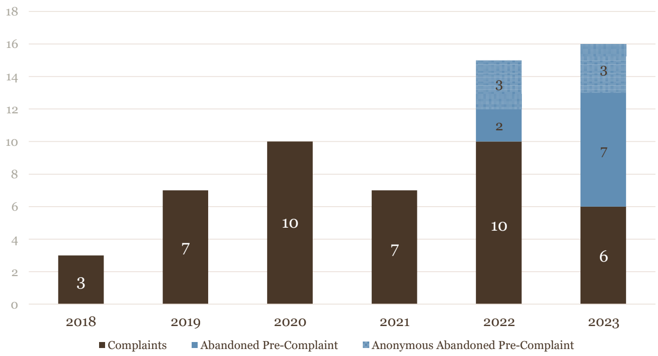
The most noticeable trend in market practice is perhaps the most intuitive: "outside dates" (also known as "long-stop dates") are materially longer today than they were two years ago. For instance, the average length from the date of execution to the outside date on a representative sample of large-cap US M&A deals we reviewed in 2021 was 235 days, increasing by almost 14% to an average of 267 days in 2023. On the other hand, we have not seen an accompanying rise in the US of "ticking fees", while antitrust break fees on surveyed deals with at least USD 1 billion equity value remain high and are now relatively common.

Theme 1

New antitrust paradigm crystallises in the US – will the courts fall in line?

As we enter the final year of the administration's current term, the FTC and DOJ continue to enforce the merger control laws vigorously. They have brought a steady stream of merger challenges that continue to focus on non-traditional theories (*e.g.*, *Amgen/Horizon* — conglomerate effects; *Sanofi/Maze* — monopolization and potential competition; and *Microsoft/Activision* — platform considerations). When taking abandoned transactions into account, 2023 has been the most active year in recent history:

Figure 1

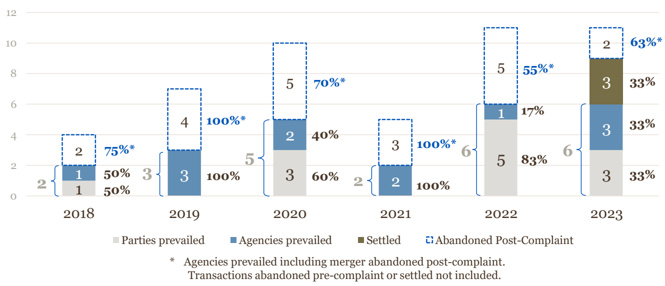


As part of a policy plan to re-set antitrust enforcement, both agencies have also demonstrated a commitment to persistence For example, the FTC commenced an internal administrative proceeding in relation to Microsoft's acquisition of Activision Blizzard even after a federal court judge declined to block the deal, and the deal closed. The FTC also successfully survived the federal appeals court review of its decision to block the *Illumina/Grail* transaction. For its part, DOJ has also pursued appeals, such as its — unsuccessful — attempt to overturn the *US Sugar/Imperial Sugar* decision.

In another 2023 show-of-force, the FTC and DOJ have also published their much-anticipated new Merger Guidelines, which reflect a commitment to pursuing more progressive theories of harm. Both agencies have also announced a planned comprehensive overhaul of merger control notification requirements, signalling an intention to shift towards a more "EU-style" approach involving significantly increased upfront disclosure.

This heightened enforcement activity and persistence has not always paid off. The FTC has also suffered two crucial losses in court in 2023, over its opposition to *Meta/Within* and *Microsoft/Activision Blizzard*. This adds to the FTC's and DOJ's previous string of defeats in 2022, including *UnitedHealth Group/Change Healthcare, US Sugar/Imperial Sugar*, and *Booz Allen Hamilton/EverWatch*. While the agencies' 2023 track-record (three wins and three losses) has therefore improved significantly compared to 2022 (when the agencies collectively prevailed in only one of six decisions), the two of the three 2023 losses were bruising defeats in high-profile international cases. On the other hand, the agencies did close out the year with a high-profile Court of Appeals victory in *Illumina/Grail*, which paves the way for future challenges based on more relaxed standards than have historically been applied, and a win in *IQVIA/Propel* coming in just before the end of the year.

