Simpson Thacher

Global Merger Regulation

Key Themes and Predictions For 2022/2023

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Preamble

In 2022, regulatory intervention in M&A has intensified and grown more complex to navigate globally. After a full calendar year under new leadership at the US agencies we have surveyed M&A regulatory intervention in three leading jurisdictions, US, EU and UK. Here are our key themes and predictions:

1 DOJ and FTC flex their muscles to become the global flagbearers of intensified merger scrutiny.

Despite the agencies' rhetoric about increased enforcement, and contrary to popular perception, the number of live mergers challenged in the last calendar year (10) is not materially different from 2021 and 2020 (7 and 10, respectively). However, the range of concerns investigated and challenged has widened, and willingness to settle has diminished considerably; as a result, the proportion of complaints resulting in abandonment and litigation have both reached 26% in 2022 after rising steadily over the prior four years. Conversely, the proportion of cases settled in the US is lower than the preceding 4 years.

2 A chequered path – US enforcement met with mixed success in Court: can your deal wait?

Federal antitrust authorities have prevailed in only 1 of their 6 cases decided in 2022, giving them a success rate of around 17% (a five-year low point), possibly reflecting a bolder approach to theories of harm being litigated.

3 Strong interventionist streak across the Atlantic both in the UK and EU: do parties give in earlier?

A record 30% of CMA cases concluded at Phase II, almost half of those being blocked or abandoned. EC officials intensified their scrutiny, with a remarkable 75% of EU Phase II cases abandoned or prohibited in 2022, even higher than the 43% rate for the CMA.

4 Behavioural remedies fall further out of favour on both sides of the Atlantic.

The US agencies' scepticism of remedies in general and particularly of behavioural remedies was manifest in a dramatic drop in consent decrees, which reduced by nearly 50% from 17 in 2021 to 9 in 2022. In particular, no 2022 consent was purely behavioural. The EC also didn't accept standard behavioural remedies in a single case in 2022.

5 PE firms come under fire.

Following through on early-2022 rhetoric critical of PE firms, the US agencies have objected to PE firms as divestiture buyers in court and intensified their scrutiny of a variety of PE practices in sweeping investigations, resulting in some cases in the resignation of PE firm-appointed directors from the board of their own investments.

6 Considering a "killer acquisition", "reverse killer" or "ecosystem" deal? These remain hot topics for 2023.

The boundaries of theories of harm are being pushed. Killer acquisitions remain under scrutiny but so too are so-called reverse killer acquisitions (*FB/Within*) and mergers with effects on the acquirer's ecosystem (again *FB/Within* but also *MSFT/Activision*). This is the theme to watch for 2023 and is likely to be tested in court.

7 TMT still under scrutiny, whilst digital sector reforms have crystallised in the EU, remain embryonic in the UK and have yet not taken off in the US.

The EC intervened in the only two TMT sector cases decided at Phase II in 2022, imposing remedies in *Meta/Kustomer* and contributing to the abandonment of *NVDIA/Arm*. Similarly, in continuation of a 2021 development and departure from the prior trend, US agencies were far more likely to litigate TMT cases than settle: none of the 2022 consent decrees related to the TMT sector, while two litigated cases and one case scheduled for trial in 2023 were TMT-related.

8 Navigating co-operation and divergence between agencies becomes more challenging and yet is crucial.

Cargotec/Konecrones is the leading example and a cautionary tale: cleared by the EC subject to remedies, but prohibited by the CMA (which concluded that the same remedies package was insufficient), with the DOJ also announcing they would have challenged the merger.

9 Exercise extreme caution: UK's voluntary merger control contains significant pitfalls for the unwary.

The CMA issued initial enforcement orders – also known as "hold separates" – in 92% of completed mergers investigated in 2022 and (100% in 2021).

10 Tide of FDI activity shows no sign of abating.

CFIUS review volumes have increased sharply in recent years, whilst our analysis for the other side of the Atlantic reveals higher levels of intervention by EU member states in FDI screening than by the EC in merger control (and the UK's new National Security & Investment Act is creating its own waves).

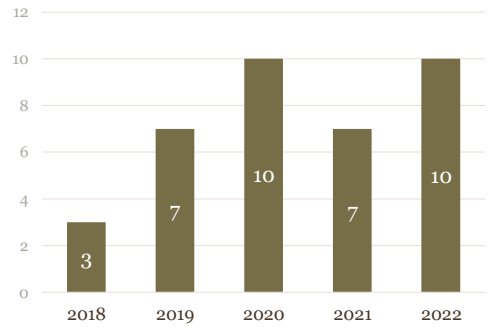
Theme 1

DOJ and FTC flex their muscles to become the global flagbearers of intensified merger scrutiny

After the first full calendar year under their new leaderships, both the DOJ and FTC have lived up to their promises on merger enforcement, taking an aggressive stance against consolidation that is reverberating globally.

Despite the agencies' rhetoric about increased enforcement, and contrary to popular perception, this aggressive stance has not involved a material increase in the sheer number of merger cases challenged. Indeed, the number of deals contested in 2022 (10) is not materially different from 2021 and 2020 (7 and 10, respectively), though it does reflect a notable uptick from 2018 and 2019 (3 and 7, respectively).

Figure 1 – US merger challenges based on complaints filed (2018-22)[1]

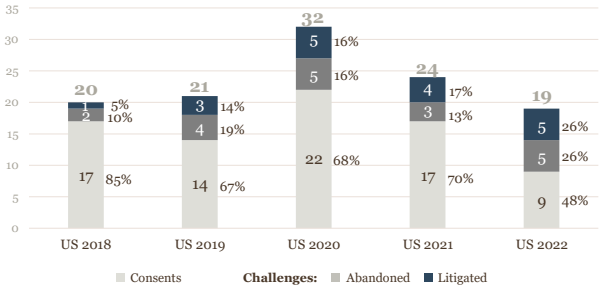


Instead, in 2022, it was borne out last year in a diminished willingness to settle cases, and a commitment to "bringing tough cases" based on a wide range of theories of harm. This is reflected by the fact that the proportion of complaints resulting in litigation reached 26% in 2022 after rising steadily over the past five years.

