Global merger control trends and outlook

EU and US merger control enforcement: quo vadis?

European Union

In the **EU**, Executive Vice President Margrethe Vestager's mandate as Commissioner responsible for EU competition policy has reached its end. Teresa Ribera has been appointed as the Executive Vice President for a Clean, Just and Competitive Transition and has taken over the competition portfolio as of December 1, 2024. Teresa Ribera is a lawyer by education with a strong environmental background gained from her time as a politician in the Spanish government in charge of the climate change-related agenda. She has no specific background in antitrust. In her role as the new Executive Vice President, she will juggle competition as well as climate change-related policies. President Ursula von der Leyen's Mission Letter to Teresa Ribera draws inspiration from the Draghi Report in a call to modernize EU competition policy.

President Ursula von der Leyen has mandated Ribera to "*modernize the EU's competition policy to ensure it supports European companies to innovate, compete and lead world-wide and contributes to our wider objectives on competitiveness and sustainability, social fairness and security.*" This appears to support the advocates of the notion of "European Champions." During Ribera's confirmation hearings, Ribera indicated that she is in favor of companies scaling up in global markets but not at the expense of fair competition. It remains to be seen how that approach will play out in practice and whether her attitude toward merger control enforcement will be more lenient when it comes to the "European Champions." Additionally, the Mission Letter instructs Ribera to review the EC's 20-year-old horizontal merger guidelines and to address the risk of killer acquisitions. This is to account for the needs of the European economy "*in respect of resilience, efficiency and innovation, the time horizons and investment intensity of competition in certain strategic sectors, and the changed defense and security environment.*" The Draghi Report recommends introducing a new "innovation defense" as a "*key element of a new approach to competition policy supporting a new Industrial Deal.*" Currently, the guidelines set out criteria under which the EC can approve a transaction that raises competition concerns, provided the transaction brings along efficiencies that outweigh the negative effects. However, in practice, the standard to demonstrate pro-competitive efficiencies is generally just too high and difficult to meet, and it is virtually impossible to demonstrate innovation efficiencies. Therefore, a revised approach would be welcome.

United States

In the **US**, the Biden Administration has encouraged greater intervention by the FTC and DOJ, in part through the Merger Guidelines finalized in December 2023 that lowered presumptive violation thresholds and introduced novel legal theories of harm. Whether the new Merger Guidelines will survive or be enforced under the incoming second Trump Administration is uncertain. Antitrust enforcement is very likely to revert to more traditional approaches under President Trump, including abandoning some of the more novel theories pursued by President Biden's DOJ and FTC, such as the current focus on labor and private equity. It is also expected that President Trump's DOJ and FTC will be more open to negotiating remedies to address specific concerns with a transaction rather than pursuing litigation. During President Trump's first term, the antitrust agencies pursued cases actively but were not hostile to deals generally and were willing to work with parties to allow deals to proceed with appropriate remedies. That should continue. Progressives from both parties, including Vice President J.D. Vance, continue to push for more aggressive antitrust enforcement, which suggests that the antitrust enforcement pendulum swing back to normal may take time and that some changes, such as the revamped HSR Form, may not go away entirely. Notably, both parties remain focused on increased regulation in both the healthcare and technology sectors. For example, President Trump recently complained on his social media platform that antitrust enforcers must crack down on "Big Tech," which has "run wild for years, stifling competition."

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AI partnerships on the antitrust regulators' radar

Antitrust regulators have increasingly worried that they acted too late to adequately regulate the Internet and expressed their desire to stay in front of AI innovation through regulation. Thus, enforcers' interest in the AI sector intensified in 2024. As is common in dynamic industries, the sector is characterized by several AI partnerships between AI developers and large digital players. AI partnerships do not look like a typical merger or acquisition, yet regulators around the world have been viewing them with skepticism, suspicious that these arrangements are just intelligently structured transactions with the aim to escape merger control. In the **EU**, in September 2024, the EC issued a brief on competition in generative AI and virtual worlds that outlined a number of competition concerns with respect to AI partnerships as well. The EU merger control regime applies to "concentrations," where there is a change of control on a lasting basis. The control refers to the possibility of exercising decisive influence over another company. The EC concluded that it considers the partnership between Microsoft and Inflection to amount to a concentration under Article 3 of the EUMR, although the EC did not ultimately probe the deal as a result of the Illumina/Grail judgment. This sends an important signal that acqui-hires can amount to a reviewable transaction in the EU.