Figure 2

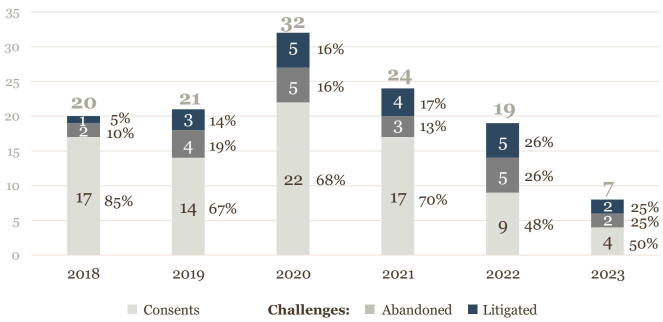


While statistically the number of merger challenges brought in 2023 (six litigations commenced) was similar to 2022 (five litigations commenced), litigation risk is also clearly more top-of-mind for the agencies, who have presumably been keen to correct the unfavourable statistics of 2022 (when they suffered losses in over 80% of issued decisions). We have seen the FTC and DOJ settle 3 pending litigations in 2023 (*ICE/Black Knight, Amgen/Horizon* and *Assa Abloy/Spectrum Brands*), in a sharp reversal of the 2022 "no settlements" mantra. On the other hand, consent decrees have become exceedingly rare (only four in 2023 — three of which were litigation settlements, and only one of which was at the investigation phase — vs. nine in 2022 and 17 in 2021), and it is clear that settlement is now essentially reserved for litigation cases only.

Theme 1

New antitrust paradigm crystallises in the US – will the courts fall in line? (*continued*)

Figure 3



Another notable trend that has emerged is the agencies' ability to "deter" potentially problematic mergers with the mere threat of litigation. In 2023, nine mergers were abandoned before a complaint was even issued, a historically large number (*see Figure 1*).

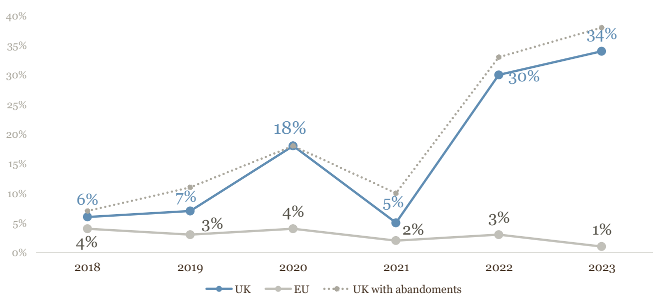
With the promulgation of the new Merger Guidelines and the agencies continuing to bring boundary-pushing cases, the key question for the coming year will be whether US courts will "fall in line" with the agencies' approach, or continue to apply a more traditionalist analysis. Winning in court will be essential to continuing the momentum the agencies built in 2023.

Theme 2

Across the Atlantic, the UK remains highly interventionist while the EU relies on conditions

We continue to see a high incidence of cases involving remedies at Phase 1 in the UK (34% in 2023 vs. 30% in 2022). In our view, there are at least two factors playing out here: merging parties may have observed the high "fatality rate" at Phase 2 and be more willing to offer early concessions, whilst the CMA looks to be increasingly comfortable settling in Phase 1, at least where the parties are offering clear-cut remedies. In the EU, on the other hand, it remains the case that hardly any deals are resolved with remedies at Phase 1 (only 1% in 2023).

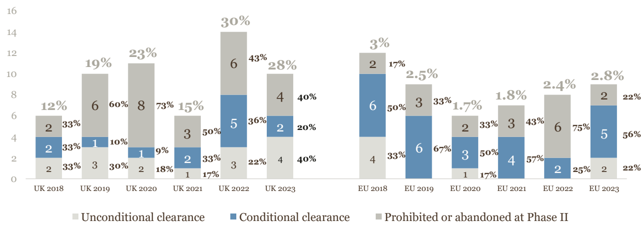
Figure 4 – EU/UK Phase 1 outcomes



At Phase 2, it is clear that the UK continues to "kill" a much higher proportion of deals, with 40% of deals prohibited by the CMA or abandoned, and rarely accepts conditions (only 20% of cases in 2023). This reflects an ongoing rejection of behavioural remedies and increasingly stringent requirements for structural divestments.