Regarding settlements, the US agency leaders have repeatedly stated their scepticism towards remedies in merger control. And this shows very clearly in the number and percentage of consent decrees which last year were at a five year low, with only nine in 2022 compared to 16, 14, 22, and 17 in the prior four years. By percentage, this represented the first time in the last 5 years where settlements accounted for less than half of the complaints filed in a calendar year (with the historical norm in the 65-85% range).

Parties continued to abandon their transactions post-complaint in substantial numbers 2022, with 5 in total (compared to 2, 4, 5 and 3 in the prior four years). This also reflects a 5-year high by percentage, accounting for over 25% of 2022 complaints. This helps the agencies to bolster their track record in a year where victories at trial have been harder to come by (see Figure 2 below).

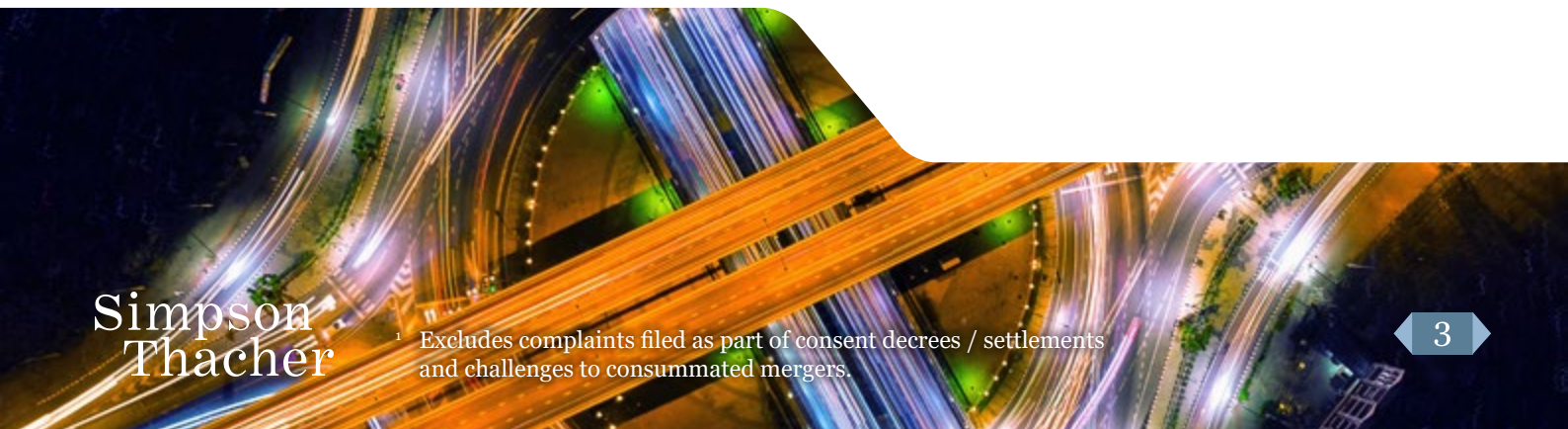
Figure 2 – US merger complaints; challenges and consents (2018-22)



High-profile casualties include *Lockheed/Aerojet* and a trio of hospital system mergers (*HCA/Steward; RWJ Barnabas/ Saint Peter's; Lifespan/Care New England*).

The 2022 actions also covered a wider variety of aggressive theories than ever before, including potential competition (*Meta/Within*), ecosystem competition (*Meta/Within; Microsoft/Activision*) monopsony/labour markets (*PRH/ S&S*), vertical theories and data misuse (*UHG/Change and Lockheed/Aerojet*), and allegations that merger agreements themselves violated the anti-conspiracy laws (*Booz/ EverWatch*).

But it doesn't end there – the FTC also announced a significant change of policy in November, embracing a much wider view of conduct that might constitute "unfair methods of competition" under its Section 5 powers. In particular, the new policy statement suggests that Section 5 may serve as a new tool to contest mergers in scenarios where they would not be captured by or violate existing merger control laws. We expect this to develop over the coming year (we also discuss the potential implications for killer, reverse-killer and ecosystem acquisitions in Theme 6).



[1] Excludes complaints filed as part of consent decrees / settlements and challenges to consummated mergers.

Theme 2

A chequered path – US enforcement met with mixed success in Court: can your deal wait?

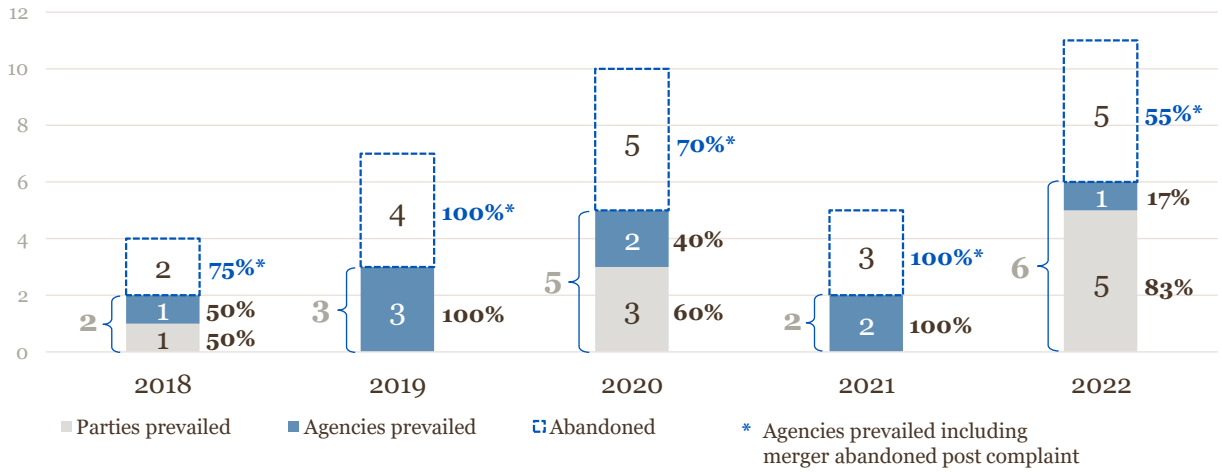
Ultimately, US agencies need to litigate to block a deal. And 2022 was a big year for litigation, with 6 District Court or ALJ judgments handed down so far in the year. To date, however, the Government's success rate in court has been underwhelming. The Federal agencies have prevailed in only one case, for a success rate of around 17% for 2022. Even if one attributes to the agencies all mergers abandoned post-complaint, the agencies' litigation success rate is only 55% for 2022. That compares to success rates of 100% (counting a settlement, two decisions in total) for decisions handed down in 2021.