European Union

At **the national EU Member State level**, both French and Portuguese competition authorities have outlined their competition concerns in the AI sector in a report and AI partnerships are also carefully watched in Germany. Under the German merger control rules (which also cover the acquisition of non-controlling minority shareholding), a deal must be notified to the Federal Cartel Office (FCO) if it meets a threshold of €400 million and the target has "substantial operations" in Germany. At the end of November 2024, the FCO concluded that it had no jurisdiction to review the partnership between Microsoft and Inflection because it has no substantial operations in Germany. For the same reason, the FCO was not able to review the partnership between Microsoft and Open AI. The FCO, however, emphasized that the hiring of employees, alongside financing arrangements and the use of IP rights, can qualify as a transaction reviewable under the German merger control law. In the UK, in the Update Paper on AI Foundational Models issued in April 2024, the CMA pledged to step up use of its merger control rules when reviewing partnerships and to monitor current and emerging partnerships closely. The UK is one of the few jurisdictions that can review non-controlling minority shareholding acquisitions under the "material influence test." From the four partnerships that the UK has reviewed, the CMA concluded that only the partnership between Microsoft and Inflection amounts to a reviewable transaction. This is also the only AI partnership that the CMA analyzed substantively, stating that the deal does not raise competition concerns in the development and supply of consumer chatbots and foundation models. Microsoft's partnership with OpenAI is still under review by the CMA, whereas the EC concluded that it cannot assess the partnership under the EUMR as it found that Microsoft had "*not acquired control on a lasting basis*" over OpenAI. We expect acqui-hires to likely become the next wave of merger control cases as far as digital markets are concerned in the EU as well as in the UK.

United States

The FTC and DOJ closely monitor AI partnerships in the **US**. In July 2024, the US agencies issued a joint statement with the CMA and EC signaling their firm commitment to preserving competition in AI. The statement noted that the agencies would "*scrutiniz[e] investments and partnerships between incumbents and newcomers, to ensure that these agreements are not sidestepping merger enforcement or handing incumbents undue influence or control in ways that undermine competition.*" The FTC has been investigating Alphabet, Amazon.com, Anthropic, Google, Microsoft and OpenAI, requiring these companies to provide information regarding recent AI investments and partnerships. In October 2024, the FTC and the DOJ participated in the G7 Competition Authorities and Policymakers Summit to discuss ways to ensure competition in AI-related technologies, products and applications. At the end of the summit, the parties issued a joint Digital Competition Communiqué outlining the competition risks, principles, plans for coordination and roles of competition authorities in preserving competition in the AI space. This statement, in combination with past statements, strongly suggests that the DOJ and FTC plan to take increased enforcement actions against companies in the AI industry. Concerns around potential consolidation of AI will likely remain a focus of antitrust scrutiny by the FTC and DOJ.

Below-thresholds mergers still not safe from merger control scrutiny

European Union

In September 2024, the EU's Court of Justice overturned the General Court's judgment in Illumina/Grail, effectively putting an end to the EC's revised Article 22 policy approach for below-threshold mergers. Under this approach, the EC could encourage a Member State to refer a transaction that meets neither EU nor any Member State's filing thresholds for the EC's review. The EC's loss in Illumina/Grail does not, however, signify a return to the days when merger filings could be excluded simply based on the target's revenues and assets. All deals, but especially those in the life sciences and digital sectors, will continue to require a comprehensive analysis of potential antitrust risks. There are jurisdictions with transaction value-based or market shares-based thresholds. Moreover, a growing number of national regulators have powers to call in below-threshold acquisitions for review. A senior official of the EC has confirmed that the EC has been actively approaching Member States to encourage them to introduce these powers in their national rules. Additionally, senior EC officials have suggested that there are several other alternatives the EC is exploring in order to catch potentially problematic below-threshold deals; for example, through introducing deal value-based thresholds.

In October 2024, the Italian competition authority referred the merger between Nvidia/Run:ai pursuant to its call-in powers and Article 22 to the EC. This is the first referral after the Illumina/Grail September judgment. Although the EC ultimately cleared the deal unconditionally in December 2024, the referral sends a clear sign that the EU's tool for capturing below-threshold deals is not dead yet. Therefore, parties negotiating deals are best advised to continue to take a cautious approach and carefully consider from the outset the potential reportability of below-threshold deals (especially if the deal has links/nexus with EU jurisdictions with call-in powers) when setting transaction timetables, closing conditions and risk allocation provisions in their deal documents.