In the EU, on the other hand, the EC has relied far more heavily on conditions: it only blocked a single deal in 2023 (*Booking/Etraveli*) – although *Adobe/Figma* was also abandoned in face of opposition from both the EC and the CMA – and cleared 56% with conditions. The EC's conditional clearance rate is up significantly from 2022, when only 25% of deals were allowed to proceed with remedies.

Figure 5 – EU/UK Phase 2 outcomes



Looking ahead, it remains to be seen if the UK will maintain its stance. The fallout from *Microsoft/Activision* may have resulted in a more caution approach on *Amazon/iRobot*, which was cleared at Phase 1 in the UK while being sent to a full Phase 2 in Brussels. Similarly, the most controversial EC prohibition, *Booking/Etraveli*, was cleared unconditionally in the UK. The CMA's experience with *Microsoft/Activision* also appears to have been a catalyst for its proposed reforms to the UK's notoriously burdensome Phase 2 process, which were announced on 20 November 2023.

Two significant pending telecom cases are also likely to provide an important gauge of the temperature for merger control enforcement more broadly in the coming years. The EC will issue a Phase 2 decision on the *Orange/MasMovil* tie-up in Spain, while the CMA will review *Vodafone/CK Hutchison's* consolidation in the UK. We expand on this topic in Theme 7 below.

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Theme 3

Ecosystem theories of harm at epicentre of most high-profile cases

Last year, we predicted that ecosystem theories of harm were a key theme to watch – and they have not disappointed. In the EU, for instance, two-thirds of total EC "intervention" cases in 2023 (*i.e.*, those with either remedies at Phase 1 or 2, including prohibitions) involved a non-horizontal theory of harm. For the most complicated intervention cases (*i.e.*, those which went to Phase 2) the proportion was even higher at just over 83%.

It is also clear that ecosystem theories were at the epicentre of most high-profile cases in 2023 – including controversial cases that have led to diverging outcomes across the Atlantic. This reflects the fact that there is not yet a consensus regarding the precise contours of such theories.

(a) *Meta/Within*: in addition to the elimination of a potential competitor, this case involved concerns about entrenching Meta as a social networking platform. The FTC sought to block the deal, but lost in federal court and has not appealed.

(b) *Microsoft/Activision*: largely turned on a variation of ecosystem concerns around cloud gaming. The FTC sought to block the deal, lost in federal court, and has initiated an FTC-internal follow-on proceeding. This contrasts with the approach on the other side of the Atlantic, where the CMA first blocked the transaction, but then ultimately accepted the parties' re-worked remedy proposal. Similarly, the EC identified concerns but accepted a "pro-competitive" remedy in Phase 2.

(c) *Amazon/iRobot*: this case was also largely centred around ecosystem concerns. Underscoring the scope for divergence, it was cleared by the CMA in Phase 1, but taken to Phase 2 by the EC. It remains under review in the US.

(d) *Booking/Etraveli*: this case followed a similar narrative and it was blocked by the EC, but cleared unconditionally in the UK.

These diverging outcomes reflect a clear lack of consensus – and more work will be needed across the authorities to find a reliable and predictable basis for ecosystem theories of harm. And even if authorities are able to converge, it remains to be seen whether courts will fall in line, with the *Meta* decision describing certain of the FTC's theories as "impermissibly speculative."

Theme 4

Did PE rhetoric result in enforcement action?

Antitrust authorities in the US and other key jurisdictions continue to emphasise that PE firms remain squarely in their cross-hairs. Roll-ups in particular are coming in for scrutiny. FTC Chair Lina Khan published an article on 21 September 2023 about the dangers of an "aggressive 'roll-up' strategy to consolidate the market and eliminate competition", bemoaning that in "recent years, private equity firms have made serial acquisitions across markets — from nursing homes and apartment buildings to emergency medicine clinics and opioid treatment centres."

