

Linklaters

Latest developments in Antitrust – What is keeping in-house counsels awake at night

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27 September 2024



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Antitrust behavioural trends

Labour Markets – Recent developments

2020, a turning point:

- > First wave of **criminal cases** in the **US** – the DOJ is still experiencing **mostly losses**.
- > **Standalone cases** started by **EU national competition authorities**.
- > **Guidelines/reports** (e.g. Portugal, the UK, as well as – jointly – Danish, Norwegian, Swedish, Finnish and Icelandic competition authorities) and **Statements** (e.g. France, Netherlands, Portugal, Czech Republic).

During the last year, also the EC has taken more interest in labour markets agreements:

- > **Dawn-raids** (November 2023) and opening of **formal investigation** (July 2024) in the online ordering and food delivery sector involving, *inter alia*, **a suspected no-poach agreement**.
- > **No EC decision** yet concerning a **self-standing** labour markets agreement, but the EC is **actively investigating cases** in this sector and will remain coordinated within the ECN.
- > Competition **policy brief** (May 2024):
 - > wage-fixing and no-poach agreements generally qualify as restrictions **by object** under Article 101(1) TFEU;
 - > **unlikely** to meet the requirements to qualify as **ancillary restraints**; and
 - > **unlikely** to meet the requirements for an **exemption under Article 101(3) TFEU**.

From a **different angle**, in the **US**, the FTC issued a **final rule** in 2024 banning **non-compete clauses** between employers and workers (but this was **recently set aside**).

ESG – Approach to collaborations across the globe

EU new sustainability guidance

- > Clarifies what sustainability agreements likely to fall outside scope of Art 101.
- > Assessment of sustainability agreements that do fall within Art 101.
- > Analysis of sustainable benefits under Art 101(3).
- > Efficiency gains + indispensable + “fair share” of benefits + no elimination of competition.

Patchwork of EU NCA approaches, ranging from conservative to liberal. Horizontal **Guidelines from EC**, and guidance from **CMA with guidance on sustainable agreements**.

US characterised by **political polarisation** driving investigations initiated by **State AGs**, at the Federal level with **Republican control of the House** and by **threat of private litigation**.

US political polarisation

- > Growing divergence between US vs EU/UK.
- > In 2022, more than 50 law firms received letters from US senators reminding them of their “duty to inform clients of the risks they incur by participating in climate cartels and other ill-advised ESG schemes.”

Fragmented approach to ESG regulation and less collaboration between national competition regulators.

ESG – The Linklaters survey

Linklaters has commissioned a comprehensive survey involving over 500 sustainability professionals from the UK, US, France, Germany, and the Netherlands. This study sheds new light on the dynamic interplay between competition law and sustainability initiatives from an industry perspective.

82% of sustainability professionals believe it is **important to collaborate** on the **pursuit of sustainability goals**.

The motivation to collaborate has changed since 2020:

We can pool resources and know-how and come up with better solutions:

49% ↓ 19%

To change ingrained industry practices requires co-ordinated action:

46% ↓ 18%

Customers are unwilling to assume cost unless industry wide:

44% ↑ 21%

We want to be seen to be working with others:

42% ↑ 7%

Individual action has no impact:

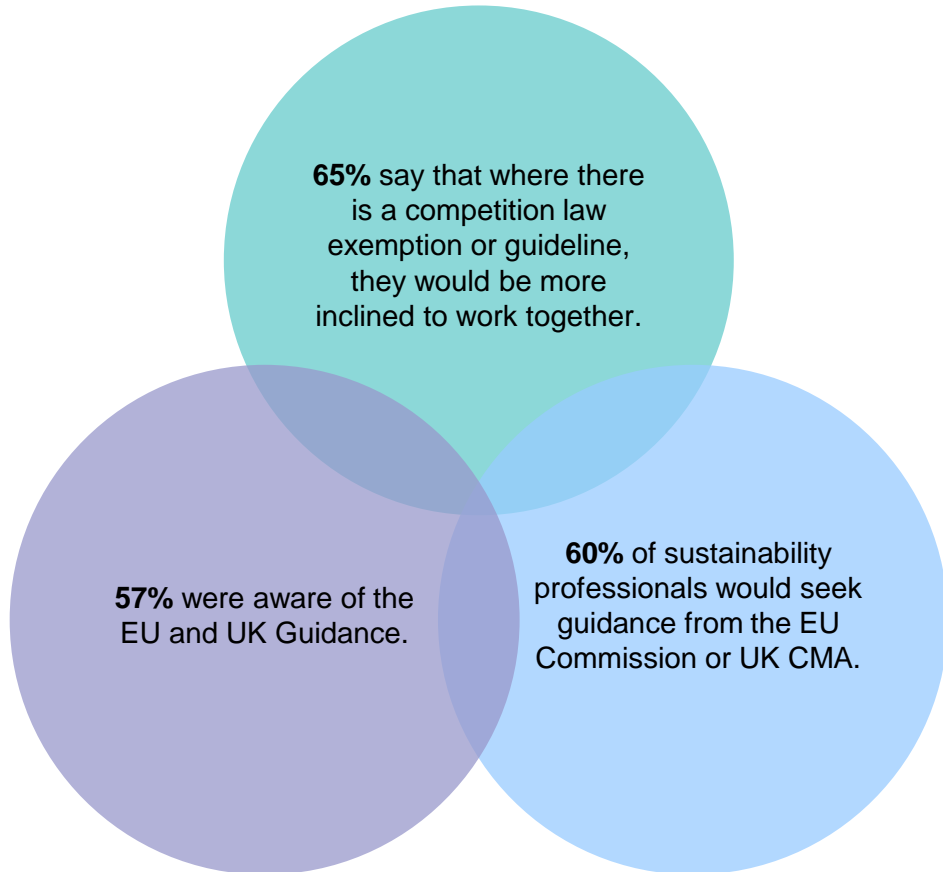
33% ↓ 15%

Most sustainability professionals feel that **competition law has been a barrier to sustainability collaborations ...**

- > **56%** reported concrete examples of sustainability projects that were not pursued because legal risk was too high, a figure which is stable since our 2020 report.
- > **60%** reported that competition law has played a role in their not pursuing a sustainability project, up from 48% in 2020.
- > **57%** of survey respondents worry about litigation risk relating to sustainability collaborations.

ESG – The Linklaters survey (2)

New guidance is having an impact, signs are positive



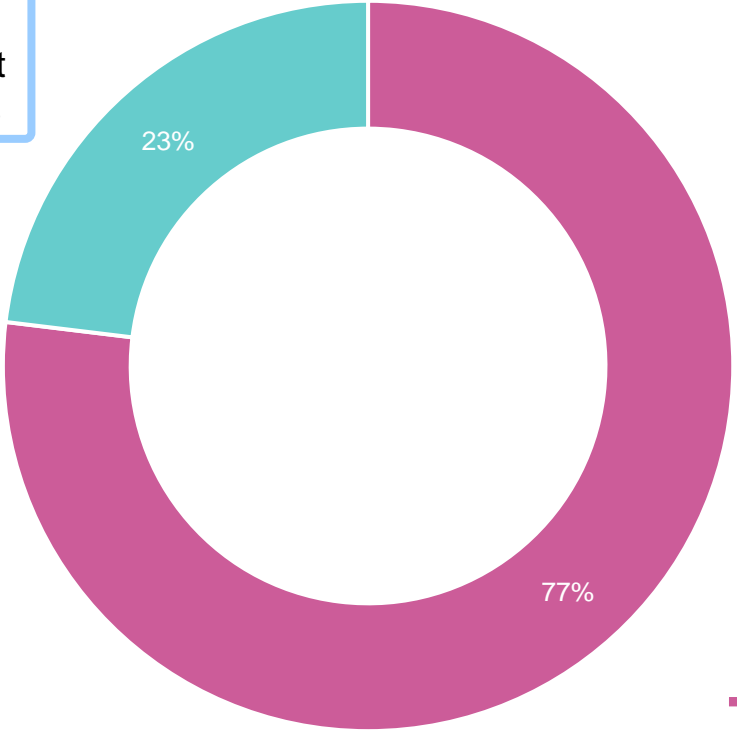
Of those who were aware of the new guidance, a substantial majority found the guidance clear and impacted their approach to risk in those jurisdictions:



EU antitrust enforcement – Trends

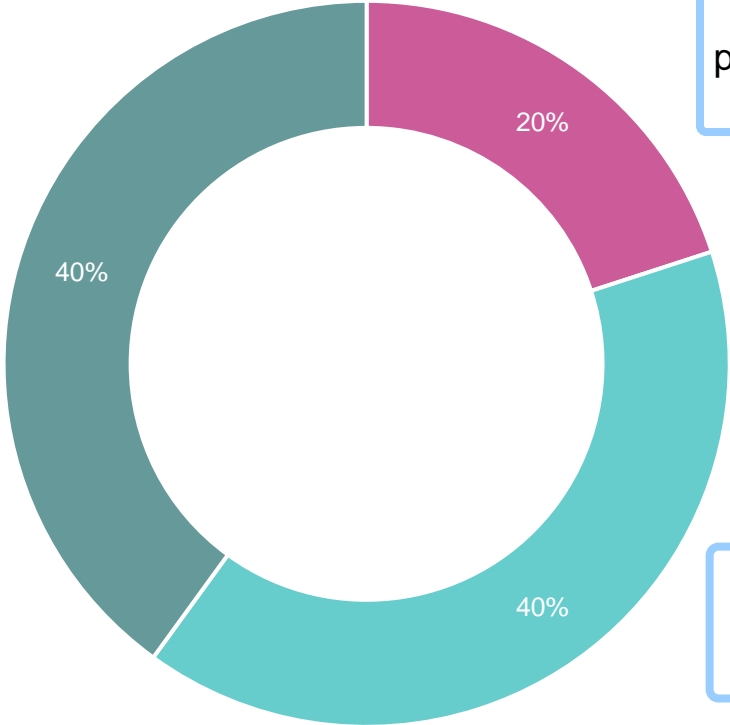
Article 101 fines 2021-2023

Mostly price fixing and market allocation cases



Article 101 investigations initiated since January 2021

Smaller share of price fixing + market allocation cases



More tech and cross-border restriction cases

- Immunity applications
- Ex-officio investigations
- Apparently ex-officio

Based on information gathered from the European Commission website, 9 July 2024

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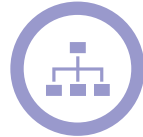
Foreign investment control

FDI – What is likely to attract attention?



Government contracts

- > Any service provided directly or indirectly to the government
- > Software relied upon by governments



Critical infrastructure

- > Healthcare
- > Security
- > Energy
- > Food and water
- > Insurance
- > Banks
- > Telecommunications
- > Transport
- > Payment systems
- > Media
- > Databases for any of the above



AI and advanced technologies

- > Artificial intelligence
- > Autonomous driving
- > Robotics
- > Cybersecurity
- > Biotechnologies
- > Nanotechnologies
- > Semiconductors



Data processing and storage

- > Personal data
- > Sensitive information

General consideration:

What level of investment is envisaged – control vs. financial participation.

FDI – Practical implications for foreign investment risk assessment

Unpredictability

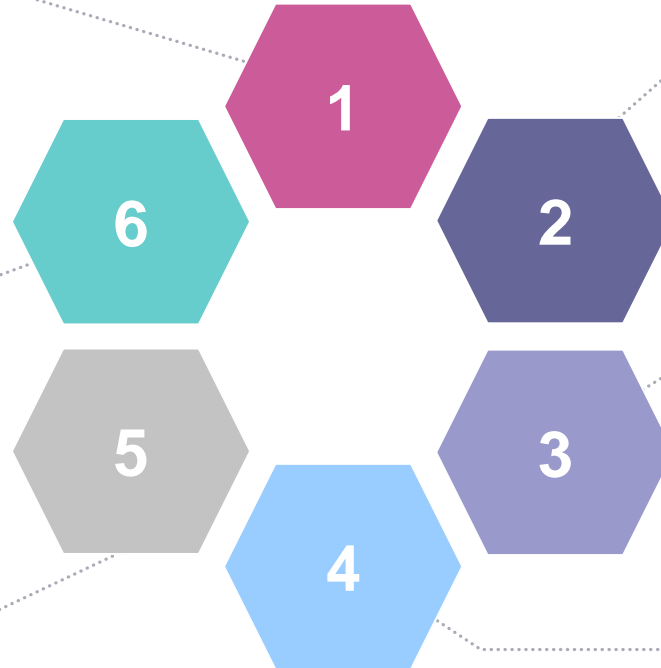
- > Politically driven process that depends on local policy goals.
- > Acquirer profile is a key factor.
- > Sensitivity varies significantly depending on target activities/sector.

Lack of transparency

- > Limited access to understand potential concerns of government stakeholders.
- > Hard to get visibility as to stage of process and expected outcome.

Limited flexibility

- > Limited scope for negotiating commitments.
- > Potential concerns may not be discussed in detail with the parties.
- > Commitments can simply be included in the terms of the decision.
- > Highly prescriptive outcomes (e.g. relating to specific contracts).



