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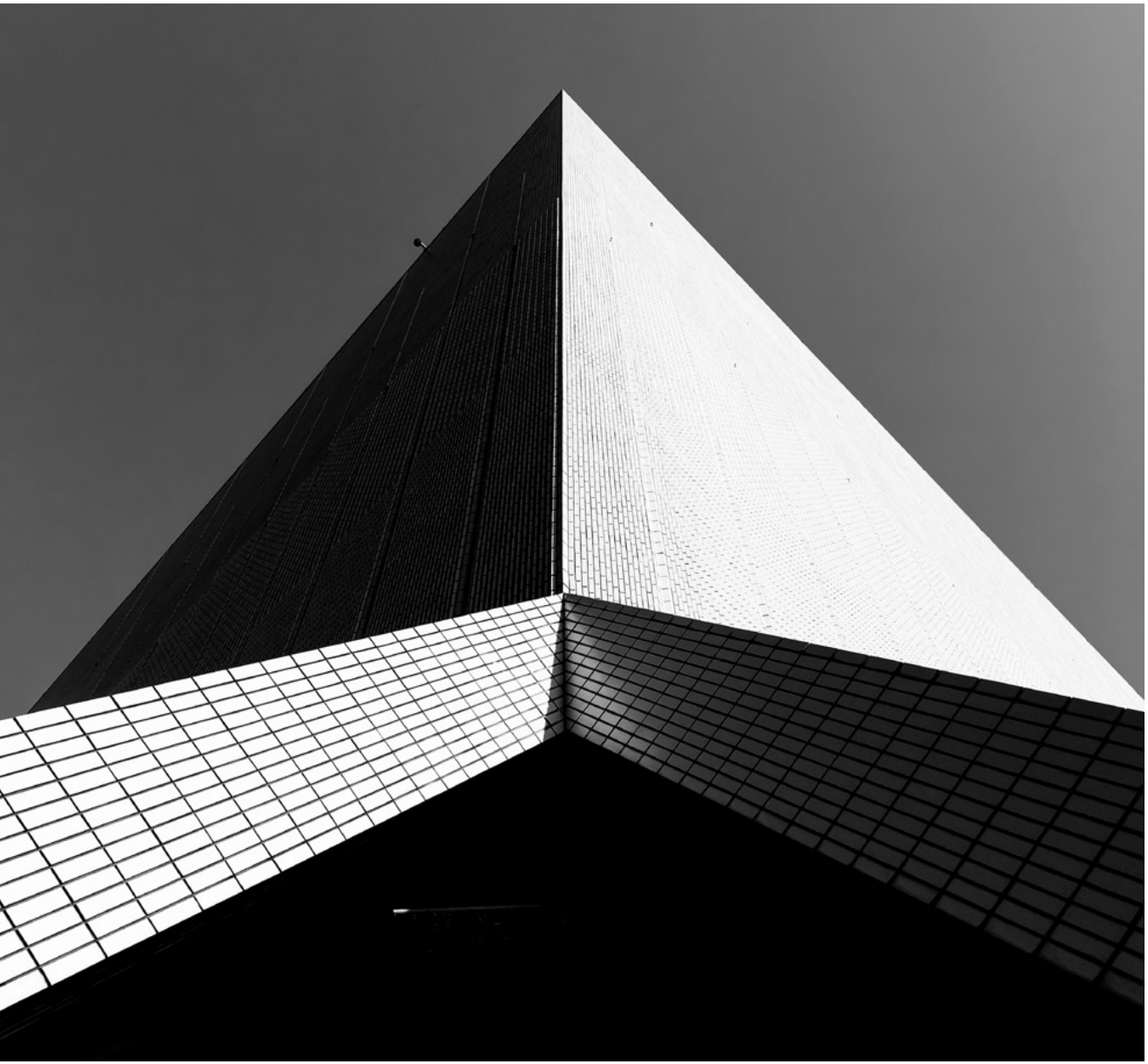

Q4 2024

Global M&A insights

This PDF contains interactive elements.

Contents

Introduction

In our biannual M&A trends report we explore the possible impact of the new U.S. administration on dealmaking, the dynamics of transatlantic M&A, private equity exits, and Mario Draghi's proposals to reshape the European merger review landscape.

Welcome to the latest edition of M&A Insights, where we bring together partners from across the A&O Shearman network to explore the themes shaping the global dealmaking.

David Broadley
Partner

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THE TRUMP EFFECT: HOW WILL THE NEW ADMINISTRATION IMPACT M&A MARKETS?

Our first article focuses on the impact of Donald Trump's decisive election victory on M&A. In it, partners Dario de Martino, Dan Litowitz, Ken Rivlin, Mike Walsh, Elaine Johnston, David Higbee, Jessica Delbaum and Lorenz Haselberger provide an initial assessment of how the new administration is likely to affect dealmaking, foreign investment screening, trade tariffs, antitrust enforcement and taxation.

INCREASE IN U.S./U.K. PUBLIC M&A

Next up, we examine the resurgence of transatlantic public M&A. There has been an uptick in U.S. acquisitions of U.K. listed companies in 2024, with deals worth USD15.2 billion recorded in the year to mid-October, nearly double 2023's total. We expect this activity to continue to increase in 2025. As Seth Jones, Scott Petepiece, Dan Litowitz, Sean Skiffington, Derrick Lott and Matt Hamilton-Foyn explain the rise is driven by increased corporate confidence, the pursuit of scale and synergies, and a more favorable financing market. But a high number of failed bids is a sign that the unique features of the U.K. takeover regime require careful navigation.

THE STATE OF PRIVATE EQUITY EXITS

In our third article, Alain Dermakar, Chris Zochowski, Paul Dunbar, Iñigo Del Val, Dirk Meeus, Katinka Middelkoop, Nick Wall, Daniel Harris and Tom Jokelston provide a global perspective on private equity exits. PE firms have faced challenges over the past 12 months in realizing their asset valuations, but as we reveal, there's cause for optimism as we head into 2025.

WILL DRAGHI'S MERGER CONTROL REFORMS SUCCEED?

Finally, we dissect the ambitious proposals from Mario Draghi to reshape Europe's merger control landscape. Draghi's recommendations include an "innovation defense" to justify deals in strategic sectors that might otherwise be prohibited, alongside a raft of other recommendations to foster growth and competitiveness. Francesca Miotto explores the likelihood of his vision becoming a reality.

We hope you find our analysis valuable, and would be delighted to discuss these or any other themes with you in more detail.

How will the Trump administration *impact M&A?*

Dan Litowitz, Dario de Martino, Mike Walsh, Ken Rivlin, David Higbee, Elaine Johnston, Jessica Delbaum and Lorenz Haselberger assess the potential impact of the incoming U.S. administration on dealmaking, foreign investment screening, merger review and taxation.