This policy message came in lock-step with a fresh enforcement push, which saw the FTC bring an action in Texas in September 2023 against a private equity firm alleging that the PE firm had acted as the "mastermind" behind a roll-up acquisition strategy involving Texan anaesthesiology firms that itself constituted "anticompetitive conduct."

On the other side of the Atlantic, most of the action has been in the UK, where the CMA uncovered a high degree of consolidation in the vet sector and has since probed a number of roll-up acquisitions (*Independent Vetcare case*), which also triggered a market study in the same sector.

More generally, we see that authorities across all jurisdictions are gathering detailed information on PE firms at every opportunity, and will pursue vigorously suspected infringements where they can.

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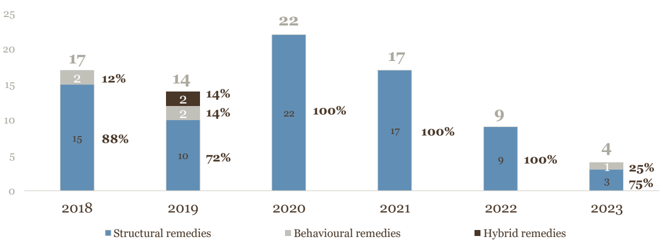
Theme 5

Behavioural remedies: down, but not out?

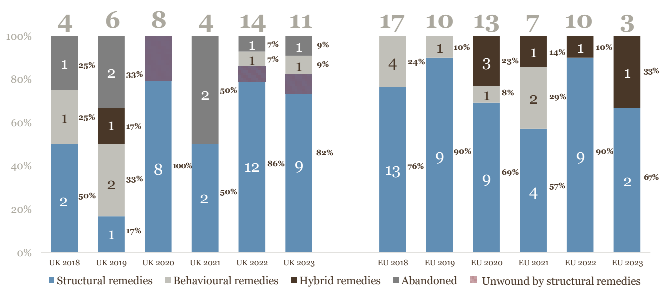
In the US, behavioural remedies are still strongly disfavoured, but there are signs that the tide is beginning to turn. In *Amgen/Horizon*, the FTC agreed to settle the case based on a pure behavioural remedy, a first for the Biden administration. As a conglomerate merger, that case lent itself uniquely well to behavioural resolution, but still suggests there may be some weakening of the agencies' previously staunch position.

Figure 6



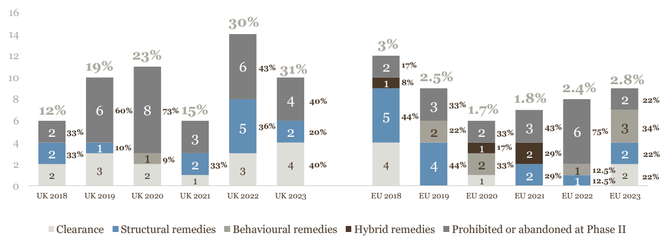
At least superficially, the UK appears to be in same boat. The CMA has loudly and repeatedly proclaimed its own disdain for behavioural solutions. However, *Microsoft/Activision* shows how that position still leaves room to explore creative solutions. On approval of the transaction, the CMA was keen to present remedy as a divestment, but many regarded it as effectively a long-term behavioural solution. Ultimately, on any view, the lesson is clear: substance trumps form.

Figure 7



In the EU, by contrast, the EC is still required to consider behavioural solutions where they are offered by merger parties and has demonstrated it will accept them in appropriate cases.

