

Global mergers and acquisitions' activity in 2021 broke all prior records – with over 63,000 transactions recorded and a global M&A value of more than \$5.1 trillion. We expect 2022 to be another very strong year in terms of M&A deal volume. We have outlined five trends we predict to significantly frame M&A activity this year: (i) enhanced deal scrutiny; (ii) ESG's aspects significance; (iii) the continued growth in the use of W&I insurance; (iv) carving-out of assets increasing deal complexity; and (v) the introduction of a potential corporate re-domiciliation regime for the UK.

TREND #1: M&A REGULATION - ENHANCED DEAL SCRUTINY



We expect that in 2022 M&A deals with a UK component will face increased regulatory challenges, as a result of the increased assertiveness of UK competition law as well as the impact of a new far-reaching national security regime, which came into force on 4 January 2022.

COMPETITION LAW DEVELOPMENTS

CMA's increasingly assertive position post-Brexit

In the post-Brexit environment the Competition and Markets Authority (CMA) appears keen to establish itself as an independent merger regulator, able to rival the European Commission and its European counterparts. As such, the CMA is adopting a more aggressive approach to penalties, is demonstrating a willingness to expand its jurisdictional reach, and has started to build a regime to monitor substantial digital firms.

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The CMA has started to apply more severe penalties on parties that fail to comply with merger control requirements – for example “gun-jumping”, filing incomplete or misleading submissions or failing to comply with their commitments.

While the CMA has the power to fine parties up to 5% of their combined turnover, historically fines for “gun-jumping” ranged between £100,000 and £300,000. However at the end of 2021 the CMA imposed a record fine of £50.5 million on Meta for breaching an order to hold separate its target acquisition Giphy, pending the CMA’s review of the merger. Meta was also fined £1.5 million in February 2022 after it failed to alert the CMA of key staff leaving the company, as was required under the CMA’s initial enforcement order (IEO). This was followed shortly by the CMA imposing its second highest IEO fine on JD Sports and Footasylum for £4.7 million for several breaches, including the sharing of commercially sensitive information between the two parties.

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Finally, the CMA has expressly stated that it is eager to monitor more closely digital markets, and “fostering effective competition in digital markets” is one of the main themes for its annual plans for 2021/2022 and 2022/2023. In this context, it created the Digital Market Unit (DMU) in April 2021, which will oversee a new regulatory regime for digital firms with substantial and entrenched market power. However the new legislation to confer adequate powers to the DMU has not yet been implemented (see below).

Consultations on CMA’s new powers

The UK Government carried out a consultation in 2021 on proposed wide-ranging reforms to the competition and consumer law regimes, and a parallel consultation on the new regulatory regime for digital markets and powers of the DMU. The Government’s response to the consultations is expected in early May this year.

Some of the proposals would have a significant impact on market participants, consumers and practitioners, as they include: enhancing the tools the CMA has to intervene in deals, jurisdictions and markets; tougher penalties for non-compliance with investigative measures; and stronger powers to enforce interim measures during investigations.

One particularly relevant proposal from the jurisdictional perspective of the CMA is a new additional merger threshold, which would allow the CMA to review mergers even if the buyer and target do not compete, where the buyer has over £100 million of revenue in the UK and only one of the parties has over 25% of the share of the supply of goods or services.

In the consultation on the new regime for digital markets and powers of the DMU, one of the Government’s proposals was to establish a mandatory merger filing for “Strategic Market Status” (SMS) digital firms (i.e. firms with substantial and entrenched market power, in at least

one digital activity, providing them with a strategic position). The Government also proposed reversing the burden of proof in Phase II investigations for deals involving SMS firms, which would establish a much lower threshold for the CMA to veto deals. SMS firms would also be subject to an enforceable code of conduct setting out how they are expected to behave. The proposals would have a very material impact on UK merger control and could discourage tech entrepreneurs from setting up a business in the UK. The Government has stated its intention to legislate on this digital market regime as soon as parliamentary time allows.

THE NEW NATIONAL SECURITY REVIEW REGIME

The UK has historically been very open to foreign investment, and between 2002 and 2021 the Government intervened in only 12 M&A transactions on national security grounds. The new regime reflects concerns about national security being undermined and significantly expands the scope of transactions covered by national security review, including minority investments and asset acquisitions (including IP).

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The key features of this new regime are a mandatory notification regime for specific transactions in sensitive areas, and a voluntary notification for other transactions that have potential national security implications. The regime operates retroactively for transactions implemented since 12 November 2020, when the legislation was originally announced.

Mandatory notification is triggered when acquirers of shares or voting rights in a sensitive sector pass certain statutory thresholds (25%, 50% or 75% of shares or voting rights) or satisfy certain other triggers. The Act lists 17 sensitive sectors, which include notably the traditional defence, energy, military and civil nuclear sectors, as well as more innovative sectors such as advanced robotics and cryptographic authentication.

Voluntary notification applies for other types of transactions which raise potential national security concerns. The interested parties can submit the relevant transaction to the Secretary of State for approval.

The Secretary of State has the power to "call in" for review any relevant transaction where there is a reasonable suspicion that it could give rise to a national security risk. Sanctions for non-compliance include heavy fines (up to 5% of worldwide turnover), imprisonment for up to five years and/or the transaction being prohibited or unwound.

This regime constitutes an extra hurdle for companies and will inevitably lead to a very significant number of transactions being submitted for review each year.

[Click here](#) for the four additional trends in our M&A Trends 2022 series.

CONTACTS

COLIN GRAHAM
colin.graham@gide.com

MATTEO MATTEUCCI
matteo.matteucci@gide.com

LAURE SAVANT-ROS
laure.savant-ros@gide.com

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