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M&A PRACTITIONERS ANTICIPATE A 'TRUMP BUMP'

The scale of Donald Trump's victory in the presidential election – and the fact the Republicans now have full control of Congress – has been greeted with optimism by U.S. dealmakers. In the wake of the election, the U.S. stock markets generally – and shares in big investment banks in particular – have surged, partly in anticipation of a deregulation-driven M&A boom.

Market participants appear to be betting that Trump's plan to lower taxes, reduce the regulatory burden certain industries face and decrease the overall size of the federal government will have a positive impact on the U.S. economy, overcoming any potential inflationary spike caused by higher import tariffs and the tightening of immigration laws. The incoming administration is also set to create a merger review landscape that is more favorable to M&A, which we explore in more detail below.

ELECTION SET TO BOOST TECH-RELATED DEAL-MAKING

While the President-elect has been critical of some big tech companies, his return to the White House is being seen by prominent investors as good for the tech sector more broadly, particularly businesses involved in artificial intelligence and digital assets.

Amid expectation of a wave of lucrative government contracts, less tech-related regulation in certain areas and a boost from Trump's desire to improve government efficiency, the media have reported founders being encouraged to pitch ideas to investors that have previously been challenging. These include businesses that sell software to federal agencies, or that develop fintech products for regulated entities such as insurers or investment banks.

LESS GOVERNMENT INTERVENTION IN AI DEVELOPMENT

The Trump administration is expected to give AI companies greater scope to self-regulate while at the same time controlling the flow of AI and related technologies to China. Indeed the 2024 Republican Party Platform states the GOP's desire to see AI development rooted in "free speech and human flourishing".

The President-elect has voiced his support for open-source AI models and has said he will repeal his predecessor's Executive Order on Safe, Secure and Trustworthy AI. This invoked the Defense Production Act to require companies developing foundation models to share information with the government.

The new administration may also seek to follow a less risk-averse approach to the development of AI for national security purposes than is set out in President Biden's National Security Memorandum on AI, which is designed to "galvanize federal government adoption of AI to advance the national security mission, including by ensuring that such adoption reflects democratic values and protects human rights, civil rights, civil liberties and privacy". That said, elements of the Memorandum support the President-elect's policy vision, including its commitment to double U.S. electrical capacity to support greater AI deployment.

The President-elect may also seek to promote the export of U.S. technology to allies, particularly in the Middle East, that are seeking to build their own sovereign AI infrastructure and ecosystems. Senior political appointees who served in the last administration will recall China's effectiveness in deploying telecommunications infrastructure throughout the world, and the new administration will be keen to prevent that from happening with AI, while at the same time maintaining stringent controls over exports of advanced technology to the PRC.

Less government intervention in AI development could spark increased transactional activity, with companies pursuing strategic acquisitions to enhance their AI capabilities and tech giants engaging in M&A to bolster their competitive positions.

While critical of President Biden's Chips Act – enacted to shore up domestic investment in semiconductor manufacturing – industry analysts are predicting the Trump administration could retain the program, albeit with some changes to the way funding is distributed. The Act gained bipartisan support in Congress when it was passed in 2022.

Another area where we expect to see change is in relation to cryptocurrencies and digital assets. Under President Biden, the Securities and Exchange Commission (SEC) and the Treasury Department have cracked down on crypto companies for alleged violations of securities and anti-money laundering laws, while banking regulators have discouraged lenders from entering the market.

The SEC has several pending litigations against crypto issuers, crypto platforms and crypto traders, many of which involve registration issues relating to whether or not the relevant crypto unit or token was in fact a security (our podcast from earlier this year explains the detail of some key recent cases).

President-elect Trump has nominated crypto advocate Paul Atkins to take over as chair of the SEC, and we therefore expect these cases to be phased out under the new administration.

Criminal crypto enforcement is also likely to be less of a priority at the Department of Justice (DOJ), particularly the sort of cases brought under the Bank Secrecy Act that we have seen in recent years.

Additionally, Republicans are expected to use their control of Congress to further develop the U.S. regulatory framework for digital assets, particularly if the pro-crypto Republican Senator Tim Scott is named chair of the Senate Banking Committee.

Industry figures have called for measures that would boost crypto adoption, for example by making it easier for crypto companies to access banking services.

Were the President-elect to follow through with his campaign pledge to create a U.S. strategic Bitcoin reserve, it could help legitimize cryptocurrencies with a wider range of citizens.

U.S. WILL REMAIN OPEN FOR FOREIGN INVESTMENT – WITH SOME RESTRICTIONS

Trump's principal focus will be on keeping the domestic economy strong via low interest rates, low inflation and a rising stock market. This will require capital inflows and as a result, the U.S. is set to position itself as being open to foreign investment over the next four years.

At the same time, we expect the new administration to emphasize an "America First" approach that would limit non-U.S. control and information rights in key industries and sectors, and outright prohibit non-U.S. investment in certain cases. How these conflicting priorities manifest themselves will be critical to assessing CFIUS clearance prospects and strategies following Trump's inauguration.

CFIUS TO FOCUS ON PROTECTING JOBS AND SCRUTINIZING CHINESE DEALMAKING

CFIUS will continue to prioritize protecting critical infrastructure, strategic technologies, sensitive personal data, and the resilience of U.S. supply chains. It will also maintain its focus on assessing the impact of foreign investments on U.S. tech leadership (particularly microelectronics, artificial intelligence, biotech and quantum computing), and on addressing cybersecurity threats.

The current focus on China-related transactions is set to intensify. CFIUS will likely use its new authorities to examine the Chinese holdings, ties, or connections of foreign purchasers, even if those connections are not directly related to the purchases under review. This will create obvious challenges for businesses that operate globally, particularly those in Germany, which maintains extensive commercial links to China.

On the other hand, taking lessons from Trump's first term on his often transactional approach to foreign policy, it would not be a surprise to see him inviting some tailored Chinese investment in non-strategic sectors where Chinese entities would not exercise control or have significant information rights.

We can expect heightened interest from the Committee in maintaining U.S. manufacturing capacity and scrutinizing the national security implications of U.S. outbound investments.

As far as the latter is concerned, the current administration has focused on U.S. investments into China, Hong Kong and Macau in technology sectors that are deemed essential to national security (namely AI, quantum computing, semiconductors and microelectronics),

Proposed legislation that is pending in Congress would expand this list to include hypersonics, satellite communication systems, and networked laser scanning technologies with dual-use applications, and bring additional countries – Iran, North Korea and Russia – into scope.

