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ARTICLE

Uncertain regulatory climate makes deal protections crucial

PART OF OUR REPORT

Global trends in merger control enforcement

READ TIME

4 mins

PUBLISHED DATE

Feb 27 2025

Regulatory intervention levels are rising. The concerns of antitrust authorities and foreign investment (FDI) regulators are evolving and can be unpredictable. Allocation of merger control execution risk in deal documents therefore remains front of mind for buyers and sellers alike.

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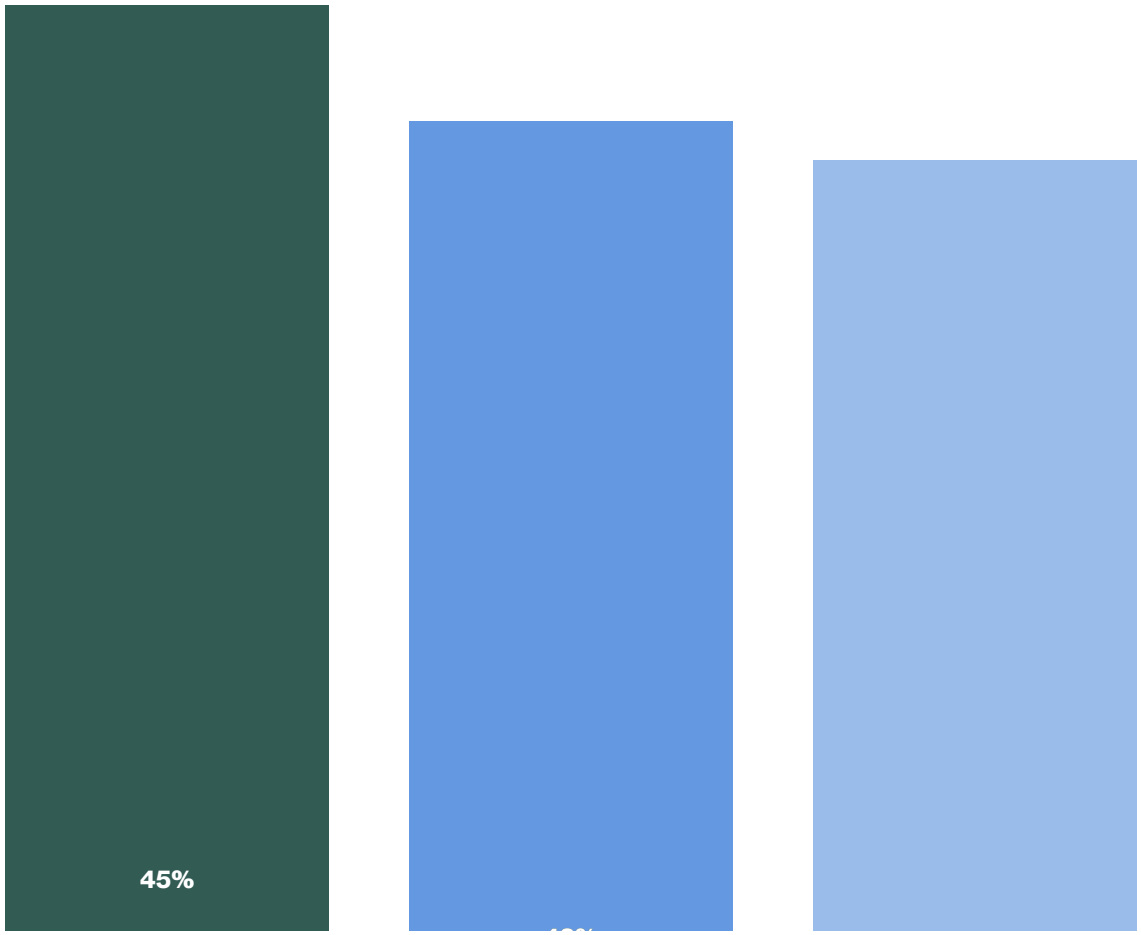
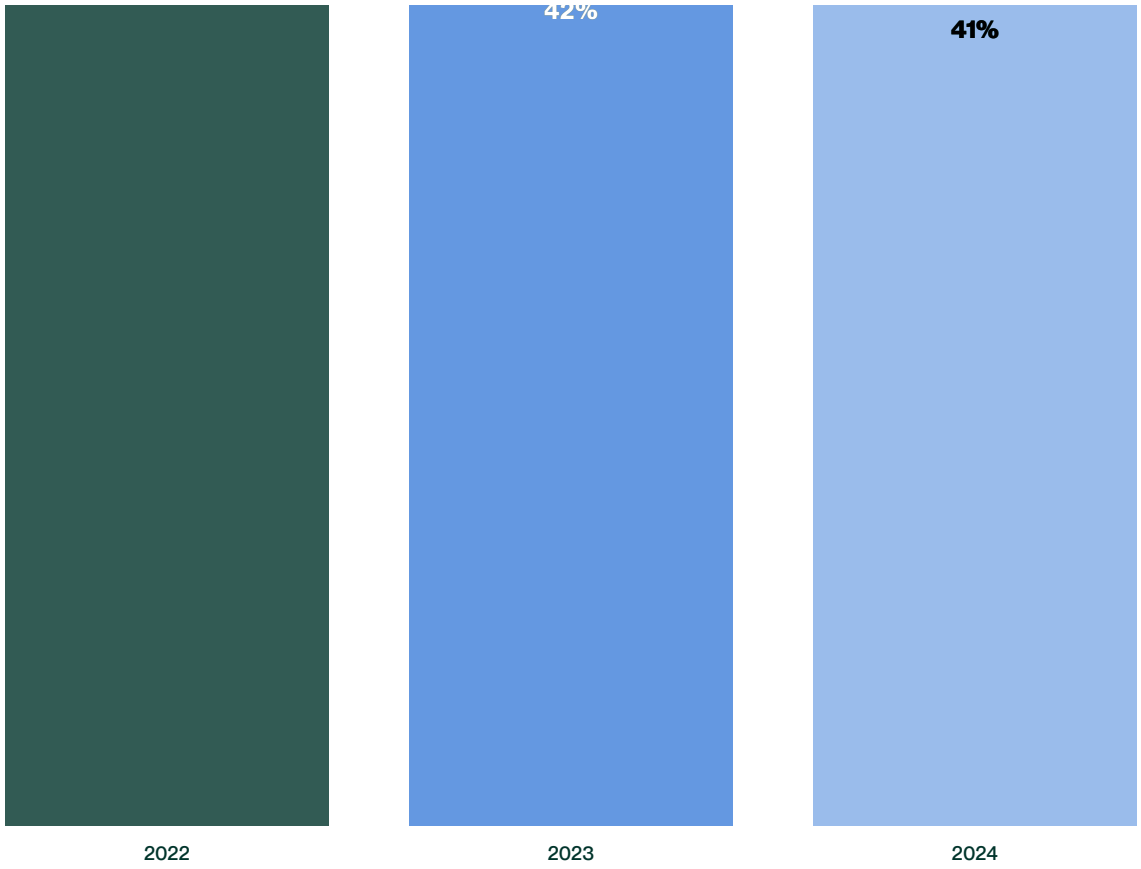
Antitrust conditions in private M&A