Furthermore, national competition authorities may want to catch below-threshold deals through antitrust rules, and potentially look to stretch the test confirmed in the Towercast judgment. In May 2024, the French Competition Authority (FCA) assessed non-reportable mergers in the meat-cutting sector under Article 101 TFEU. The FCA concluded that it is entitled to do so because, as with Article 102 TFEU, Article 101 TFEU is also a "*provision [of primary law] having direct effect*" and its applicability cannot be ruled out by a piece of secondary legislation.

Large regulatory maze for dealmaking

2024 saw a proliferation of new rules in the UK, the US, Australia and throughout the Middle East and North Africa (MENA) and provided some insights into the application of the Foreign Subsidies Regulation (FSR) in the EU.

European Union

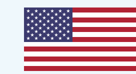
In the **EU**, as of October last year, the EC requires an additional level of scrutiny of M&A transactions on top of merger control and FDI notification obligations: a notification of an M&A transaction is required pursuant to the Foreign Subsidies Regulation (FSR). The first year of the FSR has been active with a large number of notifications, lengthy and wide-ranging requests for information, and the opening of the first (and so far only) in-depth investigation of e&'s acquisition of certain PPF Telecom group assets. The transaction was cleared with commitments in September 2024. Senior EC officials confirmed they have received more than 120 notifications (including pre-notifications) of M&A transactions, out of which more than 90 deals were cleared in Phase 1. The majority of the FSR notifications ran parallel to merger control notifications and concerned a wide range of sectors; for example, telecommunications, retail, food and beverages, pharmaceutical, financial services or transport.[1] Additionally, in August 2024, the EC issued some preliminary clarifications concerning the distortion test under the FSR. This guidance is a precursor to the EC's Guidelines on distortion and the balancing tests which are due in the first half of 2026. The FSR is expected to continue being a key feature of substantial M&A deals, with effects on transaction timetables and deal certainty.

Foreign direct investment (FDI) screening was one of the major topics in the past two years as a myriad of new regimes joined the FDI club and its more seasoned members continued to strengthen scope and enforcement, with the impacts felt in transactions across a multitude of sectors and geographies. In January 2024, the EC published its proposals to reform the EU FDI Screening Regulation. The proposed measures include mandatory screening in all Member States, revisions of the sectoral scope, as well as rules aimed at capturing foreign-backed transactions realized through EU vehicles. It remains to be seen how Member States will react to new prescriptions on their policies and processes, especially when so many of them have only recently introduced, or adapted, their FDI screening processes, to the current EU FDI Screening Regulation.

United Kingdom

In the **UK**, the new Digital Markets, Competition and Consumers Act (DMCC Act) became effective from January 1, 2025. It introduces key reforms to UK competition law, most notably, an expansion of the CMA's merger control powers. The new rules include a higher turnover threshold for merger reviews, now set at £100 million (up from £70 million), and a safe harbor for deals where no party has more than £10 million in UK turnover. The CMA can now review some purely vertical and conglomerate deals, even where the target has little or no revenue in the UK. Under the new test, the CMA has jurisdiction to review any deal where one party—usually the acquirer—has UK turnover of more than £350 million and a share of supply of at least 33% in any UK goods of services, provided the other party—usually the target—is active in the UK. This shift allows the CMA to scrutinize deals that may not involve direct competition but could harm innovation or future competition, such as "killer acquisitions."

Additionally, the DMCC Act introduces mandatory reporting requirements for large tech companies designated with Strategic Market Status (SMS). These companies must report certain transactions to the CMA, allowing the regulator to closely monitor potential anti-competitive behavior in digital markets. The Act also provides the CMA with new powers to enforce remedy undertakings, including the ability to impose fines for non-compliance. Merger parties can now ask the CMA to fast-track their case to a Phase 2 investigation without having to concede that it may give rise to competition concerns. In these cases, the CMA may extend its Phase 2 review period by up to 11 weeks, rather than the usual eight weeks, if there are special reasons.



United States

In the **US**, the FTC finalized significant updates to the Hart-Scott-Rodino (HSR) Form and Instructions in October of 2024. The table here highlights the key changes and additions. These changes will significantly increase the burden and time required to prepare HSR filings. The new rules are currently scheduled to take effect on February 10, 2025, although implementation is likely to be delayed until March 21, 2025, if President-Elect Trump issues a "regulatory freeze" memorandum as expected once he takes office.