We also anticipate CFIUS's jurisdiction expanding further to cover greenfield investments i.e., investments where a foreign parent company would create an entirely new entity in the U.S.). Currently, CFIUS does not have the ability to review such investments, but this exception came under scrutiny from Congress in 2023 in relation to two proposed deals.

The first involved a bid from Gotion Inc. – a U.S. subsidiary of a Chinese company with links to the Beijing government – to build USD2.4bn electric vehicle battery plant in Michigan. The second centered on a proposal from Fufeng Group, a Chinese manufacturer of bio-fermentation products, for a USD700 million corn milling plant in North Dakota. The plant, which was eventually cancelled, would have been just 12 miles from the Grand Forks Air Base.

Subsequently, the House Select Committee on the Strategic Competition Between the United States and the Chinese Communist Party adopted more than 150 policy recommendations made in a bipartisan report. These included giving CFIUS jurisdiction over greenfield investments involving "foreign adversary parties" as well as critical technologies, critical infrastructure or sensitive personal data. Such investments would require mandatory filings.

CONTINUITY EXPECTED AMONG COMMITTEE STAFF

Although President-elect Trump will of course make a number of political appointments at senior level within CFIUS, the bulk of the agency's work is done by its career staff. We do not expect significant turnover of personnel here, and we believe that most of CFIUS's priorities will remain unchanged. However, it is worth noting that during the first Trump administration, senior political appointees were frequently involved in the more difficult CFIUS cases, and we expect that to recur once the new government takes office.

We also note that the idea of adding the U.S. Department of Defense as a co-chair of CFIUS alongside the Treasury was floated in a report from the Heritage Foundation (authored by many of the President-elect's leading advisers), which sets out a roadmap for Trump's second term. It is unclear at this point whether this will happen, and if it did, whether it would materially impact the CFIUS review process. In any event, we expect the Department of Defense to continue to be heavily involved in any transactions that directly or indirectly touch key sectors, supply chains, and technologies that impact national security, such as quantum computers.

Bigger fines are anticipated for transaction parties that either miss mandatory filing obligations or make inaccurate statements in their submissions to CFIUS, while tougher conditions could be imposed on parties in order to obtain national security clearances for their deals. We also expect more rigorous monitoring following the closing of transactions to ensure compliance with national security agreements and other commitments made to CFIUS.

Under the new administration, transaction parties must continue carefully to assess whether their contemplated deals will trigger a mandatory filing obligation and whether voluntary filing may be warranted even in the absence of filing requirement. When assessing the prudence of a voluntary filing, parties should remember that CFIUS's jurisdiction is perpetual and that national security risks are continually evolving such that a transaction that is safe today may be risky tomorrow.

They should also thoroughly assess their own positions (including activities of all affiliated entities, the identity and activities of key shareholders and ultimate beneficial owners) in order to anticipate and prepare for potential inquiries from CFIUS.

TARIFFS COULD BE DEPLOYED IDEOLOGICALLY AND TRANSACTIONALLY

Trump has been vocal in his desire to impose higher import tariffs in support of a range of policy goals, including border security, reducing the U.S. trade deficit and supporting domestic manufacturing. However, analysts have warned that such a step – coupled with the potential impact of the proposed tightening of immigration laws – would undermine his broader economic goals.

Some Republicans are already pushing for a more nuanced approach to the incoming administration's trade policy. It's possible that the President-elect could use tariffs in pursuit of more advantageous trade deals, and may also look to aggressively deploy sanctions and export control enforcement as a foreign policy tool. Here, some analysts have suggested that Trump may be willing to recalibrate Russia sanctions as a bargaining chip to end the war in Ukraine.

The use of secondary sanctions - i.e. sanctions imposed by the U.S. on, among others, non-U.S. persons for non-U.S. activities – is set to increase in relation to entities perceived to be sidestepping Russia sanctions, particularly where they involve Chinese parties. Tougher sanctions on Iran, Venezuela and companies tied to the Chinese military are also anticipated.

This will create significant challenges for global businesses where U.S. sanctions diverge from those imposed by the U.K. and the EU. Businesses and financial institutions with material cross-border operations are advised to ensure they have a full and detailed understanding of their sanctions exposure in relation to their borrowers, supply chains, investors and joint venture partners, and to be prepared to pivot as the landscape evolves.

MORE PRO-DEAL, PRINCIPLES-LED APPROACH TO MERGER REVIEW

The antitrust environment under Trump is expected to become more pro-deal and pro-business. However, the U.S. antitrust agencies, the Department of Justice Antitrust Division (Antitrust Division) and the Federal Trade Commission (FTC), will not take a totally laissez-faire approach.

This is in part because influential figures in the Republican Party are aligned with progressive Democrats in their skepticism of big business. This is particularly true of Big Tech, where we expect to see continued activity from the Antitrust Division and the FTC over the next four years.

During the previous Trump administration, the Antitrust Division brought the first significant competition case of the internet era when it filed a landmark lawsuit against Google alleging it held an illegal monopoly in online search. Moreover, others set to have significant roles in the incoming administration are vocal critics of the tech giants, not only Vice President-elect J D Vance but also Brendan Carr, Trump's choice to head the Federal Communications Commission.

The President-elect's recent decision to make current Republican FTC Commissioner Andrew Ferguson the Chair of the Commission, and to nominate Gail Slater, current economic policy advisor to Vance, as the head of the Antitrust Division, further signal both a continued focus on Big Tech antitrust enforcement and a more balanced approach to merger enforcement.

Slater is an antitrust veteran who has worked in private practice and at the FTC. She also served as a tech policy adviser on the National Economic Council during President Trump's first term. Commissioner Ferguson, who has been at the FTC since March 2024, was previously the Solicitor General of Virginia and prior to that, among other experience, was an antitrust lawyer in private practice.

While at the FTC, he has dissented from some of the current Chair's challenges and policies. Trump has also already indicated that he intends to nominate Mark Meador, another antitrust veteran, to be the fifth FTC Commissioner. Assuming he is confirmed by the Senate, Meador will give the Republicans a majority at the FTC.

We expect the healthcare and pharmaceutical industries to continue to be a focus of antitrust scrutiny. In 2022, the FTC launched an investigation into pharmacy benefit managers (the intermediaries that sit between insurance companies and patients who are receiving prescription drugs), expressing its concern over their "enormous influence on which drugs are prescribed to patients, which pharmacies patients can use, and how much patients ultimately pay". There is bipartisan support for continuing attention on their activities.