Wide ranging commitments

- > Difficult to predict scope/impact of behavioural remedies.
- > Structural remedies on the rise.
- > Hard to be conclusive.

Timing

- > Varies significantly between jurisdictions.
- > Impacted by stakeholder engagement.
- > Long-stop Date needs to be sufficient.

Conditions precedent

- > Suspensory regimes.
- > Performance obligations (incl. break fees/HoHW provisions) tailored to cover FI risks.
- > Careful consideration of what remedies may be considered “reasonable”.

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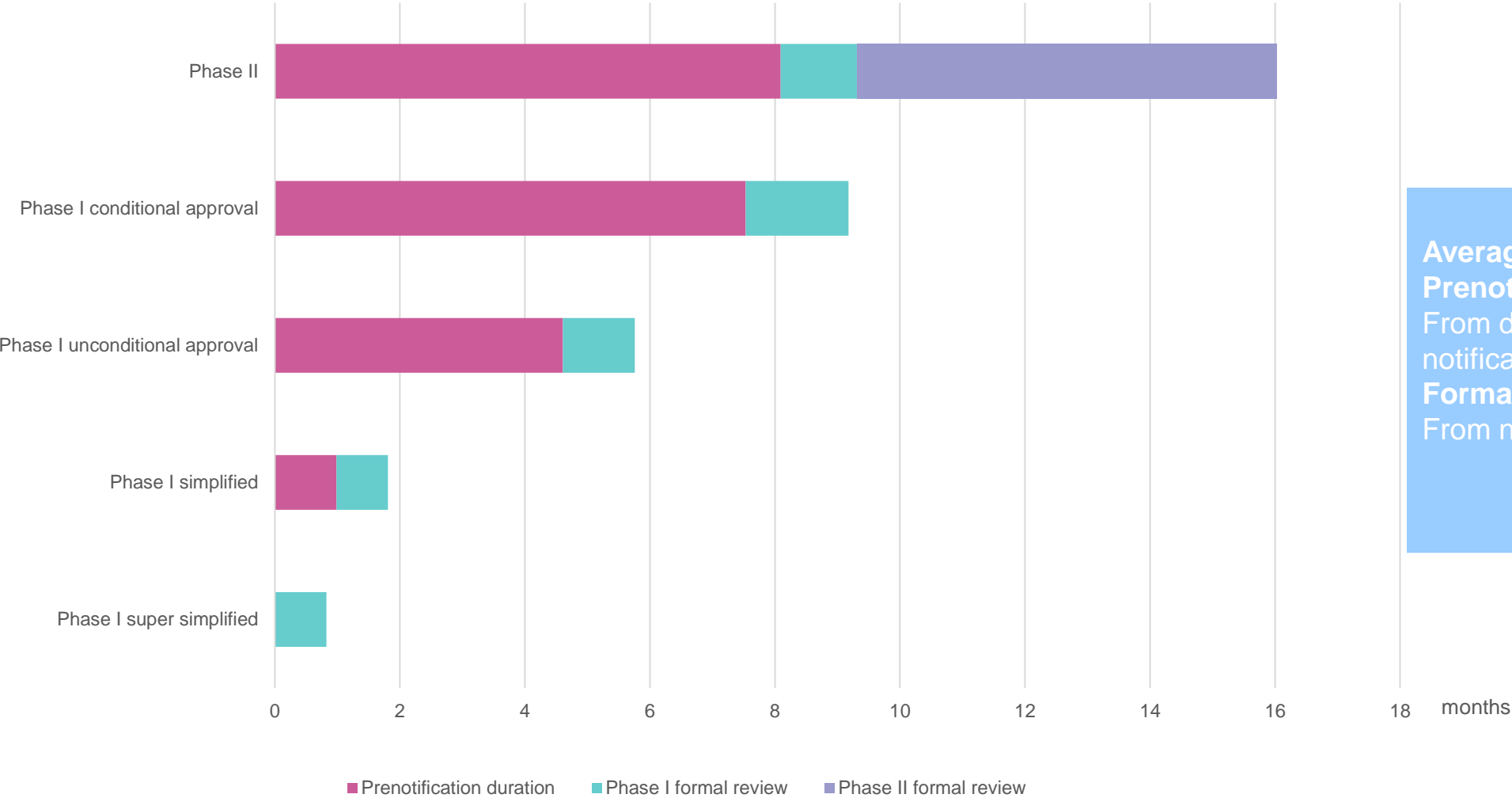
Merger control

Merger control – Recent trends

- 1 Intervention rates are increasing.
- 2 Enforcement both becoming more connected and less connected at the same time.
- 3 Investigations are becoming more burdensome.
- 4 Focus on internal documents.
- 5 Remedies are becoming tougher and more complex.
- 6 Easy deals are faster; deals with substantive issues are taking longer.