Figure 8



Theme 6

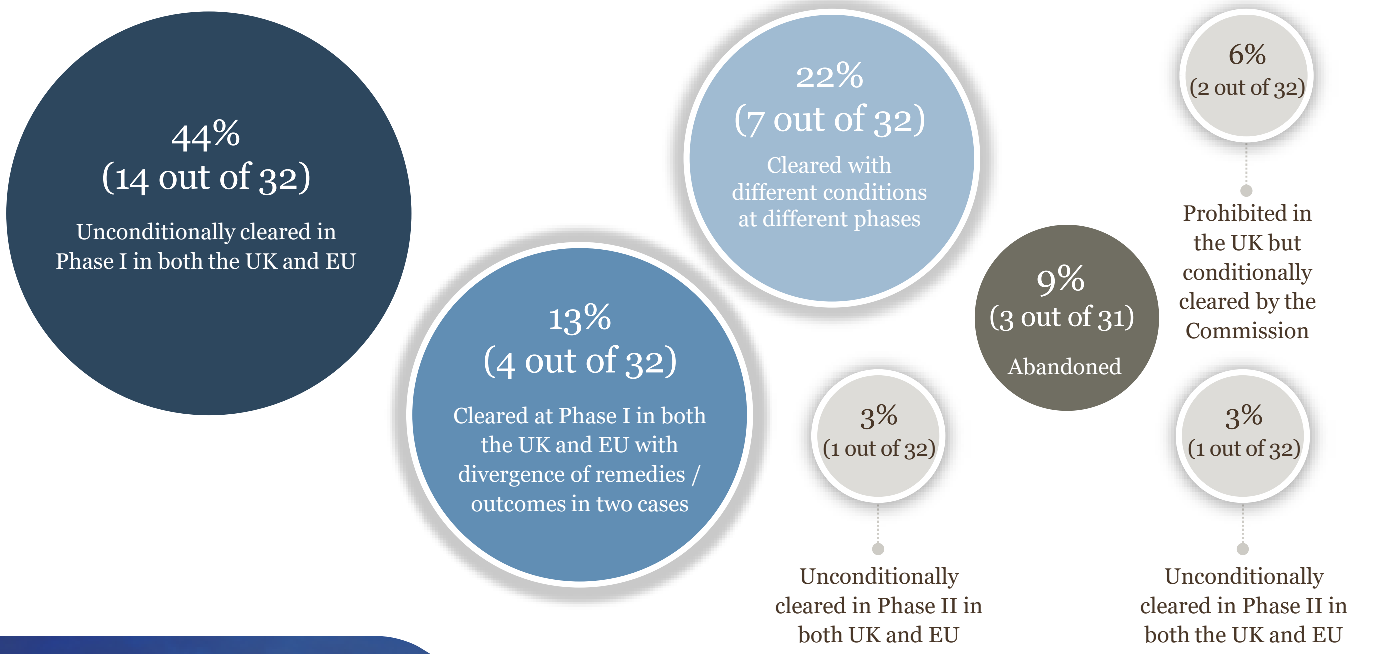
EU/UK diversion: searching for common ground with an eye to D.C.

For parties hoping to see high levels of alignment between the EU and the UK, the 2023 merger control statistics painted a disappointing picture. In total, more than 40% of overlapping cases experienced some form of divergence, with 6% prohibited by the CMA despite conditional clearance from the EC, 13% cleared at Phase 1 by both authorities but with different remedies and/or theories of harm, and a staggering 22% cleared with different conditions at different stages.

Against this backdrop, we expect the EC and CMA will be looking for common ground in 2024. *Adobe/Figma* was shaping up as the perfect test case for this – as well as providing an opportunity to find greater alignment with the US. However, likely in anticipation of united opposition on both sides of the Atlantic, Adobe announced in late December 2023 that it had walked away from the deal.

Nonetheless, the cross-Atlantic dynamic will continue to play a role. On *Microsoft/Activision*, the UK CMA sided with the US FTC in blocking the merger even when the EC had opted for a remedies solution. That position was reversed in an unprecedented procedural U-turn when the parties offered to modify the transaction with a remedy-taker for the streaming rights. This coincided with the FTC losing its preliminary injunction court case, which would have prevented the closing of the deal. The question therefore naturally arises: will the UK CMA be willing to oppose global deals in the future without the backing of either the US authorities or the EC?