PARTIAL RETREAT FROM THE 2023 MERGER GUIDELINES

We anticipate that the new Trump government will depart from some of the more aggressive enforcement positions of the Biden administration, which were reflected in the revised merger guidelines published by the Antitrust Division and the FTC in 2023. These stated that business combinations resulting in a market share of 30% were presumptively anticompetitive, and while this has a basis in 60-year-old case law (United States vs Philadelphia National Bank) and is typically cited when the agencies sue to challenge a deal, it had not in recent years been used as the sole basis to justify an investigation.

We also expect greater leniency when evaluating vertical mergers, with the enforcement agencies likely to be more receptive to arguments around the pro-competitive efficiency benefits of vertical integration. However, we still anticipate scrutiny where one of the parties has substantial market power, as well as continued skepticism of behavioral remedies.

Additionally, the new administration is likely to be less interested in investigating labor-based theories of harm (i.e., whether a deal gives the merged business too much power over employees). We also expect a step back from the current administration's general suspicion of transactions involving private equity buyers.

LIKELY SHIFT ON REMEDIES WILL MAKE DEALS EASIER TO EXECUTE

We expect the Antitrust Division and the FTC to take a more favorable view of the efficacy of structural remedies, which will give merging parties a clearer path to resolving antitrust concerns with negotiated remedies. The current administration has been unusually skeptical of remedies compared with prior governments (both Democratic and Republican) and this likely shift will be another positive change for dealmakers.

RECENT REFORMS OF HSR FILING REGIME SET TO SURVIVE TRANSITION

The FTC recently published a series of reforms to the Hart-Scott-Rodino (HSR) pre-merger reporting regime which are scheduled to come into effect on February 10, 2025. The proposals align the information required in a U.S. merger control filing more closely with other major jurisdictions globally by requiring the submission of a substantial amount of additional detail, including about horizontal overlaps and vertical relationships. The changes may now be delayed until mid-March, as it is traditional for new administrations to issue a freeze on pending rule changes to allow for a fuller review.

Notably, the new pending rules were adopted by a unanimous vote of all five current FTC commissioners (three Democrats and two Republicans). To secure the support of the Republicans, the Democratic commissioners agreed to scale back some of the original proposal's more controversial provisions.

Since the adopted proposal was a result of bipartisan compromise, our expectation is that the reforms will be implemented largely in their current form later in 2025.

TAX REFORMS EXPECTED

With Republicans in control of the House and Senate, and key elements of the first Trump administration's signature 2017 tax reform act expiring or phasing out at the end of 2025, the incoming administration has earmarked tax reform as a top legislative priority.

Among the new government's focus areas will be extending or reinstating business-friendly provisions of the 2017 tax act, including the qualified business income deduction for passthroughs, increased bonus depreciation and the more generous pre-2022 limitation on interest deductibility.

President-elect Trump has also expressed a desire to further reduce the corporate income tax rate from 21% to 20%, or 15% for companies that manufacture products in the United States. However, there is significant uncertainty as to which of Trump's many tax-related campaign promises he will pursue once in office. In addition, Congressional Republicans are expected to use budget reconciliation to pass any tax reform bill, avoiding the possibility of a Democratic filibuster but leaving open the question of how to pay for any further tax cuts or extensions.

The effect of possible tax reform on M&A activity is unclear. On the one hand, uncertainty regarding the timing, scope and content of tax reform legislation could, at the margins, have a dampening effect on activity as dealmakers await the enactment of final legislation. On the other, an expectation of further tax cuts – including a reduction in the corporate rate – may stimulate dealmaking activity.

Although the incoming administration's tax reform proposals currently are too hypothetical to affect drafting practice in M&A agreements, it is possible that this will change as reform proposals crystalize into concrete draft legislation – particularly as regards any reduction in the corporate rate (for example, on tax indemnities and valuing tax benefits).

U.K. public markets remain an attractive hunting ground for *U.S. bidders*

U.S. acquisitions of U.K. listed companies have traditionally been a staple of global deal flow. This year is no exception, although the volume of attempted bids far outweighs the number of completed deals. Bidders need to understand the unique features of the U.K. takeover regime to ensure their transactions succeed.


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Transatlantic public M&A involving U.S. bidders and U.K. targets has long underpinned global deal flow, with U.S. corporations and private equity sponsors originating more inbound takeovers of U.K. listed businesses than investors from other countries. Indeed the size and volume of these deals is often seen as a key indicator of the strength of the global M&A market, and of the confidence levels of corporations and their boards to seek international growth and scale.

So far in 2024 we have seen a return of significant transatlantic public M&A activity, with acquisitions of U.K. listed companies by U.S. acquirors worth USD15.2 billion in the period to mid-October, almost double 2023's annual total of USD7.7bn. A number of these deals have been competitive, and some have seen all or part of the consideration made up of shares issued in a listed U.S. acquiror.

Several factors are driving this uptick in activity. Corporates have been far more active in what has at times been a private equity-dominated market in recent years, driven by greater confidence in their businesses and the broader economic outlook, the desire for scale and synergies to address higher costs, and a more favorable financing market.

This has been coupled with slight improvement in private equity deal activity after an extended lull in 2022 and 2023.

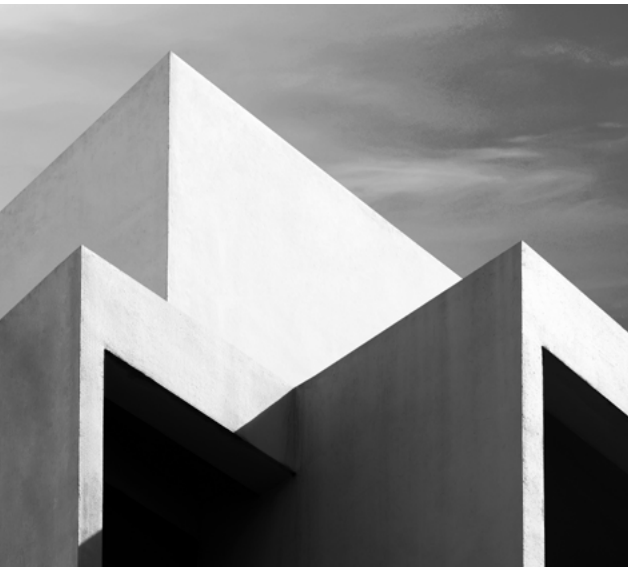
U.S. acquisitions of U.K. PLCs on the rise

Deal value and volume (2014-2024)

RELATIVE STRENGTH OF U.S. EQUITY MARKETS MAKES MANY INBOUND BIDS ATTRACTIVE

Where deals involve an offer of U.S. listed shares as consideration, clearly the synergy value is an important component of the value opportunity presented to the target company's shareholders. However, key to the narrative has also been the chance to realize a re-rating of shareholders' equity to reflect the typically higher multiples that the acquiror's stock trades at in the U.S. market.

