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Deal Uncertainty Increases as Merger Control Authorities Gain Discretionary Powers of Review

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This article is from Skadden's *2022 Insights*.

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Takeaways

- More than 50 countries now have the discretion to conduct competition reviews of mergers below mandatory notification thresholds, and the European Commission, EU member states, the U.K. and others are using this authority more frequently.
- As a consequence, companies whose merger might not have been subject to a competition review in the past need to provide for the possibility that their deal will draw the attention of regulators with discretionary review powers.
- Risks need to be allocated between the parties, and adjustments may need to be made to long-stop dates and the parties' obligations to help secure regulatory clearances.
- Understanding the areas of particular concern to individual merger control authorities is now key to a smooth closing. Transactions in innovative industries such as pharma and tech where large players acquire emerging targets with little or no revenue are most likely to see reviews.

The Perceived Enforcement Gap

In many countries, concerns exist that traditional turnover (revenue) thresholds for merger reviews do not capture some acquisitions by incumbents of nascent competitors that could play a significant competitive role in the market in the future — so-called "killer acquisitions." For example, the Australian, German and U.K. regulators issued a joint statement in 2021 noting the challenges they face when investigating mergers in dynamic and fast-paced markets, particularly in the tech sector. In many cases, the target may have a promising technology but little or no revenue, so the deals do not meet traditional notification thresholds.

Below-Threshold Reviews Become More Common in the EU

Since early 2021, the European Commission (EC) has invited national regulators to refer certain transactions to it that do not meet either national or EU thresholds for investigation, in particular "killer acquisitions." The EC is doing so under a provision in the EU Merger Regulation allowing national regulators to refer transactions that are not purely national in scope and that may give rise to serious competition issues.

Enabling the referral of transactions that do not meet national thresholds is creating uncertainty and can result in investigations of deals that have already closed.

A recent example is Illumina's completed acquisition of GRAIL, which did not meet the EU's or any member states' notification thresholds. The merger of the two cancer screening businesses was announced in September 2020, and in March 2021 several national regulators requested that the EC review the transaction. The EC accepted the referral in April 2021, and subsequently launched an in-depth investigation.

Illumina is currently challenging the EC's jurisdiction before the EU courts. But the extended investigation threatened to extend beyond the deal's long-stop date, so they chose to close the transaction in August 2021 while the EC review was still underway. As a result, the EC has launched a gun-jumping investigation

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that could result in a substantial fine, and it ordered Illumina to hold GRAIL separate for the duration of its investigation.

Stretching Jurisdiction in the UK

In the U.K., the Competition and Markets Authority (CMA) is increasingly construing the criteria for review broadly, taking jurisdiction over deals where targets appear to have limited (if any) revenues or direct activity in the U.K. In some cases, other global regulators have already approved them. Exacerbating the situation, Brexit has created the possibility of parallel reviews in the EU and U.K.

For example, the CMA recently ordered Facebook (since renamed Meta) to unwind its completed acquisition of the GIF-sharing social media company Giphy. Although Giphy did not generate any revenue in the U.K. in its last financial year, the CMA asserted jurisdiction after finding that the company's small presence in the country overlapped with Facebook's activities.

The CMA's action in this deal is not an outlier. In recent years, it has intervened in non-U.K.-centric deals in dynamic global markets on a number of occasions.

In addition, the CMA fined Facebook £50 million for failing to comply with an order requiring it to hold the Giphy business separate from its own. The regulator routinely imposes hold-separate orders, especially when reviewing completed acquisitions. Meta has appealed the order.

Other Jurisdictions Also Scrutinize High-Value/Low-Turnover Deals

Germany and Austria both adopted alternative transaction-value thresholds in 2017, requiring the notification of acquisitions by large companies of targets with significant activities in those countries, even if the targets generate no revenue there. For Germany, the new review powers extend to deals with a global value over €400 million and, for Austria, those with a global value over €200 million.

Facebook was also recently fined €9.6 million for failing to notify Austrian regulators of its acquisition of Giphy, for which Facebook reportedly paid $315 million. Austria is now conducting an in-depth investigation into the deal.

More jurisdictions are considering this approach, including South Korea, which introduced an alternative transaction-value threshold at the end of 2021, capturing deals with a global value of at least KRW 600 billion.

Separately, over 50 competition regulators around the world have the discretion to review deals that do not meet notification thresholds. More will likely follow. Italy, for example, recently proposed introducing such a power. These regulators frequently monitor the financial press and can request information from merging parties to determine if a deal raises significant enough competition issues to open an investigation, even if it has already closed.

Discretion Creates Uncertainty for Deals

There is some good news on the competition regulation front. Regulators have been trying to ease the burden of merger control for deals that clearly do not raise competition concerns. For example, a growing number of regulators are introducing or expanding simplified procedures, with shorter timescales and/or shorter notification forms for less problematic mergers.

But the trend toward alternative notification thresholds and more regulatory discretion to review deals that do not meet well-defined thresholds has led to uncertainty, delays and increased costs for dealmakers, and it can result in standstill or hold-separate orders. Regulators also can, and on occasion do, order retrospective divestments to address competition concerns, or even order a completed deal be unwound.

How Should Dealmakers Navigate This New Landscape?

Conducting an early analysis of potential competition issues, alongside the usual assessment of required filings, can identify jurisdictions where regulators may seek to investigate a transaction that falls below the notification thresholds. Proactive, voluntary approaches to those authorities can help determine whether they are likely to review a deal, thereby reducing the period of uncertainty.

For transactions in the digital and pharmaceutical sectors, which will likely be of particular interest to regulators, parties may want to consider including appropriate conditions precedent in deal documents to address the risk of an investigation. Building in extra time or flexibility into timetables may be necessary, particularly if the deal may be reviewed in jurisdictions where investigations move slowly.

For jurisdictions that do not have a statutory bar on closing before the review is complete (for example, the U.K.), the buyer may choose to go forward and close the transaction, taking on the risk of any future intervention by regulators.

See "Biden's Broad Mandate Has Altered the Antitrust Landscape, Making Merger Clearance Process Less Predictable."