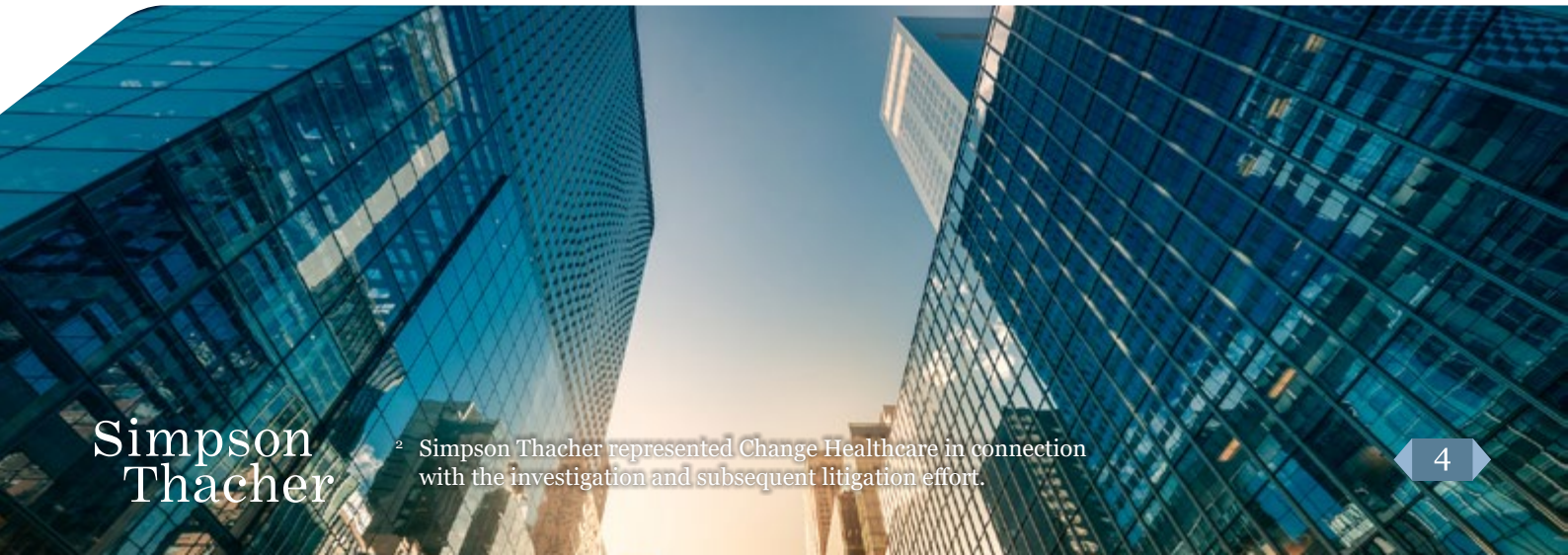
The US agencies' lone 2022 victory was in the *Penguin Random House/Simon & Shuster* deal, which was successfully challenged in court by the DOJ on rarely-used "monopsony" grounds: rather than *consumers* of books, DOJ alleged that the merger would harm authors of anticipated best-selling books.

However, the other challenges failed (though 4 out of 5 losses are now on appeal). In particular, the agencies' losing streak for litigated vertical merger cases continued, with *UnitedHealth Group/Change Healthcare*[2] building on the foundation laid by *AT&T/Time Warner*. As a result vertical merger challenges become increasingly difficult for the agencies to litigate successfully, though the agencies may attempt to change the balance of power in the vertical field with the impending revised Vertical Merger Guidelines, which are expected any day.

While the message from agency leadership remains clear that they are undeterred—days after the *UnitedHealth Group/Change Healthcare* loss, DOJ AG Jonathan Kanter confirmed DOJ remains "committed to bringing difficult cases" and FTC Chairperson Lina Khan has previously noted the FTC's "special obligation to be bringing the hard cases"—the odds of success have, at least for now, materially improved for those parties willing to go the distance.

Figure 3 – US agencies' litigation success rate (2018-22)





[2] Simpson Thacher represented Change Healthcare in connection with the investigation and subsequent litigation effort.

Theme 3

Strong interventionist streak across the Atlantic both in the UK and EU: do parties give in earlier?

The hardening of merger control enforcement has also continued across the Atlantic.

In the UK – now fully outside the EU merger control regime – the proportion of cases with remedies at Phase I has increased sharply from 5% to 30% (as shown by Figure 4 below). This may reflect an increased willingness by deal-makers and advisors to offer early concessions rather than gambling on a successful Phase II outcome.

