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ARTICLE

Antitrust authorities' skepticism of merger remedies causes headwinds for dealmakers

PART OF OUR REPORT

Global trends in merger control enforcement

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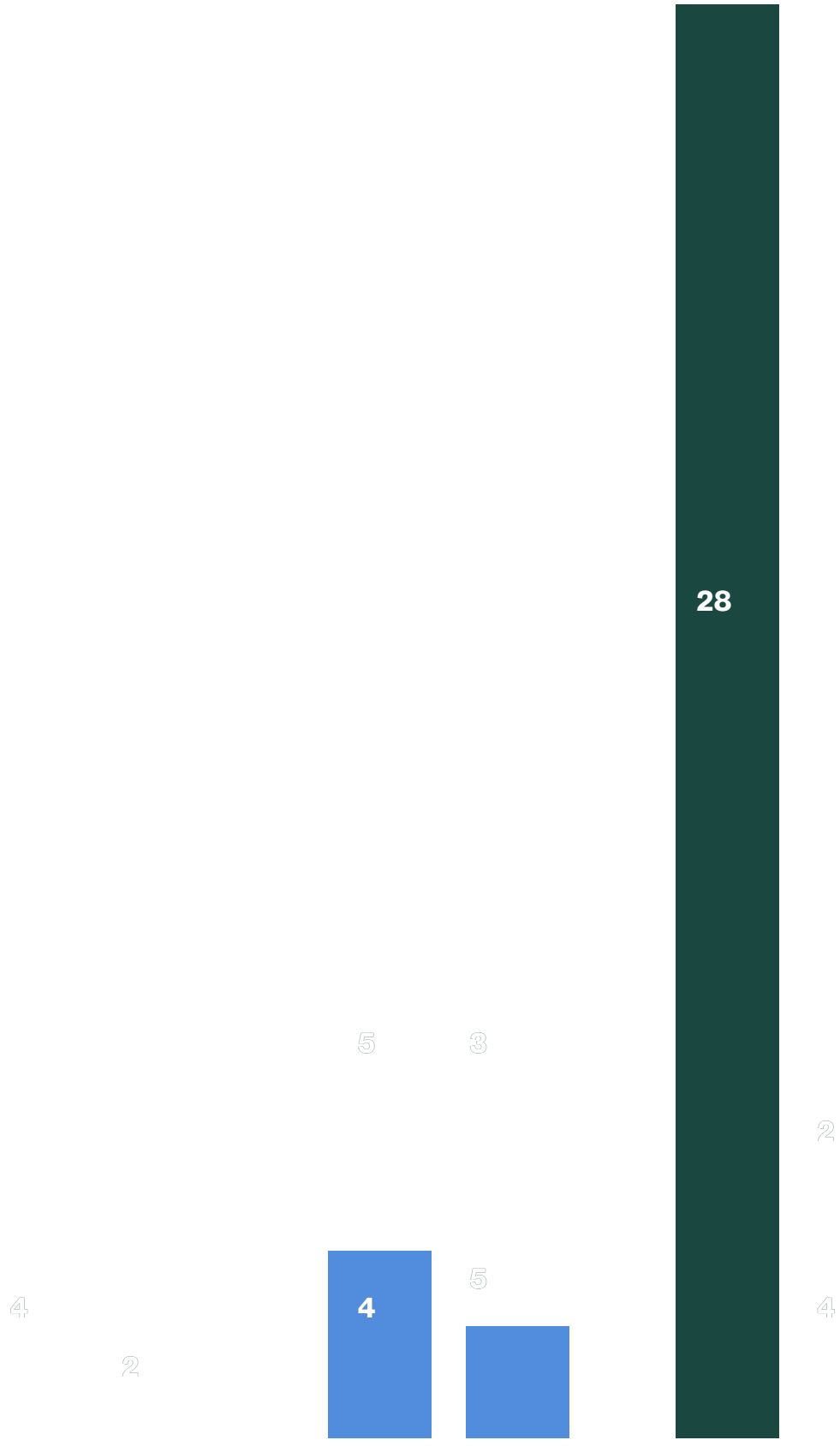
The number of deals cleared with conditions fell sharply in 2024. Many antitrust authorities remained skeptical of whether merger remedies can effectively address antitrust concerns, choosing instead to challenge and ultimately seek to block M&A. Paradoxically, where remedies were agreed, authorities were increasingly creative. Over half of cases contained behavioral commitments. We are now on the precipice of a paradigm shift. A more permissive merger control environment should mean less resistance to merger remedies. All things being equal, dealmakers should have an easier path to clearance.