Figure 9



Theme 7

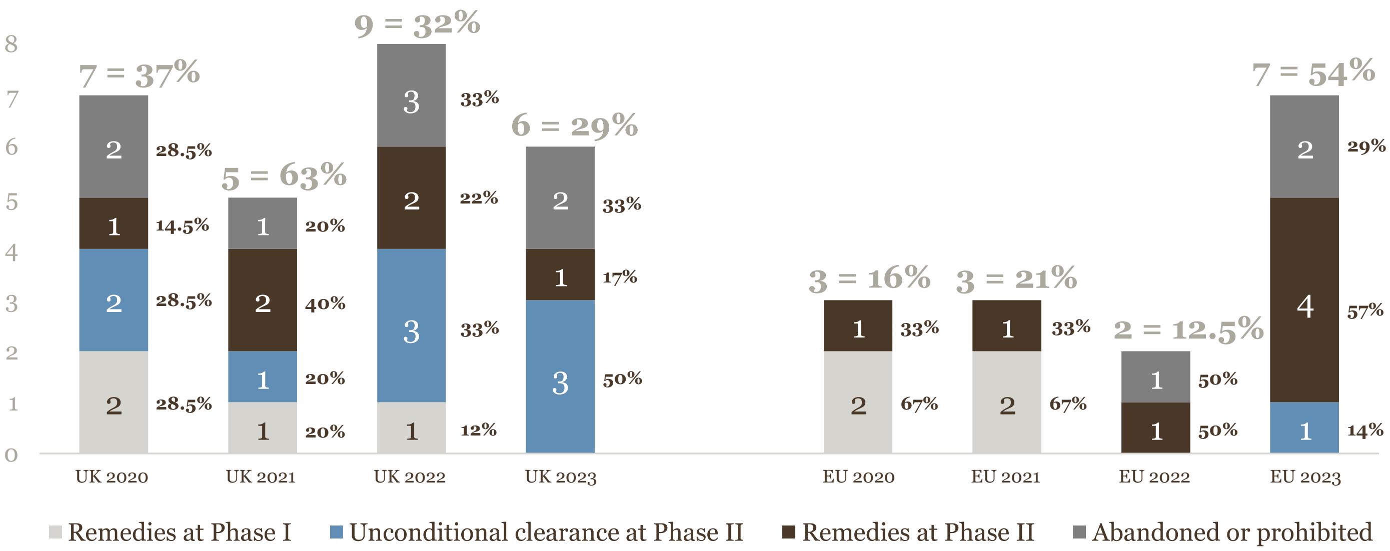
Telecom decisions provide an important "checkpoint" for European merger control

2023 was a milestone year for the telecoms sector – and EU merger control – with the EU's highest court, the ECJ, backing the EC's original prohibition of the *Hutchison/O2* merger in the UK (originally decided by the EC in 2016, before Brexit took full effect).

2024 looks set to be similarly momentous, with the EC expected to hand down its Phase 2 decision on the planned merger of Orange and MasMovil's Spanish operations, which will provide a clear signal on its willingness to countenance consolidation from four to three operators. As of December, the parties had reportedly agreed to sell certain spectrum assets to Romania's Digi Communications in an attempt to secure clearance. Digi is already the fifth-largest operator of both fixed and mobile in Spain, making it an obvious candidate for a structural solution of this kind, and – potentially – providing the EC with enough comfort to conditionally approve the merger.

In the UK, all eyes will be on the CMA's review of the *Vodafone/CK Hutchison* tie-up, which is another four to three consolidation attempt between domestic mobile network operators, after the previous attempt (*Hutchison/O2*) was blocked in 2016. Given that the 2016 prohibition was recently endorsed by the ECJ (as noted above), this new case represents a significant development – and potentially, a new point for divergence – in merger control practice across Europe. Notably, the CMA does not need to follow the ECJ's decision in *Hutchison/O2* – but the EC and merging parties in the EU do – setting the scene for either greater divergence or a move to back to alignment.

Figure 10



Theme 8

Digital mergers remain top-of-mind

In the EU, the Digital Markets Act (DMA) has come into force, which has added teeth to merger control in relation to firms designated as "gatekeepers." Looking ahead, we are also coming to the final year of the current Commission's term, and minds may turn to the legacy they are leaving behind.