Australia

In **Australia**, the Federal Government has enacted legislation to implement a mandatory suspensory merger regime effective from January 1, 2026. This reflects a significant shift from the existing voluntary informal regime currently in place. From January 1, 2026, any notifiable transactions that proceed without ACCC approval will be "void" and will attract penalties. The new regime requires notification where certain financial thresholds, based on turnover and transaction size, are met. It includes prescribed timeframes; namely, a 30-business day "phase 1" review and a 90-business day "phase 2" review subject to stop-the-clock powers. The regime targets serial transactions by applying a three-year look-back to the calculation of the thresholds and by requiring the ACCC to consider the effect of transactions by the same acquirer over the prior three-year period. From a substantive perspective, the meaning of substantially lessening competition, which forms the basis of the test against which mergers are assessed, is extended to include "creating, strengthening or entrenching a substantial degree of power in any market." This intends to target acquisitions by dominant firms of small or nascent competitors, capturing incremental changes in market power that the ACCC considers amount to a substantial lessening of competition. In addition, establishing a position of a substantial degree of market power in another market in which a dominant firm did not previously operate may also constitute a substantial lessening of competition.

To accommodate the transition to the new regime, merger parties will be able to seek clearance from the ACCC as of July 1, 2025. During the first half of 2025 the ACCC will develop guidelines, the application form and its internal processes. This shift from the previous voluntary system to a mandatory regime requires businesses to be vigilant in understanding their obligations to minimize legal and regulatory challenges. Increased compliance costs and the need for detailed documentation will become standard.

Middle East and North Africa

In the **MENA region**, competition regulations continue to develop quickly as authorities show increased focus on merger control.

Egypt

In **Egypt**, 2024 saw the introduction of a new merger control law, shifting from a post-closing notification system to a two-phase premerger review with suspensory effect. The new regime includes a local nexus test to limit the number of notifiable transactions, and a fast-task clearance process for non-contentious transactions. Since the new law went into effect on June 1, 2024, the Egyptian Competition Authority (ECA) has been actively scrutinizing transactions—reviewing approximately 55 merger filings in the first six months of the new regime.

1 As at the date of this publication, the DG COMP case search tool registers 20 notifications only. We understand that the EC has been tracking the FSR notifications of concentrations only as of October 2024.

Large regulatory maze for dealmaking *(continued)*

Morocco

In **Morocco**, the Moroccan Competition Council (MCC) has been increasingly active in merger enforcement, particularly after the publication of its first guidelines in 2023. In 2024, the MCC issued a number of fines against companies for failing to file, including a fine against a global pharmaceutical company in an amount equal to 2.5% of its local revenue.

Saudi Arabia

In **Saudi Arabia**, the General Authority for Competition (GAC) has intensified its merger clearance efforts, approving 202 transactions in 2024—more than a 17% increase since 2023 and a new record for the GAC since launching the merger control regime in late 2019. For the first time in its history, GAC also fined companies (approximately US$213,000), as a standalone action, for failing to notify a transaction, showcasing its growing enforcement power.

The United Arab Emirates

The United Arab Emirates is poised to significantly transform its merger control regime in 2025. After passing a transformative competition law in December 2023, the UAE is awaiting the issuance of its implementing regulations and related ministerial decrees for the new regime to become operational, which was expected in June 2024 but is still pending as of the date of this publication. The new law is likely to cause a spike in filings by introducing a turnover-based threshold, which is easier to trigger than the previous market share threshold. The new law will also limit the scope of available exemptions.

Spotlight on novel theories of harm continues

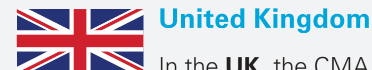
Regulators around the world have continued to engage in non-conventional theories of harm. As a result, the analytical uncertainty continues to create a challenging environment for dealmakers.