Not to be outdone by their British counterparts, EC officials have been ramping up the intensity of their scrutiny at Phase II, with an even-more-remarkable 75% of EU Phase II cases having been abandoned or prohibited. This was a significantly higher proportion than in recent years (43% in 2021, 33% in 2020) and may prompt a rise in Phase I commitment offers in 2023 as merging parties adjust to the harsh new reality.

Figure 4 – UK/EU Phase 1 Remedy Cases (2018-22)

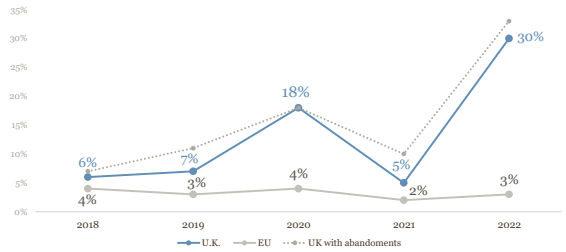
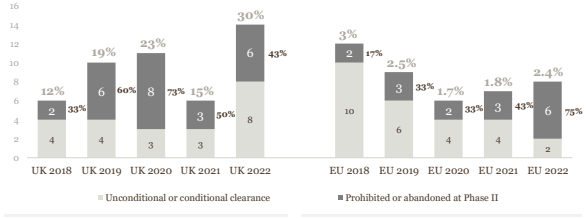


Figure 5 – UK/EU Phase 2 Outcomes (2018-22)



Indeed, the CMA also decided or frustrated a record proportion of cases at Phase II in 2022, with 6 out of 14 Phase II reviews (43%) resulting in either prohibition or abandonment. In other words, the CMA is effectively blocking nearly half the deals which are taken to an in-depth investigation. A notable example was the conclusion of the *Meta/Giphy* saga, which saw the CMA prohibit the high-profile tech acquisition for a second time, after it was remitted by the CAT for second Phase 2 review following a largely unsuccessful appeal by Meta.

Interestingly, the EC's only outright prohibitions in 2022 were *Daewoo Shipbuilding/Hyundai Heavy Industries* and *Illumina/Grail* (the latter is unpacked in Theme 6). This compares to four cases where the parties cut their losses and abandoned their deals before the final decision, suggesting that parties are increasingly unwilling to engage in high-stakes brinkmanship with the EC.

Theme 4

Behavioural remedies fall further out of favour on both sides of the Atlantic

The leaders of US antitrust agencies have been on the record voicing scepticism on remedies in general[3] – and particularly behavioural ones. For instance, Chair Khan testified to the Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights in September that the FTC "now strongly disfavor[s] behavioral remedies", which position was further reiterated in a public statement accompanying the adoption of modifications to the FTC's consent decree with *Linde/Praxair*, which also involved behavioral remedies. This is borne out in the data, with the number of consent decrees dropping dramatically by nearly 50% over the last year from 17 in 2021 to 7 in 2022 (see Figure 2 previously). None was purely behavioural.

In Europe too, both the CMA and the EC have continued to move away from behavioural undertaking, although cases resolved with remedies have grown dramatically in the UK.

Figure 6 below provides a breakdown of Phase I remedies by type over the past five years, whilst Figure 7 does the equivalent for Phase II. The CMA has imposed almost exclusively structural remedies at both Phase I and Phase II over the past five years (save for in a very limited number of predominantly railway/infrastructure cases at Phase I and a radio merger at Phase II).

Similarly, the EC "strongly prefers" structural resolutions, pointing out that behavioural remedies are "super-intensive in terms of staffing" and "easier to circumvent" than a divestiture. Walking the talk on this point, the EC almost exclusively imposed structural remedies in 2022: it accepted one hybrid remedy in *ALD/LeasePlan*, with only a single behavioural remedy issued at Phase II (in *Meta/Kustomer*).

Figure 6 – Types of Remedies in Phase I (UK/EU)

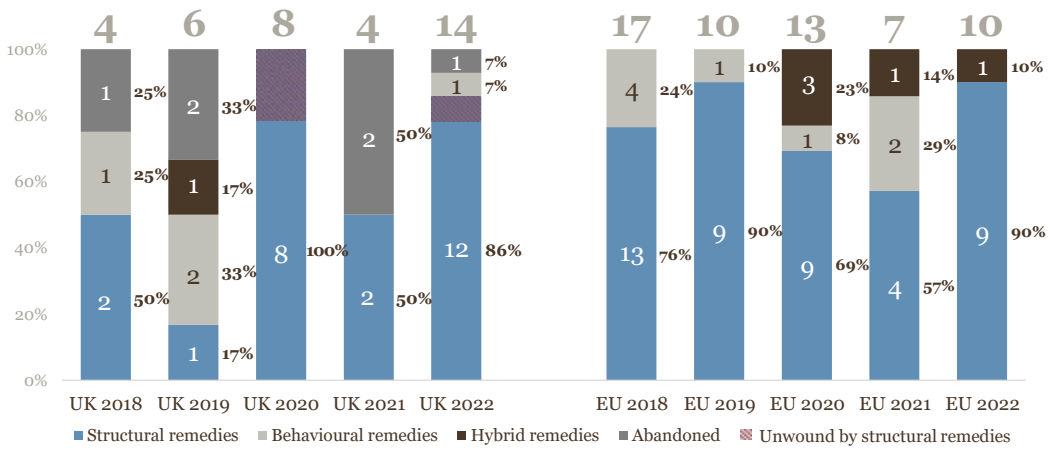


Figure 7 – Types of Remedies in Phase II (UK/EU)