Sellers approach antitrust and foreign investment conditions with caution

Our research on global private M&A deals[1] shows a slight decrease in conditional deals in 2024.

The proportion of our transactions subject to antitrust-based merger control approval conditions fell slightly to 41%. It was a similar story for FDI conditions, which dropped to 18% of our deals. Unsurprisingly, however, looking just at big-ticket deals (deal value of USD500m+), a much higher proportion were subject to antitrust or FDI approval conditions—67% and 33% respectively.

This could simply reflect year-on-year fluctuations. Or it could come down to the attitude of sellers.

In an environment where merger control and FDI enforcement remains uncertain, sellers may be preferring to engage with buyers that present less antitrust or FDI risk.

2025 may prove a turning point. Optimism that merger control enforcement will become more balanced under the new U.S. administration and in other key jurisdictions should help sellers get more comfortable with conditional agreements.

Next year's report may show some significant developments.

Regional variations in reverse break fees

Sellers continued to push hard for reverse break fees—a useful protection should a regulator intervene to block a transaction.

Our data on private M&A deals shows they had some success in North America. Reverse break fees featured in 33% of transactions subject to antitrust conditions in the region. Elsewhere, they got less traction. Overall, reverse break fees appeared in 13% of our deals with antitrust conditions in 2024 (and 12% of our deals with FDI conditions).

The average fee across our transactions was 4% of enterprise value, with a range of 0.8% to 8%. This is slightly lower than we saw in some high-profile deals in the wider market last year.

For example, IAG paid a EUR50 million (USD54m) reverse break fee to Air Europa, which amounted to 12.5% of deal value, after it terminated its planned purchase due to antitrust concerns in the EU.

We do not know the precise reason for the higher fee level in this case. But this was the second time the deal has faced antitrust roadblocks: the parties similarly walked away in 2021 after the European Commission raised concerns. This may well have been a contributing factor.

Hell or high water commitments still out of favor

"Hell or high water" (HOHW) commitments compel the buyer to do everything in its power to secure merger control clearance.

We saw their use decline by over 50% in 2022 and level off in 2023. Last year they fell further to only 15% of our private M&A deals with an antitrust condition. It was a similar story for transactions with an FDI approval condition.

With many antitrust authorities remaining skeptical about whether merger remedies can effectively address antitrust concerns, this is no surprise. Sellers may see little point in pushing for HOHW provisions where authorities are more minded to prohibit a deal.

Equally, from a buyer's perspective, where an authority is willing to accept remedies to clear a deal, these may be hard to predict, especially where concerns are novel. Buyers will therefore be less inclined to give HOHW commitments (in effect, a "blank check") that could force them to make difficult to predict and far-reaching concessions.

Best efforts commitments in the spotlight

Over the past three years, we have seen a steady increase in obligations on the buyer to use best or reasonable efforts to secure antitrust approvals. These appeared in 44% of our private M&A deals with an antitrust condition in 2024, up from 34% (2023) and 29% (2022).

Best efforts commitments made the headlines late last year. After federal and state courts secured a preliminary injunction to block Kroger's USD24.6 billion takeover of Albertsons, Albertsons promptly sued for significantly more than the agreed USD600m break fee. It alleged that Kroger failed to comply with its contractual obligation to exercise best efforts and take "any and all actions" to secure regulatory approval by "repeatedly providing insufficient divestiture proposals that ignored regulators' concerns." As of publication, this case is ongoing. Where it lands could have important implications for dealmakers.

Going forward, we expect a continued focus on the negotiation of efforts clauses.

A future shakeup in risk allocation?

Looking ahead, a pro-M&A outlook in the U.S., and a possible rekindling of key antitrust authorities' willingness to accept merger remedies may shift the balance and nature of deal conditions and protections.

Other factors may also play a part, including an unpredictable geopolitical climate, the continued proliferation of FDI regimes, any need for EU Foreign Subsidies Regulation approvals and uncertainty over whether M&A falling below notification thresholds could be called in for review and face intervention.

Get set for some interesting times.

Footnotes

1. Global trends in private M&A—research based on 2000 M&A deals on which A&O Shearman has acted (including legacy Shearman deals signed since January 1, 2024). Please get in touch with your usual A&O Shearman contact if you would like to learn more about the results.

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