European Union

In the **EU**, in June 2024, the EC published its decision in Booking/eTraveli, providing more color on the analytical framework of its 2023 decision prohibiting the deal. The decision signals an important change in the EC's thinking when assessing conglomerate mergers. The approach has attracted some criticism because the analysis departs from the EC's Non-Horizontal Merger Guidelines. According to the Guidelines, the theory of harm would suggest that the merged entity could seek to leverage its position in accommodation online travel agencies (OTAs) into the flight OTA segment. Instead, the EC's theory of harm runs in the opposite direction: Booking would have strengthened its existing dominant position in the hotel OTA market by acquiring the flight OTA channel. Booking's appeal of the EC prohibition is currently pending before the EU's General Court and is expected to provide more clarity on the EC's analytical framework with respect to conglomerate mergers. Both the Adobe/Figma and Amazon/iRobot deals were abandoned by the parties because of difficulties in achieving antitrust clearances. In September 2024, the EC published a competition brief to explain its considerations when assessing both deals. Adobe/Figma clarifies the EC's thinking behind the so-called reverse killer acquisition theory of harm; i.e., whether Adobe's decision to cease development of its product was motivated by the potential acquisition of Figma. It also illustrates how the EC may take into account the competitive impact of an acquisition within the ecosystem of products. In Amazon/iRobot, the EC analyzed vertical foreclosure theories of harm. The EC considers Amazon/iRobot as an illustration that "*the EUMR's framework is well suited to tackle structural changes in the market and to prevent incentives to foreclose rivals from arising in the first place.*" In November 2024, a senior EC official indicated that the debate over a deal's impact on innovation in Europe will become an increasingly important feature of merger control: "*[I]nnovation will become the driving force in merger analysis,*" suggesting that innovation theories of harm will play a prominent role in a foreseeable future.

United States

In the **US**, there has been increased scrutiny on competition within labor markets. The 2023 Merger Guidelines specifically state that mergers involving competing employers may warrant heightened scrutiny and that competition concerns may arise at lower levels of concentration in labor markets than they would in product markets. Tapestry and Capri abandoned their proposed merger in November 2024 after the FTC successfully alleged that the transaction would not only lead to reduced competition for handbag sales, but would also substantially harm competition in the relevant labor market by eliminating incentives to compete for employees. Similarly, in the challenge to the Kroger/Albertsons merger, while the crux of the case focused on the traditional antitrust concern about concentration in retail markets, the FTC did allege that the merger would create a monopsony in the unionized supermarket labor market. This was notable because labor considerations have routinely been reviewed in the past but until now, rarely played a substantial role in agency decision-making. A focus on labor markets may persist but there will likely be a scale-back or drop of labor in antitrust enforcement during the second Trump Administration. The US has also seen increased focus on minority investments. In the December 2023 Merger Guidelines, the agencies indicated that minority investments could allow partial owners to improperly influence a target's strategy and/or give partial owners access to the target's competitively sensitive information. Additionally, the new HSR rules signal a continued focus in this area with its new requirement for the disclosure of minority investors with significant rights.



United Kingdom

In the **UK**, the CMA has continued to broaden its approach to the substantive assessment of M&A transactions, moving beyond traditional concerns about the impact of deals on price and quality to include a wider range of potential harms. The CMA puts particular emphasis on the impact of transactions on dynamic competition, innovation, the control of critical assets, and issues such as data access and vertical foreclosure. These broader theories of harm are particularly relevant in digital markets, where the control of key data and technological capabilities can be a significant factor in maintaining or stifling competition. For example, the CMA has explored how mergers could entrench a strong market position by limiting competitors' access to valuable data or innovative technologies, thus reducing the potential for future innovation and competition.

Additionally, the CMA has turned its attention to "strategic" M&A transactions that may not involve significant horizontal overlap between the parties but still raise competition concerns. In such cases, companies may be able to reduce competitive pressure by eliminating potential future competition, even if there is little direct overlap at present. These types of transactions can also create opportunities for the merged firms to coordinate their behaviors or enhance their collective market power, which could potentially harm consumers in the long run. As some markets, especially in the digital economy, become more dynamic, the CMA's expanded approach is expected to continue to shape future merger assessments in the UK.

Australia

In **Australia**, the ACCC required remedies in order to clear the acquisition by Sigma, a publicly listed wholesaler and distributor of prescription medicines and other products to community pharmacies, of Chemist Warehouse, a publicly listed franchisor of pharmacies and retail stores. Among other things, the ACCC raised concerns that in the medium to long term, the structure change due to the vertical integration caused by the transaction would raise entry barriers. The ACCC also raised concerns that the transaction would lessen competition in pharmacy retailing by enabling Chemist Warehouse to access and use data of Sigma-supplied independent pharmacies.

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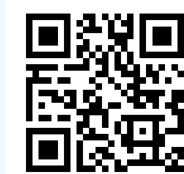

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