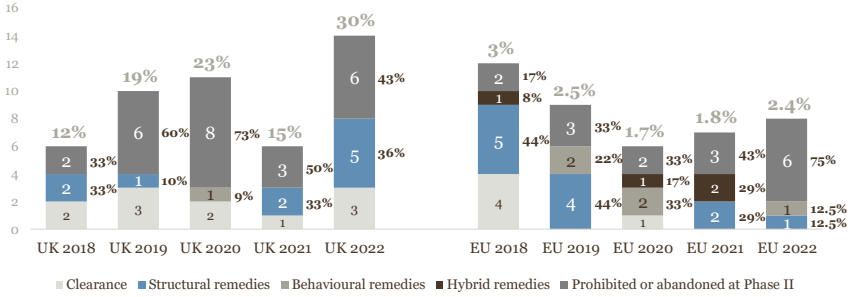
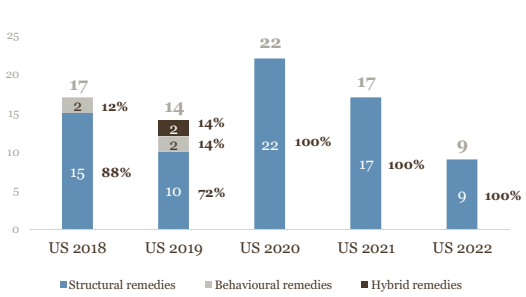


Figure 8 – Types of Remedies in Phase II (US)



[3] *"I am concerned that merger remedies short of blocking a transaction too often miss the mark. . . In most situations, we should seek a simple injunction to block the transaction. ... It is the surest way to preserve competition. . ."* Remarks by Assistant Attorney General Jonathan Kanter at New York Bar Association conference in January.

Theme 5

PE firms come under fire

Both the DOJ AG Jonathan Kanter and FTC Chairperson Lina Khan have stated that private equity is firmly in their sights. Kanter has emphasised that scrutinising PE deals is "top of mind",[4] whilst Kahn flagged that regulators need to "improve their tools [such as merger guidelines]" to go after PE "in a more muscular way".[5] This has started materialising in the US in a variety of ways.

A revitalization of Clayton Act Section 8 "interlocking directorate" enforcement involved the issuance of a raft of subpoenas to private equity firms scrutinizing their shareholdings in, and appointment of directors to, competing firms. These have so far culminated in the resignation of 7 board members from 5 companies, and "Section 8 will continue to be a priority" for DOJ.

In litigation, DOJ has criticized private equity divestiture buyers as "seek[ing] to maximize short term returns" and "flip" acquired assets, with little incentive to "make significant investments" that would have an impact "outside of [their] narrow investment horizon." (Notably, these criticisms were ineffective, and in *UnitedHealth Group/Change Healthcare* the judge approved the divestiture to a private equity buyer.)

And in merger reviews, the FTC has complained that "private equity firms increasingly engage in roll up strategies that allow them to accrue market power off the Commission's radar", and imposed burdensome "prior approval" requirements on PE firms to secure merger approvals (*JAB/SAGE Veterinary Partners*).

Authorities across the pond also have PE firms in their crosshairs. The EC concluded a report in 2020 on common shareholdings by institutional investors and is well-acquainted with the potential issues. 2023 may well be the year that it decides to take action.

In the UK, the CMA's focus has predominantly been roll-up acquisitions, as most recently demonstrated by its extraction of Phase I remedies in the *VetPartners/Goddard Veterinary* case. VetPartners – owned by PE firm BC Partners and owner of approximately 550 vet sites across the UK – was forced to divest 8 sites (out of the 47 in Goddard Veterinary's portfolio) in order to win approval. This followed an earlier vet deal in 2022, CVS's attempted acquisition of "The Vet" business, which was effectively blocked at Phase I after the CMA accepted undertakings from CVS for the disposal of the entire target business. More fireworks could be in store too, as the CMA is currently investigating eight small completed acquisitions by Independent Vetcare Limited, part of IVC Evidensia, which is Europe's largest veterinary care business and part-owned by Stockholm-based PE firm EQT.

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4 *See: https://www.ft.com/content/7f4cc882-1444-4ea3-8a31-c382364aace1*

5 *See: https://www.ft.com/content/ef9e4ce8-ab9a-45b3-ad91-7877f0e1c797*

Theme 6

Considering a "killer acquisition", "reverse killer" or "ecosystem" deal? These remain hot topics for 2023

In an attempt to tackle areas that may have previously escaped scrutiny, authorities continue to worry about so-called "killer acquisitions", particularly in the tech and pharma sectors, as well as other theories of harm both old and new. Variations on the killer acquisition theme will receive equally thorough regulatory treatment, such as "reverse killer" acquisitions, where the purchaser kills off its own potential plan to compete instead of the target's. Scrutiny of the effect of a merger on the overall "ecosystem" – as opposed to narrow market definitions – falls into the same bucket. In this latter type of case, the authority may identify competition concerns due to the strengthening of the acquirer's platform or wider ecosystem, even in the absence of even *potential future* overlaps with the target (which distinguishes them from a killer or reverse killer acquisition). Such cases blur the lines between traditional merger control theories of harm and the reasoning more commonly applied in abuse of dominance or monopolisation investigations.

Many of these killer acquisition and similar cases in recent years have had mixed outcomes. For instance, in the UK, *PayPal/iZettle* (2019) and *Amazon/Deliveroo* (2020) were both taken to an in-depth Phase II investigation by the CMA but ultimately cleared unconditionally. Conversely, *Sabre/Farelogix* was blocked by the CMA in 2020, a decision which survived an appeal by Sabre on jurisdictional grounds (concluding in 2021). *Sabre/Farelogix* was also challenged by the DOJ in the US, but the DOJ's suit was rejected by the courts. This is also reflected in the FTC's pending lawsuits against Meta, one seeking to block a like "reverse killer" acquisition (*Meta/Within*), the other to unwind an alleged killer acquisition made years ago (*FTC v. Facebook*, seeking to unwind the WhatsApp and Instagram acquisitions of 2012 and 2014)

We do not expect this track record will deter antitrust authorities from bringing fresh challenges. Instead, new regulatory tools and boundary-pushing theories of harm will be tested throughout 2023.