This is part of a recent and much broader market theme involving the relative strength and competitiveness of the U.S. compared to other jurisdictions, which in some cases has seen companies move their place of listing to the U.S. outside of an M&A context.



U.K. TAKEOVER RULES CREATE A COMPETITIVE MARKET FOR BIDDERS

Bidders have found it hard to execute in 2024, with the number of approaches made to U.K. targets far exceeding the volume of announced and completed deals. In many of these cases the target's board has been robust in its assessment of value, with a 30%-40% bid premium (historically considered the benchmark) not enough to obtain a recommendation. At the same time, several deals have not proceeded on the basis of issues arising in due diligence.

We have also seen greater competition for U.K. public companies, with U.S. corporations prepared to engage in the level playing field the U.K. regime creates for contested takeovers. U.K. boards are permitted to switch their recommendation to another bidder matching rights during a transaction, so the initial bidder needs to make its package as attractive as possible, not just in terms of price but also in relation to certainty and speed of execution.

The price of a target board recommendation is not necessarily as high as the price required to discourage other bidders from entering the race. We have seen examples of bidders being pushed to terms higher than those which may have caused a potential interloper to think twice about intervening had they been offered from the outset.

ASPECTS OF U.K. PUBLIC M&A REGIME ARE UNIQUE IN GLOBAL MARKETS

Many aspects of the U.K. regime for public M&A are unique among the major global financial centers, and certainly compared to the regulation of U.S. public company transactions.

- Deals are overseen by the Takeover Panel, an organization which is independent of government and the financial regulator, the Financial Conduct Authority.
- The Panel has a high degree of discretion to apply the rules of the Takeover Code in a manner that it considers achieves their underlying purpose, which at a high level are to "ensure fair treatment for all shareholders and an orderly framework for takeover bids".
- The rules themselves are principles-based and not written in the technical language of legislation.
- The Panel comprises a combination of permanent staff and M&A practitioners on secondment (mainly from investment banks and law firms,) and is heavily involved in the day-to-day running of deals.
- Its rules require advisors to consult with the Panel on any matter of interpretation of the Takeover Code rather than to form their own view. As a result, many key issues on a deal involve a real-time discussion with the Panel. The U.S. approach is very different in this regard, with the SEC's role more focused on with detailed rules and regulations, primarily dealing with appropriate disclosure.
- The Panel also has authority over certain aspects of a transaction, such as the circumstances in which a regulatory condition can be invoked, which in the U.S. are largely a matter of contract between the parties, and ultimately the courts in the event of a dispute.

The Panel system of M&A regulation in the U.K. takes some getting used to for those unfamiliar with the process. However, parties often recognize the benefits of being able to speak to an experienced M&A practitioner at the regulator who can provide certainty and quick decision-making (often 24/7) on a live issue.

U.K. VS U.S. M&A REGIMES—KEY DIFFERENCES COMPARED

Clearly every transaction is different and expert advice should be sought in each case. However, we set out below some of the key differences between the U.K. and U.S. public M&A regimes which are important to understand before embarking on a takeover of a U.K. listed company.

M&A issue	U.K. regime	U.S. regime
Leaks	• The Panel may require a leak announcement at an early stage if there is press speculation or an untoward price rise after the point at which a bid is "actively considered" by the potential bidder. • The risk of a leak announcement is heightened on approaching the target. • The financial advisor leads engagement with the Panel on whether a leak announcement is required. • If it is, the Code imposes a 28-day deadline for the bidder to announce a firm offer (fully financed, due diligence complete) or walk away. This can be extended by the target. • A maximum of six external parties (excluding advisors) may be brought inside before announcement.	• As a general matter, no requirement to disclose approaches and negotiations in response to inquiries, and therefore most companies adopt a "no comment" policy in the event of a leak. • A party may not remain silent about negotiations, however, if silence would result in a temporally relevant disclosure becoming inaccurate or misleading. • Also, "no comment" typically does not work in response to an official inquiry (e.g. resulting from unusual trading or market rumors). • However, stock exchanges will be reluctant to accept "no comment" in response to an official inquiry.
Due diligence	• Typically more limited than in private and U.S. M&A deals. • Any due diligence information provided by the target must also be given to other potential bidders that may emerge, even if less welcome, which naturally constrains what information may be forthcoming.	• Similar to the U.K. position, however no rule requiring that all bidders be given the same due diligence information, even though the result in practice may be the same.
Deal protection	• The target is prohibited from agreeing most deal protection measures with a bidder (e.g. break fees, no-shop, matching rights, etc). • The target can commit to assist with regulatory clearances, but the board is otherwise free to withdraw and switch its recommendation. • Reverse break fees are seen where there are substantive regulatory risks and/or bidder shareholder approval is required. • Bidders focus on director and shareholder irrevocable undertakings, price, speed and execution certainty to impose hurdles for potential interlopers.	• Deal protection measures are ubiquitous in U.S. transactions, which typically have a no-shop covenant, with a "fiduciary out" – an ability for the board to change its recommendation and terminate the agreement upon payment of a break fee (which typically is between 2% and 4% of equity value) based on constraints imposed by fiduciary principles under Delaware law) and matching rights. • Some U.S. transactions include a "go shop", which permits the target company to shop itself to others for an agreed number of days after signing, typically with a lower break fee payable if an alternative deal is struck during this period. • Reverse break fees are common to address substantive regulatory approval risks. No upper limit on reverse break fees imposed by applicable law, so on average, amounts tend to be higher than typical break fees. • Tender/support/voting agreements with directors and significant shareholders are common.

M&A issue	U.K. regime	U.S. regime
Regulatory conditions	• Panel requires all reasonable steps to be taken to satisfy conditions. • Panel will not permit a condition to be invoked unless circumstances are of material significance in context of offer. Panel will apply this test to a remedy required by a regulator to the extent known before the long-stop date. • Target companies typically negotiate contractual commitments to obtain regulatory clearances, which exist alongside Panel regime, although litigation is rare. • Long-stop date is a key focus, in particular whether it should accommodate a second request/in-depth review notwithstanding financing cost of longer period.	• Unlike in the U.K., the parties are free to agree on conditions to the transaction by contract and the SEC and courts will not intervene in what those conditions are. • Similarly, invocation of a condition is a matter between the parties (and ultimately the courts if there is a dispute as to whether it was properly invoked)) and not something the SEC is involved in. • Similar approach to U.K. around negotiation of contractual commitments to obtain regulatory clearances and long-stop date. • Litigation more common in the U.S.
MAC and other general conditions	• Very difficult to invoke. Bidder can improve ability to invoke by including specific negotiated conditions and clearly disclosing to shareholders the circumstances in which bidder would seek to invoke.	• Again, parties are free to agree contractually on the conditions to the transaction, and the SEC will not get involved. However, similar to the U.K., the no MAC condition is very difficult to successfully invoke. MAC provisions in the U.S. rarely include specific triggers, leaving this to the parties' (and courts') interpretation. A landmark Delaware case in 2018 marked the first ever successful invocation of a MAC in Delaware.
Deal structure	• Scheme of arrangement most common structure on recommended transactions – requires two-limbed shareholder approval: (i) majority in number; and (ii) 75% by value, in each case of shareholders voting.	• Statutory merger most common structure in friendly transactions, which requires (in Delaware) the affirmative vote of a simple majority of the target's outstanding shares to approve. • Tender offers are also fairly commonly used in situations where speed is paramount and the regulatory approval process can be completed very quickly, as well as in hostile situations.