Total remedy cases

Remedy cases in selected jurisdictions

Phase 1 In-depth

U.S. **EC** **U.K.**



Remedy cases fall as skepticism continues (for now)

A total of 69 deals were cleared subject to remedies in 2024. This is a steep drop from 2023. Even accounting for the fact that 20 of the 2023 remedy cases were attributable to two series of U.K. veterinary practice transactions, there was still a year-on-year decrease.

Why the decline? Antitrust authorities in key jurisdictions continued to doubt whether merger remedies can effectively address antitrust concerns.

In the U.S., there were only two consent decrees in 2024, half the previous year's already low tally.

Each was entered into by the Federal Trade Commission (FTC) and both comprised an unusual behavioral obligation. Under the Biden administration, the U.S. antitrust agencies, particularly the Department of Justice Antitrust Division (DOJ), have been unusually resistant to negotiated merger remedies, instead preferring to challenge deals or see them restructured outside the normal consent decree process.

The U.K. saw a considerable reduction in conditional clearances. Phase 1 remedy cases fell to four, the lowest since 2021 (with two conditional approvals at phase 2, up from one in 2023). But this still meant that one in five investigations ended in conditions, given a drop in total decisions.

China's State Administration for Market Regulation (SAMR) accepted commitments in just one case, a semiconductor transaction. This is down from four in 2023. Ongoing reviews into M&A in strategic sectors may, however, lead to more remedy cases in 2025.

Get set for an about turn

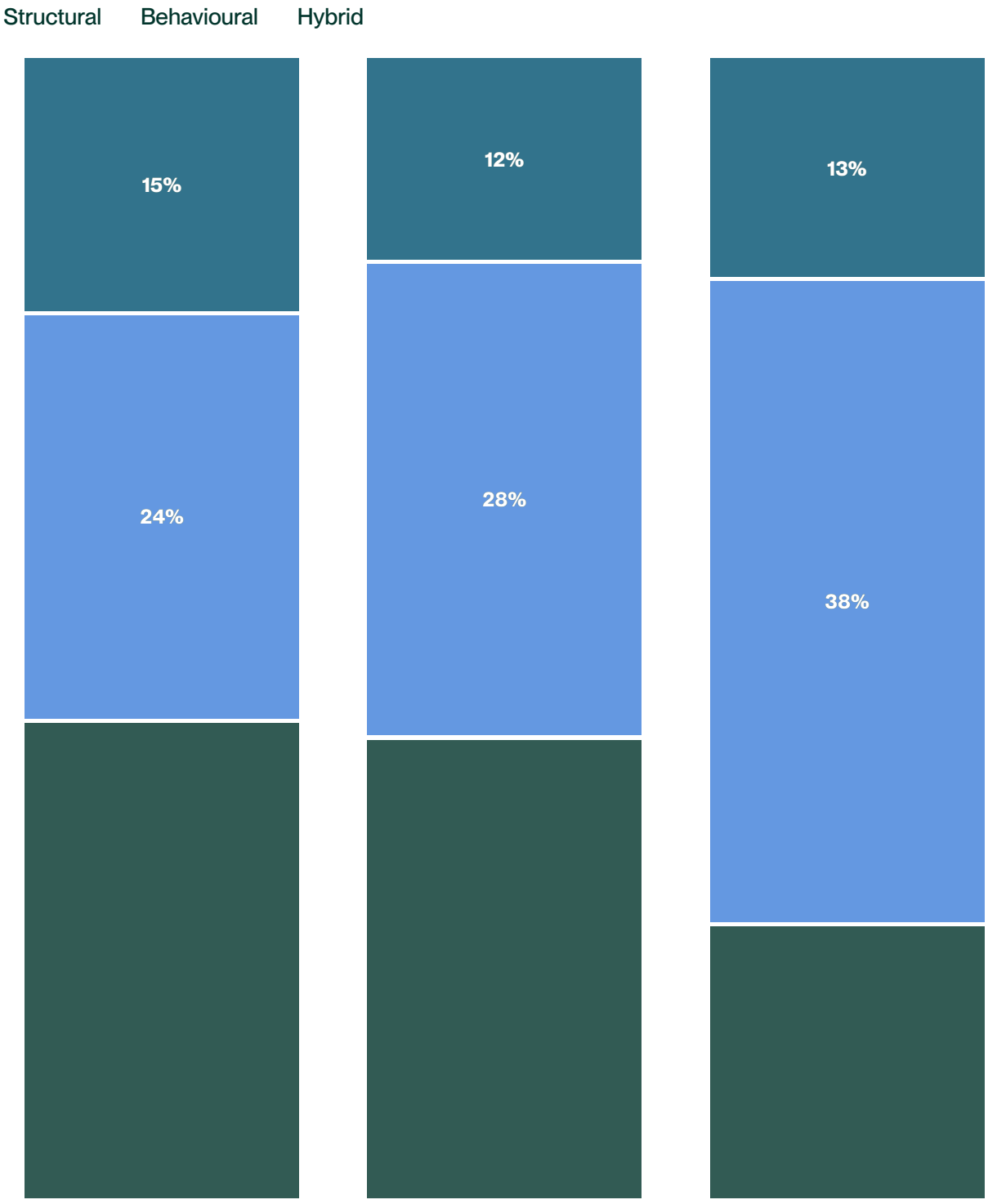
This downward trend may be short-lived. A return to pre-Biden levels of merger control enforcement is predicted under the "pro-business" agenda of Trump 2.0 and a more balanced approach may emerge following political pressure on EU and U.K. authorities to boost growth and innovation.