For instance, in March 2021, the EC changed its policy on investigating below-threshold mergers through referrals from EU member states. The much-publicised shift means that the EC will now – in the right circumstances – exercise jurisdiction over deals that do not fall within the scope of any Member States' national regimes.

This new policy has so far only captured a single deal that would otherwise have flown under the radar. That transaction, Illumina's completed acquisition of Grail (a healthcare business specialising in early cancer detection tests), has rightly been the subject of much attention. The parties unsuccessfully challenged the EC's jurisdiction before the General Court and have now appealed to the EU's top court. In the meantime, the EC has prohibited the merger, a decision which Illumina has also appealed.

Stepping back from the *Illumina/Grail* saga and reflecting on the bigger picture, however, it is clear that the EC is willing to apply its new policy to challenge transactions that raise genuine issues. We therefore expect to see at least one new case brought on this basis over the coming year, as the EC seeks to test the limits of its powers.

As mentioned above, deals affecting ecosystem competition are another increasingly important theme in merger control enforcement. An example of this is currently playing out in the headlines of the financial press around the world, as antitrust authorities in the US, EU and UK scrutinise Microsoft's proposed acquisition of Activision Blizzard. Although this transaction is ostensibly all about videogames, the role of Microsoft's broader ecosystem (including cloud platforms and computer operating systems) is being put under a microscope. For instance, the CMA has explicitly raised concerns around potential vertical effects arising from Microsoft leveraging its broader ecosystem in combination with Activision's games catalogue to foreclose rivals in cloud gaming services.

A leading US case to watch in this space is the FTC's challenge of Meta's acquisition of Within. The "reverse killer" acquisition case is based on a "potential competition" theory, with the FTC alleging that Meta was poised to enter the virtual reality fitness app space before instead electing to acquire leading market participant Within.

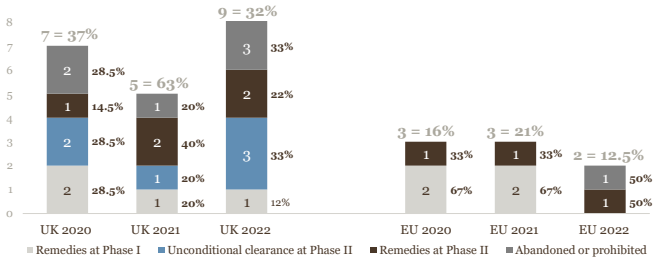
Finally, it remains to be seen to what degree the FTC's recent policy shift on "unfair methods of competition" will impact killer acquisitions and their ilk, with the recent Section 5 policy statement specifically calling out "mergers, acquisitions, or joint ventures that have the tendency to ripen into violations" and "series of mergers, acquisitions, or joint ventures that tend to bring about . . . harms."

Theme 7

TMT still under scrutiny, whilst digital sector reforms have crystallised in the EU, remain embryonic in the UK and have not taken off in the US

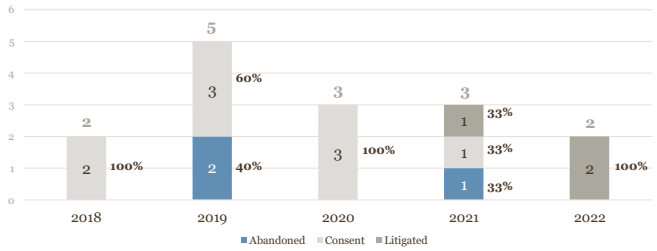
Overall the digital and tech sector remains one of the most closely-watched. Notably, the EC intervened in the only two TMT sector cases decided at Phase II in 2022, imposing remedies in *Meta/Kustomer* and contributing to the abandonment of *NVDIA/Arm*. The UK landscape was similar, with the CMA intervening in 5 out of the 8 Phase II cases in the sector.

Figure 9 – UK/EU TMT merger outcomes (2020-2022)



A number of telco consolidation cases are being considered, including in the mobile sector. In 2023 the highest EU Court – the ECJ – will hand down its eagerly anticipated judgment in relation to the Hutchison/O2 UK mobile merger. The merger was blocked by the EC but in 2020 the General Court quashed the decision. The ECJ Advocate General issued a non-binding opinion indicating that the General Court judgment should be reversed as the wrong standard was applied in determining if the merger was anticompetitive. The imminent ECJ judgment will have significant repercussions for the prospect of telco consolidation in the EU.

Figure 10 – US TMT merger outcomes based on Complaints (2018-2022)



In the US, the TMT sector featured prominently in 2022, with the commencement of the *Meta/Within* trial in December, followed closely by the *Microsoft/Activision* complaint, filed later that month. In a similar vein, the two recently-announced Amazon acquisitions (iRobot and OneMedical) continue to get close scrutiny. And, in continuance of a trend started last year, which reversed the prior trend, the agencies have been for more likely to litigate TMT cases than settle: none of the 2022 consent decrees related to the TMT sector, while two litigated cases and one case scheduled for trial in 2023 were TMT-related.

In Europe, the EC now has two further toolkits to address the digital sector: the Digital Markets Act and the Digital Services Act.

Notably, the DMA, coming into effect in May 2023, creates a mandatory pre-closing obligation on "gatekeepers" to inform the EC of their M&A activity regardless of whether it would otherwise be notifiable. For the most part this will only impact the biggest tech players – such as Google, Amazon and Apple – who are clearly within scope of the new regime.

The UK is also promising to adopt similar reforms, with Prime Minister Rishi Sunak announcing in the 2022 Autumn Statement that a Digital Markets, Competition and Consumer Bill will be introduced in the third session of this Parliament. It is expected that this legislation will include – amongst many other things – a new mandatory (and suspensory) reporting requirement for the "most significant" transactions of certain digital firms. The focus will be on regulating tech players who have substantial, entrenched market power in at least one digital activity.