M&A issue	U.K. regime	U.S. regime
Financing	• Certain funds required at time of firm offer announcement (full financing documentation). Financial advisor must provide cash confirmation statement and will appoint own counsel to verify source(s) of funds.	• No certain funds type rules or cash confirmation as in the U.K., but rather a matter of contract between the parties. • Typically acquiror will provide target company with signed debt commitment letters that, subject to limited customary conditions, require the lender party thereto to provide the required debt financing at closing.
Intention statements	• Bidder must disclose intentions for the business, locations, management, employees and R&D (pre-vetted by Panel before deal is announced). Panel review after 12 months to ensure compliance.	• No similar requirements in U.S. transactions, though often, as an IR, PR and retention matter, buyers will explain their plans at a high level to market the transaction.
Management incentives	• Any post-completion incentives package requires full disclosure and fairness opinion. Equity arrangements (outside ordinary course awards) or unusual incentive arrangements can require separate shareholder vote. Incentive arrangements often deferred until post-completion.	• Disclosure will also be required, but no requirement to obtain a fairness opinion. • Certain arrangements may require a shareholder vote, but these are not that common in the typical U.S. public company transaction as they are usually handled post-closing once the target company is no longer public. • Arrangements with target company management will generally not be negotiated until key deal terms, including price, have been agreed.

After a period of hibernation, is life returning to the *PE exit market?*

Following a period in which financial sponsors have struggled to realize acceptable prices for their assets, signs point towards a brighter outlook for 2025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At the start of 2024 private equity firms were hoping that market conditions would align in a way that would make it easier for them to exit their assets and realize above-market gains.

But through the first three quarters of the year, geopolitical uncertainties continued to weigh on public markets, interest rates remained high, and currency fluctuations prevailed. With GPs and other sellers holding firm on asset valuations, the investment cycle largely stalled.

Analysis from Bain revealed that at the end of 2023, the private equity sector globally was sitting on a record 28,000 companies with a collective value of more than USD3 trillion. The proportion of those assets held for more than five years was 18% higher than in 2022.

The extent of the squeeze has been visible in market data showing that continuation funds were responsible for 43% of the USD72bn in secondary deals completed in the first half of 2024.

But as we head toward 2025 there are signs the tide may be turning, albeit at different speeds across the world. Here, we round up developments in six key markets.

UNITED STATES: OPTIMISM, ON THE RISE SINCE SEPTEMBER, INCREASES FURTHER

U.S. deal activity and sentiment began to turn positive in Q4, buoyed by the U.S. Federal Reserve's 50-basis-point cut in interest rates in September. As expected, the fall triggered increased deal flow, with the lower cost of capital helping buyers bridge the valuation gap with stubborn sellers.

The positive vibes have only grown since the U.S. election, with widespread optimism that the new administration's policies will spur further M&A. Hopes that Donald Trump will pursue tax cuts and launch a wave of deregulation starting in January have been strong drivers of confidence in increased dealmaking and investment.

The new President is expected to introduce corporate tax cuts aimed at freeing up capital for businesses, making it easier for them to consider acquisitions as part of their growth strategies. Deregulation, which will be a major focus for Trump, should generally improve the business environment, particularly for the energy, finance and telecommunications industries.

There are also expectations that the new administration will take a more pro-deal approach to merger review (you can read more about the impact of the new U.S. administration on M&A here).

Consequently, businesses are likely to be more confident in pursuing large-scale mergers, roll-up strategies and other acquisitions.

Recent macro data may cause the Fed to take note before cutting rates further – November's inflation figure showed a slight increase to 2.7%, which while in line with expectations, is a sign that the external outlook remains volatile. However, the general view is that this is unlikely to dampen what is expected to be a strong M&A market in 2023.

The U.S. IPO market is trending upwards, with listings by businesses including Reddit and cruise operator Viking among deals that raised more than USD26bn in New York during the first three quarters of 2024, more than the annual total for 2023.

CONTINENTAL EUROPE: EXIT VALUES RISE 90% QUARTER-ON-QUARTER

Portfolio companies sold by European private equity firms in 2023 had been held for an average of six years, more than a year longer than in 2020 when exit rates were at their height.

Data from MSCI reveals that 36% of PE assets acquired six or more years ago are now worth the same or less than when they were bought. Another third (34%) are valued at between 1.0x and 2.5x invested capital. This dynamic is contributing to lower internal rates of return (IRR), with Pitchbook reporting that private equity's annualized IRR sat below 10% in the year to March 2024. The typical target is 25%.

Despite this, European PE exit values in Q2 were up 90.3% quarter-on-quarter, driven by 23 mega-exits which accounted for more than half of this total. Of those, ten were IPOs, indicating that the congested listing pipeline may finally be starting to move. 2024 is on course to be the best year for PE-backed IPOs globally since 2021 in terms of both deal count and value, and supports the signs we are seeing of an uptick in activity across Europe's capital markets.

Anecdotally, Amsterdam is growing in popularity among issuers, thanks to the Netherlands' favorable corporate laws and tax regime.

Some sponsors are also executing dividend recapitalisations to fund distributions to investors. Belron, the U.K. headquartered vehicle glass repair company owned by Belgian conglomerate D'leteren and a consortium of PE firms, is set to borrow EUR6.25 billion and add in some of its own cash to finance a EUR4.3bn special dividend.

Upon completion, Belron's investors will have seen more than a third of their original investment returned through dividends. The deal is reportedly the biggest ever dividend recapitalization and follows another, smaller dividend recap that Belron executed in 2021.

UNITED KINGDOM: RISE OF HYBRID CAPITAL PROVIDERS

There have been some eye-catching U.K. exits over the past 12 months, not least Advent's sale of delivery business Evri to Apollo and several sponsor-backed take private transactions such as Thoma Bravo's acquisition of Darktrace.