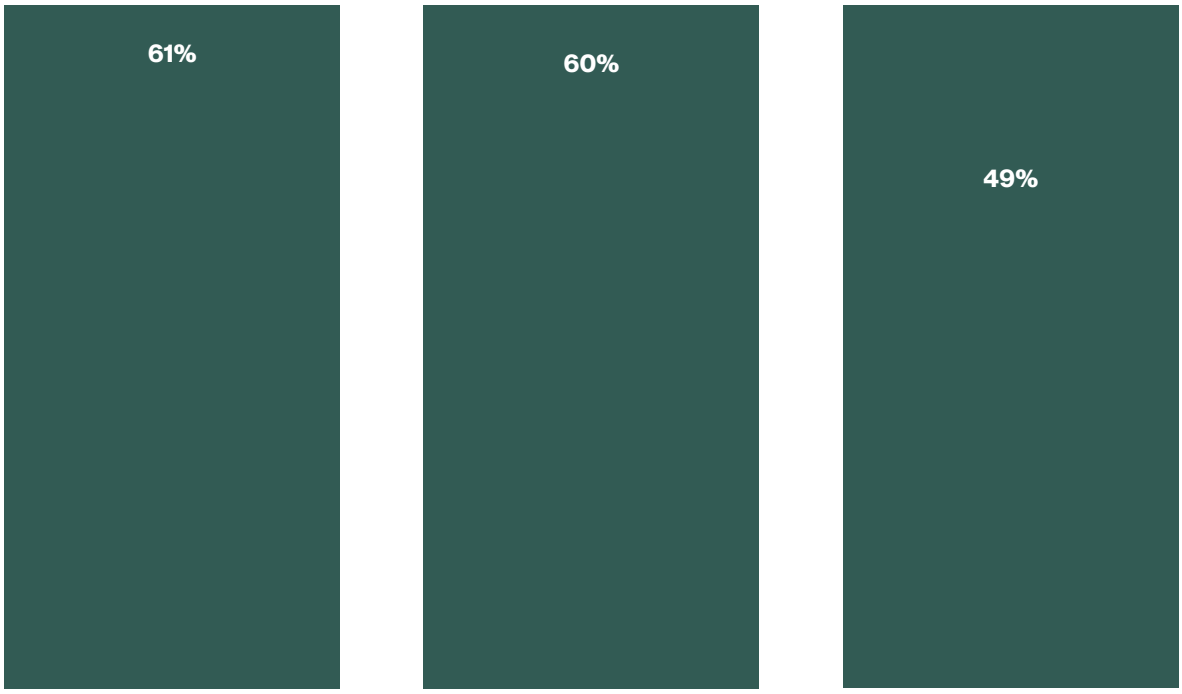
This could translate into a greater willingness on the part of antitrust authorities to accept merger remedies—both structural and behavioral—particularly in strategic sectors.

Merging parties would then have a clearer path to resolving antitrust concerns, meaning a better chance of obtaining clearance.

Movement already as behavioral remedies gain traction

Conditional clearances by type of remedy*





* Excluding South African remedy cases

As part of a recalibrated approach to merger remedies, we may see some antitrust authorities reassess their position on behavioral remedies.

In recent years, U.S. (including under Trump 1.0), EU and U.K. antitrust regulators, among others, have consistently voiced their strong preference for structural divestments over behavioral commitments. They view structural remedies as the best way to address antitrust concerns in a clear-cut way.

But we are already seeing a shifting of the dial.

In the U.K., Competition and Markets Authority (CMA) chief executive Sarah Cardell announced that a review of the CMA's approach to merger remedies will kick off in March 2025. Significantly, it will consider when behavioral remedies might be appropriate.