EU merger case duration – Pre-notification and formal review



Average duration 2020 – 2024
Prenotification duration:
From deal announcement to notification.
Formal review duration:
From notification to final decision.

The aftermath of *Illumina/GRAIL* (CJEU)

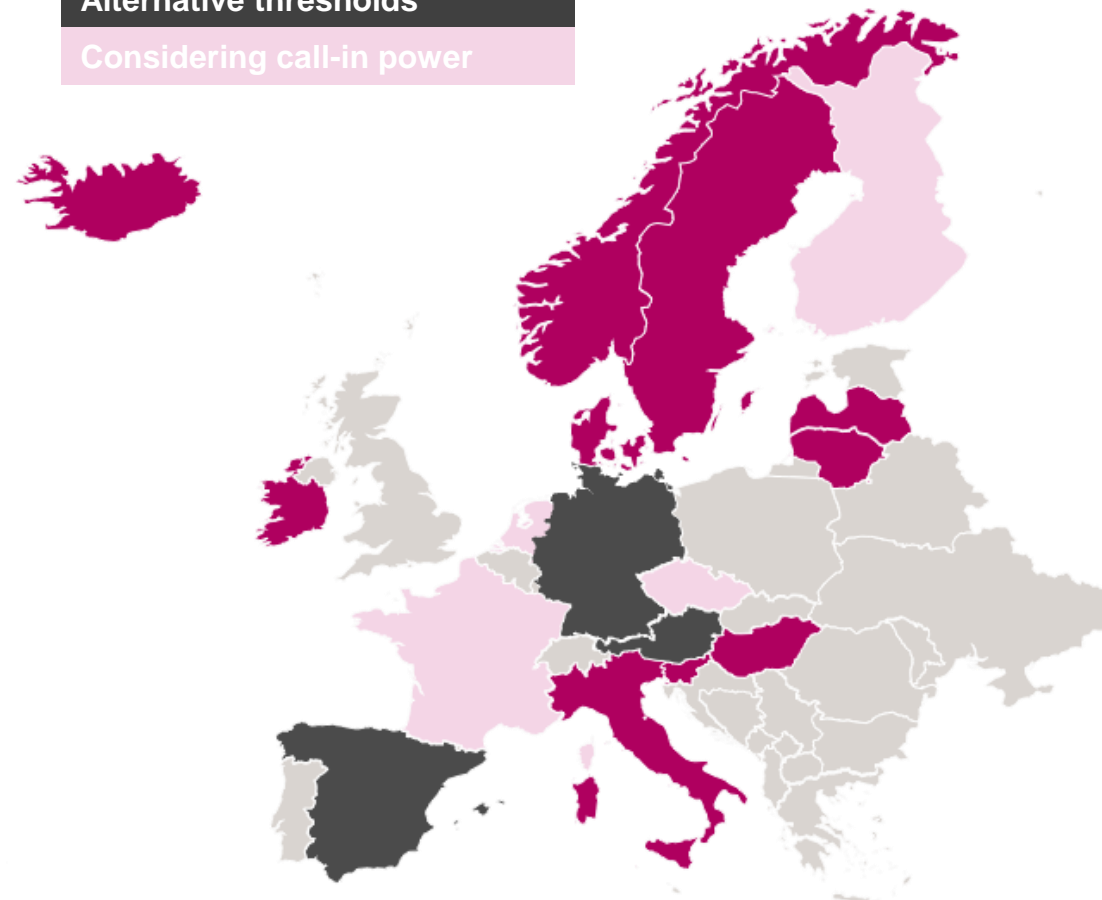
The Commission will continue to accept referrals made under Article 22 by member states that have jurisdiction over a concentration under their national rules

In the last few years, several member states have introduced provisions allowing them to request the notification of transactions that do not meet national thresholds, in situations where they might have a significant competitive impact.