Tech, AI, professional business services, data centers and climate equity/energy transition assets continue to attract significant PE interest, but the success of sale processes in other segments of the market really depends on the quality of the business and price expectations of the selling sponsors or corporates. A material number of deals are still being pulled where sponsors would struggle to achieve their targets.

Dividend recapitalizations and continuation funds are consequently a continuing theme in the U.K. On the former, sponsors are carrying out refinancings involving either new senior lenders on their own and/or hybrid capital providers who inject debt and/or preferred equity.

Hybrid capital firms are also providing financing through preferred equity in a number of other scenarios, including part financing for take privates and as an alternative capital solution for corporates.

JAPAN: CURRENCY VOLATILITY CREATES WINNERS AND LOSERS

Following the prevailing global trend, Japan-focused funds have targeted more new investments than exits in recent months.

Japan's central bank raised interest rates to 0.25% in 2024 (its first increase since 2007), making domestically sourced debt cheap relative to financing from other markets. However, the yen has also been sliding against the dollar, leading to falls in the value of Japanese assets bought by foreign funds that account in dollars. On the flipside, Japanese PE firms that have bought assets overseas and accounts in yen have seen the value of their investments rise on the back of the same currency movements.

The high cost of debt globally is driving many firms to emphasize operational engineering over leverage as a way to boost returns. This is shifting investors' focus away from purely cash-generative assets towards underperforming businesses. Salaries are one of the biggest corporate costs, and workforce restructurings are an effective way to increase the value of the business. But Japan's worker-friendly employment laws make it a difficult market in which to execute such schemes.

Looking ahead, hopes have been raised of a rebound in IPO activity following the USD2.3 billion listing of Tokyo Metro. The deal was Japan's biggest IPO since 2018, with the sale of shares to retail investors oversubscribed by a factor of ten.

AUSTRALIA: BLOCKBUSTER SALE SPARKS INTEREST IN DATA CENTERS

The prevailing trends in Australia are similar to the rest of the world, with 2024 marked by more deliberate dealmaking strategies.

A significant factor influencing this activity is the prevailing macroeconomic environment, particularly variable interest rates and stubborn inflation. In response, we have seen a notable shift towards prioritizing investments that offer strategic advantages.

Despite these challenges there are opportunities to be found, with noteworthy transactions in sectors including healthcare, technology, infrastructure and energy and resources. A prime example is Blackstone's deal for the Sydney-headquartered pan-Asian data center operator AirTrunk, which valued the business at AUD24 billion. The acquisition has sparked huge interest in similar assets, and we have seen more deal processes in this space kicking off over recent months.

Looking ahead, dealmaking is expected to increase sharply once monetary policy eases. The pressure to generate returns for both funds and their investors is intensifying given the slate of overdue sales, where interim solutions such as continuation funds have become less attractive.

Australia is also expected to gain from cross-border M&A activity as foreign investors, particularly from the U.S. and Asia, maintain their interest thanks to Australia's stable regulatory framework, a strong dollar, and Australia's strategic position as a gateway to the APAC region.

Consequently, we anticipate a sustained trend of PE portfolio exits into 2025, with a focus on the hot sectors of 2024 and emerging segments such as AI and defense where we are seeing an uptick in inquiries.

ASEAN: U.S. MEGAFUNDS BULLISH ON FUTURE ACTIVITY

ASEAN portfolio companies that should now be coming to market include those bought between 2017 and 2019, when financial sponsors had a heavy focus on consumer and tech, both sectors that have seen a fall in valuations from their pre-pandemic height.

The retreat of North American investors from China has boosted other markets across the Asia Pacific region with U.S. megafunds remaining publicly bullish about their desire to invest more in Japan and ASEAN countries such as Indonesia and Vietnam.

The secondaries market has been quiet with asset owners not yet willing to compromise on value to reshape their portfolios, but we expect activity to rise over the next 12 months as sponsors look to raise new funds on the back of realized gains.

At the same time, sponsors are launching processes to sell non-controlling stakes in premium assets, especially in the energy and infrastructure sectors where pricing and demand remain high.

We are also seeing capital solutions funds enter the market to support with deal structuring. The ASEAN private credit sector remains immature relative to the U.S. and Europe; funds have shown interest in the region for many years but only now are they starting to get comfortable with the credit risk they face under ASEAN countries' fragmented and often complex legal regimes.

Singapore remains ASEAN's de facto financial hub, but its stock market is small and relatively illiquid. Businesses have often established their ASEAN headquarters in the city state but are increasingly redomiciling to their home markets in order to exit their investments on local exchanges.

The number of Indian companies following this path is gaining pace, with recent tax and regulatory reforms from the government in Delhi making it more attractive for founders and sponsors to "reverse flip" their businesses in search of higher valuations. These deals see shareholders swap their existing equity for shares in an Indian entity, with the original structure either dissolved or merged into the newly established business. This allows the newly registered company to go public on the buoyant Indian markets.

Mario Draghi wants to reshape Europe's regulation of M&A. *Will his plans succeed?*

The former head of the European Central Bank is proposing a significant recalibration of EU competition enforcement in a bid to boost the European economy. The focus now is on whether his plans will be implemented.

Francesca Miotto
Partner

For such an expansive diagnosis of the EU's challenges, it's perhaps little surprise that Mario Draghi's 328-page report, "The future of European competitiveness", received a mixed reaction.

"Much of what he calls for is desirable," wrote The Economist. "This is a step in the right direction," added Thomas Piketty.

Europe's centrist politicians were equally supportive; their counterparts outside the middle ground less so.

Manon Aubry, co-chair of the Left group in the European Parliament, criticized Draghi's focus on "deregulation and private sector incentives, [which] signals more of the same outdated EU economic dogma".

MEPs on the far right – along with German Chancellor Olaf Scholz – rejected the Italian's call for joint sovereign debt to boost investment.

REFORMS OF COMPETITION ENFORCEMENT CENTRAL TO DRAGHI'S VISION

In Draghi's view, Europe's competitive disadvantages stem from three factors. First, that it has fallen behind the U.S. in technological innovation. Second, that its efforts to decarbonize have come at the expense of economic growth. And third, that the absence of an EU "foreign economic policy" has left it weakened in a treacherous geopolitical environment, lacking strong ties to resource-rich nations capable of supplying the materials it needs to support high-tech businesses.

One of the more controversial sections in Draghi's report deals with the impact of antitrust enforcement on the ability of European companies to compete in global markets. The European Commission has long viewed mergers as potentially harmful to innovation (and therefore consumers), and has either sought remedies from parties or blocked transactions that it believes have the potential to reduce R&D. Indeed, in recent years there has been an intense focus on tackling so-called "killer acquisitions", whereby bigger companies look to buy smaller innovators before they can grow into genuine competitors.