In March 2021, the EC introduced a new policy facilitating the referral of below-threshold cases from member states up to the EC. Many of these were expected to be in the digital and pharma sectors. However, more than two and half years down the line, the mechanism has only been used sparingly. The first case under the new policy, *Illumina/Grail*, remains arguably the most high-profile, with Illumina announcing in December 2023 that it will divest Grail in its entirety. Other examples from the digital sector in 2023 include *Adobe/Figma* and *Qualcomm/Autotalks* (with *EEX/Nasdaq Power* bringing the total to three for the year).

In the UK, digital mergers will also come under further scrutiny with the impending Digital Markets, Competition and Consumers Bill (DMCC). This legislation will introduce stricter merger reporting requirements for any firms designated as having "strategic market status" (the equivalent to a "gatekeeper" designation under the EU's DMA). It will also add a new jurisdictional threshold for all mergers (not only those in the digital sector), targeting situations where one party has a UK "share of supply" of at least 33% and UK turnover of more than £350m, as long as the other party has a UK nexus (very broadly defined). Exact timing for the DMCC's arrival remains unclear, however; it is not expected to receive final Parliamentary approval until Spring 2024. The CMA itself finished the year strong, launching a public invitation to comment on whether recent developments concerning the partnership between Microsoft and OpenAI may warrant a formal merger investigation. This is the first step in the CMA's information gathering process and it is far from certain that any further action will be taken, but more generally, we expect that any transactions affecting AI development will receive close scrutiny in 2024 and beyond.

In the US, it seems very unlikely at this point in Biden's presidential term that legislation governing digital or technology companies will be passed in the current climate. That said, the agencies' focus on "big tech" and digital markets is demonstrated by merger cases like *Microsoft/Activision* and *Meta/Within*, as well as the behemoth challenges to Facebook, Google and now Amazon alleging prior anticompetitive conduct, inclusive of mergers, leading to their current market positions.

Theme 9

National security and foreign subsidies concerns continue to drive increased governmental scrutiny

FDI regimes continue to proliferate and expand in scope throughout Europe and the world.

In the EU, the EC reported a "significant increase" in the proportion of formally screened cases in 2022, notwithstanding that it was a quieter year for M&A activity (EU figures are reported with a one-year lag). Specifically, from the 1,444 authorisation requests and *ex officio* cases dealt with in 2022, approximately 55% of cases were formally screened, compared to only 29% in 2021. However, a significant majority of cases (86%) were cleared unconditionally, and only 1% were prohibited (although this rises to around 5% when abandonments are taken into account). The onus on remedies was also reduced, with Member States imposing conditions – or insisting parties offer a solution – in only 9% of transactions, compared to 23% in 2021.

Italy was the source of a late, but significant development in EU FDI activity for 2023, with Prime Minister Giorgia Meloni announcing on 22 November that the country was blocking Safran's proposed purchase of Italy-based Microtecnica. Microtecnica – a subsidiary of Collins Aerospace owned by US defence giant Raytheon – provides actuation and flight control systems for commercial and military aircraft, while Safran is a French aerospace and defence group. This decision represents a rare but not unprecedented example of opposition to investment from a fellow (and ostensibly friendly) EU member state, and underscores the current unpredictability of the FDI landscape.

Looking ahead, the EC has consulted on possible revisions to its screening mechanism, with respondents calling for, amongst other things, increased harmonisation of member state FDI timelines and new thresholds to limit the scope of transactions that national authorities must notify (all deals screened domestically must currently be notified). The EC is expected to present its recommendations to the European Parliament by the end of 2023

In the UK, the NSI Act is nearing the end of its second full year in operation. In the 12 months to March 2023, 866 notifications were received, of which only 65 were called in. Of these 671 mandatory, 180 voluntary and 15 retrospective validations. The top 6 sectors for mandatory notification were (1) defence, (2) critical suppliers to government, (3) data infrastructure (4) military and dual-use, (5) artificial intelligence, and (6) advanced materials.