Shortly after, the CMA cleared the mobile tie-up between Vodafone and Three subject to novel behavioral conditions. These oblige the parties to deliver a pre-agreed business plan on network upgrades, with oversight by the CMA and communications regulator Ofcom. The parties also agreed to maintain pricing on certain mobile tariffs and data plans and to commit to pre-set prices and terms of access for mobile virtual network operators, in each case for a three-year period, as measures intended to protect customers during the early stages of the parties' network roll-out.

These developments have been heralded as part of a broader watershed moment for U.K. merger control policy.

However, looking across the jurisdictions surveyed in our report, they are not out of line with the international merger control landscape.

Our data shows that, while there were fewer remedy cases overall, behavioral commitments are back in fashion. In 2024, 51% of cases involved remedies that were behavioral or hybrid (i.e., combining structural and behavioral elements). This is up from just 40% in 2023.

In China, behavioral commitments have long been a mainstay in SAMR remedy decisions. All ten conditional clearances in the past three years have included them. We expect this to continue.

At EU level, the European Commission (EC) has accepted various behavioral remedies in recent years, despite stating it prefers structural fixes. In 2024, all three phase 2 conditional merger clearances included behavioral obligations alongside divestments, although these were mostly designed to complement and promote the effectiveness of the structural remedies.

Both U.S. consent decrees last year were behavioral in nature. In each case the target's CEO was banned from gaining a seat on the acquirer's board or serving in an advisory capacity. The circumstances of the cases were very specific, involving FTC allegations of the potential for future collusive activity by the individuals in question. However, they show that even the Biden FTC required only non-structural solutions in two cases, despite the U.S. agencies' recent hardline approach to remedies.

Behavioral remedies were also accepted in a number of other jurisdictions, including Brazil, Belgium, the Czech Republic, France, Hungary, Italy, Singapore, South Korea, Spain and Turkey.

Ultimately, whatever the authorities' approach to behavioral commitments or appetite for creativity in their design, the type of remedies we see will be dictated by the type of transactions coming across their desks.

Vertical deals and digital mergers, for example, often raise concerns over access, interoperability or reduced incentives to innovate, which are usually

most proportionately addressed by non-structural fixes.

Transactions in regulated sectors—such as telecoms—may also be good candidates. This is especially where there is a sector regulator to help monitor compliance with the commitments, a factor that the CMA repeatedly emphasized in justifying its acceptance of price-based behavioral remedies in the 4-to-3 U.K. mobile telecoms deal.

International cooperation is key for global remedy solutions

In multinational deals, antitrust authorities remain keen to coordinate possible remedy packages with their international counterparts.

For merging parties, having a single set of global remedies is often preferable to a patchwork of different national commitments.

Recent reforms to the U.K. phase 2 merger review process are aimed at helping parties align parallel reviews and allowing time for early consideration of remedies. The EU/U.K. competition cooperation agreement—expected to be signed during 2025—will also help. And the CMA is exploring when it might be appropriate, in global transactions, to see whether action by other agencies could resolve U.K. concerns.

Some authorities have even reassessed their own conditional clearances as other remedy decisions emerged.

The South Korean authority, for example, adjusted the conditions imposed in Korean Air/Asiana in light of later commitments agreed in other jurisdictions.

It will be interesting to see if this becomes a more common occurrence.

Decline in upfront buyers/fix-it-first commitments

With the decline in structural merger remedies in 2024, it is no surprise that we saw fewer upfront buyer and fix-it-first commitments.

But authorities continued to use them last year to bolster structural remedies and minimize implementation risk:

- In the U.K., an upfront buyer was required in each of the structural remedy cases agreed at phase 1.
- At EU level, the EC unusually agreed to both an upfront buyer and a fix-it-first commitment in its conditional clearance of Korean Air/Asiana Airlines. We saw one upfront buyer and one fix-it-first requirement in its other two phase 2 conditional clearances.

In the U.S., structural remedies usually require an upfront buyer. A greater openness to divestments under the Trump administration can be expected to lead to a revival of upfront buyers in U.S. consent decrees involving a structural remedy.

We saw some parties propose a purchaser of divestment assets when defending a U.S. merger challenge in court. However, persuading the judge of the fix might not be easy. In Kroger/Albertsons, the parties' offer of substantial store divestments to C&S Wholesale was rejected. The judge ruled that C&S would not replicate the competition lost as a result of the merger. This is a reminder that parties must provide credible and clear justifications as to why any remedy taker will be effective.

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