While it remains to be seen whether any bills proposing comparable laws can navigate the current legislative gauntlet presented in the US, analogous initiatives are under consideration, such as the Platform Competition and Opportunity Act (which would empower the US Agencies to block acquisitions by dominant platforms of actual or potential customers) and the Trust-Busting for the Twenty-First Century Act (which would make acquisitions by 'dominant digital firms' presumptively illegal).

Theme 8

Navigating co-operation and divergence between agencies becomes more challenging and yet is crucial

Navigating this landscape co-operation and divergence between authorities can be challenging and often crucial. *Cargotec/Konecrones* is a particularly interesting example and a cautionary tale. This transaction was cleared by the EC subject to remedies, but prohibited by the CMA, which concluded that the same remedies package was insufficient. Shortly after the CMA decision was announced, the DOJ also announced that they would have also challenged the merger, but ultimately did not need to proceed as the deal was abandoned in face of UK opposition.

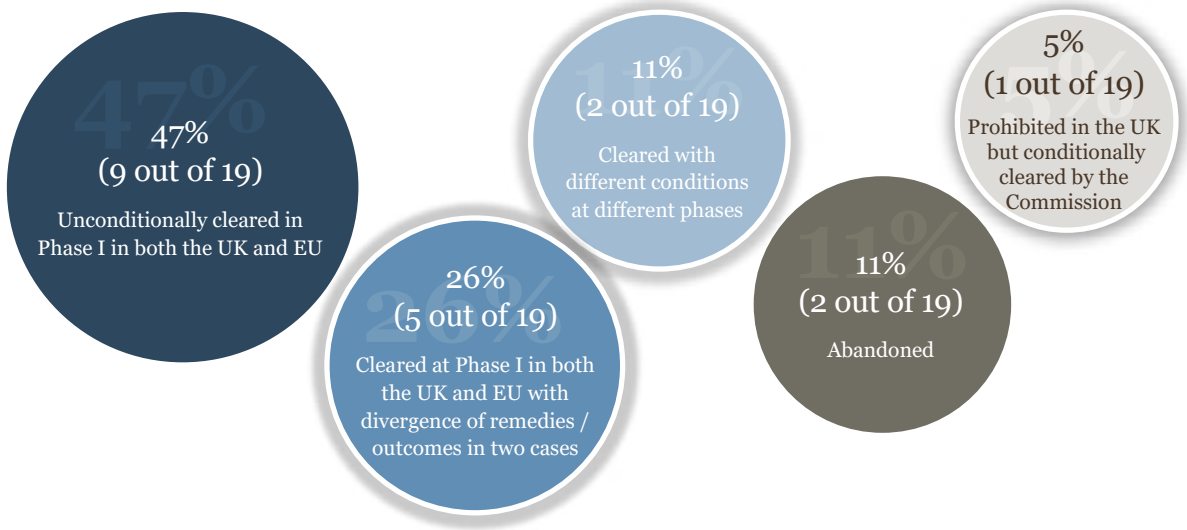
This underscores that subtle differences in approach (e.g. on mix and match remedies) can make all the difference. The CMA has not been shy to flex its muscles even on EEA-wide/ global markets and leading competition authorities may align in different ways across the Atlantic.

With regard to the newly formed equilibrium across the Channel between the UK and the EU, in 2022, 28% (24 out of 87) of CMA merger cases launched were subject (or are currently subject) to parallel review by the EC. This level of double-handling has been widely expected and is likely to remain a constant feature of the post-Brexit era.

Indeed, there is more duplication between regulators than first meets the eye, as many cases reviewed by the EC are also reviewed by the CMA only via a briefing paper. Whilst such cases may not count as parallel in any official statistics, submitting a briefing paper can still involve considerable effort and cost on the merging parties' behalf. It also reflects the significant level of uncertainty created by the voluntary UK regime – an issue that we explore further below.

Looking ahead to 2023 and beyond, it is clear that coordination of strategy and timing is essential when plotting a course through parallel EU/UK merger reviews. The CMA does not like to be left behind and has a more formalistic and longer process. For example, in *S&P Global/IHS Markit*, although the CMA and EC both announced their decisions in October 2021, the CMA process only concluded with acceptance of final undertakings in February 2022.

Figure 11 – Key statistics on EU/UK parallel merger reviews (decided cases)



Theme 9

Exercise extreme caution: UK's voluntary merger control contains significant pitfalls for the unwary

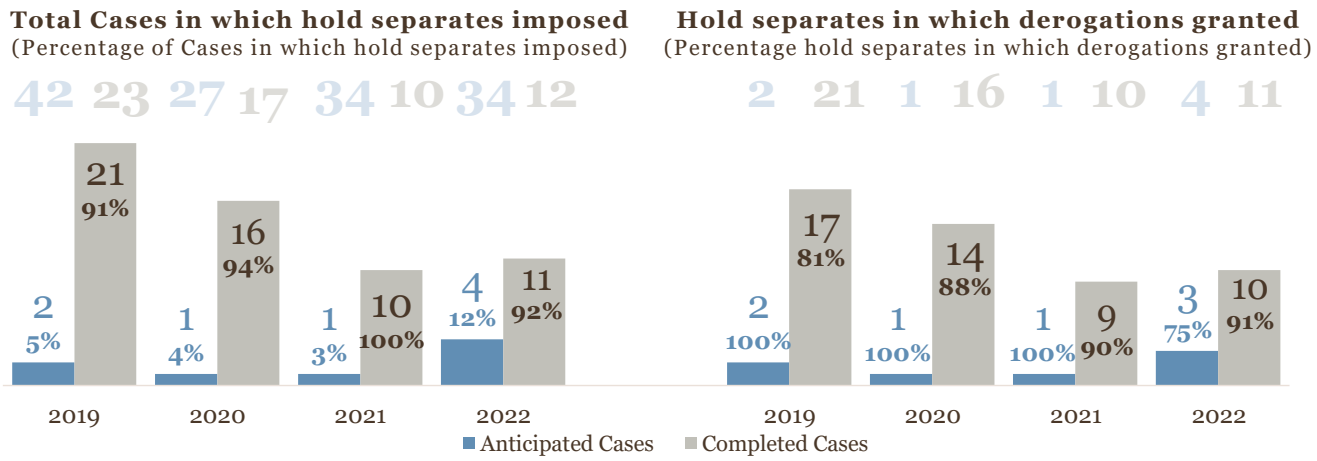
The UK's merger control regime is voluntary, and therefore allows for a greater degree of procedural flexibility compared to the EU and other jurisdictions featuring mandatory notifications and a suspensory effect. Notably, parties can close transactions without CMA approval. If the CMA is already investigating or decides to investigate, however, it will impose a "hold separate" order (also known as an "initial enforcement order" or "IEO"), prohibiting the parties from integrating. IEOs were issued in 92% of completed mergers reviewed in 2022 and (100% in 2021). Although this approach has some positives, the past year has shown that parties should proceed with extreme caution when faced with such a hold separate order.