The FSR is now also in effect and parties have begun to notify, although no figures are yet available.

More broadly, minority shareholdings are coming under scrutiny from a national security perspective, while they will typically escape attention in the merger control context.

US FDI activity has continued apace, accompanied by legislative and regulatory developments at both the federal and state level that appear likely to set the tone for other jurisdictions. CFIUS's 2023 annual report revealed record levels of engagement by dealmakers in 2022 – notwithstanding a downturn in overall M&A activity that year – alongside increasing case volumes, longer review periods, increased reliance on the use of mitigation and an increase in the number of non-notified transactions for which the Committee sought a post-closing filing.

Against this backdrop, President Biden issued an Executive Order in August 2023 as the first step in establishing an outbound investment regime. The Order initially aims to regulate investment from the United States into China or Chinese-companies relating to three key sectors: (a) semiconductors and microelectronics, (b) quantum information technologies and (c) artificial intelligence. Citing national security concerns, particularly with respect to technological advancements that could provide military advantages to China, the Order establishes a new regime that will in some circumstances prohibit, and in others require notification of, certain investments by US persons in or relating to China. Dealmakers, asset managers, institutional investors and US businesses may soon need to consider this regime — expected to come into force in 2024 — for prospective cross-border transactions.

The US has also witnessed a litany of state legislative measures to impose restrictions on the acquisition of real property by China and certain other jurisdictions. Notably, Florida enacted legislation in May 2023 prohibiting Chinese investors (amongst others) from acquiring any new interest in Florida real property (and requiring registration of their existing interests). US and foreign investors acquiring real estate — or any investment target that may own real estate — in affected states will want to consider these laws depending on their ownership structure and investor participation. Investment managers may also need to evaluate their real estate interests across their existing portfolio to determine if retrospective registration requirements or other measures may be warranted with respect to any Chinese or other limited partner investors.

Outbound controls have also emerged as a hot-button issue in Europe too. The EC announced in August 2023 that it was considering its own proposals on how to regulate outbound investments with an announcement mooted by the end of the year, although Germany and France subsequently urged caution given Europe's strong economic ties with China. A similar position has emerged in the UK, with the British Government apparently mulling whether to tighten its rules on investment into China, but they have yet to announce any concrete policy changes.

Theme 10

Adapting contractual stance to changed paradigm

Merger parties are adapting their contractual stance to the changed paradigm that has emerged in recent years. The most noticeable trend in this regard is perhaps the most intuitive: "outside dates" (also known as "long-stop dates") are materially longer today than they were two years ago. The average length from the date of execution to the outside date on a representative sample of large-cap US M&A deals we reviewed in 2021 was 235 days, increasing by almost 14% to an average of 267 days in 2023. We believe this reflects an acceptance of the increased complexity surrounding regulatory approvals in the new paradigm for deal-making.

Contrary to the expectations of some, however, we have not seen an accompanying rise in the US of "ticking fees," which remain remarkably rare. Ticking fees require one party to compensate the other for a delay in closing beyond a specified date and provide an obvious economic solution to deals taking longer to consummate. However, the market now appears to have settled into a standard practice that does not typically involve such fees, which we expect will continue to be deployed only on a handful of outlier deals.

While ticking fees may not yet be commonplace, commitments to litigate are almost omnipresent, appearing in all but one of a sample of recent large-cap public M&A deals. Considering that most parties will be operating within a longer outside date as well, the compounding of these factors means that many buyers face significant pressure to pursue every possible avenue to clearance, including via the court room if necessary. Moreover, given the success of cases taking a "litigate the fix" approach and the agencies' more recent willingness to engage in litigation settlements, negotiating for a robust remedies commitment will become even more important.

Finally, antitrust break fees on surveyed deals with at least USD 1 billion equity value remained high in 2023 at an average of 5.32% of equity value – similar to the 2022 average of 5.72% – and in our experience are now used relatively frequently. This suggests that parties continue to recognize the heightened risk of antitrust interventions – and that sellers are unlikely to start letting buyers off the hook without serious compensation any time soon.

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