Draghi, however, takes a somewhat different view, acknowledging that "big is not always bad" – particularly where the relevant markets are global, characterized by data and network effects, and where innovation is key. Working from the assumption that European businesses are simply not big enough to compete in some sectors – particularly tech – he recommends taking a longer-term view that would tilt the playing field in favor of M&A in these strategic sectors.

'INNOVATION DEFENSE' TO BOOST DEALMAKING

Under Draghi's plan, parties would be able to invoke an "innovation defense" to justify deals that might otherwise be prohibited. While the report lacks detail on when it could be used, it talks of "...the need in certain sectors to pool resources to cover large fixed costs and achieve the scale needed to compete at the global level".

Draghi is clear on the need to ensure such a defense is not abused. To mitigate this risk, his proposal envisages that this extra leeway would come with strings attached. Parties would need to agree to certain R&D investment thresholds and then submit to enhanced reporting post-closing. The Commission would monitor these disclosures and step in if the commitments weren't met.

Draghi also recommends that the Commission assess the impacts of mergers on public security and the resilience of the EU economy, notably in sectors where these considerations are critical such as defense, energy and space. Here, such an approach would further open up the prospect of a more M&A-friendly EU deal environment. Likewise, Draghi would like to see authorities providing clearer and swifter guidance to companies seeking to collaborate more closely with their competitors in areas where co-ordination is needed to drive technological standardization, or in pursuit of the EU's broader decarbonization goals.

Consistent with his headline message that the EU must compete in the global arena as a coherent and coordinated bloc, Draghi advocates that the granting of state aid to companies in strategic sectors be administered at EU level to ensure it aligns with EU-wide industrial policy and that subsidies are allocated efficiently.

Speaking at the launch of the report, Draghi told reporters that competition enforcement "should be more forward-looking rather than prudential."

Attention is now turning to how likely his plans are to be implemented. And amid the plaudits and the put-downs, the views of one person – at least for now – carry particular weight.

Commission President Ursula von der Leyen engaged Draghi to conduct his study, and it's striking how closely their views align. Indeed it's possible to trace their shared thinking through Von der Leyen's political guidelines (which were released in July 2024 and set out her programme for her second five-year term), Draghi's report (published on September 9) and Von der Leyen's September 17 mission letter to Teresa Ribera Rodríguez, the commissioner designate for a Clean, Just, and Competitive Transition. This is a newly-created portfolio that reframes the traditional competition mandate held for the past decade by Margrethe Vestager.

Ribera's priority issues and main projects, as re-stated in the European Parliament's October briefing and fleshed out by Ribera herself in her answers to the Parliament's questionnaire ahead of the confirmation hearing held on November, 12, are also strikingly in line with Draghi's views.

PROMINENT ALIGNMENT AMONG VON DER LEYEN, DRAGHI AND RIBERA

Von der Leyen began to foreshadow the themes in Draghi's analysis in her political guidelines, in which she talked of reforming EU merger rules to ensure "innovation and resilience are fully taken into account".

Draghi fleshes out the innovation theme in his report, which recommends that the Commission "accounts for innovation and future competition in its decisions ... [and] changes its operating practices and updates its guidelines" in pursuit of this goal.

Just over a week later, Von der Leyen's letter to Ribera instructed her to "modernize the EU's competition policy", including by revising the EU's horizontal merger control guidelines to "give adequate weight to the European economy's more acute needs in respect of resilience, efficiency and innovation".

In her written responses to the Parliamentary questionnaire, Ribera made numerous references to the Draghi report, stating that: "proper enforcement of competition policy should lead to more innovation and can ensure that the European industrial policy is more efficient and effective by helping to set the right incentives". She built on Draghi's recommendations and pledged to modernize competition policy by focusing on simplifying and speeding up the relevant processes and aligning with the EU's priorities.

Ribera also vowed to modernize merger control to ensure it captures "contemporary needs and dynamics", citing "changes in efficient scale for investment-intensive activities, or in the geographic scope of operations of rival firms" as relevant considerations to be factored into the analysis.

Further intellectual alignment can be found in relation to reforming the EU's state aid framework to accelerate decarbonization, and channeling more investment towards so-called Important Projects of Common Interest (IPCEIs).

Again in her response to the questionnaire, Ribera committed to simplifying and speeding up state aid assessment procedures and developing a new state aid control framework to decarbonize European industry. She identifies IPCEIs as critical to delivering European solutions to decarbonization and green transition, and promised to facilitate participation and access to them.

The papers also stress the need for Europe to continue protecting its businesses from global tech giants and state-backed foreign acquisitions using the powers afforded by the Digital Markets Act and Foreign Subsidies Regulation. The latter point is important – Draghi's plans are designed to grow European champions, so bids from outside the EU will still be closely monitored under Europe's foreign investment screening rules. Ribera, for her part, has promised a "vigorous and rigorous enforcement" of the Digital Markets Act and Foreign Subsidies Regulation.

We are also seeing member states take further steps to protect strategically important businesses – the Belgian government for example has recently purchased a minority stake in materials technology company Umicore "as part of a broader strategy of participations with a view to employment, innovation and geopolitics". Being a shareholder gives the government a direct say on any future takeover bids.

Still, while Ribera's responses clearly echo Draghi's ambitious recommendations, her statements remain rather vague.

WHAT COULD STAND IN THE WAY OF DRAGHI'S RECOMMENDATIONS BEING IMPLEMENTED?

It's clear Ursula von der Leyen believes Mario Draghi's prescription can cure Europe's ills. But she will face barriers to implementing his ideas, not least the political challenge of pushing for greater EU harmonization in the wake of a Parliamentary election that saw a surge in support for Eurosceptic parties. Following the election of Donald Trump as American president, member states must consider whether their interests are better served through closer unification.

There is also the issue of the Court of Justice of the European Union. While Draghi's competition plan requires only a reinterpretation of existing EU regulations rather than the passing of new ones, there is a corpus of European case law attached to their current application.

As it showed in the recent Illumina/GRAIL decision, the ECJ is willing to overrule the Commission when it feels its thinking has strayed too far from the intent of EU regulations. But the case could also be viewed as a sign of hope by supporters of Draghi and von der Leyen's vision.

The Court ruled that the Commission went beyond its powers in blocking a deal it saw as a "killer acquisition" because it reviewed the transaction despite the deal failing to cross either the EU or relevant national notification thresholds. This is exactly the sort of pro-M&A outcome that could become more commonplace if Draghi's ideas prevail.

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