The CMA's standard IEO is remarkably broad. It prohibits the acquirer from making strategic decisions on behalf of the target or from making any staffing or structural changes (acquisitions or dispositions) at either the acquirer or the target. Unless the CMA grants a derogation, the scope of the IEO is organisation-wide and extends to the entirety of the acquirer's business, not merely the acquisition vehicle or relevant portfolio company concerned (in the case of a private equity firm).

These onerous restrictions can be tricky navigate, even for the most sophisticated players. In 2022, the CMA fined Meta £50 million for refusing to report all the information it was required to under IEO in connection with its acquisition of Giphy, then a further £500,000 for twice changing its chief compliance officer and £1.5 million for failing to alert the CMA in advance of key staff leaving the company, both in breach of the same order.

Even if your deal has not completed, you may not be safe. The CMA can issue an IEO if it nonetheless considers there is a risk of pre-emptive action, for instance if the merging parties have begun jointly to conduct commercial negotiations with customers or suppliers. This became far more commonplace in 2022, with the CMA issuing an IEO in 12% of the anticipated mergers it reviewed, compared to 3% in 2021 and 4% in 2020.

Figure 12 – Prevalence of hold separates in CMA cases (2019-2022)



Theme 10

Tide of FDI activity shows no sign of abating

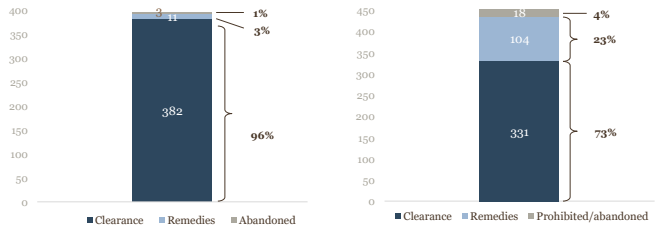
Over the last few years, CFIUS' jurisdiction has grown significantly. Notably the enactment of the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA") enhanced and modernized the regime by providing additional tools to address national security concerns. Regulations implementing FIRRMA also imposed a mandatory filing obligation for certain types of transactions involving critical technologies, sensitive personal data, and critical infrastructure.

As a result of these changes, an increasing number of transactions are subject to CFIUS review. 164 short-form declarations and 272 long-form notices were submitted to CFIUS in 2021, a sharp rise from a few years ago (only 20 declarations and 229 notices were submitted in 2018). CFIUS has also increased its focus and messaging around mitigation and enforcement, releasing its first-ever CFIUS Enforcement and Penalty Guidelines in October 2022. And in practice, foreign investors are increasingly receiving outreach from the Committee on "non-notified" transactions to request additional information or a filing. In 2021, 135 non-notified transactions were put forward to the Committee for consideration, eight of which resulted in a request for a filing.

It is expected that the Committee will continue to enhance its detection capabilities of non-notified transactions in the years to come, which is likely to result in additional regulatory enforcement activities, an increased number of transactions briefed to the Committee on a precautionary basis, and a heightened sensitivity by foreign investors to the process. Investors from China and Russia have been the primary focus of such inquiries in recent years, although not exclusively, and investors even from jurisdictions that are perceived to present lower levels of risk must navigate intervention and mitigation by the Committee in some instances. In addition, the Biden Administration released in September 2022 a new Executive Order directing the Committee to consider certain new categories of national security factors when evaluating transactions. As part of that Order, the Administration noted the importance of maintaining US technological leadership in key industries, including microelectronics, artificial intelligence, biotechnology, quantum computing and advanced clean energy technologies. It is expected that the Committee will be keenly focused on these sectors in the future.

National FDI regimes in the EU are also highly rigorous and should not be underestimated. They are reinforced by an EU framework that allows the EC to monitor activity and ensure national authorities kept informed of developments throughout the region. In fact, statistics illustrate a higher level of intervention by EU member states in national FDI screening than by the Commission in merger control.

Figure 13 – Statistics illustrate a higher level of intervention by Member States in FDI screening than by the EC in merger control (2021)



The position is similar in the UK, which has seen three prohibition decisions on Chinese acquirers, one on a Russian acquirer, and nine conditional final orders made under the NSI Act since it came into effect on 1 January 2022.

Looking ahead, the EU's proposed Foreign Subsidies Regulation ("FSR") promises to impose another (pre-closing, mandatory/suspensory) hurdle for many transactions. The FSR is intended to ensure a level playing field by preventing the distortion of the internal market by entities that receive foreign subsidies from third countries (outside the EU) acquiring companies operating within the EU. However, the broad scope of relevant governmental financial contributions and low thresholds mean that these new rules may catch many investors by surprise.

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