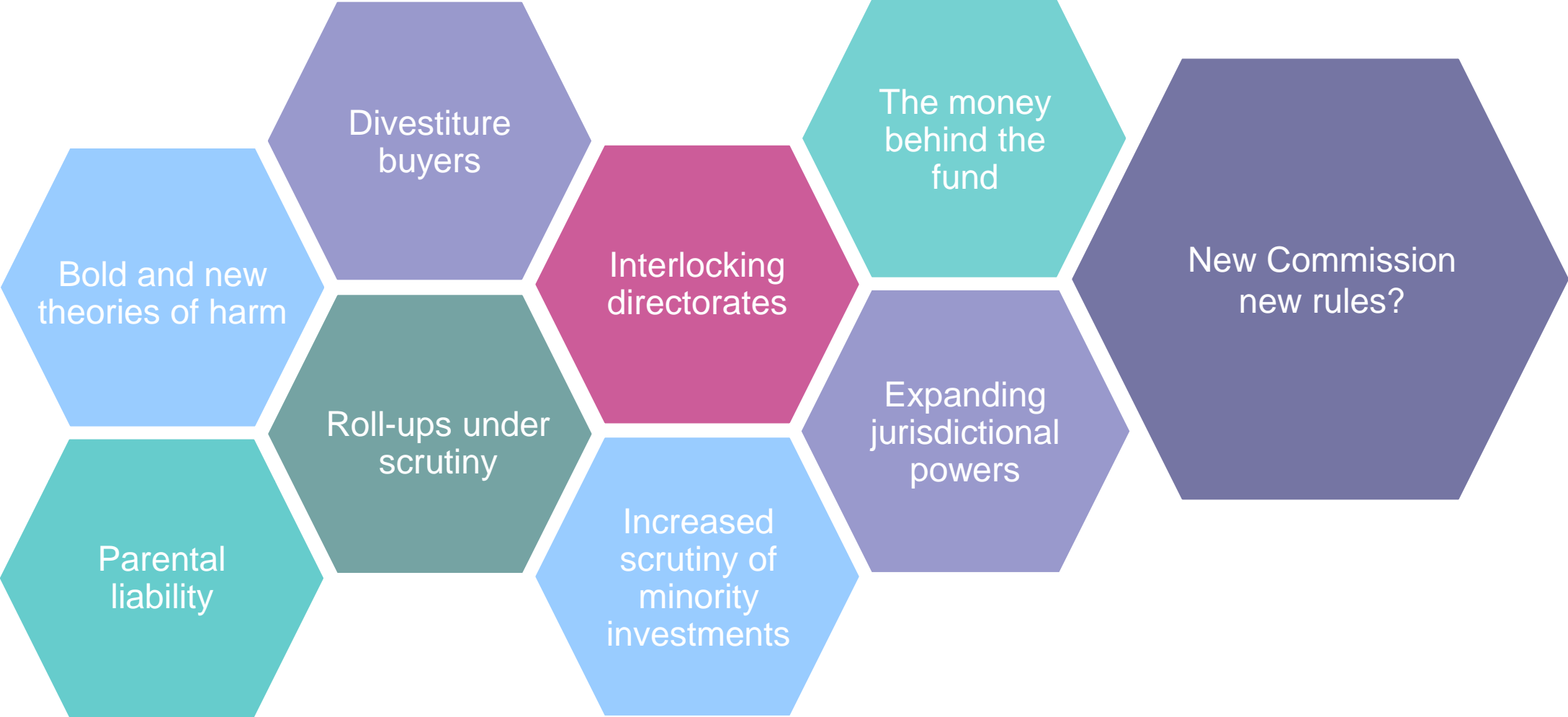
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Three in-depth inquiries into mergers that were caught under the new powers are currently being scrutinised by the Italian Competition Authority.

Existing call-in power
Alternative thresholds
Considering call-in power



Key merger control developments in the EU



Key takeaways

Consider deal drivers and valuation

- > What is the narrative for deal rationale?
- > What is the pro-competitive or competitively-neutral story?
- > What are the priorities – speed, value or something in between?

01

Assess evidence

- > Assess documents and data.
- > Do they support the rationale for the deal?
- > How do they map against contemporary theories of harm?

02

Prepare for deep investigation on strategic investments

- > Involve economists early in the process.
- > In sensitive/political deals, plan government affairs and PR strategy.
- > Map out filing strategy and consider interaction with other jurisdictions (e.g. full analysis or targeted approach?).

03

Don't score an own goal via internal documents

- > Consider what documents say if read "cold." Be ready for huge document trawls: on big deals forensic software needed.

04



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